

Second Response to the Review of FOI Laws (Cth)

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Dear Dr Hawke,

The reforms made to Commonwealth FOI in 2010 represented an amalgam of the long overdue implementation of a number of suggestions from the 1996 ALRC/ARC Report on Open Government and a few selective ideas from the far more wide sweeping and fundamental reforms generated in Queensland, Tasmania and NSW, often referred to as the FOI 2.0 model.

The resultant construct, while a significant improvement on the sclerotic system condemned by Prime Minister Rudd, was considered by Minister of State Faulkner as merely the beginning of a long transformation towards a more functional system of open government. Progress along that path to reform over the last two years has been fragmented, highly variable between agencies and limited.

The inconsistent and piecemeal approach taken to FOI reform is reflected in both the terms of reference and the methodology used to undertake this review.

The Commonwealth system of FOI needs to be reconsidered from first principles (as it was in Queensland and Tasmania). It needs to be designed to meet the contemporary needs of the Australian government and citizens while also being forward thinking and innovative enough to create an environment where FOI can make a functional and value adding contribution to public policy development, scrutiny and accountability well into this century.

A key recommendation from the 2002 Canadian Access to Information Review Task Force was that a systemic approach is required to effectively review the operation of FOI. The Task Force recognised that access to government information must be approached from a systems perspective, focusing beyond legislation to concentrate on administrative practices, culture and capacity as well as user demand, behaviour, expectation and needs.

The Solomon Report, subsequently adopted by the Queensland Government, advocated that the management of government information requires a whole of government approach. The creation of the Office of the Australian Information Commissioner was a step in that direction but it is clear that government agencies, the OAIC and others still view FOI largely in isolation from open data, e-government, archives, records management and other areas of public administration. The Australian Law Reform Report (and inquiry) into secrecy is a classic demonstration of taking a single lens perspective rather than a multi-lens and systemic approach to issues associated with open government.

In addition to engaging with those individuals or agencies who have made submissions to this review by phone or face to face meetings, it would be helpful to hold several round table forums,

bringing together a range of stakeholders and experts to generate new ideas and approaches to government information, including the role and expectations of FOI legislation in the 21st century.

Given that FOI is part of a major democratic policy program to enhance accountability and transparency in decision-making, an objective of this review should be to adopt a more rigorous and extensive assessment of the operation and evaluation of FOI. This is particularly important given the amended objects section of the FOI Act now requires government information to be managed for public purposes and as a national resource.

There are obviously unavoidable costs associated with this process, however a narrow cost fixated approach to FOI (as set out in the Terms of Reference for this review) is too simplistic. If costs are to be calculated they need to be offset by determining the dividends and public benefit derived from the operation of FOI. Any devaluing of that public benefit by begrudging, indifferent or hostile oversight of FOI should be carefully considered.

This review should reach some determination about how effectively the new objects section of the FOI Act operates and agencies should be required to account for how well and to what extent these legal objectives are met. While acknowledging that by necessity the process will be difficult, qualitative and often subjective, agencies should nevertheless attempt the task.

A key undertaking for this review must be to ask questions about the extent to which the supply, demand, distribution, quality and availability of government information has been improved since the reforms, evaluating and balancing the impact upon both agencies and citizens. For example, any difficulties or increase in agency costs associated with FOI should be offset against any significant outcomes that may have been achieved (or could be achieved) under Section 3 (2) (a) and (b) of the FOI Act namely;

- (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
- (b) increasing scrutiny, discussion, comment and review of the Government's activities.

Basic changes needed in the operation of FOI at a national level

- Statement from the Prime Minister on Freedom of Information and open government.
- Scope of FOI widened to include all government agencies and functions.
- Emulation of the New Zealand approach to Cabinet information.
- Switch from a focus on documents to a focus on information.
- Instruction to public servants that frankness and candour are requirements of public office.
- Public interest test to apply to all exemptions.
- ALRC Report recommendations into Secrecy Laws adopted.
- Simplified charging regime.
- Simplified review mechanism.
- Greater focus on changing culture and practice within the public service.
- Australia to join the Open Government Partnership.

1. Statement from the Prime Minister on Freedom of Information and open government.

Since Senator Faulkner, no Minister responsible for FOI, or Prime Minister, has shown ongoing and positive leadership, direction or commitment to ensuring the reforms made in 2010 were effectively put into place. The Prime Minister should be advised to make a public commitment to FOI and to instruct the federal public service to avoid transparency only where it is absolutely in the public interest to do so.

This statement would reflect similar approaches by Presidents Clinton and Obama. See the Memorandum from President Obama in January 2009 at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct and the US Attorney General memo March 2009 (attached).

Strong, direct leadership on FOI is vital.

