



Review of Freedom of Information Laws

7 December 2012

Michelle Cohen, Senior Solicitor

Edward Santow, Chief Executive Officer

Tami Sokol, 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; and
- 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 (then) 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 Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens 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>>.

² Government 2.0 Taskforce, (2009), *Towards Government 2.0: an Issues Paper*.

Freedom of information

PIAC also has a long-standing interest and expertise in the operation of the *Freedom of Information Act 1982* (Cth) (**FOI Act**), and comparable legislation in other Australian jurisdictions. PIAC has represented individuals and groups seeking government-held information, the release of which is a matter of public interest.

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. This includes, *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, in the early days of FOI law and practice. PIAC's work in this area has continued. For instance, more recently PIAC successfully sought access, on behalf of a consortium of public interest organisations, to important information regarding Australia's role in the conflicts in Iraq and Afghanistan.³

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 1995;⁴
- NSW Ombudsman's review of the *Freedom of Information Act 1989* (NSW);⁵
- NSW Government's public consultation draft into its Government Information legislative package;⁶
- Commonwealth government in response to its exposure drafts of the *Freedom of Information Amendment (Reform) Bill 2009* and the *Information Commissioner Bill 2009*.⁷

³ This work was covered extensively in the media. See, e.g., Anne Davies and Deborah Snow, 'Little firm exposes big mess', *Sydney Morning Herald* (4 July 2011). The full repository of documents is available at <http://military.piac.asn.au>.

⁴ Australian Law Reform Commission, *Open government: a review of the federal Freedom of Information Act 1982, Report No 77* (1995) (ALRC Report 77). 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 (Cth): 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).

⁵ Lizzie Simpson, Ee-von Lok and Claire O'Moore, *Freeing up information: response to the NSW Ombudsman's Review of Freedom of Information Law in NSW* (2008) Public Interest Advocacy Centre http://www.piac.asn.au/publications/pubs/sub2008111_20081117.html.

⁶ Lizzie Simpson, *Improving government accountability through Information Access: Submission in response to the NSW Government's public consultation draft, Open Government Information legislative package*, (2005) Public Interest Advocacy Centre <http://www.piac.asn.au/sites/default/files/publications/extras/09.06.05-PIAC-NSWFOISub.pdf>.

⁷ 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*

- Senate Finance and Public Administration Committee on the Commonwealth freedom of information reforms;⁸ and
- Australian Information Commissioner's review of charges under the *Freedom of Information Act 1982* in November 2011.⁹

In addition to the matters already resolved, PIAC continues to be involved in multiple FOI matters relating to the Department of Defence's handling and exchange of military prisoners in Afghanistan. The project began in 2005 when PIAC made FOI requests to the Department of Defence and the Department of Foreign Affairs and Trade for information regarding the rendition of detainees. PIAC appealed the Department of Defence decision to the Administrative Appeals Tribunal. In 2010 and 2011, PIAC reached a settlement with the Department of Defence wherein the Department provided PIAC with a significant proportion of the documents that it had previously claimed were exempt from disclosure under the FOI Act. The continuation of this project includes multiple FOI applications relating to Australia's role in the current conflict in Afghanistan which are currently on foot.

PIAC continues to represent a number of clients in their applications for important information via the FOI Act. By assisting and representing such individuals and groups – noting that they do not have the means to obtain paid representation elsewhere – PIAC plays an important role in contributing to the achievement of the objectives of the FOI Act.

General comments

PIAC welcomes the opportunity to make a submission in response to the review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010 (AIC Act)*. The positions adopted by PIAC in this submission are informed by PIAC's experience, especially in representing clients, as noted above.

In PIAC's earlier submissions on this subject, PIAC strongly supported the fundamental aims of FOI law – namely, to make government information more accessible and useable, and to make government more consultative, participatory and transparent. PIAC congratulates the Australian Government on earlier reforms to FOI legislation, which have sought to promote these principles.

However, PIAC believes and has previously argued that there are areas where the implementation of the legislation, or the drafting of the provisions itself, operate against the aims of the legislation. PIAC supports many of the reforms implemented in 2009 and 2010 to improve the effectiveness of the FOI regime. Nevertheless, PIAC continues to have concerns about some of the ways in which federal FOI law and practice seek to achieve accessibility, openness and transparency.

Commissioner Bill 2009, (2009), Public Interest Advocacy Centre

<http://www.piac.asn.au/sites/default/files/publications/extras/09.05.19-PIAC-FedFOISub.pdf>.

⁸ Lizzie Simpson, *Freedom of information repackaged: submission to the Senate Finance and Public Administration Committee on the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) Public Interest Advocacy Centre

http://www.piac.asn.au/sites/default/files/publications/extras/10.01.29-PIAC-sub_re_Cth_FOI_reforms.pdf.

⁹ Edward Santow & Lizzie Simpson, *Freeing up government information* (2011) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2011/12/freeing-government-information>.

1. Impact of earlier reforms to freedom of information laws including review and complaints

1.1 Review processes

As noted above, PIAC supports many of the reforms implemented in 2009 and 2010 to improve the effectiveness of the FOI regime. For example, progress has been made in making FOI more accessible by removing application charges for FOI applications, for internal review and for review by the Information Commissioner (**IC**). The internal review and IC review processes, and the publication of decisions by the IC, can help to promote consistency of FOI decision making across Commonwealth agencies, and to set minimum standards.

However, PIAC expresses some concerns over the conduct of external review by the IC, and the operation of the two-tiered merit review system under part 3 below.

1.2 Investigation of complaints

PIAC has previously submitted that investigation of complaints under the FOI Act could be enhanced by making provision for representative complaints, made on behalf of a group against the same agency, where the same common issue of law or fact arises.¹⁰ Currently, the FOI Act does not specifically provide for a representative complaints process.

