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Keeping good companies

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A Commonwealth pro-disclosure culture — implications and opportunities

By James Popple, Freedom of Information Commissioner¹

- Reform of Commonwealth freedom of information legislation has entrenched a pro-disclosure culture
- New requirements for proactive publication are enhancing community access to, and engagement with, government information
- Robust information management systems are critical if government is to meet its obligations to give access to documents and publish information, while protecting personal privacy

Reform of the *Freedom of Information Act 1982 (FOI Act)* in 2010 entrenched a pro-disclosure culture in the Commonwealth. The guiding principle behind this reform was that information held by the government is to be managed for public purposes and is a national resource.

Agencies have had to embrace this change in order to meet the new requirements of the FOI regime. These new requirements present agencies with challenges and opportunities.

Open government reform

The FOI Act gives individuals the legal right to access documents held by Australian Government Ministers, departments and agencies.² When the Act commenced, nearly 30 years ago, it was envisioned that it would usher in a new era of open government. Substantial change occurred — government became much more open — but on one view the FOI Act fell short of its potential.

Members of the public using the FOI Act to request government documents encountered many practical obstacles, such as difficulty in framing an FOI access request, the high cost of making a request, delay by government agencies in handling FOI requests, and difficulty in challenging access refusal decisions.

A joint inquiry into the FOI Act by the Australian Law Reform Commission and the Administrative Review Council in the mid-1990s raised concerns about the effective operation of the FOI Act. Key recommendations in the inquiry's final report included:

- the creation of a statutory FOI Commissioner to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies about how to use, interpret and administer the Act
- the revision of the Act's objects clause to promote a pro-disclosure interpretation of the Act
- the rationalisation of exemption provisions to apply only to information that there is a public interest in withholding and
- measures to ensure FOI charges are not inconsistent with the objects of the Act, with access to an applicant's personal information free of charge.³

Proposals for reform of the FOI Act became a feature of political discussion in 2007, and formed a key election promise of the then opposition in that year. After a period of public consultation, an inquiry by the Senate Finance and Public Administration Legislation Committee and debate in Parliament, the *Freedom of Information Amendment (Reform) Act 2010* and the *Australian Information Commissioner Act 2010 (AIC Act)* were passed by Parliament in May 2010.

The reforms included changes to the FOI Act to make it simpler for people to request access to government information, and a recasting and narrowing of some of the exemptions that government can use to refuse access to documents. Importantly, the reforms shift the emphasis from a reactive model of disclosure of public sector information in response to individual requests, to a proactive model of publication of public sector information through the information publication scheme (IPS).

A key element of the reforms was the establishment of the Office of the Australian Information Commissioner (OAIC). The OAIC is an independent statutory agency, which:

- conducts merits review of FOI decisions made by Australian Government Ministers departments and agencies
- monitors, investigates and reports on compliance with the FOI Act and
- promotes awareness and understanding of the FOI Act and its objects.

Underpinning these reforms is a broader open government agenda, which argues that the free flow of information between government, business and the community can stimulate innovation, to the economic and social advantage of the nation.

These reforms offer great potential for increasing public participation in Australia's democracy. Rapid advances in information and communication technology mean that it is now much easier to share information with vast audiences. Once in the public domain, public sector information can

be reused and reshaped. Communities of interest can 'mash up' public sector information, enriching it with data from other sources and disseminating it even more widely.

Office of the Australian Information Commissioner

The OAIC was established on 1 November 2010 to oversee the operation of the FOI Act and the *Privacy Act 1988* (Privacy Act), and to advance Australian Government information policy. The OAIC is an independent body established under the AIC Act⁴ and brings together, for the first time, three functions:

- strategic functions relating to information management in the Australian Government
- FOI functions and
- privacy functions.⁵

The OAIC is headed by the Australian Information Commissioner, who is supported by the FOI Commissioner and the Privacy Commissioner. The former Office of the Privacy Commissioner, which was the national privacy regulator, was integrated into the OAIC.

The OAIC is also responsible for promoting open government, issuing guidelines to agencies, providing assistance and training on FOI and privacy matters, monitoring compliance with privacy and FOI legislation through complaint-handling and conducting audits, reviewing legislation and providing advice to government.

