

Response to the Review of FOI laws

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Thank you for the opportunity to provide a submission to the review of FOI laws. Here are my comments in response to the review. I would also welcome the opportunity to discuss these comments in person.

(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;*

While I realise that this process gives effect to a promise to review the amended legislation two years following the implantation of the 2010 amendments, it is arguably still too soon to form a judgment about many aspects of the operation of the amended version of the Act, especially given the very small number of AAT and Federal Court decisions relating to post-amendment provisions.

In those circumstances I have reiterated below a number of points that I made in my submission to the Senate Finance and Public Administration Committee in respect of the then proposed 2010 amendments, as well as making some further comments in relation to the administration of the Act.

(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;*

The OAIC has been effective in promoting the new review regime and in developing a comprehensive set of guidelines which promote a more pro-disclosure approach to access, consistent with objective of the FOI Act. In addition, the decisions published to date are clearly expressed and consistent with the published guidelines. However, the Office has suffered from insufficient resourcing to provide for the very high initial volume of work associated with its commencement, including implementing the new publication regime and developing guidelines and other required publications. In consequence it now has a significant backlog of applications for review, leading to unacceptable delays in decision-making.

If FOI is to achieve its objectives, it is imperative that applicants are able to assert their review rights in a timely manner. In addition these delays create a scenario where agencies have little incentive themselves to comply with required timelines, as they can delay for weeks or even months and then settle with applicants long before any review is conducted. The issue of charges is dealt with below and may provide a partial solution. However, there may be merit also in giving applicants the option to proceed directly to the AAT once the appropriate time for Commissioner review has elapsed.

(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;**

The wording of this question seems to suggest that the main issues which arise in relation to the revised exemption provisions is whether they have gone too far in terms of making available information about sensitive government documents, including Cabinet documents, and documents which shed light on internal and external advice to the government. I would suggest, however, that it is equally important to consider deficiencies in those exemption provisions which were not amended in 2010 and which operate too broadly having regard to the objectives of the Act. I will therefore deal first with the specific questions posed and then go on to outline deficiencies in exemptions which have not been amended.

The questions posed arguably call for an assessment of the following three matters:

1. The changes to the Cabinet documents exemption

The Cabinet document exemption was amended in 2010 to tighten the test in s 34(1)(a) so as to prevent it being used to exempt documents not initially created for the dominant purpose of submission to the Cabinet. This change is important because it avoids any temptation for agencies to undermine the objectives of the Act by submitting documents not created for that purpose to the Cabinet as a means making them exempt. A document which falls outside this test but nevertheless requires protection because it would reveal a Cabinet deliberation qualifies for exemption under s 34(3).

2. The changes to the objects clause to the extent that it affects the interpretation of the exemption provisions.

The changes to the objects clause in s 3 are an integral feature of the 2010 reforms. Given the longstanding tradition of public sector secrecy and the natural tendency for agencies not to expose their activities to public scrutiny, it is very important that the Act should clearly mandate a pro-disclosure stance. However, the wording of what was formerly s 3 (b), which spelt out the function providing a general right of access to documents subject to 'exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities', made possible an interpretation which required a neutral (as opposed to a pro disclosure) stance to the interpretation of exemption provisions.¹ Although decision of the High Court in *McKinnon v Treasurer*² endorsed a more pro-disclosure stance,³ the judgments in that case failed to enunciate this in a way which is abundantly clear. It is arguable that a leaning stance is appropriate given that the legislation is designed to promote transparency.

3. the new public interest test as it impacts on the conditional exemptions.

¹ See, for example, *In News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64.

² [2006] HCA 45.

³ This is discussed further in M Paterson, 'Cloudy with a silver lining: McKinnon and freedom of information' (2007) 78 *Precedent* 39, 40-41.

