



Australian Government

Office of the Australian Information Commissioner

Senate Legal and Constitutional Affairs Committee
Additional Estimates 2011-12, 13 & 14 February 2012

Tabled Document

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By: Office of the Australian
Information Commissioner

Date: 14/2/2012

Mr David Tune PSM
Secretary
Department of Finance and Deregulation
John Gorton Building
King Edward Terrace
PARKES ACT 2600

Dear Mr Tune

I am writing to convey my concern at the impact upon the Office of the Australian Information Commissioner (OAIC) of the 2.5 per cent additional efficiency dividend and 20 per cent capital budget reduction announced by the Minister for Finance and Deregulation on 29 November 2011.

If there is an opportunity to review these new measures as they apply to the OAIC I would request that this occur. To assist a review I would be happy to elaborate on the information provided in this brief submission. I have written in similar terms to the Secretary of the Attorney-General's Department, as I am aware that it is open to each portfolio to review the application of the efficiency dividend measures within the portfolio. However, I believe there are special considerations applying to the OAIC that I should bring to your attention.

I have five main concerns:

- The steady increase in the OAIC's case workload
- The different treatment of the OAIC compared to other tribunals
- The unexpected high cost of administering the Information Advisory Committee
- The impact of further budget cuts on OAIC staffing levels and work output, and
- The reduction in the OAIC capital budget.

The OAIC is a very small agency with a budget of \$11,943m in the 2011-12 Portfolio Budget Statements.

Increase in OAIC case workload

The OAIC is a new agency established on 1 November 2010. The future workload was unclear when we commenced, and future patterns are still difficult to predict. However, I believe the OAIC's workload will be formidable and increasing and at the higher end of any previous expectations. Four areas of the workload warrant special consideration:

- *Information Commissioner review:* The *Freedom of Information Act 1982* (FOI Act) provides that a person may seek merit review of an FOI decision of an Australian Government agency or minister (called IC review). This external review function was formerly undertaken by the Administrative Appeals Tribunal (AAT), which received 83 FOI applications in 2010-11. The OAIC received 348 applications in the first year, between 1 November 2010 and 31 October 2011. It is possible, based on a gradual monthly increase in applications, that the OAIC could receive as high as 700 IC review applications in 2011-12.
- *FOI complaints:* The OAIC can investigate complaints about FOI administration by Australian Government agencies. The number of complaints received between 1 November 2010 and 31 October 2011 was 127. We expect a similar number of complaints in 2011-2012.

- *Privacy complaints:* This function was formerly discharged by the Office of the Privacy Commissioner (OPC), and is now discharged by the OAIC which incorporates the OPC. The number of privacy complaints received in 2010-11 was 1,222. We expect an increased number in 2011-12 (based on current figures) of 1359.
- *Privacy own motion investigations (OMI) and data breach notifications (DBN):* These functions have also been inherited by the OAIC from the former OPC. We expect that the numbers for 2011-12 will be similar to 2010-11 (48 OMIs and 43 DBNs). However, there could be a workload increase in both numbers, as indicated by a recent spate of DBNs and heightened sensitivity in the community to privacy breaches stemming from computer problems in large agencies and private entities.

Different treatment of OAIC compared to other tribunals

The Minister's announcement of the additional efficiency dividend stated that five tribunals would be exempt from this measure. One of those tribunals is the Administrative Appeals Tribunal (AAT).

The OAIC has three broad functions – freedom of information functions, privacy functions and information commissioner functions. A major element of the freedom of information functions is that the OAIC must undertake merit review of FOI decision making by Australian Government agencies and ministers. This task is essentially similar to the merit review of FOI decisions that has been undertaken by the AAT since the commencement of the FOI Act in 1982. That is, the OAIC is required to make a written decision in resolving a review application, the decision substitutes for the decision of the agency, and the OAIC can exercise the same powers as the AAT to receive evidence and to examine witnesses.

An important reason for the establishment of the OAIC was that external merit review of FOI decisions would now be undertaken principally by the OAIC in place of the AAT. A person can no longer appeal directly to the AAT from a primary FOI decision but must first seek review by the OAIC. It is likely that the AAT's FOI caseload will diminish substantially as a result of this change.

There was no explanation given in the Minister's statement as to why the AAT and other tribunals and courts were exempted from the additional efficiency dividend. However, it seems reasonable to presume that the reason for that exemption could apply as well to the OAIC in relation to its FOI merit review function.

Unexpected high cost of administering the Information Advisory Committee

The Information Advisory Committee (IAC) is established by the *Australian Information Commissioner Act 2010* (AIC Act). The function of the IAC is to advise and assist me in my role of providing advice to government on information policy and practice.

The AIC Act does not stipulate the number of members of the IAC. In September 2011 the members of the IAC were announced by the then Minister for Privacy and Freedom of Information, the Hon Brendan O'Connor, MP. The Committee comprises 13 members in addition to myself. Three members are Australian Government employees, and ten are external members. The external members are entitled under the AIC Act and Remuneration Tribunal determination to business class travel to IAC meetings and travelling allowance. The external members reside in Sydney (3), Brisbane (2), Adelaide (2), Melbourne (1), Lismore (1) and Canberra (1).

