



**Ensuring accessibility, openness and privacy:
Submission in response to the Office of the
Australian Information Commissioner's Issues
Paper 1 – Towards an Australian Government
Information Policy**

Lizzie Simpson, Solicitor

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work relevant to this submission

Open government

PIAC has a long-standing interest in open government and is a supporter of citizens' active participation in democratic processes. For over a decade, PIAC has provided public and customised training courses in public advocacy, empowering community members with the knowledge and skills to participate in and influence society's governance.

In 2009, PIAC made a submission¹ in response to the Australian Government 2.0 Taskforce's Issue Paper, *Towards Government 2.0*.²

¹ Robin Banks, Lizzie Simpson & Deirdre Moor, *Balancing information, privacy and accessibility: some comments on Towards Government 2.0* (2009) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2009/08/090824-piac-gov-20>> at 7 February 2011.

² Government 2.0 Taskforce, *Towards Government 2.0: an Issues Paper* (2009) <<http://gov2.net.au/consultation/2009/07/23/towards-government-2-0-an-issues-paper-final/>> at 24 August 2009.

Freedom of information

PIAC also has interest and expertise in freedom of information, and in privacy, advocating on the one hand for citizens to have access to public sector information, and on the other for adequate protection of an individual's right to privacy.

For over 15 years, PIAC has used freedom of information (FOI) legislation on behalf of clients. PIAC has undertaken a number of test cases under FOI legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588.

PIAC has written papers and contributed to debates about FOI legislation including making submissions to the Australian Law Reform Commission in respect of its inquiry into the FOI Act in March and July 1995³, to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009⁴, and to the NSW Government's exposure drafts of reforms to FOI laws.⁵

Privacy

PIAC also has a long history of interest in, and concern about, the appropriate protection of privacy rights within both the public and private sectors. PIAC has been a strong advocate for the protection of the privacy rights of individuals in Australia, particularly the rights to control one's personal information and to be free of excessive intrusions. PIAC's work as a consumer advocacy organisation, particularly in relation to health matters, has required PIAC to consider privacy issues because they are frequently a matter of concern to many people who contact the Centre.

In recent years, PIAC has provided legal advice and assistance to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) (the PPIP Act) and the *Privacy Act 1988* (Cth) (the Privacy Act). In 2006, PIAC represented the respondent in *Director General, NSW Department of Education and Training v MT* [2006] NSWCA 270, a landmark case concerning the interpretation of several provisions of the PPIP Act. In another matter, currently before the Office of the Privacy Commissioner (OPC), PIAC is

³ Australian Law Reform Commission, *Open government: a review of the federal Freedom of Information Act 1982*, Report No 77 (1995). See also, Kate Harrison, *Access to government using the Freedom of Information Act* (1983) PIAC; PIAC and Council of Social Services of NSW, *Freedom of Information: Community Information Program* (1988); Chris Shanahan, *Confidence and Confidentiality: Freedom of Information – Public and Private Right* (1992) PIAC; Fiona McMullin, *Public interest issues in exemption claims under the Commonwealth Freedom of Information Act: experiences of the Public Interest Advocacy Centre 1984-1994* (1994) PIAC; Bill McManus, *Australian Law Reform Commission – Review of the Freedom of Information Act 1982 (Cth): Submission in response to Discussion Paper No 59* (1995) PIAC; PIAC, *Australian Law Reform Commission Inquiry into the Freedom of Information Act 1982 (Cwth): Submission in response to issues paper 12 'Freedom of Information'* (1995); PIAC, *Submission on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* (2009). PIAC submissions are available on the PIAC website, <<http://www.piac.asn.au/publications/pubs/dateindex.html>> at 24 August 2009.

⁴ Lizzie Simpson, *Putting public interest at the heart of FOI: Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/SUB2009051_20090519.html> at 24 August 2009.

⁵ Lizzie Simpson, *Improving government accountability through information access: Submission in response to the NSW Government's public consultation draft, Open Government Information legislative package* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009060_20090605.html> at 21 August 2009.

representing a former Villawood detainee whose personal information was allegedly inappropriately disclosed to the media.

PIAC has played a leading role in privacy debates in Australia in recent years, contributing to a number of inquiries and reviews at the national and state level. Recent submissions by PIAC have addressed the privacy implications of the proposed Health and Social Services Access Card⁶, and the proposal by the Australian Bureau of Statistics to implement a longitudinal study in the population census (a proposal requiring capacity to data match over time).⁷ PIAC has also made submissions to both the New South Wales Law Reform Commission⁸ and the Australian Law Reform Commission⁹ about privacy law reform, particularly the introduction of a statutory tort of privacy.

Access for people with disability

PIAC has a long history of involvement with the operation of human rights and anti-discrimination law in Australia. This has including conducting test case litigation under both Federal and NSW anti-discrimination statutes, proposing amendments to both substantive and procedural aspects of anti-discrimination law and responding to new and amending anti-discrimination legislation.

