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Dear Mr Glenn

Review of freedom of information legislation: Supplementary submission

We made a submission in December 2012 to the review of the operation of the *Freedom of Information Act 1982 (FOI Act)* and the *Australian Information Commissioner Act 2010 (AIC Act)* being undertaken by Dr Allan Hawke AC. This letter is our supplementary submission to the review. It covers the following issues, which have come to light since we made our submission:

| | |
|---|---|
| Who qualifies as a 'person' eligible to make an FOI request (s 15, FOI Act) | 2 |
| Multiple extensions of time (s 15AA, FOI Act)..... | 3 |
| Documents of the Official Secretary to the Governor-General (s 6A, FOI Act) | 3 |
| Financial information published under the Information Publication Scheme | 4 |
| OAIC staffing and funding levels..... | 4 |
| Application of the FOI Act to the Parliamentary departments | 5 |
| Applying a time limit to the operation of some exemptions | 6 |
| Definition of privacy functions in the AIC Act..... | 7 |
| Responsibility for the privacy functions | 8 |
| Cost of the FOI system | 8 |

Please let us know if there is anything further we can do to assist Dr Hawke in his review.

Yours sincerely

Prof. John McMillan
 Australian Information Commissioner

Dr James Popple
 Freedom of Information Commissioner

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Who qualifies as a 'person' eligible to make an FOI request (s 15, FOI Act)

1. Section 15 of the FOI Act provides that 'a person' may request access to a document of an agency or official document of a Minister. Similarly, s 11 provides that 'every person' has a legally enforceable right to obtain documents under the Act. The OAIC has been approached by agencies for advice on whether a request can validly be made under s 15 by a group of people or an unincorporated association, or whether the right to make a request is confined to an individual or a body corporate or politic (that is, a legal entity).
2. In January 2013, the Information Commissioner addressed this issue by amending Part 3 of the Guidelines issued under s 93A of the FOI Act¹ and releasing a supplementary statement.² The view expressed in the guidelines and in the supplementary statement is at odds with two rulings of the Administrative Appeals Tribunal³ which express the view, in different contexts, that an FOI request under s 15 of the FOI Act can be made only by an individual or single person (including a body corporate or politic). The view expressed in the Guidelines is that 'an FOI request may be made by one person on behalf of another person, by an organisation on behalf of a client, by a person as the agent or representative of a group of individuals or corporate bodies, or by a group of individuals or corporate bodies or an unincorporated association'.⁴
3. The supplementary statement explains in detail why the view expressed in the Guidelines is the better view. In summary: it is consistent with the FOI Act; it is consistent with the common law principle that a natural person may (generally) use a pseudonym, including in relations with government; and it is consistent with amendments to the *Privacy Act 1988* that will commence operation in March 2014.
4. This approach also has the benefit of being practically implementable by agencies and ministers. There will be times when an agency or a minister, or the OAIC, will need to elicit information about the identity or legal personality of an applicant when a request is made by an agent or representative, by a person using a pseudonym or by an organisation or group of people. Similarly, it may be problematic to continue processing a request or deciding a review application that is made by an organisation or group of people unless there is a contact person who has authority to represent the organisation or group.⁵ However, these practical difficulties arise infrequently, and are easily dealt with.

¹ Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, see in particular [3.6]–[3.8] and [3.34–3.41].

² Office of the Australian Information Commissioner, January 2013, *Who qualifies as a 'person' eligible to make a request under s 15 of the Freedom of Information Act 1982?*, Statement issued by the Australian Information Commissioner to supplement an amendment to Part 3 of the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*.

³ *Re Apache Energy Pty Ltd and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AATA 296; *CKI Transmission Finance (Australia) Pty Ltd; HEI Transmission (Australia) Pty Ltd and Australian Taxation Office* [2011] AATA 654.

⁴ *Guidelines*, [3.37].

⁵ See *Guidelines*, [3.8].

5. We **recommend** that the FOI Act be amended to remove any doubt that an FOI request may be made by one person on behalf of another person, by an organisation on behalf of a client, by a person as the agent or representative of a group of individuals or corporate bodies, or by a group of individuals or corporate bodies or an unincorporated association.

