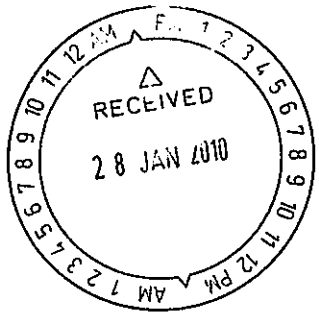

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28 January 2010

Mr Stephen Palethorpe
Secretary
Senate Standing Committee on Finance and Public Administration
Parliament House
CANBERRA ACT 2600
Email: fpa.sen@aph.gov.au

Dear Secretary

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

Telstra welcomes this opportunity to make submissions to the Committee in relation to aspects of the Information Commissioner Bill 2009 (**IC Bill**) and Freedom of Information Amendment (Reform) Bill 2009 (**FOI Bill**).

Telstra generally supports the intent and general thrust of both Bills. Telstra agrees that structural reform of the Commonwealth Freedom of Information Act 1982 (the **Act**) and associated processes is necessary to improve the transparency and scrutiny of government processes and decision making. Amongst other things, Telstra agrees that the establishment of a central office to oversee information matters, provided the agency is properly resourced, should provide much-needed coordination, consistency and enforcement of information policy at the Commonwealth level.

Telstra also acknowledges the degree of engagement which has characterised the Government's development of the Bills to this point – including the improvements which have been made to the FOI Bill from the exposure draft published by the Department in March 2009.

However, Telstra is concerned that the FOI Bill, in its current form, will erode the confidence of business in the protection of commercial information by government agencies. In particular, the restructuring of the "business affairs" exemption (in proposed s.47G) significantly weakens the level of protection afforded many types of sensitive information from that provided under the current Act.

If businesses doubt that the FOI regime offers adequate protection for their information, they are likely either to limit the amount or quality of information shared with agencies and/or to take more active steps to ensure that such information is formally acknowledged as subject to confidentiality obligations (which would then attract more certain protection under the existing exemption in s.45 of the Act). In either case, the channels of communication between the public and private sectors risk becoming become more complex, legalistic and time-consuming.

Telstra's specific concerns in this regard are:

1. The proposed sections 47 and 47G of the FOI Bill introduce a distinction between the treatment of "trade secrets" and information with a commercial value that may be diminished if disclosed, on the one hand, and any other information relating to the business affairs of an organisation. The first of these categories is now exempt from disclosure, which is a notable improvement from the exposure draft of the FOI Bill. However, the second

category ("business affairs") remains subject to the public interest test, which is weighted in favour of disclosure. Telstra submits that there is no reasonable justification for the lower level of protection afforded to business affairs information under s.47G of the FOI Bill.

2. It is not clear how the re-modelled business affairs conditional exemption in proposed s.47G will operate alongside the closely related exemption already in place in s.45 of the Act for documents that have been obtained in confidence by the Commonwealth. Telstra considers that this inconsistency is unnecessary and will lead to uncertainty over the scope and proper operation of the new conditional exemption.

3. The new consultation process in proposed s.27 does not guarantee a business the right to be notified of the proposed disclosure of its information by an agency to third parties. The consultation process would then be subject to the discretion of the agency (and in many cases a junior officer in an agency) where the agency is not best placed to assess the commercial value or sensitivity of the information to the business.

We expand on these concerns below.

The FOI Bill introduces an unwarranted distinction between "trade secrets", "information having commercial value" and other sensitive information relating to "business affairs"

Currently, under s.43 of the Act, a document is exempt if its release would disclose any of:

(a) a trade secret;

(b) information having commercial value that would be destroyed or diminished if disclosed; or

(c) any other information (i.e. not captured by (a) or (b)) concerning the business affairs of a person and the disclosure of which would unreasonably affect the person adversely in relation to their business affairs.

Under proposed s.47, the current exemption from FOI disclosure would be maintained for information in (a) and (b) above – an approach which Telstra endorses.

However, information under the third limb has been separated from the others and would be conditionally exempt – so that the exemption takes effect only subject to a public interest test. As the Committee will be aware, the newly formulated public interest test in proposed s.11B of the FOI Bill is weighted towards disclosure. The FOI Bill would therefore significantly weaken the current protection for information which, if disclosed, is expected to unreasonably and adversely affect the business affairs of a person.

The distinction now being introduced between s.47 and s.47G is not explained in the draft Explanatory Memorandum. On one view, it seems to be between documents containing information with *intrinsic* commercial value (e.g. board papers, pricing proposals, confidential submissions submitted to an agency) and documents which, although possibly not sensitive of themselves, nonetheless disclose information which would damage a person's business affairs (e.g. the fact that a company participated in a tender process, supplied certain goods or advice to an agency or made certain submissions to a governmental process).

