

## WILLIAM FORGAN-SMITH

Dr Allan Hawke, AC  
Review of FOI Laws  
Department of Attorney General  
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Dear Sir

This submission asserts that

- FOI policy and practice has been captured by its practitioners. It does not work for its customers rather has become a plaything and sinecure for a small number of "insiders". The gaps between philosophical concept / ideological proposition, operational practice, and the reason the legislation exists - customer needs and the Australian community's "right to know" - are clear and growing. This submission unashamedly favours ideology – of a fully "open government" - and customers.
- The required "culture", business management and decision making paradigm focus for each and every Right to Know, FOI and Privacy law requirements must be a schematic that is fair, just, economical, informal and quick and which gives customers and related third parties procedural fairness. The objective: to satisfy the customer's needs, not the Commonwealth's or the Information Commissioner's.
- A business goal of our Parliament, Government and "open government" management must be to reduce FOI claims through the simple expedient of ensuring the information is already in the public domain. Secrecy begets FOI and like customer requirements. Put another way, secrecy comes at a cost. It creates unnecessary government expenditure and inhibits wealth creation and community enrichment.
- On receipt of an FOI or like request the action clerk and the delegate / decision maker should act as the customer's agent[s], ensuring that customer's needs are met save to the extent that FOI or other appropriate law restricts full delivery of the required product.
- When we have department and agencies let alone the Australian Information Commissioner using staffing levels as an excuse for poor service and failure to meet the already loose FOI time-frames, informed critics can be certain that OIAC and other parts of the APS which do likewise are flawed organisations. A tradesman who blames his tools for poor quality work is not taken seriously. OIAC is in the same situation: floundering and flaying about unwilling to admit it is the problem.

Over its forty-one (41) paragraphs the submission develops this critique.

Please feel free to contact me for further input or to arrange to meet.

Yours sincerely

*William Forgan-Smith*

3 January 2013

## INTRODUCTION

1. FOI policy and practice has been captured by its practitioners. It does not work for its customers rather has become a plaything and sinecure for a small number of "insiders". The gaps between philosophical concept / ideological proposition, operational practice, and the reason the legislation exists - customer needs and the Australian community's "right to know" - are clear and growing. This submission unashamedly favours ideology and customers. It will be critical of the practice and some practitioners. The argument will be informed by the writer's background experiences as a

- o FOI decision maker and agency champion – right back to 1982 and, indeed, earlier;
- o workforce planner and productivity specialist and management consultant; and as a
- o seven year FOI mendicant.

2. The submission specifically addresses issues that go to matters (b) and (c) as also (f) and (g) of the Terms of Reference. In doing so it takes a customer centric view although in regard to (g) "the desirability of minimising the regulatory and administrative burden, including costs on government" the perspective will be driven by cost issues (including the opportunity cost of rework and appeals) as also productivity and workforce planning considerations. The current FOI "managers" are not noted for their customer centric decision making or for their interest in ensuring the Commonwealth's FOI products are delivered efficiently or even cost effectively.

## DISCUSSION

3. The gap between the rhetoric of FOI and Privacy legislation and its product delivery by AOIC and the Commonwealth's departments and agencies is large. It should not be. Such Acts exist for the customer, not for the Commonwealth. Unlike, say, traffic laws they are not about societal control / public order but rather about growing the community and national wealth through open access to government information.

4. FOI legislation exists to emancipate citizens through our access to knowledge: to open government information to all. A reading of the McMillan – Popple joint submission clearly identifies that neither the Australian Information Commissioner nor the FOI Commissioner comprehends this basic tenant.

5. The joint submission the Review received from the Australian Information Commissioner and the Freedom of Information Commissioner (December 2012) seems never once to refer to "customers", to "customer service" let alone to "product quality" or "customer satisfaction". To the extent customers are mentioned they are "applicants" and they "request" information: this is almost the same as being viewed a social security mendicant. Certainly experience indicates that fellow Australians are treated as troublesome petitioners by the OAIC as also by the Commonwealth Ombudsman and, it would seem, by many departments and agencies.