An Important aspect of the 2010 amendments was the inclusion via s 11B(4) of an inclusive list of factors that may not be taken into account as weighing against the public interest in disclosure. This list is of most direct relevance to the deliberative processes exemption (and to the related exemption in s 47E(d)) for the reason that it has put to rest a number of the so-called “re Howard factors” which operated to narrow its operation.⁴ It did not, however, address all of those factors; the two which it does not specifically proscribe are the disclosure of policy development and inhibition of frankness and candour tests. These have, however, been impacted on by the strengthening of the objects clause as made clear in the following extract from the new FOI Guidelines:

Many earlier decisions applied or referred to the AAT’s decision in *Re Howard and the Treasurer* ... which listed five factors that could support a claim that disclosure would be contrary to the public interest. Three of those factors are now declared to be irrelevant considerations by s 11B(4) of the Act (the high seniority of the author of the document in the agency to which the request for access to the document was made, misinterpretation or misunderstanding of a document, and confusion or unnecessary debate following disclosure). The other two Howard factors (disclosure of policy development, and inhibition of frankness and candour) are not, in those terms, consistent with the new objects clause of the FOI Act (s 3) and the list of public interest factors favouring access in s 11B(3)). It is important that agencies now have regard to the more extensive range of public interest factors that may favour or be against disclosure⁵

Candour and frankness arguments arguably lie at the heart of the deliberative processes exemptions, which are a common feature of freedom of information laws. They reflect a view that there are circumstances where a measure of secrecy is necessary to protect the integrity of the decision-making process and that excessive transparency may jeopardise good decision-making either by inhibiting free and frank expressions of views or by discouraging public servants from making permanent records of information that needs to be recorded to ensure good governance. On the other hand, such practices are inconsistent with public servants’ statutory duties, and assertions that disclosure is likely to have this effect therefore warrant close scrutiny. Moreover, given that the first leg of the test for exemption under s 47C(1) encompasses most of the decision-making documents of agencies, it is important to delimit the scope of the public interest test so that it cannot be used to justify non-disclosure simply on the basis that some public servants might feel less comfortable if their deliberations were subjected to public scrutiny. To allow it to operate in this way has the consequence of removing from scrutiny the very documents to which members of the public need to have access in order to be able to participate meaningfully in, or to be able to understand and evaluate, the decision-making of government agencies. Public officials are generally required to provide reasons on request for decisions that affect individuals; arguably it is not unreasonable to expect them to account more generally for their decision-making.

⁴ There was a tendency for review bodies to accept and apply as a de facto set of guidelines a set of factors articulated in any early AAT decision in *Re Howard and the Treasurer* (1985) 7 ALD 645.

⁵ See OAIC, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982(2010) [6.77] accessed at http://www.oaic.gov.au/publications/guidelines/guidelines-s93a-foi-act_part6_conditional-exemptions.html.

As I have stated elsewhere, the inappropriate acceptance of arguments based on inhibition of candour and frankness encourages “a culture which legitimates fear of public criticism, rather than one in which public servants are expected to have the necessary fortitude to give frank advice *irrespective of any potential criticisms*. To the extent that they are accepted, they encourage Ministers and public servants to hide behind them as a means of preventing access to any information which might potentially expose them to criticism.”⁶

Back in the late 1970s when the merits of enacting the Freedom of Information Act were being debated there were genuinely held fears that providing rights of access to government documents would pose a fundamental threat to key aspects of our Westminster system of government and to the efficient operation of the Commonwealth government.⁷ Despite some anecdotal evidence of practices such as the use removable adhesive labels as a method for avoiding disclosure of sensitive comments, these concerns in general proved not to be well-founded. In other words, public servants were initially concerned about transparency but became less so as they learned to be less fearful of its adverse consequences. There were similar concerns expressed by medical practitioners when information privacy laws first created enforceable rights of access in respect of private sector bodies⁸ but again they seem to have adjusted and there is no evidence that providing patients with rights of access to their own personal records had produced any adverse effects. It seems that the 2010 amendments to the Act may have reawakened similar concerns, but it is important to remember that these provisions are still new and that there has been insufficient time for a similar process of adjustment to take place.

Candour and frankness issues are not confined to internal communications and the questions posed also require an assessment of whether the 2010 changes have impacted the candour and frankness of communications by third parties. The main provision which offers protection is the public interest conditional exemption in s 47E(d) which provides protection where the disclosure could reasonably be expected to “have a substantial adverse effect on the proper and efficient conduct of the operations of an agency”. Disclosure may arguably have an adverse effect on an agency’s operations if it can reasonably be expected that it will affect adversely the candour and frankness of communications by third parties which are necessary for the efficient conduct of an agency’s operations. This is acknowledged in the OAIC’s FOI Guidelines which include in a non-exhaustive list of factors against disclosure the following:

- that disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information, and
- that could reasonably be expected to prejudice an agency's ability to obtain similar information in the future.⁹

⁶ Submission to Australia’s Right to Know Independent audit of the state of free speech, p 5.