Multiple extensions of time (s 15AA, FOI Act)

6. Section 15AA of the FOI Act provides that an agency or a minister may extend the period for dealing with an FOI request by a period of no more than 30 days by agreement with the applicant. Agencies have sought OAIC advice about whether multiple extensions can be agreed with the applicant. Our advice to agencies is that an agency (with the applicant's consent) may extend the processing period under s 15AA with multiple extensions provided that the sum of those extensions does not exceed 30 days.
7. In our submission, we have recommended that the FOI Act be amended to remove the requirement in s 15AA to notify the OAIC of extensions of time by agreement and otherwise limit the OAIC's role in approving extensions of time to situations where an FOI applicant has sought IC review or lodged a complaint about delay in processing a request.⁶
8. We also **recommend** that the FOI Act be amended to remove doubt that multiple extensions can be agreed under s 15AA, provided that they do not together extend the period by more than 30 days.

Documents of the Official Secretary to the Governor-General (s 6A, FOI Act)

9. On 19 December 2012, the Full Court of the Federal Court in *Kline v Official Secretary to the Governor-General*⁷ dismissed an appeal from a decision of the AAT⁸ which had affirmed an IC review decision of the Freedom of Information Commissioner.⁹ In doing so, the Court also made the following comment:

One question which arose in the course of argument was whether the expression 'document of the Official Secretary' in s 6A was limited to documents in the possession of that official. In our view, the expression is not so limited. The scope of the section would be so limited if the definition of 'document of an agency' in s 4(1) applied, as it does in s 11(1), but that expression is not used in s 6A so the definition does not apply. The consequence is that s 6A would apply even where the document of the Official Secretary was in the possession of another agency.¹⁰

⁶ See [121]–[131].

⁷ [2012] FCAFC 184.

⁸ *Kline and Official Secretary to the Governor-General* [2012] AATA 247.

⁹ *'B' and Office of the Official Secretary to the Governor-General* [2011] AICmr 6.

¹⁰ [2012] FCAFC 184, [28] per Keane CJ, Besanko and Robertson JJ.

10. This comment is only *obiter dictum* but it is hard to reconcile with the definitions in s 4(1) of the FOI Act. The Office of the Official Secretary to the Governor-General is a body established for a public purpose by an enactment¹¹ and, therefore, a 'prescribed authority' and, therefore, an 'agency'. So, if it were not for the Court's obiter comment, s 6A would not apply to documents of that Office in the possession of another agency.
11. We **recommend** that the FOI Act be amended to remove doubt that s 6A does not apply when a document of the Official Secretary is in the possession of another agency.

Financial information published under the Information Publication Scheme

12. In a submission to the Department of Finance and Deregulation in July 2012,¹² the Information Commissioner recommended the development of a list of financial information that should be published by agencies under the Information Publication Scheme (IPS). His submission included an indicative list of such information.
13. This financial information is arguably already required to be published, being 'information in documents to which the agency routinely gives access in response to [FOI] requests'¹³ or 'information held by the agency that is routinely provided to the Parliament'.¹⁴ Some agencies already publish this information. However, it would enhance public accessibility and accountability of government spending if a common practice was adopted by all agencies.
14. We **recommend** that a list be developed of financial information that should be published by agencies under the IPS.

OAIC staffing and funding levels

15. In our submission, we gave information about the OAIC's staffing and funding levels since its establishment until December 2012.¹⁵ The situation has changed further since then.
16. We noted in our submission that the OAIC was structured around the former Office of the Privacy Commissioner (OPC). Initial planning anticipated that an average staffing level (ASL) of 68 OPC staff would be joined by an additional 32 staff for the FOI and information policy functions, for a combined ASL of 100. The OPC had an ASL of 60 at the end of 2009–10. By the end of 2010–11, the OAIC had an ASL of 75.26. This was projected to rise to 81 in the 2011–12 budget; the actual 2011–12 ASL was 79.87.

¹¹ *Governor-General Act 1974*, s 6.

¹² See http://www.oaic.gov.au/publications/submissions/2012_07_finance_commonwealth_financial_accountability.html. The submission was made in response to a discussion paper prepared by the Department of Finance and Administration in March 2012, *Is Less More? Towards Better Commonwealth Performance*. The Department published a position paper in November 2012, *Sharpening the Focus: A Framework for Improving Commonwealth Performance*.

¹³ FOI Act, s 8(2)(g).

¹⁴ FOI Act, s 8(2)(h).

¹⁵ See [73]–[75].

17. The 2012–13 portfolio budget statement forecast an ASL of 79. As at December 2012, the OAIC had 77.85 full-time equivalent staff;¹⁶ as at February 2013, it has 63 (only three more than the OPC had when the OAIC commenced operation). This further reduction is the result of voluntary redundancies, and the non-extension of contracts, made necessary by the OAIC's limited budget.

