

Review of the Freedom of Information Act and the Australian Information Commissioner Act.

Submission Peter Timmins.

This submission addresses issues relevant to the review of the operation of the Freedom of Information (FOI) Act and the Australian Information Commissioner Act, and the extent to which those Acts and related laws continue to provide an effective framework for access to government information.

1. Review focus

The statutory provisions that require the review to be undertaken refer to a review of the operation of the FOI and the AIC acts.

Such a review requires examination of the provisions of the act, the way the act has been interpreted and applied, and the outcomes and results where, as in this case, the objects of the act as an instrument of government policy are clear.

The Terms of Reference list matters that the review should consider. Those terms do not limit the statutory requirement to review the operation of the acts.

The review will obviously look at the implementation of the 2009-2010 reforms including the OAIC, its role, functions, review structures, effectiveness and efficiency, as well as the result of changes to agency publication obligations, exemption provisions, fees and charges etc.

Generally the reforms were a welcome step forward. Various problems and areas for improvement have been identified. Delay at both agency level and at the OAIC are a concern.

A review of the operation of the FOI act however needs to go beyond an assessment of the effect of the 2009-2010 reforms.

Those reforms did not result from a comprehensive review. There has been no comprehensive review of the FOI act since the joint Australian Law Reform Commission/Administrative Review Council inquiry culminating in Report 77 Open Government, completed in December 1995. Some recommendations from that review

influenced the 2009-2010 changes. Others, listed in Attachment A were not part of the government led consultation.

There have been major changes in accountability and transparency norms, information and communications technology and public expectations regarding access to information since that time.

Rick Snell in a submission to the review has called for fundamental rethinking of the FOI act. The act also needs redrafting.

Mark Robinson SC appearing for the Law Council of Australia before the Senate Finance and Public Administration Committee on 5 February 2010 in connection with the 2010 reforms said:

"(The act) was complicated, turgid legislation to start with. All that has been done, with great respect, is that more of the same—perhaps a little better drafted—has been engrafted into it. That raises two difficulties. One is that it is very hard to read and understand, and that is for a lawyer who is interested. Secondly, there is 20 years of judicial decision making based on the current FOI Act. Instead of a whole new FOI Act, there is a grafted section which goes to the heart of it. It is more than a heart transplant—it is like a whole body plus half a heart transplant—and it is going to be very difficult for a Federal Court to work out how to deal with it over the next 10 years or so. It will be fascinating to see what is done with it, if anything. If it works, the Federal Court will not be anywhere near this act, but it does need to be reviewed from scratch in the future."

The remaining four months for this review are unlikely to allow sufficient time to undertake a rethink and rewrite although a significant start can and should be made.

The review may need to consider a recommendation to the Attorney General for an Australian Law Reform Commission reference of the kind made by then Attorney General Ruddock in the last days of the Howard government, and subsequently withdrawn by the Rudd government in 2008.

In the meantime attention to shortcomings or problems with the laws and to implementation issues outlined in this submission would assist in ensuring an effective framework for access to government

information consistent with the objects of the act and stated government policy.

2. The FOI act

In a survey this year by Access Info Europe and the Centre for Law and Democracy, two respected international NGOs, the Commonwealth FOI act was ranked 48 of 93 national laws. The act received 84 points out of a possible 150. The rating was for the law only, not implementation or results and outcomes.

(<http://www.rti-rating.org/news>)

There is room for difference of opinion about what was surveyed, and the marking and points allocated. It can be argued the act should have received a few more points and a promotion of 5-10 places up the list. In the absence of more formal standards the RTI Index and similar methodologies are helpful guides on what constitutes good law.

Regardless of the precise rank or score in the index, the Commonwealth FOI act emerges as mid-range, not in the high categories by international comparison.

2.1 Impediments to effectiveness

The Australian framework falls short when assessed against these emerging standards:

a. The law should reflect the digital information age.

(Comment: Written documents remain central to the operation of the FOI act. The absence of digital context and the primacy of paper is incongruous given the Australian Government Information Management Office is promoting publication of [Public Sector Information](#) and access, use and reuse of data sets through [Data.gov.au](#); and National Archives Australia is leading the Federal Government's [Digital Transition Policy](#), that requires agencies to move to a comprehensive digital information and records management regime and away from paper-based records by 2015.