⁷ See, for example, the Report of the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and aspects of the Archives Bill 1978 (1979) chapters 3 and 19.

⁸ See M Paterson, “New rights of access to and amendment of medical records: An analysis of the relevant policy issues relating to proposed changes affecting private sector health consumers” (1988) 5 *Psychiatry, Psychology and Law* 215.

⁹ OAIC, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* [6.25].

These factors were recently applied by the FOI Commissioner as a basis for upholding a decision to refuse access to documents relating to a conciliation process undertaken by the Human Rights Commission in an attempt to resolve a complaint made by the FOI applicant.¹⁰

Moving beyond the specific questions posed, I would reiterate the following comments which I made to the Senate Committee in respect the need for further changes to specific exemption provisions:

Documents subject to legal professional advice

There are two specific problems with this provision. First, the exemption has expanded in its scope due to a change in the common law test from a test of sole purpose to one of dominant purpose. This is potentially problematic due to the scope for documents to contain general policy advice as well as specific advice in relation to ongoing legal matters. Second, the wording of the provision requires that it be of “such a nature” as would be privileged, not simply that it is privileged. As I point out in my book at [8.116]:

“An issue that may arise is whether an imputed waiver of privilege in respect of a communication affects its status for exemption. In the case of the Commonwealth and Victorian FOI Acts, the requirement that a document must be ‘of such a nature’ that it would be privileged has been interpreted by some review bodies as requiring an assessment based on the initial nature of the documents.¹¹ Others, however, have taken the view that waiver may preclude a claim for exemption.”¹²

There are two possible ways of addressing these difficulties. The first is to implement the ALRC’s recommendations that s 42 should be amended (a) to provide that a document is exempt if it was created for the sole purpose of seeking or providing legal advice or use in legal proceedings and (b) to make it clear that it does not apply if the client has waived legal professional privilege at common law.¹³ The second is to make this exemption provision a conditional one so that the problems can be addressed more indirectly via the public interest balancing test.

Breach of confidence

The current wording of this section is open to criticism on the basis that it requires decision-makers to apply a test established in case law which is both complex and difficult to understand. The Queensland Information Commissioner commented in *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [23] in respect of the common law test that:

Its complexity is compounded by the fact that uncertainty still attends some aspects of its modern development such that not only leading academic writers but also many

¹⁰ See *L' and Australian Human Rights Commission* [2012] AICmr 21 (15 August 2012). See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 (27 July 2011).

¹¹ *Re Colonial Mutual Life Assurance Society Ltd and Department of Resources and Energy* (1987) 12 ALD 251 at 252; *Re Prescott and Auditor-General* (1987) 2 VAR 93 at 100.

¹² *Re Sullivan and Department of Industry, Science and Technology* (1997) 49 ALD 743 at 756.

¹³ ALRC/ARC, *Open Government Report*, Recs 66 and 67.

judges seem to disagree on some points of principle or on methods of approach to some issues.

A second problem is that the formulation of the test in terms of whether disclosure “would found” an action for breach of confidence leaves it unclear to what extent the common law public interest exceptions are applicable. There are a number of cases where defendants have successfully defended actions for breach of confidence by non-governmental plaintiffs on the basis that disclosure was in the public interest because it revealed some wrongdoing. However, the exact nature of this limited public interest test remains unclear.¹⁴ It has variously been categorised as a matter that operates to deny the existence of a duty of confidence, a defence and a discretionary bar to obtaining equitable relief.¹⁵ As currently worded, s 45(1) is open to interpretation as allowing for a consideration of public interest only if this constitutes an element of the action.¹⁶