FOI Act reforms

The pro-disclosure cultural shift of the amended FOI Act is exemplified by its new object provision. Section 3 declares that the objects of the Act are to:

- give the Australian community access to information held by the government by requiring agencies to publish the information and providing for a right of access to documents
- promote representative democracy by:
 - increasing public participation in government processes, to promote better-informed decision-making and
 - increasing scrutiny, discussion, comment and review of the government's activities
- increase recognition that information held by the government is to be managed for public purposes and is a national resource and
- facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Other key changes to the FOI Act relate to:

- the FOI request and review process
- applying the public interest test
- contracted service providers and
- publication of public sector information (through the IPS and disclosure log requirements).

FOI request and review process

Amendments to the FOI Act have made it far easier for a person to make an FOI

request and to challenge an adverse agency decision. FOI requests can now be made by email. All application fees, including fees for internal review, have been abolished. No costs will apply where a person requests access to their own personal information. The first five hours of decision-making time is free for all applicants. All charges are waived if statutory timeframes for processing a request are not met.

Applying the public interest test

A public interest test has been added to many of the FOI exemptions — the 'conditional' exemptions.⁶ If one of these exemptions applies, an agency must still give the applicant access to the document requested, unless access to the document would, on balance, be contrary to the public interest.⁷

To add rigour to that balancing process, the FOI Act specifies public interest factors that must be considered (such as promoting the objects of the Act) and factors that are irrelevant and cannot be considered (such as the high seniority of the author of a document, or that giving access to the document could result in embarrassment to the government).⁸

Contracted service providers

Under the FOI reforms, anyone can now request access to documents held by contracted service providers who are delivering services to the public on behalf of an agency. An agency must ensure that, if an FOI request is made, the contractor is obliged by the contract to provide the agency with relevant documents relating to the performance of that contract.

This requirement does not apply to contracts for services provided for the agency's own internal use, such as contracts to provide in-house IT services or to recruit departmental staff. However, contracts for services provided to the public are covered.

This is an important change that ensures that government functions are open to scrutiny, whether performed by

government agencies or by private sector providers under contract.⁹

Information publication scheme

Publication of government information carries economic and social benefits and can stimulate innovation and economic prosperity. It can also enhance participatory democracy by assisting the public to better understand how government makes decisions and administers programs. An informed community can participate more effectively in government processes, and contribute to better policy and decisions. Transparency in government can also lessen the risk that people will be disadvantaged in dealings with government through lack of knowledge or a misunderstanding of government processes.

Under the IPS, which began on 1 May 2011, all Australian government agencies subject to the FOI Act are required to publish a broad range of information on their websites. Specifically, agencies must publish an agency plan (explaining what they will publish, and to whom), publish specified categories of information, and consider proactively publishing other government information.¹⁰

The purpose of the scheme is to allow the FOI Act to evolve as a legislative framework for giving access to information through agency-driven disclosure rather than as a scheme that is primarily reactive to requests for documents. The FOI Act can, of course, still be used by individuals to request access to documents that have not already been released through other channels, or published under the IPS. At the same time, there is scope for government to publish a broader section of 'public sector information' voluntarily.

Documents published by agencies on their web sites must meet the Web Content Accessibility Guidelines 2.0 (WCAG 2.0), as part of the whole-of-government Web Accessibility National Transition Strategy, administered by the Australian Government Information Management Office.¹¹ WCAG 2.0 identifies techniques to create and manage web content in

ways that are more accessible to people with disabilities: for example, through assistive technologies like screen readers. It also recognises that more accessible websites are generally more user-friendly.

The Australian Information Commissioner has issued guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. The guidelines, among other things, provide assistance to agencies to meet their obligations under the IPS.¹² In monitoring compliance with the IPS provisions, the OAIC will take a pragmatic approach, in light of resourcing and other agency constraints. However, agencies will need to show a genuine commitment to meeting their obligations, consistent with accessibility requirements, within specified time frames.

Disclosure log

As of 1 May 2011, agencies and ministers are required by s 11C of the FOI Act to publish on a website, to the public generally, information that has been released in response to each FOI access request, subject to some exceptions. This publication is known as a 'disclosure log'.¹³ The requirement to publish a disclosure log complements the establishment of the IPS. Together, these reforms require agencies (and, for the disclosure log, ministers) to publish a greater range of government information.

In time, disclosure log publication should reduce the resources required by agencies to deal with multiple requests for access to the same documents. It will also improve access to government resources that are of interest to the community.

Not all documents that are given to an applicant are required to be published in a disclosure log. For example, if a person is given access to their own personal records, this information should not be published.

