Submission to the Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*

19 December 2012

EXECUTIVE SUMMARY

The parties to this submission are: AAP, ASTRA, Commercial Radio Australia, Fairfax Media, Free TV Australia, MEAA, News Limited, Sky News and WAN (the parties).

The FOI system currently has two primary weaknesses:

- The government provides too few resources to meet public demand for information and review of decisions; and
- The protection of Cabinet documents and agency exemptions – preventing many documents from being accessed and made public.

Watering down FOI

The parties to the submission are disappointed that the terms of reference contemplate watering down the Australian public's right to know by proposing the reformulation of exemptions to the FOI Act.

The parties to this submission vehemently oppose any consideration of the argument that the provision of "frank and fearless advice" is threatened by the existence of FOI. The parties propose that "frank and fearless advice" is exactly the information that should be available to the Australian public. The parties also oppose any extension to the existing Cabinet exemption.

Under-resourced FOI system cannot continue

Under the reformed FOI Act and the AIC Act journalists continuously encounter barriers to accessing information including systemic delays in processing, failures of agencies to assist with applications and poor decision making.

The parties to the submission urge the Government to adequately resource the management of FOI requests and reviews of decisions – within existing budgets.

Current review processes – timelines and alternative avenues required

Further, the Office of the Australian Information Commissioner is failing its core purpose of providing an independent merits review mechanism.

The parties to the submission hold that timeframes and timelines must be introduced into the review and appeals process.

The parties also recommend that applicants be allowed to access alternative means of review at an early stage, including to the Administrative Appeals Tribunal.

1. INTRODUCTION

Timely access to government information about policies and programs, administration and management is a fundamental right and crucial to allowing voters to be informed in a democracy. Any attempt to diminish this right is unacceptable.

On 24 March 2009 the then Special Minister of State, Senator John Faulkner, in a speech to the Australia's Right to Know (ARTK) Freedom of Speech conference said:

> *"Democracy has at its heart a tension between ideas of responsible government and the disincentives for members of a government – who live and die by public opinion – to make unpopular decisions."*
>
> *"There is a growing acceptance that the right of the people to know whether a government's deeds match its words, to know what information the government holds about them, and to know the information that underlies debate and informs decision-making, is fundamental to democracy."*
>
> *"We still expect our parliament and our government to make decisions in the public interest, rather than their own political interests, but we no longer accept that the possibility of punishment at the polls for a necessary but unpopular decision gives a government the right to evade scrutiny."*

The Scope of the Review and the Terms of Reference

The Hawke review is required by s.93B of the *Freedom of Information Act 1982* (FOI Act) and s.33 of the *Australian Information Commissioner Act 2012* (AIC Act).

Senator Faulkner also noted in March 2009 that the then proposed reforms were not a final step because "new patterns of democratic engagement require new ways to inform debate and decision-making. Legislation, regulation, and policy must keep up, or they will end up strangling access rather than enabling it."

"In addition, the Government has given a commitment to again review the operation of the FOI Act after these reforms are bedded down," he said.

In the Terms of Reference published on 29 October 2012 the Attorney-General tasked Dr Hawke to:

> *"Review and report on the operation of the Freedom of Information Act 1982 (FOI Act) and the Australian Information Commissioner Act 2010 and the extent to which those acts and related laws continue to provide an effective framework for access to Government information."*

Those Terms of Reference need to be approached with some caution, because those Acts and related laws do not, and never have, provided any framework for access to Government information. The FOI Act has always expressly provided for Ministers and agencies to have the power to publish or give access to information or documents apart from under that Act (see now s.3A(1); and before the 2010 amendments s.14).

The AIC Act does confer upon the Information Commissioner personally the function of reporting to the Minister on any matter that relates to the Commonwealth Government's policy and

practice with respect to the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government and on the systems used or proposed to be used for such collection, use, disclosure, management, administration, storage or accessibility (AIC Act s.7).

The review will be careful to distinguish between the restricted purposes of the FOI Act and the broader policy advisory role of the Information Commissioner.

The objects of the FOI Act are prescribed in s.3 of that Act and they are:

1. To give the Australian community access to information held by the Government of the Commonwealth via:

   (a) requiring agencies to publish the information; and

   (b) providing for a right of access to documents.

2. The Parliament intends, by those objects, to promote Australia's representative democracy by contributing towards the following:

   (a) increasing public participation in Government processes, with a view to promoting better informed decision making; and

   (b) increasing scrutiny, discussion, comment and review of the Government's activities.

3. The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.

Importantly the review is established pursuant to s.93B of the FOI Act.

The reviewer should exercise his functions in accordance with s.3(4) of that Act so that as far as possible, he facilitates and promotes public access to information, promptly and at the lowest reasonable cost.

The parties are concerned that terms of reference include issues that have the potential to diminish the scope and effectiveness of aspects the FOI Act. In particular:

- the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents;
- the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;
- the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act; and
- the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

The Hawke review should not recommend any changes that would diminish the right of Australians to obtain timely access to government information through the FOI Act. The Hawke review must aim to improve the FOI Act and further its objects by contributing to increased public participation in government processes, with a view to promoting better-informed decision-making, increasing scrutiny, discussion, comment and review of the government's activities.

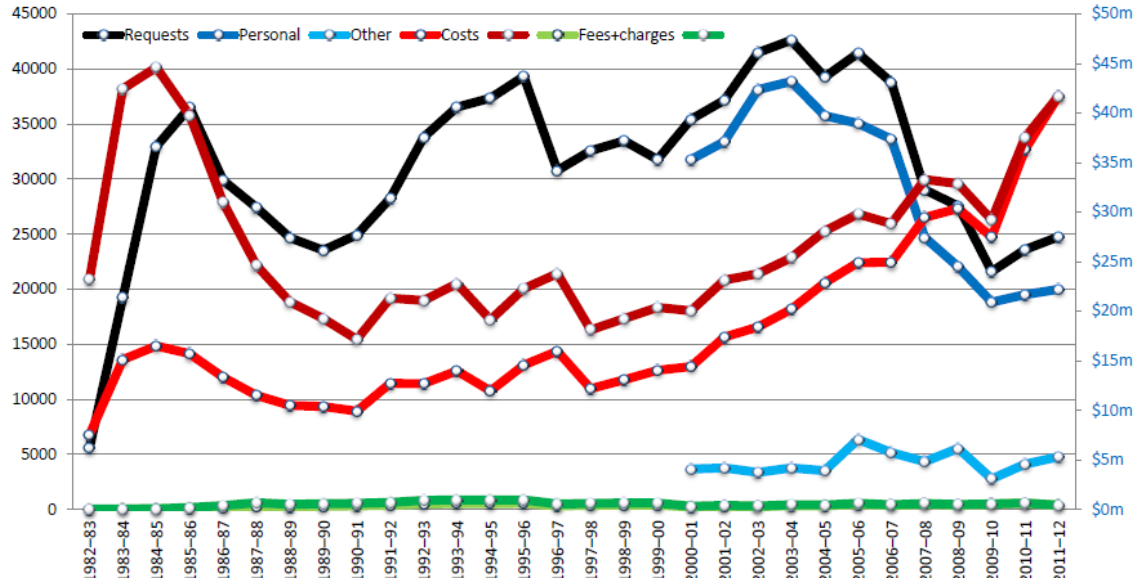
2. THE OPERATION AND EFFECTIVENESS OF THE FOI ACT

The reformed FOI Act improved the process of applying for documents held by the government. Key improvements include electronic lodgement and the removal of an application fee.

However, journalists still face a number of barriers to gaining access, including systemic delays in processing, sometimes exorbitant charges, failures of agencies to assist with applications and inappropriate exemption claims. There is also evidence of a clear decline in the proportion of requests granted in full or part and significant delays with a substantial minority of non-personal requests. Another noted failure is the merits review process administered by the Office of the Australian Information Commissioner (OAIC).

THE OPERATION AND EFFECTIVENESS OF THE OAIC

The OAIC costs $14.6 million per year.[1] That additional administrative cost accounts for about the whole of the increase in costs experienced with changes to the FOI Act as shown in the following table.[2]



While some of the resources allocated to the OAIC would have been allocated in any event for privacy compliance functions, the question arises whether the increase in costs for administration of the FOI Act, through the allocation of additional resources to the OAIC for that function delivers value for money.

Issues with OAIC

The Freedom of Information Commissioner Dr James Popple stated in the OAIC Annual Report 2011-12; *"…the reforms have been successful…It is easier, and cheaper, to access documents and government information than it was before the reforms."*[3]

[1] Office of the Australian Information Commissioner *Annual Report 2011-12*, Appendix 1
[2] Source – Information Commission Presentation to ICON Network
[3] Office of the Australian Information Commissioner *Annual Report 2011-12*, pp xii

However, the evidence relating to processing times and the quality of the information released does not support such claims. Further, the management of timely and effective reviews undertaken by the OAIC is sub-optimal.

In fact, it is becoming ever clearer that there is inadequate and ineffective resourcing to properly manage FOI requests and reviews of decisions. The parties to this submission urge the Government to cause agencies including the OAIC to address this matter expeditiously.

Poor processing times and quality of the information released

The Office of the Australian Information Commissioner's 2011-12 annual report shows that in each of the last four reporting years there has been a decrease in the proportion of FOI requests granted in full or in part:

- 93.9 per cent were granted in full or in part in 2008-09
- 92.5 per cent in 2009-10; and
- 88.4 per cent in 2011-12.

Over the same period, requests yielding full release have fallen from 71 per cent in 2008-09 to 59.1 per cent 2011-12.[4] While the proportion of personal requests granted in full remained constant over the years spanning commencement of the FOI reforms the proportion of non-personal requests granted in full fell from 31.6% to 28.4% with the proportion refused rising from 25.9% to 26.9%.[5]

The same report shows significant delays with non-personal related FOI requests. Of 3507 non-personal requests in 2011-12:

- 2660 were completed within the statutory time frame;
- 394 requests were delayed by up to 30 days over the statutory limit;
- 192 requests were delayed by 30 to 60 days;
- 156 requests were delayed by 61 to 90 days; and
- 105 requests delayed by more than 90 days.

The OAIC itself notes that agencies' delay in processing FOI applications was the issue most frequently raised by complainants, and states that:

> *"some agencies have made decisions or dealt with FOI applicants in ways that are at odds with the pro-disclosure culture that the FOI Act promotes and requires."*[6]

Poor performance of review processes and outcomes

The availability of a robust and timely merits review mechanism is fundamental to secure the right of access compared conferred by the FOI Act. That is currently a role of the OAIC. By the OAIC's own standards it is failing in this core area.

Non-personal material held by agencies is often the most valuable for informing the public of the government's performance. However, those matters are often those that are subject to the greatest level of delay.

[4] Ibid, pp 120
[5] Ibid, pp 120
[6] Ibid, pp 124

As the 2011-12 annual report notes:

> *"One of the OAIC's deliverables is to finalise 80% of all IC review applications within six months of receipt. In 2011-12, only 32.8% were finalised within six months* [emphasis added].[7]
>
> *"Since early in its operation, the OAIC has had a backlog of IC reviews on hand: that is, not finalised. On 30 June 2012, the OAIC had 357 IC reviews on hand: 56% of the total number of IC reviews received since November 2010."*[8]

Indeed, the failure in the review process is such that a report in *The Age* newspaper published on April 9, 2012 stated:

> *"The OAIC expects to receive as many as 700 FOI review applications in 211-12. In February [2012], the office had a backlog of more than 340 applications and this is expected to grow. Applicants for FOI reviews can expect a six-week wait before any response and a delay of six months or longer before the matter is progressed.*
>
> *"Departmental FOI officers have candidly acknowledged that the OAIC's growing backlog allows 'sensitive' FOI requests to be 'put on the back burner.'"*[9]

Such outcomes can be interpreted as enabling Government to keep important information under wraps. The parties believe that it is undesirable, and detrimental to all Australians that delays and backlogs could conceivably be used to justify sensitive FOIs being left unaddressed (at worst) or delayed (at best).

Recommendation – appropriate resourcing within existing budgets

The parties to the submission call on the Government to appropriately and adequately resource the management of FOI requests and reviews of decisions – within existing budgets and ensure that agencies, including the OAIC devote sufficient resources to the review of FOI decisions.

The delays in processing caused by under-resourcing are real issues for all people seeking access to information – including media organisations. It is disappointing and also concerning that the outcomes that are experienced have a chilling effect on the right of the Australian – and international – public to know.

[7] Ibid, pp 96
[8] Op. cit.
[9] Phillip Dorling "Reform on FOI bogs down" *The Age* 9 April 2012: http://www.theage.com.au/opinion/political-news/reform-on-foi-bogs-down-20120408-1wjof.html

3. THE OPERATION AND EFFECTIVENESS OF THE TWO-TIER REVIEW SYSTEM

In addition to these issues regarding the timeliness of OAIC decisions, the parties to this submission are also concerned about the quality of decision making by the OAIC in relation to reviews.

Lack of time limits associated with review

In March 2012 Seven Network (a party to this submission) reviewed 17 published decisions taken by the OAIC since January 2011. Only one of the 17 decisions took less than 100 days. Eighty-two per cent of the decisions took longer than 20 weeks, meaning applicants were left waiting for more than five months in nearly all cases. Seven decisions took more than 200 days to be delivered and two took more than one year.

By way of further example, it took 393 days to decide whether a diary entry relating to political party function was an official document of a Minister; and it took 275 days to determine whether a letter to the Prime Minister from a political organisation is an official document of a Minister. These decisions, which only turn on whether s.4(1) of the FOI Act applies, should have been made more quickly and reflects poorly on the performance, capability and capacity of the OAIC. More recently, it took the Commissioner 11 months to decide that two letters to the Prime Minister from a former Prime Minister concerning current matters of political debate were not exempt by reason of their containing personal details (name and address) of the former Prime Minister. That decision turned on a very narrow question of fact – and while the former Prime Minister may have been entitled to be consulted, an appropriate decision making process could have accommodated that with very little delay.

It is relevant to note that more than two in three decisions made by the OAIC that were reviewed by the Seven Network affirm the original ministerial or agency decision (meaning in those cases, the applicant's appeal was unsuccessful). Only five of the 17 decisions were set aside and substituted with a different decision. Significantly, only one decision was wholly in the original applicant's favour.

In a speech to the Australian Corporate Lawyers Association on 12 August 2012, barrister Tom Brennan stated the Information Commissioner and the Freedom of Information Commissioner met regularly with government officials in a forum known as "ICON" (Information Contact Officers Network), and that that network is constituted by officials of agencies responsible for FOI administration.

Mr Brennan noted that material provided by the Freedom of Information Commissioner to the ICON network meetings indicates that the backlog has continued to grow:

> *"By 16 March 2012 the office had received 504 applications for review of which 162 had been finalised. Of the 162 finalised reviews, some 140 were finalised by the applicant withdrawing or by the exercise of summary dismissal powers by the Commissioner. Only 3 matters had been resolved by agreement between the applicant and the agency concerned or by the variation of decision and 19 matters had been resolved on the merits."*
>
> *"In the six weeks following, until 31 May 2012 a further 100 applications were received. In that period 76 applications were finalised, of which 69 were dealt with through*

withdrawal or summary dismissal and 7 were resolved on the merits. None were resolved by agreement or variation of decision."

Mr Brennan raises a significant issue in relation to the review process – the high incidence of reviews dismissed or withdrawn:

> *"In total between 1 November 2010 and 31 May 2012 some 604 applications for review had been received. Of those, 209 have been dealt with through withdrawal or summary dismissal. That is a very high number and large proportion. Three matters were resolved by agreement or variation of the decision and 26 had been resolved on the merits. They are both low numbers and very low proportions. The backlog of unresolved review applications had grown to some 366. That is a very high number and constitutes 60% of applications received."*

Consideration of some of the data published in the Commissioner's Annual Report indicates that major adjustments were made to the review process towards the end of the financial year.

For example at Table 8.3 on page 95 the Commissioner reports that in the year to 30 June 2012 some 78 applications for review were dismissed pursuant to s.54W of the Act, including 22 pursuant to s.54W(b) by which, in effect, the Commissioner refers applications for review to the AAT.

Yet at 31 May 2012 the total of all reviews which had been closed since November 2012 at the discretion of the Information Commissioner pursuant to any provision of s.54W was 57, and by 31 May 2012 there was no mention in any publication by the Information Commissioner of any decision having been made by him pursuant to s.54W(b) resulting in referral of applications for review to the AAT.

There seems no doubt that the rate of discretionary rejection of applications for review pursuant to s.54W rose substantially in June 2012 – no fewer than 21 were rejected for that reason that month. Further it may be that all 22 of the applications for review which were referred by the Commissioner to the AAT were referred in June 2012. The changes in review process merit close review.

Lack of time limits means no access to AAT until completion of review

The parties are also concerned about the high level of review applications being withdrawn or dismissed and the fact that the merits review role has been conferred without the imposition of any time limits for its exercise. As a consequence, an applicant usually has no access to the Administrative Appeals Tribunal (AAT) until after the Information Commissioner has completed the review exercise. There is serious concern that there no formal constraint on the OAIC to act promptly.

Further the significant number of reviews which have been refused by the Commissioner pursuant to s.54W(b) and thereby referred to the AAT calls into question the rationale for the prohibition on applicants approaching the AAT prior to the exercise of such a discretion by the Commissioner. There is no information publicly available to explain the basis for the decisions to refer applications to the AAT.

Recommendation – implementation of timeframes for review

Timeframes must be introduced into the review and appeals process. It is clear that timeliness is crucial when reporting on the activities of government, particularly as an issue may lose its relevance or currency as a result of delays.

Lack of rigour and independence of review process

In the *Open Government Report: a Review of the Federal Freedom of Information Act 1982*[10] the ALRC commented upon the inconsistency of the role of conduct of determinative merits review on the one hand and the other FOI functions to be conferred on an Information Commissioner on the other.

The freedom of information functions conferred upon the OAIC by the *Australian Information Commissioner Act 2010* s.8 include:

(a) promoting awareness and understanding of the FOI Act and the objects of the Act;

(b) assisting agencies to publish information in accordance with the Information Publication Scheme;

(c) providing information, advice, assistance and training to agencies and others on the operation of the FOI Act;

(d) issuing guidelines to be taken into account by decision-makers under the FOI Act;

(e) proposing to the Minister legislative changes to the FOI Act;

(f) proposing to the Minister administrative action necessary or desirable in relation to the operation of the FOI Act;

(g) monitoring, investigating, reporting on compliance by agencies with the FOI Act;

(h) collecting information statistics from agencies and Ministers about the FOI Act.

In addition to those functions the Commissioner is responsible for the conduct of merits reviews under Part VII of the FOI Act.

There is a fundamental and necessary incompatibility between the function of performance of external merits reviews on the one hand and the other functions conferred upon the Commissioner on the other.

At least in some cases, and in particular in contentious cases in which the media are likely to be involved, the external merits review function cannot be effectively discharged without the reviewer being, and being seen to be, independent of the agency or Minister whose decision is subject to review.