Finally, assuming that s 45(1) does not contain a public interest test, its wording leaves it open to agencies and third parties to structure their dealings in ways which allow for the exemption to be claimed thereby shielding their commercial dealings from public scrutiny.¹⁷ For example, it is common practice to include confidentiality clauses in government contracts and for agencies to set up processes which create legitimate expectations of confidentiality on the part of third parties.¹⁸

Cabinet documents

The Cabinet documents exemption should be subject to some form of public interest test (as is the case in the United Kingdom and New Zealand) which serves to ensure that documents are not withheld for longer than necessary to protect the mechanism of collective responsibility. Failing that, it would be appropriate to include some time limit along the lines of those found in both the Victorian and New South Wales legislation. The lack of evidence suggesting that ten-year time limits in the Victorian and NSW FOI Acts has caused any harm to Cabinet government in those states suggests that a de facto time limit of 20 years resulting from the proposed changes to the open access period in the Archives Act is excessively long.

(e) the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act;

¹⁴ For a very useful discussion of this issue and of the relevant caselaw see the decision of the New South Wales Supreme Court in *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464 at [76]–[223].

¹⁵ See Jason Pfizer, ‘Public Interest Exception to Breach of Confidence Action: Are the Lights About to Change?’ (1994) 20 *Monash University Law Review* 67, 90–1.

¹⁶ See *Corrs Pavey Whiting and Byrne v Collector of Customs and Alphapharm* (1987) 14 FCR 434 at 451.

¹⁷ See, M Paterson, ‘Commercial in Confidence Claims, Freedom of Information and Government Accountability: A Critique of the ARC’s Approach to the Problems Posed by Government Outsourcing’ in *Administrative Justice: The Core and the Fringe* (eds R Creyke and J McMillan), Australian Institute of Administrative Law, Canberra, 2001.

¹⁸ Victorian Parliament, Public Accounts and Estimates Committee, *Commercial in Confidence Material and the Public Interest*, 35th Report to Parliament, Melbourne, 2000, key finding 1.1 at p 1. See also M Paterson, ‘Commercial in Confidence and Public Accountability: Achieving a New Balance in the Contract State’ (2004) 32 *Australian Business Law Review* 315.

Exclusions

I would argue as a matter of principle that it is preferable to redraft or expand exemption provisions to provide appropriate exemption for documents that need to be withheld from access rather than excluding specific bodies from the Act either totally or in relation to specified documents.

Removing a body entirely from coverage under the Act has the consequence that all aspects of its activities are removed from public scrutiny, irrespective of whether or not their disclosure is likely to cause harm.

A disturbing feature of the current Act is the sheer scale of the exclusions for national security bodies and their documents. As I have commented recently:¹⁹

The issue of transparency of national security bodies} has become increasingly important in a context where post-September 11 concerns about terrorism have led to a considerable augmentation of the powers of security and law enforcement bodies, including their surveillance powers.²⁰

The increases in surveillance powers of have added to the imbalance in power between citizens and their governments, and it is therefore especially important that they are subject to scrutiny to ensure that they are not abusing their powers. A factor which differentiates Australia from other western nations is the fact that we lack any Bill of Rights, and therefore any mechanism for ensuring that civil liberties are not unacceptably undermined by national security laws. Arguably, therefore, the need for transparency is all the greater²¹

This issue has arisen again in the context of the recent release by the Attorney-General of a Discussion Paper advocating among other things a strengthening of ASIO's warrant powers under the *Telecommunications (Interception and Access) Act 1999* (Cth) and seeking comments in relation to a proposal to impose data retention periods for up to two years.²²

...

To the extent that documents require protection for reasons of national security, defence or international relations, they will arguably fall within the exemptions in s 33(1). In that case special review procedures are available and arguably provide sufficient protection.

Alternatively, if there is a real concern that agencies or Ministers may inappropriately fail to claim exemption because they are unaware of the potential implications of release, this could be dealt with via a requirement for consultation in relation to any correspondence from specified national security organisations along the lines of those available under ss 26A, 27 and 27A.

¹⁹ "FOI Aspirations and Reality: The Australian Experience", paper presented at the 2nd National Information Law Conference, Canberra, 14-16 November 2012.

²⁰ M Paterson, *Freedom of Information and Privacy in Australia* (2005) [1.76] – [1.77].

²¹ *Ibid*, [1.79].

