

Initial Response to the Review of FOI Laws (Cth)

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Dear Dr Hawke,

Thank you for the limited opportunity, given the submission deadline, to make this submission to your review. My intention is to submit a set of key changes I consider necessary to the *Freedom of Information Act* 1982 and the *Australian Information Commissioner Act* 2010 and just as importantly changes needed in the practice, administration and culture of open government at a federal level in the 21st century.

My intention is to expand upon these recommendations and points before Friday but I wanted to meet your deadline and allow others a chance to comment on or respond to some of my ideas. The approach you have adopted to this review severely limits opportunities for discussion and the exchange of ideas. I will be available to meet with you to expand upon the points below or to respond to submissions made by others especially government agencies.

Terms of Reference

Impact of reforms to FOI laws including new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system and the effectiveness of the Office of the Australian Information Commissioner. 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, including: (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.

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

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

Basic changes needed in the operation of FOI at a national level

- Statement from the Prime Minister on Freedom of Information and open government.
- Scope of FOI widen to include all government agencies and functions.
- Emulate the New Zealand approach to Cabinet information.
- Switch from focus on documents to information.
- Instruction to public servants that frankness and candour are requirements of public office.
- Public interest test to apply to all exemptions.
- ALRC Report recommendations into Secrecy Laws adopted.
- Simplified charging regime.
- Simplified review mechanism.
- Greater focus on changing culture and practice within the public service.
- Australia to join the Open Government Partnership.

1. Statement from the Prime Minister on Freedom of Information and open government.

Since Senator Faulkner no Minister responsible for FOI, or Prime Minister, has shown ongoing and positive leadership, direction or commitment to ensuring the reforms made in 2010 were effectively put into place. The Prime Minister should be advised to make a public commitment to FOI and to instruct the federal public service to avoid transparency only where it is absolutely in the public interest to do so.

2. Scope of FOI widen to include all government agencies and functions.

In the 21st century there is no justification to exclude any agency or function entirely from the coverage of the FOI Act or the supervision of the Information Commissioner. If the USA can operate with agencies like the FBI and CIA covered by the Freedom of Information Act there is no justification or necessity to exclude any Australian agency from the *Freedom of Information Act* 1982.

The *Freedom of Information Act* 1982 should be extended to include any body, government or non-government carrying out public functions; or receiving substantial public funds and automatically extend to the creation of any future government agencies unless specifically excluded.

3. Emulate the New Zealand approach to Cabinet information.

Ministers should be required to consider the appropriateness of publishing Cabinet material and information under guidelines similar to those adopted in New Zealand in 2009 (see attached NZ Cabinet Office Memo).

This would also include the possibility of releasing such material where appropriate before a matter is considered or decided by Cabinet (See point 8 of the NZ Cabinet Memo).

4. Switch from focus on documents to information.

As suggested in Mr Thomler's submission to this review there should be a shift to a 'right to information' framework "where the format of the information is de-emphasised in favour of a focus on the content." The key policy objective of the FOI Act should be devoted to the management of the supply, demand, distribution, quality and timing of availability of information held by government rather than the focus being on the excessive protection of information regardless of harm.

5. Instruction to public servants that frankness and candour are requirements of public office.

Much has been made, generally in anecdotal comments as opposed to any solid evidence, about the chilling effect of possible disclosure has on the capacity of public servants to be fully candid and frank in their dealings with Ministers.

A minimum requirement of accepting public money and their access to the public payroll, for all public officers, is an expectation or requirement that they will give full and frank advice.

6. Public interest test to apply to all exemptions.

There should be no absolute exemptions and all exemptions should be subjected to a public interest test.

7. ALRC Report recommendations into Secrecy Laws adopted.

The 61 recommendations contained in the Australian Law Reform Commission: Secrecy Laws and Open Government in Australia (ALRC Report 112) 2010 should be implemented.

It is difficult to see how an open government system as envisaged under the 2010 reforms can be achieved without adopting and implementing at least the majority of changes recommended by the ALRC in relation to the management of secrecy laws and provisions.

8. Simplified charging regime.

As Mr Thomler points out in his submission the charging practices of federal agencies are inconsistent and where applicants (and the public in general) are penalised because of the inadequacies of an agency's document and data management systems .

9. Simplified review mechanism.

All review requests should go directly to the FOI Commissioner who must be staffed and resourced to ensure that reviews are finalised promptly.

One suggestion is that each agency should be required to transfer resources to the Office of the Australian Information Commissioner based on FOI review workload generated in the previous year by each agency.

10. Greater focus on changing culture and practice within the public service.

Despite the passage of two years since the reforms Mr Thomler can write:

“I have encountered a large number of public servants responsible for the collection, holding and dissemination of information who:

- a. Were unaware of their obligations under the amended FOI Act
- b. Had mistaken beliefs about their obligations under the amended FOI Act
- c. Were actively conspiring to not record information in 'documents' in order to avoid it being FOIed “

Variable compliance and commitment to the reforms is inexcusable. I understand that the Information Commissioner has worked hard to produce cultural change but clearly far more needs to be done and achieved.

In particular the counterproductive influence of many ministerial staffers upon the effective operation of the objectives of the FOI Act need to be addressed.

11. Australia to join the Open Government Partnership.

As Peter Timmins has frequently commented on his blog Open and Shut the Australian Government's slowness to sign up to President Obama's global initiative is both unfathomable and sends a very negative message both domestically and internationally about Australia's commitment and capability to achieve open government.

Final Comments

I apologise for the brevity and terseness of these suggestions but I have sacrificed detail to enable my meeting of your deadline.

I found it very helpful to have access to Mr Thomler's submission. It would have been helpful if your review process had offered ways of facilitating the exchange of ideas and experiences.

Furthermore given the staffing capacity, resources and experience of the Australian Public Service it would have been helpful to have made agency submissions due by the 7th of December 2012 and the public given an opportunity to consider and respond to those submissions by the end of January.

I have submitted an opinion piece to *Public Administration Today* that will be published before your review is complete. In that piece my main argument is that the APS has failed to embrace FOI and open government as a policy program. I argue that the APS in general and its leadership specifically have neglected (since 1983 and 2010) to seek the benefits of greater openness and have focussed primarily on the negatives and costs associated with FOI.