[10] http://www.alrc.gov.au/report-77

However the effective discharge of the Commissioner's other functions make it impossible for him to be seen to be independent of Government agencies.

For example the Commissioner has established a series of workshops with Information Contact Officers of departments and agencies under the acronym ICON. We do not doubt that that is an important and effective forum through which the Commissioner can discharge his functions of promoting awareness and understanding of the FOI Act, and assisting agencies on various aspects of operation and administration of the FOI Act. However it is impossible for the Commissioner to hold those regular meetings with respondent agencies and their representatives and to then be accepted as an independent umpire by applicants who seek to question decisions made by those respondent agents, hopefully under the influence of the Commissioner's guidance provided at those ICON meetings.

Similarly, the Commissioner has issued guidelines for decision makers. In discharge of his merits review function the Commissioner is required to consider whether or not to apply those guidelines in an individual case. In being required to do so he is required to make invidious choices – particularly where the statute operates to require the Commissioners themselves to personally make decisions and to issue guidelines.

Many of the Commissioner's merits review decisions have been on the assessment and waiver of charges. He has separately reviewed FOI charging and published his recommendations. Applicants seeking review of charging decisions under current law are left in the invidious position of seeking that outcome from a reviewer who has published his views that the legislation should be changed to restrict the right applicants are seeking to exercise.

Each of the above examples is an example of structural incompatibility of the OAIC's main stream role with its merits review role.

This circumstance is exacerbated by the OAIC's laudable commitment to alternative dispute resolution mechanisms, including conciliation and mediation. While those mechanisms may well be effective in many cases, the absence of any framework to clearly delineate between the alternative and informal dispute resolution mechanisms first employed, and formal merits review exacerbates the difficulties of providing an external merits review function which is capable of being seen by applicants to be independent. That is, parties dealing with the OAIC in an alternative dispute resolution process have no way of being assured that information provided or admissions made will not be taken into account in making any decision on a formal merits review.

There would be no incompatibility between the broader freedom of information functions of the OAIC and it retaining an alternative dispute resolution function – in which reviews would be resolved one way or another by agreement.

However consideration must be given to either removing the formal merits review function from the Commissioner, or providing to applicants the option of applying to the AAT for review, without requiring any decision by the Information Commissioner.

The fact that in the last financial year some 22 decisions were in effect referred by the Commissioner to the AAT would indicate that the Commissioner himself sees no difficulty arising from any such "bifurcated" review process. This review could usefully analyse the details of those 22 cases and assess the effect of the referrals to the AAT.

Attachment A provides relevant documentation regarding an application for review by Seven Network to the OAIC against the Commonwealth Department of Immigration in relation to current and future overcrowding in detention centres – issues upon which the Reviewer will be well informed from his own review of those matters. They are matters of manifest public interest. The OAIC was unable to complete the review in a timely manner and has revealed poor process and a failure to address bias. The decision making process adopted by the Commissioner might, or might not, ultimately prove to be effective and legally accurate. However it cannot result in the applicant (or affected third party) being satisfied that any review has in fact been conducted independently and in accordance with the facts. Not only has there been extensive delay in the handling of the application for review, the Information Commissioner in his letter of 28 November 2012 in effect concedes that advice to the review applicant from the OAIC, in giving reasons refusing to provide to the review applicant documents which had been provided to the Information Commissioner for the purposes of the conduct of the review, were inaccurate.

In his letter of 28 November 2012 the Commissioner advised that he had prepared a non-binding case appraisal that was being sent to the respondent agency and the affected third party. He noted it would be open to those parties to make further detailed submissions to him in response to that non-binding case appraisal but that the appraisal would not be provided to the applicant. It seems unlikely that any further submissions by the respondent or affected third party could be provided to the applicant.

The consequence is that the decision-making process will in effect be, as the Commisioner would have had it throughout, a dialogue between the Commissioner, the respondent and the affected third party. The applicant will not participate. The applicant cannot be provided with any adequate assurance that any decision has been made in accordance with the law and based on the facts.

Recommendation – access to alternative means of review, including the AAT, at an early stage

To address the issues outlined above the parties to this submission recommend that applicants be allowed to access alternative means of review at an early stage, including the AAT.

Under the *Government Information (Public Access) Act 2009* (NSW), a number of review rights exist. An applicant may seek an internal appeal, approach the Office of the Information Commissioner (NSW OIC) for a review of the agency's decision or they may go to the Administrative Decisions Tribunal to request a review.

In the Open Government Report, the ALRC considered whether the Information Commissioner should have a merits review role. It stated that it was:

> *"not usual for an institution responsible for formulating guidelines on the administration of legislation to have individual case dispute resolution powers. Providing advice and assistance to both parties and, perhaps, facilitating a request could give rise to a conflict*

of interest and a perception of a lack of independence if the FOI Commissioner were to have determinative powers."[11]

While, such conflict of interest may not exist in this case, the provision of an appeal process direct to the AAT from a refusal or deemed refusal of an agency would alleviate pressure on the OAIC and provide an alternative mechanism for applicants interested in accessing an independent tribunal with extensive experience with FOI matters. It is only through such a mechanism that the perceptions of lack of independence can be addressed in circumstances where those perceptions are necessary attributes of the OAIC's other functions, and of the OAIC's implementation of Alternative Dispute Resolution mechanisms.

Therefore the parties to this submission recommend amendment of the FOI Act to provide a direct right to apply to the AAT for applicants at the deemed refusal stage or from an internal review.

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11 Australian Law Reform Commission *Open Government - A Review of the Federal Freedom of Information Act 1982*, 1996, paragraph 6.20: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf

4. THE REFORMULATION OF THE EXEMPTIONS IN THE FOI ACT

In its June 1, 2009 response to the draft *Information Commissioner Bill 2009* and the draft *Freedom of Information Amendment (Reform) Bill 2009*, ARTK addressed the issue of key exemptions. The parties to this submission maintain that and any reform to further extend of the Cabinet exemption or to protect the concept of frank and fearless advice are vigorously opposed.

Similarly, any attempt to limit access to so-called sensitive documents is also rejected. Existing exemptions amply protect the public interest and changes to increase a government's ability to prevent documents from release will only contribute to secrecy – perception and/or reality – and ultimately damage Australia's democracy.

The parties to the submission do not support the extension of exemptions in the FOI Act, including the application of the new public interest test taking account of sensitive government documents including Cabinet documents; and frank and fearless advice.

Public Interest Test

The parties believe the new public interest test has contributed to the efficiency of operation of the FOI Act. However, the test does not apply to several exemptions in the Act, including cabinet documents and documents relating to national security, defence and international relations.

The parties believe that the single public interest test should be applied consistently across all exemption categories, furthering the objects of the FOl Act.

There is no evidence that applying a public interest test to all categories of exemption will have a detrimental impact on the Government's decision making processes. It is unlikely that Australian decision makers, including courts, may conclude that it would be in the public interest that documents be released if it could cause the harm of compromising collective ministerial accountability or endanger national security.

The parties believe that the FOI law needs to provide for the extraordinary. Government failings of indisputable national and significant consequence can occur and should not be protected by the sanctity of Cabinet. The Australian Wheat Board bribery scandal, information relevant to weapons of mass destruction and Australia's decision to go to a non-UN sanctioned war in Iraq, the troubled home insulation scheme are examples where there is a legitimate public interest in release of information.

In such situations, decision makers should be required to consider where the public interest lies and consider whether or not to decide to release the documents. Of note, the New Zealand Official Information Act allows greater access to Cabinet information without any discernible problems in administration or management.

Reformulation of exemptions

The parties to the submission do not support the reformulation of exemptions in the FOI Act.

Sensitive government documents, including Cabinet documents, are no exemption

ARTK supported the amendments in the FOI Bill to clarify the scope of the Cabinet exemption on the basis the exemption only captures documents prepared for the dominant purpose of submission to the Cabinet.

The parties to this submission maintain that the Cabinet exemption should not extend to extracts of factual or statistical material contained in Cabinet documents. This material does not reveal the deliberations of Cabinet. This material does, however, play a vital role in informing the public about the quality of Cabinet decision making.

The provision of frank and fearless advice is no exemption

The terms of reference of the review refer to the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government.

The reference to third parties who deal with government causes us great concern. There is no basis to think that there exists any "third party" which in fact deals with government on a "frank and fearless" basis – and there are good and substantial reasons to think that public administration would generally be enhanced by commercial parties dealing with government continuing to experience the pressure to be accurate (including the pressure that comes from the risk of disclosure of their communications with government).

Notably, third parties are not subject to the *Public Service Act* and its duties and mechanisms to enforce obligations of accuracy.

"Frank and fearless advice" from public servants is exactly the information that should be available to the Australian public. Logically, if frank and fearless advice supports the quality of Government programs and policies, then Government would be happy for such information to be released. If such advice does not support a government policy or program, and/or identifies flaws or problems, then the public will be better informed – despite any negative political consequences for the Government.

Broader community knowledge of the failures or flaws of a government policy or program can lead to pressure to reform or discontinue the policy or program, ensuring funds are spent in the national interest, not the political interest of politicians. This is precisely the reason why 'frank and fearless advice' is the correct manner in which advisers to Government should act, and what should be available to the Australian public.

In its I June 2009 response to the draft *Information Commissioner Bill 2009* and the draft *Freedom of Information Amendment (Reform) Bill 2009,* ARTK noted its consistent arguments that the public interest factors first identified in *Re Howard*[12], including the issue of frank and fearless advice, lacked any evidentiary basis and have been blight on effective FOI. ARTK supported the decision to make at least some of those factors irrelevant in determining the public interest test.

However, ARTK argued the then FOI Bill should be amended to specify that the discouraging of full and frank advice is an irrelevant public interest factor.

The flaws in arguing against disclosure in those circumstances were identified in the AAT's judgment in *McKinnon v Dept PM & Cabinet* V2005/1033[13]. In that case, Deputy President Forgie rejected claims that public servants have a reasonable expectation the documents they prepared

[12] *Re Howard and the Treasurer of the Commonwealth* (1985) 7 ALD 645
[13] [2007] AATA 1969

would remain confidential. The case also showed that failing to provide frank and fearless advice directly contradicted obligations under the Public Service Act.

5. THE APPROPRIATENESS OF THE RANGE OF AGENCIES COVERED BY THE FOI ACT

The parties to this submission believe that as a general principle, all agencies should be covered by the FOI Act except agencies inexorably linked to national security such as ASIO or ASIS – although the administrative functions of such agencies should be in scope.

The Parliament and the Governor General should be covered by the FOI Act because tax payers are entitled to know how public funds are being spent and because their functioning as institutions is at the heart of the operation of Australia's representative democracy. The exclusion of parliamentary departments was criticised by the Australian Law Reform Commission (ALRC) which recommended their inclusion in 1996.

Internationally, England, Scotland, India, Ireland, South Africa and Mexico all allow FOI requests to parliamentary departments. Domestically, Tasmania's *Right to Information Act 2009* allows requests to parliamentary departments, although this is limited to administrative matters.

Further, the failure to allow FOI access to Parliament cannot be justified given the importance of Parliament to Australia's democracy and international best practice.

6. THE ROLE OF FEES AND CHARGES ON FOI

The veracity of the right to access information must be upheld

The report of the *Review of charges under the Freedom of Information Act 1982* (Charges Report) notes:

> *"FOI charges can discourage or inhibit the public from exercising the legally enforceable right of access to government information granted by the FOI Act. The objective of the Act to make government open and engaged with the public will be hampered if it is too expensive or cumbersome for people to make FOI requests*".[14]

The Charges Report goes on to refer to the *"problem of large and complex applications from specific categories of applicants who use the FOI Act rather than rely upon other means to obtain information (such as law firms that use the FOI Act as a form of discovery, and members of parliament, journalists, researchers and the media)".*[15]

This comment displays a troubling misunderstanding of the importance of a legal right to information for everyone, regardless of profession or purpose.

The parties to this submission are committed to an FOI Act which provides a formal, legal right of access to government information at the lowest cost. Such a right cannot be subordinate and supplementary to the informal provision of information by agencies, which can selectively release information to an applicant. The FOI Act exists because an independently reviewable, legal right of access is required to ensure access to government information – and this should be upheld at all times, to the highest standards.

[14] Prof. John McMillan *Review of charges under the Freedom of Information Act 1982* February 2012, pp 1
[15] McMillan, op. cit, pp 5

Administrative release no substitute for FOI

The Charges Report states that *"agencies are encouraged to establish administrative access schemes that enable people to request access to information or documents that are open to release under the FOI Act. A scheme should be set out on an agency's website and explain that information will be provided free of charge (except for reasonable reproduction and postage costs."*[16] However the availability of administrative access schemes cannot replace or diminish the FOI process.

When coupled with the right to access information at the lowest cost, the parties therefore reject the proposal in the Charges Report that agencies impose a $50 application fee if a person makes an FOI request without first applying under an administrative access scheme that has been notified on an agency's website.

This proposal diminishes the fundamental right to information and also penalises a citizen for exercising that right. Administrative access may be offered as an alternative to access through FOI but it cannot be used to replace the right to government information. Various States have well established systems whereby agencies, with the agreement of applicants, will initially deal with a request as if it were for administrative access and only move to the more formal and expensive FOI processes if the applicant is dissatisfied with the outcome. We have no difficulty with approaches such as that – but they operate by agreement, and not by curtailing a right otherwise enjoyed by the applicant.

Further, the assertion that administrative release can be an effective process for obtaining access to information has been found to be wrong by a research project conducted by Seven Network in September this year. (See Attachment B)

In October 2012, Seven Network sought information through fifteen administrative requests made to ten government departments in the period 5 September to 29 September 2012. Information contained in this document refers to phone and email conversations between a Seven News journalist and government department representatives.

The departments approached were:

- Education Employment and Workplace Relations (regarding two consultancies);
- Finance and Deregulation, the Department of Defence (regarding three consultancies);
- Attorney-General's;
- Treasury (regarding three consultancies);
- Infrastructure and Transport;
- Industry Innovation Science Research and Tertiary Education;
- the Australian Public Service Commission;
- Sustainability Environment Water Population and Communities; and
- Families Housing Community Services and Indigenous Affairs.

Of the reports requested, three were unable to be released as they were not yet complete, one was apparently "confidential" and two reports were claimed to be an "internal evaluation". Two requests were responded to with details of how to find information regarding the reports online, and one report and subsequent consultancy was cancelled. Of the total requests, six were replied to with varying responses regarding how to go about making a FOI request to gain access to the requested information.

[16] Ibid., pp6

During the course of at least five phone conversations, the journalist requesting information was asked "what administrative release was" and was obliged to direct public servants to the website for the OAIC for further information.

This research establishes that there exists neither the culture nor the systems to ground any confidence that administrative access schemes can be made to operate as an alternative to the right to access under the FOI Act. In truth, at this time they may be not much more than a dream, a hope or a gleam in the Information Commissioner's eye. While we have no doubt that the Commonwealth could learn a great deal from the States (and the OAIC could develop a better approach to administrative access by close study of State practice), the case for linking administrative access schemes with FOI charging has not been made out and should not be pursued.

Processing charges

The Charges Report also recommends that no FOI processing charge should be payable for the first five hours of processing time (which includes search, retrieval, decision making, redaction and electronic processing). The charge for processing time that exceeds five hours but is less than 10 hours should be a flat rate of $50. The charge for each hour of processing after the first 10 hours should be $30 per hour.[17]

Such a proposed charging mechanism – particularly the proposed payments beyond the first 10 hours – is a disincentive to seeking information. Such charges confirm the statement made in the Charges Report that *"FOI charges can discourage or inhibit the public from exercising the legally enforceable right of access to government information granted by the FOI Act."*

Such charging proposals undermine the objective of the Act – that is, to make government open and engaged with the public. The parties believe that such a proposal should not proceed.

Same day disclosure processes

Another issue impacting the parties to this submission is the use of same day disclosure processes by government, to diminish investment by media in FOI. A previous ARTK submission was made to Government regarding this issue. A copy of that submission is at Attachment C.

OAIC guidelines – Part 14 Disclosure Log – are available on this matter.[18] However, the parties note that some agencies are ignoring or failing to adhere to the guidelines, and/or using outdated versions of the guidelines.

The parties to the submission recommend review of this particular matter.

Processing time

The Charges Report also recommends a ceiling on processing time of no more than 40 hours replacing the practical refusal mechanism in ss 24, 24AA and 24AB. This is rejected by the parties to the submission.

[17] Ibid, pp6-7
[18] http://www.oaic.gov.au/publications/guidelines/part14-disclosure-log.html

The FOI Act uses the term "unreasonably" relevant to whether a request diverts resources or interferes with functions, and this term allows judgement on the basis of the public interest of the information sought. The parties contend that this term must remain; and in any event there must be external merits review of any decision to refuse a request because of processing demands.

Any suggestion that an agency can set a 40 hour limit by a non-reviewable decision will seriously diminish the effectiveness of the FOI Act. In fact we have grave concerns that such a provision would be available to agencies to defeat almost every contentious, public interest focussed FOI request. Even in cases where only specified and readily located documents were requested, how would an applicant effectively question a (non reviewable) decision to refuse access because the agency has estimated that reading the specific documents for the purpose of making exemption decisions will take more than 40 hours? Similarly, in the case of single, large documents the provision would operate to make the documents in effect exempt simply because of their size – because reading them would take longer than the 40 hours.

Other charges issues

The parties support the reform allowing an applicant to apply for reduction or waiver of an FOI charge on the basis of financial hardship.

The recommendation in the Charges Report that an applicant pay $100 if applying directly for Information Commissioner review (when internal review is available) is onerous and denies a right of timely appeal. Such a proposal is not supported.

Payment options – electronic funds transfer must be available in all instances

There are various processes and payment options – including limitations – across agencies. The parties to this submission urge the government to ensure that electronic payment is available, and accepted, in all instances for the payment of FOI fees and charges.

Department of Immigration and OAIC Internal Review

1.	Our application for IC review	June 12
2.	OAIC letter of consideration for IC review	June 18
3.	Our letter of reply to Charine Bennett	June 25
4.	Email response from Charine Bennett	June 25 4.50pm
5.	Our Letter of response	June 28
6.	Email from DIAC internal review decision of 17 February	July 10
7.	Email and letter from Charine Bennett refusing IC review	July 12
8.	Our Letter of response to DIAC	July 17
9.	Our Letter of response to Professor McMillan	July 17
10.	Email and letter to Professor McMillan	August 9 1.30pm
11.	Email from Charine Bennett with 2 letters Response to our letter of 17 July and update on IC review	August 9 1.40pm
12.	Email from Charine Bennett decision on DIAC's application for further time	August 9 6.14pm
13.	Email from Charine Bennett response to our letter of 9 August 2012	August 10 9.59am
14.	Email from Tom Brennan to respond (we did not respond went to Blanks)	August 10 10.45
15.	Emails from Blanks/Brennan and letter to OIAC	August 22
16.	Two letters to OAIC from Stephen Blanks for Hearing and Charine Bennett has no further Involvement	September 26

17. Email from Annan Boag OAIC and two letters of response to Blanks letters of 26 September and email from Rowan Patterson DIAC 13 Sep refusing a hearing

November 28

FILE COPY

June 12, 2012

Professor John McMillan
Australian Information Commissioner
Office of the Australian Information Commissioner
Level 3, Minter Ellison Building
25 National Circuit
FORREST ACT 2603

Dear Prof McMillan,

I apply for review of a decision deemed to have been made by the Department of Immigration and Citizenship **(DIAC)** under s54D of the *Freedom of Information Act 1982* **(FOI Act)**, details of which are set out below and in the annexures to this letter.