6. The joint submission is not without merit. Most of its recommendations – certainly those in areas where I am comfortable entering the discussion – are supported. The problem is, though, they are recommendations made to protect process operatives (no matter how well intentioned the two Commissioners might be) rather than to meet customer needs or even philosophic / ideological presumptions.

7. The *Freedom of Information Act 1982* (FOI Act), in particular, exists only because the Australian people, through their representatives in parliament assembled (to use an antique phrase), require a right of access to the widest possible range of government held information, not to "documents" (as now) as such.

8. The FOI Act does not exist to employ public servants but to provide a community / customer required product. Over time the failure of successive governments and their employed "FOI champions" – such as John McMillan AO when he was Commonwealth Ombudsman (in its old guise) and, now, Information Commissioner - to deliver that product seamlessly and, particularly, to the required standard spawned the need for the enhanced product range captured by the *Australian Information Commissioner Act 2010*. For his failure to deliver, Professor McMillan was given the Australian Information Commissioner sinecure.

9. As I recall the original (1982) FOI Act was a simple document. Its S14 probably read and, certainly, made clear:

14. Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.<sup>1</sup>

10. Back in 1982 when FOI was being introduced to agencies and I was involved in implementation training and as an FOI delegate / decision maker with the (then) Telecom Australia<sup>2</sup> this was emphasised. FOI was introduced not because any law restricted most government documents being made available but because they were not. This culture of withholding information and secrecy has yet to be consigned to the dust bin of history.

11. The FOI Act's s11 "every person" Right of Access seems to have remained constant:

- 1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
  - a) a document of an agency, other than an exempt document; or
  - b) an official document of a Minister, other than an exempt document.
- 2) Subject to this Act, a person's right of access is not affected by:
  - a) any reasons the person gives for seeking access; or
  - b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

12. The current Right of Access is a reasonable start point. Unfortunately it appears many FOI decision makers are more excited by the caveats, exemptions and the process, per se, rather than the required legislative outcome: meeting customer needs. I suppose that provides these public servants with work. Quickly providing the relatively unfettered access that the parliament has legislated does not require as many public servants and, being less taxing, would see classification / salary levels reduce.

13. Career driven public servants, let alone the best and brightest, are not attracted to FOI or similar administrative law roles. Like being the payroll manager, there is no career path from FOI manager to departmental secretary. On the other hand it can be intellectually interesting (for those who like to potter around before saying NO), has few time pressures, and comes with hardly any clear KPI measures yet does have a certain cachet and profile: the departmental Secretary will know you exist and there will be cross government meetings to attend. I do not say this to derogate those who are in such positions but to highlight the human resource management challenge of staffing this sort of role.

14. Attracting and retaining "talent" to and at senior professional / junior executive levels at the Offices of the Commonwealth Ombudsman and Australian Information Commission must also be difficult. Again, they are not roles for aspiring departmental secretaries or

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<sup>1</sup> This is extracted from the 1992 version of the Act, the earliest on the ComLaw.gov.au data base. Those with long memory or greater search capabilities may know why this clause has been deleted.

<sup>2</sup> Actually, then, the Australian Telecommunication Commission.

other high flyers yet require, or should, a certain degree of critical decision making and general executive savvy, including much customer and community outreach. Whether so many of these roles require the occupant to have tertiary law qualifications, as might be the current consideration, is problematic. Indeed it may be that having lawyers as FOI operatives and decision makers acts to prevent the process being customer focussed.

15. Identifying, attracting and recruiting an Information Commissioner, Commonwealth Ombudsman and the like as also their immediate subordinate executives must also be difficult. Certainly the current information Commissioner and Ombudsman have had long careers in like administrative law roles. The outside observer has to posit that either the recent searches undertaken for both roles fell short and / or failed to attract exciting new talent.

16. Linked to this narrow and what might be termed incestuous cadre of top level Open Government / Right to Know officials is the issue of what talents and competencies are needed for such roles. At present most are from a narrow legal background, as well as being narrow in their work experience. None would seem to be potential candidates for executive roles in core public sector departments or agencies, or in the private sector. Few seem to have any qualifications or experience in operations management, in customer service or product delivery or even in line management let alone profit, or even cost, centre management. For one reason or another, many seem to be refugees from private sector employers.