It is planned to hold three IAC face-to-face meetings each year in Canberra and one in Sydney. The cost of the first IAC meeting in December 2011 was \$6,043 (7 external members), but would have been \$13,910 if all members had opted to access business class travel. The cost could be higher than \$50,000 each year if all members attend meetings and access business class travel. There is also

interest among IAC members in forming sub-committees to work with OAIC staff. This would impose additional travel costs.

The OAIC will examine options for reducing the cost of future IAC meetings, but I do not see that a change to telephone conferencing will be viable in this establishment phase. IAC members agreed at the first meeting in December that the success of the meeting was largely attributable to opportunity the meeting presented for free-ranging discussion between people with differing expertise, who had not previously worked together as a committee, and who were deliberating on the role they could play in assisting government in the emerging area of information policy and practice. The Committee would not achieve its potential in this establishment phase if we were to attempt telephone conferencing over six sites for meetings likely to last for 3-4 hours.

The OAIC did not receive any ear-marked funding for IAC meetings and was expected to meet the costs from its own budget. The projected IAC costs are higher than we had anticipated, due to the high number of external members appointed to the Committee, and the high number who reside some distance from Canberra.

The IAC is an important element in the new scheme for development of information policy in the Australian Government. The variety of experience of Committee members means that it has the potential to make a valuable contribution to Australian Government administration and policy. My concern is that I will not be able fully to draw on the preparedness of Committee members to work with the OAIC, because it will be too costly for the OAIC to arrange regular committee and sub-committee meetings or to fully support the Committee in providing research and project assistance.

The impact of further budget cuts on OAIC staffing levels and work output

The Minister's announcement stated that agencies would be expected to find savings in a range of areas that included use of consultants, domestic and international travel, hospitality and entertainment, and media and advertising expenditure. The OAIC's expenditure in 2010-11 on the areas identified in the Minister's announcement amounted to approximately \$.264m or just over 3 per cent of that year's expenses.

It seems likely that the OAIC could only absorb the additional efficiency dividend by reducing staff numbers. Of the OAIC's 2011-12 budget of \$11,943m, 70 per cent relates to staffing costs. Only eight of the OAIC's current staff are non-ongoing.

The total staff of the OAIC is already substantially smaller than the estimated figure two years ago. The projected staffing figure provided by government during the establishment of the OAIC was that upon opening the office would have 100 staff. 68 staff were to come from the OPC, and 32 new positions were estimated for Budget development purposes for the new FOI and information policy functions. The total OAIC staff as at 30 June 2011 reported in the OAIC Annual Report 2010-11 was 78.87 FTE staff (the average staffing level for 2010-11 was 75.26 staff).

If we are forced to further reduce OAIC staff numbers, I hold a genuine concern that we will not be able to discharge our functions effectively. We are already experiencing difficulty in dealing with the complaints and IC reviews that we are receiving. For example, as at November 2011 the OAIC had completed 89 IC review applications (including 8 published decisions) and had an unresolved backlog of 259 cases. I believe that it will be embarrassing both to the reputation of the office and the success of the new open government measures if we are unable through staffing pressures to reduce the backlog.

Reduction in capital budget

A separate issue is that there is also to be a 20 per cent reduction in agency capital budgets. I believe that this measure will have a notable and uncharacteristic effect upon the OAIC, because an inadequate departmental capital budget (DCB) was provided for the OAIC on establishment.

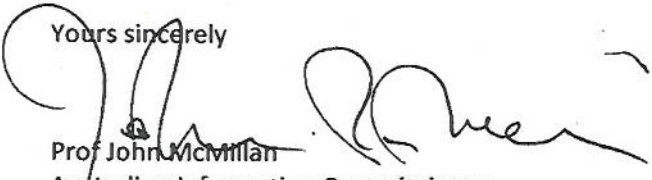
When it was established in November 2010, the OAIC received from the Department of Prime Minister and Cabinet (then the portfolio department) a capital injection of approximately \$2.1m. However, no arrangements were established for a DCB, other than to carry across the old DCB established for the OPC (\$0.025m). A reduced figure of \$0.02m would seem a completely inappropriate funding level to maintain a capital base of \$2.1m.

In addition during the last Capital Budget review OAIC sought to re-phase capital funding into 2012-13, but was advised that there was no scope for this re-phasing. Consequently, all remaining capital funds are now phased for 2011-12 with the remnant OPC DCB of \$0.025m applying after this time (to be reduced to \$0.02m under the new measure). We do not believe this will leave us in a viable position.

As part of its establishment, the OAIC purchased a new case management system to replace the legacy system from the OPC which is now ten years old and obsolete. Further significant capital expenditure this year will include development of a new website integrating the temporary site that was set up as an interim measure for the OAIC's launch and the old OPC website, and the purchase of an electronic records management system. These are essential purchases which will need to be maintained and then replaced at the end of their useful lives. This will not be possible with the OAIC's current DCB of \$0.02m.

I would be pleased to discuss these matters further or to provide additional information. I can be contacted directly on 6239 9124, or matters can be taken up with Alison Leonard, Assistant Commissioner Operations, on 6239 9128.

Yours sincerely



Prof John McMillan
Australian Information Commissioner

2 February 2012