I further apply for a decision that you not undertake an IC review because *"the Information Commissioner is satisfied that the interests of the administration of this Act make it desirable that the IC reviewable decision be considered by the Tribunal".*

Background

On May 12, 2011, I lodged an FOI application with the Department of Immigration and Citizenship seeking information about advice from Serco (which is contracted by the Department to operate Australia's Immigration Detention Centres) about current and future overcrowding in detention centres to the department, the department's response to such advice including whether the department instructed Serco to cease the provision of any such advice. A copy is **annexure A.**

On February 17, 2012, the agency provided a decision releasing some information but exempting other information from release. A copy is **annexure B.** On March 20, 2012, I lodged an internal appeal application. A copy is **annexure C.** The Department was obliged by s. 54C of the FOI Act to make a decision on my internal appeal by no later than 19 April 2012. Not only did the Department fail to do so, in an email of April 23, the agency advised that "unfortunately at this stage DIAC has not yet allocated a decision maker to conduct this review". A copy is **annexure D.** To the best of my knowledge, the internal review has still not commenced.

The objects of the Act require prompt resolution

The question of current and future overcrowding of detention centres is a matter of current public interest and debate and which the Australian Government and Parliament are currently actively considering. The documents which are the subject matter of my FOI request will better inform members of the public, including immigration detainees and their advocates and immigration detention centre staff on those questions. Provided their publication is timely, it will increase public

participation in Government processes, thereby promoting better informed decision making. (see s3(2)(a))

The documents will also provide information about whether the Australian Government is managing and administering detention centres properly. Their timely publication will increase scrutiny, discussion, comment and review of the Government's activities in managing the detention centre network and its contract with Serco. (see s.3(2)(b))

In order for citizens to be informed on issues of strong public interest, the government is obliged (by s3(4) to provide information under the FOI Act promptly. Clearly, in this case, there has been sustained and continued failure by the agency to adhere to the requirements of the FOI Act.

The information I have sought should be available to the public now.

Direct access to the AAT

I seek a decision under s54W(b) that permits me to apply to the AAT for review of this decision without waiting for a review by you or your office because:

> 1.The AAT's processes of directions hearings and directions, fixing matters for final hearing and hearing and determining them, its resourcing and the constitution of its membership combine to make it highly probable that any application I make will be resolved promptly.
> 2.For reasons of either process, personnel or resourcing, you and your office are incapable of, or in any event highly unlikely to, resolve the application promptly.

In assessing what is desirable in the administration of the Act you should place primary weight on the Parliament's expressed objectives for that administration in s 3 of the Act.

The AAT

If you conduct a search on my name as applicant in the decisions of the AAT you will see that I am very experienced in the conduct of applications for review of FOI decisions in that Tribunal.

Based on that experience I expect that an application by me in this case would be heard within 6 to 8 weeks and finally determined within 10 to 14 weeks from filing.

OAIC Review

The OAIC faces major problems in providing timely reviews.

The letter by Professor McMillan to the Secretary of the Finance Department of February 2, 2012, notes: "We are already experiencing difficulty in dealing with complaints and IC reviews we are receiving. For example, as at November 2011 the OAIC had completed 89 IC review applications and had an unresolved backlog of 259 cases." A copy is **annexure E**.

Further, in an interview published in The Age on April 9, Professor John McMillan warned that refusal to adequately fund oversight of freedom of information legislation was undermining the government's declared commitment to increased transparency and more open government. The article further states that "the OAIC expects to receive as many as 700 FOI review applications in 2011-12. In February, the office had a backlog of more than 340 applications and this is expected to grow. Applicants for FOI reviews can expect a six-week wait before any response and a delay of six

months or longer before a matter is progressed". In a subsequent email to my office, the OIAC has confirmed this is a fair reflection of Prof McMillan's views. A copy is **annexure F**.

The OIAC's stated view that any review application faces a delay of six months before it is progressed means that access to the information I have sought from the Immigration Department faces even further and unacceptable delays if I await the OIAC belated response.

For the purposes of the decision under s.54W it does not matter whether those delays are caused by, or contributed to, by your office's processes as compared to those of the AAT, to its personnel or to its level of resources. What is clear is that review by your office is substantially slower than review by the AAT. Further, there is nothing to suggest that review by your office is more cost effective than review by the AAT.

I have significant experience at the AAT and have the resources to ensure adequate representation in proceedings at the Tribunal.

Given the delays already, I request a response to this letter within 14 days.

I place you on notice that I consider it arguable that in the circumstances of this case, the terms of s.54W(b) read with s.3(2) and 3(4) and in the context of the review scheme in the FOI Act, impose upon you a duty to make a decision on this application. If you fail to do so within a reasonable time I will apply for an appropriate order by way of judicial review.

My electronic address for service is mmckinnon@seven.com.au

I have copied this letter to the secretary of DIAC.

Yours sincerely,

Michael McKinnon
FOI Editor

Enc.

Australian Government
Office of the Australian Information Commissioner

18/6/2012

Our reference: MR12/00213

Mr Michael McKinnon
FOI Editor
Seven Network (Operations) Limited
GPO Box 604
BRISBANE QLD 4001

By email: mmckinnon@seven.com.au

Dear Mr McKinnon

Your application for Information Commissioner review

Thank you for your request for Information Commissioner review (IC review) under the *Freedom of Information Act* 1982 (the FOI Act).

You have sought IC review of the deemed decision of the Department of Immigration and Citizenship (the Department) to affirm its decision of 17 February 2012 to partially release copies of the documents that you requested. You had sought internal review by the Department of that decision on 20 March 2012.

The Department deleted some information as irrelevant to your request under s 22 of the FOI Act and some information as exempt under the commercially valuable information exemption (s 47 of the FOI Act).

In your application for IC review, you say that the information you have sought from the Department is a matter of current public interest, and you seek a prompt resolution of your review. You also request that the review be conducted by the Administrative Appeals Tribunal (AAT) because, in your view, that would enable the matter to be resolved more quickly than if it were conducted by the Information Commissioner.

Review by the AAT

Section 54W(b) of the FOI Act provides that the Information Commissioner can decide not to undertake an IC review, or not to continue to undertake an IC review, if the interests of the administration of the FOI Act make it desirable that an IC reviewable decision be considered by the AAT. Before the Information Commissioner could make such a decision in relation to your IC review, you would need to provide reasons as to why you think that the Department's decision of 17 February 2012 (deemed to have been affirmed on internal review) is wrong.

In your letter of 12 June 2012 to the Information Commissioner, you said that:

- the subject matter of your request is a matter of current public interest and debate.

In your letter of 20 March 2012 to the Department (a copy of which you attached to your letter to the Information Commissioner), which sought internal review of the Department's decision, you said that:

- the material that the Department edited from the documents on the basis that it was irrelevant (s 22) should be released as it will provide useful context
- the Department should only have exempted material on the basis that it has commercial value that would be destroyed or diminished if the information were disclosed (s 47) if it consulted the relevant organisation first, and it is not clear that the Department did consult in this case, and
- there is a high level of public interest in the release of the documents you have requested.

I note that the obligation to consult a third party organisation in relation to s 47 is an obligation not to give access without consultation; it is not an obligation to consult in circumstances where access is not given: see s 27(4). I also note that the exemption in s 47 is not one of the public interest conditional exemptions in Division 3 of Part IV of the FOI Act. Nor is there a public interest component to s 22.

You have not explained why you contend that the Department has misapplied s 22 or s 47.

Reasons for your application

Please provide reasons why you contend that the Department's decision is wrong. If you provide such reasons, the Information Commissioner will be in a position to decide whether it is in the interests of the administration of the FOI Act that the Department's decision be considered by the AAT (s 54W(b)).

The Australian Information Commissioner has issued Guidelines under s 93A to which regard must be had for the purposes of performing a function, or exercising a power, under the FOI Act. You may wish to refer to Part 5 of the Guidelines (about s 47) and Part 8 (about s 22) in preparing your reasons. Please note that the application of ss 22 and 47 raise different issues.

Section 55D of the FOI Act provides that the Department has the onus of establishing that its decision is justified. However, before we can further consider your application for IC review, we need to understand the substance and scope of that application.

Please provide reasons for your contention by **9 July 2012**. If you do not provide reasons, it is open to the Information Commissioner to finalise your IC review on the basis that it is lacking in substance (s 54W(a)(i)).

Further information

If you would like to discuss this matter, I can be contacted on (02) 6239 9170 or at charine.bennett@oaic.gov.au. Please quote the reference number **MR12/00213**.

Yours sincerely

Charine Bennett

Charine Bennett
Director, Compliance
Office of the Australian Information Commissioner
18 June 2012

FILE COPY

June 25, 2012

Ms Charine Bennett
Director, Compliance
Office of the Australian Information Commissioner
Level 3, Minter Ellison Building
25 National Circuit
FORREST ACT 2603

via email: charine.bennett@oaic.gov.au

Dear Ms Bennett,

Thank you for your letter.

It raises three threshold issues.

First, your statement that *"before we can further consider your application for IC review, we need to understand the substance and scope of that application"* is one of the more extraordinary pronouncements to have fallen from any public official responsible for merits review. Suffice to say I cannot recall when an agency official responsible for internal review has made such an outlandish statement.

Clearly enough from the first paragraph of my letter my application is for review of the decision deemed to have been made by the Department of Immigration. That is the substance and scope of the application.

Second, your advice that if I do not provide reasons why I contend that the Department's decision is wrong the Commissioner may finalise the review on the ground that it is lacking in substance is incorrect. I am a review applicant. I do not give reasons. Decision makers give reasons.

Once again it is clear enough that a ground of review that is sufficient to avoid the Commissioner being satisfied as set out in s54W(a)(i) is that the evidence does not establish that the Department's decision was justified. I rely on that ground.

Third, your statement that before the Information Commissioner could make a decision under s54W(b) I would need to provide reasons as to why I think that the Department's decision of

17 February 2012 (deemed to have been affirmed on internal review) is wrong is not supported by the terms of the matter of which the Commissioner needs to be satisfied. I could understand advice to the effect that the Commissioner would be assisted in making a decision by advice as to the grounds upon which I rely to contend that the decision is not justified; or even that the Commissioner would be unlikely to be satisfied as I have requested without first having received advice on that question from me. However either of those propositions is a long way from your assertion that the Commissioner could not make such a decision absent that advice.

As a result of my concerns with respect to each of the three matters above I sought to ascertain whether you were a decision maker, or were writing in some other capacity. I went to the OAIC website but could find nothing by way of an instrument of delegation or other operational information which might assist me with that.

I therefore ask:

1. Are you authorised to make a decision on my:
    a. Request for IC review?
    b. Request for the exercise of the s54W(b) discretion?

2. If the answer to 1a or 1b is "No":
    a. Who is so authorised?
    b. Does that person/those people agree with you on each of the three matters mentioned above?

Once I have heard from you in response to this email I will consider what further material I might provide as to my grounds for contending that the Department's decision is wrong.

Yours sincerely,

Michael McKinnon
FOI Editor

To: O'Malley, Jenny
Subject: FW: Information Commissioner Review [SEC=UNCLASSIFIED]

Dear Ms O'Malley

I am forwarding this response to Mr McKinnon's letter to you for his attention.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170| charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

From: Charine Bennett
Sent: Monday, 25 June 2012 4:50 PM
To: 'mmckinnon@seven.com.au'
Cc: James Popple
Subject: FW: Information Commissioner Review [SEC=UNCLASSIFIED]

Dear Mr McKinnon

Thanks for your response.

The answer to your question regarding authorised decision making is that yes, I am authorised as a delegate of the Information Commissioner under s54W to decide not to undertake, or not to continue to undertake an IC review. This power is delegated to me as an Executive Level 2 employee in the Compliance Branch of the OAIC. I am also authorised to undertake preliminary inquiries for the purpose of determining whether or not to undertake an IC review.

The instrument of delegation of powers conferred on the Australian Information Commissioner by the *Freedom of Information Act 1982* is available on the OAIC website at http://www.oaic.gov.au/publications/other_operational/oaic_foi_delegation_s25.pdf . Thank you for bringing to our attention the fact that this document needed to be more accessible. We have also added a reference to the location of functional delegations on our IPS page at http://www.oaic.gov.au/ips/index.html#what_we_do.

Noting the concerns that you have expressed about the information I requested, I would also add that the Freedom of Information Commissioner, Dr James Popple, is aware of the review application you made and the letter I sent to you. He is also available to discuss the issues you have raised if you would like to contact him. Dr Popple can be reached on 02 6239 9137.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170| charine.bennett@oaic.gov.au

June 28, 2012

Ms Charine Bennett
Director, Compliance
Office of the Australian Information Commission
Level 3
Minter Ellison Building
25 National Circuit
FOREST ACT 2603

Via email: charine.bennett@oaic.gov.au

Dear Ms Bennett,

I refer to your email of 25 June 2012.

I note that you do not resile from any of the three positions that you have put in your letter to me. Each is legally defective. I reserve my rights and the balance of this letter is without prejudice to that reservation.

In the balance of this letter I provide further detail on the grounds upon which I rely for my application.

In doing so I indicate that should this matter proceed in the AAT I expect that the Tribunal will follow its usual course such that the respondent would be required to file and serve any Statement of Facts and Contentions before I was required so to do. I reserve my right to add to, amend or depart from any of what is stated below in that event.

Further if the matter does not proceed by way of AAT review I envisage that I will apply pursuant to s.55B of the *Freedom of Information Act 1982* for the holding of a hearing for the purposes of the conduct of the IC review. On any such hearing I will contend that an effect of the onus provision within the Act, taken together with the fact that the respondent, but not I, knows the content of the documents in question and the demands of procedural fairness is that the respondent should be required to articulate the details of its case for any claimed refusal of access before I am required to respond to that case. Again I reserve the right to add to, amend or depart from anything which is stated below once I have had the opportunity to consider the respondent's case.

Seven Network (Operations) Limited, ABN 65 052 845 262
Sir Samuel Griffith Drive, Mt Coot-tha QLD 4066 Australia, Postal Address: GPO Box 604, Brisbane QLD 4001 Australia
T +61 7 3368 7214 **F** +61 7 3368 7215

Ground 1

The primary decision maker misconstrued the scope of my request.

This ground is relevant to each redaction or refusal pursuant to s.22.

The terms of my request were annexed to my application for IC review and I do not repeat them.

The terms of the decision maker's consideration of that request were annexed to my IC review and I do not repeat them.

It is apparent from the decision maker's formatting of the terms of the request that he has regarded each of what he has set out as sub-paragraphs (b) and (c) as limited by the phrase "containing information from Serco".

That construction of my request was not open on the request as submitted.

In the alternative, the primary decision maker's deletions and refusal under s.22 may have been infected by such an error. Merits review is appropriate to assess whether each of those deletions and refusals was properly made.

Ground 2

This ground is relevant to each exemption claimed pursuant to s.47(1)(b).

The primary decision maker is to be taken to have found as facts that:

(1) each of the documents claimed to be exempt pursuant to s.47(1)(b) contains information;

(2) that that information has a commercial value; and

(3) that that commercial value could reasonably be expected to be destroyed or diminished if the information were disclosed.

She did so having regard only to "departmental files and/or documents" identified in the Statement of Reasons.

That material was insufficient to ground any conclusion that any of the information contained in any of those documents was not already in the public domain.

That material was insufficient to ground any conclusion that any such information had any commercial value.

That material was insufficient to ground any conclusion that any such material was communicated in confidence.

That material was insufficient to ground any conclusion that release of any of the information would or could reasonably be expected to have any particular impact upon any commercial value.

Whether material exists which might establish the exemption claimed is properly a matter for merits review, and well suited to adjudication by the AAT. At this stage what can be said is that if such material exists, the primary decision maker has not had regard to it.

Yours sincerely,

Michael McKinnon
FOI Editor

I was provided with no opportunity to make submissions on that question and have no basis for assessing the veracity of what Ms Bennett says, or of what DIAC is reported to have said to Ms Bennett.

I note Ms Bennett's advice as to next steps. I expect that I will be provided with a copy of all material relevant to this matter which is received by your office, other than the documents claimed to be exempt. I expect, at the appropriate time, to make a request that there be a hearing in this matter.

Nothing set out above provides any reason to delay the progress of the IC review.

Tom

From: McKinnon, Michael [mailto:MMcKinnon@seven.com.au]
Sent: Friday, 13 July 2012 10:25 AM
To: Tom Brennan
Subject: FW: FOI - Internal Reveiw [SEC=UNCLASSIFIED]

Immigration letter

From: Mary.Miller@immi.gov.au [mailto:Mary.Miller@immi.gov.au]
Sent: Tuesday, 10 July 2012 5:31 PM
To: McKinnon, Michael
Cc: O'Malley, Jenny
Subject: FOI - Internal Reveiw [SEC=UNCLASSIFIED]

Dear Mr McKinnon

Re: FOI request FA11/5/00558
File Number ADF2011/12025
Your ref 162/11

I am writing to inform you that I have been appointed as the decision maker on your Freedom of Information (FOI) request for internal review of the decision provided on 17 February 2012.

The request was for:

> *"...documents produced in the last five years, including correspondence, containing information from Serco about*
> *a) forecasts, warnings, advice about current or future overcrowding in immigration detention centers and facilities and*
> *b) Immigration's consideration and views on such forecasts, warnings or advice and*
> *c) any responses from the Immigration Department to Serco advising, suggesting or requiring Serco to stop, cease or change such forecasts, warnings or advice about actual or possible overcrowding."*

I have begun my assessment of the documents. In particular, I note your view that the information removed as out of scope under section 22 of the FOI Act as should be released as it would provide useful context.

I have done a preliminary assessment of the deleted information as 'irrelevant' against the scope of your request. It is my view that the information is outside the scope of your request, comprising for example,

personal information about detainees, or low level administration detail about the detention centre. At this point I am satisfied that the deleted material is irrelevant. Therefore, I do not believe that the internal review process will achieve the desired outcome.

As an alternative, I could provide a brief out line of the information which is currently deemed to be out of scope, allowing you to decide which documents you wish to seek access to under a fresh FOI request.

