



SUBMISSION

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

The Senate Standing Committee on Finance and Public Administration

**By Dr Johan Lidberg¹, Academic Chair Journalism, Murdoch University, Perth,
Western Australia**

¹ Dr Lidberg created and pioneered the first International Freedom of Information Index. This is a tool that can be used to evaluate how well FOI systems work in practice. For further information please see:
<http://wwwstaff.murdoch.edu.au/~jlidberg/>



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Summary

The issues before the committee are the following:

1. Whether the Bills contain measures effective to ensure that the right of access to documents is as comprehensive as it can be;

Summary assessment: **Access can always be made more comprehensive. However, after assessing the FOI Reform Bill, it is my view that the suggested amendments do address most of the issues and problems in the current 1982 Act. The most important changes are: the abolition of the \$30 application fee, the establishment of the Information Commissioners, IC, and the by-passing of the internal review process. Please see below for further discussion.**

2. Whether the improvements to the request process are efficient and could be further improved;

In short yes. But there is still room for improvement. The most important area is processing fees. This is not addressed in the Bills. However, the ICs are charged with reviewing the fee structure and one would hope that change is on its way as processing fees are frequently used by government agencies as a way to block FOI requests. There are several examples where perfectly legitimate requests, if somewhat controversial, have received processing fees of several thousand dollars.

3. Whether the measures will assist in the creation of a pro-disclosure culture with respect to government and what further measures may be appropriate;

The support and powers given to the ICs in the Bills are re-assuring. However, the detail is very scant on exactly what the ICs should do (this is further covered under the heading 'The Information Commissioners' Challenge' below). In my view little more can be done in a legal sense regarding this issue. Changing from the current culture of secrecy within the Australian public service to a pro-disclosure regime requires long-term (probably decades) commitment from successive government in supporting the ICs. One way of ensuring this is making the FOI system part of the possible future Australian Bill of Rights. Absolutely pivotal will be to appoint ICs that are fiercely independent and integrity strong.

4. Assessment of the functions, powers and resources of the Information Commissioner.

The commonwealth government has committed \$19.5 million to the IC's office over four years. It is hard to assess how far this money will take the ICs on their 'culture changing' mission. It is certainly better than the current situation, but the success is heavily dependent on being able to employ staff that is dedicated to effecting the change. But \$19.5 million is a good start.

The powers invested in the commissioners are adequate, in my view.

Functions: you can only do so much in legislation when it comes to how an organisation/government office works. This will have to be assessed at a later point in time.

Recommendations

- Extend the free FOI request processing time for non-profit organisations and journalists from five hours to a full day (The free five hours is an improvement on the current fee system, but it needs to extend further. I note that the Information Commissioner is to conduct a review of the fee structure, but this particular change could be included straight away).
- The Information Commissioner should consider extending the free processing time further. This would be a potent way to signal to government, the public service and citizens that a culture shift is under way. It would also start dealing with the issue at the core of the Australian FOI system – the common perception among public servants and government officials that the state OWNS the information. This is a complete misconception as the government holds information ON BEHALF of the public. Hence, the public paying to access information that is theirs in the first place makes no sense at all. Common to well functioning FOI systems is that there are no processing fees. This needs to be considered.
- Abolish the general exemptions for government agencies in schedule 2 (see below).
- When/if Australia gets a Bill of Rights as part of the Constitution: make FOI part of the constitution to safe guard against summary changes to FOI. Extensive access to un-spun, quality, government-held information is a right for every citizen and should not be tampered with lightly.
- Reconsider demanding that the FOI Commissioner, FOIC, has to have a legal background (see below).
- Every effort should be made to recruit all three commissioners externally and, not in the first instance, from within the public service. This is to ensure as much independence as possible in the IC's office. At the very least the FOIC should be recruited externally.

Introduction

In the last decade it has become abundantly clear that the current federal FOI regime in Australia is dysfunctional¹. It does not deliver on the promises made in the objects part of the 1982 FOI Act. It is therefore heartening to conclude that the proposed amendments and changes to the FOI Act indicate that the current government is sincere in its efforts to make the FOI system work better. The most important reform is the creation of an Information Commissioner Office (IC) that will also house one FOI Commissioner and one Privacy Commissioner. The quite far-reaching proposed powers given to the FOIC could potentially bring great improvement to the functionality of federal FOI in Australia. However, as numerous previous studies have shown (see footnote 2), extensive FOI is easy to promise but much harder to deliver². A potent and sound FOI Act can be blocked in practice if the attitudes towards FOI held by senior public servants and Ministers are not changed. This will be the greatest challenge for the Information Commissioner. I will return to this matter later in this submission.

This review draws on the submission that was made to the Privacy and FOI Policy Branch, Department of the Prime Minister and Cabinet in May 2009. It is noted that some of the recommendations provided then has been acted upon (by-passing internal review and cabinet documents exemptions dropped to 20 years). I am sure they were pointed in several other submissions as well, nevertheless, it is good to see that the consultation process have had an impact on the final Bills. Most of this submission will be spent on the Information Commissioner Bill as this, in my view, will be the most important of the two.

