

Part A: Freedom of information past and present

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1. Introduction to FOI in Australia and abroad

Why FOI legislation is important

The democratic purpose of FOI legislation in Australia is to confer a legal right on members of the public to access information held by the government. When FOI legislation was first being considered by the Australian Parliament in the 1970s, the Senate Standing Committee on Constitutional and Legal Affairs set out three broad reasons why FOI legislation is important. Those reasons are as relevant today.

First, FOI provides a mechanism for individuals to see what information is held about them on government files, and to seek to correct that information if they consider it wrong or misleading.

It seems to us that there are three quite specific justifications for having effective freedom of information legislation in Australia, each of which arises out of the principles upon which democratic government claims to be based. The first of these touches upon the rights of the individual. With certain national security exemptions ... we believe that every individual has a right to know what information is held in government records about him personally. We believe that the individual has the right to inspect files held about or relating to him, and ... the right to have material which is inaccurate corrected on such a file.[1]

Second, FOI enhances the transparency and accountability of policy making, administrative decision making and government service delivery. For example, FOI enables individuals to understand why and how decisions affecting them are made and, armed with that knowledge, question or support the decisions made by government. Transparency in decision making can also lessen the risk of inefficient and corrupt practices.

[W]e believe that when government is more open to public scrutiny, it in fact becomes more accountable. As a result there is a greater need for it to be seen as efficient and competent. The accountability of the government to the electorate, and indeed to each individual elector, is the corner-stone of democracy, and unless people are provided with sufficient information accountability disappears.[2]

Third, a community that is better informed can participate more effectively in the nation’s democratic processes.

[W]e believe that if people are adequately informed, and have access to information, this in turn will lead to an increasing level of public participation in the processes of policy making and government itself. ... Unless information is available to people other than those professionally in the service of the government, then the idea of citizens participating in a significant and effective way in the process of policy making is set at nought. This participation is impossible without access to information.[3]

More recently, a fourth reason for FOI legislation has emerged. There is greater recognition that information gathered by government at public expense is a national resource and should be available more widely to the public. This is due in considerable part to developments in information technology use in the government and non-government sectors since the FOI Act was enacted. This reason was summarised by the Government 2.0 Taskforce that examined how Web 2.0 technology could be used to achieve more open and responsive government:

As policy maker and service deliverer, the government spends large sums collecting, analysing and transforming vast amounts of data, information and content ... Government has already invested in the production of this information. It thus exists as a national asset. Internationally and nationally, there is a growing recognition of the extent to which [public sector information] is a resource that should be managed like any other valuable resource - that is to optimise its economic and social value.[4]

An internationally recognised right

The importance of FOI legislation was recognised by the United Nations little more than a year after the organisation’s inception. In December 1946 the General Assembly resolved:

Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.[5]

This right is enshrined in Article 19 of the Universal Declaration of Human Rights, adopted in 1948:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The right is echoed also in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, 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.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

a. For respect of the rights or reputations of others;

b. For the protection of national security or of public order (order public), or of public health or morals.

1. Freedom of information legislation should be guided by the principle of maximum disclosure.
2. Public bodies should be under an obligation to publish key information.
3. Public bodies must actively promote open government.
4. Exceptions should be clearly and narrowly drawn and subject to strict ‘harm’ and ‘public interest’ tests.
5. Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.
6. Individuals should not be deterred from making requests for information by excessive costs.
7. Meetings of public bodies should be open to the public.
8. Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.
9. Individuals who release information on wrongdoing - whistle-blowers - must be protected. [\[7\]](#)

A report of the Special Rapporteur in 2010 drew attention to the role of public access to information in sustaining democratic practice:

In order for democratic procedures to be effective, people must have access to public information, defined as information related to all State activity. This allows them to take decisions; exercise their political right to elect and be elected; challenge or influence public policies; monitor the quality of public spending; and promote accountability. All of this, in turn, makes it possible to establish controls to prevent the abuse of power.[\[8\]](#)

The European Union has also recognised the right to information in Articles 8 and 42 of the Charter of Fundamental Rights of the European Union:

8. [Personal] data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

42. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.[\[9\]](#)

Other recent developments confirm the growing importance attached to public access to government information:

- Twelve European countries - Belgium, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia, and Sweden - were the first states to sign the world’s first treaty on access to information on 19 June 2009, the Council of Europe Convention on Access to Official Documents.
- Participants at the UN World Press Freedom Day conference in Brisbane on 3 May 2010 made a declaration (the ‘Brisbane Declaration’) calling on member states to enact legislation guaranteeing the right to information in accordance with the internationally-recognised principle of maximum disclosure, setting out a number of principles and other actions that should be taken.[\[10\]](#)
- A number of countries formed an Open Government Partnership with participating countries endorsing an Open Government Declaration on 20 September 2011. The Declaration commits countries to: increasing the availability of information about governmental activities; supporting civic participation; implementing high standards of professional integrity; and increasing access to new technologies for openness and accountability.[\[11\]](#)

