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Review of the FOI Act

Dear Dr Hawke

Submission to the review of the operation of the *Freedom of Information Act 1982 (FOI Act)* and the *Australian Information Act 2010 (IC Act)*

Thank you for the opportunity to comment on the important discussion of freedom of information and the extent to which those Acts and related laws continue to provide an effective framework for access to government information.

My response is framed around the terms of reference as provided (underlined):

- (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 reforms to the FOI Act in 2009 and 2010 were a positive step and a launching point for further reforms in promoting transparency and enhancing the process of democracy. In particular the decision to abolish Conclusive Certificates was much more than a symbolic gesture towards achieving those goals. It is important for government to acknowledge and demonstrate commitment to principles of access to information, which forms an important element of representative democracy.

Modern western democracies are characterised by their social justice policies and reforms, attention to governance, and human rights which distinguish them from oppressive regimes. In the same way, access to information is a key element in a representative democracy that extends democracy beyond the three year electoral cycle.

The goals and ideals of the Open Government Partnership (OGP) and Government 2.0 Taskforce are important in helping governments to be transparent and accountable to their constituents for whom they represent.

Until governments routinely publish most of their information online, FOI continues to be the primary method to access government information. In my own experience, sometimes these avenues prove to be difficult to navigate and there is resistance to sharing information. Should Australia decide to join the OGP it

would serve as a positive sign of the government's commitment to FOI enshrined formally through the OGP Declaration.

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

The establishment and effectiveness of the OAIC is important in any discussion of FOI. A truly responsive and effective avenue of appeal via the Commission can only operate well with proper and adequate resourcing. I currently have a review pending with the OAIC and it took some months for the OAIC to allocate the review to a case officer due to the pressures of inadequate resourcing. The Information Commissioner has raised these issues in Senate Estimates and the issue of resourcing has been reported in the media.

The OAIC is an important oversight body reporting on FOI matters like those in Chapter Eight (8) of the Annual Report which refers to disputes due to poor communication (including some applicants not receiving acknowledgments); incorrect applications of the Act; and unsatisfactory customer service.

A paragraph taken from the OAIC's Annual report:

'One of the OAIC's important roles is in assisting agencies that are subject to the FOI Act to comply with their obligations under the Act. Details of agency FOI activities are given in Chapter 9. However, there have been some examples of agency activity during the reporting period that are at odds with the pro-disclosure culture that the FOI Act promotes and requires.'

This paragraph highlights the need for a third party oversight agency to ensure adherence to the FOI Act and as an external agency has no immediate vested interest in the outcome.

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

It is essential that the OAIC remain to ensure an external review process is available to applicants particularly given the failure of many departments and agencies to adhere to the Act as highlighted in the OAIC Annual Report. While internal reviews can be successful because of the requirement to use a new decision maker (where there has been a full or partial refusal), the newly appointed officer is often from the same line area. This was my experience in seeking an internal review. It would be more appropriate for agencies to nominate decision-makers from another division.

From my own experience in the APS and in speaking with other public servants, there is huge variation in competency, knowledge and experience in applying the Act. Advice is often around which exemptions can be applied to avoid disclosure (particularly to cover mismanagement or in the case of political considerations). As a former public servant I am yet to see a positive 'how to' approach from line areas towards the principles of FOI in the APS. There are many public servants who work in FOI who would also like to see this culture change.

Of course, cultures and attitudes around disclosure vary from agency to agency and it would be unfair to generalise. There are many good people working in the

area of FOI who do not have the authority or decision making powers or influence to further the goals of greater transparency within their departments.

- (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

There are already a number of exemptions under the FOI Act that deal with Cabinet documents and other exemptions covering national security and liaison with third parties like foreign governments or commercial bodies. The current government has already reduced the period of access to Cabinet documents from 30 to 20 years.

