

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 an opportunity to speak personally to Allan Hawke regarding my social media FOI request to 158 agencies in April 2012, the lack of response I received from over 40 agencies (presumably due to understaffing of their FOI email account) and the other issues and peculiarities in responses I identified.

Note that I am happy to make available to the OAIC and Dr Hawke the email account and complete record of written correspondence with agencies during this FOI process.

1) **Definition of ‘information’.**

The current FOI laws assume that ‘information’ is stored in ‘documents’. As such, FOI requests must ask for documents, which may contain the information they seek. Agencies may refuse FOI requests where they may be required to create new ‘documents’ in order to provide the information.

This is a fallacious assumption and open to substantial abuse by agencies seeking to conceal information by withholding it.

For instance, there are copious grey areas where information is stored in a format which some agencies may consider ‘documents’ and others may not, such as data feeds, databases and reporting systems where the data has not been specifically extracted to create a ‘document’.

Much of the information held today by agencies doesn’t reside in documents at all, and with a shift to electronic storage occurring as mandated by the NAA and more and more material produced in audio, visual, multimedia and online formats, less and less information will be in a format which agencies will consider ‘documents’.

A case in point was my recent FOI request to 158 FOIable entities requesting information on the public social media accounts they operated and the existence of any social media guidance. I provided an online survey which took less than ten minutes to complete when the right information was at hand in an agency. However over 30% of agencies refused to complete this simple and fast process because, from their perspective, it meant creating a new ‘document’ (a survey response). These agencies required a follow-up broadening of the FOI request for documentation which might contain some of this information. In most cases (over 90%) agencies stated that they did not have this information in documents and therefore could not supply it.

I undertook this request following a number of requests from within government agencies who had been attempting to source this information for more than three years in order to inform their own decision-making processes. It is extremely disturbing that agencies could fail to share this much needed data with each other, let alone that they were unable to share such publicly because it had never been stored in ‘documents’ – despite the request being for their **public** social media accounts (ergo for the viewing of the public).

While it may seem a simple solution to re-address the definition of ‘document’, the constantly changing nature of technology means that any modification of this definition will have a limited timespan and be open to abuse by agencies seeking to conceal information.

Instead I would advocate a shift to a ‘right to information’ framework, as adopted by several Australian states, where the format of the information is de-emphasised in favour of a focus on the content.

2) **Misunderstanding and misuse of FOI**

While working in the public sector following the introduction of the amended FOI Act, and subsequent to leaving the public service, I have encountered a large number of public servants responsible for the collection, holding and dissemination of information who:

- a. Were unaware of their obligations under the amended FOI Act
- b. Had mistaken beliefs about their obligations under the amended FOI Act
- c. Were actively conspiring to not record information in ‘documents’ in order to avoid it being FOIed

This was, and is, extremely troubling to me and, in my view, jeopardises the successful operation of the amended FOI Act.

Most public servants (including senior staff) were well-intentioned, but misinformed, having not been adequately educated on the changes to FOI – either because they rarely received FOI requests or because they had not received information on the changes within their agencies.

Several examples of this occurred during my social media FOI request where several agencies refused to reveal which web browser their staff used, claiming this was ‘commercial in confidence’ despite the information being readily available to any website visited by staff by default. This type of mis-classification of information can add significant cost and time to FOI requests, adding substantially to the government’s overall cost of compliance.

A few public servants evidenced a clear intention to withhold, or make extremely difficult to obtain, information on the basis that while it might qualify for release under FOI, it could damage the reputation of the agency, Senior Executives, Ministers or the Government and therefore release could result in repercussions that would damage the staff member’s standing and career.

I have several discussions with public servants who stated that while they supported FOI, they were not prepared to risk their job over releasing information that would make senior managers or the Ministers’ office unhappy. Note that I don’t believe this is a particularly large issue, however it does exist and even a single instance exposed could damage the standing of the APS and government severely.

I believe there needs to be several steps taken to address the above issues. Firstly when FOI laws are changed there is a need for a comprehensive communication and education process to be enforced at all levels of the APS.

Secondly, there needs to be appropriate recourse and support for public servants who fear loss of career or position due to releasing information ‘unpopular’ with a senior manager or Minister’s office. These people are not whistle-blowers and cannot be easily identified as being bullied as often their actions to withhold or conceal the existence of information are undertaken under an ‘understanding’ rather than a visible threat.

I would suggest that the APS consider an anonymous avenue for APS staff who fear potential retribution that they can provide information to prior to authorising FOI releases, which can then be referenced after the fact should the actions they fear come to pass. This is only a partial measure as there are many subtle ways in which managers and Ministers’ offices can attempt to influence agency information releases, and other approaches should be considered.

3) Exclusion of Governor-General’s office from FOI

I can see no good reason that the Governor-General’s office is excluded from FOI requests and believe this exclusion should be removed. It is in the public interest to access the activities and decision-making processes and understand, for example, the process by which key awards nominees are considered.

4) Publication consistency

Currently there is enormous inconsistency in how agencies publish FOI requests and responses through the Information Publication Scheme and FOI Disclosure Log.

Firstly, different agencies (and teams within agencies) follow different approaches – some releasing FOI information to the public and to the requester at the same time, others allow for a matter of days or weeks.