Application of the FOI Act to the Parliamentary departments

18. In their joint submission to the review, three of the four Parliamentary departments¹⁷ say:

The three departments have been affected by a change in the guidelines in May this year by the Australian Information Commissioner stating that the FOI Act applied to the parliamentary departments when previously the guidelines stated that the FOI Act did not apply to the departments of the Parliament. The change in the guidelines was not consequent upon a legislative enactment by the Parliament nor upon a decision of a court. It has raised a number of issues which require urgent clarification by a deliberative decision of the Parliament rather than through a variation in executive interpretation of longstanding legislative provisions.¹⁸

19. As the OAIC explained in correspondence with the Parliamentary departments, and in its Annual Report, the FOI Act applies to those departments not because of change made to the Guidelines but because of a legislative enactment:

For years it had been assumed that the FOI Act did not apply to the Parliamentary departments, and that was probably the case up until 1999. However, when the *Parliamentary Service Act 1999* was enacted, those departments became subject to the FOI Act. This is because they were established by, or in accordance with, s 54 of the *Parliamentary Service Act*. This makes each of them 'an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment' and therefore a 'prescribed authority' for the purposes of the FOI Act. It is possible that the application of the FOI Act to the Parliamentary departments since 1999 was unintentional, or at least inadvertent.¹⁹

The Guidelines were changed when the effect of this legislative change was understood.²⁰

20. We note that the Parliamentary departments 'support amendments to the FOI Act which would clarify that the Act applies to requests for access to departmental documents which relate to matters of an administrative nature'.²¹

¹⁶ As explained in our submission, this figure does not include 14.65 FTE positions funded under memoranda of understanding with other agencies to undertake specific privacy work that was not the responsibility of the OPC.

¹⁷ The Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services.

¹⁸ At [2].

¹⁹ *Office of the Australian Information Commissioner, Annual Report 2011–12*, p 111.

²⁰ *Guidelines*, [2.5].

²¹ At [3].

21. We note that s 46(c) of the FOI Act provides an exemption for documents the public disclosure of which would infringe the privileges of the Parliament. We remain of the view, as expressed in our submission, that:

... the FOI Act should continue to apply to the Parliamentary Departments, other than the Parliamentary Budget Office. Consideration should be given to the possible need for a similar exemption for research/advice to Members of Parliament provided by the Parliamentary Library.²²

Applying a time limit to the operation of some exemptions

22. In our submission, we have recommended that the FOI Act be amended to apply a time-limited exemption to certain types of exempt documents.²³ We explained that:

This would promote a ‘disclosure by design’ approach to document creation. Without such a time limit, documents are restricted from release until the open access period in the *Archives Act 1983* ... We suggest that the review consider the introduction of time limits to the operation of exemptions in relation to certain document types. Such a mechanism could operate under s 12 of the FOI Act to prescribe documents that are not covered by the enforceable right of access under the FOI Act. After the elapse of a specified period of time an FOI request could be made for the documents, and normal exemption provisions would apply. In assessing this option, the review could consider the types of documents that would be appropriate for deferred access, taking into consideration similar mechanisms in other jurisdictions. Categories of documents the review may wish to consider in addition to [Parliamentary Budget Office] documents are incoming government briefs and parliamentary question time briefs.²⁴

23. In his submission to the review, the Director-General of the National Archives of Australia raises concerns about our proposal.²⁵ He says that the proposal, if adopted, ‘would ... significantly alter the balance Parliament has struck between the preservation and public disclosure of the Commonwealth’s archival resources under the Archives Act and access to government documents under the Freedom of Information Act’.²⁶
24. We think that this concern is based on a misunderstanding of our proposal, which we seem not to have explained clearly enough. We do not propose any change to the operation of the Archives Act. Our proposal is that the FOI Act be amended so that documents in specified categories would be outside the scope of the FOI Act for a specified period. After that period, those documents would be subject to the FOI Act in the usual way (and the normal exemption provisions would apply) until they came within the ‘open access period’ under the Archives Act in the usual way.

²² Appendix, p 64.

²³ See [148]–[153].

²⁴ At [152]–[153].

²⁵ Pages 5–6.

²⁶ Page 5.

