



**Submission to the Attorney-General's
Department Review of the *Freedom of
Information Act 1982* and the *Australian
Information Commissioner Act 2010***

Simon Frew (simon.frew@pirateparty.org.au)
Brendan Molloy (brendan.molloy@pirateparty.org.au)
Mozart Olbrycht-Palmer (mozart.palmer@pirateparty.org.au)
Rodney Serkowski (rodney.serkowski@pirateparty.org.au)

December 2012



Introduction

Pirate Party Australia thanks the Attorney-General for providing an opportunity to submit its views on legislation that is fundamental to democracy in Australia.

Pirate Party Australia is a political party founded on policies relating to information, knowledge and culture: it campaigns for copyright and patent reforms, the protection of personal privacy, increased governmental transparency, and minimal censorship. As of December 2012, the Party has applied for registration with the Australian Electoral Commission. The AEC has advertised the application and invited objections. The Party expects to be registered in February.

The Party is part of an international movement that has seen electoral success in Germany (seats in four state parliaments), Sweden (two seats in the European Parliament), the Czech Republic (one senator), and holds many local government positions throughout Europe.

General Comments

The thrust of this review appears to be aimed at winding back some of the commendable principles in the Declaration of Open Government. Pirate Party Australia believes that governmental transparency is necessary for the public to make informed decisions about who they vote for and the exposure of corruption. We fully support the Declaration of Open Government and believe it should be the basis upon which the Freedom of Information (FOI) system is built.

The Declaration states:

The Australian Government now declares that, in order to promote greater participation in Australia's democracy, it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology.¹

It continues:

The Australian Government's support for openness and transparency in Government has three key principles:

- **Informing:** strengthening citizen's rights of access to information, establishing a pro-disclosure culture across Australian Government agencies including through online innovation, and making government information more accessible and usable;

¹ Declaration of Open Government. <http://agimo.govspace.gov.au/2010/07/16/declaration-of-open-government/>

- **Engaging:** collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought; and
- **Participating:** making government more consultative and participative.²

While the principles in the Declaration are worthy of support, both the government and the public service have failed to adequately deliver on the promise of openness and transparency. This is glaringly evident to Pirate Party Australia, where much of the Governments' policy discussions around file-sharing, copyright and civil liberties are occurring behind closed doors.

In 2011, the Federal Government began negotiations between movie studios and ISPs in an attempt to put together a policy on online file-sharing. The Australian public were excluded from the meetings and attempts to find out what was discussed through an FOI request were refused.

Pirate Party Australia's Treasurer, Rodney Serkowski, filed a freedom of information request in September 2011, requesting information on the nature of the discussions. The information was largely refused on the grounds that the... "[d]isclosure of documents whilst the negotiations are in process would... prejudice, hamper and impede those negotiations to an unacceptable degree. That would, in my view, be contrary to the interests of good government - which would, in turn, be contrary to the public interest."³ Another request filed by Delimiter journalist Renai LeMay into the closed-door meetings earlier this year was rejected on the grounds that "the discussions that are taking place are at a delicate and sensitive stage."⁴

The negotiations were the target of FOI requests precisely because they were organised against the principles espoused in the Open Government Initiative. There was no attempt to engage citizens or to enable participation in the process. When, due to public outcry, consumer groups were included in the process, the government invited the Australian Communications Consumer Action Network (ACCAN), a government funded body headed by Professor Michael Fraser, an advocate for strict copyright laws, who was also head of the Australian Copyright Council.⁵ These issues and conflict of interest could have been avoided if the discussions were properly minuted and made publicly available.

This is just one example of a complete failure of both government and the public service to take the Open Government Initiative seriously. The policy process undertaken by the government was opaque and excluded citizens in favour of vested interests. It is precisely this kind of behaviour that FOI laws are designed to expose. It is imperative that Freedom of Information Laws are reformed to allow for greater transparency so the public can make

² Ibid.

³ Jane Purcell, on behalf of the Attorney-General's Department. *Re Freedom Of Information Request*. 19 December, 2011. <http://blog.serkowski.net/wp-content/foi/Statement%20of%20Reasons%20-%20Serkowski.pdf>.

⁴ Renai LeMay. "Piracy meetings still censored: "No public interest"." *Delimiter*. 24 April, 2012. <http://delimiter.com.au/2012/04/24/piracy-meetings-still-censored-no-public-interest/>.

⁵ Josh Taylor. "Questions raised over piracy talk invitees." *ZDNet*. 6 June, 2012. <http://www.zdnet.com/questions-raised-over-piracy-talk-invitees-1339339234/>.

informed decisions about the effectiveness of their government.

Responses to Terms of Reference

(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;

Pirate Party Australia has no direct experience of the FOI system prior to 2009. However, it has extensive experience of the appeals process. The Party's comments will be limited to the operation of the current system.

The process of public participation in governance requires timely access to information so the public can offer informed opinion on proposed policies. The reluctance of government departments to allow access to information is exacerbated by the lengthy appeals process, often only releasing documents after the relevant decision has been made and the chance to make an informed contribution has passed.