It is my view that government does not exist to provide ‘exclusives’ to media outlets and, while media outlets might protest that they would make less FOI requests if they could not write exclusive stories and therefore Australian democracy would be injured, I do not believe this is a fair assessment of the situation, and ‘exclusives’ are tantamount to the government providing an unfair financial benefit to the FOI requester over others.

Secondly, different agencies publish information in different formats and structures, without clear metadata which would allow for open data scraping and representation of the material in different forms.

OpenAustralia is soon to release a website for making and reporting on FOI disclosures and they have found that, due to agency inconsistency, they will need to write a different screen scraping tool for each agency’s information Publication Scheme and FOI Disclosure Log.

I would like to see a standard approach for agencies to release information simultaneously to requester and the public and for a standardised metadata schema to be used to allow improved reuse of released information, with the schema published openly and available for review.

5) Fees and charges

In the same social media FOI request to over 150 agencies, I was charged a highly variable amount in fees for the same information.

Most agencies charged zero, one wanted to charge me \$7 (which I promptly paid and then never received the documentation) and one sought to charge me more than \$700. I don't think agencies have a clear and consistent system for charging fees and I believe it is inappropriate to charge the public for situations where the issue is the agency's own document and data management processes.

Citizens should not be penalised by agencies who have underinvested in their IT and document management systems in the FOI process. Rather agencies should be taking appropriate steps to maintain a high degree of effectiveness in these systems, not for FOI sake, but for the productivity benefits that accrue when agency staff can locate and make use of documents, information and data quickly and reliably.

I believe that agency FOI charges over \$100 should all require audit review by the OAIC (with appropriate resources allocated to do so) and any system issues be forwarded to the Australian National Audit Office for review to establish if senior agency officials have adequately invested in internal management and information systems and misrepresented the internal state of the agency, and its capacity to be productive, to government.

This step would, firstly, discourage agencies from using cost impositions as a technique to avoid releasing uncomfortable information and cast greater accountability on senior management to ensure that they address internal information sharing and productivity issues.

6) **Accessibility**

The accessibility of information released by government remains an issue, as are any attempts by the OAIC to obtain exemptions from accessibility requirements.

While recognising that some of the information released under FOI may not be readily or cheaply available in accessible formats, government, as a whole, needs to define a strategy for how to make this information accessible to ensure that a significant proportion of the Australian community is not disadvantaged in FOI releases.

This whole-of-government activity could be led by AGIMO, who has substantial experience in this area, and look at developing a central capability to transform information to accessible formats in a cost-effective manner, rather than placing the cost on individual agencies without the economies of scale.

7) **Staffing and resourcing of FOI capabilities in government**

A significant issue in the reform of FOI was the lack of funding support for agencies, who generally had to rely on the same number of staff to address a doubling of the workload.

With all respect to the hardworking public servants who have achieved this, it is inappropriate and infeasible for governments to increase FOI workloads without an acknowledgement of the cost, both for FOI officers and for web teams publishing information online.

Appropriate provisions need to be made through the OAIC to understand the cost impost of FOI requests and the additional funding required to sustain information

release to legal requirements. The government must then consider how this should be funded, through either a reduction in efficiency dividends or changes in how FOI is funded within government.

8) **Central disclosure log**

The current approach in government is for each agency to have a separate FOI Disclosure Log for every agency.

This is needless duplication of the mechanism and process and a number of issues for agencies would be solved if the government established a central Australian Government FOI Disclosure Log.

This would reduce the accessibility (6) and publication cost issues (7) from agencies and remove the need for a metadata schema for all agencies to follow (in 4).

The central log could have search and filtering systems such that people could easily perform a whole-of-government FOI search and, with RSS or API support, would allow agencies to publish back into their own site the FOI disclosures relevant to them without significant IT work.

The system could have data admin functionality for agencies to allow them to add material as required and support a standard metadata and structure for the collection and presentation of FOI information to remove inconsistencies across agencies.

This approach would reduce the FOI workload on agencies who are mistakenly approached by citizens who do not understand the structure and responsibilities of individual agencies, as the central disclosure log would make it easier for them to identify which agency to approach.

Finally, this system could also provide a consistent FOI request process, with directive rules to forward requests to the appropriate agencies as emails or, better yet, via a back-end management system which would allow agencies to update the status of the request over time, providing a whole of government view on the management and timeliness of FOI without significant staff effort.

This system could be used to manage all offline and personal FOI requests as well, providing a whole-of-government FOI management system that ensured standard compliance, reduced the risk of 'lost' FOIs, permitted easy consultation across agencies and significantly reduced the cost impost on some agencies for developing and maintaining their own FOI management systems.

9) **Blind testing FOI**

My final recommendation is that the OAIC be funded to conduct regular 'blind tests' of FOI, putting requests in to a large number of agencies on a regular basis to assay whether they perform as they state they perform.

From my social media FOI request I found a major agency whose FOI email address on their site was non-functional (bounced) and over 40 (of about 158) agencies did not respond at all to FOI emails. I declined to chase them because of the personal (unpaid) time this would take, however it does signify a major deficit in the management of FOI by many agencies.