Take the following hypothetical example, based on PIAC's experience in a number of situations. Imagine a residential community group became aware that a number of people had sought information through the FOI Act from a particular government agency, concerning matters that affect their community. At a local community meeting, a number of community members became aware that the relevant agency had failed adequately to respond to their FOI requests, and failed to comply with the FOI Act in the same way (i.e., all the decisions were not made within time, or no applicant was provided with reasons for the decision). In this situation, it would be more efficient for a representative complaint to be made, than have the IC deal with each complaint on a case-by-case basis. The representative complaints function could operate in the same way as s 38 of the *Australian Information Commissioner Act 2010* (Cth), which provides a process by which representative complaints can be made to the IC in relation to breaches of the *Privacy Act 1988* (Cth).

PIAC believes that such a provision would have the effect of reducing the number of complaints made to the Office of the Australian Information Commissioner (**OAIC**). It would also reduce the resources required to investigate individual cases that continually raise the same or similar issues, and enable the OAIC to consider systemic issues rather than just individual cases.

PIAC supports the OAIC's ability to investigate complaints regarding the operation of the FOI Act on its own motion,¹¹ and we submit that this function should be retained. An own-motion investigation function complements the other roles of the OAIC, such as preparing annual

¹⁰ Above n 7, 29

¹¹ Part VIIB, Division 2 of the FOI Act

reports, conducting audits and issuing reports cards on the performance of agencies, and promoting awareness about the new FOI laws. PIAC supports retaining the requirement for agencies to provide the OAIC with information under s 93 of the Act, to assist the OAIC to perform its functions in an efficient and effective manner.

However, as a practical matter, the OAIC's ability to undertake own-motion investigations is constrained by its available resources. Given the backlog in processing complaints¹², it seems unlikely that the OAIC will be able to exercise this function to the extent that may be necessary. Therefore, PIAC submits that the OAIC should be adequately resourced to investigate complaints to further the objectives under the Act, effectively resolve problems that arise regarding agency decisions, and promote savings and efficiency under the Act.

Recommendation 1

1. *Parts VII and VIIA of the Freedom of Information Act 1982 (Cth) should be amended to allow for review applications to be made as representative complaints.*

Recommendation 2

2. *The Office of the Australian Information Commissioner should retain the power to initiate own-motion investigations in relation to the operation of the Freedom of Information Act 1982 (Cth).*

Recommendation 3

3. *Adequate resources should be provided to the OAIC to enable it to conduct efficient and expeditious investigations, and effectively to resolve problems that arise regarding agency decisions under the Freedom of Information Act 1982 (Cth).*

2. Effectiveness of the OAIC

PIAC strongly supports the Australian Parliament's decision to establish the OAIC as an independent statutory office.

The OAIC has been able to fulfil a number of essential functions, including monitoring, reporting, providing education, advice and guidance to both agencies and the community about the FOI Act. PIAC endorses the OAIC's role as an advocate for a whole-of-government approach to information policy and opening up government information to the public. In PIAC's view, this is an essential part of the ongoing process of acculturating government agencies to openness and eschewing unnecessary restrictions on the free flow of information.

PIAC's experience has been that there has been a considerable degree of inconsistency in the interpretation of key FOI Act provisions across government. We have observed this both through our own experience, and anecdotally in our engagement with other community organisations. In PIAC's experience, we have observed there to be varying points of view across government agencies regarding the process and the timeline for consultation with third parties. We have also become aware that there is a varying degree of transparency exhibited by agencies. For example, in support of a decision made under the FOI Act, one agency provided PIAC with a

¹² Office of the Australian Information Commissioner, *Annual Report 2011-2012*, 21 and 96.

schedule of all documents that it located in relation to our request, and identified document by document where particular exemptions of the FOI Act apply. Another agency provided PIAC with a bundle of pages, but did not advise us whether any additional documents were located that had been fully exempt or which pages provided belonged to which documents where documents were partially exempt.

Of course, the significant FOI reforms make it almost inevitable that initially there will be at least *some* inconsistency as agencies grapple with the amended regime, and what it requires as a matter of practice. However, the level of inconsistency is marked even taking this into account.

A key means of promoting a consistent approach across agencies is the provision of OAIC guidance and the building of a body of jurisprudence (from the OAIC, the Administrative Appeals Tribunal and the court system itself), which would delineate the practical boundaries of the FOI Act. With this in mind, it would be useful for the OAIC to review and amend the FOI guidelines to be more prescriptive in certain areas to ensure greater consistency of application of the FOI Act, and stricter adherence to the Act's key objectives.

This would be particularly useful in the area of public interest charges waivers, discussed below, for which there is a notable lack of consistency in the amount of discount provided and in the application of the Commissioner's guidelines across agencies.

Although ss 30 and 31 of the AIC Act state that the IC is to provide the Minister and Parliament with an annual report about the operation of FOI legislation, PIAC submits that a formal process of reporting be implemented across all agencies to report annually to the OAIC on their implementation of the FOI Act and these reports should be available to the public in accessible form (either via each agency's website or the OAIC's website). This would also assist the OAIC in performing its functions under s 7(g) AIC Act.

The OAIC should also issue guidelines that specify how agencies should comply with these reporting requirements to ensure that statistics and reports provided give a clear and comprehensive picture of an agency's implementation of the FOI Act. The OAIC should be able to provide annual 'report cards', based upon agencies' reports and other evidence such as investigations by the OAIC on how well each agency is complying with the requirements of the FOI Act. This would allow the OAIC to highlight best practices as well as agencies that are performing poorly in applying FOI legislation. This would also encourage the development of better file management systems within agencies to lessen their administrative burden and ensure efficient processing of requests.