FOI and political culture

Support for open government has a strong footing in democratic political theory. As early as 1822 former United States President James Madison observed:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[\[12\]](#)

The same point was made the following century by United States consumer advocate Ralph Nader:

A well informed citizenry is the lifeblood of democracy; and in all arenas of government information, particularly timely information, is the currency of power.[\[13\]](#)

This theme was also taken up in Australia by Prime Minister Malcolm Fraser in 1976 in explaining his Government’s support for FOI legislation:

If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?[\[14\]](#)

United States President Lyndon Johnson echoed the same sentiment when signing that nation’s first FOI Act in 1966:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

A recurring theme is that public trust in government is tied to an open political culture, as noted by the Franks Committee in Britain in 1972 in a report on the British Official Secrets Act:

A democratic government ... needs the trust of the governed. It cannot use the plea of secrecy to hide from the people its basic aims. ... A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propaganda agencies, will lose the trust of the people.[\[15\]](#)

It is also frequently said that open government can inhibit pathologies that destroy the fabric of a nation. As United States jurist and later Supreme Court Justice Louis Brandeis observed:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.[\[16\]](#)

To similar effect was the remark of publisher Joseph Pulitzer:

There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy.

2. FOI principles and reforms

Development of FOI legislation in Australia

World-wide, the first legislation relating to FOI was introduced in Sweden in 1766. Finland took the same step nearly two hundred years later in 1951, followed by the United States of America in 1966, and Denmark, Norway, Austria, France and the Netherlands during the 1970s. More than 80 countries now have national FOI legislation.

Australia was the first nation with a Westminster style of government to enact FOI legislation. The legislation was first proposed to the Parliament in 1974 during the Labor government of Prime Minister Whitlam, but was enacted in 1982 under the Coalition government of Prime Minister Fraser. In those intervening years FOI proposals were considered by two interdepartmental committees (in reports tabled in the Parliament in 1974 and 1976), by the Royal Commission on Australian Government Administration in its report tabled in 1976, and by the Senate Standing Committee on Constitutional and Legal Affairs in a report tabled in 1979.[\[17\]](#) There was considerable public and parliamentary debate about the FOI proposals during that period.

At the same time as FOI legislation was being considered, the Parliament was establishing a new system of administrative law in Australia. Three major Acts were the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976 and the Administrative Decisions (Judicial Review) Act 1977. There were parallel themes in the FOI and administrative law reforms. Both were designed to confer legal rights upon members of the public to question and challenge government decisions, including by taking a dispute to an independent ombudsman, tribunal or court. Both also had the objective of ensuring greater transparency and accountability in the processes of government.

After its commencement on 1 December 1982, the FOI Act was reviewed many times, resulting in numerous recommendations for amendment and improved FOI administration. Major reports on the Act and its administration were prepared in 1987 by the Senate Standing Committee on Legal and Constitutional Affairs, Report on the Operation and Administration of the Freedom of Information Legislation; in 1995 jointly by the Australian Law Reform Commission (ALRC) and the Administrator of the Freedom of Information Act.

Two other reports in 2007 that had a strong influence on Australian Government developments were prepared by other bodies. Both were strongly critical of FOI law and practice in Australia. They were a report by ‘Australia’s Right to Know Coalition’, formed by 12 major media companies;^[18] and a report in Queensland by the FOI Independent Review Panel, appointed by the Queensland State Government.^[19]

A finding common to many of those reviews, noted in the comprehensive joint ALRC-ARC review, was that ‘[c]oncerns about the operation of the Act include the number and breadth of the exemptions, the high cost of obtaining information and the quality of the current review procedures’.^[20] Another frequent criticism was that there had been little cultural change in some government agencies, and that a presumption in favour of disclosure was not practised across government. There was also concern that government agencies could exploit restrictions and gaps in FOI laws to make it harder for the public to gain access to government information, especially information that might be embarrassing to the government or an agency.

Another event in 2006 that drew attention to FOI difficulties was the decision of the High Court in *McKinnon v Secretary, Department of the Treasury* (2006) 228 CLR 423. The Court confirmed that the Administrative Appeals Tribunal (AAT) had limited power to review an exemption claim made in a conclusive certificate. The Court’s decision was greeted by a chorus of media criticism that the FOI Act had failed to meet its objectives.

In 2007 the Australian Labor Party made an election commitment to ‘drive a culture shift across the bureaucracy to promote a pro-disclosure culture’ and to reform the FOI Act.^[21] The first stage in the Government’s FOI reform program was the passage of the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009. The practical effect of the Act was to abolish conclusive certificates for all exemption claims under the FOI Act and the Archives Act 1983, and thereby enable the AAT to undertake full merit review of any exemption claim. The symbolic importance of the Act was that Government thereby relinquished its right to have the final say on whether a requested document qualified for exemption on the ground that disclosure would damage security, defence or international relations, or reveal Cabinet, Executive Council or internal policy deliberations.