If you agree to withdraw your request for internal review of the information deleted as irrelevant under s22(1)(a)(ii) of the FOI Act, would you please confirm your decision by return email to this address. I would then provide you with the outline of the information and continue the review of exempted material under section 47 of the Act.

I look forward to hearing from you shortly and to receiving your assistance in this matter.

Yours sincerely

Mary Miller
Assistant Director
FOI & Privacy Policy Section
Governance and Audit Branch
Governance and Legal Division
Department of Immigration and Citizenship
Telephone (02) 6264 1923
Email mary.miller@immi.gov.au

O'Malley, Jenny

From: Charine Bennett <Charine.Bennett@oaic.gov.au>
Sent: Thursday, 12 July 2012 3:37 PM
To: McKinnon, Michael
Cc: Paula Gonzalez; O'Malley, Jenny
Subject: RE: Information Commissioner Review [SEC=UNCLASSIFIED]
Attachments: image002.jpg; mmck.pdf

Dear Mr McKinnon

Thank you for your call. I attach a copy of a letter posted to you yesterday about the commencement of an IC review. I understand that you feel strongly that you should be allowed to apply to the AAT and disagree with the decision to commence an IC review.

After I finalised the letter yesterday, DIAC contacted me to confirm what the options available to it are now that the IC review has commenced. They said they had been in contact with you in the internal review space about the issues about exemptions made under s22 of material considered not to be relevant to your request. As indicated in the letter, I advised DIAC that it was open to it to make a revised decision under s55G if the effect of this would be to give access to a document in accordance with the request, or to try to reach an agreement with you (in whole or in part) under s55F. I confirmed that the timeframe for the request for information and documents remained.

As indicated in the letter, I will be away after today until 3 August. The contact person in my absence is Ms Paula Gonzalez, who is also a Director in the Compliance Branch and I have copied this email to her.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170| charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

From: O'Malley, Jenny [mailto:JO'Malley@seven.com.au]
Sent: Thursday, 28 June 2012 11:39 AM
To: Charine Bennett
Subject: RE: Information Commissioner Review [SEC=UNCLASSIFIED]

Dear Ms Bennett

Please find attached letter of response to your email of 25 June 2012.

Kind regards

From: Charine Bennett [mailto:Charine.Bennett@oaic.gov.au]
Sent: Monday, 25 June 2012 4:52 PM

11/12/2012
7.

Our ref: MR12/00213
Your ref:

Mr Michael McKinnon
Seven Network (Operations) Limited
GPO BOX 604,
BRISBANE QLD 4001

Copy to mmckinnon@seven.com.au

Dear Mr McKinnon

Application for review of Department of Immigration and Citizenship's FOI decision

Thank you for your response of 28 June 2012 to my request for further information regarding your application for Information Commissioner review (IC review).

Your application for exercise of discretion not to undertake IC review

Firstly, I am writing to let you know that the Information Commissioner is not satisfied that the interests of the administration of the *Freedom of Information Act 1982* (Cth) (the Act) that the IC reviewable decision should be considered by the Administrative Appeals Tribunal. Therefore, he will not exercise the discretion under s54W(b) not to undertake an IC review and has instead decided to commence an IC review.

Information requested from DIAC

Under s55A, as an affected third party required to be notified of the IC review application, Serco is also a party to the review. DIAC has confirmed that Serco was consulted during the initial decision-making process and made contentions against the release of the documents.

I have written to Department of Immigration and Citizenship (DIAC) advising that a review is being undertaken. I have also requested copies of the 12 documents to which access has not been fully granted, correspondence related to the consultation with Serco under s27 and submissions for consideration on the exemptions applied. The response from DIAC is due to be provided in early August.

10.

Next steps

Once the response from DIAC has been received, you will be provided with an opportunity to comment on the submissions (subject to any valid confidentiality considerations). I will be in contact with you again at this point.

At any time during an IC review of an access refusal decision, an agency may vary an access refusal decision in relation to a request, if the variation would have an effect of giving access to a document in accordance with the request (s55G(1)(a). The Information Commissioner may resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F).

If the review is not finalised under either of these mechanisms, the matter will be decided by a formal decision in writing. The Information Commissioner has advised that he will be the decision-maker in this case.

I will be on leave from Friday 13 July until Friday 3 August 2012. While I am away, you can contact Ms Paula Gonzalez (paula.gonzalez@oaic.gov.au or 02 6239 9171) about your IC review.

Yours sincerely

Charine Bennett

Charine Bennett
Director
FOI Compliance Branch
11 July 2012

FILE COPY

July 17 2012

My Ref: 162/11
FOI Request: FA11/5/00558
File Number: ADF2011/12025

Ms Mary Miller
Assistant Director
FOI and Privacy Policy Section
Governance and Audit Branch
Governance and Legal Division
Department of Immigration and Citizenship

Dear Ms Miller,

Further to your email of 10 July 2012 in relation to my FOI internal review request.

I have applied to the Information Commissioner for review of your department's decision. In that context I do not understand what purpose would be served by my withdrawal of my internal review application.

Thanks for your offer of help.

Yours sincerely,

Michael McKinnon
FOI Editor

July 17, 2012

Professor John McMillan AO
Australian Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

Dear Professor McMillan,

I refer to Ms Bennett's letter to me dated 12 July 2012.

She advised me that you had decided to refuse to exercise your discretion under s54W(b) of the FOI Act. Please provide me with a statement of your reasons for that decision, including your findings of fact and references to the evidence or other material upon which it is based.

I would be grateful if in furnishing that statement of reasons you attended in particular to providing me with material sufficient to assure me that you and your office have complied with your obligations under s55(4)(b) to provide me with a reasonable opportunity to present my case. You will be aware that that obligation extends beyond the conduct of an IC review and affects all conduct in relation to an IC review.

In this case the material available to me (the Department's statement or reasons) was inconsistent with any contentions from Serco having been taken into account at the primary decision making stage. My letter to Ms Bennett of 28 June 2012 made clear that my case was based on that material, and based on that material the fact was that there had been no consultation with Serco. Ms Bennett has nevertheless made a finding of fact that "DIAC has confirmed that Serco was consulted during the initial decision making process and made contentions against the release of the documents". On that basis she seems to have reasoned that Serco was in fact consulted and did in fact make such contentions. That is a matter which would seem to be based on ex parte communications with DIAC and relevant to the exercise of your discretion.

I was provided with no opportunity to make submissions on that question and have no basis for assessing the veracity of what Ms Bennett says, or of what DIAC is reported to have said to Ms Bennett.

I note Ms Bennett's advice as to next steps. I expect that I will be provided with a copy of all material relevant to this matter which is received by your office, other than the documents claimed to be exempt. I expect, at the appropriate time, to make a request that there be a hearing in this matter.

Nothing set out above provides any reason to delay the progress of the IC review.

Yours sincerely,

Michael McKinnon
FOI Editor

P: 07 3368 7214
F: 07 3368 7215
Email: mmckinnon@seven.com.au

O'Malley, Jenny

From: O'Malley, Jenny
Sent: Thursday, 9 August 2012 1:30 PM
To: 'Paula Gonzalez'
Subject: RE: Information Commissioner Review [SEC=UNCLASSIFIED]
Attachments: Ltr Professor McMillan review MR12-00213.pdf; image001.jpg

Dear Paula

I attach a copy of a letter for Professor McMillan's attention in relation to review (ref: MR/00213).

The original will be posted today.

Kind regards

Jenny O'Malley
PA to Freedom of Information Editor

Seven Network (Operations) Limited
Sir Samuel Griffith Drive | Mt Coot-tha | Brisbane QLD 4066 Australia
Postal Address: GPO Box 604 | Brisbane QLD 4001 Australia
Telephone +61 07 3368 7218 | Facsimile +61 07 3368 7215 | Mobile +61 000 000 000

From: Paula Gonzalez [mailto:Paula.Gonzalez@oaic.gov.au]
Sent: Tuesday, 24 July 2012 9:07 AM
To: O'Malley, Jenny
Subject: RE: Information Commissioner Review [SEC=UNCLASSIFIED]

Hello Jenny
Just a quick note to let you know that Prof McMillan is drafting a response to Mr McKinnon's latest letter dated 17 July – he should receive a response shortly.

Paula Gonzalez | Director | Compliance
Office of the Australian Information Commissioner
+61 2 62399171
paula.gonzalez@oaic.gov.au

www.oaic.gov.au
Protecting information rights – advancing information policy

From: O'Malley, Jenny [mailto:JO'Malley@seven.com.au]
Sent: Tuesday, 17 July 2012 3:50 PM

O'Malley, Jenny

From: McKinnon, Michael
Sent: Thursday, 9 August 2012 11:54 AM
To: O'Malley, Jenny
Subject: FW:

J, can you send this please, cheers m

From: Tom Brennan [mailto:brennan@selbornechambers.com.au]
Sent: Thursday, 9 August 2012 11:20 AM
To: McKinnon, Michael
Cc: Stephen Blanks (Stephen@sbalaw.com.au)
Subject: RE:

Michael

Advice on prospects is always easier with the benefit of at least some evidence!

Consequently, can you write to OAIC saying:

"In her letter of 11 July 2012 Ms Bennett said that relevant materials were to be lodged by the respondent with the OAIC by early August. Please provide to me by return:

- a copy of all such material
- all other material held by the OAIC and sourced either from the respondent or the affected third party relevant to this review; and
- any record of communications between OAIC and either of those parties relevant to this review,

other than the documents claimed to be exempt."

Tom

From: McKinnon, Michael [mailto:MMcKinnon@seven.com.au]
Sent: Thursday, 9 August 2012 11:05 AM
To: Tom Brennan
Subject:

Tom, budget for immigration appeal is approved in a tight environment. However, W Coatsworth has asked if we can get a brief on our prospects. As background, I have pointed out the appeal breaks new ground as it is the first where the OIAC will act as a Tribunal and we need to establish the right processes etc and seek relevant evidence and cross-examine etc. It will also allow comparison between an AAT process and the OIAC's competence etc. An A4 page or 1 1/2 pages max. Would that be OK? Cheers M

Michael McKinnon
FOI Editor

Seven Network (Operations) Limited
Sir Samuel Griffith Drive | Mt Coot-tha | Brisbane QLD 4066 Australia
Postal Address: GPO Box 804 | Brisbane QLD 4001 Australia
Telephone +61 0 7 33687214 | Facsimile +61 0 7 33687215 | Mobile +61 0418 463841

FILE COPY

August 9, 2012

Your Ref: MR12/00213

Professor John McMillan AO
Australian Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

Dear Professor McMillan,

I refer to Ms Bennett's letter to me dated 11 July 2012.

She advised me that relevant materials were to be lodged by the respondent with the OAIC by early August. Please provide to me by return:

- a copy of all such material
- all other material held by the OAIC and sourced either from the respondent or the affected third party relevant to this review; and
- any record of communications between OAIC and either of those parties relevant to this review, other than the documents claimed to be exempt."

I look forward to your response.

Yours sincerely,

Michael McKinnon
FOI Editor

P: 07 3368 7214
F: 07 3368 7215
Email: mmckinnon@seven.com.au

To: Tom Brennan
Subject: FW: MR12/00213 update on your application for IC review [SEC=UNCLASSIFIED]

Tom, McMillan's response. He appears to be doing his best to argue that the matter can and should be done on the papers and our rights our constrained. Cheers M

From: Charine Bennett [mailto:Charine.Bennett@oaic.gov.au]
Sent: Thursday, 9 August 2012 1:40 PM
To: McKinnon, Michael
Cc: O'Malley, Jenny
Subject: MR12/00213 update on your application for IC review [SEC=UNCLASSIFIED]

Dear Mr McKinnon

Now that I am back from leave I am dealing with your application for IC review. I attach two letters to you from the Information Commissioner. One responds to your letter of 17 July requesting reasons for commencing an IC review (rather than exercising the discretion not to review available under s54W(b)). The other provides an update on your IC review.

These letters will also be posted to you today.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170| charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

Australian Government
Office of the Australian Information Commissioner

Our reference: MR 12/00213

Michael McKinnon
FOI Editor, Seven Network (Operations) Ltd
GPO Box 604
BRISBANE QLD 4001

Dear Mr McKinnon

I am writing to provide further information about the progress of your application for IC review of a deemed decision of the Department of Immigration and Citizenship. Earlier letters from Ms Bennett dated 18 June 2012 and 11 July 2012 explained the action taken by this office following receipt of your IC review application.

On 3 August 2012 the Department provided me with copies of the documents to which you were refused access partially and in full. The Department has also advised that you have made a further request dated 13 July 2012 under the *Freedom of Information Act 1982* for 'all documents covered by the agency's section 22 determination in relation to my earlier FOI request FA 11/05/00558'. I am advised that discussions are occurring between yourself and the Department about the scope of this request, and that you have been provided with a schedule (also provided to me) of the documents covered by the earlier s 22 decision.

In light of this development my preliminary view is that no further consideration should be given in this IC review to the Department's s 22 decision. The issue that I would have been required to decide was the proper interpretation and application of your FOI request to the Department dated 12 May 2011. The central issue was whether the information to which you were denied access fell within the description of 'documents .... containing information from Serco about ... overcrowding in immigration detention centres and facilities', 'Immigration's consideration and views on such forecasts' and 'responses from the Immigration Department to Serco' advising Serco not to provide forecasts on overcrowding.

There is no longer a practical need to resolve that issue of interpretation. It has been superseded by your later FOI request that is directly worded to seek the material that DIAC had not considered to be within the scope of your first request. I cannot see that any other issue of principle concerning the operation of s 22 falls to be decided in this FOI review.

The Department's initial FOI decision dated 17 February 2012 also denied access under s 24A. You were advised that documents relating to the Department's previous service provider cannot be located. You have not referred to this aspect of the Department's decision in your application to the Department for internal review dated 20 March 2012, in your application for IC review dated 12 June 2012 or your letter to Ms Bennett dated 28 June 2012 detailing the grounds for your IC review application. I am therefore assuming that you are not seeking a review of the Department's s 24A decision.

The remaining issue is the Department's decision to refuse access to parts of three letters from Serco to the Department, dated 8 July 2010, 13 December 2010 and 21 April 2011. I understand that you have been given partial access to those letters. The decision to refuse access was based on s 47(1)(b) of the FOI Act, which applies to 'information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed'.

In its response to my office on 3 August 2012 DIAC submitted that:

> It is DIAC's position that the information contained within the s 47(1)(b) exemption is information that has a commercial value. It directly relates to Serco's commercial activities, profitability and viability of Serco's work within the immigration detention services environment. The information discussed is known only to a limited number of parties (DIAC, Serco and one other commercial entity) as the information relates to confidential business discussions, negotiations and arrangements that have taken place between these three parties. The information is still current and DIAC contends there is a reasonable expectation that disclosing this information would reduce the value and/or profitability of Serco's business and would destroy or diminish Serco's ability to conduct essential negotiations that relate to its business affairs.

The Department has advised me that Serco was consulted under s 27 of the FOI Act and made a submission in support of an exemption contention. Serco is accordingly a party to this IC review under s 55A(1)(c) of the FOI Act. I am writing to Serco to invite a submission on why the documents in contention should be exempt from release under s 47(1)(b). I have asked Serco to address the issue of whether disclosure could be expected to diminish the commercial value of the information in the three letters under consideration. I have also asked the Department for a further submission on this issue.

Once I have heard from Serco and the Department I will write again to you to invite any further submission you may wish to make before I reach a decision.

Yours sincerely

Prof John McMillan
Australian Information Commissioner

9 August 2012

11.
2.

Australian Government
Office of the Australian Information Commissioner

Our reference: MR 12/00213

Michael McKinnon
FOI Editor, Seven Network (Operations) Ltd
GPO Box 604
BRISBANE QLD 4001

Dear Mr McKinnon

Request for statement of reasons

I refer to your letter dated 17 July 2012 requesting a statement of reasons for my decision relating to s 54W(b) of the *Freedom of Information Act 1982*, communicated to you by Ms Charine Bennett by letter dated 11 July 2012.

Section 54W(b) provides that I may decide not to undertake an IC review if I am satisfied 'that the interests of the administration of the [FOI] Act make it desirable that the IC reviewable decision be considered' by the Administrative Appeals Tribunal. As advised by Ms Bennett I was not satisfied that I should decline to undertake an IC review of the application that you made by letter dated 12 June 2012.

I assume that your request for a statement of reasons is made under s 13 of the *Administrative Decisions (Judicial Review) Act 1977*. The requirement in s 54X of the FOI Act that reasons be provided applies only where I decide not to undertake or continue an IC review.

The matters that I took into account in making my decision were as follows:

- The scheme of the FOI Act is that a person must apply for Information Commissioner review prior to applying for AAT review. A person cannot apply for AAT review unless the Information Commissioner has made a decision that can be reviewed by the AAT, or the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that AAT review be permitted without IC review first occurring.

- The primary argument you gave in your letter of 12 June 2012 for seeking a decision under s 54W(b) was that your application could be resolved more quickly through AAT review than through IC review. I accept that the timeframe for resolving a case is a relevant consideration. I do not accept that it is the only or the principal matter to be considered. Nor do I accept that your application was likely to be resolved more promptly had I made a decision under s 54W(b) not to undertake an IC review. Many applications for IC review have been resolved promptly without the need for a hearing under s 55B or a decision under s 55K.

- The nature of the issue arising in an IC reviewable decision is an important consideration in deciding whether to permit review by the AAT pursuant to s 54W(b). The decision of the Department of Immigration and Citizenship dated 17 February 2012 that was referred to in

your application for IC review refused access under three sections of the FOI Act – s 22(1) (documents considered irrelevant to your request); s 24A (documents cannot be located); and s 47 (release could adversely affect an organisation's commercial affairs).

- I was not satisfied that it was desirable in the interests of the administration of the FOI Act that those matters be resolved by the AAT without IC review first being undertaken. Each of those matters was of a nature that could appropriately be addressed in an IC review. The number of folios involved was not large in number (less than 70), and the Department's decision and your application for review did not appear to raise any issue that made the matter more appropriate for AAT review. Specifically, it was likely that the s 22 issue could be readily resolved by submissions from the parties and inspection of the documents to which you were refused access to identify if those documents fell inside the scope of your FOI request dated 12 May 2011. The s 47 issue applied to only 10 folios that were released in part. It is likely that this issue could be resolved in the normal manner by inspection of the documents and submissions from the parties.

- I took into consideration that the Department had failed to make a decision on your application for internal review prior to you applying for IC review on 12 June 2012. It was possible that the Department would give further consideration to your FOI request while an IC review was being undertaken. Under s 55G of the FOI Act it was open to the Department to vary its earlier access refusal decision by deciding to give access to documents to which access had earlier been refused.

- I also had regard to paragraphs 10.60 – 10.68 of the FOI Guidelines that I have issued under s 93A of the FOI Act.

Your request for a statement of reasons asked me to address compliance with s 55(4)(b) of the FOI Act, which requires that I provide each party to an IC review with a reasonable opportunity to present his or her case. This obligation applies to the conduct of the IC review overall, and does not necessarily require a series of separate hearings during the IC review.