²² Attorney-General's Department, *Equipping Australia against emerging and evolving threats* (July 2012) accessed at

<http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjicis/n**s12012/additional/discussion%20paper.pdf>.

I would also reiterate the comments which I made to the Senate Committee in respect of the extension of the Act to contractors.

The new s 6C is ... a positive feature of the package given the extent of outsourcing of government functions, including the provision of core government services and facilities such as welfare services. However, while this provision is useful, it is also important to 'close the loop' by providing for some feedback mechanism in situations where an agency has failed to implement the required contractual measures or where it is unable to recover a document from a contractor despite taking reasonable steps to do so. Arguably there should be some procedure whereby the Information Commissioner is informed of these circumstances and required to implement appropriate measures to redress them. For example, a refusal or inability by a contractor to provide documents as required should be taken into account in deciding whether to renew its contract or to allow it to bid for other contracts.

- (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.**

The cost of FOI is a vexed question as it is often considered in isolation without reference to the positive benefits (including economic benefits that flow from the discouragement of corrupt practices) that can flow from a well-functioning FOI law. On the other hand, the charges payable for FOI access affect levels and patterns of usage and also the nature and extent of the burden imposed on agencies by the FOI regime.

A specific issue which has attracted controversy of late is the use of FOI as a strategic litigation tool by applicants who are involved in litigation with government agencies. These activities have highlighted the complexity of the provisions in the Act which allow for refusal of access on workload grounds and the potential for the Act to be used in an oppressive way in a context where the charges that can be imposed are substantially less than actual cost involved in providing access. It is, however, important to ensure that these activities do not result in changes which impact adversely on the vast majority of applicants who make appropriate use of the Act. It is also important to bear in mind that the fact that an applicant seeks access to documents in the context of ongoing legislation against the Commonwealth or a Commonwealth agency does not per se make that activity abusive or contrary to the public interest. In fact, the imbalance between agencies and many litigants suggests that providing generous FOI access in the public interest and consistent with the underlying rationale of the "new administrative law" of which the FOI Act formed the final element, which was to strengthen the rights of individuals vis a vis the government. That is consistent with cl 2 (f) of the Commonwealth Model Litigant rules which refers to not taking advantage of a claimant who lacks the resources to litigate a legitimate claim.

Questions concerning any changes to the existing charging regime need to be considered having regard to the following matters:

- The extent to which charges affect usage and the desirability of not discouraging appropriate uses that enhance the democratic objectives of the Act.

- The need to assess and factor both the direct and indirect benefits of FOI in the assessing the extent, if any, to which it imposes an unreasonable burden of agency resources.
- The extent to which low charges may encourage frivolous or vexatious uses of Act and the interrelationships between charges and other provisions that are directed to this issues, including the vexatious applicant provisions in ss 89K – 89N and the provisions in ss 24- 24AB which allow for refusal on workload grounds.
- The wording of s 11(2) which precludes consideration of an applicant’s reasons for seeking access and its interrelationship with the vexatious applicant s.
- The possible advantages in imposing different charges and/or workload tests for different categories of applicants.

Having regard to these issues, I would make the following comments in relation to the OAIC’s Recommendations in its Review of Charges under the FOI Act.

Recommendation 1 – Administrative access schemes

The encouragement of administrative access makes good practical sense. However, while this proposal may ensure more prompt access in some cases, it may also add delay of up to 30 days for applicants who are denied administrative access or do not receive it within 30 days and then have to proceed afresh with an FOI request. This may not be highly problematic where the alternative involves a \$50 application fee but it would become more so to the extent that the application fee were to be more substantial. The issue of delay is potentially most problematic for the media for whom timeliness of access is a major issue. It may also be an issue for an applicant who seeks FOI access to pursue some appeal process which is itself subject to tight timelines. A possible way of addressing this issue would be to reduce the time available to an agency to deal with an FOI access request where the applicant has applied for administrative access and been denied access or not received it within 30 days.

