

Privacy and FOI Policy Branch

Department of the Prime Minister and Cabinet

May 14, 2009

**Submission on the Exposure Drafts:**

**Freedom of Information Amendment (Reform) Bill 2009**

**Information Commissioner Bill 2009**

Submission by

Dr Johan Lidberg

[j.lidberg@murdoch.edu.au](mailto:j.lidberg@murdoch.edu.au)

Creator of the International Freedom of Information Index,  
<http://wwwstaff.murdoch.edu.au/~jlidberg/>

Program Chair Journalism Murdoch University

Member of Civil Liberties Australia

## **Contents**

Introduction .....	3
Freedom of Information Amendment (Reform) Bill 2009 .....	3
The Information Commissioner .....	3
The review (appeal) process .....	4
Exemptions .....	5
Conclusion.....	6
Recommendations .....	6

## Introduction

In the last decade it has become abundantly clear that the current federal FOI regime in Australia is dysfunctional<sup>1</sup>. It does not deliver on the promises made in the objects part of the 1982 FOI Act. It is therefore heartening to conclude that the proposed amendments and changes to the FOI Act indicate that the current government is sincere in its efforts to make the FOI system work better. The most important reform is the creation of an Information Commissioner Office (IC) that will also house one FOI Commissioner and one Privacy Commissioner. The quite far-reaching proposed powers given to the FOIC could potentially bring great improvement to the functionality of federal FOI in Australia.

However, as numerous previous studies have shown (see footnote 1), extensive FOI is easy to promise but much harder to deliver. A potent and sound FOI Act can be blocked in practice if the attitudes towards FOI held by senior public servants and Ministers are not changed. This will be the greatest challenge for the Information Commissioner. I will return to this matter later in this submission.

## Freedom of Information Amendment (Reform) Bill 2009

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

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

## *The Information Commissioner*

Initially I was skeptical towards the suggested three commissioners (IC, FOI and Privacy), however, provided they deliver as promised in the Bill, active information and education regarding FOI

---

<sup>1</sup> See <http://wwwstaff.murdoch.edu.au/~jlidberg/> for several studies on this topic.

directed towards the public and agencies, pro-active assessment of the functionality of FOI and INDEPENDENCE from government, it may well be valid to have three commissioners.

The surprisingly extensive powers of investigation and decision making granted to the Information Commissioner in the Bill forms a solid base for the IC to act on.

Schedule 4 Division 7, 55J

(2) For the purposes of implementing a decision on an IC review, the Information Commissioner may perform the functions, and exercise the powers, of the person who made the IC reviewable decision.

(3) A decision of the Information Commissioner on an IC review has the same effect as a decision of the agency or Minister who made the IC reviewable decision.

The Bill as it stands on the IC and FOIC is solid in my view. However, it will be absolutely crucial WHO is appointed as IC, FOIC and Privacy Commissioner. Experience from WA shows that governments not serious about FOI can water down the functionality of FOI by seeking out a 'tame' FOIC and/or by delaying re-appointment. True, the IC and FOIC will need to do more than just be a FOI advocate, they need to bring into office diplomatic and facilitator skills if the culture of secrecy is to be changed.

In my view, **integrity and independence** are the most important properties for the future Information Officers.

Historically there has been two major obstacles to proper federal FOI functionality in Australia: turn-around time and fees and charges.

As I have pointed out in earlier submissions, the long turn-around time we can live with (30 days, plus scope for more if granted by the FOIC) if this means a fair handling of the FOI request (best international practice is one to seven days).

**The fee structure is still a major problem. Agencies have actively used excessive fees as a way to discourage requests (see Lidberg, 2006, in footnote 1).**

I note that there are provisions made to lower the FOI request processing charges in the Bill. This is a good first step, but it needs to be reviewed further. This is a task given to the IC. How it is handled will indicate how the IC perceives the 'balance of power' in terms of FOI.

### ***The review (appeal) process***

As pointed out above, the far-reaching review powers granted the FOIC is very positive, as is the method of mediation between FOI parties when a request is under review.

However, I note that the Internal Review process is retained as a pre requisite before the case can be assessed by the FOIC. Experience and previous studies (see footnote 1) show that Internal Reviews is a waste of time. In the vast majority of cases the Internal Reviews uphold the initial decision. I suggest that Internal Reviews should be abolished and that appeals should go straight to the FOIC.

## Exemptions

Cabinet documents have long been a loop hole for making information exempt (you may perhaps recall the episode of the ABC satire drama series *the Hollow Men*, when 'sensitive' documents were put in wheelie bins and wheeled around an empty cabinet room and hence made exempt). This is to some extent addressed in the Bill. However, the 30 year exemption rule for Cabinet documents stands. This is unfortunate as it could be much shorter, 20 years should suffice.

There has been some confusion regarding the exempt agency schedule. This is regulated in Schedule 2, Section 7 in the FOI Act, 1982. Although the public interest test has been extended, as far as I understand Schedule 2 still stands.

## Schedule 2

Section 7

### Part I—Exempt agencies

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

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

## Conclusion

The draft FOI Bills are clearly a major step in the right direction. However, as pointed out in the introduction, the FOI amendments and reforms will be to no avail unless they are coupled to a sincere and long-term (decades) commitment to change of the current attitudes towards FOI held by the public service and some Ministers. Much will hinge on the Information Commissioners. They will be the drivers of change and they will in turn be dependent on government support for their actions.

It is timely that the federal government is acting on FOI. The last few years has seen a momentum for change building. Examples of this are the reviews and major amendments proposed to state FOI in Queensland and Tasmania. Even if they probably will not admit as much, the states do look to the federal government for guidance, or at least leadership, on FOI. This is one of the reasons why federal FOI reform is so important.

It is also interesting to note the government will ask the Australian Law Reform Commission to re-visit the issue of FOI and the private sector. The current global economic recession has driven home the point that the private sector impacts as much, if not more, on the daily lives of citizens, as do governments. It is therefore timely to re-examine what kind of information access mechanisms could be applied to the private sector to increase accountability. The South African Access to Information legislation to some extent applies to the private sector. Examining this law could perhaps be a good starting point.

There are currently 68 plus (and counting) FOI laws in force around the globe. Benchmarking against the best of these is a way to keep the Australian FOI system up to speed. I note that the Information Commissioner has this task as part of the brief. This is to be commended. There are international indications that the wave of secrecy, fueled by the global fear created by the September 11 attacks on the US, is somewhat subsiding. It is heartening to see that Australia has picked up on this.

## Recommendations

- Extend the free FOI request processing time for non-profit organisations and journalists from five hours to a full day (The free five hours is an improvement on the current fee system, but it needs to extend further. I note that the Information Commissioner is to conduct a review of the fee structure, but this particular change could be included straight away).
- Abolish the Internal Review process. The reviews of requests should go straight to the FOIC (see above for rationale).
- Abolish the general exemptions for government agencies (see above).
- Decrease the exemption period for Cabinet documents from 30 to 20 years.
- When/if Australia gets a Bill of Rights as part of the Constitution: make FOI part of the constitution to safe guard against summary changes to FOI. Extensive access to un-spun,

quality, government-held information is a right for every citizen and should not be tampered with lightly.