

# **Strengthening the right of access to documents and information**

Submission to the review of the  
Freedom of Information Act 1982 (FOI Act)  
and the  
Australian Information Act 2010 (IC Act)

**Mark R. Diamond, *PhD***

and

**Angela O'Brien-Malone *BSc, BA(Hons), PhD***

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## Introduction

Before making comments against the Terms of Reference for the Review [1], we first consider their phrasing. Given the painful labour involved in producing the 2010 reforms and the fanfare with which the government announced its intention to reform the existing FOI law, one might have expected the Terms of Reference to have asked for a consideration of how the Act could be improved so as better to promote its objects (s 3), especially as the intentions of the Parliament in creating the current FOI law are so clearly stated in those objects.

Specifically, the Terms of Reference might have been drafted so that the Review could consider:

- The manner and extent to which the operation of the FOI Act, particularly in terms of its administration by the plurality of government agencies, has served to promote Australia's representative democracy
- The manner in which, and degree to which, the practical operation of the Act has succeeded in increasing public participation in Government processes generally
- The manner and degree to which agencies have, through their administration of the Act, promoted better-informed decision-making, either in themselves, in other agencies, or the public
- The manner and degree to which agencies have, through their administration of the Act, allowed for and promoted increased scrutiny, discussion, comment and review of Government activities
- The manner and degree to which agencies have, through their administration of the Act, (a) promoted the recognition that information held by the Government is to be managed for public purposes, and (b) promoted the utilisation of that information as a national resource
- The role that fees and charges have played in promoting or hindering the objects of the Act

Instead, the Terms of Reference have been phrased so as to give the strong, though possibly unintended, impression that their purpose is to lay the ground-work for a roll-back of some of the 2010 reforms. That unfortunate impression is created by the Terms of Reference being broadly aimed at a consideration of what some vested interests might perceive to be the failures or limitations of the current Act or of the Office of the Information Commissioner.

Perhaps it was thought that concentrating on the limitations or failures of the current Act would be the most time-efficient way of proceeding with the Review. However, any assessment that fails to include an examination of both the merits, as well as the limitations, of the Act risks losing sight of those aspects of the current legislation which are working well or are working much better than the Act as it existed prior to the 2010 reforms.

We sincerely hope that the impression conveyed by the Terms of Reference is misleading, and that the commitment of the Government to improving and strengthening the right of Australians to access government documents is as great as it was when Special Minister of State, John Faulkner, released the draft bills for FOI reform in March 2009 [3].

## **Terms of reference**

... 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.

## **Impact of the reforms to FOI laws in 2009 and 2010**

### **Culture of transparency and openness**

The FOI reforms were intended to bring a culture of transparency and openness to government agencies. That does not appear to have happened, or at least not as broadly as one would hope, despite the efforts of the Australian Information

Commissioner and the influence of such things as the *Advisory Group on the Reform of Australian Government Administration*.<sup>1</sup>

As the Information Commissioner said in his speech [4] to the UNESCO conference on 2 May 2010, six months prior to the reforms taking effect:

It has long been suspected that the objectives of the FOI Act are not warmly embraced by all within government. An occasional criticism of the FOI Act is that it prevents agencies getting on with their pre-eminent and important role of developing and administering government policy. There is not the same support within government for FOI as there is for some other framework laws that ensure integrity and transparency, such as financial accountability and conflict of interest laws.

Openness and transparency still run counter to the instinct of many, though certainly not all, public servants. For example, as we noted in our 2010 submission to the Senate Finance and Public Administration Committee [2], despite the emphasis of successive governments on evidence-based policy,

The majority of program evaluation reports do not see the light of day. Although some Agencies have a good record for publishing evaluation reports, most do not. The excuses for non-publication are numerous but the effect is the same: the Parliament and the Australian public are denied the opportunity to discover what is working, and what is not working—to discover where public money is being spent effectively, and where it is being wasted on programs that do not work.

The FOI Act provides one of the few means by which the Australian public can discover the true value (i.e., usefulness, effectiveness and efficiency) of the programs for which they pay.