2. Scope of FOI widened to include all government agencies and functions.

In the 21st century there is no justification to entirely exclude any agency or function from the coverage of the FOI Act or the supervision of the Information Commissioner. If the USA can operate with agencies like the FBI and CIA covered by the Freedom of Information Act, there is no justification or necessity to exclude any Australian agency from the *Freedom of Information Act* 1982.

The coverage of the *Freedom of Information Act* 1982 should be extended to include any government or non-government body that carries out public functions or receives substantial public funds and should automatically extend to include government agencies created in the future, unless expressly (and by necessity) excluded.

FOI systems in many western democracies have demonstrated a capacity to protect sensitive military, security and economic information without resorting to the blunt and sweeping mechanism that exclude entire operations or substantial functions of an agency from the operations of the FOI Act. As Justice Kirby explained in the hearings of the 2006 McKinnon case in the High Court, a small zone of secrecy is necessary for the effective operation of government. However, the current scope of the FOI Act and the extent of exclusions from its coverage clearly exceeds required levels of confidentiality, security and protection and is not conducive to an effective and sophisticated system of government information management

3. Emulation of the New Zealand approach to Cabinet information.

Ministers should be required to consider the appropriateness of publishing Cabinet material and information under guidelines similar to those adopted in New Zealand in 2009 (see attached NZ Cabinet Office Memo provided with my initial submission), including the possibility of releasing such material before a matter is considered or decided by Cabinet (See point 8 of the NZ Cabinet Memo).

In the last 30 years the entire nature and fundamentals of APS administration have changed in response to new ideas generated to accommodate the changing needs of governance and

accountability. The nature of government and parliamentary operations and processes have also evolved and in some cases been radically transformed from what they were and how they operated in the mid 20th century.

Yet in the design of FOI we have, almost unthinkingly, stayed committed to an antiquated and outmoded concept of Westminster government and Cabinet operations. We need to reconsider the system to ensure the vital elements and functions of Cabinet confidentiality continue and are enhanced, while allowing a greater level of transparency and scrutiny to occur. The NZ example demonstrates that effective government can continue even with a greater degree of transparency throughout the cabinet decision-making process.

Furthermore, the approach taken by the Reserve Bank demonstrates how the adoption of 21st century thinking in relation to information, scrutiny, accountability and effectiveness can lead to a more open and informed decision-making process. There is no evidence to show that the increasing level of openness surrounding the operations of the Reserve Bank Board have diminished its effectiveness, ability to reach decisions and respond to crises or challenges. Indeed the evidence seems to indicate that a greater level of openness has improved economic analysis generally, and enhanced commentary and understanding about the Reserve Bank and its decisions specifically.

Contrasting the approach taken by the New Zealand Government and the Reserve bank, with the speculation, guesswork and unsophisticated analysis that accompanies the Cabinet decision-making process in Australia, it is clear we need to reconsider our approach to Cabinet information.

4. Switch from a focus on documents to a focus on information.

As suggested by Mr Thomler in his submission to this review, there should be a shift to a 'right to information' framework "where the format of the information is de-emphasised in favour of a focus on the content." The key policy objective of the FOI Act should be devoted to the management of supply, demand, distribution, quality and timing of availability of information held by government agencies, rather than focussing on the excessive protection of information regardless of harm.

In a digital age, the goal should be to make information readily accessible to people using a variety of platforms, serving both to promote government transparency and accountability, while simultaneously reducing the burden on agencies to manage cumbersome and outdated systems and processes associated with meeting their obligations under FOI.

The AOIC is embracing the Open Data movement/approach but doing so from a legislative base and focus that drips with a world view set in the late 19th century in terms of technology, governance and the relationship between citizen and state and the capacity and resources of citizens. Whilst the digital age does not empower or ensure equality for all citizens it does have the capacity to transform those inequalities and power/knowledge imbalances. There is a world of difference between an adversarial tussle over documents that, once removed from their surroundings, lose a lot of meaning and insight, and a process that encourages the creative supply of information to assist understanding and capacity to engage in public policy development and scrutiny.

5. Instruction to public servants that frankness and candour are requirements of public office.

Much has been made, generally in anecdotal comments as opposed to any solid evidence, about the chilling effect that possible disclosure has on the capacity of public servants to be fully candid and frank in their dealings with Ministers. However, a minimum requirement for all public officers accepting public money and gaining access to the public payroll, is an expectation or requirement that they will give full and frank advice.

I understand, as a former bureaucrat, board member and academic, the value and necessity of the capacity to think/discuss/float ideas in private. However the impact upon frankness and candour has been overlaid throughout the operation of the FOI Act.

The NZ public service has operated with a significantly higher level of openness (including up to the Cabinet level) without frankness and candour being severely diminished. It is only now, after 30 years in operation, that disquiet about frankness and candour in New Zealand has arisen and it should be noted that such concerns relate to an inner core of decision-making far deeper than the outer fringes that are of concern to Australian public servants.