In May 2003, PIAC made an extensive submission in response to the Productivity Commission's Issues Paper on the *Disability Discrimination Act 1992* (Cth) (the DDA). That submission focused on the interpretation and application of the phrase 'unjustifiable hardship' and on the complaint process.

General Comments

PIAC welcomes the opportunity to make a submission in response to the Office of the Australian Information Commissioner's Issues Paper, *Towards an Australian Government Information Policy* (Issues Paper).¹¹

⁶ Public Interest Advocacy Centre, *Health and Social Services Access Card: Submission to Access Card Consumer and Privacy Taskforce, Discussion Paper* (2006); Public Interest Advocacy Centre, *Access Card Proposal Still Fails Public Interest Test: Comment on the Exposure Drafts of the Access Card Legislation* (2007).

⁷ Public Interest Advocacy Centre, *Submission to the Australian Bureau of Statistics on Enhancing the Population Census: Developing a Longitudinal View* (2005).

⁸ Public Interest Advocacy Centre, *Matching Rights with Remedies: a statutory cause of action for invasion of privacy, Submission to the NSW Law Reform Commission on Consultation Paper 1 – Invasion of Privacy* (2007)
< http://www.piac.asn.au/sites/default/files/publications/extras/07.12.21-PIAC_Sub_to_DP72.pdf> at 9 February 2011; Public Interest Advocacy Centre, *Improving clarity and enhancing protection of privacy rights: Response to the NSW Law Reform Commission's Consultation Paper 3: Privacy Legislation in NSW* (2008)
< <http://www.piac.asn.au/sites/default/files/publications/extras/08.12.24-PIAC-NSWPrivacy.pdf>> at 9 February 2011.

⁹ Robin Banks & Anne Mainsbridge, *Resurrecting the right to privacy: response to Australian Law Reform Commission Discussion Paper 72: Review of the Australian Privacy Law* (2007)
< http://www.piac.asn.au/sites/default/files/publications/extras/07.12.21-PIAC_Sub_to_DP72.pdf> at 9 February 2011.

¹¹ Office of the Australian Information Commissioner, *Towards an Australian Government Information Policy, Issues Paper 1* (November 2010)
<http://www.oaic.gov.au/publications/papers/issues_paper1_towards_australian_government_information_policy.pdf> at 9 February 2011.

In PIAC's earlier submission to the Taskforce, PIAC strongly supported the program's aims of making government information more accessible and useable, and making government more consultative, participatory and transparent. However, PIAC considered that the challenge was to implement Government 2.0 in a way that balances open government and freedom of information with privacy, while providing maximum access for people with a disability or other particular needs.

In this submission, PIAC adopts a similar position, arguing that any Australian Government Information Policy must have at its core the principles of accessibility, openness and transparency.

Draft Principles on Open Public Sector Information

1. Open access to information – a default position

PIAC strongly supports Draft Principle 1. Consistent with this draft principle, PIAC submits that it is essential that agencies are under an obligation to proactively identify and disclose all information, unless there are very strong reasons why some government information should be withheld.

However, PIAC is concerned that this draft principle relies too heavily on information technology as the means for achieving open government information. While use of information technologies can (and most likely will) make it easier and more comfortable for many people to engage on policy and other issues, the total reliance on such technologies should be avoided. There are far too many people in Australia who are unable to access, either at a reasonable cost or at all, the benefits of such technologies. While most people working in office environments would have ready access to the technologies that will enable them to participate, others working in other environments, and many who do not have paid employment, do not have anything like the same ease of access. It would be inappropriate for Government to rely solely on information technology, such as websites and social media, as a means of access to information and as a mechanism to obtain public input to government processes and conduct consultations.

Government needs to commit to parallel mechanisms to ensure access for those otherwise precluded, such as people living in remote communities who may not have access to computers or the internet.

In addition, PIAC is of the view that all information, which is provided to the public through the use of websites or other information technology, must be available in an accessible form online with a mechanism readily available for a person to request the provision of information directly in an accessible form. This could mean, for example, having an identified office within government that can be contacted to request the relevant government information be sent by post in a particular form.

This approach is necessary to comply with Australia's commitments under the UN *Convention on the Rights of Persons with Disability*¹², in particular, its obligations under the following Articles of that Convention:

Article 9 – Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, ... to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

...

b) Information, communications and other services, including electronic services and emergency services.

¹² *Convention on the Rights of Persons with Disabilities*, opened for signature 31 March 2007, UN Doc/A61/611 (entered into force 3 May 2008, entered into force for Australia 16 August 2008).

2. States Parties shall also take appropriate measures:
- a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
 - ...
 - f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
 - g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
 - h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 29 - Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

- a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly ...
- b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs ...