The long title of the act refers to a right of access to “official documents.” The object section refers to giving access to information by providing for a right of access to documents. Document is broadly defined in eight parts in the interpretation section and extends to recorded information. However the primary definition is “any paper or

other material on which there is writing.” Part III is headed “Access to Documents.” Those words are used in Section 11 and other provisions particularly Section 15 which confers the right to “access a document of an agency or official document of a minister”. The headings of sections in the Act including all the exemptions other than those conditionally exempt, refer to documents.

Section 17 is headed “Requests involving the use of computers” suggesting by implication that this is not the usual case. Computers are the primary storage and retrieval mechanism for information in all government agencies, and agencies routinely undertake a search of such systems in response to an application. However the Act does not mandate such a practice, nor require a search using the most efficient means available to locate information. Section 17 is only enlivened where the information requested is “not available in a discrete document in written form.”

There is no reference to data-sets, or meta-data, or any requirement to provide information in response to an application in machine readable format.

b. The right of access applies to the executive branch with no bodies excluded.

(Exclusions from the act include intelligence agencies, and in whole or part, a range of other bodies listed in Schedule 2 of the act. The effect of agency or class-based exclusions is to remove from potential public scrutiny information concerning the conduct of public functions and the use of public money without any balancing of public interests that arise. The ALRC in Open Government Report 77 (1995) recommended that all excluded bodies be asked to justify their status and brought within scope if they failed to do so. The CIA and New Zealand Intelligence Service are each subject to their national information access law.

Limited application of the act to bodies such as the Official Secretary to the Governor General in respect of “matters of an administrative nature” also require reconsideration if the decision and reasons stated in the AAT by Deputy President Hack are upheld in current Federal Court proceedings.

(<http://foi-privacy.blogspot.com.au/2012/05/aat-pulls-shade-on-foi-access-to.html#.UMqpCoUzgUk>)

Any exclusions must be tightly drawn. For example the current exclusion of documents held by the Australian Broadcasting Corporation (and SBS) – “with respect to documents in relation to its program materials” – has been interpreted in a way that goes far beyond what appears to have been the original intention to protect its commercial and competitive interests.

c. The right of access applies to the legislature, including both administrative and other information, with no bodies excluded. *(Three parliamentary departments appear to be covered but publicly available information suggests the government may seek to legislate for the exclusion that was thought previously to apply. The Parliamentary Budget Office is excluded for reasons advanced by the major political parties about the need for confidentiality regarding work undertaken in costing policy proposals. Why information relating to administration of the PBO should be exempt has not been explained.)*

d. The right of access applies to State-owned enterprises including commercial entities that are owned or controlled by the State. *(Government owned corporations such as NEHTA are not covered.)*

e. The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding. *(Neither category is covered by the act. Then minister Faulkner in March 2009 announced the government had decided to refer to the ALRC the issue of possible extension of the FOI act to the private sector. This did not occur. Some information held by a contractor who provides a service to the public is in effect taken to be held by an agency as a result of the 2010 reforms. There is no publicly available information about how these provisions have worked in practice.)*

f. There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension. *(The 30 day time limit can and frequently is extended. The OAIC has granted over 4000 extensions. The ALRC in 1995 recommended the time limit should be gradually reduced to 14 days over a three year period. Provision should be made in the act for expedited processing where information sought might be necessary for reasons particular to an applicant, or for applications by the media or others concerning matters of broad and immediate public significance are involved.)*

g. There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.

(The 2010 reforms abolish the application fee and provide five hours free processing and go part way on this. The ALRC in Open Government 77 recommended charges be limited to when access was granted and to the cost of reproduction.)

h. The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.

(Some other secrecy laws trump FOI. The ALRC Report 112 Secrecy and Open Government made a number of recommendations regarding this issue, commenting "(o)fficial secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not.'. The existence of over 500 secrecy provisions in other acts is said to have a "chilling" effect on attitudes towards release of information. The ALRC also recommended that the Archives Act should provide that the public access provisions of the Act override any secrecy provisions that would otherwise apply. There has been no government response to the report in the three years since the inquiry was completed.)

i. A harm test applies to all exemptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.

(A number of absolute exemptions are not based on harm. All information held by a government agency or minister should be available for access subject to a public interest test. This should involve consideration of disclosure of requested information on the basis of the content, timing and circumstance and whether any harm would result from disclosure.

j. There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.