While there are good reasons for exemptions under the Act, often these exemptions are used too broadly. The applicant cannot know for sure if the exemptions are used appropriately. For example, exemptions around ‘affecting relations with foreign governments’ or with commercial-in-confidence declarations by third parties are such that the decisions can be subjective with no clear guidelines on when exemptions should be applied. There is good argument that relations with foreign governments for example in the case of Wikileaks and Mr Julian Assange, do not outweigh the public’s right to know about what the government is doing to assist one of its citizens; or what plans a foreign government may have in relation to that citizen. It was interesting to note the same correspondence between former Prime Minister Rudd and the former Attorney-General, Mr McClelland released by two different departments in a similar time period showed completely different redactions. It demonstrates how these decisions are entirely subjective and are influenced by departmental cultural mores.

Similarly, mining company correspondence (‘third parties’) in relation to heritage or environmental considerations is often released with redactions using commercial-in-confidence exemptions eg. Tarkine heritage listing. Historical experience shows this sector is not always transparent about possible impacts of mining. The public’s right to know should be weighted heavily in favour of disclosure. Mining companies are using resources in the ground on Australian soil, and many companies being foreign owned, may not hold the same attention or mindfulness to long term consequences.

There is no reason to believe that ‘frank and fearless’ advice would not be forthcoming from foreign governments or other bodies who would no doubt continue to act in their own interest as well as wishing to foster good diplomatic relations with the Australian Government. There is an opportunity here for government to be more transparent and diminish fears that truth is something to be feared. Providing leadership on open government will no doubt, eventually lead to adapting cultures and ‘frank and fearless’ can operate without

impediment. In my experience the presence of ‘frank and fearless’ advice is influenced more by relationships and personalities than fears of openness.

Without a body like the OAIC to examine claims, many decisions and exemptions would go unchallenged. It would indeed be an ideal society where applicants could always rely on the judgement and discretion of government decision makers, however the OAIC annual report highlights the spirit of FOI has not always been fully embraced by some agencies.

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

There is a good case to be made to include national security agencies in the FOI Act particularly for corporate information which would not breach over-riding national security concerns. While annual reports do include financial and other information there is no valid reason to exclude these agencies from the Act completely.

There is also a good argument to include some briefing material and advice to government on national security and defence policies. One would be hard placed to think of any government policy that would match the public interest test than factors influencing a decision to go to war or ones that affect civil liberties or privacy concerns. The revelations of whistleblower Mr Andrew Wilkie, formerly of the Office of National Assessments, about misleading information about weapons of mass destruction in Iraq highlights a gap in the accountability regime.

(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

At present there is no consistency on charges. Some departments do not charge at all for release of documents even those requiring clarification or searches, some agencies impose charges beyond the capacity of most people, and the rest fall somewhere in-between. Examples of variation is highlighted via the newly released Right To Know website <http://www.righttoknow.org.au/> which is administered by the Open Australia Foundation. In the pre-release test application for information from the Department of Foreign Affairs and Trade about ‘Uranium sales to India’ an initial fee of over \$2,000 was applied until the applicant requested a waiver of fees and a helpful FOI officer provided advice on wording and scope of the request to assist both parties.

A similar situation arose with another pre-release test request put through the site to the Australian Federal Police about the ‘AWB Inquiry’ which initially attracted an estimated costing of over \$40,000. Factors influencing this estimate were also due the applicant’s (me) wide scope which meant “boxes of material” would have to be waded through as advised by one officer via phone.

This also suggests there is room for education and providing a guiding hand to applicants to assist them in narrowing their requests to make the process simpler and easier. Comments to applicants that it is up to them as to ‘what documents

they want' are generally unhelpful. Members of the public would not necessarily know which documents contain the information they seek.

Agencies have it in their power to offer assistance to the applicant in refining requests because they have the knowledge and tools to identify the documents on behalf of the applicant ie. documents which contain the information they seek. Helpful guidance would, in the long term, save time for both the applicant and the agency thus reducing the burden.

I endorse with the OAIC's recommendations for a new charges framework with the following exceptions and highlighting areas for discussion:

Recommendation 2: FOI application fees - \$50 is a high application fee. Ideally information should be freely available and should not come at a cost. If it is decided an application fee must be charged, it should be minimal (\$20-30) and free for low income earners and pensioners. There is a strong argument also in favour of providing information free of charge to journalists who, in principle, serve to keep governments to account. High charges make this process more difficult. Any concerns about opening the 'flood gates' would be obviated by suggestions already made for agencies to routinely publish information online.

