



Cyberspace Law and Policy Centre
A Centre for the Public Interest in Networked Transactions



Commonwealth FOI amendments shouldn't miss the opportunity for real reform

Submission on the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009 to the Senate Finance and Public Administration Committee

Nigel Waters

January 2010

Nigel Waters, Principal Researcher, Interpreting Privacy Principles Project
Cyberspace Law & Policy Centre, UNSW Faculty of Law, Sydney NSW 2052

Research for this submission is related to the Interpreting Privacy Principles Project, an Australian Research Council Discovery Project



Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009

This submission is made in my personal capacity, but is based on my experience in a number of relevant roles:

- Recent involvement in implementation of the New South Wales FOI reforms, as adviser to the Acting NSW Information Commissioner from September 2009 to January 2010
- A longstanding interest in FOI Reform, including academic commentary in 1996 on media use of FOI in 1996, and subsequently as a Research Fellow at the Cyberspace Law & Policy Centre at UNSW
- Deputy Federal Privacy Commissioner 1989-1997
- Board member of the Australian Privacy Foundation 1998 to date
- Principal of Pacific Privacy Consulting 1997 to date

I am happy for this submission to be made public.

1. Information Commissioner Bill

1.1. Structural relationship between Privacy and FOI Commissioners

I welcome the creation of the office of Information Commissioner (IC), and have no difficulty in principle with the IC having overall responsibility for both privacy and FOI – this is a model which appears to work satisfactorily in the UK and some Canadian provinces, and which has now been adopted in Queensland.

The proposed structure of two subordinate Commissioners – for privacy and for FOI, is also desirable, provided they remain independent statutory appointments – it would not be appropriate for these two officers, with their specific functions, to be under the day to day direction of the IC. This appears to be assured by clause 12(5)(a), but the drafting, and even the explanatory memorandum, are particularly obscure and opaque on the precise relationships. Clause 12(4), requiring IC approval for specified actions under privacy functions, appears inconsistent with clause 12(5) which suggests that the PC or FOIC exercising *all* privacy functions must use their own judgment (although cl.12(5)(a) is incomprehensible!).

Schedule 5 of the related FOI Amendment (Reform) Bill changes all the references in the Privacy Act to 'the Privacy Commissioner' to 'the Information Commissioner', I cannot see why this is necessary, given that some of the privacy functions will clearly remain the exclusive responsibility of the Privacy Commissioner either under the Act itself (cl.12(1)) or under an equivalent to delegated authority from the Information Commissioner. It will set back public understanding of the Privacy Act – after 20 years there is at least a base level of recognition in the community that privacy problems should be taken to the Privacy Commissioner (both federally and in NSW

and Victoria). To now change this will lead to confusion, especially when complainants and others will still find themselves in practice dealing with a Privacy Commissioner, with no right of appeal to or review by the IC

It is inconsistent to require the FOI Commissioner, but not the IC or PC, to have legal qualifications (cl.14(3) & cl.21(3)), given that all three will be able to perform privacy and FOI functions. Legal expertise, while very important particularly for review functions, can be provided by senior staff. To ensure the best possible field of candidates, none of the three Commissioners should be required to have legal qualifications.

I acknowledge that many commentators, and privacy advocates, doubt the wisdom of a collegiate model, and would prefer to see the retention of a separate independent privacy commissioner responsible for all privacy functions. I accept that there are risks to privacy protection from giving a role to Commissioners with other open government objectives. However, there are also in my view significant potential advantages to having a 'college' of Commissioners collectively taking responsibility for a balanced approach to both privacy and open government. Collectively, such a college can carry more weight both with the bureaucracy and the wider community. Experience in Australia with the single privacy commissioner model has been disappointing, and I consider that, on balance, it is worth experimenting with the multiple Commissioner approach, subject to the other comments I make in this submission.

1.2. Critical importance of appointments

Experience both in Australia and overseas suggests that the structural arrangements for FOI and privacy are less important than the approach taken by the regulators, which is determined primarily by the personal qualities and commitment of the individual appointees as Commissioners. The best laws can fail to meet expectations if a Commissioner lacks commitment or competence, while a good Commissioner can make effective use of a poor law.