(Some FOI act exemptions include a public interest test but there are no hard overrides of this kind.)

k. Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.

(Nothing of this kind is in Australian law other than the gradually reducing 30 year archives open access rule, now at around 28 years.)

l. The independent oversight body may impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management).

(No powers to impose measures.)

m. The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.

(Approved as part of allocations to the relevant minister's portfolio.)

n. Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.

(The Archives Act has a provision regarding unauthorised destruction of records. The FOI act contains no provision concerning sanctions for interference with decision-making.)

o. There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).

(No comprehensive whistleblower protection legislation.)

p. Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.

(No formal requirement.)

2.2 Other changes that would improve effectiveness

a. Administrative access

Administrative access can provide efficient, effective access to information without the costly, legal technicalities associated with a formal FOI application. This should become an optional first point of access for applicants. Time and cost must have been minimal when

the Department of Parliamentary Services provided Administrative Access to a copy of this document without the need for a formal application.

http://www.righttoknow.org.au/request/report_on_e_parliament_conferenc#outgoing-60

In contrast see this response to a straight-forward request to DFAT who advised it had no Administrative Access scheme.

http://www.righttoknow.org.au/request/australia_and_open_government_pa#outgoing-55

Agencies may need more incentives and disincentives and the OAIC more stick to deliver on the promise of free and informal administrative access, a system with benefits to agencies and users of the act.

b. Search, retrieval and provision of access

An agency or minister should be required to conduct a search for information using the most efficient means available. The act should provide for access by down-loading via the internet, memory stick, disc or other device, or in the form of paper copies where requested. Data should be available in open and non-proprietary formats that are machine-readable.

c. Publication requirements

The Information Publishing Scheme represented a first cautious step towards pro-active publication. The requirements are modest. The scheme should now be extended to ensure publication of research papers, expert /consultant reports, grants, loans and guarantees, the Harradine Index of Files, senior officer travel and expenses, and cost of ministerial travel , entertainment and other departmental support

d. Definition of personal information

The broad nature of personal information as defined in the act should not include as it does at present information about ministers or public servants that relates to the conduct of official functions. The definition should be qualified along the lines of

WA FOI Act (Schedule1 Clause 3):

(3) Matter is not exempt matter under sub clause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to

(a) the person;

- (b) the person's position or functions as an officer; or
- (c) things done by the person in the course of performing functions as an officer.

A similar exclusion in the WA Act applies to information about a person acting under a contract with an agency.

e. Personal factors

A decision maker should have regard to any special factors concerning the relationship or the reasons given by the applicant for seeking access where this would favour disclosure to the applicant but not to others. Disclosure to the world should not be automatically assumed in all cases. While reasons should be irrelevant to the right to make an application and to processing the application, particular factors including special relationships should be taken into account in making a decision concerning access to the personal information of another person. A Senate Committee made a recommendation along these lines in a report in 1978. A Senate Committee made a recommendation along these lines in a report in 1978. So did ALRC 'Open Government Report' (Recommendation 61). The NSW Government information (Public access) Act contains a good model.

3. Implementation - factors that limit effectiveness

a. Culture

The climate or culture within government sets the tone and context for the administration of the law. Other than the anecdotal, indicators of cultural change since 2010 are not publicly available. The Australian Public Service Commission State of the Service Report 2012 includes a chapter (3) on Transparency and Integrity. Apparently no questions were asked in agency or employee surveys regarding attitudes, awareness, and practice in providing access to information.

The review should be in a position to obtain information about prevailing culture that is not accessible by those of us outside government.

Available evidence remains strong that culture is a significant impediment to the achievement of government policy objectives.

The ALRC in Report 112 Secrecy and Open Government made these observations [15.54]

“..agency culture can prevent information from being disclosed in situations where disclosure would be lawful and appropriate. As has been commented on extensively in the context of FOI, there are compelling drivers for agencies to sacrifice the goals of openness and accountability because of a real or perceived need for non-disclosure. Such a ‘culture of secrecy’ was criticised by the ALRC and the ARC in ALRC 77. In 2008, the Independent Review Panel examining the *Freedom of Information Act 1992* (Qld) discussed the tensions in information management:

“Inherent at an organisational level, the urgency of the everyday imperatives in modern government can pull the public sector’s information culture towards information protection in the interests of issues management, at the expense of the important but less urgent information goals for transparency in government. ... Culture brings a more complex setting. Access to government information reaches to the core of political and bureaucratic interests and operates beyond purely legal considerations and dispassionate calculations on the public interest.”

