

FREEDOM OF INFORMATION ACT 1982 (CTH) REVIEW

SUBMISSION

Dear Dr Hawke,

Freedom of Information plays an essential role in allowing open access to government in Australia. As the 30th anniversary of the FOI Act passes, the development of FOI law and culture since the act was initially passed has undergone incredible change. However, there are still a range of issues that need be addressed to enhance the quality of transparency and open government in Australia. This submission contains a number of recommendations based on experiences in obtaining access to documents under the FOI Act as a journalist. As the terms of reference of this review do not appear to be limited to the 2010 FOI changes, the submission also contains a number of issues that linger from before the amended Act came into force. An appendix has also been provided that contains FOI decision letters of issues raised in this submission, as well as a table of time taken to deliver a range of non-routine FOI requests.¹

1. LIMITATIONS ON THE DEFINITION OF 'DOCUMENTS'

The current scope of the FOI Act allows access to what is defined as 'documents' which poses a number of limitations on data driven journalism. While the definition of a document within the Act is broad, limitations arise when FOI users requests data sets or statistical information. Because the definition of a 'document' generally only includes information already in a document, requests that ask for sets of information can be refused. This poses a problem for data driven journalism and can lead to FOI requests being refused. For instance, the Department of Immigration and Citizenship (DIAC) refused an FOI request for statistical information about the number of staff it employed in their FOI section on the grounds that the information sought did not meet the definition of a 'document'.²

The Act should be amended to reflect the broader 'right to information' that is central to the objects of Freedom of Information. S 5 of the *Right to Information Act 2009* (TAS) provides a broader definition that allows data to be delivered in broader ways and which would prevent agencies rejecting reasonable requests for information.

¹ APPENDIX A

² APPENDIX B

2. ACCESS TO INFORMATION FROM PRIVATE ENTITIES/CONTRACTORS

The current FOI framework faces a number of difficulties in compelling agencies that engage with third parties or independent authorities to deliver documents. A growing number of federal government services are being delivered by the private sector or managed by independent authorities. These organisations deliver services for the government, and should be subject to the same level of scrutiny. However in practice many fall beyond the reach of the FOI Act for two key reasons.

Firstly, the FOI Act provides a limited definition of what constitutes an agency for the purposes of the Act. A prescribed authority is defined in s 4 as “a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council”. There is then a number of express exclusions for a range of other bodies. If an entity does not meet the test of being 1) established for a public purpose and 2) established by, or in accordance with the provisions of, an enactment, it will not be subject to the Act. The phrase established ‘by an enactment’ is generally interpreted as meaning that the entity has been established pursuant to a legislative instrument. As a growing number of entities are created that are not established pursuant to such an instrument, this creates a number of gaps. For instance, the Aged Care Standards and Accreditation Agency (ACSAA) claims to be exempt from the FOI Act for precisely this reason. The Agency is responsible for accrediting aged care facilities within the Commonwealth, and despite being funded by the Federal Government, and performing vital accreditation functions that previously were part of the Department Of Health and Aging (DOHA), it is seen an independent entity.

When *The Global Mail* attempted to obtain information about the agency from DOHA as part of an investigation earlier this year, several requests were refused. In his refusal letter,³ Michael Culhane wrote that:

“The Accreditation Agency is an independent body that is paid an accreditation grant under the Aged Care Act 1997 (the Aged Care Act) for the purpose of accreditation of residential aged care services...It is my understanding, however, that as the Accreditation Agency is not an agency as defined for the purposes of the FOI Act there may be no legally enforceable right of access to the Accreditation Agency.”

Another bizarre example of agencies falling outside of the FOI Act can be found in the Australian Health Practitioner Regulation Agency. This organisation governs the regulatory scheme for a range of medical professions. Both *The Global Mail* and *The*

³ APPENDIX C

Australian have attempted to access documents from AHPRA this year and received the surreal response that AHPRA is subject only to the *unamended* Freedom of Information Act.⁴ This appears to be because the entity was formed pursuant to a co-operative referred agreement from the states. However, the entity performs a vital national function and forms part of a major federal health scheme. It should be subject to the Commonwealth FOI Act in its own right.

Secondly, the Act has an extremely weak mechanism in place to obtain documents from private contractors. When the amended Act came into force s 6C was inserted which states that 'agency must take contractual measures to ensure they receive a document' in the event they receive a request for a document. That section appears to have been largely ineffective in obtaining documents from contractors. The requests I have lodged with the Department of Immigration and Citizenship for documents relating to Serco and IHMS are consistently delayed, and DIAC appears neither willing nor able to compel these private contractors to deliver documents.⁵ The recent Ernst and Young internal audit report of DIAC's FOI functions made reference this issue.⁶ Journalists need to be able to access important documents relating to private contractors and other private entities more effectively.