I am satisfied that the letters between yourself and my office concerning your s 54W(b) request – specifically, your letters dated 12 and 28 June 2012, and Ms Bennett's letter dated 25 June 2012 – provided a reasonable opportunity for you to be heard at this stage of the IC review. The information conveyed by Ms Bennett, that DIAC had consulted Serco, is a matter on which you can be heard before conclusion of the IC review and did not require a separate hearing at this preliminary stage. I also draw your attention to s 54V of the FOI Act which provides that my office may make preliminary inquiries before conducting an IC review.

Yours sincerely

Prof John McMillan
Australian Information Commissioner

10 August 2012

12

O'Malley, Jenny

From: Charine Bennett <Charine.Bennett@oaic.gov.au>
Sent: Thursday, 9 August 2012 6:14 PM
To: McKinnon, Michael
Cc: O'Malley, Jenny
Subject: Decision on s15AB extension of time request - OAIC Reference RQ12/01424 - DIAC FOI decision (Reference FA 12/07/00492 [SEC=UNCLASSIFIED]

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr McKinnon

Further to this email, I am writing to advise you of my decision on DIAC's application for further time. We do not have a record of receiving a response from you to Ms Raams' consultation email.

DIAC provided a copy of the schedule of documents sent to you by DIAC on 18 July in which DIAC provided points to describe the content of the material that you had not been provided in your earlier FOI request. DIAC advised that it had prepared this after a conversation with you in which you advised that you may be prepared to narrow the scope of the FOI request if you were provided with a brief outline of the information within the scope of the request. DIAC has advised that as of today it has not received a response from you regarding the scope of the request.

I have decided not to grant DIAC an extension of time for the full period of time requested. However, I consider that DIAC should receive extra time for the number of days in which it has been waiting for a response on the scope of the request, that is the period from 18 July until today (23 days). I consider that the work undertaken by DIAC in preparing this schedule and seeking to engage on the scope of the review is an element of complexity and it is appropriate to extend the processing period in a way similar to 'stopping the clock' where charges are assessed.

The effect of this decision is to extend the date on which the decision on your request is due to **Tuesday 4 September 2012**. I note that this date may yet be affected by any of the provision that impact on agency timeframes in processing requests such as charges or formal consultation with affected third parties. DIAC is also not precluded from making a further request for time but I make no comment as to whether any such request would be agreed to by the OAIC.

Review rights

You may seek review of our decision making process under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act). An appeal under the ADJR Act must be made to the Federal Court within 28 days of the date of our final decision. Before making an appeal please contact the Federal Court registry in your State or visit www.fedcourt.gov.au/contacts/contacts.html.

If you are unhappy with the way we have handled this matter, you may complain to the Commonwealth Ombudsman. This service is free, and you can contact the office on 1300 362 072 or visit www.ombudsman.gov.au.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au

02 6239 9170| charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

From: Leia Raams
Sent: Tuesday, 7 August 2012 3:27 PM
To: 'mmckinnon@seven.com.au'
Subject: Re: OAIC Reference RQ12/01424 - DIAC FOI decision (Reference FA 12/07/00492 - s 15AB request for an extensio of time [SEC=UNCLASSIFIED]

Dear Mr McKinnon,

I write to advise that on 3 August 2012 our Office received a request from the Department of Immigration and Citizenship (DIAC) for an extension of time to process your FOI application. DIAC advised that it sought agreement under s 15AA of the *Freedom of Information Act* 1982 (the Act), but that it has not received a reply from you. DIAC has applied for more time because the application is complex. DIAC said that there has been some difficulty in discussing the scope of your request and that the decision making process will be complex because the documents contain personal information of various third parties, business information of third parties as well as operational and intelligence gathering information. DIAC has not advised if any consultations would afford more time under s 15 (6) of the Act.

DIAC has sought an **extension until 27 September 2012**, which would make it a further 46 days. Before making a decision I would like to offer you the opportunity to comment on DIAC's request and if you object, to advise of your reasons why.

May you please respond to this email by **close of business 9 August 2012**. If I do not hear from you by this date, it is likely I will proceed to make a decision without your input. Please note that once I have made a decision a copy of it will be provided to you for your reference. You will also be advised of your review rights.

If you have any questions please do not hesitate to contact me on the number below or via return email.

Kind Regards,

Leia Raams | Compliance Officer
Office of the Australian Information Commissioner
GPO Box 2999 CANBERRA ACT 2601 |www.oaic.gov.au
Phone: +61 2 6239 9196
Fax: +61 2 6239 9187
Email: Leia.Raams@oaic.gov.au

Protecting information rights – advancing information policy

O'Malley, Jenny

From: Charine Bennett <Charine.Bennett@oaic.gov.au>
Sent: Friday, 10 August 2012 9:59 AM
To: McKinnon, Michael
Cc: O'Malley, Jenny
Subject: Response to your letter of 9 August seeking further information about OAIC communication with DIAC in relation to your IC review (MR12/00213) [SEC=UNCLASSIFIED]
Attachments: image001.jpg; Ltr Professor McMillan review MR12-00213.pdf; Notice of application for IC review - MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network [SEC=IN-CONFIDENCE:CLIENT]

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Mr McKinnon

In response to your letter yesterday, please find attached a copy of the email I received from DIAC on 3 August 2012 including the chain of communication I have had with them about your application for IC review. I have removed attachments to the email which included exempt material or discussion thereof.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170 | charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

From: Paula Gonzalez
Sent: Thursday, 9 August 2012 1:59 PM
To: Charine Bennett
Subject: FW: Information Commissioner Review [SEC=UNCLASSIFIED]

From: O'Malley, Jenny [mailto:JO'Malley@seven.com.au]
Sent: Thursday, 9 August 2012 1:30 PM
To: Paula Gonzalez
Subject: RE: Information Commissioner Review [SEC=UNCLASSIFIED]

Dear Paula

I attach a copy of a letter for Professor McMillan's attention in relation to review (ref: MR/00213).

August 9, 2012

Your Ref: MR12/00213

Professor John McMillan AO
Australian Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

Dear Professor McMillan,

I refer to Ms Bennett's letter to me dated 11 July 2012.

She advised me that relevant materials were to be lodged by the respondent with the OAIC by early August. Please provide to me by return:

- a copy of all such material
- all other material held by the OAIC and sourced either from the respondent or the affected third party relevant to this review; and
- any record of communications between OAIC and either of those parties relevant to this review, other than the documents claimed to be exempt."

I look forward to your response.

Yours sincerely,

Michael McKinnon
FOI Editor

P: 07 3368 7214
F: 07 3368 7215
Email: mmckinnon@seven.com.au

O'Malley, Jenny

From: Erin.Welsh@immi.gov.au on behalf of foi@immi.gov.au
Sent: Friday, 3 August 2012 9:28 AM
To: Charine Bennett
Cc: Linda.Rossiter@immi.gov.au
Subject: Notice of application for IC review - MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network [SEC=IN-CONFIDENCE:CLIENT]
Attachments: pic24992.gif; Scehdule of out of scope documents.doc

Dear Ms Bennett

Further to your correspondence below, DIAC would like to advise that Mr McKinnon lodged a new FOI request with DIAC on 13 July 2012 as follows:

> *I am seeking access to all documents covered by the agency's section 22 determination in relation to my earlier FOI request FA 11/05/00558*

DIAC has allocated this request to a decision maker who has sent Mr McKinnon an expanded schedule of documents from the previous request and is currently in the process of refining the scope of the request with him.

In response to your request for information of 11 July 2012, please see the information and documents attached below:

1. The exempt documents identifying the parts which were not released and the exemption applied

(See attached file: Redactions not applied on documents that were released to applicant.pdf)

As indicated above, these are the documents within the scope of Mr McKinnon's new request. I have also attached a copy of the expanded schedule that has been provided to Mr McKinnon to assist him in refining the scope of his current request.

(See attached file: Scehdule of out of scope documents.doc)

2. The notice to Serco from DIAC advising that an application for IC review has been made to the OAIC Currently, DIAC/Serco FOI consultation processes are facilitated by the department's Detention Services Coordination Section as they are in regular contact with Serco on a range of different departmental matters, including FOI matters. This IC review has been discussed verbally with the department's Detention Services Coordination Section and the following written advice has been provided to them to be passed onto Serco for their information.

(See attached file: Email to DISD.pdf)

3. Correspondence between DIAC and Serco regarding the s27 consultation, Serco's exemption contentions and any notice of the decision to partially release documents provided to Serco.

(See attached file: Binder of documents of correspondence with Serco.pdf)

Submissions with any further reasons for the application of the exemptions claimed:

There are three documents within this decision in which the s47(1)(b) exemption was claimed (in part). These documents are:

- Serco letter to department dated 8 July 2010 (3 folios)

- Serco letter to department dated 13 December 2010 (3 folios)
- Serco letter to department dated 21 April 2011 (4 folios)

(See attached file: s47(1)(b) documents.pdf)

It is DIAC's position that the information contained within the s47(1)(b) exemption is information that has a commercial value. It directly relates to Serco's commercial activities, profitability and viability of Serco's work within the immigration detention services environment. The information discussed is known only to a limited number of parties (DIAC, Serco and one other commercial entity) as the information relates to confidential business discussions, negotiations and arrangements that have taken place between these three parties. The information is still current and DIAC contends there is a reasonable expectation that disclosing this information would reduce the value and/or profitability of Serco's business and would destroy or diminish Serco's ability to conduct essential negotiations that relate to its business affairs.

As the Section 22(1)(a)(ii) - irrelevant material refusal decision is now the subject matter of a new FOI request that is currently in progress, DIAC is not proposing to provide any further comment on this aspect of the decision at this stage. Please advise if this is not acceptable.

I hope this information is of assistance

Kind Regards

Erin Welsh

A/g Assistant Director
FOI & Privacy Policy Section
Governance & Audit Branch
E: erin.welsh@immi.gov.au
T: (02) 6225 6988

Freedom of Information Helpdesk
Department of Immigration and Citizenship

----- Forwarded by Erin Welsh/ACT/IMMI/AU on 16/07/2012 03:47 PM -----

"Charine Bennett" <Charine.Bennett@oaic.gov.au>

11/07/2012 06:04 PM

To: "foi@immi.gov.au" <foi@immi.gov.au>

cc:

Subject: RE: Notice of application for IC review - MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network [SEC=UNCLASSIFIED]

Protective Mark: UNCLASSIFIED

Linda

As discussed, now that the IC review has commenced it is not open to DIAC to make an internal review decision.

The options for resolution if DIAC is open to releasing more information to the applicant are for a s55G revised decision if DIAC is prepared to make a decision that would have an effect of giving access to a document in accordance with the request or a decision by agreement (in whole or in part) under s55F if the terms of the agreement would be within the powers of the Information Commissioner and the IC is satisfied that it is appropriate. Alternatively, the reasons that DIAC would have provided to the applicant to affirm the refusal decision should now be directed as submissions to the OAIC for consideration.

I will be on leave from 13 July to 3 August. I would be happy to talk to you tomorrow if you have any further questions or issues to discuss.

Regards

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170| charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

From: Linda.Rossiter@immi.gov.au [mailto:Linda.Rossiter@immi.gov.au] **On Behalf Of** foi@immi.gov.au
Sent: Wednesday, 11 July 2012 5:34 PM
To: Charine Bennett
Cc: foi@immi.gov.au
Subject: RE: Notice of application for IC review - MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network [SEC=UNCLASSIFIED]

Dear Ms Bennett

I am writing to advise that DIAC has already allocated Mr McKinnon's internal review to a decision maker who has been in contact with Mr McKinnon regarding the scope of his review . Can you please advise if you wish DIAC to cease its review or whether you wish to wait until that review is finalised?

Regards

Linda Rossiter
Director
FOI and Privacy Policy Section
Department of Immigration and Citizenship
Phone (02) 6264 1482
Mobile 0423 843 240

"Charine Bennett" <Charine.Bennett@oaic.gov.au>

"Charine Bennett" <**Charine.Bennett@oaic.gov.au**>	To	"foi@immi.gov.au" <foi@immi.gov.au>
	cc	"Linda.Rossiter@immi.gov.au" <Linda.Rossiter@immi.gov.au>
	Subject	RE: Notice of application for IC review - MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network [SEC=UNCLASSIFIED]
11/07/2012 12:06 PM	Protective Mark	UNCLASSIFIED

Dear Mr Patterson

I am writing to advise that the Information Commissioner has decided to commence an IC review of Mr McKinnon's application. The scope of the IC review is of the 12 documents identified by DIAC as within the scope of the FOI request that were partially refused under s22(1)(a)(ii) – irrelevant to the request or s47(1)(b) – commercially valuable information.

Mr McKinnon has provided a copy of his application to DIAC for internal review dated 20 March 2012 in which he sought review of both exemptions applied.

Information requested

To assist with our IC review could you please provide copies of the follow in documents:

1. the exempt documents identifying the parts which were not released and the exemption applied
2. the notice to Serco from DIAC advising that an application for IC review has been made to the OAIC
3. correspondence between DIAC and Serco regarding the s27 consultation, Serco's exemption contentions and any notice of the decision to partially release documents provided to Serco.

Noting that the onus is on DIAC to establish that DIAC's decision in respect of the application is justified or the Information Commissioner should give a decision adverse to the applicant, I also invite you to provide submissions with any further reasons for the application of the exemptions claimed to the relevant parts of the documents. Submissions should be prepared with a view to the parties to the review being provided with an opportunity to respond to any new reasons or adverse material. If there are any parts of submissions for which DIAC would seek to be kept confidential, please identify these and provide reasons for the request.

At any stage during an IC review, the Information Commissioner may resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). It is also open to DIAC to may vary the access refusal decision if the revised decision would have an effect of giving access to a document in accordance with the request (s55G(1)(a)). Please let us know if you are considering making a revised decision or seeking to reach an agreement with Seven Network (Operations) Limited.

Please provide the requested information by **3 August 2012**. We are happy to receive your submissions and supporting documents by email. The exempt documents and any other material can be provided to Level 3 Minter Ellison Building, 25 National Circuit Forrest or by mail to GPO Box 2999 Canberra ACT 2601.

Dealing with exempt documents

This Office will not provide copies of the documents that you consider are exempt under the Act to the review applicant. The Office would not provide this material to the review applicant even if the Commissioner decides to vary DIAC's decision. Rather an IC review decision made under s 55K needs to be implemented by the respondent agency who also may want to exercise appeal rights to the Administrative Appeals Tribunal. At the conclusion of the IC review any exempt material that Department of Immigration and Citizenship has provided to this Office will be returned to Department of Immigration and Citizenship and will not be retained by the Office.

Please feel free to contact me if you wish to discuss this request. I will be on leave from 13 July to 3 August and Paula Gonzalez can be contacted in my absence.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
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Protecting information rights – advancing information policy

From: Rowan.Patterson@immi.gov.au [mailto:Rowan.Patterson@immi.gov.au] **On Behalf Of** foi@immi.gov.au
Sent: Tuesday, 19 June 2012 9:30 AM
To: Charine Bennett
Cc: foi@immi.gov.au; Linda.Rossiter@immi.gov.au
Subject: Re: Notice of application for IC review - MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network [SEC=UNCLASSIFIED]

Dear Ms Bennett

In response to your questions below

1. what is the status of the internal review decision? Has this now been finalised?
As previously advised to Mr McKinnon, we are yet to assign Mr McKinnon's review to an officer for assessment.

2. whether DIAC received any exemption contention against release from Serco (or any other third party) in making its original decision that material was exempt under s47? (ie is Serco an affected third party?)
DIAC received from Serco exemption contentions from Serco for certain information relating to their business. Consequently yes, Serco is an affected third party.

As DIAC has been notified that an IC review has been made regarding a request where Serco is an affected third party, we will inform Serco shortly.

Please let me know if you have any further questions.

Kind Regards

Rowan Patterson

Assistant Director
FOI & Privacy Policy Section
Governance and Audit Branch
Governance and Legal Division
Department of Immigration and Citizenship

Phone 02 6264 1432
Email rowan.patterson@immi.gov.au
FOI@immi.gov.au

"Charine Bennett" <Charine.Bennett@oaic.gov.au>

"Charine Bennett" <**Charine.Bennett@oaic.gov.au**>	To	"foi@immi.gov.au" <foi@immi.gov.au>
	cc	
	Subject	Notice of application for IC review - MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network [SEC=UNCLASSIFIED]
18/06/2012 06:58 PM	Protective Mark	

Dear Mr Patterson

I am writing to notify you that the Information Commissioner has received an application for review from Mr Michael McKinnon of the Seven Network. The application relates to a deemed affirmation decision by DIAC on internal review to refuse full access to documents sought by Mr McKinnon in a request DIAC received on 16 May 2011. Mr McKinnon has provided a copy of DIAC's decision of 17 February 2012 and his request for internal review of this decision dated 20 March 2012.

An Information Commissioner review has not been commenced at this stage. I request your assistance with two aspects of preliminary inquiries. Could you please advise:

1. what is the status of the internal review decision? Has this now been finalised?
2. whether DIAC received any exemption contention against release from Serco (or any other third party) in making its original decision that material was exempt under s47? (ie is Serco an affected third party?)

Under s54P of the FOI Act, DIAC is required to take all reasonable steps to notify any affected third party that an application for IC

review has been made and provide a copy of the notice to the Information Commissioner, or seek an order from the Information Commissioner under s54Q that notice is not required to be given.

I would be grateful for your response to these queries by Monday 2 July.

Yours sincerely

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170| charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

Australian Government
Department of Immigration and Citizenship

FOI Request FA 11/05/00558
File Number ADF2011/12025

Original scope of your request

"...documents produced in the last five years, including correspondence, containing information from Serco about
a) forecasts, warnings, advice about current or future overcrowding in immigration detention centers and facilities and
b) Immigration's consideration and views on such forecasts, warnings or advice and
c) any responses from the Immigration Department to Serco advising, suggesting or requiring Serco to stop, cease or change such forecasts, warnings or advice about actual or possible overcrowding."