The next stage in the reform process, following a period of public consultation, was the introduction into the Parliament in 2009 of the Australian Information Commissioner Bill and the Freedom of Information Amendment (Reform) Bill. In proposing the 2010 reforms, Senator John Faulkner noted:

Both in practice, and as a symbol, ‘freedom of information’ represents the pinnacle of citizens right to know: a legal requirement to give the Australian community access to information held by the Australian Government.^[22]

After an inquiry by the Senate Finance and Public Administration Legislation Committee,^[23] and debate in Parliament, the two Bills were passed by Parliament in May 2010. The reforms constitute the most substantial change to Australia’s national freedom of information legislation since the FOI Act was enacted in 1982.

Key FOI principles

The FOI Act introduced six key principles in 1982:

- All members of the public enjoy an equal right of access to government documents. An FOI applicant is not required to explain their reason for seeking access, or demonstrate a special need for or interest in a document.
- The right of access to government documents is a legal right. A government agency or minister has no residual discretion to deny access to documents upon request, and can do so only if a document is exempt from disclosure under the FOI Act.
- A person who is denied access to a document can appeal against the decision of the agency or minister to an independent tribunal, which can review the merits of that decision and make a fresh determination that is binding on the agency or minister (except, prior to 2009, when a conclusive certificate was in place).
- At all stages of the FOI processing and review process the agency or minister bears the onus of establishing that their decision is justified.
- Agencies must publish information that explains their role and work, such as their decision making powers, organisational structure, categories of documents, FOI procedures, and policies and guidelines applied in making decisions that affect members of the public.
- An agency or minister may grant access to any document, even an exempt document, unless prevented by a secrecy provision in another statute from doing so.

Objectives of the 2010 legislative reforms

The 2010 reforms built on those key FOI principles. The Australian Information Commissioner Act 2010 and the Freedom of Information Amendment (Reform) Act 2010 made the following broad changes:

- There is a new presumption of openness and of maximum disclosure. Information requested under the FOI Act or otherwise should be provided unless there is an overriding reason not to do so. Whether requested information is covered by an FOI exemption is only one issue to be considered. This presumption of openness is embodied in a new objects clause in the FOI Act and in a new public interest balancing test that applies to many exemptions (both of which are explained below).
- Agencies should proactively publish as much information as practicable on the agency website. A new Information Publication Scheme (IPS) expands the range of information an agency is required to publish, and invites agencies to publish additional information that will be of public interest. This is often described as the ‘push’ model of FOI disclosure, as contrasted with the traditional FOI model that largely relies on agencies reacting to information requests (the ‘pull’ model).
- It is easier for members of the public to make FOI requests. The request procedure is simpler, and there are reduced charges, stronger pressure on agencies to observe the processing time limits, and assistance given by the OAIC.
- The FOI review process is designed to be inexpensive and informal, so that it is easier for a person to question or challenge an FOI decision by an agency or minister. New complaint and review procedures based in the OAIC implement this objective.
- Two new independent statutory officers in the OAIC - the Australian Information Commissioner and the Freedom of Information Commissioner - play a leadership role in securing the FOI principles and objectives. The OAIC is, in essence, an information champion, with a comprehensive range of powers and functions to promote open government, protect information rights and advance information policy. A particular function of the OAIC is to ensure improved FOI administration by agencies and ministers, by monitoring and reviewing how the requirements of the legislation are being met.
- FOI, privacy and information policy are integrated in a single office based in the OAIC. This reflects the importance attached to effective information management in government, and reinforces the responsibility of agencies to pay close attention to information issues. The aggregation of information functions in the OAIC enables a larger and better resourced office to play a strategic role in aiding the development of consistent information policy in government, monitoring information management and record keeping in agencies, and providing advice and assistance to agencies and the public. Greater harmony between privacy and FOI principles can also be managed.

The Archives Act has also been changed as part of this legislative reform package. The open access period in the Archives Act, which defines the age at which most government information is released to the public, is being reduced from 30 years to 20 years (and from 50 years to 30 years for Cabinet documents). This change is being phased in over a 10-year period, commencing on 1 January 2011. All Australian Government agencies, including security intelligence agencies that are excluded from the operation of the FOI Act, fall under the Archives Act.

Summary of the 2010 FOI Act reforms

The main FOI Act changes that commenced on 1 November 2010 are summarised below. A more detailed explanation of the FOI Act including these changes is given in Part B of this Guide.

Objects of the Act

The objects clause of the FOI Act was revised to spell out more clearly the intention of the Act to promote disclosure of information held by government and increase scrutiny of government activities.

Coverage of the Act

The coverage of the Act was extended to documents held by contracted service providers that are delivering services to the public on behalf of Australian Government agencies.

Narrower exemptions

The scope of the exemption for Cabinet documents was amended and the exemptions for Executive Council documents, documents relating to an agency’s conduct of industrial relations and documents arising out of companies and securities legislation were repealed.