Freedom of Information Amendment (Reform) Bill 2009

After reading the Bill the conclusion is that the information access 'balance' has shifted in favor of the FOI requestors. This is based on a number of the suggested amendments:

- The creation of a FOI Commissioner (provided he/she is independent and will work in the interest of the public)
- The general public interest test for release of information
- A much simplified review (appeal) process
- An onus on government agencies to pro-actively publish information
- The revoking of the \$30 application fee. This is symbolically very important. It sends a signal that the government holds information on behalf of the people. This could be the first step away from the notion that the government OWNS the information. This is an all too common view among many public servants and ministers.

² Please see <http://wwwstaff.murdoch.edu.au/~jlidberg/> for access to several studies on this topic

Exemptions

The 30 year exemption rule for cabinet documents has been changed to 20 after the consultation round. This is another positive, but this does not close the long standing loop hole for making information exempt (you may perhaps recall the episode of the ABC satire drama series *the Hollow Men*, when 'sensitive' documents were put in wheelie bins and wheeled around an empty cabinet room and hence made exempt). This is an issue for the Information Commissioners to look into.

The major exemption issue is that Schedule 2, Section 7 in the FOI Act, 1982, listing exempt agencies still stands in the amended Bill.

Schedule 2

Section 7

Part I—Exempt agencies

Aboriginal Land Councils and Land Trusts, Auditor-General, Australian Government Solicitor, Australian Industry Development Corporation, Australian Secret Intelligence Service, Australian Security Intelligence Organisation, Inspector-General of Intelligence and Security, National Workplace Relations Consultative Council, Office of National Assessments, Pipeline Authority

It has been argued that it is not practical to extend FOI to cover for instance ASIO as the vast majority of documents held by this agency would be exempt under other sections of the Act. This is true, but, as with the abolition of the \$30 application fee, exempting any agency sends a message of secrecy, rather than openness. In the US and Sweden, the two bench mark FOI systems, there are no general exemptions for any agencies. Hence, FOI in the US covers the CIA as well. This is important as it indicates that the culture of openness and transparency should extend to all government agencies, including the secret ones.

The Information Commissioner Bill 2009

Initially I was skeptical towards the suggested three commissioners (IC, FOI and Privacy), however, provided they deliver as promised in the Bill: active information and education regarding FOI directed towards the public and agencies, pro-active assessment of the functionality of FOI and INDEPENDENCE from government, it may well be valid to have three commissioners. The surprisingly extensive powers of investigation and decision making granted to the Information Commissioner in the Bill forms a solid base for the IC to act on.

Schedule 4 Division 7, 55J (2) For the purposes of implementing a decision on an IC review, the Information Commissioner may perform the functions, and exercise the powers, of the person who made the IC reviewable decision. (3) A decision of the Information Commissioner on an IC review has the same effect as a decision of the agency or Minister who made the IC reviewable decision.

The Bill as it stands on the IC and FOIC is solid in my view. However, it will be absolutely crucial WHO is appointed as IC, FOIC and Privacy Commissioner. Experience from Western Australia shows that governments not serious about FOI can water down the functionality of FOI by seeking out a 'tame' FOIC and/or by delaying re-appointment. True, the IC and FOIC will need to do more than just be a FOI

advocate, they need to bring into office diplomatic and facilitator skills if the culture of secrecy is to be changed. In my view, **integrity and independence** are the most important properties for the future Information Officers.

Historically there have been two major obstacles to proper federal FOI functionality in Australia: turn-around time and fees and charges. As I have pointed out in earlier submissions, the long turn-around time we can live with (30 days, plus scope for more if granted by the FOIC) if this means a fair handling of the FOI request (best international practice is one to seven days). **The fee structure is still a major problem. Agencies have actively used excessive fees as a way to discourage requests (see Lidberg, 2006, in footnote 1).** I note that there are provisions made to lower the FOI request processing charges in the Bill. This is a good first step, but it needs to be reviewed further. This is a task given to the IC. How it is handled will indicate how the IC perceives the 'balance of power' in terms of FOI.

The review (appeal) process

As pointed out above, the far-reaching review powers granted the FOIC are very positive, as is the method of mediation between FOI parties when a request is under review. I note that the internal review process has been dropped as a mandatory step in the review process and that appeals can be put straight to the FOIC. This is crucial and a very positive sign that the government have acted on some of the recommendations in the consultation process.

The Information Commissioners' challenge

The explanatory memorandum to the IC Bill states under clause 8: Definition of freedom of information functions:

The intension is that the Office of the Information Commissioner be a resource for agencies as well as for the public. In carrying out this function, it is also intended that the Information Commissioner and the FOI commissioner will have a key responsibility in deriving a pro-disclosure shift across government.

How this shift is to take place is not further detailed. One assumes that this will be up to the ICs. Information Openness and awareness campaigns have been run in other countries and systems. Below is a brief summary of one that was done in Sweden [this author's translation].