15.55 In its submission in response to IP 34, the Australian Government Attorney-General’s Department (AGD) noted that a number of reviews have considered the impact of secrecy laws on information sharing and indicated that cultures of secrecy within some agencies pose a greater barrier to information sharing than legislative restrictions.”

The recent Cornall and OAIC reports on the Department of Immigration and Citizenship suggest culture in this, one of the busiest FOI agencies, leaves much to be desired.

Cornall observed that at a time when a pro-disclosure approach is required “the Department presently appears to have more of an attitude of resistance to disclosure.”

The OAIC report stated:

“The culture of an agency must be attuned to effective FOI administration. Two ways of instilling that culture are for the chief executive officer of the agency to issue an instruction to all staff directing that FOI compliance is a responsibility of the entire agency, and to include FOI compliance as a key performance indicator in the performance agreements of senior officers.”

This case study in excessive caution may be indicative of the broader culture in DFAT, and perhaps other agencies.

<http://foi-privacy.blogspot.com.au/2011/03/dfat-foi-case-study-in-excessive.html#.UM5wZoUzgUk>

The ALRC in Report 77 Open Government and Report 112 Secrecy and Open Government made recommendations for steps to promote cultural change including provisions in performance agreements of senior officers in Australian Government agencies to ensure efficient and effective information-handling practices. The ALRC commented that giving tangible incentives to staff to pay greater attention to, and to improve, an agency's information-handling practices will increase the likelihood of cultural change.

b. Ministerial involvement or interference in decisions

Section 23 confers authority on the responsible minister on behalf of an agency to make a decision in response to a request made to the agency.

The extent to which ministers have exercised this authority since the commencement of the Act is unknown.

A minister should retain authority for the making of decisions on requests for information held by the minister but not in respect of applications for information held by an agency. Section 23 should be amended accordingly.

There has also been a perception of less formal ministerial involvement in decision making in the case of applications for documents containing politically sensitive information. The Commonwealth Ombudsman (Annual 2005-2006 Chapter 7) commented that complaints to his office concerning applications to access non-personal documents typically raise concern about the involvement of ministers and their staff in dealing with a particular application.

The Cornall report on FOI processing in DIAC refers to the practice of briefing the Minister's Office about upcoming FOI decisions, in some cases allowing five days for comment. Mr Cornall found this practice observed in other agencies as well.

An objective decision must be in good faith based on relevant but no irrelevant considerations. A determination on an application to an agency should be free of political or other influences not specified in the legislation.

The NSW GIPA act includes a specific provision that a minister cannot direct or control an officer in dealing with an application for agency information.

That act also includes offence provisions for acting unlawfully, directing unlawful action, improperly influencing a decision on access, misleading conduct or deception, and the concealment or destruction of government information.

Provisions along these lines in the Commonwealth act would strengthen the independence of the determining officer in making the correct decision.

c. Dominant legal perspective .

The FOI function continues to be located in the legal area in many agencies, perhaps a result of the act's administrative law heritage. This seems unnecessary, undesirable and costly. It sends a message to applicants that they are entering contested territory.

The Cornall report on DIAC refers to an earlier Ernst and Young report that found even fairly routine material was disclosed only after processing "through a heavily controlled legal framework."

Cornall reported that the DIAC Freedom of Information and Privacy Policy Section that processes non-personal requests was to be co-located with a new legal unit, and responsible to DIAC's Chief Lawyer in the Governance and Legal Division (although it sits in the Governance Branch rather than the Legal Branch).

Cornall found that FOI was also managed in a legal branch in Veterans Affairs, the Australian Taxation Office and Human Services, the three largest Federal agencies in FOI terms.

According to the report, the majority of FOI decision makers in the ATO are lawyers. In DHS the Ombudsman, Privacy and FOI Branch is part of the Legal Services Division and an "FOI legal team has recently been established in the Department's Legal Services Division for complex matters." Cornall reports the Chief Counsel there "regards the freedom of information area as a high risk area for the

department and compliance with the department's FOI obligations commands a lot of her attention."