Nothing is more important than that governments appoint strong independent Commissioners, in the full knowledge that in the areas of FOI and privacy, they could often make life uncomfortable for the incumbent government. This is a necessary risk that must be taken by a government that is truly committed to privacy protection and open government.

Parliament can help to ensure good appointments if a parliamentary committee is given a role in the appointment process, as is the case under the NSW GIPA Act. Under the British Columbia law an all-party committee of the legislature *selects* the Information and Privacy Commissioner, and there may be other relevant precedents. I note fears that involvement of politicians in the appointment of statutory officers could 'politicise' the process, and may also deter some good applicants. However, on balance I favour a committee role as a safeguard against Executive government appointing officers who are less likely to robustly hold government to account, as both privacy and FOI commissioners need to do. I therefore submit that the IC Bill

should make provision for a parliamentary committee to have the role at least of approving proposed appointments to the three Commissioner positions.

1.3. Information Policy functions

I have major reservations about the proposed information management advisory role of the Information Commissioner. While it is essential that the IC is *involved* in wider information management policy, he or she should not have express functions that go to the desirability of information sharing or exchange. These are matters which are properly the responsibility of executive government, and to give the IC direct responsibility for this role (cl.7) and a related advisory committee (cl.27) conflicts with the IC's independent FOI and privacy watchdog roles. Government should be required to consult the Information Commissioner on wider information policy but must remain at arms length from any initiatives that may expressly favour increased data sharing, matching or exchange. The FOI function is about making government information available, without any value judgement about proposed uses other than the statutory aims of improving accountability and protecting privacy. The provision in cl.7(b) for unlimited additional functions to be given to the IC compounds the potential for a conflict of interests.

If the provision for an Information Advisory Committee remains, it should include guaranteed representation from civil society to ensure that it is not dominated by agency and 'technical' members who may be expected to favour data sharing, matching and exchange without necessarily considering important consumer protection and human rights perspectives.

1.4. Reporting

Given the importance of the 'watchdog' role in relation to both privacy and particularly FOI, it would be preferable to upgrade the reporting provisions (cl.30) so that the Information Commissioner reported directly to Parliament rather than through the Minister. These reports could either be direct to Presiding Officers or via a Committee – the latter option would fit with a Committee role in appointment of Commissioners as I have suggested above.

Also, the Commissioner should be able to report at any time – not just annually.

I comment below on the adequacy of the agency reporting requirements under FOI Act.

2. Freedom of Information Amendment (Reform) Bill

2.1. Overview

The proposed amendments mark a significant shift towards a more effective 'second generation' FOI law, following the similar developments in Qld and NSW. There would be merit in 're-branding' the revised law as a 'Right to Information' regime. The new Queensland FOI law is titled *The Right to Information Act 2009 (Qld)*, and the Acting NSW Commissioner has consciously adopted this branding to emphasise the radical change introduced by the *Government Information (Public Access) Act 2009 (NSW)*. While the new Commonwealth Information Commissioner could choose to follow this lead, it would in my view be helpful for the legislation to use the words 'right to information' to re-enforce the message to agencies and the public that this is a radical re-launch of FOI, which has a poor image. Ideally, the name of the Act should be changed to 'Right to Information' but at the very least, the objects clause (Schedule 1, proposed section 3) should expressly refer a new 'Right to Information' regime.

The proposed new regime shifts the emphasis from reactive release of information in response to applications towards proactive release of information. This is highly desirable to advance open government, but involves two risks that need to be managed, both in the wording of the legislation and in implementation.