Sadly, although the FOI legislation provides some of the apparatus necessary for ensuring open and transparent government, the existence of an apparatus does not guarantee that its use will be willingly embraced. You can't legislate for hearts and minds. Hearts and minds must be won. In that respect, the efforts of the Office of the Information Commissioner have been central to the progress that has been made, and are critical to ensuring that a culture of more open government will eventually permeate the Australian Public Service.

### **Frank and fearless advice**

Snell [8] remarks that:

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

If the assertion is correct — that the current FOI framework has hampered the flow to Ministers of “frank and fearless advice from agencies and from third parties who deal with government” — then there is a problem. But is the assertion correct? *Is* there a problem, and how can we know whether there is or not? This question is critical given that an agency that does not fully embrace the objects and spirit of the

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<sup>1</sup> If agencies make submissions to your review suggesting ways to strengthen and promote public access to information held by the Australian government, then it will be clear that we are wrong in our assessment of the extent of cultural change!

current FOI law would have a vested interested in claiming that the flow of advice to Ministers was hampered.

There are a variety of research methods from the social sciences by which it might be possible to undertake an objective, rational assessment of whether the flow of frank and fearless advice to government has in fact been impeded by the FOI legislation. It would be difficult but it could be done. Suffice to say, we know of no research study that has used appropriate methods to examine the issue.

### **Short delays to mitigate the possible effects on advice of FOI openness**

The Information Commissioner [7] has suggested that documents might be inaccessible for a short period (perhaps 90 days<sup>2</sup>) following their creation. The idea has considerable merit and would serve to mitigate the effects of the FOI regime on the free flow of advice to Ministers—if indeed such effects exist.

Like other people, public servants need time and space in which to think. Not every idea flourishes. Not every document that is conceived as possible advice to a Minister actually becomes advice. Some people think best by committing their ideas to writing, after which the ideas might be examined, refined, improved, or found wanting and rejected entirely. To have one's thinking processes scrutinised in the moment of them being committed to writing might well inhibit the creation and appropriate formulation of good advice. But that is not an argument for burying documents for an extended period. Rather it is an argument for allowing time for ideas to grow.

## **The effectiveness of the Office of the Australian Information Commissioner (OAIC)**

The Office of the Information Commissioner is an essential plank of the FOI framework. Its capacity to fulfil its mission should be enhanced.

*Backlogs and other delays.* Delays generally act to the detriment of FOI applicants and to the advantage of agencies, particularly so when an agency wishes to avoid a legitimate request for information. Timeliness of access is just as important to the cause of open and transparent government as is the fact of access.

*Resources.* The OAIC cannot be effective unless it is adequately resourced. Many a good idea has been starved into ineffectiveness. At current staffing levels, the OAIC cannot properly fulfil its functions, and the realisation of the objects of the Act is undermined. While the OAIC frequently appears to perform wonders, asking for daily miracles is asking too much.

The OAIC should be better funded, given more staff, and greater resources.

*Problems of delegation.* In addition to general processing delays, there are currently very substantial delays within the OAIC between the time that a decision is drafted for consideration by the Information Commissioner and the time that a decision is actually made and published. The cause appears, in part, to be that the current

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<sup>2</sup> The Information Commissioner suggest several different ways of considering what should constitute an appropriate delay (e.g., until after an election, some fixed number of days, etc.).

legislation does not allow sufficient delegation or sharing of the decision making authority of the Information Commissioner.

The IC Act and FOI Act should be amended to address the problem.

## **The role of fees and charges on FOI**

The primary value of the FOI process does not lie in the grant of access to any specific documents, nor in the disclosure to the individual applicant of the information that the documents contain. Rather, the primary benefit to Australia is through the general effect of the FOI Act in promoting transparent and accountable government in the interests of representative democracy. Because we all benefit from the existence and use of FOI legislation, it is not reasonable to charge the whole of the cost of any FOI request to an individual making the request.

That said, fulfilling the requirements of the FOI Act undoubtedly makes claims on agencies' resources, as does an agency's fulfilment of any other relevant legislative requirement. It is true that, under the current FOI framework, the costs of providing access must substantially be paid from the budget of individual agencies. But an agency's money is sourced from taxes. The money administered by an agency is not money that it holds for its own benefit but for the benefit of the Australian people.

It is not obvious that any fees at all should be charged for reasonable FOI access. Individuals do not pay to vote. Why should individuals pay for reasonable access to open and transparent government?

