



December 7, 2012

C/o Richard Glenn  
Assistant Secretary  
Business and Information Law Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Dr Hawke,

### **Review of the FOI Act 1982 and Australian Information Commissioner Act 2010**

I understand the Australia's Right to Know coalition of media organisations will lodge a thorough submission covering the range of matters canvassed by the Terms of Reference as nominated by Attorney-General Roxon. While Nine Network Australia does have a range of concerns about the operation of the Act, I do not wish to duplicate the Right to Know coalition's contribution in this brief submission.

However, I wish to draw your attention to the matter of time periods for exclusive access due to the special hardship this has caused to Nine News on a number of occasions. This problem has emerged since Section 11C and a disclosure log system was put in place in 2010. The present operation of this section of the Act, including the scope it provides to selectively disadvantage journalists, needs to be urgently addressed. I believe this specific area of concern is relevant to point 1 (a.) in the Terms of Reference.

We do not oppose the existence of disclosure logs and recognise the opportunity they provide for others to access information produced through the FOI process, but the timeframes for publication after release to applicant need to be fair to the applicant.

Section 11C(6) of the FOI Act states that released information must be published on a disclosure log "within 10 working days after the day the person is given access to the document". Notably, there is no minimum time frame for when documents can be placed on the disclosure log. In practical terms, this has created a blurry area where agencies can act selectively at their whim to punish journalists by denying them exclusivity. While some agencies may wait 10 days after release and others a few days, there are some agencies that can and do publish information on their disclosure log on the same day as release to an applicant. I have noted agencies are also prepared to "tip off" rival journalists that documents have been placed on the Disclosure Log to ensure there is no chance of exclusivity.

Simultaneously publishing of documents on disclosure logs at the same time of release to applicants may take place even where significant processing fees have been paid for access.

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This provision providing from zero time to 10 days for publication on a disclosure log is a major shortcoming of the FOI Act that needs to be addressed for the sake of fairness and clarity.

While all media outlets can be disadvantaged by simultaneous disclosure, television news is especially disadvantaged. Television news differs significantly from on-line, radio and print news due to its production requirements. It is not possible for a television news program to broadcast a news story based on complex documents in a fair and accurate way on the same day as documents become available. Television news has unique logistical issues involved in getting news into a visual form through a camera that do not arise in other news media. As well as the time to interpret the information contained in documents released under FOI, television news has additional requirements:

- Reporters need to be assigned
- Talent needs to be located
- On-camera interview times need to be arranged
- Camera crews need to be available

In today's digital age characterised by the decline in print, more investigative journalism will be undertaken in future by television journalists. It is unfair that a Freedom of Information regime has been created that can be so demonstratively unfair to one form of media.

Nine News is among the most active users of state-based freedom of government laws in NSW, Queensland and Victoria. Rarely do the relevant disclosure log arrangements in NSW and Queensland cause difficulties as reasonable exclusivity periods are generally observed. However, under current Commonwealth Act Disclosure Log arrangements, the uncertainties of what time period applies mean Nine News has become hesitant about using the FOI Act. The Office of the Australian Information Commissioner's guidelines issued under Section 93A advises that same date publication, if widely adopted or practised across government "may discourage journalists from using the FOI Act". I would contend that as far as Nine News is concerned, it already is.

We are reluctant to invest considerable time and resources in using a system where agencies may elect to benefit rival media organisations with information from an investigation initiated by us. We believe this outcome is strongly at odds with the stated Object of the FOI Act in Section 3 (4) whereby the functions and powers provided by the Act are to be "performed and exercised, as far as possible, to facilitate and promote public access to information". An undefined disclosure log publication system discourages use of FOI.

It is worth noting that during the recent reform process for Queensland's Freedom of Information laws, the FOI Review Panel's final report, *The Right to Information: Reviewing Queensland's Freedom of Information Laws (2008)* recognised the principle

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that it is reasonable for a media outlet to expect the “reward” of exclusivity that comes from investing in investigative journalism. That is why Queensland Parliament made the sensible decision to rule out simultaneous disclosure and allow a general rule of five business days before lodgement on a disclosure log in the *Right to Information Act 2009*.

It is naïve and even damaging to the public interest to dismiss the importance of exclusivity to media organisations. Exclusivity is an important driver for the media to continue to invest in publishing or broadcasting information that keeps governments and public figures accountable. Journalists will always do the majority of heavy lifting in terms of investigative journalism for the benefit of the community. Remove the possibility of exclusivity for media organisations and the community loses out from the wider societal benefits that come from investigative journalism.

Nine News asks this review to consider the option of making the 10 business days a mandatory minimum timeframe for material released to an applicant to be placed on a disclosure log. This would provide television news outlets time to properly produce and promote an exclusive story generated by their own investigation. It would also remove the possibility that agencies will use simultaneous or near-simultaneous disclosure to selectively punish journalists and discourage media outlets from using FOI.

I look forward to the outcome of this review.

Regards,



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Investigations Editor

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