‘Conditional exemptions’ and the public interest test

Timeframe for processing requests

The standard 30 day time limit for an agency or minister to make a decision on a request is unchanged. However, an agency or minister can now request an extension of time from the Information Commissioner in certain circumstances, including when the matter is complex or voluminous. No access charge can be imposed if a decision is not made within the statutory time limit, including any authorised extension.

Charges

The FOI Act and Freedom of Information (Charges) Regulations have been amended to remove application fees for requesting access to documents and applying for internal review. There is no charge if a person requests access to their personal information, or for the first five hours of decision making time for other requests.

Vexatious applicant declarations

The Information Commissioner may declare a person to be a vexatious applicant if satisfied that the person is engaging in FOI actions that are an abuse of process or are manifestly unreasonable.

Complaint investigation

The Information Commissioner can investigate a complaint about how an agency handled an FOI request, or took other actions under the FOI Act. The Information Commissioner can also conduct investigations of an agency’s actions at the Commissioner’s own initiative.

Merit review by the Information Commissioner

The system for review of FOI decisions by agencies and ministers was changed. A person may still seek internal review of an agency decision, but can also apply directly to the Information Commissioner to undertake merit review of the agency decision. A decision of the Information Commissioner can be reviewed by the AAT.

Protections for disclosure of information

The protection provided by the FOI Act to agencies and their staff against civil and criminal liability was extended, in keeping with the aim of promoting a culture of disclosure. As well as protecting disclosure required in response to a request, the Act protects disclosure in good faith as permitted by the Act.

Information Publication Scheme

The information publication requirements in the FOI Act were expanded in the new IPS, aimed at enabling the FOI Act to ‘evolve as a legislative framework for giving access to information through agency driven disclosure rather than as a scheme that is primarily reactive to requests for documents’. [24] Information published by an agency must be accurate, up to date and complete. The Information Commissioner is to review compliance by each agency with these requirements every five years.

Publication of information disclosed under the FOI Act

Agencies and ministers are required to maintain a ‘disclosure log’. Information given to a person in response to an FOI request must be published on a website within 10 days, or details provided of how the information may be obtained. This publication requirement does not apply to personal and business information if it would be unreasonable to publish the information or to other types of information the Information Commissioner has determined to be exempt.

The way forward for the FOI Act

The primary purpose of the 2010 reforms to the FOI Act was ‘to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government’.[25]

Further actions are planned to help ensure that the changes to the FOI Act meet the intended objectives, and to identify any areas for improvement or changes required to take advantage of new technologies.

The minister responsible for the FOI Act must have a review of the Act undertaken after 1 November 2012, with the review to be completed within six months and the report tabled in Parliament. A review of the Australian Information Commissioner Act will also be conducted at the same time.

The Government has asked the Information Commissioner to review the charges and fees under the FOI Act with the final report due in early 2012.

In addition, the FOI Act requires each agency, together with the Information Commissioner, to review the operation of the IPS in that agency, at least once every five years. This will be complemented by the Government 2.0 Taskforce’s recommendation that the Information Commissioner develop a common methodology for evaluating the economic and social value generated from published public sector information, and publish an annual report on the contribution of each agency to the consolidated value of Commonwealth public sector information - a recommendation accepted in the Government’s response to the Report of the Government 2.0 Taskforce.[26] This was taken up by the OAIC in November 2011 in Issues Paper 2: Understanding the value of public sector information in Australia.

3. FOI and open government

When the FOI Act was enacted in 1982, the terms ‘FOI’ and ‘open government’ meant much the same thing - public access to government-held information. However, with significant recent developments in government information policy - culminating in the Australian Government’s Declaration of Open Government and the establishment of the OAIC - ‘open government’ has many new connotations.

Foremost are associations with information technology and the possibilities of use and reuse of government information outside the public sector. This was a central theme for the 2009 report of the Government 2.0 Taskforce which noted that: ‘Internationally and nationally, there is a growing recognition of the extent to which [public sector information] is a resource that should be managed like any other valuable resource - that is, to optimise its economic and social value.’[27] Flowing from greater information openness are issues of open licensing, metadata standards and machine-readability to enable data reuse. According to the Taskforce, government could further foster openness by adopting Web 2.0 technologies to enhance collaboration and break down barriers between government and the community.

The reformed FOI Act reflects many of these new information policy settings, for example, by formally recognising government information as a national resource and by establishing a proactive scheme for information publication. Other information policy initiatives overlap with, or expand on, the objects of the FOI Act. This chapter provides an overview of those initiatives that have a bearing on open government and FOI. A summary of the newer and broader meaning of ‘open government’ is given at the end of this chapter.