Recommendation 2 – FOI processing charges

This recommendation would considerably simplify the processing of charges and is not unreasonable if requests are dealt with in an efficient manner. However, the ability to impose charges for search and retrieval raises potential issues where an agency has an inefficient filing system or inefficient document retrieval procedures and this becomes more of an issue if charges are substantially increased (as is the case for applications that take more than 10 hours to process). Arguably therefore this would require close supervision and guidance to ensure that applicants are not being unfairly penalised for inefficiencies within agencies.

It should also be pointed out that any regime which imposes differential charges based on processing time has the potential to be undermined by breaking it up into multiple applications lodged by different agents.

Recommendation 3 – FOI access charges

This recommendation again makes practical sense. It does, however, reduce the potential for an applicant for whom charges are an issue to negate this aspect of charging by availing themselves of the opportunity to view the document in person rather than receiving copies etc. Depending of the size of a document, the alternative of receiving it in electronic form may prove to be reasonably cost effective but it is possible to envisage scenarios where all of the alternatives add substantially to the

cost of access. A possible intermediate position would be to allow some minimum period of inspection free of charge.

Recommendation 4 – FOI processing ceiling

To the extent that workload issues need to be addressed then there is a logic in tackling them directly rather using indirect measures such as increased in charges. The provisions in ss 24- 24AB which allow for refusal on workload grounds exist for this purpose but they are cumbersome and complex to apply and may themselves create onerous workload requirement. The concept of a processing ceiling provides a much simpler and easier to administer solution, although it is again capable of being undermined via the making a multiple applications through different agents. [If the recommendation is 4.3 is intended to deal with this issue then I would suggest that the language in s 24(2) may need some amendment to further clarify the circumstances where it is appropriate for an agency to treat two or more requests by different applicants as a single request and the applicability of s 11(2).]

There is, however, a further difficulty which is partially addressed by the framing of the ceiling in discretionary terms. That is where an application by an applicant who is not vexatious and who has made reasonable attempts to appropriately narrow his or her request will take more than 40 hours to process and there are either strong public interest grounds supporting access or the applicant is prepared to pay the actual cost involved in processing the application (and to accept any appropriate extension of processing timelines). While giving an agency discretion to waive the ceiling goes some way towards dealing with this, it is difficult to see why the exercise of that discretion should not be subject to external review (especially if that review is restricted to the circumstances where there are strong public interest grounds supporting access or the applicant is prepared to pay the actual cost involved in processing the application). This is important bearing in mind that there are many possible reasons why a request may take more than 40 hours to process, including reasons that are beyond the control of the applicant.

Recommendation 5: Reduction and waiver

An issue with this recommendation relates to the ambiguity in a test based on “special benefit to the public”. This is derived from the New South Wales Government Information Act and I note that the relevant guidelines state that:

There is no prescriptive definition of “special benefit to the public generally”. However, as a general guide, information that better informs the public about government or concerns a publicly significant issue would be of special benefit or special interest to the public generally. For example, if the information would inform public debate about an issue, increase public understanding about government functions, or contribute to the public’s understanding of an issue of public significance (such as the environment, health, safety, civil liberties, social welfare, or public funds), then this would have a special benefit. Information that could be viewed as satisfying public curiosity would not ordinarily satisfy the special benefit ground.²³

²³ OICNSW, Guideline 2: Discounting charges- special benefit to the public generally (March 2011) [3.2.2] accessed at http://www.oic.nsw.gov.au/agdbasev7wr/_assets/oic/m15000112/guideline_2_discounting_charges_march11.pdf,

The NSW Guidelines further state that:

The public generally may include:

- a section of the community (e.g. single parents, persons aged over 65, persons with a disability, persons of a particular nationality)
- a community group (e.g. volunteer rescue groups, kids support service providers)
- a group of persons from a particular area (e.g. persons residing in a suburb where the information relates to issues, such as waste management proposals, within that suburb)
- a group of people with a common interest (e.g. local government constituents, a parents and citizens association, student unions or university students generally, advocacy groups)
- persons of a particular occupation or industry sector (e.g. medical practitioners, academics, newsagents) or
- any other members of the public other than the applicant (e.g. neighbours who may be interested in the same development proposal).

The agency need only be able to envisage that the information may be of special benefit to other members of the public other than the applicant. They need not be satisfied that it will be a large group of persons.²⁴

Provided that the proposed test is similarly interpreted in the context of the Commonwealth Act, it should not be problematic.

