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# Freedom of Information: A Government Perspective

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Significant reforms were made to the *Freedom of Information Act 1982* (Cth) from 1 November 2010. The guiding principle behind these reforms is that information held by the Government is to be managed for public purposes and is a national resource.

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.

A key element of the reforms was the establishment of the Office of the Australian Information Commissioner. The OAIC is an independent statutory agency, which conducts merits review of FOI decisions made by Commonwealth 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 communica-

tion 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.

In recognition of this new environment, the OAIC has released the *Principles on open public sector information*<sup>2</sup> to provide a framework for government information management in Australia. The principles set out the central values of open public sector information: it should be accessible without charge, based on open standards, easily discoverable, understandable, machine-readable, freely reusable and transformable.

This paper describes recent changes to Australian FOI laws and charts their progress during the first year of reform.

## The Australian Government's FOI reform agenda

The FOI Act gives individuals the legal right to access documents held by Australian Government ministers, departments and agencies.<sup>3</sup> Enacted in Australia nearly 30 years ago, freedom of information legislation, it was envisioned, 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

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<sup>2</sup> <<http://apo.org.au/research/principles-open-public-sector-information>>.

<sup>3</sup> FOI Act, s11(1).

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.<sup>4</sup>

Proposals for reform of the FOI Act became a feature of political discussion in 2007, and formed a key election promise of the incoming Australian Government 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* were passed by Parliament in May 2010.

### **Establishment of the 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* (Cth), and to advance Australian Government information policy. The OAIC is an independent body established under the *Australian Information Commissioner Act 2010*,<sup>5</sup> and brings together, for the first time, three functions:

- strategic functions relating to information management in the Australian Government;
- FOI functions; and
- privacy functions.<sup>6</sup>

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 matters, monitoring compliance with privacy and FOI legislation through complaint-handling and

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<sup>4</sup> Australian Law Reform Commission and Administrative Review Council, *Open government: A review of the federal Freedom of Information Act 1982*, ALRC Report No 77 / ARC Report No 70, 1995.

<sup>5</sup> *Australian Information Commissioner Act 2010* (Cth), s5.

<sup>6</sup> *Ibid*, ss7, 8 and 9.

conducting audits, reviewing legislation and providing advice to government.

### FOI reforms

The FOI reforms are intended to create a pro-disclosure culture within government and the public service to ensure transparency and accountability in Government. Openness and transparency in Government is underpinned by three key principles:

1. *Informing*: strengthening citizens' rights of access to information, establishing a pro-disclosure culture across Australian government agencies including through online innovation, and making government information more accessible and usable.
2. *Engaging*: collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought.
3. *Participating*: making government more consultative and participative.

The pro-disclosure cultural shift of the amendments to the FOI Act is exemplified by its new objects. Section 3 declares:

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
  - (a) requiring agencies to publish the information; and
  - (b) providing for a right of access to documents.

- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:

- (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.

- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.

- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to 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 (the information publication scheme and disclosure log).

### 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 e-mail. 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 are not met.

### Applying the public interest test

A public interest test has been added to many of the FOI exemptions. A decision maker is required to balance the public interest in access against any perceived harm that would arise from public disclosure.<sup>7</sup>

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).<sup>8</sup>

### 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. Agencies must take measures in contracts they enter after 1 November 2010 to ensure that, if an FOI request is made, the agency can obtain documents that relate to the performance of the 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. 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.<sup>9</sup>

### Publication of public sector information

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.

The Information Publication Scheme (IPS) began on 1 May 2011, and requires government agencies to publish a broad range of documents on their websites. Under the IPS, all Australian Government agencies subject to the FOI Act are required to publish a broad range of information on their websites. Specifically, agencies must:

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<sup>7</sup> FOI Act, s11A(5).

<sup>8</sup> FOI Act, ss11B(3), (4).

<sup>9</sup> Office of the Australian Information Commissioner, *Documents held by government contractors – Agency obligations under the Freedom of Information Act*, October 2010.

- publish an agency plan (ss8(1) and 8(2)(a))
- publish specified categories of information (s8(2))
- consider proactively publishing other government information (s8(4)).<sup>10</sup>

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 and each agency 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, which is the first stage of the Web Accessibility National Transition Strategy, administered by AGIMO.<sup>11</sup> 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.

