Commonwealth OMBUDSMAN

Submission by the Commonwealth Ombudsman

SENATE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE

FREEDOM OF INFORMATION AMENDMENT (REFORM) BILL 2009 AND INFORMATION COMMISSIONER BILL 2009

Submission by the Commonwealth Ombudsman, Prof. John McMillan

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Introduction and summary

The Commonwealth Ombudsman deals with the current *Freedom of Information Act 1982* (the FOI Act) in two principal ways. First, the Ombudsman investigates the actions that Commonwealth agencies take under the FOI Act, including their decisions. The FOI Act has some special provisions that reflect this role of the Ombudsman. Secondly, the Ombudsman's office is itself an agency subject to the FOI Act. It receives requests and makes decisions that are subject to review.

Both of these roles have informed this submission. We support the modernisation and strengthening of the Act that is proposed. We recognise the advantages that will follow from the creation of dedicated specialist oversight offices, though we expect that our own role will be reduced to a minor extent. We are also conscious that the increased obligations on agencies will have workload implications and will require agencies to review their allocation of resources to the different functions they perform.

Background

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

In relation to the current FOI Act, the Ombudsman's oversight role is expressed in a number of provisions:[1]

- s 57 - which establishes the principle that a person cannot apply to the Administrative Appeals Tribunal for review of a decision while a complaint to the Ombudsman about the relevant decision is on foot. Section 56(2) extends this principle to complaints about 'deemed decisions'
- s 55(3) - which extends the time limit for applying to the AAT where there has been a complaint to the Ombudsman about a decision[2]
- s 56(3) - which creates a power (rarely if ever exercised) for the Ombudsman to deem a reviewable adverse decision to have been made, thereby enabling a person to appeal to the AAT
- ss 26, 29(9) and 30A(4) - which require a person receiving an adverse decision to be informed of the right to complain to the Ombudsman.

[1] These provisions are what remains from amendments made in 1991 that repealed Part VA of the FOI Act, which had designated a special FOI oversight role for the Ombudsman.
[2] But see s 59A in relation to 'reverse-FOI' applications by a person whose information an agency proposes to disclose.

The Ombudsman receives a steady number of complaints each year about FOI administration, as well as FOI requests for Ombudsman records. The annual caseload relating to FOI matters has been as follows:

	Complaints finalised about the handling by other agencies of FOI matters	FOI requests received by this office
2004-05	289	15
2005-06	259	22
2006-07	303	26
2007-08	206	23
2008-09	204	23

The office also receives, in addition to those formal requests for Ombudsman records, an equivalent number of informal requests for information which are dealt with outside of the FOI regime, and about fifty other requests that are invalid (eg, lack of an Australian address or application fee).

The office has published two general reports arising from own motion investigations into FOI administration: *Needs to Know: Own motion investigation into the administration of the Freedom of Information Act 1982 in Commonwealth agencies*, Report No 3/1999; and *Scrutinising Government: Administration of the Freedom of Information Act in Australian Government Agencies*, Report No 2/2006. Other reports have been published arising from complaint investigations in specific agencies: *Department of Immigration and Citizenship: Timeliness of Decision-Making under the Freedom of Information Act 1982*, Report No 6/2008; *Department of Finance and Deregulation: Processing of an FOI Application*, Report No 20/2009.

Response to Terms of Reference

The Committee identified four matters as principal issues for consideration.[3]

Is the right of access as comprehensive as it can be?

The proposed 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.

More requests will be valid as barriers such as an application fee and a requirement for an Australian address will be removed. Our experience is that these are the most common causes of a request being considered invalid by the receiving agency. An extra administrative requirement is being added – for an FOI request to be identified as such – but we support this as a sensible requirement which recognises that many agencies have developed administrative processes to provide routine information without formality.

[3] Some commentary in this submission draws on a speech by the Ombudsman to a joint seminar of the Commonwealth FOI Practitioners' Forum and the Privacy Contact Officer Network (June 2009), 'FOI and Privacy Reform' (available at www.ombudsman.gov.au).

Another change that is likely to enhance the right to access is that agencies are being encouraged as part of the new scheme to make documents public independently of an FOI request. The Information Commissioner will play a large role in providing guidance and a stimulus to agencies. In addition, agencies will be required to publish documents that have released under the FOI Act. We support this new information publication scheme, which has been limited in order to protect individual privacy.