Telstra submits that even this assumed distinction does not justify a lower threshold being applied to information which has an unreasonable and adverse effect on the business affairs of a person. The reason that trade secrets and information with commercial value are exempted is because disclosure of this information, by its very nature, is expected to have an adverse effect on the person or business

whose information it is. Indeed, the legal description of a "trade secret" includes that disclosure to a competitor would be liable to cause real harm to the owner of the secret.[1]

It is therefore not clear why information which an agency expects would unreasonably and adversely impact a person's business affairs – even if it is not technically a trade secret or commercially sensitive document – should be treated any differently. Although the three categories of information referred to above may take different forms, the adverse effect of disclosure on the business affairs of a person is the same in each case and Telstra submits that it is this effect on the business that should be the proper basis for applying an exemption.

Furthermore, the Federal Court has found that the question under the existing exemption in s.43 of whether disclosure of information would have an "unreasonable" adverse effect on the business affairs of a person already holds, within it, a need to balance the potential adverse impact with any public interest in disclosure.[2] That is to say, even if the current description of the exemption in proposed s.47G was included instead in s.47, it would still allow agencies to take public interest factors into account. However, this more integrated approach to the public interest is far more appropriate, in relation to this type of document, than making disclosure subject only to the re-weighted public interest test in proposed s.11B.

To ensure consistency of approach across the different types of business affairs and confidentiality exemptions and to prevent any detrimental impact on the degree of openness between the private and public sectors, Telstra submits that the FOI Bill should be amended to extend the current exemption for trade secrets and sensitive commercial information in proposed s.47 of the FOI Bill to also include the business affairs information currently addressed in s.47G.

How will the proposed approach to "business affairs" interact with the existing exemption for confidential documents?

The legal uncertainty which would be created by trying to apply different exemption standards to different types of commercial information is highlighted by exploring the way that the new conditional exemption in s.47G might operate alongside the existing exemption for confidential information in s.45 of the Act.

Under s.45, a document is exempt if its disclosure would support an action for breach of confidence. To bring a claim for breach of confidence, amongst other things, the claimant needs to show that information had the quality of confidentiality and that disclosure would result in detriment to it.[3] These elements therefore closely resemble and to some extent overlap, the test for the business affairs exemption (proposed for s.47G).

Once again, it is not clear the basis upon which a different (and weaker) approach is justified in relation to business information that unreasonably and adversely affects a person, from other breaches of confidence causing detriment. Telstra considers that the closely related and overlapping nature of the exemptions in each of the proposed s.47 and s.47G and under existing s.45 justifies a consistent approach across all three.

At the very least, if the Committee was minded not to re-integrate the business affairs and trade secrets exemptions under a single and consistent test, Telstra submits that the Information Commissioner should be required (under the FOI Bill itself) to publish guidelines that clarify the role of and distinctions between those exemptions relating to confidential information or trade secrets that are exempt and those relating to business affairs that remain subject only to a conditional exemption.

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[1] *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 at 536.

[2] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* 108 ALR 163 at 178.

[3] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 per Gleeson CJ at [30]

The amended consultation process does not guarantee notice of the proposed disclosure of a business' information and therefore a right to challenge any decision to disclose

The FOI Bill significantly weakens the right of businesses to be notified of the proposed disclosure of information which becomes the subject of an FOI request.

The current notification process in section 27 of the Act provides, quite appropriately, that where information relates to the business, commercial or financial affairs of an organisation, that organisation must (unless it is not practicable) be given an opportunity to make submissions to the agency before the information is disclosed publicly.

Telstra is concerned that the proposed s.27(3) of the FOI Bill qualifies this requirement by only requiring a decision maker to notify an organisation about disclosure of its information when the agency determines that the organisation might "reasonably wish to make an exemption contention". In making this decision, the agency has freedom to take into account, "any other matters ... [it] considers relevant."

As a matter of policy, if an agency is considering disclosing the information of an individual or company, the person/company should have a right to be notified of, and to make submissions about, that disclosure. Amongst other things, it will not always be apparent to an agency whether disclosure will be detrimental to the business involved. If factors that suggest disclosure will not be problematic (such as those set out in s.27(3)) do exist, such as existing public knowledge of information, the agency might expect that submissions by affected parties will not oppose disclosure – however that should not excuse the agency from allowing a fair opportunity for third parties to be heard.

To the extent that sections 27(3) substantially weaken the obligation to consult with interested parties, Telstra is concerned that it can no longer be certain that it will receive notification documents will be disclosed. In such cases, there would appear to be few, if any, appeal or other rights if the released documents damaged the persons privacy or commercial position.

The right to make submissions is particularly important under the FOI Bill because a person is not entitled to restrain the publication of information (during the period in which a decision by the agency is being reviewed) unless that person had made a submission in support of its exemption.

Subject to these comments and concerns, Telstra welcomes the reforms being introduced in the FOI and IC Bills.

Yours sincerely,

Jane van Beelen
Acting Executive Director – Regulatory Affairs
Public Policy and Communications