2.1 The disclosure log

Section 11C of the FOI Act provides that the IC is responsible for the maintenance and publication of a 'disclosure log'. The rationale of this reform is laudable – namely, to promote openness and transparency and ensure that the fruits of FOI applications (other than those relating to personal information) are shared across the community.

However, PIAC is concerned that the operation of the disclosure log, in its current form, is having a number of unintended, negative consequences. PIAC submits, for the reasons set out below, that the disclosure log regime should be tweaked to address these problems.

As it presently operates, the disclosure log impacts negatively on investigative journalists, and others wishing to use the FOI Act to promote accountability in respect of government activities. The problem is not with the disclosure log per se, but rather that the risk of immediate publication of documents on the disclosure log creates a powerful disincentive for such people to use FOI, given the professional and commercial imperative in being able to 'break' a newsworthy story – that is, to be the first person to report a new event or story to the public.

It is almost universally accepted that, while investigative journalists and others might occasionally be irritating to government, and the light they shine might of course have the potential to cause political embarrassment, the role that investigative journalists and other accountability organisations play is crucial to a system of liberal democracy. There is clearly a very strong public interest in revealing government corruption, unlawful activity or incompetence.

FOI can be a powerful tool in the revelation of such activity. PIAC's own experience, referred to above, in respect of military accountability is a case in point. In addition, just within the last month, information obtained under the FOI Act has recently been used to promote government accountability in relation to the treatment and detention of asylum seekers¹³, and to air government concerns with respect to public health¹⁴. For this reason, any action by government that might limit or deter this kind of investigation using FOI should be very carefully scrutinised.

PIAC submits that the disclosure log should be retained, but that a better balance be struck to promote general openness in respect of government information while not deterring investigative journalism.

In striking a more appropriate balance, PIAC proposes that consideration be given to the process by which decisions are made regarding *when* to place documents onto the disclosure log. Although the maximum time frame for release is set at 10 days, the discretion regarding when to release documents that have been produced under the FOI Act is provided to each individual agency. PIAC believes that s 11C of the FOI Act should be amended to require a government agency to consult with the applicant regarding the appropriate timing for publication of material on the disclosure log. The Act should state that an applicant should be able to request that the document(s) obtained via FOI should not be published on the agency's disclosure log for up to one week following disclosure to the applicant, and that this request must be complied with by the agency unless there are compelling public interest reasons to the contrary – a decision that would be subject to merits review by the OAIC on an urgent ex parte basis.

¹³ Taylor, Paige, *Asylum Surge Means it's Camping on Christmas Island*, The Australian, 14 November 2012
<http://www.theaustralian.com.au/national-affairs/immigration/asylum-surge-means-its-camping-on-christmas-island/story-fn9hm1gu-1226516189011>.

¹⁴ Tanquintic-Misa, Esther, *Australia Maybe Getting Richer But It's Also Getting Sicker, No Thanks to the Mines* International Business Times Australia, 5 November 2012
<http://au.ibtimes.com/articles/401371/20121105/mines-asthma-australia.htm>

PIAC also submits that the legislation (FOI Act or the Regulations) should be amended specifically to require an agency to consider whether charges should be reduced or waived in circumstances where a document requested by the applicant is published on the disclosure log earlier than seven days from the day on which the documents were provided to the applicant. The OAIC has offered preliminary consideration to the relationship between the time of disclosure and the waiving of fees in the IC guidelines to the Act¹⁵. PIAC supports the IC's general approach to waiving charges in these circumstances but advocates for a longer period between release of documents and their publication on the disclosure log.

There is also an anomaly in the FOI regime in that, if an agency chooses to provide a document to an applicant for an administrative access scheme, the agency is not required to publish that material on its disclosure log. Unless the document(s) in question would not have been disclosed via FOI, there seems no compelling policy reason why such documents should not be subject to the disclosure log process as well.

In addition, having the disclosure log available in online format only can create accessibility problems for people with disability, or who are unable to access the Internet. PIAC submits that agencies publish a list of documents as an Appendix to their annual report to the OAIC.

Recommendation 4

4. *Each government agency should be required to report annually to the OAIC on its implementation of the Freedom of Information Act 1982 (Cth), and these reports should be publicly available.*

Recommendation 5

5. *Section 11C of the Freedom of Information Act 1982 (Cth) should be amended to state that:*
 - (a) *a government agency must consult with the applicant regarding the appropriate timing for publication of material on the disclosure log;*
 - (b) *an FOI applicant may request that any document(s) the applicant obtains via FOI not be published on the agency's disclosure log for up to one week following disclosure to the applicant;*
 - (c) *the agency must comply with this request unless there are compelling public interest reasons to the contrary – a decision that is subject to merits review by the OAIC on an urgent ex parte basis.*

Recommendation 6

6. *The Freedom of Information Act 1982 (Cth) or Regulations should be amended specifically to require an agency to consider whether charges should be reduced or waived in circumstances where a document requested by the applicant is published on the disclosure log within seven days of also providing that document to the applicant.*

¹⁵ Freedom of Information Commissioner, (2011), *Guide to Freedom of Information Act 1982*, 14.

3. Effectiveness of two-tiered system of merits review

PIAC acknowledges that the introduction of the OAIC's merits review process has created a more informal external merits review process for FOI decisions, as compared with the merits via the Administrative Appeals Tribunal. It is also significant that OAIC review can be conducted 'on the papers' without requiring the applicant to pay an application fee. However, due to resource constraints within the OAIC, and the absence of a statutory timeframe, IC reviews add significant time to the resolution of a FOI request. Ensuring that information is provided in response to applications within a reasonable time frame is essential to ensuring that the value of documents sought under an FOI request is not diminished by unnecessary delay.