Changes to exemptions, most notably the narrowing of the public interest test, is likely to mean that fewer requests will be refused; this too will encourage requests and result in more information being made publicly available. The right of free access to external review by the Information Commissioner of the merits of decisions will provide an accessible mechanism for review, and remove the cost barriers to AAT review that may have previously deterred some applicants.

Another change is the introduction of a 'vexatious applicant' provision. The practical effect of this change is not wholly predictable and may be limited, but it could enable agencies to provide a better access service to more applicants, rather than having to respond repeatedly to a small group of applicants. There has been a tendency in some agencies, including this office, for disproportionate resources to be required to deal with FOI requests with no apparent value to the applicant or the community.

Overall, we consider that the proposed amendments will enhance the right of access. We have no further changes to recommend. The right of access provided by the Act will be supplemented in an important way, by the work that can be undertaken by the new positions of Information Commissioner and Freedom of Information Commissioner.

Are the improved request processes efficient?

The combined impact of the proposed changes will be a greater workload for agencies in providing access to information, formally and 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.

Some of the proposed changes could make it simpler and less time-consuming for agencies in dealing with FOI requests. One such change, noted above, is that more requests are likely to be valid, and thus require less agency time in assessing requests, communicating with applicants, and defending agency decisions. The removal of some access charges could also lessen agency administrative effort.

On the other hand, it is foreseeable that other changes that will increase the number of FOI requests could create bottlenecks if there is no corresponding improvement in agency administration. Such bottlenecks could be reflected in increased complaints to the Commissioner, and some additional 'deemed refusal' review applications to the AAT. This could in turn result in resources being directed away from processing requests, and towards resolving disputes. Our experience is that when delays become entrenched in FOI, it can take considerable time and resources for them to be resolved.

This challenge will have to be met by agencies in two ways. One is by committing adequate resources to FOI administration. The other is by adopting a pro-disclosure philosophy in which information and documents are released more routinely and without resistance.

The long experience of the Ombudsman's office is that FOI operates more smoothly in an agency when there is a clear commitment to FOI objectives and to sound FOI practice. An example in point is the marked improvement that occurred in FOI administration in the Department of Immigration and Citizenship (DIAC) following DIAC's response to criticisms of delay in FOI processing.[4] There was a substantial decrease both in the number of FOI requests and in delay in handling those requests. The number of FOI requests recorded by DIAC dropped from nearly 15,000 in 2006 - 07 to about 9,000 in 2007 - 08. The number of requests on hand that exceeded the 30 day time period in the FOI Act dropped from 2,686 on 30 November 2007 to 439 on 19 June 2008.

The proposed changes include a new mechanism to constrain delay in FOI processing. Unless an agency obtains an extension of time from the Information Commissioner to process an FOI request, the agency will not be able to levy an FOI charge. The impact of this mechanism is untested, but is likely to provide a practical stimulus to agencies to develop efficient administrative processes, supported by an adequate allocation of resources to deal with both routine FOI administration and unexpected high numbers of requests.

Creating a pro-disclosure culture

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.

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. And there will be two Commissioners, an Information Commissioner and an FOI Commissioner, to combat agency obstruction and negativity.

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.

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, the way Cabinet submissions are prepared in a confidential manner may come under pressure. Agencies may have to consider adopting new approaches,

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[4] Eg, Commonwealth Ombudsman, *Department of Immigration and Citizenship: Timeliness of Decision-Making under the Freedom of Information Act 1982*, Report 6/2008.

[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.

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 is 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.

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.

The reduction to twenty years of the open access period for the purposes of the *Archives Act 1983* will serve as a continuing reminder to agency staff that the culture in which they work is one that is premised on eventual disclosure and openness.

Powers, functions and resources of Information Commissioner

A major shortcoming in the current 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 that has not been separately funded by government.

The creation of an Information Commissioner heralds a major shift. It will be an independent statutory office, 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

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

for those decisions. It is significant that the Information Commissioner will be supported in this work by an FOI Commissioner.

The range of functions conferred on the Information Commissioner is extensive. In discharging them, the 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. Agency heads and Ministers will need to heed the work of the Information Commissioner, more than they might have been involved in FOI administration in the past. In the earlier years, at least, the Information Commissioner is likely to enjoy substantial government support and to attract considerable media interest.