2.2. The public interest test

The first risk is that if the law applies a formal public interest test to the release of *all* government information (not just to formal access applications), agencies may apply the test inappropriately to information which has traditionally been freely available, or to information which under the new regime should be made freely available. Proposed section 3A, and the application of the public interest test only to formally requests (proposed s.11A) appear to address this risk. However, it is also important that any explanatory and guidance material, including from the Information Commissioner, 'heads off' any potential misunderstanding. The open government objectives of the law would be significantly frustrated if agencies started to apply strict 'gatekeeper' processes to all decisions to publish or otherwise proactively release government information. This is a distinct risk under the NSW GIPA Act, which on the face of it applies the public interest test to all information disclosure, and I understand that it is already emerging as a problem in the implementation of the new Queensland Right to Information regime, despite it generally being seen as a model for second generation FOI laws.

The law can further assist in avoiding this risk by ensuring that the immunity offered to public servants from consequences of release of information applies not just to 'good faith' application of the public interest test but also to sensible 'good faith' discretionary decisions *not to apply* the test to some broad categories of information.

Items 50 & 56 appear designed to address this, but the Committee should satisfy itself that this is indeed the effect, and that the overall design of the amendments avoid this risk altogether.

2.3. *Privacy in the FOI regime*

The second risk is that the privacy rights of individuals could be subordinated to the open government objectives. I reject the contention that FOI and privacy are necessarily in conflict in a generic sense – both laws in my view are substantially about accountability of government agencies and should operate in a complementary way, but there is no doubt that there will sometimes be a tension between protection of the privacy of individuals and open government.

A balance must be struck. The single public interest test introduced by s11A(5) includes privacy as just one of a number of considerations to be taken into account (proposed s.47F). This is significantly different from the position under the current s.41 where documents are exempt if their disclosure would be involve an ‘unreasonable disclosure of personal information’. In my view, and I suspect the view of most privacy regulators and experts, the proposed change would weight the scales too heavily against privacy – personal information would have to pass a double test to qualify for withholding. Firstly its disclosure would have to be ‘unreasonable’ and then ‘contrary to the public interest’. It is difficult to see why a disclosure of personal information could be ‘unreasonable’ and yet in the public interest.

I submit that personal privacy justifies a specific variation on the single public interest test - there should be a default presumption that personal information about third party individuals should not be released, unless the public interest in doing so substantially outweighs the privacy interests of the individuals concerned. (It may be that this test could also be the default public interest test for other conditional exemptions).

There is an important qualification to my suggested default presumption. It is essential that personal information about public servants in the performance of their duties is not withheld – if this were allowed the accountability objectives of open government regime would be significantly constrained (as it has been in practice under many first generation FOI laws because of failure to address this issue). The solution is not, as is sometimes suggested, to exclude information about public servants from the definition of ‘personal information’ as they are as entitled as anyone else to the other protections of privacy laws, including rights of access and correction. Instead, there needs to be a specific ‘clawback’ from a default presumption of non-release, expressly for personal information about public servants in relation to performance of their official duties. Such information should not even be subject to a public interest test – it should be expressly be required to be disclosed if included in the response to a formal FOI request.

There is of course a separate zone of human relations/personnel personal information about public servants to which the normal personal information exemption should apply. A definition of ‘information about public servants in relation to the performance of their duties’ would be needed to ensure this distinction.

2.4. Subject access under Privacy or FOI?

Currently, individuals have a right of access to personal information about themselves (subject access) under both the Privacy Act and the FOI Act. The Privacy Act suggests, and Privacy Commissioners have encouraged, a default position of using FOI Act processes for such requests. However, an estimated 85-90% of all FOI requests are for 'subject access' and this significantly distorts the focus of FOI, which should arguably be on the accountability open government objectives rather than on individual rights.

The government proposes to amend the Privacy Act so that it is the principal legislation which provides for an enforceable right of access and correction, but will do so in privacy amendment legislation to be introduced in 2010, rather than in this FOI reform Bill. While this will delay this desirable change, it is probably necessary to ensure that all the implications have been considered. In particular, consideration needs to be given to the threshold test that will determine whether an application is to be handled under FOI or Privacy law. While most subject access requests will be clearly identifiable as exclusively for the applicants own personal information, there is a category of 'mixed requests' where both the information requested and the motives of the applicant will fall into both the 'rights' and 'accountability' streams. Such requests are necessarily complex and can be difficult to handle. The anticipated Privacy Act amendments will need to address these issues. In the meantime, both clear subject access requests and mixed requests will continue to be dealt with under FOI, and any difficulties with the latter addressed on a case by case basis.