As with the IPS, issues relating to web publication and accessibility arise in relation to the disclosure log. In addition,

the disclosure log raises issues about the security of publishing redacted documents — documents that have been edited before being provided to FOI applicants.¹⁴

Personal privacy

A document is conditionally exempt under the FOI Act if its disclosure would involve the unreasonable disclosure of personal information about any person, including a deceased person.¹⁵ The vast bulk of FOI applications are for personal information, usually by people seeking their own personal information from government;¹⁶ the personal privacy exemption does not apply to documents containing just the applicant's personal information.¹⁷

The OAIC, with FOI and privacy functions, works with agencies to ensure that the emphasis on disclosure in the FOI Act is balanced with the protection of personal information provided by the Privacy Act.

Information management

Sound information management is critical to an agency's capacity to meet its FOI and privacy obligations. In this new culture of openness, robust systems and frameworks are essential. Strong internal leadership on information management is crucial to ensure that agencies respond strategically to the open government reforms.

To process an FOI request, an agency will have to do some or all of the following:

- consult with the applicant to clarify the scope of the request
- search for relevant documents
- consider whether any exemptions apply
- consult other agencies and affected third parties
- redact information from edited versions of the documents and
- publish the documents on the disclosure log.

An agency's information management systems need to be efficient and effective so that that agency can do all of this within the time frames set out in the FOI

Act, and meet rising public expectations about government responsiveness.

An agency's information management systems are also crucial to its capacity to meet its obligations under the IPS provisions: to publish the required information in a searchable, accessible and up-to-date form. These systems also need to ensure that personal information and other sensitive material is appropriately protected.

An agency's capacity to meet its FOI and IPS obligations will depend upon the extent to which its FOI, information technology, communications and web publishing areas can work together. Many agencies have a chief information officer (CIO) whose responsibilities mostly relate to information technology. Increasingly, CIOs will need also to foster cultural change on information openness, the use of Web 2.0 technologies, and the development of robust systems and procedures across the agency to meet these challenges.

Conclusion

Australia's FOI reforms have already caused cultural change in Australian Government agencies and facilitated a move towards greater openness. Most agencies have made good progress in publishing and sharing information. Strong internal leadership on information management is vital for agencies to respond strategically to these reforms; in several agencies, senior executives are leading the pro-disclosure cultural change.

Government information is a national resource. These reforms offer great potential to ensure that that information can be accessed, built upon and disseminated widely, to increase public participation in Australia's democracy.

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Dr Popple will speak at CSA's Annual Public Sector Update in Canberra on 30 August 2012. View the program at www.CSAust.com/PublicSectorUpdate and click on Canberra.

Notes

- 1 The author acknowledges the assistance of Jackie Randles and Mark Gallagher, from the OAIC, in the preparation of this article
- 2 s 11(1) FOI Act
- 3 Australian Law Reform Commission and Administrative Review Council, 1995, *Open government: A review of the federal Freedom of Information Act 1982*, ALRC Report No 77 / ARC Report No 70
- 4 s 5 AIC Act
- 5 ss 7, 8 and 9 AIC Act
- 6 Pt IV, Div 3 FOI Act
- 7 s 11A(5) FOI Act
- 8 ss 11B(3) and (4) FOI Act
- 9 The OAIC has issued guidance on how agencies can ensure that they comply with this requirement, including a model clause for agencies to include in contracts: see OAIC, 2010, *Documents held by government contractors — Agency obligations under the Freedom of Information Act*
- 10 The IPS requirements are set out in Pt II of the FOI Act
- 11 See www.finance.gov.au/publications/wcag-2-implementation [4 July 2012]
- 12 OAIC, 2010, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, Part 13
- 13 *ibid*, Part 14
- 14 Under s 22 of the FOI Act, if a Minister or agency decides to refuse to give an FOI applicant access to an exempt document, they must give the applicant access to an edited copy of that document, modified by deletions, if it is practicable to create an edited copy that is not also exempt. See also OAIC, 2012, *Redaction and freedom of information*
- 15 s 47F(1) FOI Act
- 16 In 2010–2011, 82.6 per cent of all FOI requests to Commonwealth agencies and Ministers were for personal information: OAIC, 2011, *Freedom of Information Act 1982 Annual Report 2010–11*, p ix
- 17 s 47F(3) FOI Act. Note that, in some circumstances, access may be granted not to the applicant but to a health care professional: see s 47F(5) and (7) ■