#### **MOVING FORWARD: A NEW PARADIGM**

**17. On receipt of an FOI or like request the action clerk and the delegate / decision maker<sup>3</sup> should act as the customer's agent, ensuring that the customer's needs are met save to the extent that FOI or other appropriate law restricts full delivery of the required product.**

18. The McMillan – Popple submission proclaims: *[t]he OAIC is, in essence, an information champion, with a comprehensive range of powers and functions to promote open government, protect information rights and advance information policy.* This is laudable, if a fictitious statement of current and past practice. Importantly it is not what is required.

19. The OAIC exists to serve the Australian people in our - the peoples' - exercise of open government and to facilitate customers accessing all open government products. It does not exist to employ Messrs McMillan and Popple. Whilst the Information Commissioner and FOI Commissioner may initiate own motion exercises or be tasked by government to make certain enquiries for it such ancillary functions only exist as add-ons to the core function: that of customer agent, facilitator and champion in accessing government information. If there was no Open Government / Freedom of Information product range there would be no need for the ancillary functions.

20. That "information" is not always neatly captured in document form means that Australians are still a long way from having access to open government. Whilst the definition of document is now fairly wide, clearly not all - or even the majority - of government information is easily captured nor distributable given its current form and / or data record format. Fortunately new methods of knowledge management<sup>4</sup> are overcoming some of these barriers. That said my experience of post-modern public servants is that these days little work is done "on the file". Emails and other telecommunications exchanges, let alone phone or face-to-face conversations are not

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<sup>3</sup> One assumes "the Delegate" is also the decision maker. It would seem at OAIC and OCO this is not always the case, the delegate being but a signature giver to a decision made by some other person generally but not always a more junior employee.

<sup>4</sup> See for example AS 5037: Knowledge Management, 2005.

captured or, if they are, are but kept in *ad hoc* local or personal files. The era of "file notes" and inter office memoranda being written to record conversations, informal meetings and other interesting information, let alone decisions) is not part of 21<sup>st</sup> century organisational life.

21. The Joint Submission comments on what might be some exciting New Zealand endeavours in making information rather than documents available. Such Kiwi initiatives and like developments around the world should be pursued: "information" must be given its widest meaning in the FOI Act.

22. In an era of contingent workers, whether employed as casuals or temporary employees or as consultants, as well as where young graduates have been brought up in a "just do it" environment capturing detail is not seen as important. I would expect there are multiple breaches of the *Archives Act 1983* every day in every sub unit of every department. And with increasing numbers of redundancies, staff turnover (including retirement of key middle managers / senior professionals and other holders of "corporate memory) and organisational restructures these "personal files" are lost: trashed, hopefully at least shredded. Adding to the loss of such *ad hoc* files is the loss of corporate memory: this may be an even bigger challenge (but not for this submission). Even many data files are developed by individuals or local work groups and are not known to the Commonwealth's overarching IT management information systems.

23. The FOI Act sets time frames for departments to meet when processing and delivering customer orders. Unfortunately these are not mandated and no penalty applies for failure to achieve what, in reality, are merely department / agency MIS "reportables".

- a. The time limits within the FOI Act should become a mandated imperative. Failure to meet each time frame should see the customer order being satisfied in full and free of any charge or fee that might otherwise be applicable.

24. I note that the Information Commissioner favours changing the current basic 30 day time frame to 25 business days (which is longer, hence customer unfriendly). I have sympathy with his reasons for this change though 20 business days should be sufficient in a time when email and other almost instantaneous data manipulation and information exchange are the norm. By day 5 of these 20 days the customer order should be acknowledged, a file reference given and the name and contact details of both the action officer and delegate provided to the customer.