Recommendation 3: FOI processing charges – FOI processing should attract no cost or as little cost to the applicant as possible. Information held by governments for the electorate should not attract charges unless the search time is considerably lengthy (over eight hours). If there is to be a charge imposed a flat fee of \$50 should be the maximum which would be affordable and allow most people access to their government, except where the public interest is deemed of 'special benefit'. The cost of redaction should not attract a charge especially as the redaction may be disputed by review.

There should be no charges for decision making time. There are often factors which make this process unreasonably lengthy including potential for blowouts for political or bureaucratic reasons that are completely out of the control of the applicant. This would also provide incentives to agencies to progress requests as quickly as possible. Agencies that adopt cultures of openness would spend less time decision-making.

It is reasonable for some 'actual cost' charges for photocopying or printing for bulky documents, unless the document is already scanned and can be emailed to the applicant with ease. Most documents are scanned and housed in databases like the ministerial database *Slipstream* which makes it easy for public servants to find ministerial correspondence, Secretary's correspondence, briefings, QoNs and PPQs. For those applicants who require hard copy the cost of photocopying at 0.5c per page would be fair. Given technological advancements it would be reasonable to predict the number of requests for hard copy would be minimal.

Recommendation 4: Ceiling on processing time – The ceiling of 40 hours is fair however good record management processes would, in most cases, result in speedy processing. While the OAIC Review recommends an agency's 40 hour estimate is to be reviewable, it should be overruled altogether if the reason for a

lengthy process is inadequate record keeping. Failure in governance and probity around records management should not be a penalty incurred by the applicant.

Also if a document did exist but is reported as not existing it should be mandatory for departments to report 'if' and 'why' the document was destroyed.

In addition, if the 40 hour ceiling is reached due to hesitancy by the department to release information this cost should not be borne by the applicant. While Conclusive Certificates have been removed, agencies and ministerial offices do consult and deliberate on releases and all factors taken into account. There is no reason why the decision making and deliberative processes shouldn't be quick. The applicant should not bear the financial burden of delays in these instances. In fact the opposite should apply, where the department waives all fees should they not meet their obligations under the FOI Act.

Recommendation 5: FOI access charges - It is reasonable to impose charges to cover actual costs in some instances such as recommended by the OAIC for printing, electronic storage media and transcription (actual costs, excluding time) - excluding financial hardship or public interest determinations.

I am unsure of where the first part of the OAIC's recommendation would apply where it states \$30 per hour be charged for supervised access to documents. In my response I am making an assumption this refers to older material, perhaps housed in archives, which may be too delicate to copy or for other reasons unable to be released, and which would require researchers to visit agency premises and to take notes under the supervision of a government employee. If this is correct I feel the \$30 per hour charge is too high and will place unnecessary burden on applicants and researchers.

See also comments as outlined above in recommendation three (3) relating to *Slipstream*, scanned documents and processing charges.

Recommendation 7: Waiver - I endorse most of this recommendation except for the freedom of agencies to apply any charge (OAIC quotes up to a 50% reduction) where it is established that release of the documents would be of special benefit to the public.

To cite an example: It was recently reported that a summary report showing an overspend for a ministerial office for financial years 2007–08 was not sufficiently in the public interest to validate the time it would take to extract the report from an older version of Finance One. This was contrary to separate advice provided to me by an experienced finance officer that extracting the report would take little time. It was also surprising to discover there was no hard copy of the summary report in a relevant file or a scanned document.

This experience demonstrates the potential for disagreements over what constitutes 'special benefit to the public'. Such decisions are highly subjective, easily open to abuse in refusing access or in imposing unreasonable charges to discourage applicants. The OAIC is an important external agency in scrutinising those sorts of claims or assertions. Where a document is deemed of special

interest to the public it should automatically be published online, but if it is not a 100% waiver of fees should apply.