## **Minimising the regulatory and administrative burden on government agencies**

### **Minimising costs**

As the Commissioner noted in his speech [4] to the UNESCO conference on 2 May 2010, a significant objective of the legislative reforms was:

to move from a 'reactive' or 'pull' model of FOI administration, in which agencies disclose information in response to requests; to a 'proactive' or 'push' model, in which agencies take the initiative to make information available to the public. The central element in this new approach will be an expanded web publication scheme.

We suggest that an agency that focuses its efforts on a proactive, 'push' approach to FOI administration, and endeavours to publish its more significant work, is likely to receive fewer requests and to have more control over its workload than an agency which focuses its endeavours on responding to the 'pull' model of FOI administration.

Contrarily, an agency that has a culture of resistance to FOI and that habitually opposes FOI requests is likely to accrue significantly greater costs through resisting FOI requests that are later judged to be legitimate than if the agency had taken a less oppositional initial position. Thus, an agency's costs are partly a product of its own culture and of its attitude towards the legislation; to that extent, some costs are within an agency's own control.

Two points which we discuss further below are of relevance to the question of costs; these are found in *Disclosure Logs and Other Suggestions, Preparatory Period—Information Commissioner*.

### **Disclosure logs and minimising administrative burden**

Part of the expanded web publication scheme enshrined in the FOI Act is the requirement that agencies publish information (“disclosure logs”) about access requests that have been granted. An agency’s disclosure log provides a window on its FOI culture. The window suggests that not all agencies are equal.

A good example of an agency’s disclosure log (surprising in our view, considering the nature of the material with which the department deals) can be found at the website of the Department of Defence. Improvements could be made, but on the whole, the Department of Defence has approached the construction of its disclosure log in a manner that strongly supports the objects of the Act. Not only does it publish the fact that access has been given to documents, it almost always makes the documents themselves available for downloading from the agency website. The extent of the agency’s commitment to the disclosure process is shown by the fact that many of the documents are many megabytes in size—the largest so far (FOI number 020/12/13) is 72 megabytes!

In contrast, the disclosure logs of several other agencies, including the Department of Education, Employment and Workplace Relations (DEEWR), are very limited. For example, although DEEWR reports that it has granted 75 requests for access, in only 25 per cent of cases are the documents available for downloading. In the remaining 75 per cent of cases, a person wanting a copy of the documents is told that they must telephone the agency. Given that the largest document available for download from the DEEWR disclosure log is only 0.9 megabytes, one must presume that it is not for want of electronic storage space that the other documents have not been made available.

There are several negative effects of agencies fulfilling the disclosure requirements by publishing only the fact that an access request has been granted.

1. The disclosure culture of the agency is cast in a poor light.
2. The public are unable to browse documents that have been released.
3. A person who wants a copy of the documents must contact the agency—a demand that not only acts as a further barrier to the free and open flow of information but also increases the administrative burden on the agency.
4. The agency can levy new fees for re-releasing the already disclosed documents!
5. The content of the documents is not indexed by major internet search engines.
6. The agency contributes only minimally to promoting the broader objects of the Act and so limits the economic and social benefits that could accrue to the Australian community from the release of the documents (see ref public sector information).

We suggest amending the publication provisions of s 11C to require that agencies (a) make released information available for downloading from the agency website unless there are reasonable grounds for not doing so, and (b) publish those “reasonable grounds” when the agency chooses not to make the information directly available.

### **Anticipating FOI requests**

Agencies could act to reduce their own administrative burden. By proactively publishing major documents that could reasonably be expected to be the subject of a valid FOI request, an agency could considerably reduce its costs.

### **Other suggestions**

Here, we mention, with minimal comment, ideas that have been raised in other submissions.

#### **Blind testing of FOI — Thomler**

Endorsed with variation.

Thomler [9] suggests that:

the OAIC be funded to conduct regular ‘blind tests’ of FOI, putting requests in to a large number of agencies on a regular basis to assay whether they perform as they state they perform.

The fundamental idea is excellent. It would be appropriate for the ANAO to do the testing.

#### **Publication consistency — Thomler**

Endorsed.