Open government policy reform between 2008 and 2010

Between 2008 and 2010 the Australian Government commissioned a number of reviews relating to information policy and open government.[28] The reports from those reviews pointed to opportunities, particularly through use of technology, to improve government information-handling practices, foster innovation, promote greater transparency in government, and provide the public with greater access to public sector information. These reports included:

- *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*, (2010) Advisory Group on Reform of Australian Government Administration (discussed further below)
- *Engage: Getting on with Government 2.0*, (2009) Government 2.0 Taskforce (discussed further below)
- *Information Policy and e-governance in the Australian Government*, (2009) Dr Ian Reinecke (report commissioned by the Department of the Prime Minister and Cabinet)
- *Australia’s Digital Economy: Future Directions*, (2009) Department of Broadband, Communications and the Digital Economy
- *National Government Information Sharing Strategy*, (2009) Department of Finance and Deregulation
- *Secrecy laws and open government in Australia*, (2009), Australian Law Reform Commission
- *Venturous Australia: Building Strength in Innovation*, (2008) Department of Innovation, Industry, Science and Research
- *Review of the Australian Government’s use of Information and Communication Technology* (also known as ‘The Gershon Review’) (2008), Department of Finance and Deregulation and Sir Peter Gershon.

A key report was the 2009 report of the Government 2.0 Taskforce, which examined how Web 2.0 technology could be used more effectively to achieve ‘more open, accountable, responsive and efficient government’.^[29] The report defined its area of focus in terms of three pillars: achieving a shift in public service culture and practice; application of Web 2.0 tools to government; and open access to public sector information.^[30]

Recommendation six of the report concerned the release of public sector information. The report argued that as government invests time and resources in collecting, analysing and transforming large amounts of data, public sector information should be considered as a national resource.^[31] Unlike other resources, the value of information is generally increased, rather than decreased, by making it available.^[32] It is therefore in the national interest to get maximum value from public sector information by making it publicly available for creative reuse.

The report proposed a number of principles in order to maximise the benefits of publishing public sector information. Information should be available free, relatively quickly, licensed for reuse, and in machine readable formats. It must be easy to locate, understand, transform and use. The report summarised these principles as ‘find, play, share’.^[33] It anticipated that encouraging access and reuse of this public sector information would encourage community engagement with the public sector, increase public accountability and ultimately enhance trust in government.

The Government issued its response to this report in May 2010 and accepted the majority of recommendations with some modifications. It agreed in principle with the publication of public sector information and noted the OAIC’s role in this regard, in particular, in reporting to the Cabinet Secretary on information policy. The Government also accepted recommendations that OAIC develop a common methodology to inform government on the social and economic value generated from published public sector information and annually publish a report outlining the contribution of each agency to the consolidated value of Commonwealth public sector information.^[34] More generally, a steering group was formed to implement the recommendations, led by the Australian Government Information Management Office with the OAIC as a member.

data.gov.au

As part of the work of the Government 2.0 Taskforce, the data.gov.au website was established to host government datasets.^[35] Datasets are provided by numerous government agencies from across Australia and contain highly diverse information, ranging from crime data to locations of public barbeques. The site also provides links to other catalogues of publicly available government data, such as that held by the Australian Bureau of Statistics.

Where agencies have chosen to make the data available under an open licence, the majority have used ‘Creative Commons’^[36] - a suite of generic licences that allow copyright holders to give advance permission for certain uses of their material - to ensure that their data is available for reuse. The site invites interested parties to use the data that has an open licence in any way they choose, and encourages users to create new applications.^[37]

Ahead of the Game: Blueprint for Reform of Australian Government Administration

Another important report in 2010 proposing open government reform was Ahead of the Game: Blueprint for Reform of Australian Government Administration.^[38] The report was prepared for government by an Advisory Group headed by the Secretary of the Department of the Prime Minister and Cabinet. The Government responded in May 2010, accepting all recommendations in the report and the Department of the Prime Minister and Cabinet is tasked with implementing the reform agenda.

One of the nine priority areas for reform listed in the report was ‘creating more open government’. The report stated that this could be done by harnessing technology in two areas - making public sector data available to and useable by the public, and using collaborative technologies (such as Web 2.0 tools) to consult the community on the design and review of programs and services.^[39] A broader objective in doing so would be to make government agencies more outward looking and embrace a philosophy of ‘citizen focused service delivery’, resulting in better and more coordinated services to the community. Another broad objective was to enable the community to participate more actively in government, rather than being passive recipients of services and policies.

Declaration of Open Government, 2010

These policy initiatives culminated, in July 2010, in a Declaration of Open Government, issued on behalf of the Government by the Minister for Finance and Deregulation.^[40] The Declaration arose from a recommendation of the Government 2.0 Taskforce, and picked up the themes in that report on using technology to build a culture of openness and citizen participation in government. The Declaration provided in part as follows:

The Australian Government now declares that, in order to promote greater participation in Australia's democracy, it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology.

Citizen collaboration in policy and service delivery design will enhance the processes of government and improve the outcomes sought. Collaboration with citizens is to be enabled and encouraged. Agencies are to reduce barriers to online engagement, undertake social networking, crowd sourcing and online collaboration projects and support online engagement by employees, in accordance with the Australian Public Service Commission Guidelines.