Definition of privacy functions in the AIC Act

25. The functions of the OAIC include the 'privacy functions ... which are about protecting the privacy of individuals in accordance with the *Privacy Act 1988* (and other Acts)'.²⁷ Section 9 of the AIC Act defines the privacy functions:

- (1) The **privacy functions** are functions conferred on the Information Commissioner by an Act (or an instrument under an Act), if the functions:
 - (a) relate to the privacy of an individual; and
 - (b) are not freedom of information functions.
- (2) The functions mentioned in subsection (1) include, but are not limited to, the provisions in the following table.

| Provisions that confer privacy functions | | |
|--|--|-------------------------------------|
| Item | Legislation | Provision |
| 1 | <i>Privacy Act 1988</i> | Division 2 of Part IV |
| 2 | <i>Crimes Act 1914</i> | Division 5 of Part VIIC |
| 3 | <i>Data-matching Program (Assistance and Tax) Act 1990</i> | Sections 12 to 14, and the Schedule |
| 4 | <i>National Health Act 1953</i> | Section 135AA |
| 5 | <i>Telecommunications Act 1997</i> | Section 309 |

26. Recent legislation, such as the *Healthcare Identifiers Act 2010* and the *Personally Controlled Electronic Health Records Act 2012*, has conferred functions on the Information Commissioner. Some of these functions come under the definition in s 9(1) because they clearly relate to the privacy of an individual. However, some of these functions, such as those related to the design of systems to protect personal information, may not directly relate to the privacy of an individual.
27. If legislation confers a privacy function on the Information Commissioner, it will usually be preferable that that be done in (or, at least, recognised in) the Privacy Act.²⁸ If that is not done, and the relevant legislation is not listed in the table in s 9(2), there may be uncertainty as to whether the function is a privacy function.
28. To reduce uncertainty, and to ensure that the scope of privacy functions is not inadvertently narrowed, we **recommend** that:
- s 9(1)(a) of the AIC Act be amended to include, in the definition of privacy functions, functions conferred on the Information Commissioner that 'relate to the privacy of an individual or the protection of personal information', and
 - s 9(2), including the table, be removed.

²⁷ AIC Act, s 4.

²⁸ This approach is adopted, for example in s 27A (in relation to healthcare identifiers), s 28 (tax file numbers) and s 28B (personal property Securities) of the Privacy Act.

Responsibility for the privacy functions

29. In its submission to the review, the Australian Privacy Foundation asserts that '[i]t is now extremely difficult to explain in plain English who is responsible for what functions under the Privacy Act'. We disagree.
30. The Australian Information Commissioner and the Privacy Commissioner have the privacy functions;²⁹ the Freedom of Information Commissioner may also perform them.³⁰ In practice the privacy functions are usually performed by the Privacy Commissioner and are sometimes performed by the Australian Information Commissioner.

Cost of the FOI system

31. In their joint submission to the review, Australian Associated Press and others³¹ say:

The OAIC costs \$14.6 million per year. That additional administrative cost accounts for about the whole of the increase in costs experienced with changes to the FOI Act ... While some of the resources allocated to the OAIC would have been allocated in any event for privacy compliance functions, the question arises whether the increase in costs for administration of the FOI Act, through the allocation of additional resources to the OAIC for that function delivers value for money.³²

32. The reported cost attributable to agency compliance with the FOI Act, to which the joint submission refers, was \$41.719m in 2011–12, an increase of \$5.401m (or 14.9%) on the previous year.³³ To facilitate comparison with previously published figures (over the last 30 years), these figures do not include the reported cost attributable to agency compliance with the IPS (\$3.798m)³⁴ or the OAIC's expenditure on the performance of its FOI functions (approximately \$4.604m).³⁵ Taking those costs into account, the increase in the reported costs of FOI in 2011–12 was approximately \$13.803m; only a third of this is attributable to the cost of the OAIC.

²⁹ AIC Act, ss 10(1)(a) and 12(1). The privacy functions are defined in s 9 of the AIC Act and include functions conferred by the Privacy Act.

³⁰ AIC Act, s 11(2).

³¹ The submission is from Australian Associated Press (AAP), the Australian Subscription Television and Radio Association (ASTRA), Commercial Radio Australia, Fairfax Media, Free TV Australia, the Media, Entertainment and Arts Alliance (MEAA), News Limited, Sky News and West Australian Newspapers (WAN). Page 6, footnotes omitted.

³² Page 6, footnotes omitted.

³³ *Office of the Australian Information Commissioner, Annual Report 2011–12*, p 135.

³⁴ *Office of the Australian Information Commissioner, Annual Report 2011–12*, p 142.

³⁵ *Office of the Australian Information Commissioner, Annual Report 2011–12*, pp 144, 147.