Accessibility has emerged as a concern due mainly to the historic nature of the documents that will need to be published, and the current heavy reliance on manual FOI document processing or the use of scanned PDF files. Some agencies have

indicated they have difficulty publishing documents in a range of accessible formats. Agencies will need to integrate their communications, web publishing and IT operations with their FOI operations in order to respond cohesively and effectively to the new publication requirements.

FOI teams need to coordinate effectively with other agency staff to ensure effective information management. For example, FOI teams need to understand their agency's processes for making documents available, and accessible, on the web and ensure that system administrators are given sufficient time to do so. On the other hand, IT teams need to be aware of the statutory timeframes for publication and ensure that the web management systems can accommodate them.

Some agencies have raised concerns that some of the information that they publish is at risk of being misinterpreted, or used to draw dubious or incorrect conclusions. Agencies can mitigate this risk by publishing information in context: by making raw data available together with a clear explanation and summary. Importantly, agencies should see themselves as the custodians of this information – a national resource – rather than the owners of the information.

The Australian Information Commissioner has issued Guidelines under s93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. Part 13 of those Guidelines is intended to assist agencies to meet their obligations under the IPS.<sup>12</sup> In monitoring compliance with the

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<sup>10</sup> The IPS requirements are set out in Part II of the FOI Act.

<sup>11</sup> See <<http://www.finance.gov.au/publications/wcag-2-implementation/>>.

<sup>12</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982* (2010), part 13.

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 timeframes.

### Disclosure log

As of 1 May 2011, agencies and ministers are required by s11C 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'.<sup>13</sup> 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 information that is given to an applicant is 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.<sup>14</sup>

### The OAIC's FOI functions

The OAIC's role in overseeing the FOI Act includes reviewing ministers' and agencies' FOI decisions, and investigating complaints about agencies' activities. The Information Commissioner review system provides simple, practical and inexpensive external merits review. IC review decisions are published on the OAIC web site.<sup>15</sup> Over time, these decisions will form a useful set of precedents to guide FOI decision making. The OAIC also has powers to conduct investigations and inspect agency documents. As well as monitoring compliance with the FOI Act, the OAIC conducts training, publishes guidelines, and advises the government on FOI reform.<sup>16</sup>

### Information Commissioner Reviews

In the period 1 November 2010 to 30 June 2011, the Information Commissioner received 176 applications for IC Review raising 210 review issues. All but three of the applications sought review of access refusal decisions; those three applications were for review of access grant decisions.

Twenty-nine of the applications were finalised by 30 June 2011. Four of these were concluded through a published decision of the FOI

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<sup>13</sup> See *Guidelines*, part 14.

<sup>14</sup> Under s22 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.

<sup>15</sup> <<http://www.oaic.gov.au/publications/decisions.html>>.

<sup>16</sup> *Australian Information Commissioner Act 2010* (Cth), s8.



Commissioner, affirming the agency decision in two cases and setting aside the agency decision and making a substituted decision in the other two.

Eighteen IC review requests were identified as invalid; consideration was given to whether these could be usefully responded to as a complaint or enquiry, or assistance provided to the applicant to make a valid review application. The most common reason affecting validity was that the original FOI request was made prior to 1 November 2010.

In some other cases, applicants had sought review before there was a reviewable decision, such as a decision on the imposition of a charge. The remainder of review applications finalised were either resolved by agreement, withdrawn, or closed at the discretion of the Commissioner.

Many IC reviews can be resolved through agreement between the parties rather than through a formal decision by the Commissioner. The OAIC has encouraged resolution by agreement between the parties. This is particularly useful where the decision for which IC review is sought is a deemed decision or turned on the exercise of discretion to impose a charge. Many disputes can arise from a misunderstanding between the parties, including about issues underlying the FOI request, and the IC review process can be a catalyst for opening communication and resolving the dispute.

### Complaints to the Information Commissioner

In the eight months from 1 November 2011, the OAIC received 88 FOI complaints and finalised

39 of these. No own motion FOI investigations were commenced in 2010–11.