The possibilities for open government depend on the innovative use of new internet-based technologies. Agencies are to develop policies that support employee-initiated, innovative Government 2.0-based proposals.

The Australian Government's support for openness and transparency in Government has three key principles:

- Informing: strengthening citizen’s rights of access to information, establishing a pro-disclosure culture across Australian Government agencies including through online innovation, and making government information more accessible and usable*
- Engaging: collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought; and*
- Participating: making government more consultative and participative.*

In making the Declaration of Open Government, the Minister noted that it underpinned a range of Government initiatives already under way, such as the establishment of the OAIC and the Government’s broader freedom of information reforms.

OAIC and the Principles on Open Public Sector Information, 2011

On 1 November 2010, coinciding with the OAIC’s commencement, the Information Commissioner released an issues paper entitled Towards an Australian Government Information Policy which proposed a set of draft ‘Principles on open public sector information’ for discussion. The draft Principles covered a number of issues that overlapped with the requirements of the FOI Act, such as: taking a default position of open access to information; sound decision making processes for information release; appropriate charging for access; and transparent complaints processes. The Principles also incorporated other matters (including points raised by the Government 2.0 Taskforce) such as: ensuring information is discoverable and useable (published in open and standards-based format, is machine-readable, and uses high quality metadata) and has clear reuse rights (open licensing terms).

Following consultation with key stakeholders and the public, the OAIC released a revised final set of eight Principles on open public sector information.^[41] As noted in the accompanying report, the Principles are intended to act as a central point of consonance in the information policy sphere, interacting closely with other government information policies and legislation.

The Principles guide agency publication of government information, including information released under the FOI Act, via the IPS. They complement the provisions of the IPS while also guiding agencies on the release of public sector information more broadly, beyond the requirements of the FOI Act. Moreover, the Principles give prominence to the idea of information reuse and the associated issues of open licensing, appropriate formats and metadata standards. This is a central tenet of information openness and is essential if the full potential of government information is to be realised.

The Information Commissioner’s guidelines on the IPS encourage agencies to have regard to the Principles.^[42] The guidelines encourage agencies to publish information in addition to their requirements under the FOI Act and note that the Act does not limit or restrict publication of information by agencies, including information that is exempt from disclosure under the FOI Act (s 3A).

The Principles are non-binding on agencies, and apply broadly to the spectrum of Australian Government agencies and their varied information holdings.

Open government redefined

Open government now embraces three themes.

Public access to government-held information upon request

FOI legislation gives the public a legal right to request access to specific documents and to challenge access denials before an independent commissioner or tribunal. An FOI Act should embody the key principles and objectives summarised in Chapter 2 of this Guide.

by preparing records in a form that supports prompt and inexpensive disclosure or publication when access requests are received.

Open data through proactive publication of public sector information

Government agencies should initiate information publication, working from the premise that public sector information is a national resource that should be available for community access and use. Technology holds the key to effective publication. Information should be published on the web in a form that makes it easily discoverable, downloadable, machine-readable and useable. As far as practicable, information should be published on open licensing terms so that it can be re-used by the community.

Proactive publication can be supported by the data.gov.au website, the Information Publication Scheme in the FOI Act, and effective information management and governance within agencies.

Civic engagement and collaboration

Open government should facilitate community participation in government policy formulation, decision making, and program review. These processes can be enhanced by the innovative use of technology by agencies.

Technology can help build a government culture that is more customer or citizen focussed, making it easier for the community to access government services and to exchange information with government. Community participation in government can be facilitated and improved by techniques such as blogs, social networking, crowd sourcing and online consultation and community collaboration projects.

4. Office of the Australian Information Commissioner

The OAIC is an independent statutory agency established by the Australian Information Commissioner Act 2010. The OAIC reports to the Minister for Privacy and Freedom of Information and falls within the portfolio of the Attorney-General.

The OAIC is headed by the Australian Information Commissioner, supported by the Freedom of Information Commissioner, the Privacy Commissioner and the staff of the OAIC. The Office has three broad functions:

- the privacy functions, which are the functions conferred on the Information Commissioner by the Privacy Act 1988 and other legislation
- the freedom of information functions, which are functions directed to oversight of the operation of the FOI Act and to protecting the public’s right of access to government documents
- the information commissioner functions, which require the Information Commissioner to report to the Minister on policy and practice with respect to government information management.

This comprehensive range of functions and powers allows the OAIC to play an active and strategic role in assisting the development of a consistent and workable information policy across all Australian Government agencies.

While the privacy and FOI functions can be carried out by each of the three Commissioners, in practice, the FOI Commissioner will be chiefly responsible for the FOI functions, and the Privacy Commissioner for the privacy functions.