Lawyers should play the same role in FOI as they do in any other area of public administration-provide advice as and when required.

Information access is a service to the public not a legal battleground.

4. Outcomes and results.

The law is an insufficient indicator of transparency. How the law works in practice and to what effect is of greater significance.

Regarding practice, those of us outside government only have the Cornall report to assist judgment. That report looked at processing only, not at the quality of decisions. It was not encouraging.

The review should seek to undertake audits that can inform opinion about the operation of the act in practice. The low use rate for non-personal applications is a reminder that after thirty years FOI is still not widely known or utilised.

What government seeks to achieve through information access is set out in policy terms in the Open Government Declaration of July 2010 and in legal terms in the objects section of the FOI act.

The Open Government Declaration states:

"The Australian Government now declares that, in order to promote greater participation in Australia's democracy, it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology..."

The Australian Government's support for openness and transparency in Government has three key principles:

Informing: strengthening citizen's rights of access to information, establishing a pro-disclosure culture across Australian Government agencies including through online innovation, and making government information more accessible and usable;

Engaging: collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought; and

Participating: making government more consultative and participative."

The FOI act establishes rights for citizens for these purposes. As the long title states this is "An Act to give to members of the public *rights*

of access to official documents of the Government of the Commonwealth and of its agencies.”

The object section of the act (s 3) reiterates the policy purpose that underpins the law and Parliament’s intentions in enacting legislation:

The objects of this Act are *to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:*

- (a) requiring agencies to publish the information; and
- (b) providing for *a right of access* to documents.

Parliament’s intentions are to *promote representative democracy* by contributing towards

- (a) *increasing public participation* in Government processes, with a view to promoting better-informed decision-making;
- (b) *increasing scrutiny, discussion, comment and review* of the Government’s activities.

Parliament also intends the law to increase recognition that information held by the Government is to be managed for public purposes and is a national resource; and that functions and powers given by the 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.

There has been little if any discussion of outcome performance indicators.

The review should seek to test the views of agencies and the OAIC on how they measure results and outcomes that can be attributed to the operation of the FOI and OIC acts. If no measures are available the review should encourage government to develop material that would assist mapping progress towards desired goals.

5. The review and 2010 reform issues

The terms of reference require consideration of a number of issues arising from the reforms of 2009-2010.

As stated above in some respects the answers to some of the questions posed may be “too early to tell.”

Time does not permit a detailed response to each.

Briefly

a. The impact of reforms:

An improvement based on anecdotal evidence, but patchy. A first but welcome step in the right direction.

b. The OAIC

Good start. Could do with more teeth in the form of powers to lay down the law and pull some out there on board, or in line.

Resource constraints are a major concern. 2012-13 will see a reduction of around \$300, 000 in resource levels that proved insufficient the year before.

Reviews delayed are reviews in effect denied particularly in those cases where information sought has a relevance that passes with time.

The OAIC starts off with unambitious KPIs: 80% of FOI reviews to be completed within six months, and 80% of FOI and privacy complaints to be finalised within 12. (See OAIC [Portfolio Budget Statement](#)). Things seem to get worse from there. The targets set, even if achieved, are almost designed to ensure a level of dissatisfaction.

DIAC isn't the only agency that deserves a close look. I'm sure the OAIC knows other agencies where FOI performance warrants close examination. It could have done more, and more quickly, to get the point across to poor performers-they know who they are- that it is on the job with whatever stick it has available with more than one own motion investigation in the first 18 months.

c. New two-tier system of merits review

Overhaul. Beef up the OAIC. Reviews by the AAT of OAIC review decisions only on a question of law.

d. Reformulation of the exemptions.

Better, particularly the improved objects and the link to the public interest test.

Blanket exemptions not linked to harm are inconsistent with the objects. A public interest test should apply in all cases.

There has been no apparent diminution of protection for sensitive documents including cabinet documents.

On the contrary questions still need to be asked why any information prepared for the dominant purpose of consideration by cabinet, or a record of a cabinet decision must remain confidential for 28 years, regardless of the nature of the information. In NSW and other states there has been no evidence of adverse consequences as a result of a limitation on use of a cabinet document exemption only for 10 years after creation of the document. Other exemptions or public interest considerations against disclosure of still genuinely sensitive information continue to apply.