Furthermore, many cases under the FOI Act raise complex issues of statutory interpretation and it is more appropriate that these be decided by the AAT.

The AAT is subject to a statutory requirement to provide 'a mechanism of review that is fair, just, economical, informal and quick',¹⁶ and has established case-management procedures that ensure that cases are generally dealt with in a timely manner. By contrast, while it is clear that the OAIC has been undertaking very considerable efforts to perform its functions to the best of its ability with limited resources, the OAIC is not subject to a comparable statutory exhortation, and its process for conducting IC reviews is not as well developed.

In PIAC's experience, the lack of statutory timeframes, which apply to privacy complaints, is problematic and undermines a critical theoretical advantage of this review mechanism. Creating an added level of review can, of course, increase the administrative burden on agencies and create a lengthy resolution period for the applicant. In many circumstances, the information sought in a FOI application has some urgent use for which it is sought and additional delays in processing requests detracts from the Act achieving its stated purpose.

For example, PIAC is currently in the process of seeking documents under the FOI Act regarding Australia's compliance with international human rights law obligations. However, as time passes, the ability of any material obtained to assist outcomes in the current military deployments overseas is diminished. In this matter, PIAC's initial request was made in March 2012. The request has now been through the process of internal review, and we have made a subsequent application to the IC. We do not expect a response from the IC until March 2013, and do not anticipate that we will receive any documents until July–August 2013, taking into account anticipated applications for extension of time from the relevant government department for consultations with third parties, and to process the request.

PIAC is of the view the IC should retain determinative review powers, but that applicants should have the option of applying directly to the AAT for a review of an access-refusal or access-grant decision.

However, if the IC is to retain its determinative review powers, additional safeguards must be built into this review mechanism.

First, specific time periods could be built into IC reviews. For example, the Independent Review Panel has suggested that the Queensland FOI legislation should specify that there are 20

¹⁶ *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

working days for an IC mediation, 20 working days are then allowed for the parties to make additional submissions if they fail to reach an agreement during mediation, and a further 40 working days for the IC to reach a decision about an external review.¹⁷ Where those time frames are not met, the IC review would be considered a deemed refusal.

Alternatively, there could be a more general provision allowing the applicant to treat an IC review as a 'deemed refusal' after 60 days and be allowed to progress to the AAT for a decision.

Finally, the FOI Act could require the IC to establish and publish case-management procedures consistent with those adopted by the AAT or Federal Court to ensure that matters are properly dealt with in a timely manner.

Recommendation 7

7. *The IC should retain determinative review powers, but applicants should be able to apply directly to the AAT for a review of an access-refusal or access-grant decision.*

Recommendation 8

8. *Alternatively, Part VII, Division 6 of the Freedom of Information Act 1982 (Cth) should be amended to introduce time frames in relation to Information Commissioner reviews. Where time frames are not met, the Information Commissioner review would be treated as a 'deemed refusal' and the applicant would be able to progress to an AAT external review.*

Recommendation 9

9. *The Freedom of Information Act 1982 (Cth) should be amended to require the Information Commissioner to establish and publish case management procedures consistent with those adopted by the AAT or Federal Court to ensure efficient management of Information Commissioner Reviews.*

4. Reformulation of exemptions, including the new public interest test

4.1 Reformulation of exemptions

The ALRC said in 1995 that '[w]hat distinguishes the approach to disclosure of government information in the FOI Act from approaches taken prior to its enactment is its focus on the public interest'.¹⁸ Stemming from this, as a fundamental feature of FOI legislation, is that it creates a *right* of access to government-held information.

PIAC supports the new formulation of exemptions and the introduction of a public interest test for conditionally exempt categories of materials. However, PIAC believes that the public interest test should extend to *all* categories of exemptions in order to further the aims of the FOI Act and to ensure the circumstances of each request are considered on a case-by-case basis. By way of illustration, some documents may genuinely be sensitive when they are created, but that

¹⁷ Freedom of Information Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008), 250-53.

¹⁸ Australian Law Reform Commission, above n 4, 95

sensitivity may diminish markedly over time. For example, generally it would not be in the public interest to release a document containing information about a criminal investigation while the investigation is on foot, but when an investigation is complete there may no longer be any compelling reason to deny access to the document.

Furthermore, PIAC maintains that classes of documents or agencies should not be automatically excluded from the provisions of the Act merely because they are more likely to create sensitive documents in the course of their duties as a result of the nature of their organisation or a particular aspect of their work. This is discussed further under part 5 below.

4.2 Public interest factors

In PIAC's experience under the current Act, in considering FOI requests, agencies have focussed disproportionately on exemptions and other reasons against disclosure, at the expense of giving due weight to public interest factors in favour of disclosure. PIAC believes that the list of public interest considerations, as currently set out in s 11B of the FOI Act, goes some way towards creating a stronger pro-disclosure culture within government but the weighing up exercise conducted by agencies should be more clearly articulated to applicants.

We note that some additional factors in favour of disclosure are set out in the IC's guidelines on the public interest test. We support the detailed explanation of the principles and weighing-up exercise, which should form the basis of a determination under Part III of the Act. Without those guidelines, there is a risk that the factors set out in s 11B could end up being treated as the only legitimate public interest factors that should be taken into account when considering an FOI request notwithstanding that the legislation expressly states that the list is not intended to be exhaustive.

4.3 New exemption

PIAC notes that the reformulation of the exemptions has resulted in the introduction of s 47 of the FOI Act as an exemption for trade secrets and commercially valuable information, which is not subject to an overriding public interest test.