Clearly, some organisations that are substantially supported by the Federal Government and perform services that warrant scrutiny are falling between the gaps in the description of FOI agencies subject to the Act. However both of these issues could be addressed substantially by broadening the operation of the Act in the same way as the *Right to Information Act 2009* (TAS) which states:

If a private organisation is funded by or performs a role of a public authority, a person is entitled to the information related to –

- (a) that performance; or
- (b) the progress of work; or
- (c) the evaluation of work; or
- (d) the expenditure of public moneys –

In terms of an effective compulsion mechanism, the resource allocation of the OAIC, which is discussed below, would substantially assist in the enforcement.

⁴ <http://resources.news.com.au/files/2012/09/13/1226473/326074-aus-foi-doc-of-month-sept-2012.pdf>

⁵ See Appendix A for some of these requests

⁶ <http://www.immi.gov.au/about/foi/pdf/mir-of-foi.pdf>

3. EXEMPTIONS: SECRECY PROVISIONS

The exemption relating to secrecy provisions within Acts should be re-examined. S 38 of the Act prevents release if disclosure is ‘prohibited under an enactment’, and this section has been subject to criticism from the OAIC. In *A v Department of Health and Ageing* (2011)⁷ the applicant sought documents relating to his deceased mother that was held under the Aged Care Act. DOHA refused access to the documents on the grounds that a secrecy provision in the Aged Care act prevented access under s 38.

In his decision, Commissioner Popple noted from the outset that he was uncomfortable with the current operation of the exemption:

“This IC review requires consideration of the interaction between provisions of the FOI Act and provisions of the AC Act. That interaction is complex and, in this case, leads to a result that does not sit comfortably with the IC review role under the FOI Act.”

The scope of this section is not limited to the Aged Care Act. Schedule 3 of the FOI Act lists Acts where secrecy provisions apply, however this list is not exhaustive. The key problem with this exemption is that it removes power from the OAIC to release information, prevents the documents being subject to the normal FOI exemption process and instead provides an overriding discretion to Ministerial officers to release information.

The Global Mail experienced similar difficulties in attempting to obtain information from DOHA.⁸ In response to requests for documents relating to the Aged Care delivery network, Michael Culhane wrote:

“Your requests that I have numbered 4 to 7 are for documents in the possession of the Department that would contain personal information about individuals and information about the affairs of approved providers of aged care. The information would have been acquired by the Department under or for the purposes of the Aged Care Act. Such information is exempt under section 38 of the FOI Act because release of this information is prohibited under subsection 86-2(1) of the Aged Care Act. The fact that certain information is prohibited from release under subsection 86-2(1) of the Aged Care Act is no reviewable under the FOI Act.”

These secrecy provisions prevent access to vital documents of public interest that could substantially enhance government transparency, and they clearly frustrate journalists

⁷ http://www.oaic.gov.au/publications/decisions/2012_aicmr31.html

⁸ Appendix C

attempts to access information. S 38 should be abolished entirely. There is no reason why information subject to a secrecy provision cannot simply go through the normal FOI exemption filters that prevent the release of personal, commercial or business information. In the alternative, The OAIC should expressly be given the power to release information that is subject to a s 38 exemption. This could be achieved by amending s 55L to allow the OAIC and AAT to grant access to exempt documents in certain circumstances where a secrecy provision is relied upon.

4. EXEMPTIONS: IRRELEVANCE

The exemption related to irrelevant material should also be re-examined in this review. s 22 of the Act allows an agency to redact a document if the decision maker deems a particular section to be 'irrelevant'. The section is ripe for abuse by agencies, and is frequently cited to deny access to large swathes of documents that don't contain an express reference to the types of documents sought. However in reality those sections may provide vital context information, or may have a use to journalists that the decision maker has not considered. There is no compelling reason why the section relating to irrelevance should be retained at all. If a document is subject to the Act, and information contained in it is not subject to another exemption, then as much of that document as possible should be released to the public. This is consistent with the objects of the Act to promote and increase government transparency.

5. CHARGES AND THE OAIC

The current two-tiered system of merits review has a number of advantages and should be retained. The OAIC should retain its merits review function, and it should not be reduced to an entity with only investigative functions. Agencies who have poor FOI cultures are being challenged to improve their compliance largely because of the continual intervention and scrutiny of the OAIC.

However, I have strong reservations about the altered model of merits review proposed by the OAIC in the recent Charges Review.⁹ The OAIC suggested establishing an "administrative access scheme" prior to the formal FOI period. The review suggested agencies be given 30 days to determine whether they would release information proactively, at which point the applicant could apply without an application fee. As a further disincentive to applicants lodging FOI requests straight away, the review suggests that if this occurs before access is attempted informally, a \$50 charge should

⁹ http://www.oaic.gov.au/publications/reports/2012_Charges_review_report_FINAL.pdf

apply. Further, to seek OAIC review of the decision the charges review recommends that applicants be compelled to seek internal departmental review first. If they don't, a \$100 fee will apply for the OAIC review.