As a former head of agency, Mr Wood noted in his submission that staff should operate on the basis that they should be prepared to publically, or before parliamentary committees, stand by and justify advice they prepare for their Secretary or Minister.

6. Public interest test to apply to all exemptions.

There should be no absolute exemptions and all exemptions should be subjected to a public interest test.

7. ALRC Report recommendations into Secrecy Laws adopted.

The 61 recommendations contained in the Australian Law Reform Commission: Secrecy Laws and Open Government in Australia (ALRC Report 112) 2010 should be implemented.

It is difficult to see how an open government system as envisaged under the 2010 reforms can be achieved without adopting and implementing at least the majority of changes recommended by the ALRC regarding the management of secrecy laws and provisions.

8. Simplified charging regime.

As Mr Thomler points out in his submission, the charging practices of federal agencies are inconsistent, including where applicants (and the public in general) are penalised because of the inadequacies of an agency's document and data management system.

Application fees should be kept to a minimum, not exceeding \$20. There are alternative methods for handling excessive numbers of applications, burdensome and time-consuming applications and/or vexatious or troublesome applicants than by creating prohibitive fee structures.

Processing charges should be removed. As Ms Doyle and Mr Wood's submissions reveal these charges are applied inconsistently over time and between agencies. The majority of Departments now have, or ought to have ICT and records management systems that enable the inexpensive retrieval and/or creation of information in response to requests. In many cases, information provided under a FOI request will be reused by many others and therefore the original applicant should not bear the cost. Additionally, if (via the Objects section) government information is a national resource to be used to further inform and improve policy debate and/or to scrutinise government activity, then processing costs should not be recovered from those endeavouring to meet these objectives. Fees should be reduced where the OAIC has determined there have been unnecessary, unjustifiable or excessive delays in processing FOI applications.

The idea of a limit/ceiling on processing time is a useful one. However, any limit should be reviewable by the OAIC and applicants should not be disadvantaged by slow, cumbersome and ineffective records management, OICT and processing procedures used by agencies.

Digital information should be free, with a small charge for reproduction via other means (paper, sound etc). Greater use should be made of government systems such as *Slipstream*, as noted by Ms Doyle, to improve efficiency in processing, meeting and managing of FOI requests.

I agree with Ms Doyle and reject the indexing of fees and charges to the CPI. As Ms Doyle states the FOI process is a legal right granted by parliament and is intended to serve a number of important democratic and participatory purposes. Any changes should only occur after consultation with the public.

9. Simplified review mechanism.

All review requests should go directly to the FOI Commissioner who must be staffed and resourced to ensure that reviews are finalised promptly. As Ms Doyle notes in her submission the handling of internal reviews is very much the luck of the draw depending on which agency and which culture is in place regarding FOI.

One suggestion is that each agency should be required to transfer resources to the Office of the Australian Information Commissioner proportional to the FOI review workload generated in the previous year.

10. Greater focus on changing culture and practice within the public service.

Despite the passage of two years since the reforms, Mr Thomler writes:

“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 “

The submissions from Ms Doyle and Mr Wood as well as the OAIC Annual Report all reveal a degree of variable and/or poor compliance in excess of what should be tolerated by a well trained public service administering an FOI Act in accordance with the clear objects set out in Section 3.

Variable compliance and commitment to the reforms is inexcusable. I understand that the Information Commissioner has worked hard to produce cultural change but clearly far more needs to be done. In particular, the counterproductive influence of many ministerial staffers upon the effective operation of the objectives of the FOI Act must be addressed.

11. Australia to join the Open Government Partnership.

As Peter Timmins has frequently commented on his blog Open and Shut, the Australian Government's slowness to sign up to President Obama's global initiative is unfathomable and sends a very negative message both domestically and internationally regarding Australia's commitment and capacity to achieve open government.

This case is made very clearly in Senator John Faulkner's extensive coverage of the reasons and value to Australia in becoming a participating member of the OGP. See <http://www.senatorjohnfaulkner.com.au/file.php?file=/news/QCRMVHXKFO/index.html>

Final Comments

I found it very helpful to have access to Mr Thomler's submission. It would have been helpful if your review process had gone some way to facilitating the exchange of ideas and experiences.

Furthermore, given the staffing capacity, resources and experience of the Australian Public Service, it would have been helpful if agency submissions were due by the 7th of December 2012, allowing the public the opportunity to consider and respond to those submissions by the end of January.

I have submitted an opinion piece to *Public Administration Today* that will be published before your review is complete. In that piece my main argument is that the APS has failed to embrace FOI and open government as a policy program. I argue that the APS in general, and its leadership specifically, have neglected (since 1983 and 2010) to seek the benefits of greater openness and have focussed primarily on the negatives and costs associated with FOI.