



Australian Government

Department of Home Affairs

Submission to the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018

Home Affairs Portfolio Submission

Senate Legal and Constitutional Affairs Legislation Committee

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Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018

Introduction

The Department of Home Affairs (the Department) provides the following submission to the Senate Legal and Constitutional Affairs Legislation Committee regarding the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the Bill).

Compliance with timeframes

The primary focus of this Bill considers the issues impacting the Office of the Information Commission and opportunities to enhance the management of the decision review process. In addressing these matters, it is necessary to consider the precursory events resulting in increasing demands for review subsequently impacting on the Information Commissioner's capacity for timely outcomes.

Progression of Technology

Society is increasingly expecting government services and communication to be delivered through digital channels with the benefits of technology continuing to evolve to deliver efficiencies through quick and easy information creation, capture and sharing. The resultant impact is an increase in the number of information systems driving a significant growth in the volume of material being generated. Data, records and communications are captured in a multitude of systems requiring diverse skills to conduct the complex interrogations required to locate information required.

Equally, it is widely accepted that government agencies are now in a better position than ever before to capture information, expanding from the traditional high value records for long term retention as records to include low value transactional material. This is evidenced by the Department's electronic document and records management system experiencing growth at a rate of four terabytes per month for just one system.

It is essential the *Freedom of Information Act 1982* (the Act), which was initially drafted in an era of paper based information management, adapts and keeps pace with the evolution and growth rates of information creation, communication and storage. The statutory timeframes for processing requests for access to documents must be suitably aligned with the increasing efforts required to identify, locate and prepare greater volumes of information in a format able to be accessed by FOI applicants.

It is recommended the Bill considers a tiered structure for timeframes for release in line with the size and complexity of a request with greater flexibility for opportunities for extension based on these factors. Increasing the ability for agencies to operate within the timeframes for delivery will reduce the effort, impact and lost time currently committed to responding to requests for information surrounding overdue cases.

Provision of statement of reasons during Information Commission review

The Bill seeks to restrict agencies' ability to respond to inquiries that will assist the Information Commissioner, provide adequate statement of reasons, or provide any other relevant information and submissions to the Information Commissioner. The Department submits this would diminish the quality of the review process and limit the development of case law.

The purpose of a review is to make a fresh decision. This requires the review officer to consider all relevant information and submissions from both the responding agency and the applicant. In the event that a Deemed Refusal decision was subject to review, the proposed restrictions would impede the ability for the review

officer to reach an informed decision. The Administrative Review Council Best Practice Guide 1 – Lawfulness¹ states it would be a legal error to:

“... regard irrelevant considerations, just as it is to ignore a relevant consideration.”

To make a lawful decision in both the primary and review decisions, the entirety of the exceptions, exemptions and public interest criteria should be available for consideration during the review of an access decision under the Act.

For efficiencies, current agency practice is to only apply the most appropriate exemption at the time the original decision is issued, regardless of the potential for the application of additional exemptions. This amendment will require consideration and application of all relevant exemptions during the primary decision process, extending the required timeframe for processing and resulting in a complex statement of reasons.

Additional matters for consideration

Disclosure of names of Australian Public Servants, government contractors and service providers

The Department submits consideration be given to the disclosure of the names of junior Australian Public Servants (non-Senior Executive Service), government contractors and service providers as part of this Bill.

The Department is committed to providing a framework under the *Work Health and Safety Act 2011* (WHS Act) and *Work Health and Safety Regulations 2011* (WHS Regulations), to secure the health and safety of workers, by protecting workers and other persons against harm to their health, safety and welfare through the elimination of risks arising from their work place.

To manage foreseeable risks, both physical and mental, resulting from the disclosure of workers' names in documents released under FOI, the Department's policy is to redact staff members' and contractor/service provider names, in order to:

- protect the privacy, safety and wellbeing of officers, noting the prevalence of social media and the ability to locate personal information and individuals locations on social media and across the internet
- help ensure that officers are not targeted or groomed by criminal organisations
- help maintain the Department's investigative and operational integrity.