Summary

The Open Sweden campaign 2000–2002

- The campaign started during autumn 2000 and finished on June 30 2002.
- It was a national government initiative. The aim was to make Sweden into an international role model in terms of openness and transparency and information access to government held information for the public, the corporate sector and the media.
- Towards the end of the 1990s studies showed a lack of knowledge and commitment to FOI.
- Several trade unions reported a trend of silence among its members in the public sector [in Sweden whistle blowing is part of the FOI Acts and whistle blowers have legal protection as do journalists in the form of extensive shield laws. FOI and whistle blowing are seen as two sides to the same coin].

The campaign covered:

- Greater transparency at the public sector workplaces [whistle blowing encouraged]
- Awareness campaigns about FOI

- Stimulating debate on FOI

The committee worked along two trajectories:

Educating the public regarding FOI and educating and engaging public servants and agencies regarding FOI. In total 230 government agencies took active part in the campaign. FOI project leaders led the knowledge and educational process at the participating agencies. The website www.oppnasverige.gov.se [no longer on-line] was a very important communication resource for the project leaders to get in touch with other stake holders, such as the public. The website contained information about FOI, training material, media coverage etc.

A FOI information booklet was printed in 50 000 copies. The booklet targeted politicians and public servants that could potentially receive FOI requests.

Suggestions and recommendations

The Open Sweden campaign was positively received by most stake holders. The advent of a central push for increased functionality of Swedish FOI has had both symbolic and practical meaning. It has showed government agencies that the national government takes the openness issues seriously.

The core recommendations:

- It is the view of the committee that that the public service should be responsible for informing the public on their rights under FOI. Web sites and printed material from government agencies should always contain information on FOI.
- Youth and young adults should be separately targeted in a FOI information campaign. Secondary schools and universities could be valuable partners in this campaign.
- Web based publication of government held information offer new and virtually un-limited opportunities to make as much government held information public as possible in an effort to facilitate citizens' access to information. This is also a way to pre-empt FOI requests and in practice save resources on processing requests. If the information is already public, the request does not need processing.
- It is the view of the committee that all employees that work in endeavors financed by tax payers money should have the same level right to public speech (ie whistle blowing) and protection from persecution as those that work in a traditional government agency.
- Openness, transparency and publication of government held information should be the default setting for agencies. Information should always be regarded as public until 'proven' not public. Hence, no agencies should be exempt from FOI.
- A standing 'Information Commission', IC, should encourage, advocate and educate government agencies and the public on information access issues [this is similar to the commissioners suggested in the commissioners bill]. The IC should also design and police a reporting system ensuring FOI delivers on its promises in practice [the current Australian federal annual FOI reporting system for each agency is a start but needs to be refined to better reflect the aims of the law].

Some of the recommendations have already been identified during the work to reform federal FOI in Australia. However, some others, in particular the pro-disclosure policies may provide useful input for the Australian FOIC.

Appointment of Commissioners

As pointed out above, and numerous times before in other submissions and research articles, the success of re-vitalising federal FOI in Australia hinges on WHO gets appointed as IC and FOIC. It is noted that under clause 14 in the IC Bill, it is stipulated that FOIC should have a legal background. I can see the merit in this for the assessment of FOI request appeals. However, equally important, will be the information

and, in part 'inspirational' role of the FOIC in convincing the public service why it should break with its tradition of secrecy inherited over centuries via the political traditions of the Westminster (some of course call it 'Washminster') system of government. This is truly a herculean task! To find the person/s capable of this, I think it would be unfortunate to limit the recruitment grounds to candidates with a legal background. This may mean that some suitable candidates will not, or cannot, apply. It would also make sense if at least the FOIC is recruited from outside the ranks of the public service to ensure as much independence as possible.

Conclusion

The draft FOI Bills are clearly a major step in the right direction. However, as pointed out in the introduction, the FOI amendments and reforms will be to no avail unless they are coupled to a sincere and long-term (decades) commitment to change some of the current attitudes towards FOI held by the public service and some ministers. Much will hinge on the Information Commissioners. They will be the drivers of change and they will in turn be dependent on government support for their actions. It is timely that the federal government is acting on FOI. The last few years has seen a momentum for change building. Examples of this are the reviews and major amendments proposed to state FOI in Queensland and Tasmania. Even if they probably will not admit as much, the states do look to the federal government for guidance, or at least leadership, on FOI. This is one of the reasons why federal FOI reform is so important.

It is also interesting to note the government will ask the Australian Law Reform Commission to re-visit the issue of FOI and the private sector. The current global economic recession has driven home the point that the private sector impacts as much, if not more, on the daily lives of citizens, as do governments. It is therefore timely to re-examine what kind of information access mechanisms could be applied to the private sector to increase **accountability**. The South African Access to Information legislation to some extent applies to the private sector. Examining this law could perhaps be a good starting point. There are currently 68 plus (and counting) FOI laws in force around the globe. Benchmarking against the best of these is a way to keep the Australian FOI system up to speed. I note that the Information Commissioner has this task as part of the brief. This is to be commended. There are international indications that the wave of secrecy, fueled by the global fear created by the September 11 attacks on the US, is somewhat subsiding. It is heartening to see that Australia has picked up on this.

Signed, Perth 27 January, 2010

Dr Johan Lidberg, Academic Chair Journalism, Murdoch University Perth