Recommendation 6 – Reduction beyond statutory timeframe

As noted in the OAI's report, "An important change to the FOI Act in 2010 is that no charge is payable if a decision on a request is made outside the statutory timeframe, including authorised extensions". The report further states that: "There was general acceptance in submissions to this review that this was an appropriate and effective mechanism to ensure that FOI decision making in agencies is timely and properly supported". The report nevertheless goes on to propose a more graduated drop in charges on the basis that the total reduction in charges may be inappropriate in the case of minor delays that are due to unexpected developments that might affect an agency's ability to respond to a request in a timely manner.

This recommendation dilutes the disincentive effect of reg 5 which is an issue given that current 30 day time period is already too long from the perspective of certain applicants, including journalists for whom timeliness is a paramount consideration. If time limits are too long, this may have the consequence that issues are no longer of current interest by the time the information about them becomes available. This is important because journalists have an important role to play in enabling the Act to achieve its objectives. For this reason the US Act permits an expedited search where both the request is made by a person primarily engaged in disseminating information to the public and

²⁴ Ibid [3.2.3].

the information sought is urgently needed to inform the public about some actual or alleged federal government activity.²⁵

In the absence of any equivalent expedited search procedure in the Act, I would suggest that this recommendation should be implemented only subject to an exception which covers similar categories of applicants.

Recommendation 7 – Internal and IC review fees

Internal review can serve a useful normative effect and its more extensive use should reduce the volume of applications for review by the FOI Commissioner, thereby reducing the backlog of outstanding review applications. There is therefore merit in encouraging its more extensive use.

However, this recommendation is subject to a similar criticism to Recommendation 6 to the extent that it would impose additional delays for applicants who would not otherwise have applied for internal review and who are unsuccessful when they do so. This is again an issue for media users and arguably again requires some amendment to address this issue. While a \$100 charge is not a massive impost, the costs of exercising review rights are as much an issue for journalists as for other users. It may therefore again be worthwhile considering whether some exception is appropriate.

Other

The Commonwealth FOI Act differs from other Australian FOI Acts in specifically providing that an applicant's right of access is not affected by any reasons that he or she gives for seeking access or by a decision-maker's belief as to what those reasons might be. While the concept of universal access is a fundamental feature of freedom of information legislation and should not be undermined by the imposition of any form of standing requirements, the unequivocal wording of s 11(2) is problematic for a number of reasons that go beyond the issues raised in the OAIC's paper (notably where there are valid reasons for a specific applicant to obtain access to information that do not apply to world at large²⁶). They also, however, underlie the comments that I have made regarding to the ability of applicants to make multiple applications via agents (or to orchestrate the making of applications by multiple applicants). Given that the applicant of s 11(2) is "subject to this Act" there would be merit in making explicit in the Act the circumstances where it is appropriate to have regard to an applicant's identity or reasons for seeking access and, possibly (in the context of any workload ceiling) and also for there to be clear guidance as to the circumstances where it is appropriate to make inferences about these matters.

Summary

The 2010 amendments have, in general, made important and positive amendments to the Freedom of Information Act. To the extent that it now warrants further amendment, this should arguably be by way of further strengthening its transparency dimensions, rather than cutting them back. I have

²⁵ 5 USC § 552(a)(6)(E)(v)(II) (2000). For further details see US Department of Justice, 'Freedom of Information Act Reference Guide' (2006) <<http://www.usdoj.gov/oip/referenceguidemay99.htm#expedited>> accessed on 1 August 2007.

²⁶ For a recent example see *Re LIXW and Australian Federal Police and QKDP (Party Joined)* [2011] AATA 187 (22 March 2011). See further Maeve McDonagh and Moira Paterson, "Freedom of Information: Taking Account of the Circumstances of Individual Applicants" (2010) 3 *Public Law* 505,

suggested some required areas of improvement, but in the longer term it requires more comprehensive oversight than is possible with the current terms of reference.

At the same time there seems to be an arguable case for some amendments to the Act to deal with the administrative issues discussed in the OAIC's Review of Charges report, although it is important to ensure that they are implemented in ways which do not undermine the improvements that have been made to date.