Thomler [9] suggests that there should be:

*A standard approach for agencies to release information ... and for a standardised metadata schema to be used to allow improved reuse of released information, with the schema published openly and available for review.*

The suggestion regarding metadata is particularly relevant to whether, and to what extent, the information that is released by agencies can be indexed by internet search engines. That, in turn, significantly affects the utility of the information and the extent to which it contributes to fulfilling the general objects of the FOI Act.

We noted earlier that the Department of Defence has a particularly good disclosure log, but even there the information is not able to be indexed by internet search engines. The published summary of the *fact* of disclosure can be indexed but the PDF copies of the (scanned) released documents themselves are not indexable.<sup>3</sup>

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<sup>3</sup> The Department of Defence has probably chosen to release scanned documents for two reasons. First, in some cases there might not be original electronic versions of the material that is released. Second, by scanning the documents the Department can guarantee the adequate redaction of confidential material. Nonetheless, the website could be improved by post-processing the redacted, scanned images using optical character recognition. The post-redaction text of the documents would then be indexable.

**Central disclosure log — Thomler [9]**

Endorsed.

**Scope of FOI widened to include all government agencies and functions — Snell [8]**

Endorsed.

**Change of focus from documents to information — Snell [8], Thomler [9]**

Endorsed.

We know of agencies that have refused to provide requested information on the purported ground that the Act provides a right of access only to 'documents' and not to 'information'. It is true that the access provisions of the Act are phrased in terms of 'documents' but the requirements of s 15(2) of the Act are not such as to demand that an applicant use the actual words 'document' or 'documents' in their request for access. An applicant can request 'information', provided that there is sufficient detail in the applicant's request for the agency to be able to identify relevant documents.

Additionally, in *Langer and Telstra Corporation Ltd [2002] AATA 341 (10 May 2002)*, Deputy President Forgie found that:

The terms of the definition [of document in s 4] are broad enough to encompass within them records kept on paper and in electronic form such as in e-mail records or in documents kept in electronic form,

and so, presumably, are also broad enough to encompass electronic databases and the tables of 'information' that they contain.

Nonetheless, a reformulation of the Act in terms of 'information' rather than 'documents' might make it easier to administer as more and more documents

- (a) are stored in electronic form, and
- (b) exist only 'virtually' and temporarily, being created as-needed from multiple, linked databases.

We therefore endorse the changes suggested. The changes would require careful construction and would probably benefit from the input of people who are knowledgeable about databases and other electronic "information containers".

**Public interest test to apply to all exemptions — Snell [8]**

Endorsed.

**Calculating days — Information Commissioner [7]**

We endorse the recommendation of the Information Commissioner that FOI processing periods should be calculated in working days, not calendar days.

**Preparatory period — Information Commissioner [7]**

We endorse the excellent suggestion of the Information Commissioner that at the front end of the FOI processing period there be a short period within which an

agency can talk informally to an applicant and clarify the scope of a request before the FOI clock starts running.

### **Vexatious applicants — Information Commissioner [7]**

In his recent speech, the Information Commissioner noted that to have an applicant declared vexatious is a high bar to cross. It should be kept high.

To our knowledge, there has been no judicial consideration of the meaning of 'vexatious applicant' in the context of the FOI Act. In other contexts, it is taken to refer to person who pursues multiple actions, none of which have any reasonable prospect of success, rather than (as some agencies might hope) to an applicant whose persistence is annoying.

There is merit in the Information Commissioner's suggestion that agencies be allowed to make an IC reviewable decision that a specific application is vexatious. However, the significant danger with that option (given the current, parlous, resources of the Office of the Australian Information Commissioner) is that agencies would use the option as yet one more avenue for delaying unpalatable, though legitimate and meritorious, applications.

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## **Disclaimer**

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## **About the authors**

Dr Mark Diamond is an evaluation expert with a long record of publication in peer reviewed journals. He has been a research and evaluation consultant to the private sector and to government. He maintains a blog on matters related to ethics, evaluation, and research at <[www.markdiamond.com.au](http://www.markdiamond.com.au)>. He is currently employed within the APS.

Dr Angela O'Brien-Malone has extensive experience as a senior academic with specialist expertise in evaluation and research methodology. She has a long record of publication in peer reviewed journal and is the recipient of a Vice Chancellor's Award for Teaching Excellence. She is currently employed within the APS.