25. During these first 5 days (or indeed at any time during the life of a customer order) nothing should prevent the agency talking with or otherwise engaging the customer to better understand their need. I am totally confounded as to why this does not happen now or why the Commissioners' joint submission suggests a specific head of power is required to enable this to happen. It was not needed when I was an FOI delegate (1982-1992). Unless some superior court has intervened since 1992 limiting agencies capacity to action FOI orders efficiently there seems no obstacle – save bureaucratic inertia (and / or because they are scared to become involved in customer contact and problem solving) – to this happening now.

26. Most FOI orders placed by individual Australians are, presumably, caused by the customer being aggrieved by, or not understanding, an earlier interaction with the Commonwealth. In these situations FOI is a form of customer complaint. Solving that complaint is likely to see the FOI order withdrawn or substantially amended. Nothing in the Act or operating instructions for action officers and delegates should circumvent their or the wider agency's capacity to engage in an open diversity of order processing options so long as the FOI order is met, and met within the mandated timeframe.

- a. The need for alternative dispute mechanism, raised by McMillan AO and Dr Popple, should only be necessary where the agency and the customer can not reach a mutually agreed solution package.

27. It was my experience as an FOI delegate that by working with the FOI customer to resolve the “real” problem – generally via line management solving the outstanding matter - most often saw the FOI requirement withdrawn or met as part of that operations management’s intervention. That I was part of operations management (FOI being but a small part of my various roles at those years) meant that often I could directly intervene to solve the underlying customer issue.

- a. It is accepted that there can be some “Chinese wall” issues in such a dual role or the approach could be used to “heavy” a FOI customer to withdraw their FOI order – so as to allow the agency to circumvent Right to Know and FOI imperatives - but that is controllable.
- b. Having line management involved in the FOI order solution package also serves as valuable feedback to it and supports “learning organisation” enterprise.

28. Where the FOI order is placed by a community group, media organisation or some other corporate entity for information about a matter not specific to them the same principles should apply even if their want for the information is not the same as individual customers.

29. As the Commonwealth makes more information freely available (or for sale as distinct intellectual property and data products) one might hypothesize that FOI orders from many such customers will substantially decline.

**30. A business goal of Parliament, Government and the Right to Know management must be to reduce FOI claims through the simple expedient of ensuring the information is already in the public domain. Secrecy begets FOI and like imposts. Open Government saves money.**

- a. There is a direct (plus opportunity cost) to secrecy: that of FOI claim (including appeal) processing compounded by the opportunity cost involved in Commonwealth resources being diverted to meet such, most often, unnecessary customer orders.
- b. The indirect cost of secrecy is even greater. Where the innovative and creative use of Commonwealth information is kept from the imaginative and / or entrepreneurial endeavours needed to enhance our community and democracy governments fail the nation’s people. Put bluntly there is an economic significance to the free exchange of data and information: *failure to permit the circulation of new ideas – including economic and political ideas ... - is almost always prima facie proof that the state is weak at its core*<sup>5</sup>.

31. The Act should be amended to ensure that agencies can not use each time hurdle to unnecessarily delay a customer order. (This again is a direct cost to the Commonwealth).

- a. For example presently both the Commonwealth Ombudsman and the Australian Information Commission are notorious for close to the 30 day mark of a simple FOI order “realising” that a third party needs to be consulted (as to their agreement to release information), or for seeking an extension of processing time that would, or should have been evident to them weeks earlier. Clearly this should have been recognised at the time the FOI order was received or at least acknowledged.
- b. Interestingly, but of concern, is when this FOI customer has pointed out in an FOI

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<sup>5</sup> Alvin Toffler, Power Shift. Bantam Books, 1990: p402.

order that third party information is involved this has not triggered early action at OAIC or, as I suspect, has been used, insolently, to delay order delivery.

32. A word on customers: many Australians are not comfortable dealing with "government", the public service, authority. Some see themselves as disenfranchised. Indeed many are much marginalised, lack the social skills and / or are otherwise removed from the world of information exchange and evaluation, of government processes and the bureaucratic model of service delivery. My experience is that such customers tend to be loud or even angry, from anxiety, when dealing with "authority". They consider that the way to get what they want is to be vocal, assertive, even bullying. Other people are quiet or shy, even timid. Others, again, will have psychological pathologies that are not amenable to temperate interactions and problem solving.