This ensures that the Department is meeting its duty of care as set out in the WHS Act and Regulations by:

- eliminating risks to health and safety so far as is reasonably practicable
- if elimination is not reasonably practicable, minimising the risks so far as is reasonably practicable.

The Department has found it necessary to take such measures as a result of concerns raised by workers, including:

- Medical personnel - releasing the names/other identifying information of medical personnel who undertake medical assessments of visa applicants generally poses unacceptable safety risks to these personnel as described in a request for removal of names stating:

“While our [departmental] offices are routinely protected by security officers... Our clinics are not as fortified and the default release of personal details of their medical practitioners is a matter of ongoing concern, particularly when FOI applicants are not simply interested in reviewing and challenging their medical assessments, but may also wish to meet the relevant medical officers and

¹ The ARC Best Practice Guide 1 – Lawfulness is available on their website at:
<https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/ARCBestPracticeGuide1Lawfulness.aspx>

engage them in a more considered discussion. In the present age of social media, and armed with the personal details of a medical practitioner, a determined visa applicant may now readily identify and track down a relevant (or ex-personnel) medical practitioner.”

- Detention officer names - releasing the names/other identifying information of detention services staff endangers the safety of the staff by making them subject to recriminations. Release of names also impacts on the quality of security reporting due to staff reluctance to submit security reports for fear that their details will later be released under FOI to the subject of the report. In a specific example, there was a direct link established between the release of a security information report by the Department under FOI and a detention officer being confronted in an aggressive and abusive manner by the subject of the report. This incident occurred in the workplace during 2017. Following this incident the Department began a review of its policy to release staff names and sought advice from stakeholders. The following information was provided to request the removal of detention officer names:

“...redact all [departmental] staff names and any personally identifying information from all documents released by the Department under FOI as a means of:

Protecting our staff from:

Detainee and sympathiser aggression and assault (both inside IDFs and outside of work hours);

Cyber bullying; and

Removing the strong disincentive for [departmental] personnel to accurately report refractory behaviour by people in detention...”

- APS staff personal safety - The Department has recorded a number of incidents from July 2015 to July 2017 where aggrieved clients or other parties have contacted departmental staff outside of a formal work setting, in order to intimidate or influence them. Although a direct link between the incidents and the release of staff details under FOI cannot be substantiated, the incidents highlight the hostile environment in which departmental staff can work and the need for identity protection.
- APS staff integrity – The release of staff identity exposes workers to targeting by nefarious and lobby groups seeking to gain knowledge or access information or systems for the purposes of circumventing laws and controls. Such gathering of information exposes departmental employees, their families, friends and associates to grooming making them susceptible to corruption or bribery.

The Act provides a range of exemptions that could be considered to address these issues however the application of an exemption requires consideration and identification of ‘real harm’ each time a request for documents is being assessed by an agency. To establish ‘real harm’ considerable consultation with stakeholders would be required and this would add to processing delays. A provision in the Act to determine that personal information of workers, as defined by the WHS Act, is either irrelevant or exempt for the purposes of the Act. This would provide for the protection of workers and reduce the potential impact to processing times. The Department acknowledges that there may be circumstances where procedural fairness or natural justice requires the identification of workers that are decision makers, this information should be made available to the impacted individual outside the parameters of this Act.

Public Interest Disclosure Act 2013

The Department submits this Bill should consider the inclusion of the Public Interest Disclosure Act 2013 (PID Act), to Schedule 3 – Secrecy provisions, of the Act. The PID Act was introduced to establish a framework to encourage and facilitate the reporting of misconduct within the public sector. Subdivision C of the PID Act provides for the protection of the identity of a disclosure. Disclosure of the identifying information is prohibited, unless it is in accordance with the PID Act, and an offence is committed if an unauthorised disclosure is made to another person. The Department finds that this provision holds the quality of secrecy and that the identifying details of a person who makes a PID disclosure should be exempt from release under subsection 38 of the Act.