Or why any information communicated to an Australian official by anyone in any foreign government including the time of day according to such paranoid secret keepers as Burma and North Korea, will under our law be exempt from disclosure where the parties agree to or imply confidentiality. Even where the information at the time sought is now in the public domain here or there, and regardless of whether the foreign government concerned still regards it as sensitive. No public interest, including justice to an individual trumps the fact that the parties involved agreed it was information communicated in confidence.

The specific reference and implied concern about 'frank and fearless' advice is surprising.

This 'Howard factor' soldiers on - and should be put to rest or at least in its proper place.

Justice Mason in *Sankey v Whitlam* over thirty years ago stated the argument that disclosure will result in want of candor in advice given by public servants "is so slight it may be ignored." And that the possibility of future publicity might "act as a deterrent against advice which is specious or expedient."

The 1979 Senate committee report on the draft FOI bill stated that "one must seriously question after *Sankey* and *Whitlam* whether candor in internal communications can hereafter be relied upon as a public interest consideration."

While two judges in the High Court in McKinnon and the Treasury left it open as a public interest consideration, Deputy President Forgie in McKinnon and Secretary Department of Prime Minister and Cabinet (2007) AATA1969 [116-129] pointed to the Public Service Act, Public Service Values, and Guidance from the Public Service Commission and National Archives all espousing how public servants should/must/had an obligation to provide frank, honest and impartial advice. And urging that oral advice should be recorded.

In that case a number of claims by Dr. Shergold that documents concerning government deliberations should not be disclosed in response to a Freedom of Information application on public interest grounds were rejected - that disclosure would reveal deliberations of senior public servants, would mean that proper records would not be created, and that frank and candid advice would not be offered. Similar claims were dismissed for the same reasons by then Clerk of the Senate Harry Evans as grounds for refusal by ministers and public servants to respond to questions in parliamentary committee hearings.

<http://foi-privacy.blogspot.com.au/search?q=Claims+about+%22advice+to+Government%22+don't+wash+with+Harry+#.UM5zZ44ob9I>

The need for confidentiality in provision and consideration of advice and the weighing of options – thinking space - is acknowledged. But after decisions have been taken, good government in most instances would be enhanced by disclosure of the decision making process, the choices available and the arguments for and against, unless the sensitive nature of the issues at hand, and therefore the public interest demands otherwise.

Now isn't the time to return to pre-1982 days. If the law needs to be clearer let's do that.

e. The range of agencies covered

Too limited at present-see earlier in this submission.

f. Fees and charges and costs

Efficiency is not mentioned in the Terms of Reference although they refer to “the role of fees and charges’ and “the desirability of minimising the regulatory and administrative burden including costs, on government agencies”

It is clearly desirable to minimise costs and the administrative burden through efficiencies while at the same time achieving desired outcomes and results. Efficiency requires an assessment of how well systems and resources are utilised and applied in the implementation of the laws.

There is little information publicly available about efficiency in managing access to government information. The review should seek information and data that would throw light on what resources are allocated to the information access function, whether agencies fully utilise available technology, what constitutes good practice and whether agencies apply such methods and practices.

Much is made of the OAIC annual report figure of \$41 million for the FOI function based on agency reports that include estimates of time spent in dealing with applications. The total included staff costs of \$33.8 million, and \$6.5 million in legal advice and litigation costs.

The averaged agency cost per request in 2011-2012 was \$1876, up from \$1799 the previous year and double the cost in 2007-2008. It is unclear what gave rise to the increase, or what agencies are doing to reduce costs.

Responding to requests for information is a cost of doing government business in a democratic society. The public has rights and cost should not be a significant barrier that stands in the way of exercising those rights. The public also has a right to enjoy lowish costs as one of the dividends flowing from the hundreds of millions spent on improved information management systems within government over the years. In fact there should be another dividend-access to tools that assist in knowing more about what information government holds, to better inform requests from outside the loop.

With regard to efficiency, anecdotal evidence suggests some agencies are not operating optimally. The Auditor General for example has drawn attention to record management shortcomings over the years, shortcomings that must significantly impact on FOI administration.

The Cornall report on DIAC refers to aspects of poor process, leading to long delays and presumably high cost to the agency.