2.5. The public interest test generally

The way in which the Bill deals with exemptions is in my view unnecessarily complex and misses the opportunity to significantly simplify the existing FOI regime, which has become overly legalistic. At the most basic level, it should not be necessary to 'follow the trail' of provisions from proposed s.11A through decisions about conditional or absolute exemptions (Part IV, Division 3) back to the factors relating to conditional exemptions in s.11B, in order to understand whether a document may be withheld.

The Bill does not exhaustively list public interest factors (s.11B(2)), but does list some pro-disclosure factors (s.11B(3)) and also expressly lists some factors which may *not* be argued to support non-disclosure (s.11B(4)). This latter list is welcome, but to support the open government objectives it would arguably be preferable to *exhaustively* list factors against disclosure, as the new NSW Act does (GIPA Act 2009 s.14).

The Bill, unlike the exposure draft, proposes that documents containing trade secrets or commercially valuable information should be unconditionally exempt; i.e. not subject to a public interest test (proposed s.47). No convincing justification is given for these categories being given special treatment. In the NSW legislation they are

included a business interests in the list of ‘considerations’ against disclosure to be taken into account *in* the public interest test, not in the limited list of unconditional ‘conclusive presumption’ against disclosure (GIPA Act 2009 Schedule 1).

It is particularly unacceptable for these commercial interests to be given higher protection than personal information. While a case could perhaps be made for a very strictly defined category of trade secrets, the other concept of ‘commercially valuable information is far too imprecise to be the grounds for an exemption, and invites abuse both by commercial entities mentioned in government documents and by agencies seeking excuses not to release requested information. The prevalence of outsourcing and of private-public partnerships means that ‘commercially valuable information’ will routinely be included in government documents which should, for accountability reasons, be at least potentially accessible. The qualification in s.47 that the commercial value of the information would have to ‘be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed’ is an insufficient protection against inappropriate application. By definition, the value of any commercial information may be diminished by exposure – that in itself should not be grounds for unconditional exemption.

The conditional exemption provided by proposed s.47J (‘the economy’) – widening the existing s.44 exemption, stands out as being potentially open to abuse by agencies seeking excuses for withholding information, although it is at least subject to the public interest test.

Other interested parties with more direct experience of making FOI requests will no doubt make submissions about the potential risks to the open government objectives of the revised exemptions. I defer to their opinions, but would generally urge the Committee to subject all of the exemptions to detailed scrutiny and require convincing justification before accepting their necessity. The more, and more complex, the exemptions, the less effective the legislation will be in achieving its objectives.

2.6. Other

The provisions in Schedule 4 of the Bill for review of decisions on access requests are desirable, and the change from the exposure draft to make internal review optional is welcome.

The Bill replaces Part II of the FOI Act with new Information Publication Scheme requirements. While these are generally welcome and a significant advance, the Committee should seek assurances that no less information about agency *experience* of FOI is routinely published. I note the requirement in Schedule 4 for agencies to provide the Information Commissioner with information for his/her annual report. This should not be a substitute for agencies including details of numbers and types of requests and their outcomes in their own annual reports.

Schedule 5 changes all the references in the Privacy Act to ‘the Privacy Commissioner’ to ‘the Information Commissioner’ – This is in my view both unnecessary and unhelpful – I explain why in my comments above on the IC Bill, to which this change is directly related.

3. Review of the legislation

The provision for a review of both Acts two years after commencement (proposed s.93B) is welcome. Consistent with my suggestions above for reporting by the Commissioners, I submit that a Parliamentary Committee be required to approve the appointment of a reviewer and their terms of reference, and that the review report should be provided direct to Parliament rather than via the Minister.

Nigel Waters