At the time of introducing this exemption, the Explanatory Memorandum set out the rationale for the change as being that "information of this type has very high commercial value and includes information that gives business an advantage over its competitors".¹⁹ PIAC contends that this is not a sufficient justification for removing it from the list of conditional exemptions subject to the public interest test. While it may be true that some trade secrets and commercially valuable information has 'high commercial value' and may provide competitive advantage, this private interest ought not automatically to trump the public interest.

It is also problematic that trade secrets and commercially valuable information is not considered within the terms of s 47G – ie, the conditional exemption for business information – especially given that the term 'trade secrets' is not defined in the FOI Act. Although the IC guidelines attempt to provide clarity on the operation of s 47, there still appears to be an unnecessary and confusing overlap between the operation of ss 47 and 47G.

¹⁹ Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2009 (Cth), 19.

Recommendation 10

10. Section 47 of the Freedom of Information Act 1982 should be deleted and s 47G should be expanded explicitly to include trade secrets and commercially valuable information.

Recommendation 11

11. The words in ss 47G(1)(a) and 47G(1)(b) of the Freedom of Information Act 1982 “would, or could reasonably be expected to” should be amended to read, “would reasonably be expected to”.

5. Appropriateness of agencies covered

There appears to be a lack of any common characteristic, or overarching justification, for the agencies and documents currently listed in Schedule 2 of the FOI Act.

Agencies should not be automatically exempt from the provisions of the FOI Act merely because they are more likely to create sensitive documents in the course of their duties as a result of the nature of their organisation – eg, the Australian Secret Intelligence Service, Australian Security Intelligence Organisation or the Parliamentary Budget Office.

PIAC submits that the majority of agencies named in Schedule 2 could rely on the other exemptions in the FOI Act where they hold truly sensitive documents that it would be contrary to the public interest to disclose. To the extent that the existing exemptions do not cover these documents, new exemptions could be created within the body of the FOI Act and made subject to the public interest test.

Recommendation 12

12. The Australian Government should review the continued use of Schedule 2 of the Freedom of Information Act 1982 (Cth). All agencies should be required to justify their continued exclusion from the Act in relation to the functions/documents listed in the Schedule.

6. Role of fees and charges

6.1 Different approach to charges

PIAC maintains its previously-stated position that the idea of recovering costs from applicants is at odds with the fundamental principle that FOI concerns the right of individuals to access information:

[R]ights 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. On a practical level, PIAC is not convinced that the existing fees actually cover the costs involved in acknowledging receipt of a freedom of information request and making an initial assessment of the request, particularly if the application fee is reduced

on the basis of financial hardship or public interest to only \$15 to make an initial application and \$20 to seek an internal review.²⁰

In addition, Article 19(2) of the International Covenant on Civil and Political Rights provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek and receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The United Nations Human Rights Committee has determined that the right to access information provided for under Article 19 of the ICCPR includes access to government information²¹.

Therefore, PIAC's primary submission is that the FOI Act should be amended to remove all fees and charges in respect of FOI applications. This position would provide recognition of the open government imperative in international human rights law, and the implied freedom of political communication that is protected under the Australian Constitution.

In the alternative, fees and charges should not be payable when applications for government documents are made in the public interest. A waiver of all fees and charges should apply to individuals, not-for-profit organisations and journalists where persons in each of these categories make FOI requests to further the public interest. Adoption of this approach would be consistent with the objectives of the FOI Act, and acknowledge the uneven relationship between government agencies and FOI applicants, in particular when those applicants can demonstrate financial hardship.

In 2010-11, the total amount of fees and charges collected represented only 1.68% of the total costs of administering the FOI Act.²² Given that the amount of fees and charges collected by agencies represents a tiny proportion of the cost of administering the FOI Act, it seems clear that the Act's charges and fees are not imposed to cover the costs associated with processing FOI applications.

PIAC is of the view that it would be appropriate for a separate mechanism to be included in the FOI Act to resolve the costs of dealing with vexatious requests. One of the rationales for imposing charges for applications made under the FOI Act is to create a disincentive for vexatious applicants to make requests that only harass or intimidate staff, or unreasonably interfere with the operations of any agency. Specific provisions that address vexatious requests would provide agencies with a way to control their costs with respect to vexatious applications and create a disincentive for vexatious applicants.

PIAC submits that agencies should be able to refuse a request when the agency considers that the request is vexatious, but that any decision to refuse a vexatious request should be reviewable by the IC. This will provide agencies with a way to control their costs associated with vexatious

²⁰ Simpson with Lok and O'Moore, above n 5 at 34

²¹ Human Rights Committee, General Comment No.34 (12 September 2011), CCPR/C/GC/34, Paragraphs 18 and 19.

²² Prof. John McMillan, *Review of Charges under the Freedom of Information Act 1982*, (2012), 5.

requests, and the right of review will ensure that the appropriate checks and balances are afforded to preserve the ability for persons to access government information.

Currently, Part VIII Division 1 of the FOI Act deals with the ability for certain persons to be declared vexatious applicants. PIAC reiterates concerns that we have previously raised regarding the power to stop applicants making *any* FOI requests or other applicants under the FOI Act if they are declare 'vexatious', and the ability for these powers to be open to abuse. We have previously submitted that it is more consistent with the purposes of the FOI Act to focus on vexatious requests rather than vexatious applicant (an approach which is taken in Tasmania²³ and the UK²⁴).

6.2 Recommendations of the Information Commissioner

6.2.1 Administrative access scheme

The IC, in his 2012 report,²⁵ recommended a new charges framework aimed at encouraging no cost administrative access as the first step to any information access request. PIAC broadly encourages this approach.

The recommendations suggest that agencies may impose a \$50 application fee if a person does not make an administrative access request before making an FOI request. PIAC believes imposing a cost at any stage of the FOI process is contrary to achieving the aims of the legislation. In this case, an additional concern is the further administrative burden on agencies that is created by requiring an application via administrative access before an FOI request, especially where the request may not be suitable for the administrative access scheme – e.g., documents that require third party consultations.