Departmental document: CI Daily Report 20091019 (7 folios)

Folio	Description	Decision	Legislation	Out-of-scope details
1-2	Daily operations report	Released in part	s.22(1)(a)(ii)	• Anniversary of SIEV-X • Senator Hanson-Young's visit to the school • Deteriorating health of a detainee.
3-7	Record of day-to-day operations not related to scope of your request	Refused	s.22(1)(a)(ii)	Admin issues, such as: • Morning tea for Pink Ribbon day • Vehicle audit • System updates with confirmation that the ICSE system has updated. • Report on the number of minors in detention on the Island • Number of removals • Number of Community detention • Current interpreters available on CI • Number of completed interviews • Number of outstanding interviews • Media activity

6 Chan Street Belconnen ACT 2617
PO Box 25 BELCONNEN ACT 2616 • Telephone 02 6264 1111 • Facsimile 02 6225 6970 • Website: www.immi.gov.au

Departmental document: Incident Report 25 November 2009 (7 folios)

Folio	Description	Decision	Legislation	Out-of-scope details
1	Report cover page (details of incident not related to scope of your request)	Released in part	s.22(1)(a)(ii)	• Incident report about physical violence between two groups – detailed report about the incident and the response - does contain limited personal information. The report does contain recommendation to better control and prevent incidents.
2-4	Details of incident not related to scope of your request	Refused	s.22(1)(a)(ii)	Same as above
5-7	Report some of which details are not related to scope of your request	Released in part	s.22(1)(a)(ii)	Same as above

Departmental document: Serco letter to department dated 8 November 2010 (2 folios)

Folio	Description	Decision	Legislation	
1-2	Letter discussing results of overcrowding and some details not related to scope of request	Released in part	s.22(1)(a)(ii)	**Mr McKinnon** –This is out of scope, however, it does discuss the impact on Serco concerning the overcrowding eg Serco's contract, increases in the number of activities, staff, extra kitchen equipment etc.

Departmental document: National Service Provider Contract Meeting (NSPCM) Minutes from Wednesday 10 November 2010 (5 folios)

Folio	Description	Decision	Legislation	Out of Scope details
1-2	Meeting	Released in part	s.22(1)(a)(ii)	• Endorsement of minutes

	minutes some of which details are not related to scope of your request			from the previous meeting • Serco and IHMS general business • Technical Audits • Programs and Activities • Occupational Therapists • Children on School Holidays • Job Opportunities • Computer systems • Training • Transport • Escorts including International Escorts • Finance Sub Committee • Issues Register • Consent form • Other business –allowance program, loud hailers at VIDC, Stakeholder Engagement High Court Outcome
3-5	Minutes relating to separate issues irrelevant to scope of your request	Refused	s.22(1)(a)(ii)	As above

Departmental document: Serco letter to department dated 24 December 2010 (4 folios)

Folio	Description	Decision	Legislation	Out of Scope details
1-4	Letter discussing results of overcrowding as well as separate issue not related to scope of FOI request/	Released in part	s.22(1)(a)(ii)	**Mr McKinnon** –This is out of scope, however, it does discuss the impact on Serco concerning the overcrowding eg limitation of accommodation for additional staff, increase in the number of activities, safety and security systems, processing delays, dealing with property, recordkeeping

Departmental document: Serco letter to Secretary dated 19 January 2011 (2 folios)

Folio	Description	Decision	Legislation	Out of Scope details
1-2	Letter addressing resource issues and some details that are not related to your request	Released in part	s.22(1)(a)(ii)	• Pivotal roles that the Human Rights Commission and the Ombudsman play. • Detention security

Departmental document: National Service Provider Contract Meeting (NSPCM) Minutes from Wednesday 9 February 2011 (5 folios)

Folio	Description	Decision	Legislation	Out of Scope details
1-5	Meeting minutes some of which details are not related to scope of your request	Released in part	s.22(1)(a)(ii)	• Welcome • Action arising from last meeting • Serco and IHMS General Business • Programs and Activities • Computer access • Creating a healthy living environment • National training • Organisational Charts • Transport and Escorts • Finance Sub committee report • Issues register • OH&S visits • Establishment of Facilities Subcommittee • Other business – allowance program, loud hailers at VIDC, Manchester on Christmas Island, loose assets

Departmental document: Serco Draft Operational Hand back Plan dated 25 March 2011 (13 folios)

Folio	Description	Decision	Legislation	Out of Scope details
1-13	Operational plan some of which details are not related	Released in part	s.22(1)(a)(ii)	• Discussion surrounding a major incident • Planning a risk assessment

	to scope of your request			• Contractual requirements to maintain good order and discipline • Robust intelligence gathering • Physical Security • Daily routines • Welfare checks • Medical requirements • Activities • Canteen • Operational staffing • Contingency Plans • Security • Communication • Risk assessment report – detailing how and who will be responsible and the stakeholders eg DIAC, AFP, IHMS

Departmental document: Serco Final Operational Hand back Plan dated 25 March 2011 (14 folios)

Folio	Description	Decision	Legislation	Out of Scope details
1-14	Operational plan with additional text. Plan contains details are not related to scope of your request	Released in part	s.22(1)(a)(ii)	Essentially the same information as above

Departmental document: Serco letter to department dated 21 April 2011 (4 folios)

Folio	Description	Decision	Legislation	Out-of Scope details
1-4	Information of commercial value and other details irrelevant to scope of your request	Released in part	s.47(1)(b), s.22(1)(a)(ii)	• Discussing security issues at the centre.

O'Malley, Jenny

From: McKinnon, Michael
Sent: Friday, 10 August 2012 10:45 AM
To: O'Malley, Jenny
Subject: FW: MR12/00213 update on your application for IC review [SEC=UNCLASSIFIED]
Attachments: Ref MR1200213.pdf; Our Ref MR 1200213.pdf

Categories: Red Category

From: Tom Brennan [mailto:brennan@selbornechambers.com.au]
Sent: Friday, 10 August 2012 10:39 AM
To: McKinnon, Michael
Cc: Stephen Blanks (Stephen@sbalaw.com.au)
Subject: FW: MR12/00213 update on your application for IC review [SEC=UNCLASSIFIED]

Michael

Please reply:

"Please provide to me by return all records of communications concerning this review between you or your office on the one hand and the respondent or affected third party on the other.

Further, please ensure that all such records that might be created in the future are copied to me at the time of their creation.

This request does not extend to copies of the documents claimed to be exempt."

Tom

From: McKinnon, Michael [mailto:MMcKinnon@seven.com.au]
Sent: Friday, 10 August 2012 10:11 AM
To: Tom Brennan
Subject: FW: MR12/00213 update on your application for IC review [SEC=UNCLASSIFIED]

Tom, McMillan's response. He appears to be doing his best to argue that the matter can and should be done on the papers and our rights our constrained. Cheers M

From: Charine Bennett [mailto:Charine.Bennett@oaic.gov.au]
Sent: Thursday, 9 August 2012 1:40 PM
To: McKinnon, Michael
Cc: O'Malley, Jenny
Subject: MR12/00213 update on your application for IC review [SEC=UNCLASSIFIED]

Dear Mr McKinnon

Now that I am back from leave I am dealing with your application for IC review. I attach two letters to you from the Information Commissioner. One responds to your letter of 17 July requesting reasons for commencing an IC review (rather than exercising the discretion not to review available under s54W(b)). The other provides an update on your IC review.

15..

O'Malley, Jenny

From: Stephen Blanks <Stephen@sbalaw.com.au>
Sent: Wednesday, 22 August 2012 11:50 AM
To: McKinnon, Michael; brennan@selbornechambers.com.au
Cc: O'Malley, Jenny
Subject: RE: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]
Attachments: letter to AIC 120822.pdf

Copy of letter as sent, for your records.

Regards
Stephen

From: McKinnon, Michael [mailto:MMcKinnon@seven.com.au]
Sent: Wednesday, 22 August 2012 11:06 AM
To: Stephen Blanks
Subject: Re: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]

Good to go cheers m

Sent using BlackBerry

From: Stephen Blanks [mailto:Stephen@sbalaw.com.au]
Sent: Wednesday, August 22, 2012 10:34 AM
To: Tom Brennan <brennan@selbornechambers.com.au>
Cc: McKinnon, Michael
Subject: RE: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]

Tom, Michael

I have drafted the attached letter – let me know if you have any comments.

Regards
Stephen

From: Tom Brennan [mailto:brennan@selbornechambers.com.au]
Sent: Tuesday, 21 August 2012 4:04 PM
To: Stephen Blanks; Tom Brennan
Cc: MMcKinnon@seven.com.au
Subject: RE: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]

1. I assume the "consideration" will be of the request to be provided with the ex parte communications. God knows why that takes any consideration at all. Perhaps the best way to deal with that is to point out that Mr McKinnon, is, by reason of s55A a party to the review, and in the absence of a properly made order restricting it, is entitled to complete transparency of any dealings between the Commissioner or those acting on his behalf and any other party.
2. I agree he cannot consider the application for a hearing without submissions. You should say so.
3. We have an email address for Immigration in Bennett's email string. I agree we should ask for a direction to the effect you suggest, and in any event copy our letter to that email address along with our earlier letter.

45

4. I agree it would be helpful to make the points of the AAT as a comparator.
5. I'll deliver at lunch time.

Tom

From: Stephen Blanks [mailto:Stephen@sbalaw.com.au]
Sent: Tuesday, 21 August 2012 3:48 PM
To: Tom Brennan
Cc: MMcKinnon@seven.com.au
Subject: RE: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]

MM is keen to get another letter to them.

I can see scope for a letter which draws attention to the obligation in s 55B(2) to notify the other parties of the application, and to give them a reasonable time to respond. It seems to me that the AIC cannot now say that he will "consider" the request in due course. Consideration of the request for a hearing should presumably follow submissions from the parties. (A very peculiar aspect of all of this is that the parties do not cc each other in all correspondence with the AIC – should we ask the IC to give a direction to this effect?).

MM is keen to point out that if the AIC had decided (on 11 July) to not conduct an IC review, we would have had our first directions hearing in the AAT by now, and have a clear timetable leading to the conduct of a hearing within a reasonably short timeframe, and that as things presently stand, we do not know when we might get a hearing, if at all, and whether or not we get a hearing, that the IC process is likely to take longer and involve more interaction than an AAT application.

From your comment re Friday afternoon, I assume you are delivering your paper in the morning!

Regards
Stephen

From: Tom Brennan [mailto:brennan@selbornechambers.com.au]
Sent: Tuesday, 21 August 2012 3:20 PM
To: Stephen Blanks
Subject: RE: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]

Absent court proceedings there is nothing to be done.

That having been said, I suspect they will become a model of a merits review authority on Friday afternoon.

From: Stephen Blanks [mailto:Stephen@sbalaw.com.au]
Sent: Tuesday, 21 August 2012 3:08 PM
To: MMcKinnon@seven.com.au; brennan@selbornechambers.com.au
Subject: FW: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]

Any ideas on how to deal with non-responsiveness?

From: Charine Bennett [mailto:Charine.Bennett@oaic.gov.au]
Sent: Tuesday, 21 August 2012 2:34 PM
To: Stephen Blanks
Subject: RE: MR12/00213 - Michael McKinnon [SEC=UNCLASSIFIED]

Dear Stephen

Thanks for your letter on behalf of Mr McKinnon. The Information Commissioner will consider this request in due course. Taking into account the Commissioner's other commitments, I do not expect that a response will be provided this week.

Regards

Charine Bennett | Director | Compliance
Office of the Australian Information Commissioner
GPO Box 2999 Canberra ACT 2601 | www.oaic.gov.au
02 6239 9170| charine.bennett@oaic.gov.au

Protecting information rights – advancing information policy

From: Stephen Blanks [mailto:Stephen@sbalaw.com.au]
Sent: Tuesday, 21 August 2012 12:44 PM
To: Charine Bennett
Subject: MR12/00213 - Michael McKinnon

Dear Charine

Please see *attached* letter. An original will be sent by post.

Regards
Stephen

SBA Lawyers

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Solicitor

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Principal: Stephen Blanks

Your ref: MR 12/00213

22 August 2012

Emeritus Professor John McMillan AO
Australian Information Commissioner
GPO Box 2999
CANBERRA ACT 2601

Dear Emeritus Professor McMillan

McKinnon and Department of Immigration and Citizenship
MR/00213

We refer to the email from Charine Bennett yesterday afternoon in response to our letter dated 21 August 2012 in which our client made an application under s.55B of the *Freedom of Information Act 1982* for the conduct of a hearing, and requested certain records to enable our client to make submissions pursuant to s.55B(3).

We note that Ms Bennett responded as follows:

> The Information Commissioner will consider this request in due course.

We wish to clarify the request that Ms Bennett refers to in her email.

Our client accepts that you cannot consider our client's application for a hearing until after you have received submissions pursuant to s.55B(3). However, we note that s.55B(2) provides an unqualified obligation to notify the other parties to the IC review of our client's application, and our letter yesterday requested specific records to enable our client to make submissions for the purposes of s.55B(3).

We therefore assume that the reference to our client's request in Ms Bennett's email is a reference to our client's request for records. Please let us know if this assumption is not correct.

In relation to the request for records, we note that as our client is a party to the IC review (by reason of s.55A of the Act), we would expect that, to ensure complete transparency of the IC review process, our client would be entitled (in the absence of a properly made order restricting access) to receive copies of all communications between each other party to the IC review and you.

There would appear to be two ways in which this can be achieved. One would be, as is presently being done by our client, to request you to provide copies of such communications as the need arises. An alternative method would be for you to:

(a) give a written direction under s.55(2)(e) that the parties to this IC review copy each other with all communications to you; and

(b) adopt a practice of copying any communication from you or your office to a party to the IC review concerning the IC review to each party.

In seems to us that giving such a direction and adopting such a practice would be the most efficient and time-saving means of proceeding in the circumstances, at least going forward from this point. We note the process applicable to merits review of FOI decisions in the AAT necessarily involves any communication between a party to AAT proceedings and the AAT being copied to each other party to the AAT proceedings.

Our client requests that you give a direction as suggested above, and we respectfully suggest the following terms:

> That, from the date of this direction, each party to the IC review send by email to each other party to the IC review a copy of all communications from the party to the Australian Information Commissioner or the Office of the Australian Information Commissioner. For the purposes of this direction, the email addresses of the parties are:
>
> (a) for the IC review applicant, Mr Michael McKinnon, stephen@sbalaw.com.au;
>
> (b) for the IC review respondent, the Department of Immigration and Citizenship, Erin.Walsh@immi.gov.au
>
> (c) for the third party, Serco, _____.

In anticipation of such a direction being given, we are copying this letter and our letter yesterday to the respondent to the IC review. Could you please provide us with a copy of the third party's contact details so that we may forward copies of this correspondence directly to the third party.

It would, in our client's view, be unfortunate if the conduct of the IC review is delayed by procedural delays arising out of difficulties in obtaining copies of communications between parties to the IC review and you which are necessary for the purposes of making submissions in relation to the application for a hearing made by our client. By way of comparison with proceedings in the AAT, if our client's request that you decline to conduct an IC review in this matter had been acceded to, and he had commenced proceedings in the AAT, an initial directions hearing in the AAT would have been held by now, which would have resulted in a final hearing date having been set and a timetable fixed for the preparation of the matter.

We look forward to your prompt response to this letter.

Yours faithfully

SBA Lawyers
Stephen Blanks

cc. Erin Walsh Erin.Walsh@immi.gov.au

16.

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Principal: Stephen Blanks

SBA Lawyers

Your ref: MR 12/00213

26 September 2012

Emeritus Professor John McMillan AO

Australian Information Commissioner

GPO Box 2999

CANBERRA ACT 2601

Dear Emeritus Professor McMillan

McKinnon and Department of Immigration and Citizenship

MR/00213

This letter is the applicant's submission in support of his application for a hearing on the question whether three documents are exempt by reason of s.47(1)(b) of the *Freedom of Information Act 1982* (Act).

Submissions under Protest

It seems the decision-maker, his office, the respondent and the affected third party each have available to them a copy of the documents "Email to DISD.pdf" and a "Binder of documents of correspondence with Serco.pdf" referred to in an email of 3 August 2012 from the respondent to Ms Charine Bennett. The second of those documents in particular contains an exemption contention against release of the documents in issue by the affected third party to the respondent.

The Commissioner has repeatedly refused to provide a copy of those documents to the applicant. The applicant is thereby prejudiced in making these submissions.

The Commissioner is obliged to have provided those documents to the applicant. His failure to do so renders any decision taken adverse to the applicant vulnerable to challenge for denial of procedural fairness.

The applicant does not, by making these submissions, waive any rights with respect to that matter.

The Issue for the Decision-Maker

The Commissioner must consider whether to hold a hearing because the applicant requested a hearing (Act s.55B).

That consideration cannot be assisted by s.55(1) because that provision only applies when each of the three sub-paragraphs of the provision are satisfied; and sub-paragraph (c) cannot be satisfied because the applicant has requested a hearing under s.55B.

Consequently s.55(2) now applies to the conduct of this IC review, at least insofar as it is considering the claim to exemption pursuant to s.47(1)(b).

The first question that therefore arises is in what way does the Commissioner consider it is appropriate to conduct this IC review (Act s.55(2)(a)).

In answering that question the Commissioner will have regard to the following matters prescribed by s.55(4).

(a) the requirement to conduct the review with as little formality and as little technicality as is possible given a proper consideration of the matters before the Information Commissioner;

(b) the requirement to ensure that the applicant, Serco and the Department are each given a reasonable opportunity to present their respective cases; and

(c) the requirement to conduct the review in as timely a manner as is possible.

In her letter of 13 September 2012 Ms Bennett referred to guidelines said to have been issued by the Commissioner which state in part that the Commissioner will only decide to hold a hearing if satisfied that there is a special reason to warrant a hearing.

The Commissioner should not have regard to those guidelines because they are inconsistent with the provisions of the legislation identified above.

Alternatively, the guidelines should be read so that they are consistent with the legislation. In that circumstance any question of fact contemplated by sub-sections 55(2) and 55(4) of the Act will constitute a "special reason" if it indicates the desirability of holding a hearing.

The matters before the Commissioner

The only matter before the Commissioner is whether or not part of the content of three documents constitutes information which has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

The Commissioner has received three submissions relevant to those questions, each of which is inconsistent with the other. Those inconsistencies highlight that questions of detailed fact arise on this review, which questions cannot be answered by reference to the content of the documents – because the answers depend not upon the content of the "information" but rather upon the basis for any allegation of a commercial value and the basis for any expectation that that value would be destroyed or diminished.

The first submission was from the respondent on 3 August 2012. That submission stated that the information directly related to Serco's commercial activities, profitability and viability of Serco's work within the immigration detention services environment.

In contrast in a submission of 28 August 2012 the respondent said the information described Serco's internal workings and internal business affairs, including price negotiations.

Serco, in contrast on 30 August 2012 submitted that "the redacted information refers to sensitive negotiations relating to the costs and responsibilities for insurance".

The question which arises is which, if any, of the information is concerned with Serco's internal workings and internal business affairs, which are to be distinguished from the content of negotiations between Serco and the Australian Government.

On the question of the degree of confidentiality of the information the Department's first submission stated that the information was known only to a limited number of parties – and identified those parties as the Department, Serco and "one other commercial entity".

In its second submission the Department states that the information is "confidential information" and that it relates to pricing negotiations between Serco, the Department and relevant insurers.

In neither submission does the Department identify any basis for its submission that the information is "confidential information" or is known only to the parties so identified. Further, the inconsistency between the first submission, identifying only one other commercial entity that was privy to the information; and the second submission, which identifies multiple "relevant insurers" indicates that the nature of any sharing of the information concerned is a live factual issue. Further, in the absence of any indication as to the source of the Department's submissions as to the information being confidential and only shared with either one or some other commercial entities or insurers little or no weight can be give to the Department's submissions on that question.