Information Commissioner functions

The Information Commissioner is solely responsible for the information commissioner functions, and is supported by an Information Advisory Committee. The members of the Committee are appointed by the Minister and comprise senior executives from key agencies and suitably experienced people from outside government.^[43]

The information commissioner functions empower the Commissioner to report to the Minister on any matter relating to the government’s policy or practice with respect to ‘the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by government’.^[44]

Since its commencement, the OAIC has undertaken a number of information policy initiatives, in line with this function. In 2010 the OAIC released an issues paper entitled Towards an Australian Government Information Policy which proposed a set of principles on open public sector information. (The issues paper and Principles are discussed in greater detail in Chapter 3.) The issues paper provided a comprehensive overview of recent information policies and initiatives and sought to identify areas of overlap and complexity in the information policy environment. In May 2011, following consultation, the OAIC released a final set of Principles on open public sector information accompanied by a report on their review and development. In November 2011 the OAIC released a further Issues Paper discussing a methodology for assessing the economic and social value of published public sector information, Issues Paper 2: Understanding the value of public sector information in Australia.

The OAIC also manages a public sector Information Contact Officer Network known as ‘ICON’ which meets regularly to share ideas on advancing the goals of open government, circulate news on developments in information policy and to discuss all aspects of FOI and privacy.

The Information Commissioner is an ex officio member of the Administrative Review Council that advises the Government on administrative law reform.^[45]

Freedom of information functions

The FOI functions and powers of the Information Commissioner are described in more detail in Part B of this Guide. The following is an overview of the FOI functions.

Promoting awareness of the FOI Act and providing advice

Promoting awareness and understanding of the FOI Act among ministers, agencies and the community; providing FOI information, advice, assistance and training to ministers, agencies and the community.

Issuing guidelines

Issuing guidelines on the interpretation and administration of the FOI Act (to which agencies and ministers must have regard when applying the Act).

Overseeing the IPS

Overseeing the IPS, including assisting agencies to publish information under the scheme and reviewing agency compliance with the scheme

Monitoring compliance with the FOI Act

Monitoring, investigating and reporting on compliance by agencies and ministers with the FOI Act; and preparing an annual report on the basis of information and statistics collected from agencies and ministers

Complaints investigation

Investigating complaints from the public about FOI administration by agencies, and undertaking own motion investigation of agency actions; issuing an implementation notice (following an investigation) requiring an agency to specify the action it will take to implement the Commissioner’s recommendations

Merit review

Upon application from a person following an FOI request to an agency or minister, reviewing an agency’s or minister’s decision to refuse or defer access, provide access to a qualified person instead of the applicant, impose a charge, refuse to amend a record of personal information, refuse an extension of time to apply for internal review, or to grant access where an affected third party objects to the proposed disclosure. The Information Commissioner has formal powers to require any person to provide information, documents or answers to questions, and the decision of the Commissioner is binding upon the agency or minister

Granting extensions of time to agencies and declaring an applicant ‘vexatious’

Exercising two new powers: to extend the time for an agency or minister to make a decision on an FOI request; and, on the Commissioner’s own motion or upon application from an agency or minister, to make a vexatious applicant declaration that restricts a person’s rights to make an FOI request or application

Conducting a review of FOI charges in the first year, and conducting a review of the operation of the FOI Act after two years.

Reporting and compliance

Under the Australian Information Commissioner Act, the Information Commissioner must prepare an annual report as soon as practicable after the end of the financial year, for presentation to the minister and tabling in Parliament, covering a range of FOI and privacy matters. The FOI matters include:

- information about any guidelines issued by the Information Commissioner under the FOI Act
- the number of applications for access to documents received during the year
- the decisions made on requests for access (for example, whether access was granted or refused)
- the numbers of applications made for internal review, Information Commissioner review and AAT review, and the results of those reviews
- the number of complaints made to the Information Commissioner (other than requests for merit review) and the results of any investigations undertaken as a result of those complaints.

Agencies are obliged to provide the Information Commissioner with the information the Commissioner needs to prepare the report.

The Information Commissioner must also monitor and report on the operation of the IPS.

Footnotes

[1] Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information(1979) para 3.3.

[2] Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information(1979) para 3.4.

[3] Senate Standing Committee on Constitutional and Legal Affairs, Freedom of Information (1979) para 3.5.

[4] Report of the Government 2.0 Taskforce, Engage: Getting on with Government 2.0 (2009) p 40.

[5] United Nations General Assembly, Resolution 59(1), 65th Plenary Meeting, 14 December 1946.

[6] For example, see the 2005 annual report of the Special Rapporteur, UN Document E/CN.4/2005/64.

[7] Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Document E/CN.4/2000/63, 18 January 2000, paras 43, 44. The principles were noted by the United Nations Commission on Human Rights in Resolution E/CN.4/RES/2000/38, 20 April 2000, para 2.

[8] Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr Frank La Rue, Report to the Human Rights Council, 20 April 2010, paras 30-31.