6.2.2 Processing and other access charges

PIAC agrees that subject to a ceiling of 40 hours, there should not be charges in respect of personal information under the FOI Act.

The IC recommended a tiered charging model where no processing charges would be payable for the first five hours of processing time, \$50 per hour for hours 5 – 10 and then \$30 per hour for every hour after 10 hours of processing time²⁶. The recommendations also included additional costs for supervising document inspection and other activities. As stated above, PIAC believes that if charges are to be payable, they should reflect the amount of information provided rather than the processing time.

PIAC is of the view that applicants should not be penalised if agencies do not have efficient record-management systems. If an agency's record-keeping systems are such that it takes many

²³ *Right to Information Act 2009 (Tas)*, s 20

²⁴ *Freedom of Information Act 2000 (UK)* s 14(1).

²⁵ Above n 22, Part 4.

²⁶ Above n 22, 37-39.

hours to process even a simple FOI request, the applicant should not be made to pay for that time. Indeed, the approach proposed is likely to encourage agencies to reconsider and improve their existing records management system. Similarly, such an approach to costs would encourage applicants to narrow their search to only those documents that they are really interested in, and hence, are prepared to pay for. It would also deter agencies from over-reliance on exemptions, given that if agencies refused to grant access to documents they would not be able to impose any charges in relation to that decision.

This proposal is consistent with the recommendations made by the Independent Review Panel in its report in 2008,²⁷ and reflects the criticisms of the ALRC in its review that '[r]ecords management, which is fundamental to the effectiveness of the FOI Act, is not given sufficient prominence'.²⁸

6.2.3 Processing time and practical refusal

The IC's recommendations included a ceiling on processing time, whereby any request, which would require more than 40 hours of processing time, will operate in place of practical refusal and create a barrier to fulfilling the request.²⁹ For the reasons outlined above, PIAC believes that FOI applicants should not be penalised for inefficient record-keeping and administrative processes within an agency. In addition, although the operation of the practical refusal provision is not consistent across departments, removing the consultation element of the practical refusal process removes an inclusive tool for ensuring better access to information.

Instead of imposing a ceiling on processing time, it would be preferable to create guidelines on the use of the practical refusal power to ensure consistency across agencies and continue to promote meaningful consultation between the applicant and the agency.

6.2.4 Waiver

PIAC notes that currently there is a worrying inconsistency between agencies in the amount of reduction they offer in the case of demonstrated financial hardship or special benefit to the public. In PIAC's experience, the finding of public interest or financial hardship can result in different reduction amounts by different agencies – eg, a 25% reduction on one occasion, 17% on another occasion and 50% on a third occasion. PIAC supports the recommendation of the IC that there should be a set reduction amount if the specified grounds for waiver are made out but PIAC is of the view that in all these cases the reduction should be 100% of the costs.

However, more guidance and specificity are needed in applying the IC's guidelines to these tests, to ensure consistent application. A 'guideline judgment' of the IC may provide more persuasive and clearer reasoned steps to follow for each agency in determining waiver.

²⁷ Electoral and Administrative Review Commission, *Report on Freedom of Information* (1990) 181 cited in Freedom of Information Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008) < http://www.rti.qld.gov.au/__data/assets/pdf_file/0019/107632/solomon-report.pdf > at 16 November 2012 Recommendations 61-71.

²⁸ Australian Law Reform Commission, above n 4.

²⁹ Above n 22, 68-71.

6.2.5 Reduction for delay in processing

PIAC agrees that where the agency fails to notify the applicant within the specified statutory timeframes, FOI charges should be reduced in accordance with the amount of delay. FOI decision-making should be timely and properly supported. There are statutory mechanisms to allow agencies to obtain extensions of time where resources are limited, where requests are voluminous or where third party consultation is required. If agencies, in spite of these statutory mechanisms, fail to meet the timeframes, it is reasonable that FOI charges should be reduced to account for the additional delay.

6.2.6 Fees for review

PIAC agrees that there should be no application fees for internal review or review to the Information Commissioner. The right to appeal an agency decision is a desirable and necessary part of an applicant's access to justice to ensure accountable and rigorous decision making from government agencies. Additionally, as discussed above, access to government information is viewed under the ICCPR as a basic human right. By imposing additional fees for internal review or IC review of agency decisions, an additional and unnecessary burden is imposed on applicants.

Recommendation 13

13. Part VIII, Division 1 of the Freedom of Information Act 1982 (Cth), dealing with vexatious applicants, should be amended to provide that the Information Commissioner can declare requests to be 'vexatious requests' rather than empowering the Information Commissioner to declare applicants to be 'vexatious applicants'.

Recommendation 14

14. Charges should not be levied in respect of applications made under the Freedom of Information Act 1982 (Cth). Alternatively, fees and charges should be waived for applications that are made to further the public interest or in cases of demonstrated financial hardship.

Recommendation 15

15. Where statutory time frames are not met, FOI processing charges should be reduced in accordance with the amount of delay.

Recommendation 16

16. Charges should continue not to be levied in respect of internal reviews or reviews by the Information Commissioner.

Recommendation 17

17. The Information Commissioner should create more rigorous guidelines for use of the practical refusal power to ensure consistency across agencies.

7. Minimising regulatory and administrative burden

PIAC recognises that minimising regulatory and administrative burden on government agencies provides a more efficient and useful FOI regime for both agencies and applicants.

PIAC makes various recommendations below, which seek to encourage more effective file management systems and administrative operation, which will reduce the cost to agencies of administering FOI requests.