PIAC raises the issue of accessibility based on its experience acting for Bruce Maguire who lodged two complaints of unlawful disability discrimination against the Sydney Organising Committee for the Olympic Games (SOCOG)¹³. The second complaint related to SOCOG's website. Mr Maguire wanted to access the website and keep up to date with current news of the Games. Mr Maguire had the software and hardware that enabled him to read websites that are formatted to provide access. SOCOG's website was not formatted correctly and was therefore inaccessible to him. Commissioner Carter found that SOCOG had indirectly discriminated against Mr Maguire by failing to make the website accessible to him, rejecting SOCOG's argument of unjustifiable hardship, which was that the cost and time of changing the website outweighed the benefit to Mr Maguire and others. This case received considerable media and professional attention and was the first case in relation to access to websites in the world.

Recommendation:

That Draft Principle 1 be amended to make it clear that government agencies should be required to provide additional or alternative methods of accessing information by people who are not able to access information online.

2. Effective information governance

PIAC supports Draft Principle 2. It is important that a senior officer within an agency is given clear responsibility for not only overseeing and managing an agency's information policies and FOI obligations but also acting as an advocate encouraging agency's to open up government information to the public.

¹³ *Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games* [2000] HREOC No. H 99/115 (Unreported, W Carter HC, 24 August 2000) <http://humanrights.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm> at 24 August 2009.

3. Robust information asset management frameworks

PIAC supports this draft principle: ensuring government-held information is properly managed maximises the ability of the public to access that information.

4. Findable information

PIAC does not have any comments to make about Draft Principle 4.

5. Sound decision-making process

PIAC broadly supports Draft Principle 5.

In relation to the issue of protecting personal information, PIAC reiterates the comments it made to the Government 2.0 Taskforce about the privacy risks associated with the use of online technology, particularly the problem that personal information may be collected ‘invisibly’ from people visiting government websites, and other websites such as social media, and how that information is subsequently stored, used and disclosed. If people who have engaged with government through government websites and social media subsequently discover that information has been collected about their visit to the site without there being public disclosure of that collection (as well as information about the purpose of collection, use, storage and disclosure), those people are less likely to be willing to use such technologies in future to engage with government and, indeed, may reduce their other engagement with government processes. This could also raise concerns about compliance with Information Privacy Principles 1 and/or 2 of the *Privacy Act 1988* (Cth).¹⁴

The potential for users to disclose personal information of a third party also highlights the need for active moderation of social media sites that are used by government agencies in order to avoid those sites being used for unlawful or illegal purposes including breach of privacy, defamation and harassment.¹⁵

6. Transparent complaints processes

PIAC strongly supports Draft Principle 6.

Additionally, PIAC suggests that greater emphasis be placed on improving education and training of public servants, Ministers and other senior officials about the positive benefits of actively disseminating government information to encourage decision-makers to make less conservative and more rigorous decisions.

¹⁴ *Privacy Act 1988* (Cth), s 14.

¹⁵ Banks et al, above n1, p 4.

7. Open and accessible formats online

PIAC refers to the comments it made in relation to Draft Principle 1 above, and suggests that this principle could be drafted more broadly to ensure that it also covers individuals who are not able to access the internet or other online information sites.

8. Appropriate charging for access

PIAC strongly supports this draft principle.

PIAC takes the view that the charges imposed by an agency for providing access to information should be limited to the costs of enabling access to the information, and not the cost of producing the information.

In order to reinforce this draft principle, PIAC considers that it may be helpful to emphasise that access to government information is part of an individual's fundamental democratic right; and that rights should not be made conditional on paying for them. This is a cost that government should bear as part of fulfilling its democratic responsibilities of being transparent and accountable to the people. As the Electoral and Administrative Review Commission commented in its 1990 report, *Report on Freedom of Information*:

Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.¹⁶

Recommendation:

That Draft Principle 8 be amended to emphasise that access to information is part of a person's fundamental democratic rights and therefore the cost of access should be minimal.

9. Clear reuse rights

PIAC does not have any comment in relation to Draft Principle 9.

10. Engaging the community

Broadly speaking, PIAC support Draft Principle 10, but urges the Office of the Information Commissioner to consider broadening the scope of this principle.

¹⁶ Electoral and Administrative Review Commission, *Report on Freedom of Information* (1990) 181 cited in FOI Independent Review Panel, *The Right to Information –Reviewing Queensland's FOI Act* (2008) 185.

The idea of engaging the community in questions about government information policy should not be limited to consultation or discussions about which particular pieces of information should be published or allowing individuals to identify errors or raise concerns: the principle should also recognise that community engagement can generate government information, for example via social media websites.

Some examples of broader community engagement or online collaboration were reported in the Government 2.0 Taskforce Report including the Human Rights e-forum, the Homelessness Information Clearinghouse and the open forum as part of the National Human Rights Consultation.¹⁷

Recommendation:

That Draft Principle 10 be amended to include broader engagement with the community about government information policy.

¹⁷ Government 2.0 Taskforce, n 2 above, 4.5.1

Recommendations

1. That Draft Principle 1 be amended to make it clear that government agencies should be required to provide additional or alternative methods of accessing information by people who are not able to access information online.
2. That Draft Principle 8 be amended to emphasise that access to information is part of a person's fundamental democratic rights and therefore the cost of access should be minimal.
3. That Draft Principle 10 be amended to include broader engagement with the community about government information policy.