[9] Charter of Fundamental Rights of the European Union (2007/C 303/01). These principles were given binding legal force in the Treaty of Lisbon, which came into force on 1 December 2009. The European Parliament resolved on 17 December 2009 that improvements were needed to the legal framework for access to documents.

[10] United Nations Educational, Scientific and Cultural Organisation, Brisbane Declaration: Freedom of Information: the Right to Know, 3 May 2010.

[11] Countries that have so far endorsed the Declaration include: Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom and the United States, with many more in the process of committing to the Declaration, <http://www.opengovpartnership.org/>.

[12] James Madison, Letter to W T Barry, 4 August 1822.

[13] Ralph Nader, ‘Freedom of Information: the Act and the Agencies’ (1970) 5 Harvard Civil Rights - Civil Liberties Law Review 1.

[14] The Canberra Times, 23 September 1976, p 2.

[15] Departmental Committee on Section 2 of the Official Secrets Act 1911 (Lord Franks, Chairman), Report, Cmnd 5104, HMSO (1972) vol 1, p 12.

[16] Louis D Brandeis, Other People’s Money and How the Bankers Use it (1914) 92.

[17] A more detailed [history of the development of the FOI Act up to 1983\(from the NLA web archive\)](#) is available at <www.dpmc.gov.au/foi/history.cfm>.

[18] Report of the Independent Audit into the State of Free Speech in Australia (2007), report by Ms Irene Moss for the Australia’s Right to Know Coalition.

[19] Queensland FOI Independent Review Panel, The Right to Information: Reviewing Queensland’s FOI Act (2007) (chair, Mr David Solomon AM).

[20] Australian Law Reform Commission/Administrative Review Council, Open government: a Review of the Federal Freedom of Information Act 1982, ALRC Report No 77/ARC Report No 40 (1995) para 1.2.

[21] Australian Labor Party, Government Information: Restoring Trust and Integrity (2007), policy statement by Mr Kevin Rudd MP and Senator Joe Ludwig.

[22] Freedom of Information Reform: Companion Guide, issues by the Cabinet Secretary, Senator John Faulkner, March 2009.

[23] Senate Finance and Public Administration Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009 [Provisions], Information Commissioner Bill 2009 [Provisions] (2010).

[24] Revised Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010, p 1.

[25] Explanatory Memorandum for the Freedom of Information Amendment (Reform) Bill 2010, p 1.

[26] Department of Finance and Deregulation, Government Response to the Report of the Government 2.0 Taskforce, recommendations 6.11 and 6.13.

[27] Report by the Government 2.0 Taskforce, Engage: Getting on with Government 2.0 (2009) p 40, at www.finance.gov.au/publications/gov20taskforcereport/index.html.

[28] These reviews are comprehensively summarised in Section 2 of OAIC, [Towards an Australian Government Information Policy: Issues Paper 1\(from the NLA web archive\)](#), November 2010, <www.oaic.gov.au/publications/papers/issues_paper1_towards_an_austrian_government_information_policy.html>.

[29] Engage: Getting on with Government 2.0, px.

[30] ‘Public sector information’ as used in the Government 2.0 Taskforce report is broadly equivalent to what this Guide refers as ‘government information’ or ‘information held by Government’. The Taskforce accepted the broad Organisation for Economic Co-operation and Development (OECD) definition of public sector information: ‘information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the government or public institutions, taking into account [relevant] legal requirements and restrictions’ (see OECD recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information [C(2008)36] at p 4, <www.oecd.org/document/36/0,3746,en_2649_34223_44384228_1_1_1_1,00.html>) Further information about the definitions of ‘document’ and ‘information held by Government’ under the FOI Act is in Chapter 5 of this Guide.

[31] Engage: Getting on with Government 2.0p 40.

[32] The social and economic value of public sector information is taken up in more detail in OAIC, Issues Paper 2: Understanding the value of public sector information in Australia, November 2011.

[33] Engage: Getting on with Government 2.0 p 41.

[34] Department of Finance and Deregulation, Government Response to the Report of the Government 2.0 Taskforce (2010) p 10 (see response to recommendation 6).

[35] A dataset is a collection of data, often presented in tabular form.

[36] See <http://creativecommons.org.au/about/cc>.

[37] See <http://data.gov.au/>.

[38] Advisory Group on Reform of Australian Government Administration, Ahead of the Game: Blueprint for Reform of Australian Government Administration (2010).

[39] Ahead of the Game, recommendation 2.1.

[40] See [Declaration of Open Government](#), <www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html>

[41] OAIC. [Principles on open public sector information\(from the NLA web archive\)](#). (2011)

[42] OAIC, Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982, Part 13: Information Publication Scheme, paragraph 13.10.

[43] A list of [members of the Information Advisory Committee\(from the NLA web archive\)](#), is available at <www.oaic.gov.au/infopolicy-portal/iac.html>

[44] See the Australian Information Commissioner Act 2010, s 7(a)(i).

[45] The Council is established by the Administrative Appeals Tribunal Act 1975, Part V.

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