PIAC believes that although the FOI regime requires government expenditure, public exposure, or the fear of public exposure all create an incentive for government officials to manage public monies responsibly and leads to overall savings in this way.

7.1 Role of charges in creating good systems

PIAC believes that charges should not be increased or extra charges introduced to minimise the administrative burden on agencies.

As discussed above, the current charges regime, where cost is determined by the amount of hours it takes to process a request, does not create an incentive for agencies to evaluate their file management processes and invest in better systems to create efficiency in processing requests. PIAC believes that if charges are to be payable at all, they should be based on the amount of information provided rather than the time taken to process the request.

7.2 Human resources

The UK's FOI regime was scrutinised in 2012 by the UK Justice Committee³⁰. The final report included a study by the Constitution Unit on the FOI regime in local government, and found that an increase in the number of requests had not led to an equivalent increase in costs, in fact the overall price of the regime had decreased.

In his study, Dr Jim Amos concluded that an efficient cost-effective freedom of information regime was one where 'positive leadership [was] combined with good systems, staff and organisation'.³¹ The study also found that employing senior staff members into FOI roles or encouraging more active participation of senior directors in the FOI process has been crucial at local government level to improving agency culture around FOI rather than viewing the regime as a compliance issue.³² By creating more ownership over the FOI process by senior staff members, efficiency of the FOI process can be more effectively managed to reduce the administrative burden on agencies.

In PIAC's experience, FOI officers in government agencies are not always equipped with the necessary authority or knowledge to be able to give meaningful input in consultation with

³⁰ UK Justice Committee (26 July 2012), Post-Legislative Scrutiny of the Freedom of Information Act 2000

³¹ Ibid.

³² Ibid.

applicants to create manageable FOI requests for the agency. As a result, extra time and resources are spent referring back to other staff members and staff in the line area adding unnecessary time to the processing of a request. It has been PIAC's experience, on more than one occasion, that an FOI request has been refined in consultation with the FOI officer over the course of a number of months but ultimately the request was practically refused as the advice PIAC was given from the FOI officer was not consistent with the practical realities of the file management systems in the line area.

To further decrease the administrative burden on agencies, practice and procedures of each agency should be more transparent and publicly available to assist applicants to form meaningful and manageable FOI requests at first instance rather than engaging in an ongoing dialogue with FOI officers to refine the scope of the requests.

Recommendation 18

18. Senior staff members should be employed as FOI officers to ensure staff members have the requisite authority and knowledge to efficiently manage the FOI process. To further reduce the administrative burden, line area procedures in each agency should be publicly available to assist applicants in forming meaningful and manageable FOI requests at first instance.

7.3 Administrative access scheme

Administrative access schemes are practical alternatives to the formal FOI process for the release of particular kinds of documents in a cost effective and efficient manner. Administrative access schemes are best suited to documents that contain personal information, statistics or data regarding the operation of an agency, would be released in full under if a request were made under the FOI Act. Administrative access schemes are also useful for the provisions of discrete information that can be easily pinpointed by the government department.

All government departments should be encouraged to establish and promote administrative access schemes to further the objectives of the FOI Act, and to contribute to resources savings in relation to applications that are appropriately made under the legislation (eg, for information that is subject to secrecy or other statutory provisions, information that clearly falls within an exemptions, documents that require third party consultations and requests that would involve a significant use of agency resources to process).

However it is critical that agency-specific administrative access schemes are consistent with principle one of the *Principles on Open Public Sector Information*³³, which declares that Australia government agencies should adopt a default position of open access to information. PIAC has become aware that some agencies have imposed standard conditions in regard to administrative access schemes that are more onerous than would apply if the same information were sought via the FOI Act.

³³ Office of the Australian Information Commissioner, *Principles on Open Public Sector Information*, (2011) http://www.oaic.gov.au/publications/reports/Principles_open_public_sector_info_report_may2011.pdf

PIAC recently applied via an administrative access scheme for aggregated non-sensitive data. The relevant agency indicated that it was willing to provide PIAC with the data under administrative access, provided that we PIAC agree to particular conditions. These conditions included that PIAC:

- adhere to particular legislative provisions concerning access to and use of data;
- only use the data for the stated purpose of the request;
- provide copies of any findings, reports or publications that are based on the data to various named government agencies; and
- modify any findings, reports or publications to either reflect or present the comments of those named agencies.

In PIAC's view, these conditions were unduly restrictive, and could not have been imposed if we had requested the material under the FOI Act. For example, the FOI Act specifically states that a person's reasons for seeking access to government-held information are irrelevant to their application under the Act.³⁴

Following PIAC's refusal to accede to these conditions, the relevant agency decided not to release the requested data to PIAC. An internal review of the appeal affirmed the initial decision. Eventually, PIAC sought the same data by way of an application made under the FOI Act, and we obtained all of the information we were seeking in timely manner, in the absence of the restrictions initially suggested by the agency in question.

PIAC believes that the IC should play an active role in ensuring that administrative access schemes that are developed by agencies are flexible, practical and promote the objectives of the FOI Act. In addition, agencies such as the Australian Bureau of Statistics and the Bureau of Meteorology, which are responsible for compiling statistical data for the benefit of the public, should provide access to their data free of charge.

PIAC also submits that there should be no charges imposed for applications made under administrative access schemes, given the often uncontroversial nature of the information that may be provided under the scheme.

PIAC notes that the IC has indicated that the protections against civil and criminal actions against agency and their officers that release documents under the FOI Act should also apply to the release of documents or information under the administrative access scheme, when that material is released in good faith. PIAC supports this approach.

Recommendation 19

19. The Information Commissioner should be resourced to provide advice to individual government agencies regarding their administrative access schemes, before the relevant department adopts them.