Recommendation 8: Reduction for delayed processing - The OAIC's recommendation to penalise agencies for tardy responses is a good one which provides incentives for public service agencies to meet their FOI obligations. A greater incentive would be to retract all charges if an agency fails to notify a decision on a request within the prescribed statutory period unless an extension has been agreed where the agency is required to contact third parties. A staggered approach in fee reduction as recommended by the OAIC would provide too much room for delay without sufficient financial incentive. It is also incumbent upon agencies to ensure FOI sections are appropriately resourced to meet these obligations, including high quality training not only for FOI officers, but for designated decision makers.

Compulsory FOI workshops and seminars run for all staff, particularly new employees, similar to the mandatory Security Seminars, would be useful in communicating FOI obligations under the Act and in fostering an agenda of openness.

Recommendation 10 Indexation – In regard to the OAIC's statement "*all FOI fees and charges should be adjusted every two years to match any Consumer Price Index (CPI) change over that period, by rounding the fee or charge to the nearest multiple of \$5.*" I am not sure that the CPI is the most appropriate index to decide increases for FOI fees. CPI does not reflect the public's ability to pay; in fact an increase in CPI would mean applicants may have a reduced ability to pay and CPI increases do not necessarily reflect the cost to agencies.

The FOI process is a public service and decisions about increases in charges should be a decision perhaps reviewed by the OAIC or the responsible portfolio Minister (currently the Attorney-General) and in consultation with the public.

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

In a representative democracy Freedom of Information is a right. It is a mechanism to hold governments to account and assists in making the process of government more transparent. While agencies are naturally mindful of costs, fiscal considerations do not outweigh the public's right to access information.

A culture of secrecy and where information is restricted or censored is not a foundation from which transparency can prosper. It is a foundation at its worst manifestation exposes government processes to corruption.

The most effective way to minimise the administrative burden and costs to agencies is to routinely publish information online and to operate with good record management systems which facilitate quick and efficient processing.

Online publishing has been expanded in the last few years to include, for example the *Senate Order for the Production of Indexed Lists of Departmental and Agency Files*. This is a useful list that may help with refining FOI requests. There is room for improvement of the listing in banning partial redactions of titles as

practised by some departments, and ensuring file titles are narrowed so as to be more relevant to content than a broad category (or including the ‘fine print’ on some files into the indexed list).

Government departments also publish annually *Agency Contract Lists* valued at over \$100,000. This practise could be expanded to include publishing all contracts and financial transactions online, which would aid in reducing the number of FOI requests. That is, publish all financial information routinely online. From reading the disclosure logs many requests seek financial information and publishing would reduce the burden.

The practice of publishing government information online could be expanded to briefing materials, ministerial correspondence and other material, while continuing to respect and observe rules around exemptions and privacy. The Government’s *Engage: Getting on with Government 2.0* report as published on the Department of Finance and Deregulation website, outlined a number of recommendations to improve government interaction with citizens and improve transparency and access to information.

While the Government’s progress on these reforms is ongoing, citizens should not be penalised - through FOI restrictions - because of delays in meeting the Gov2.0 goals and recommendations. Continuing in the path of early reforms of this government in increasing transparency and accountability in the FOI process is important in any modern democracy. Restricting information or increasing impediments to access are hallmarks of oppressive regimes and not ones that social democracies like Australia should be considering.

Agency FOI disclosure logs which display information already released, also serves to prevent duplication of effort. The disclosure logs could be improved to ensure consistency of format across government including listing by date of publication (most recent first); description of information sought; partial or full release which also cites any exemptions used under the Act; and providing links to scanned documents (rather than a phone number which increases the administrative burden).

It would also be advantageous to establish a central FOI repository that brings together all the agency logs in a user-friendly site categorised alphabetically by agency.

Summary

The role of a well-resourced OAIC is an important component in any consideration of FOI reforms as well as a commitment to further reforms and leadership on transparency.

The early amendments to the FOI Act by the current government were a great achievement for FOI reform and established the groundwork for ongoing reforms by government. It would be a shame to see these reforms wound back or to restrict access via prohibitive fees.

Thank you once again for providing the opportunity to comment on the FOI Review and the very important subject of FOI reform.

Yours sincerely

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