At the National Information Law Conference in Canberra in November the officer in charge at Foreign Affairs and Trade described the FOI unit as resembling a craft shop when he assumed responsibility, with officers utilising tape and pen to redact information by hand from documents prior to release. Software for this purpose had been utilised subsequently. How widespread “craft shop” practices still exist in FOI administration across government is unknown.

The degree to which ministers and public servants purposefully game the system, and the resulting effect and cost is unknown. To what extent an abundance of caution in interpreting the law, delay in responding to requests, inadequate searches for relevant information and poor decisions based on the premise that the applicant is unlikely to challenge add to cost is also unknown.

What this FOI matter cost the Department of Industry, Innovation, Science, Research and Tertiary Education is unclear but it is certain to be in next year’s cost statistics. It wasn’t brought on by the applicant’s behaviour.

<http://foi-privacy.blogspot.com.au/2012/09/gaming-foi-system.html#.UM5nKYUzgUk>

A major efficiency issue is whether the right decision is made on an application the first time. Information about the extent to which original decisions are consistent with the law is limited and only comes to light in the event the matter receives later visibility. Many applicants may simply live with the results of a poor decision.

As to the future, Professor McMillan’s report is a good start. However the proposed flat 40 hour cut off, without more, needs rethinking. The proposal is an attempt to put more certainty around the substantial and unreasonable diversion of resources provision that has been in the FOI act since it commenced. It’s origin is a NSW ADT decision years ago that interpreted similar words in the NSW act to mean that anything that involved 40 hours processing time was getting into substantial diversion of resources territory. However it was not a strict rule and other factors, including the nature of the information sought needed to be considered.

Some upper limit on resource use seems necessary if for no other reason than resources devoted to one person's large FOI request, at some point, after tens, hundreds or thousands of hours, become resources used in a way that disadvantages other applicants waiting in line. The "unreasonable" tag needs to remain in the equation somewhere allowing the nature of the application to be taken into account, and consideration given to factors such as the public interest in making the application before enabling an agency to pull the diversion of resources plug.

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I would welcome the opportunity to discuss these and other issues with Dr Hawke.

Peter Timmins.
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16 December 2012.

Attachment A - Recommendations in the ALRC Report

77-Open Government -that were not taken up or publicly acknowledged by the government during the 2009-2010 reforms.

28. The definition of document should be amended to clarify that it includes data.

31. In three years the time limit for processing FOI requests should be reduced to 14 days.

42. The FOI Act should be amended so that a 'neither confirm nor deny' response under s 25 is not available in respect of documents information about the existence or non-existence of which would be exempt under s 33A (Commonwealth/State relations).

44. Section 33(1)(b) of the FOI Act should be subdivided and the exemption for information communicated in confidence by an international organisation made subject to a public interest test.

52. Section 36 of the FOI Act should be amended to exclude purely statistical information.

55. Section 37 of the FOI Act should be amended to provide that specified documents (those described in FOI Act (NSW) Sch 1 cl 4(2)) are not exempt if their disclosure would, on balance, be in the public interest.

58. Section 44 of the FOI Act should be repealed. (Partly acted upon).

61. Section 41 of the FOI Act should be amended to provide that in weighing the public interest in disclosure an agency may have regard to any special relationship between the applicant and the third party.

73. The parliamentary departments should be made subject to the FOI Act.

74. The intelligence agencies should remain in Schedule 2 Part I. All other agencies currently listed (other than GBEs) should be required to demonstrate to the Attorney-General that they warrant being excluded from the operation of the Act. If they do not do this within

12 months, they should be removed from Schedule 2 Part I.

75. If s 43 of the FOI Act is amended as recommended by the Review, the exemptions in Schedule 2 Part II for documents relating to competitive commercial activities of agencies should be repealed. All other agencies listed in Schedule 2 Part II should be required to demonstrate to the Attorney-General that the documents specified warrant exclusion from the operation of the Act. If they do not do this within 12 months, those documents should be removed from Schedule 2 Part II.

76. Schedule 2 Part III should be repealed provided s 43 of the FOI Act is amended, as recommended by the Review, to apply to documents that relate to agencies' competitive commercial activities.

88. Agencies should only be able to impose charges in respect of documents that are released. Charges should be assessed in accordance with a fixed scale that has been determined on the basis of a realistic assessment of what information technology and record management systems an agency could reasonably be expected to be using. The scale should be developed by the FOI Commissioner in consultation with the Chief Government Information Officer and reviewed annually.