Recommendation 20

20. The Australian Bureau of Statistics, the Bureau of Meteorology and other relevant organisations that are responsible for compiling statistical data for the benefit of the

³⁴ Freedom of Information Act 1982 (Cth), s 11(2).

public, should be required to provide that data free of charge. This requirement would be appropriately incorporated into the Freedom of Information (Charges) Regulations 1982.

Recommendation 21

21. *There should be no charges imposed for applications made under the administrative access scheme. This amendment would be appropriately incorporated into the Freedom of Information (Charges) Regulations 1982.*

8. Conclusion

This submission has suggested a range of reforms to the current freedom of information regime that would ensure that current rights of access government information are retained, or increased, in the context of a more efficient, effective and accessible administrative system.

The precise cost of responding to all FOI requests, and of administering accountable, fair and efficient FOI system, is difficult to ascertain. This is in part because it is difficult to quantify the significant social benefits that stem from the FOI process, not the least that FOI is essential to enhancing democratic rights and participation in Australia. Making government information publicly available also generates economic savings and improved social outcomes by making research and data available to the community and by informing citizens of their rights and complaints options. FOI also opens up the rationale and machinations behind government decision making to citizens. This level of public scrutiny must contribute to the efficiency and accountability of government agencies.

PIAC is cognisant that it is tempting to offset costs associated with the FOI process by imposing fees and charges to applicants. However it is our strong view that going down that path is at cross purposes with the objectives of the FOI Act, because charges and fees will inevitably impede the ability of many Australians to seek access to government information on an equal basis with others.

9. Summary of Recommendations

1. Parts VII and VIIA of the *Freedom of Information Act 1982 (Cth)* should be amended to allow for review applications to be made as representative complaints.
2. The Office of the Australian Information Commissioner should retain the power to initiate own-motion investigations in relation to the operation of the *Freedom of Information Act 1982 (Cth)*.
3. Adequate resources should be provided to the OAIC to enable it to conduct efficient and expeditious investigations, and effectively to resolve problems that arise regarding agency decisions under the *Freedom of Information Act 1982 (Cth)*.
4. Each government agency should be required to report annually to the OAIC on its implementation of the *Freedom of Information Act 1982 (Cth)*, and these reports should be publicly available.
5. Section 11C of the *Freedom of Information Act 1982 (Cth)* should be amended to state that:

- (a) a government agency must consult with the applicant regarding the appropriate timing for publication of material on the disclosure log;
- (b) an FOI applicant may request that any document(s) the applicant obtains via FOI not be published on the agency's disclosure log for up to one week following disclosure to the applicant;
- (c) the agency must comply with this request unless there are compelling public interest reasons to the contrary – a decision that is subject to merits review by the OAIC on an urgent ex parte basis.
6. The *Freedom of Information Act 1982* (Cth) or Regulations should be amended specifically to require an agency to consider whether charges should be reduced or waived in circumstances where a document requested by the applicant is published on the disclosure log within seven days of also providing that document to the applicant.
 7. The IC should retain determinative review powers, but applicants should be able to apply directly to the AAT for a review of an access-refusal or access-grant decision.
 8. Alternatively, Part VII, Division 6 of the *Freedom of Information Act 1982* (Cth) should be amended to introduce time frames in relation to Information Commissioner reviews. Where time frames are not met, the Information Commissioner review would be treated as a 'deemed refusal' and the applicant would be able to progress to an AAT external review.
 9. The *Freedom of Information Act 1982* (Cth) should be amended to require the Information Commissioner to establish and publish case management procedures consistent with those adopted by the AAT or Federal Court to ensure efficient management of Information Commissioner Reviews.
 10. Section 47 of the *Freedom of Information Act 1982* should be deleted and s 47G should be expanded explicitly to include trade secrets and commercially valuable information.
 11. The words in ss 47G(1)(a) and 47G(1)(b) of the *Freedom of Information Act 1982* "would, or could reasonably be expected to" should be amended to read, "would reasonably be expected to".
 12. The Australian Government should review the continued use of Schedule 2 of the *Freedom of Information Act 1982* (Cth). All agencies should be required to justify their continued exclusion from the Act in relation to the functions/documents listed in the Schedule.
 13. Part VIII, Division 1 of the *Freedom of Information Act 1982* (Cth), dealing with vexatious applicants, should be amended to provide that the Information Commissioner can declare requests to be 'vexatious requests' rather than empowering the Information Commissioner to declare applicants to be 'vexatious applicants'.
 14. Charges should not be levied in respect of applications made under the *Freedom of Information Act 1982* (Cth). Alternatively, fees and charges should be waived for applications that are made to further the public interest or in cases of demonstrated financial hardship.
 15. Where statutory time frames are not met, FOI processing charges should be reduced in accordance with the amount of delay.

16. Charges should continue not to be levied in respect of internal reviews or reviews by the Information Commissioner.
17. The Information Commissioner should create more rigorous guidelines for use of the practical refusal power to ensure consistency across agencies.
18. Senior staff members should be employed as FOI officers to ensure staff members have the requisite authority and knowledge to efficiently manage the FOI process. To further reduce the administrative burden, line area procedures in each agency should be publicly available to assist applicants in forming meaningful and manageable FOI requests at first instance.
19. The Information Commissioner should be resourced to provide advice to individual government agencies regarding their administrative access schemes, before the relevant department adopts them.
20. The Australian Bureau of Statistics, the Bureau of Meteorology and other relevant organisations that are responsible for compiling statistical data for the benefit of the public, should be required to provide that data free of charge. This requirement would be appropriately incorporated into the *Freedom of Information (Charges) Regulations 1982*.
21. There should be no charges imposed for applications made under the administrative access scheme. This amendment would be appropriately incorporated into the *Freedom of Information (Charges) Regulations 1982*.