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JOHN T D WOOD Director

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Dr Allan Hawke AC
c/-Mr Richard Glenn
Assistant Secretary
Business and Information Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Dr Hawke

FOI Review

By way of background, I initiated the national FOI Legislation Campaign in 1976; administered a Federal Government agency subject to FOI; supervised the Commonwealth Ombudsman's investigation of FOI complaints; and have been a FOI requester. My comments on your Terms of Reference follow.

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;

The amended FOI Act has undoubtedly been a great improvement on the old; in particular the insertion of the Objects sections and the removal of conclusive certificates. However, it is increasingly evident to me, that the Objects are being honoured by the agencies that I have dealt with recently, in name only. I refer especially to the overuse of the 'deliberative processes' conditional exemption. It has been used against me even when I have sought purely factual material. The flippancy with which the factors favouring access are addressed by the agency is staggering – that is they often just repeat the factors set out in s11B(3) without any consideration of them being given.

In each of the last three requests made by me, the time taken for the whole process, including internal review, review and/or complaint to the Office of the Information Commissioner (OAIC), have been: 13 months; 8 months; and 14 months (still not complete). Part of these delays were due to the agency, and part the OAIC. In the last of these cases the agency has not met one deadline, and failed on four occasions to acknowledge my correspondence. Not one of the agencies concerned consulted me in relation to my request as envisaged by s.15.

I cannot see how these delays can have, in any way, been consistent with the aim of the Minister expressed in his second reading speech:

> 'The aim of these measures is to ensure that the public interest in disclosure remains at the forefront of decision making, and that the right of access to documents is not unduly restricted by liberal application of exemption criteria.'

I also cannot see how such delays '….promote Australia's representative democracy by contributing towards the following:

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(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', as intended by the Parliament.

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

Whilst my discussion with the OAIC have always been professional and helpful, there have been long delays in processing the cases, largely due to a chronic shortage of staff resources. It is quite evident that the Government seriously underestimated the volume of cases that would have to be handled by the Commissioner. To fail to devote more resources to the OAIC would fly in the face of statements about ensuring the accountability of the Government. One agency I dealt with clearly had no intention of acceding to my request from the very beginning and, I suspect, just let it go through to the OAIC to save itself the workload!

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

Nevertheless, I think that the new system is a vast improvement on the old, and if the OAIC was properly resourced, a very good structure.

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

The reformulation was an excellent idea in theory, and would be in practice if some agencies took their responsibility to address the factors seriously. The inability – or unwillingness – to properly address factors in favour of disclosure seems to indicate either arrogance or a fundamental lack of understanding of the principles of participative democracy. From my experience, agencies exhaustively argue the public interest factors against disclosure, but the simply restate the criteria for disclosure without any serious effort at outlining what those factors might possibly be.

The reference to '*legitimate protection of sensitive government documents including Cabinet documents'* assumes that Cabinet documents, *ipso facto*, should be exempt. That is a very contestable assertion, and one that doesn't seem to have occurred to our neighbours in New Zealand. If we are truly to improve our governance, then Cabinet documents should not have any special privilege – indeed why any greater importance than accorded cabinet by the Australian Constitution. Cabinet documents should face the same public interest tests as any other document.

When I was head of a government agency. I applied the principle that any member of my staff should be happy to stand in public and defend any advice given to a Minister. If they were not prepared to do so, then they should rethink the advice. That, in my view, is the way to ensure the so called 'frank and fearless advice' so frequently claimed to be inhibited by FOI legislation.

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

It is not evident to me why the Auditor-General, ASIO, or a number of the other exempt agencies are so. The Commonwealth Ombudsman is not, so why the Auditor-General? In the USA, the CIA can live within the jurisdiction of their FOI Act, why not ASIO and ASIS, and the Inspector-General of Intelligence and Security?

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;

In general I think that the Information Commissioner's recommendations in relation to fees is reasonable. However, I should emphasise that fees should not be used as a mechanism for deterring applicants, as they so demonstrably were before amendment of the Act. It should also be remembered that individual applicants face a considerable barrier already in terms of the

time that can be taken up in pursuing a request, particularly if one has to go through the various appeal processes.

When the original Act came into force in 1982, I pointed out that the decision of the then government not to provide extra resources for administration of the Act was a foolish decision.

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

Whilst this might seem to be stating the obvious, the means for achieving the objective implicit in this Term of Reference, it should be tested against the actual efforts made by agencies to manage information and records efficiently. For example, AusAID possesses thousands of reports of consultants employed under Australia's development aid programme. There would be electronic versions of these, but where is AusAID's electronic library, where these are centrally lodged and available to the public who pay for the aid programme? Clearly the same applies to many other agencies.

Of course it is going to cost more to administer government in an open and accountable way. That should also be acknowledged by the current government. I am extremely skeptical of the costs of administering the Act being reported by the OAIC. Frankly, the oft maligned corporate sector spends more on accountability as a proportion of turnover than does the Federal government.

If we are to take accountability and participation in the policy process seriously – and is beyond time that occurred – then we also deserve a statutory requirement that Ministers and officials create and maintain records, such as is required under section 17 of the NZ *Public Records Act 2005*:

> **17 Requirement to create and maintain records**
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> (1) Every public office and local authority must create and maintain full and accurate records of its affairs, in accordance with normal, prudent business practice, including the records of any matter that is contracted out to an independent contractor.
>
> (2) Every public office must maintain in an accessible form, so as to be able to be used for subsequent reference, all public records that are in its control, until their disposal is authorised by or under this Act or required by or under another Act.

Yours sincerely,

John T D Wood
Director