# FOI AND PRIVACY REFORM

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*[Presentation to a joint seminar of the Commonwealth FOI Practitioners' Forum and the Privacy Contact Officer Network, Canberra, 26 June 2009]*

Australia is on the threshold of a major change in open government practice and administration. This will be brought about by the exposure draft legislation published recently by the Cabinet Secretary and Special Minister of State to reform the freedom of information (FOI) and privacy scheme.[1] I will address four aspects of the proposed changes, with a particular focus on FOI reform.

## Office of the Information Commissioner

There is firstly to be the establishment of the new Office of the Information Commissioner, to consist of three commissioners: the Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner.

A major shortcoming in the federal FOI scheme is that it lacks an FOI champion, who is independent of government, has a dedicated role and powers, adequate funding, and a secure power base. The Ombudsman, the Australian Government Solicitor and the Attorney-General's Department have all played important and effective roles in safeguarding FOI principles and promoting best practice FOI administration, but their role and influence has always been circumscribed. FOI has always been a minor function of each office without separate and dedicated funding.

The creation of an Information Commissioner heralds a major shift. It will be an independent statutory position, with a range of functions that include monitoring agency compliance with the *Freedom of Information Act 1982* and *Privacy Act 1988*, promoting the objects of both Acts, issuing guidelines on administration of the Acts, providing training to agency staff, investigating complaints received from the public, conducting own motion investigations, advising the government on information policy, and reviewing agency FOI decisions and making determinations that can substitute for those decisions.

The range of functions is extensive. In discharging them, the Information Commissioner will be in regular contact with all Australian Government agencies, and with staff at all levels in those agencies. Many of the new functions are proactive rather than reactive. I foresee that agency heads and Ministers will need to heed the work of the Information Commissioner, more than they have in the past been involved in FOI administration. At least in the earlier years the Information Commissioner is likely to enjoy substantial government support and to attract considerable media interest. The budget allocated to the new office, of $12.2M over four years, is more generous than perhaps some people had expected.

[1] See *Freedom of Information Reform: Companion Guide,* released by the Cabinet Secretary, Senator Faulkner, March 2009. Revised legislative proposals were introduced into the Parliament in November 2009: Information Commissioner Bill 2009, Freedom of Information Amendment (Reform) Bill 2009.

In the past I had expressed misgivings about creating a separate office of Information Commissioner, and suggested that such a function would have greater long-term stability and support if it was located as a separately funded function in the office of the Ombudsman.[2] By and large, Information Commissioner offices in Australia have had a chequered career, and have often encountered government hostility or been relegated to the side benches.

That could be the experience of the new federal Information Commissioner, but it is unlikely to happen in the first five years. The context is new and entirely different. The Commissioner will have a range of functions that go beyond the traditional review role of settling individual disputes about document access. The Commissioner will have an extensive information management role that includes advising government on the coordinated development of information policy. The credibility of the office and its support within government will not rest on its performance in a single dispute.

## Creation of similar schemes in Queensland and New South Wales

The second important change is that there will be the simultaneous creation of similar schemes in Queensland and NSW. New legislation in Queensland establishes an office with three commissioners – an Information Commissioner, a Right to Information Commissioner and a Privacy Commissioner;[3] while the new legislation in NSW establishes an office of Information Commissioner that will later be combined with the existing office of Privacy Commissioner.[4] In both jurisdictions the reform has been sponsored by the Premier, adequate funding for the new offices has been promised, and the Information Commissioner in each jurisdiction will have a determinative power to grant access to documents.

There is likely to be strong cooperation between the three new offices in the Commonwealth, Queensland and NSW, and the two existing Information Commissioner offices in Western Australia and the Northern Territory. On the other hand, there is also likely to be early and healthy competition between the new offices, in three areas in particular:

- in developing principles for proactive web publication of government documents and FOI disclosure logs
- in issuing guidelines and public information brochures and conducting training
- in generating an FOI jurisprudence through the adjudication of individual disputes.

Co-operation and competition between the new offices will elevate the importance of FOI administration in Australian government. Hopefully the result will be more open government. A special challenge facing the federal Information Commissioner will be that the Queensland and NSW counterparts start life with a more far-reaching statutory framework. The

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2 J McMillan, 'Designing an Effective FOI Oversight body – Ombudsman or Independent Commissioner?', Paper to the 5th International Conference of Information Commissioners, New Zealand, 2007 (available at www.ombudsman.gov.au).

3 *Right to Information Act 2009,* and *Information Privacy Act 2009*.

4 *Government Information (Information Commissioner) Act 2009,* and *Government Information (Public Access) Act 2009*.

Commonwealth is taking the limited step of amending the existing FOI Act, whereas new Acts with fresh titles are being enacted in Queensland and NSW – the *Right to Information Act* in Queensland, and the *Government Information (Public Access) Act* in NSW.

