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Mr Stephen Palethorpe
Secretary
Senate Finance and Public Administration Committee
Parliament House
CANBERRA, 2600 ACT

Dear Mr Palethorpe,

Please accept the following submission with respect to your inquiry on the *Freedom of Information Amendment (Reform) Bill 2009*.

Open access period

I generally support this Bill. In particular, I strongly support the expansion of the open-access period to commence 20 years after the making of the document. As a person who has used Commonwealth documents for the purpose of research, I have found that 30 years is simply too long to wait for important legal and historical information. By the time the 30 years is up, material is often lost, relevant people are often dead, and the chance to record a comprehensive and accurate account of what occurred is often lost.

Special access under the *Archives Act* for documents in the closed access period

Because this period of 30 years is too long, I have previously sought special access to Commonwealth records that are between 20 and 30 years old. It has taken me six years of battling bureaucracy to get access to most of these documents. I went through the process under s 56 of the *Archives Act* 1983, which is a procedure for academics and others who are preparing research publications of national importance (*Archives Regulations*, reg 9). From this experience, I can tell you that this process also needs reform. Decisions about access to documents under the *FOI Act* are the subject of criteria, time limits and review procedures. The same is true if one applies for documents in the open access period under the *Archives Act*. However, if one applies under s 56 of the *Archives Act* for special access to documents in the closed access period for research purposes, there is no access to merits review (in the end, I had to resort to the Ombudsman after trying for five years to get a Department to make a decision). Nor are there any effective time limits (s 56(5) only requires reporting of decisions at 3

monthly intervals, not that anyone actually *make* a decision – or at least this appears to be how the Commonwealth reads the provision). Nor is there an equivalent public interest test or legislative criteria to direct the Minister in making a decision.¹

The amendments to the *FOI Act*, should extend to the special access regime under s 56 of the *Archives Act* so that it too is applied in a fair and timely manner and can be the subject of review if it is not. The same public interest test should apply to the Minister's decision and it should be reviewable by the Office of the Information Commissioner. It would be absurd to have one set of criteria, time limits and review mechanisms for FOI and a broad and largely unfettered discretion with no time limits and no review under the *Archives Act* with respect to access to exactly the same documents.

Finally, on this point, while I understand the necessity for the phase-in period for the new open access period under the *FOI Act*, it would seem appropriate that the new open access period come into effect immediately with respect to requests under s 56 of the *Archives Act* where it has been accepted by the Commonwealth that they meet the requirements of *Archives Regulations*, reg 9 (eg. that they are for the purpose of a research work of national importance). This will not increase the Commonwealth's work burden, as all the documents requested have to be assessed anyway. It would merely remove the discretion of the Minister to refuse access to documents that are over 20 years old, if they would not otherwise be 'exempt documents' under the *Archives Act*. To this extent, it may even reduce the Commonwealth's work burden.

Amendments to the *Archives Act*

Section 33 of the *Archives Act* sets out the exemption provisions with regard to those documents that are in the open access period (i.e. those documents currently over 30 years old). Proposed ss 35-7 amend those exemptions to update them with respect to documents communicated in confidence by a foreign government. However, it is not clear why all the other exemptions in s 33 have not been updated to make them consistent with the proposed FOI exemptions. Those documents made conditionally exempt under the *FOI Act*, which are subject to a public interest test, should not be completely excluded under the *Archives Act* without the application of a public interest test. For example, business affairs seem to be conditionally exempt under the proposed provisions of the *FOI Act*, but completely exempt once the documents are over 30 years old under the *Archives Act*. Such a result would be silly.

Fees and charges

The reason why academics, writing research works of national importance use the special access provisions in the *Archives Act* rather than the *FOI Act*, is that the procedure under the *Archives Act* is free of charge. This seems fair, given that the Commonwealth benefits from the publication of research works of national importance.

¹ For further detail on these issues, see my submission on the Commonwealth's FOI reform proposal at: http://www.dpmc.gov.au/consultation/foi_reform/pdfs/PDFs2.pdf

Under FOI, in contrast, the charges can be prohibitive, especially if a significant amount of material is requested. Fees are set under the regulations, rather than the Act. The Commonwealth's 'FOI Reform-Companion Guide' stated that it proposed to change the fee regime so that the first five hours of the decision making time would be free of charge for journalists and not-for-profit community groups. If this proposal is to go ahead, academics should also be included (given that they are even less well-resourced than journalists).

Publication of information in accessed documents

I agree with the proposal that documents released under FOI should be made public (proposed s 11C). It appears a little unfair, however, that a person who has paid a fortune in FOI charges for access to documents (eg a journalist or an academic) should find them published immediately, free of charge, to all the person's competitors. It would seem reasonable that there be some delay (eg a month) before the information is made freely available to everyone else, or that a portion of the applicant's fees be recouped instead from others who seek access to the same information.

The deletion of 'irrelevant' material

Proposed s 11B states that embarrassment to the Commonwealth or a loss of confidence in the Commonwealth Government must not be taken into account in deciding whether access to a document would be contrary to the public interest. Yet proposed s 22 gives public servants *carte blanche* to modify a document by deleting material that 'would reasonably be regarded as irrelevant to the request for access'. In other words, the embarrassing material will, in most cases, be simply deleted as being 'irrelevant'.

There is no sensible reason for deleting 'irrelevant' material from a document that otherwise falls within the terms of an FOI request, as long as that material is not otherwise exempt. There can be no harm in including 'irrelevant' material if it is not exempt and it meets the public interest test. The only conceivable reason to include this provision is to provide a means of deleting embarrassing material. I strongly recommend that this provision be altered so that material can only be deleted from a document that falls within a FOI request if that material itself is exempt. Moreover, as long as this provision remains, people will feel obliged to cast much wider requests to ensure that material is not deleted as 'irrelevant'. This will increase the amount of material that needs to be produced and the amount of time required for finding and assessing it. It therefore encourages inefficiency in the process and increased costs.

Public interest test

I support the new public interest test. I support its balancing of relevant interests. I also support the inclusion of factors favouring access. I suggest that a further factor should be added to s 11B(3), being:

- (e) promote understanding of Australia's history, system of government and political affairs.

The reason for this suggestion is that the material may not directly inform current debates on matters of public importance. Rather, if it is historical material, it may give a better understanding of present day matters through developing a deeper understanding of Australia's past and its effect upon the political system. There is a significant public interest in the Australian people having a better understanding of our past and the way our system of government has operated. This should be reflected in the reasons for granting access to government documents.

If I can be of any further assistance to the Committee, please let me know. I will be away on holidays for part of January, but am contactable by e-mail.

Yours sincerely,

Anne Twomey