In contrast Serco in its submission does not assert that any of the information is confidential and does not make any submission as to the scope of knowledge as to the content of the information.

As to the impact on Serco of disclosure of the information the Department in its second submission asserts that disclosure could diminish Serco's future bargaining position and/or the fairness of future tender processes that could reasonably be expected to receive a bid from Serco. Later the Department hardens that conclusion to say that disclosure of the information not only could, but would diminish Serco's future bargaining position. It does not identify with whom Serco might be bargaining, such that its future position would be diminished.

Serco on the other hand identifies that disclosure of the information could affect Serco's future ability to negotiate insurance for the facilities for which Serco is responsible, or significantly affect the premiums of any future insurance. Serco does not assert that it apprehends any adverse impact upon its participation in any future tender process or the fairness of any such process.

Again detailed questions of fact arise as to the impact on Serco of any such disclosure.

Each of the above matters are properly matters for evidence to be led by Serco and the Department. It may well be, having seen that evidence, that Mr McKinnon seeks to lead responsive evidence – for example it may be that an expert insurance broker will have something to say of any claims as to the adverse impact of release of the information concerned.

In those circumstances it is appropriate that Mr McKinnon be provided with an opportunity to test the evidence which is to be led against him, and to lead any responsive evidence.[1]

For the above reasons a proper consideration of the matters before the Information Commissioner requires that there be a hearing.

[1] See *Re Barbaro and Minister for Immigration & Ethnic Affairs* (1983) ALD 1 at [5] approved and applied in *Fisse v Department of Treasury* (2008) 172 FCR 513.

Further any consideration of that matter will require evidence and submissions from both the Department and from Serco and for responsive evidence and submissions from Mr McKinnon. It is very likely that in a multi-party review involving those matters, a hearing fixed for a date set in advance will result in a review which is concluded in a more timely manner than any alternative.

Yours faithfully,

Stephen Blanks

SBA Lawyers

Stephen Blanks

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SBA Lawyers

A 119 Evans St.
Rozelle NSW 2039

P (02) 9555 8654
F (02) 9555 7354
E firm@sbalaw.com.au

www.sbalaw.com.au

Principal: Stephen Blanks

Your ref: MR 12/00213

26 September 2012

Emeritus Professor John McMillan AO
Australian Information Commissioner
GPO Box 2999
CANBERRA ACT 2601

Dear Emeritus Professor McMillan

McKinnon and Department of Immigration and Citizenship

MR/00213 – Application for Recusal of Ms Bennett

The applicant applies for a direction that Ms Charine Bennett has no further participation in the conduct of the above IC review; and raises for your consideration whether you should recuse yourself.

The application is based upon a reasonable apprehension of bias. The facts grounding that reasonable apprehension are as follows.

By letter of 9 August 2012 the applicant wrote to you and requested that you provide to him by return:

- A copy of all relevant materials which were to have been lodged by the respondent with the OAIC by early August;
- All other material held by the OAIC and sourced either from the respondent or the affected third party relevant to this review; and
- Any record of communications between OAIC and either of those parties relevant to this review, other than the documents claimed to be exempt.

By email of 10 August 2012 Ms Bennett responded saying:

> *"In response to your letter yesterday, please find attached a copy of the email I received from DIAC on 3 August 2012 including the chain of communication I have had with them about your application for IC review. I have removed attachments to the email which included exempt material or discussion thereof."*

One of the documents removed by Ms Bennett was the file entitled "Email to DISD.pdf".

Contrary to Ms Bennett's advice of 10 August 2012, that was not a document which included exempt material or discussion thereof.

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Rather, as Ms Bennett states in her letter of 13 September 2012 it was a document prepared for the purposes of notifying Serco that an application for IC review had been made.

A second volume of documents removed from the email by Ms Bennett was that entitled "Binder of documents of correspondence with Serco.pdf".

In her letter of 13 September 2012 Ms Bennett described that folder of documents:

> *"Information I requested from DIAC to confirm that Serco was a party to the review as an affected third party within the meaning of s.53C. That is, I needed to be satisfied that DIAC had in fact consulted with Serco under s.27 of the FOI Act and Serco have made an exemption contention against the release of the document ... This material was obtained for a procedural issue and does not go to the substantive matter for determination in the IC review or to your client's request for a public hearing."*

Ms Bennett's two descriptions of the folder of documents are inconsistent such that one of them must be false.

Either the folder of documents included exempt material or discussion of exempt material, in which case it is relevant to the substantive matter for determination and to the request for a hearing; or it contains no such material.

Each of the items of correspondence referred to above from Ms Bennett has been in response to a letter addressed to you as Information Commissioner.

On 21 August 2012 we wrote to you and requested the provision of certain records to enable our client to make submissions pursuant to s.55B(3).

Ms Bennett responded to that letter "The Information Commissioner will consider this request in due course."

On 22 August 2012 we wrote confirming our understanding that Ms Bennett's reference to "this request" was to the provision of records.

It would seem that you may have been party to the decisions communicated by Ms Bennett in her letter of 13 September 2012 as to the provision of documents.

Further, you rang the writer on 24 August 2012 and foreshadowed a letter of the kind sent by Ms Bennett on 13 September 2012. At the bottom of page 2 of that letter Ms Bennett seems expressly to refer to that telephone conversation.

If it be the case that you participated in settling the letter of 13 September 2012 and the response of 10 August 2012 then you should also be recused from further participation in the review.

Yours faithfully,

Stephen Blanks

SBA Lawyers

Stephen Blanks

O'Malley, Jenny

From: McKinnon, Michael
Sent: Monday, 3 December 2012 3:03 AM
To: O'Malley, Jenny
Subject: FW: Response to application for recusal and application for hearing - McKinnon - MR12/00213 [SEC=UNCLASSIFIED]
Attachments: Letter to S Blanks - decision on application for hearing.pdf; Letter to S Blanks - decision on application for recusal.pdf; Attachment to application for hearing.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Mate, this stuff needs to go on the immigration and OIAC internal review file with the front page also updated, Can you do this asap as it needs to go as an attachment to the main report, cheers M

From: Stephen Blanks [mailto:Stephen@sbalaw.com.au]
Sent: Wednesday, 28 November 2012 4:35 PM
To: McKinnon, Michael
Cc: brennan@selbornechambers.com.au
Subject: FW: Response to application for recusal and application for hearing - McKinnon - MR12/00213 [SEC=UNCLASSIFIED]

Hi Michael

A response from the AIC to our recent letter!

I haven't read it all in detail yet, but will do so tomorrow morning.

Regards
Stephen

From: Annan Boag [mailto:Annan.Boag@oaic.gov.au]
Sent: Wednesday, 28 November 2012 5:21 PM
To: firm@sbalaw.com.au
Subject: Response to application for recusal and application for hearing - McKinnon - MR12/00213 [SEC=UNCLASSIFIED]

Dear Mr Blanks,

Please find **attached** correspondence from the Office of the Australian Information Commissioner regarding your two letters dated 26 September 2012. I apologise for the time it has taken to provide you with a response. The originals will follow by post.

As mentioned in the Information Commissioner's letter, we have prepared a case appraisal addressed to the Department and Serco, advising them of the Commissioner's preliminary view that they have not discharged their onus of demonstrating that the documents are exempt.

We will be in touch when we receive a response.

Regards,

Mr Annan Boag | Review/Investigations Officer

Office of the Australian Information Commissioner
4 National Circuit, BARTON ACT
GPO Box 2999 CANBERRA ACT 2601 |www.oaic.gov.au
Phone: +61 2 6239 9109
Email: annan.boag@oaic.gov.au

Protecting information rights – advancing information policy

Australian Government
Office of the Australian Information Commissioner

28 November 2012

Our ref: MR 12/00213

Mr Stephen Blanks
SBA Lawyers
119 Evans Street
Rozelle NSW 2039
[By email]

Dear Mr Blanks

Application for hearing

I am replying to your letter dated 26 September 2012 in which you made submissions in support of your client's application that a hearing be held under s 55B of the *Freedom of Information Act 1982*.

As required by s 55B(2)-(3) the other two parties to the IC review – the Department of Immigration and Citizenship and Serco Immigration Services – were invited to make a submission on this application. The Department made a written submission opposing the application, contending that the issue in the IC review could be adequately resolved on the basis of written submissions from the parties. I attach the Department's submission dated 13 September 2012.

I have decided not to hold a hearing in this case. The substantive issue that I am required to decide is whether portions of three documents are exempt under s 47(1)(b) of the FOI Act. I have inspected those documents and have considered the submissions of the Department and Serco in support of the exemption contention that the documents are exempt. Those submissions are framed in general terms, claiming that disclosure would reduce the value of Serco's business, diminish its ability to conduct essential negotiations that relate to its business, diminish its bargaining position, compromise any future tender process, and affect its ability to negotiate insurance for premises or significantly affect the insurance premiums.

My preliminary assessment is that I am not satisfied, on the basis of the submissions to date, that I should affirm the exemption claim. I have prepared a non-binding case appraisal that is being sent to the Department and Serco. It will be open to them to make a further or more detailed submission in support of the exemption claim, or for the Department to vary its decision and release the documents to your client under section 55G. This procedure is discussed in paragraph 10.96 of the Guidelines that I have issued under s 93A of the FOI Act.

I do not expect that I will be in a position to provide your client with a copy of the case appraisal at this stage of the proceedings. The case appraisal necessarily refers to material that is claimed to be exempt, and disclosure of that material at this interim stage would be contrary to the requirement in s 55K(5) of the FOI Act that I not disclose exempt material in an IC review. Whether I can provide your client with a copy or an extract from any submission made by the Department or Serco will be governed by the same consideration.

I have decided to follow this course of action, rather than arrange a hearing as requested by your client, as I consider it a more suitable and convenient method of resolving the issue under review. It may be that I will be in a position to make a decision in your client's favour following this case appraisal and consideration of any submissions I receive. On the other hand, it may be that I will invite further submissions from your client following this stage. If so, it is possible that I will be in a position to provide a better indication of the issues in dispute to assist your client in making a submission.

I have considered the point made in your letter of 26 September 2012 'that detailed questions of fact arise on this review [that] are properly matters for evidence to be led by Serco and the Department' and that your client, upon receiving that evidence, may seek to test it and lead responsive evidence. I do not exclude those possibilities, but my present understanding is that it may not be possible for any such evidence to be led and tested in an open hearing of the kind that your client has requested. The nature of the exemption claim arising in this case is such that it may not be possible to elucidate the claim without revealing information that is claimed to be exempt. Consequently, I am not satisfied a hearing under s 55 of the Act is the better way to proceed.

I add that I am aware of my obligation, both under the FOI Act s 55(4)(b) and more generally, to ensure that your client is given a reasonable opportunity to present his case before I make a final decision.

I now address the 'submission under protest' claim in your letter of 26 September. You complain that my office has 'repeatedly refused' to provide your client with two documents described as 'Email to DISD.pdf' and 'Binder of documents of correspondence with Serco.pdf'. You further claim that I am obliged to provide those documents to your client, and that the failure to do so has prejudiced your client in making submissions.

The documents in question were provided to my office by the Department as attachments to an email. As Ms Bennett explained in a letter to you dated 13 September 2012, the documents do not relate to the main issue arising in this IC

review concerning the exempt status of three documents. My office requested a copy of the documents to be satisfied that the Department had discharged the procedural obligation imposed upon it by s 54P of the FOI Act to notify an affected third party of the IC review application. The content of the documents was also described by DIAC in similar terms in an email of 3 August 2012 that was provided to you by Ms Bennett.

It is not the practice of my office to provide each party to an IC review with a copy of all documents that we receive from other parties to the review. Generally that is unnecessary and could lengthen and unnecessarily complicate the resolution of the large volume of IC reviews that we receive. In this case, the documents were mostly correspondence between the Department and Serco. It would not be appropriate for my office to release that correspondence to another party without first consulting both the Department and Serco. If this issue was being addressed in the context of an FOI request to my office for access to those documents it is likely that we would transfer the request to the Department under s 16(1)(b) of the FOI Act.

The guiding consideration, noted above, is that each party to an IC review must be given a reasonable opportunity to present his or her case on the issue arising for decision in the IC review. The FOI Act further provides that I may conduct an IC review in the manner that I consider appropriate (s 55(2)(a)), and do so with as little formality and technicality as is appropriate (s 55(4)). It follows that I do not accept the analogy that you draw in your letter of 22 August 2012 with the procedure of the Administrative Appeals Tribunal, in which you say that the AAT registry provides parties with the copies of all documents filed by other parties.

My office will contact you again after I receive a response from the Department and Serco on the case appraisal process. I have asked them to respond within two weeks.

Yours sincerely

Prof John McMillan
Australian Information Commissioner
28 November 2012

Australian Government
Office of the Australian Information Commissioner

28 November 2012

Our ref: MR 12/00213

Mr Stephen Blanks
SBA Lawyers
119 Evans Street
Rozelle NSW 2039
[By email]

Dear Mr Blanks

Application for recusal of Ms Bennett

I am replying to your letter dated 26 September 2012, requesting that I make a direction that Ms Charine Bennett play no further role in handling the IC review application lodged by your client, Mr Michael McKinnon.

I have considered your request but have decided not to make a direction. My decision is based principally on two matters.

First, I do not accept the factual premise for your application, namely the suggestion that Ms Bennett's email of 10 August 2012 and her letter dated 13 September 2012 were misleading in a material way. Ms Bennett's email of 10 August 2012 was briefly phrased and explained that attachments which included exempt material had been removed. That brief statement was accurate so far as it went. She did not go into greater detail, as she did in her letter of 13 September, into the status of all the attachments that were removed.

Ms Bennett's response must be seen in context. IC reviews are ordinarily conducted in an informal manner, consistently with s 55 of the *Freedom of Information Act 1982*. Staff members of the Office of the Australian Information Commissioner handle a large volume of individual IC review applications and FOI complaints, and strive to respond quickly and informally to requests that are made to them.

There is no settled procedure that requires OAIC staff to respond to your requests in this case for a copy of all correspondence from the respondent agency. As I noted in a telephone conversation with Mr Blanks on 24 August 2012, I regard a request of that nature as irregular in the context of the OAIC's normal style and procedure for resolving IC reviews. Nevertheless, as the course of this matter illustrates, when a

request is pressed or put more formally we treat it seriously and respond in a more detailed and formal manner.

I am satisfied that Ms Bennett has acted appropriately, helpfully and professionally in her handling of this IC review application.

The second ground on which I have rejected your request is that I believe it is misconceived in law. Ms Bennett will not be the decision maker in resolving this application: that is a non-delegable function that can only be discharged by one of the three Commissioners who constitute the OAIC (Australian Information Commissioner Act 2010 s 25(e)). So far as any allegation of bias is concerned, the issue to be resolved is whether a fair minded observer apprised of all the facts would reasonably apprehend that one of the Commissioners would not bring an impartial mind to resolving the IC review application.

I am satisfied that a reasonable apprehension of bias does not exist, bearing in mind:

- the matters explained above (in particular, that your client was given a fuller explanation in the letter of 13 September as to why all attachments were not provided)
- an IC review decision has not yet been made and your client is being given an adequate opportunity to make submissions that address the substantive exemption issue to be resolved
- the concern you have expressed about Ms Bennett's correspondence has been raised and adequately addressed in this letter.

I refer you also to *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, in which the High Court dismissed an allegation of bias that was based on the conduct of a person who provided assistance to the decision maker. As McHugh J noted at 462, 'It is erroneous to suppose that a decision is automatically infected with an apprehension of bias because of the pecuniary or other interest of a person associated with the decision-maker. Each case must turn on its own facts and circumstances.'

It follows from what I have said that I do not accept your further request that I also recuse myself from further participation in this IC review. For the record I note that Ms Bennett has reported to me and we have discussed how this matter should be handled.

Please note that Ms Bennett is no longer assisting me with this matter as she has been assigned to other duties for reasons unrelated to your application for recusal. The review officer responsible for the day to day carriage of this matter is now

Mr Annan Boag, who you may contact by telephone on 02 6239 9109 or by email to annan.boag@oaic.gov.au.

Yours sincerely

Prof John McMillan
Australian Information Commissioner
28 November 2012

Annan Boag

From: Rowan.Patterson@immi.gov.au on behalf of foi@immi.gov.au
Sent: Thursday, 13 September 2012 5:13 PM
To: Charine Bennett
Cc: Linda.Rossiter@immi.gov.au; foi@immi.gov.au; Erin.Welsh@immi.gov.au
Subject: RE: MR12/00213, your ref FA 11/05/00558 Mr Michael McKinnon, Seven Network - application for hearing [DLM=For-Official-Use-Only] [SEC=UNCLASSIFIED]
Attachments: Information Commissioner Review.pdf

Dear Ms Bennett

Thank you for providing an opportunity to comment on Mr McKinnon's application for hearing.

It is DIAC's view that there is no need for a hearing in this instance and that there are no special circumstances that would warrant a hearing.

Although DIAC accepts that there has been a regrettable delay in providing Mr McKinnon a decision on his request, this delay was not due to any particular issues arising from the request. Rather the delay was one of several delays that DIAC are currently working through to ensure that, in the future, applicants are not subject to similar delays.

Addressing the information subject to Mr McKinnon's review, it is DIAC's view that the Information Commissioner (IC) can adequately come to a decision on the documents based on the information currently available for the following reasons:

- The exempt information covers part, or the whole, of eight pages across three documents.
- The exempt information all relates to the same issues surrounding Serco's insurance arrangements.
- It is DIAC's view that the information is, and would remain, exempt under s47 as Serco's business information.
- If the IC wishes to seek further information from Serco regarding their views regarding DIAC's application of s47, this could be sought in writing and would not impact the ability of the IC to make a decision on papers.
- DIAC would be prepared to make an additional submission on the application of the exemptions if required. As previously advised, DIAC commenced an internal review but was removed from the process as the OAIC had taken on the case as a review.

Given the small scope of information subject to Mr McKinnon's IC review, and the capacity of the OAIC to seek further submissions on the application of s47 on the documents, DIAC feels that there would be no benefit gained from the IC conducting a hearing rather than making a decision on papers.

Please contact me if you have any further questions or wish to seek any additional submissions.