The current FOI system does not go far enough. The Australian public have a right to observe the political process to ensure decisions are made in the public interest. Hiding behind exceptions to protect the deliberative process for example, enables the government to act on behalf of vested interests and against the public interest without fear of discovery. A system that requires greater transparency would enable greater participation in the political process and would ensure that departments shift their cultural predisposition from secrecy to one of transparency and inclusiveness in policy development and decision making processes.

(b) the effectiveness of the Office of the Australian Information Commissioner

Pirate Party Australia believes it is necessary to have an appeals office such as that of the Australian Information Commissioner, however, it is the Party's view that the OAIC is currently not as effective as it should be.

As Pirate Party Australia have discovered, requests made under the *Freedom of Information Act 1982* may be rejected, incorrectly, on various grounds and the process of appeal is far from swift. It is not unusual for the process to take in excess of six months, with reports of up to 18 months for the OAIC to complete a review.

As stated above, timely access to information about policy plans enables greater public participation in government and is imperative where governmental decision making processes are expedited for political reasons. Making sure government agencies and departments release information whilst public discourse is active is essential for that discourse. Where a vital part of that process, in this case, avenues for appeal against departmental decisions to suppress information, are significantly handicapped it is possible

that departments are knowingly wrongly denying access to information in the knowledge that the process is significantly delayed.

Making more information available generally to the public would lighten the burden on the Information Commissioner and provide the public with better information about important decisions that affect their lives.

Better funding the Office of the Information Commissioner and enabling a more prompt appeal process would enhance public access to government information and in turn, help create better policy.

(c) the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters;

Pirate Party Australia believes that the Office of the Australian Information Commissioner (OAIC) and the Administrative Appeals Tribunal (AAT) are not operating as effectively as they could be. In practice, the OAIC and the AAT both draw out the process of obtaining information to lengths that hamper participation in democratic processes.

Pirate Party Australia's Treasurer, Rodney Serkowski, requested draft legislation relating to matters of national security under the *Freedom of Information Act*. As the issue of national security legislation has been prominent within the past six months — the Parliamentary Joint Committee on Intelligence and Security has conducted an inquiry on the matter — the Party has been highly interested in draft legislation in this area. The Attorney-General's Department rejected the request.

As the Party did not consider the grounds of the rejection to be reasonable, the decision has been appealed to the OAIC,⁶ however it is unlikely the review will be completed before a bill is presented to Parliament. This is but one example of the failings of the FOI system.

The directions the government is moving in, regardless of issue, should be made public. The electorate has a right to know what legislative positions and decisions are being considered. The current two-tier system allows such information to surface after periods exceeding six months in some cases. This is clearly not ideal, as it means positions may not surface until after an election — if the electorate is not informed of policy and decisions being considered (such as data retention, in the case of national security), they cannot be expected to cast informed votes. Draft legislation being worked on prior to an election may surface after that election, and contradict previous statements made by government. This deception is not indicative of a healthy or progressive democratic socio-political paradigm.

The longer it takes for documents to become available, the less informed the electorate. Pirate Party Australia describes considerations for ways to alleviate dependence on the OAIC and AAT in its answer to "(g) the desirability of minimising the regulatory and administrative burden, including costs, on government agencies" below.

⁶ Pirate Party Australia. "Pirate Party appeals National Security Legislation Freedom of Information Refusal." 20 November, 2012. <http://pirateparty.org.au/2012/11/20/pirate-party-appeals-national-security-legislation-freedom-of-information-refusal/>.

(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;

For democracy to function it is paramount that the Australian public have access to or can obtain accurate information about the decision-making processes undertaken in our name. The tradition of keeping government deliberations secret is archaic and not sufficient in the 21st Century. It is in the public's interest to see exactly why decisions are made, to ensure politicians correctly carry out their mandates.

What passes for 'sensitive government documents' could hide corrupt activities including directly aiding donors, organising insider trading, and other nefarious abuses of power. For people to have faith in the political system, we must see how we are governed, not just what public relations experts present. A public interest test should consequently be weighted heavily in favour of the public.

(ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;

Agencies and third parties should offer frank and fearless advice to the public service and politicians without the need for confidentiality. Where confidentiality exists it implies the discussions are occurring in the special interests of the advisor and not in the best interests of Australian citizens.

One such instance where confidential materials and representations supplied to the government have been used as justification for the policy direction of the government was the use of the report commissioned by Australian Content Industry Group entitled 'The Impact of Internet Piracy on the Australian Economy' by the former Attorney-General Robert McClelland.⁷

After citing the study in his address to the WIPO 'Blue Sky Conference', and subsequently the study being heavily referred to in the media, there were obvious concerns regarding the contents of the report and how such determinations of economic harm were arrived at.^{8 9} After some investigation and having sought the report under the *Freedom of Information Act*, the report was 'voluntarily' released after the Attorney-General's Department contacted

⁷ (Former) Attorney-General Hon. Robert McClelland MP. "Address to the Blue Sky conference on future directions in copyright law, Sydney." 25 February, 2011. <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22media%2Fpressrel%2F589537%22>.