- a. Against these challenges, most customers will have a reasonable "beef". They will be confident putting their case and using the Right to Know product range to satisfy their need[s] to be informed and / or to comprehend. Those public servants who understand and are at ease with customer service will enjoy working in this environment. Those who do not will flounder and cause customer angst.

33. As I recall the public service recruitment decision making matrix does not seek to attract and identify recruits who have an inherent attraction to customer service. Ways of ensuring that OAIC, OCO and like agencies attract and retain skilled operatives who are customer driven, not just process and / or policy focussed, must be found. Certainly having barristers in top customer service or even managerial positions is likely to cause problems: they are of a personality type that self selected to be a sole trader and to act through intermediaries. Dealing directly with customers, staff, time restrictions and complexity is outside their personality type and psychological pathology comfort zone. Also, and deleteriously, they bring no management training or experience to the tasks at hand.

### **COST OF SALES & THE RIGHT TO KNOW PRODUCT RANGE**

34. It is said that the Commonwealth's budget outlay reductions and efficiency dividend requirements in flowing through to less staff availability makes it more difficult for agencies to meet current FOI needs and processing targets. This is generally claimed within the context of some belief that the base workforce quantum was already to low. It is unlikely that was the case. Rather, because of inbuilt inefficiencies and low individual and business unit throughput, work levels were and remain artificially high. The lack of managerial and business skills, or even interest in either, evident in the top executive at OAIC and OCO aggravate and add to the general public servant disinterest in cost centre efficacy.

35. Reviews and Appeals occur because customers' orders are not satisfied. Whilst this may be for some legislated reason, since the information does not exist, or because FOI decision makers lack the nous and / or capacity to negotiate with customers (or, indeed, with their own line management) a customer order that can be met, the reality is that in quality management terms Reviews and Appeals are "rework"<sup>6</sup>. Thus they indicate system or process shortcomings. It would seem the Information Commissioner should be vigilant in tracking and comprehending why a customer order is not met and thence in assisting departments and agencies to reach six sigma levels of customer satisfaction<sup>7</sup>.

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<sup>6</sup> Of course they may not have the skill or standing to extract from elsewhere in the agency the required information. An activist OAIC should be ever vigilant and use its Commissioners' influence with agency CEOs to reduce this bureaucratic stone walling.

<sup>7</sup> Six Sigma is a set of tools and strategies for process improvement. Six Sigma seeks to improve the quality of process outputs by identifying and removing the causes of defects (errors) and minimizing variability in business processes.

36. When we have, amongst others, OIAC using staffing levels as an excuse for secrecy, poor service and failure to meet the already slack time FOI frames informed critics can be certain that OIAC is a flawed organisation. A tradesman who blames his tools for poor quality work is not taken seriously. OIAC is in the same situation: floundering and flaying about unwilling to accept IT is the problem.

### **Case Study**

This writer's particular interest in OCO and OIAC goes back to 2004. In answer to a simple enquiry of the CEO of a major Commonwealth agency he was told that a certain head of power did not exist and that, in any case, the Constitution was on the Commonwealth's side. Now it just happened that the writer was confident that the Constitutional assertion was wrong (whilst putting aside the concern as to why an agency head would answer a customer's product query with Constitutional advice). I also found it perverse the CEO denied that a particular clause even existed in the Act for which the agency provided shop front services. Queried, the CEO remained adamant. Thus begin the whole sorry saga of my FOI, Ombudsman and Information Commissioner interactions. Though they are not a matter for this submission or your Review it is instructive to note that although the original advice was eventually shown to be wrong and is no longer a matter of interest to me just about every subsequent piece of correspondence I have had from "Canberra" has opened up some new Pandora's Box that has allowed further FOI requirements and appeals to be lodged. The venture has also extended to the involvement of two Cabinet Ministers and the personal time and effort of the Secretary Department of the Prime Minister and Cabinet and of the Australian Public Service Commissioner (and his General Manager, Ethics) apart from the three Commonwealth Ombudsman (during the period), and now the Australian Information Commissioner, to say nothing of subordinate staff. Put succinctly: Professor McMillan's approach has been key to this extensive and expense farrago of indecent dealing with me.