Kind Regards

Rowan Patterson

Assistant Director
FOI & Privacy Policy Section
Governance and Audit Branch
Governance and Legal Division
Department of Immigration and Citizenship

Phone 02 6264 1432
Email rowan.patterson@immi.gov.au
FOI@immi.gov.au

ATTACHMENT B: ADMINISTRATIVE RELEASE NO SUBSTITUTE FOR FOI

Research project conducted by Seven Network, September 2012

AGENCY	LOG DETAILS	PR REP NAME	PR REP PHONE	PR REP EMAIL
Department of Education Employment and Workplace Relations ***CLOSED 6/9 @ 9:34am***	11:40am 05/09/12 PS spoke to **Danielle** to request docs. Sent email to confirm request. 9:35am 06/09/12 Chantal emailed To confirm no progress reports available at this stage. Waiting to hear from **MM** as to whether satisfied with response. **MM** Happy with response.	NA	02 6240 7300	media@deewr.gov.au (Shared inbox)
Department of Finance and Deregulation ***CLOSED 5/9 @ 5:24pm***	11:50am 05/09/12 PS spoke to **Morgan** to request docs (Amelia away sick). Sent email to mediaenquiries@finance.gov.au to confirm request. 5:24pm 05/09/12 Email rec'd from **Emma**: "Corporate Scorecard was engaged to undertake a Financial Viability Assessment on the Registrants that were recommended for short listing for the role of Head Contractor for The Lodge and not an "evaluation" report as per the request. Please note the information contained in the report is confidential and no further information will be released." Forwarded to **MM** for advice.	Amelia Huang, Head of PR (might be currently acting head)	02 6215 3138	Amelia.huang@finance.gov.au **GENERAL** Mediaenquiries@finance.gov.au

	9:50am 06/09/12 **MM** advised was final avenue. All closed.			
Department of Defence **(NOVA AEROSPACE CONSULTANCY)** ***CLOSED 6/9 @ 2:32pm***	11:59am 05/09/12 **PS** spoke to **Sharon** – no one avail as all in meeting. Sent email "ATTN: Elenore" to request docs. 12:35pm 05/09/12 **Chris** emailed to advise he was looking into it. 12:52pm 05/09/12 **PS** emailed to thank and said looking forward to response. 1:39pm 06/09/12 **Chris** emailed to advise best to go through FOI.	Elenore Eriksson, Assistant Communication and Media	02 6127 1999	mediaops@defence.gov.au
Attorney- General's Department ***CLOSED 10/9 @ 4:52pm***	12:10pm 05/09/12 **PS** left a message on Voicemail service. Sent email to request docs. 12:41pm 05/09/12 **Tracy** left VM for **PS** to return call and clarify request. **PS** left VM in return. 9:34am 10/09/12 Left VM for **Tracy** to return call. Left details of request on message, and have sent email AGAIN to request docs and asking to confirm receipt of email. 10:17am 10/09/12 **Tracy** called to advise "The contract is new so there isn't a report at this stage. All we can get at this stage is the information around the contract. No actual content til completion." Requested email	NA	02 6141 2500	media@ag.gov.au

	to confirm in writing. 4:52pm 10/09/12 Email rec'd from **Tracy** "outcomes of this research are not expected until the middle of 2013."			
Department of Defence **(BOZ TECHNICAL SERVICES PTY LTD CONSULTANCY)** ***CLOSED 5/9 @ 5:20pm***	11:59am 05/09/12 **PS** spoke to **Sharon** – no one avail as all in meeting. Sent email "ATTN: Elenore" to request docs. 12:22pm 05/09/12 **Sharon** called **PS** mob – might have to be FOI'd, subject to expert opinion 5:20pm 05/09/12 **Sharon** called – advised potentially large # of reports and docs, some of which not on the public record. Some work not owned by Defence – other departments can scan/use interdepartmental databases. Written confirmation rec'd via email at 5:29pm.	Elenore Eriksson, Assistant Communication and Media	02 6127 1999	mediaops@defence.gov.au
Department of the Treasury	12:25pm 05/09/12 **PS** called **Louise**. She requested email to medialiaison@treasury.gov.au . Email sent to request docs.	Manager of Communications Louise Perez OR	02 6263 3091 (Louise) 02 6263 3736 (Virginia)	Louise.perez@treasury.gov.au

CLOSED 11/9 @ 2:07pm	3:11pm 07/09/12 Email rec'd from Communications Unit "*Treasury will not be releasing the report."* Returned email 8:37am 09/09/12 asking for a reason why they're not releasing. 12:15pm 10/09/12 Email rec'd – my enq has been forwarded to appropriate area of Treasury for response. 2:07pm 11/09/12 Email rec'd stating "National Housing Supply Council's current view on housing supply and affordability is contained in its June 2012 report: 'Housing Supply and Affordability – Key Indicators, 2012', which is available from the Council's website (www.nhsc.org.au). Treasury has no further comment."	Virginia Stanhope (works underneath Louise)		
Department of Infrastructure and Transport ***CLOSED 11/9 @ 9:47am***	12:32pm 05/09/12 **PS** called – **Vanessa** on leave. Left message with receptionist **Marissa** to pass on to Media Dept. ***NO EMAIL SENT*** 12:55pm 05/09/12 **Kat** called – email sent to media@infrastructure.gov.au to confirm request for docs. 9:23am 10/09/12 Emailed to remind/prompt (media@infrastructure.gov.au) 9:47am 11/9/12 Email rec'd stating "The reports have not been finalised."	Vanessa Goodspeed	02 6274 7032	vanessa.goodspeed@infrastructure.gov.au
Department of industry,	12:38pm 05/09/12 **PS** called **Clinton** – had "*never heard of it*". Sent email to confirm request to **Clinton's** email, and to	Clinton Porteous, Head of Media and	02 6213 6000 (both)	Clinton.porteous@innovation.gov.au

Innovation, Science, Research and Tertiary Education ***CLOSED 5/9 @ 3:34pm***	mediateam@innovation.gov.au 2:04pm 05/09/12 Phone call from **Helles Byrnes** (FOI Office). Advised we'd have to request via FOI. Told her no-we are requesting under Administrative Release. She will call/email back. Said there was some confusion between departments. 2:09pm 05/09/12 Call from **Helles Byrnes** (FOI Office). Advised we would need to request under FOI Act as don't usually release this kind of document under Administrative Release. Available for contact foi@innovation.gov.au or on 02 6213 7761. 3:34pm 05/09/12 Email rec'd from **Helles** confirming FOI required to access these documents. "*the Media team provide information about the Department's activities through media statements"* 4:22pm 05/09/12 Sent email to mediateam@innovation.gov.au requesting docs under administrative release. 9:27am 10/09/12 Emailed to prompt/remind (mediateam@innovation.gov.au) 10:25am 10/09/12 Had meeting with **MM -** believes will not return contact and will go down same avenue.	events OR Megan Watson, Head of Communications		Megan.watson2@innovation.gov.au
Australian Public	12:43pm 05/09/12 **PS** called **Karen** – not direct line. Left message,	Acting director of	02 6202 3500	Karen.kentwell@apsc.gov

Service Commission	and have emailed **Karen** to request docs. 12:48pm 05/09/12 Following Out Of Office reply from **Karen**, contacted **Julie Padanyi-Ryan** on 02 6202 3812. No email supplied, so left message to please contact. ***NO EMAIL SENT – email address unknown*** 2:41pm 06/09/12 **Claire (media contact)** called **PS** to ask more specifics. Passed on details of dates etc. She will call back. 3:58pm 12/09/12 **Chris (FOI)** called – he had never heard of Admin. Release. Another sector are looking at docs to see if can be released, and he is going to familiarise himself with AR and get back to me. Told him he could find it via Google on the Information Commissioner's page.	Strategic Communications Karen Kentwell (AWAY TIL OCTOBER 1, 2012)	(main line) **Julie Padanyi-Ryan** on 02 6202 3812	.au Email unknown for **Julie Padanyi-Ryan.**
Department of Sustainability, Environment, Water, Population and Communities. ***CLOSED 10/9 @ 4:43pm***	10:57am 05/09/12– **MM** called **Siobhain** to advise **PS** calling. 11:08am 05/09/12 – **PS** spoke to **Siobhain** to request docs. Emailed general media address to confirm request. 4:53pm 05/09/12 **Siobhain** emailed to advise she hadn't forgotten and was finding out more about the review and relevant docs. 4:40pm 06/09/12 **VM** from **Siobhain** to advise she was sending email RE: request. 4:40pm 06/09/12 **Siobhain** emailed to advise Dept of Ag, Fisheries and Forestry are finalizing report – gave details on how to contact them.	Rachel Parry, Assistant Secretary, Communications and Ministerial Services OR **Siobhain Ryan**, Media Department	02 6274 1072 (Rachel) 02 6274 2434 (**Siobhain**)	Rachel.parry@environment.gov.au Siobhain.ryan@environment.ggo.au **SIOBHAIN has advised best email is directed to media@environment.gov.au ATTN: SIOBHAIN**

	9:21am 10/09/12 Emailed **MM** to check if wanting to pursue through different agency. 10:44am 10/09/12 Called Dept Ag, Fish/Forestry – spoke to **Shane** - he will find out more for me (was CC'd in on email on Thursday 6/9 @ 4:40pm. 11:16am 10/09/12 **Shane** returned call – advised was not able to release due to embargo – would be released electronically at the end of the month. Awaiting email to confirm in writing. 4:43pm 10/09/12 Email rec'd stating "report on the Preparation of Ecosystems Services Review is anticipated to be made publicly available towards the end of this month. Once released, it will be available on the DAFF website."		Dept of Ag, Fisheries, and Forestry 02 6272 3232 (Shane?)	

Department of Defence ***CLOSED 17/09 @ 10:50am***	10:07am 17/09/12 Spoke to **Simon** – emailed through request for documents at 10:11am. 10:50am 17/09/12 Email rec'd from Simon "unable to be obtained through administrative release, you will need to make an FOI request.'	N/A	02 6127 1999	mediaops@defence.gov.au
Department of the Treasury – IAN MOORE ***CLOSED 2:48pm 26/09/12***	10:12am 17/09/12 Emailed general address requesting docs. 12:17pm 17/09/12 Email rec'd from treasury – has been forwarded to the approp area for response. 8:29am 26/09/12 Sent email asking what stage my enquiry was at as no response so far. Waiting on response.		02 6263 3091 (Louise)	Louise.perez@treasury.gov.au medialiaison@treasury.gov.au
Department of the Treasury – ANGUS DAVID ST JOHN PARADICE ***CLOSED 2:48pm 26/09/12***	10:17am 17/09/12 Emailed general address requesting docs. 8:29am 26/09/12 Sent email asking what stage my enquiry was at as no response so far. Waiting on response.		02 6263 3091 (Louise)	Louise.perez@treasury.gov.au medialiaison@treasury.gov.au
Department of Education Employment and	10:18am 17/09/12 Spoke to **Siobhan** – emailed request for docs at 10:20am	N/A	02 6240 7300	media@deewr.gov.au (Shared inbox)

Workplace Relations	3:33pm 18/09/12 **Tom** called to ask for more info RE: request – specifics required or otherwise it has to be FOI'd. According to his superiors, Admin Requests are treated the same as FOI requests. No difference. Told him very different, but his response was that dep't saw it as FOI request. Waiting on email to confirm in writing. 8:27am 26/09/12 Emailed DEEWR to find out where confirmation email is. Waiting on response. 9:32am 26/09/12 Email from **TOM** "currently liaising with FOI team and will get back to you as soon as I can if we require anything further from you." Wait to hear now.			
Department of Families, Housing, Community Services and Indigenous Affairs ***CLOSED 24/9 @ 1:09pm***	10:25am 17/09/12 Spoke to **Michelle** – emailed request for docs at 10:25am 11:30am 17/09/12 **Ben Houston** called to clarify details of request – we want AUDIT report. 4:21pm 22/9/12 Email from **Kahlia** to advise report was internal and as such would not be available. Returned email 8:04am 24/9 asking if available via FOI to ascertain reason. 1:09pm 24/09/12 Email rec'd – FOI request welcomed, however "each request is assessed individually."	N/A	02 6146 8080 Ben Houston direct – 02 6146 4148	fahcsia.media@fahcsia.gov.au

AUSTRALIA'S RIGHT TO KNOW

RESPONSE TO DISCUSSION PAPER – DISCLOSURE LOGS
OFFICE OF THE AUSTRALIAN INFORMATION COMMISSION

28th March 2011

Australia's Right to Know (ARTK) Coalition welcomes the opportunity to comment on the March 2011 Disclosure Log Discussion paper issued by the Office of the Australian Information Commission.

Australia's Right to Know (ARTK) has been actively involved in the process of reforming the FOI regime, implementation of the new legislation and formation of the Australian Information Commission. Journalists of our organisations regularly use the FOI system to obtain information that is then made available to the public though our media businesses.

ARTK strongly supports the principle of the new regime of openness of access to information and documents of government. ARTK supports disclosure logs as integral to facilitating a pro-disclosure culture across government. Together with the Information Publication Scheme that commences on 1 May 2011, they will enable ready access to the public, to government information.

We consider the term disclosure log is appropriate and we are of the view a similar template for all disclosure logs would assist access to such logs.

We note it is intended the disclosure log requirement will not apply to certain information including:

- personal information about any person if publication of that information would be 'unreasonable' (s 11C(1)(a))
- information about the business, commercial, financial or professional affairs of any person if publication of that information would be 'unreasonable' (s 11C(1)(b))
- other information of a kind determined by the Information Commissioner if publication of that information would be 'unreasonable' (ss 11C(1)(c) and 11C(2))
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that would need to be made to delete information listed in one of the above dot points (s 11C(1)(d)).

However, to ensure equity of disclosure, it is important that the disclosure log requirement should apply to information about a person or business that ahs been released to another FOI applicant, where the person or business was consulted under ss 27 or 27A of the FOI Act and did not object to the release to that particular FOI applicant.

We do not consider there should be a requirement for agencies and ministers to inform FOI applicants and third parties of the requirements in s 11C. Applicants and third parties have already been consulted and the decision to publicly release has already been made by the FOI process.

ARTK supports disclosure logs containing a summary of an FOI applicant's request, whether the documents requested were provided in full or in part, and whether all information provided to the FOI applicant is made available under the disclosure log. An agency or minister should be allowed to supplement a disclosure log entry with comment or explanation although this must be a purely supplementary aspect of the log.

We are of the view as much information concerning the application that can be made publicly available the more open the process will be.

ARTK accepts that 12 months is a reasonable period for agencies and ministers to make available, by website download or otherwise, information that is listed in a disclosure log register.

However, any log should provide an archival aspect so that applicants can check whether the agency has released documents on a given issue in the past. The log should advise when information is likely to be removed from an agency's or minister's website and the date of any removal.

10 Days disclosure/simultaneous disclosure

ARTK notes that agencies and ministers must publish information in a disclosure log within ten working days after the FOI applicant was 'given access' to a document (s 11C(6)). It is open to an agency or minister to publish information on a disclosure log earlier than the period of ten days stipulated in s 11C(6) and therefore open to an agency or minister to publish information that is to be provided to an FOI applicant either at the same time that access is provided, or earlier.

ARTK understands that this provisions is included in the Act as it promotes openness and makes documents available for all to access not just the FOI applicant

Some ministers and agencies have been publishing information at the same time or very shortly after they are making it available to the journalist who has sought the documents under a FOI request.

As noted in the discussion paper informal representations have been made to the Information Commissioner by a number of journalists pointing out the practical effect this is having and suggesting that public release should be delayed for several working days after the documents have been given to the applicant.

ARTK nots the Information Commissioner response is that a "principle of equal public access rather than exclusive individual access is inherent in the Information Publication Scheme and the disclosure log mechanism. A key function of the Information Commissioner is to promote greater openness for the benefit of the public generally. It is always open to an individual applicant, including a journalist, to make special arrangements with an agency about the scope, form and time of access. It is not part of the Information Commissioner's role to script or endorse individual arrangements, beyond monitoring their consistency with the FOI Act.

We strongly support the principle of openness. However, we are concerned that simultaneous release, ultimately works against the objective of openness and can be used to undermine the efficient operation of FOI.

Allowing the public and other journalists to have simultaneous access disregards the work expended and costs incurred by the applicant in pursuing the FOI request.

Journalists are responsible for the majority of non-personal related FOI requests to the Commonwealth Government. There is a definite and strong public interest in journalists pursuing stories using FOI as it provides credible and useful information about policies, programs and administration that would not otherwise emerge.

The discussion paper notes that: "The objects of the FOI Act are, it is said, more likely to be achieved if experienced and interested journalists use the FOI Act. This use will be discouraged if the fruits of their labour are undercut by simultaneous release.

Indeed, there is a risk that agencies will strategically use this device to discourage media interest in using FOI.

FOI works more smoothly and effectively if there is cooperation and trust between agencies and applicants. This is important when the need arises to discuss the scope of a request or to agree upon an extension of time to process a request. There is a risk that a dispute about the date of disclosure on a particular occasion will flow over and create an unhealthy climate for efficient FOI processing in the future.

We are concerned that the simultaneous release does not take into account the realities of the business of journalism.

Media companies choosing to use FOI in pursuit of stories invest considerable resources and time in FOI applications without any guarantee of a useful result and historically such FOI applications often fail to produce any useful information. Simultaneous release rewards all media companies equally for the work of just one organisation.

For example, a recent request to Commonwealth Treasury, that required an appeal to the AAT, yielded information placed on the agency's website. This information appeared exclusively in one newspaper that was alerted to its existence by a senior Treasury official while the company involved in the appeal did not receive the information in a timely enough fashion to allow broadcast before that publication.

Simultaneous release of FOI information deters journalists and media companies from undertaking the often time-consuming and expensive use of FOI legislation given the benefit accrues to everyone and does not recognise the decision by a company or organisation to invest in FOI-related journalism.

Another significant public interest factor in support of staged release for journalists is the nature of FOI documents themselves. The documents are often obscure, complex and require contextual explanation. As it stands, journalists are obliged to publish or broadcast immediately after receipt of information in order to beat competitors. Once again, this is the reality of the media industry. If a 5-day period of grace is provided, then there is time available to ensure the information is understood and both agency and political comment can be sought and provided to the public as part of the context. There is an overwhelming public interest in journalists being able to report accurately and fairly on often complicated public policy and program issues.

ARTK believes that at best there is only a miniscule benefit to the public interest in the general release of documents sought by a journalist at the same time as release to the applicant providing those same documents are still released within the 10 days envisaged under the Act as the case under the Act.

It is long-standing practice in both Commonwealth and State press galleries that responses to questions about information for potential stories is provided exclusively to the journalist seeking the information. This recognises the reality of the media industry and its competitive nature and such an approach should be applied to some extent to the release of FOI information to journalists.

The Queensland *Right to Information Act 2009 (QLD)* provides the opportunity for release to journalist 24 hours before general public release. In practice, this arrangement often is longer than 24 hours as agencies accept the advantage of allowing journalists to have sufficient time to digest, analysis and report on government information.

Ideally, in the Commonwealth sphere there should be a 5-day grace period (working days) before public release of information sought by a journalist. This time frame reflects the complexity of many of the documents in a number of FOI applications.

It should be noted that a number of Commonwealth agencies, including Department of Defence and Customs, already allow a stage release process for journalists.

However, some agencies like Commonwealth Treasury have already adopted a same day release policy. ARTK is of the view, all agencies should be bound by a common policy in relation to this issue.