The Commissioner's powers appear to be appropriate to the functions to be performed, that include oversight and monitoring, complaint investigation, determination of cases, and promotion and training. The Commissioner will have powers similar to the Ombudsman's office to seek information either on a cooperative basis or by compulsion. The Commissioner can also decline to deal with a matter. The Commissioner will have powers specifically referable to the FOI function, such as the power to require additional searches and a capacity to require follow up information through an implementation notice.

The addition of a determinative power will give the Commissioner a role not available to this office, and one which will allow the Commissioner to take an active leadership role in developing a culture of open government. A particular challenge facing the Commissioner will be to balance that determinative function with the other functions that require the Commissioner to develop a cooperative, trusting and less formal working relationship with agencies. The Commissioner's decisions will be appealable to the AAT; this too will bear upon the role of the Commissioner in developing a consistent FOI jurisprudence that is applied by agencies.

There is the risk that a new problem of 'review exhaustion' could develop if applicants can apply for internal review and appeal to the Information Commissioner and the AAT. This could be a challenge for the Commissioner in managing the expectations or frustrations of some applicants. We note as well that a person will not be required to seek internal review before lodging approaching the Information Commissioner.

Unless expressly excluded, the Ombudsman's office retains the capacity to investigate complaints relating to actions taken and decisions made for the purposes of the FOI Act. That is recognised in the provisions that deal with transfer and consultation to avoid overlap.

It is most unlikely that we would investigate any matter that could be or is being handled by the Commissioner. This stance recognises that the Parliament has established the Commissioners with the express purpose of providing an independent and specialist body to perform a specialised task. We have taken the same position in relation to matters arising under the *Privacy Act 1988*, for which the Privacy Commissioner has responsibility but which are also capable of investigation by the Ombudsman.

We may, at some point, seek to make an agreement with the Commissioners about, for example, cases where the FOI element is a small but integral part of some other action currently being investigated by the Ombudsman, where it may be disproportionate for it to be dealt with by the Commissioner. We are, however, keen to discourage 'forum-shopping' and to avoid inconsistent results in similar cases.

Additional comments

Ombudsman oversight of the Information Commissioner

The Commissioner will be an independent agency, with rapidly developing expertise in the area of FOI and with appropriate powers and functions provided by the FOI Act. The Commissioner will also be a 'prescribed authority' for the purposes of the *Ombudsman Act 1976* and the Ombudsman will have the jurisdiction to investigate the Commissioner's actions.

We have, over time, developed a set of principles relating to investigating complaints we receive about the actions of oversight, review and regulatory agencies. This is appropriate, bearing in mind that they are established as independent statutory agencies, they have an expertise in a particular area, and they have a large discretion to develop their own regulatory philosophy and to allocate resources to the different functions they are required to perform.

In broad summary:

- We will investigate, on the same basis as we investigate complaints against other agencies, general questions of administration (for example, answering correspondence, managing contracts and tenders).
- Where a complaint raises an issue about delay or the priority attached to a particular matter, we will ensure that the matter is receiving the priority relevant to a matter of that kind under the agency's own guidelines and practices and that the complainant has been given an opportunity to advise the agency of any reasons he or she should receive higher priority.
- Where a complaint raises an issue about the merits of a decision made by the other oversight agency, we examine whether the complainant has received a decision that contained adequate information to explain it, that advised of any relevant review or similar rights and that was, on its face, broadly reasonable; we are cautious not to intrude inappropriately on the merits of decisions made by other expert oversight bodies.

The title of the Information Commissioner

We recommend that consideration be given to retitling the new position as 'Australian Information Commissioner'. There are presently four other Information Commissioners in Australia, in New South Wales, Queensland, Western Australia and the Northern Territory. It could be a source of confusion to members of the public if the new national office has the same title.

Our experience, likewise, is that it can be confusing to people outside Australia to understand the role and jurisdiction of a national body that is not described as such. Specifically, it is often necessary for us to explain that the Commonwealth Ombudsman is a national Ombudsman that is different from the State or regional Ombudsman.

We also think it appropriate that the national Information Commissioner have a title that more closely identifies it with the activities of the Australian Government and the Australian Parliament.