⁸ Ernesto Van Der Sar. "Secrecy and Darkness Surround Mysterious \$900m Piracy Report." *TorrentFreak*. 14 March, 2011. <http://torrentfreak.com/secrecy-and-darkness-surround-mysterious-900m-piracy-report-110314/>.

⁹ Andrew Crook. "Mysterious anti-piracy report to be released 'this week'." *Crikey*. 16 March, 2011. <http://www.crikey.com.au/2011/03/16/mysterious-anti-piracy-report-to-be-released-this-week/>.

the relevant authors of the document, pursuant to the Party's request. Had no request been submitted, it is questionable as to whether the report would have ever been released and analysed, showing subsequently that it was poorly conceived and should not have been used as the basis for any legislative response by the government. It also shows how powerful and necessary the freedom of information framework is for ensuring that government policy is based on evidence, and not 'lobbysomics' or vested interests.

Another such instance of vested interests wielding undue influence on the political process can be demonstrated with the watering down of the Mineral Resources Rent Tax. A concerted effort from the Minerals Council, undermined the then Rudd government and ensured the policy was significantly watered down.¹⁰ Public scrutiny will help ensure such undue influence is kept to a minimum by providing transparency in discussions, so the public can be confident that politicians are acting in the populations' best interest.

Any organisation wishing to hide their views from the public are not offering frank and fearless advice about what is best for the country. Open dialogue would limit any misunderstanding and potential backlash from perceived collusion, because the Australian public would be well served, with the same advice as the government.

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

It is the view of the Party that no government agency, organisation or entity should be wholly exempted from the oversight mechanisms provided by the *Freedom of Information Act*.

It is highly inappropriate for entire agencies to be exempted from the scrutiny of the general public or journalists. Exemptions for material, where necessary, should be handled on a case by case basis, with the ordinary avenues of appeal.

The general principle of the Act should be to have as broad an application as possible, to as many agencies as possible, and certainly agencies like the Australian Secret Intelligence Organisation (ASIO) should not be shielded from public scrutiny.

(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

Fees and charges are an impediment to achieving the intended outcomes of the *Freedom of Information Act*. Even relatively small fees and charges work to stonewall applicants, which can often be independent or citizen journalists, volunteer activists or non-government organisations without adequate resources to commit to such endeavours. There is an inherent right for citizens to examine government documents and other materials in the spirit of accountability and transparency in a modern and open democratic society and prohibitive

¹⁰ Matthew Knott. "The Man Who Killed Rudd's Mining Tax." *Business Spectator*. 28 November, 2011. <http://www.businessspectator.com.au/bs.nsf/Article/Mitch-Hooke-MRRT-mining-tax-minerals-council-Kevin-pd20111128-P26WR?opendocument>.

costs work to undermine those notions.

There is no evidence that fees are required as a deterrent against frivolous requests, and indeed many requests would probably not be necessary should the cultural predisposition of many government agencies and departments shift to a default of openness and the making of more material publicly accessible. The Party is of the opinion that all fees should be removed.

(g) the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

Rather than attempting to roll back the public's access to information, implementing the Open Government Declaration more thoroughly would reduce the costs of fulfilling FOI requests because there would be less need for requests to be made.

Having a default position of transparency would greatly reduce the administrative burden because the public would have access to documents without the need for government employees to sift through data and make decisions about what is relevant, what is secret and what can be published.

As noted above, Pirate Party Australia feels that the OAIC is not operating optimally. A faster route to review decisions is the Administrative Appeals Tribunal, which the Party feels is both overkill and overly expensive for most cases.

The issue is twofold:

1. The public needs timely access to information.
2. The administration needs to be as efficient as possible.

Neither of these aims are achieved by the current system. This is not a fault of the intention of the systems, but the implementation.

Having a freedom of information request take more than 12 months to be filled is clearly not providing the public with timely access to information, nor is it a reasonable use of public resources. The shorter it takes for a request to be filled, the more efficient and less costly the process becomes in the long-term.

Unfortunately, faster completion of requests will obviously require increased staffing in the short term. Therefore, the most effective way to reduce the inefficiencies is to prevent as many FOI requests as possible making it to the OAIC or the AAT by completing them before this stage or making the need for a request redundant.

Pirate Party Australia advocates the regular release of governmental documents. Given that the cost of making documents publicly available has been drastically reduced with the accessibility and proliferation of the World Wide Web, regularly releasing government documents would significantly reduce the number of requests made. A recent example of this is Pirate Party Australia Secretary Brendan Molloy's request for a copy of the complete

classification database (as kept by the Classification Board) after changes were made to the system that prevented him from duplicating it with a software application.

After negotiations and wildly inaccurate cost quotes following a freedom of information request, he eventually obtained the database on a USB drive after over 70 days. This is an example of where making the database publicly available by default through a mandatory public sector information framework or regulation under the Act would significantly increase the efficiency of the freedom of information system.

Where a request is made, it would save considerable time and money if sections of documents that were simply unrelated to a request were not redacted. If, for example, a request is made relating to a particular issue, documents that also discuss other issues should not require censoring. The less time public servants spend blacking out information on the grounds that it is unrelated to the request, the less costly the system becomes.