The most frequently raised issue in FOI complaints was processing delay (38 complaints). Many complaints about timeliness overlapped with issues about communication. Complaints could be avoided if agencies maintained open and regular communication with FOI applicants, assisting them to focus the scope of their FOI request so that they can be completed in a timely manner. Applicants are more willing to agree to extend processing times, or accept that extra time is necessary, if they understand the difficulties that agencies face in processing the requests and are kept informed about the progress of their requests. The OAIC has been working to encourage better communication between FOI applicants and agencies about processing of requests, both when complaints arise and through its day-to-day engagement with agencies in the processing of extension of time requests

For those issues investigated, most were able to be resolved with the agency and finalised as adequately dealt with. Four complaints (which raised six issues) were finalised under s 86 and the agencies were notified of the investigation outcomes.

### Principles on open public sector information

The Australian Government faces many challenges in developing a coherent and effective information policy. These include:

- ensuring a coordinated approach to government information management, given the variety of reforms, initiatives and proposals



- currently at play in the federal public sector;
- ensuring smooth interaction between key information policy agencies and committees;
- keeping pace with international developments and innovations; and
- bringing agencies along with new information policy developments, and making sure they are well equipped to implement change.

To assist agencies to navigate these issues, and to facilitate a free flow of information between government, business and the community, the OAIC developed eight *Principles on open public sector information*.<sup>17</sup> The OAIC will apply these principles when monitoring compliance by Australian Government agencies with the publication requirements of the FOI Act. The principles are not otherwise binding on agencies, and operate alongside legal requirements about information management that are spelt out in the FOI Act, the *Privacy Act*, the *Archives Act 1983*, and other legislation and the general law.

The OAIC developed the principles through a process of public consultation. They draw on considerable work in Australia and overseas that defines standards and principles to shape government information management practices.<sup>18</sup> In summary, the principles are:

1. Open access to information – a default position  
Information held by Australian Government agencies is a valuable national resource. If there is no legal need to protect the information it should be open to public access. Information publication enhances public access. Agencies should use information technology to disseminate public sector information, applying a presumption of openness and adopting a proactive publication stance.
2. Engaging the community  
Australian Government policy requires agencies to engage the community online in policy design and service delivery. This should apply to agency information publication practices.
3. Effective information governance  
Australian Government agencies should manage information as a core strategic asset. A senior executive ‘information champion’ or knowledge officer in the agency should be responsible for information management and governance.
4. Robust information asset management  
Effective information management requires agencies to take a range of steps, including maintaining an asset inventory or register of the agency’s information, identifying the custodian of each information holding and the responsibilities of that officer, training staff in information management, protecting information against inappropriate or unauthorised use, access

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<sup>17</sup> Office of the Australian Information Commissioner, *Principles on open public sector information: Report on review and development of principles* (2011).

<sup>18</sup> That work, undertaken by government agencies, public inquiries and the Organisation for Economic Co-operation and Development, is discussed in an OAIC issues paper, *Towards an Australian Government Information Policy* (2010), and report, *Principles on open public sector information: Report on review and development of principles* (2011).

or disclosure, and preserving information for an appropriate period of time based on sound archival practices.

5. Discoverable and useable information  
The economic and social value of public sector information can be enhanced by publication and information sharing. This requires that information can easily be discovered and used by the community and other stakeholders.
6. Clear reuse rights  
The economic and social value of public sector information is enhanced when it is made available for reuse on open licensing terms. The default condition should be the Creative Commons BY standard.
7. Appropriate charging for access  
Agencies can reduce the cost of public access by publishing information online, especially information that is routinely sought by the public. Charges that may be imposed by an agency for providing access should be clearly explained in an agency policy that is published and regularly reviewed.
8. Transparent enquiry and complaints processes  
Agency decision making about information publication should be transparent. This

can be supported, within the agency's information governance framework, by an enquiry and complaints procedure for the public to raise issues about agency publication and access decisions. The procedure should be published, explain how enquiries and complaints will be handled, set timeframes for responding, identify possible remedies and complaint outcomes, and require that written reasons be provided in complaint resolution.

### Conclusion

Australia's FOI reforms have already begun to cause cultural change in Australian Government agencies. 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 and, 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.