37. The Case Study is included here – seriously abridged – to suggest that eight years of "toing and froing" on what was started by a bit of supercilious letter writing by two very junior, naive clerks (as my initial FOI search finally revealed) which the agency's CEO signed and then for two years supported can not be justified. At another level neither can my continuing to prosecute the new matter[s] that continue to surface as each new interaction goes pear-shaped. But what started as an academic exercise has so revealed that the Commonwealth – particularly the Commonwealth Ombudsman and the Australian Information Commissioner – use, with complete disregard for common sense and prudent public administration let alone their fiduciary duty and legislated and other terms and conditions of employment, public monies (including the opportunity costs that accrue) in so keeping our relationship alive. Indeed such conduct may be in breach of duties APS employees owe under Ss14, 41 and 44 of the *Financial Management and Accountability Act 1997* as well as the general fiduciary duty of care all employees owe their employer.

38. The wise use of public monies must always run in parallel with the particular laws being administered. It is not open to an employee, let alone an agency head, to incur expenditures greater than those appropriated by Parliament to his or her stewardship. But that stewardship also entails not being profligate within even that limit. A CEO must do things right whilst also doing the right thing. The first involves being efficient, the other being effective: the twining of management and leadership. Nothing in the laws that the Information Commissioner or the Commonwealth Ombudsman administer on behalf of the

Commonwealth would seem to allow those two Officers to dispense with the obligations they owe their employer on other fronts, particularly as an agency head as such.

- a. The discussion put in paragraphs 71-81 of the Joint Submission indicate that Messrs McMillan and Popple are not comfortable as cost centre managers. Cost centre managers should always be facing staffing pressures. That is a major driver to ensuring an organisation adopts best practice processes – including employing peak performing staff - and adapts to its environment.

39. On several occasions I have sought information as to the cost of the OCO and / or OAIC keeping me as an unsatisfied customer. I am always told that no such detail is kept. This seems perverse especially when at least some of the underpinning data needs to be closely kept if OAIC, OCO or individual departments and agencies base much of their customer billing on hours worked.

- a. One has to assume that such time based “guesstimates” charges are not able to be supported and that worker productivity is neither measured nor audited.
- b. In like manner it might be assumed that the yearly budget requests for the Commonwealth’s FOI and Right to Know operations must be based on nothing but whimsy: probably some straight line projection of past total hours / FTE to expected work load changes.
- c. In an environment where 40 hours of decision making is suggested as a maximum that should, reasonably, be allowed to meet any one customer order (para 206 of the Joint Submission) not knowing whether time is a valid measure of effort is indefensible.

40. Whilst the subject of charges and fees is of interest it involves issues where this writer would want to better understand the underlying cost structures as also any research that has sought to ascertain at what price point[s] customers’ resistance to the charging regime adversely impacts their exercise of Open Government and Right to Know services. The writer is clear that there should be access fees – including an order fee – but the requirement is to adopt something that is more than nominal but less than a disincentive causing the marginalised poor as well as the main-stream of Australians to shy away from having their “right to know” satisfied.

**41. The required “culture”, business management and decision making paradigm focus for all FOI or Privacy law requirements must be fair, just, economical, informal and quick. It must provide customers and related third parties with procedural fairness. The objective is to satisfy customer needs, not the Commonwealth’s or the Information Commissioner’s. The FOI process should never be captive to “the process”.**

- a. A wider recruitment net needs to be cast with a view to attracting a diversity of talents and ages as also of business management training and experience to key roles at OAIC and OCO, including as agency head / CEO. Building institutional customer service and business acumen and the decision making input of a more eclectic and outwardly focussed leadership group is critical. This applies also to the middle manager cadre who tend to be the decision makers at first instance both in departments / agencies and in the OAIC and OCO.

 Scientia est potestas<sup>8</sup>

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<sup>8</sup> Latin, loosely translated as “Knowledge is power”.