The Queensland Act goes further than the proposed Commonwealth amendments in spelling out public interest factors that favour disclosure and non-disclosure. Other innovative Queensland provisions deal with publication schemes, disclosure logs, requests for metadata, and transfer of personal information requests to the privacy regime. The NSW legislation also contains interesting new provisions, on mandatory proactive release of government information, authorised proactive release, and informal release of government information.

It is possible that the jurisprudence under the different Commonwealth and State schemes will not in future be as compatible as at present. The more likely result, however, is that each scheme will stimulate improved performance under other schemes. Comparison between the schemes and their jurisprudence could in that sense become a stronger feature of Australian FOI practice.

## Increased FOI activity

The proposed Commonwealth amendments are likely, in the early years at least, to facilitate more FOI access requests. One reason this will occur is the change to the FOI charge schedule: there will be no FOI application fee, no charge for personal information requests, no charge for the first five hours of decision making time for requests from journalists and not-for-profit groups, and no charge for the first hour for other requests. A large practical barrier to greater use of the FOI Act is being removed.

Another stimulant to greater use of the FOI Act is that the Information Commissioner can be called on to provide advice and assistance to members of the public, to investigate complaints against agencies and to adjudicate access refusals.

There will be some off-setting pressures. An underlying objective of the new scheme is that people will not have to resort to formal legal processes to obtain government documents and information. Agencies will be expected to publish more information, to facilitate informal access to documents, and to embrace more enthusiastically a philosophy of open government.

The combined impact of those changes will nevertheless be a greater workload for agencies in providing access to information, formally or informally. Dealing with access requests is likely to be a larger agency function than at present. There will be a strengthened whole-of-government focus on information disclosure.

### Changed ground rules on information disclosure and publication

The proposed changes also shift the ground rules for information disclosure and publication. We are about to enter a new and different phase in public administration. I will give three examples of how this shift will occur.

In the first place, the FOI Act currently contains mixed messages. The objects clause in the Act (s 3) says as much about confidentiality as it does about openness. This has led the Federal Court in several cases to reject an argument that the interpretation of the Act should 'lean in favour of disclosure'.[5] FOI fees and charges are another way that an agency can obstruct access. Nor is there any effective sanction in the Act against an agency that fails to comply with FOI timelines or that is unenthusiastic about its FOI obligations.

Those mixed messages are all to be removed. The Act will contain a new objects clause that sends a positive and expansive pro-disclosure message. An agency that does not obtain an extension of time from the Information Commissioner for deciding an FOI request cannot charge for providing access. The newly-established Information Commissioner and FOI Commissioner will also be active in stemming agency obstruction and negativity.

A second shift that is likely to occur, over time, is in the way government does business. Pressure will build on the Government, on Ministers and on agencies to develop a new attitude and new practices about disclosure of policy proposals. For example, I think that the way Cabinet submissions are prepared in a confidential manner will come under pressure. Agencies may have to consider adopting new approaches, such as the development of supplementary Cabinet papers that can be published to provide at least a public outline of the issues and evidence that went before the Cabinet.

Finally, the underlying tension that exists between FOI and Privacy will be brought to the surface, at least internally within the Office of the Information Commissioner. Privacy Commissioners have worked hard to convey the message that privacy and openness are not in contest. Agencies, however, sometimes act differently and incline towards greater privacy protection than towards greater information disclosure. It is commonplace that agencies, even in dealings with the Ombudsman, cite the need to protect personal privacy as the justification for restricted or slow disclosure.

Partly this imbalance arises because there is a privacy champion (the Privacy Commissioner) but no FOI or open government champion. Partly, too, it is because the Privacy Act contains penalties for breaching the privacy rules, such as an award of damages for unauthorised disclosure in breach of the Privacy Principles.[6] By contrast, there are no sanctions for failing to disclose non-exempt documents under the FOI Act. Another factor in the imbalance is that privacy protection has become packaged as a human right, whereas the right to information has not. In the public arena, any claim that is given a human rights facet is likely to be given extra weight and stronger support.

A major challenge for the new Office, headed by three commissioners, and administering both Privacy and FOI Acts, will be to grapple with that tension and the imbalance that currently favours privacy protection. I make no predictions on how the tension will be resolved, other than to observe that there are interesting times ahead.

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[5] Eg, *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 66; *Searle Australia Pty Ltd v Public Interest Advocacy Centre & Department of Community Service & Health* (1992) 36 FCR 111 at 114.

[6] Eg, *Rummery and Federal Privacy Commissioner* [2004] AATA 1221.

## Future directions

In summary, we are entering a new phase of privacy protection and information disclosure in Australian government administration. The policy of open government and the right to information will be of greater practical importance than they have hitherto been. Government, and government administration, will be changed, irreversibly and for the better.