If this proposed scheme were introduced, it would simply add more layers of bureaucracy to an already bloated system of merits review. Journalists would be forced to use this informal scheme and agencies could simply wind down the clock on each of these periods to delay access to information.

6. APPLICATION FEES

In relation to application fees, I would welcome a system where applicants were required to pay a small fee, but no other processing or search charges. Having processing fees would be a better way to weed out unnecessary applications, and eliminating processing charges would vastly improve FOI culture in Australia. Further, the \$100 application fee for OAIC review proposed in the charges review could also be effective, and prove a useful way to curb the number of appeals made.

While this is outside the scope of this review, it's worth noting that the OAIC can't hope to function effectively unless it is afforded more adequate funding. The current scheme and the impacts on the OAIC's office are clearly showing, as the Commissioner simply doesn't have the resources to undertake all of its FOI functions. Only 35 per cent of the OAIC's resources are dedicated to FOI - around \$4.5 million - a minuscule amount of resources for an agency that effectively took charge of the operations of the Administrative Appeals Tribunal and the Commonwealth Ombudsman in hearing appeals, complaints and investigations of FOI matters. Further, as Privacy legislation continues to strengthen the OAIC's other functions will continue to place more of a strain on its overall effectiveness.

7. UNREASONABLE AND SUBSTANTIAL DIVERSIONS OF RESOURCES

The unreasonable and substantial diversion of resources provision should not be altered to operate in the manner proposed by the OAIC charges review. In the review the OAIC recommended a blanket 40 hour cap on processing documents if the agency estimated it would take more than this amount of time. This suggested change has the potential to be exploited by agencies that wish to frustrate access to larger documents and audit reports. The reality is that many important documents would far exceed this 40 hour processing cap.

The Department of Immigration and Citizenship have taken the unusual step of refusing

a number of recent requests now on the grounds that 40 hours reflects the current processing threshold.¹⁰ Setting aside the erroneous belief that the OAIC charges recommendation should be taken to reflect the current interpretation of s 24AB despite ample case law to the contrary,¹¹ this highlights precisely how the provision will be used to frustrate access to important documents or records - indeed, one of the requests related specifically to a set of audit reports. The threshold for processing requests should be set much, much higher, and if any re-examination of this provision were undertaken, an exemption to the cap *must* be made for documents that are of public interest.

I hope you will consider these points in your review.

Kind Regards,

Paul Farrell

Freelance Journalist

¹⁰ Appendix D

¹¹ See *Cainfrano v Director General*, *AB v Department of Education*, *Age v Cenitex*, *Chapman v Commissioner of Police*, *Department of Treasury v Kelly*, *Commissioner of Police v McIntosh*, *Zammit v Department of Health*

APPENDIX A

request	agency	date requested	date finalised	time taken	decision
<i>'documents and correspondence relating to Arunachalam Jegatheeswaran and the war crimes allegation brought against the Sri Lankan President in October 2011'</i>	Attorney General's Department	12/10/2012	24/02/2012	132 days	Access Granted in Part
<i>Any footage shot by Serco staff or it's subcontractors of planned or unplanned uses of force on detainees since January 1 2010 and the accompanying incident reports, as outlined under the Detention Services Contract 2009 in section 2.2.4 Security Services subsection 3.3 Digital Records.</i>	Department of Immigration and Citizenship	4/01/2012	15/11/2012	311 days	Withdrawn. s 24AB notice delivered on November 13.
<i>"...All video footage held by the ImmigrationD</i>	Department of Immigration and Citizenship	28/11/201	02/11/2012	344 days	No documents within scope.

<p>Department of planned uses of force at Curtin Immigration Detention Centre since it was reopened in 2010 and the accompanyin g reports for each use of force... Further to this request... I would like to clarify that I would also like to request the accompanyin g audio of the videos."</p>					
<p>"The 2009 Immigration Detention Centre contract with Serco and DIAC, and certain audits and reports required under the contract</p>	<p>Department of Immigration and Citizenship</p>	<p>2/3/2011</p>	<p>ongoing</p>	<p>630 days, ongoing.</p>	<p>Access partially granted to Contract. Access denied to audit documents on s 24AB grounds - matter ongoing.</p>
<p>the Ernst and Young, Management Initiated Review of Freedom of Information, report to the Department of Immigration</p>	<p>Department of Immigration and Citizenship</p>	<p>11/10/2012</p>	<p>07/11/12</p>	<p>27 days</p>	<p>Access Granted. Report released informally onto DIAC website</p>

and Citizenship (2011)					
<p>1) A list of all websites prohibited from access to detainees by Serco and the dates of prohibition in accordance with their contractual obligations outlined in the Immigration Detention Services contracts 2.2.1 People in Detention Services subsections 1.2.3 use of computers and 1.2.4 internet services.</p> <p>2) A list of any websites that have subsequently had access allowed to them after prohibition along with the dates of subsequent access.</p>	Department of Immigration and Citizenship	04/01/2012	17/07/2012	193 days	Access granted in part.

