HAVE RECENT CHANGES TO FOI CAUSED A SHIFT IN AGENCIES' PRACTICES?

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Background to the reforms

In June 2008, the FOI Independent Review Panel chaired by Dr David Solomon AM published its report on Queensland's Freedom of Information legislation.[1]

The findings of this review were significant not only in prompting changes by the Queensland Government to the Queensland FOI legislation but also at Commonwealth level. The Solomon report was central to the Commonwealth Government's subsequent review and amendment of the *Freedom of Information Act 1982* (Cth) ('*FOI Act*').

Significant changes were made to the *FOI Act*, designed to ensure that 'information should be made available more quickly and it should be more responsive to the request that has been made.'[2]

At Commonwealth level, these changes centred on:

- the establishment of the Office of the Australian Information Commissioner;
- changes to the way in which the exemptions operate (including the operation of the public interest tests); and
- an increased emphasis on a push model for the disclosure of government held information, including a publication regime.

The Solomon report emphasised the need for a 'cultural shift' in the attitudes of agency personnel involved in the processing of requests.[3] However the subsequent amendments to the *FOI Act* did not amend to any great extent the mechanics of how requests are processed by agencies. This was despite the Queensland FOI Independent Review Panel receiving submissions from both government agencies and FOI applicants commenting upon or complaining about delays in processing times and unsatisfactory responses to requests.
The Solomon report commented upon the difficulties Queensland agencies were experiencing with respect to their handling of records and FOI and, in particular, electronic records. The report was critical of agency practices for the recording and preservation of emails.[4]
It considered various initiatives to improve record keeping of electronic records by Queensland agencies including:

- development of a state wide strategic information policy;
- a state wide audit of government record keeping practices;

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- better training of agency personnel; and
- development of a document management system for electronic documents to tag each document at the point of creation and assess whether it can be disclosed in response to an FOI request.[5]

However, the subsequent changes to the *FOI Act* did not result in specific changes to the way in which agencies were to manage their record keeping or respond to requests for electronic documents.

The problems associated with the processing of FOI requests for electronic documents have since been echoed in a report by the Western Australian Information Commissioner on the administration of freedom of information in Western Australia (2010).[6] In that report the Commissioner recommended that 'agencies should be aware of the importance of complying with their obligations under the State Records Act 2000, particularly in relation to matters raised in the review including the management of electronic and hard copy documents."[7]

The view is clearly expressed in both reports that government agencies have an obligation to properly store electronic documents and retrieve and process them in response to FOI requests. What does this mean at Commonwealth level and how far does a Commonwealth agency's obligation extend in its response to FOI requests for these records?

What is a document?

The term 'document' is broadly defined in the *FOI Act*[8]. It is accepted at both Commonwealth and State levels that the term includes electronic documents, whether stored on a computer server or backup tape and includes emails.[9] Databases are also specifically provided for under the *FOI Act*.[10]

While the question of metadata has not been specifically determined at Commonwealth level, there is a view that metadata is also a 'document'.[11]

The 1995 report on the review of the *FOI Act* conducted by the Australian Law Reform Commission and the Administrative Review Council[12] confirmed that 'data' or electronic information should continue to be accessible under the *FOI Act*.

At the time of the 1995 report, the problem of management of, search for and retrieval of electronic documents was an emerging one for Commonwealth agencies. It has presented increasing difficulties for agencies and applicants since then as the use of electronic records and email has become standard.

Agencies often report to AGS that they have difficulty in processing requests for electronic documents in an effective and timely manner; applicants and other stakeholders complain about what they perceive to be poor record keeping by agencies (particularly in the case of email) and poor records management training within agencies, resulting in poor searching and delays in responding to requests.[13] In cases where FOI applicants are presented with the cost of retrieval of electronic documents (particularly emails and back-up tape searches), we have seen further complaints to agencies about the outrageous cost of FOI, particularly when searches of back-up tapes are required.

In the meantime, the definition of 'document' in the *FOI Act* has continued to be shaped by advances in technology and the form of FOI requests from applicants who want to know what electronic documents (particularly emails) are within an agency's possession.

The Solomon report did not recommend any changes or qualification to the definition of 'document' in the Queensland FOI legislation but provision was made in the resulting *Right*

to Information Act 2009 (Qld) concerning metadata and backup tapes.[14] No corresponding amendments or qualifications were made to the definition in the *FOI Act* nor were any amendments made to the Act to specify the form in which electronic documents should be disclosed.

Requirements for search and retrieval of documents

Prior to the reforms at Commonwealth level, FOI requests for documents which included electronic documents tended to be answered by agencies in a manner largely dependent upon the wording of the FOI request and the attitude of the FOI applicant. Strategies for handling such requests included:

- an assumption that the request did not extend to documents held in electronic form, particularly where the documents were also held in paper form (on files) or, alternatively, that it only extended to those documents held on the agency server[15];
- seeking clarification from the applicant about whether electronic files were sought and, if so, which ones;
- asking the applicant to exclude certain categories of electronic documents (for example duplicates of paper documents and documents on backup tapes); and
- in some cases, the issue of a notice under s 24 of the FOI Act to the effect that the request would constitute an unreasonable diversion of agency resources.

The Administrative Appeals Tribunal's assessment of the sufficiency of these strategies was broadly consistent with the Federal Court's assessment of the sufficiency of searches associated with discovery undertaken pursuant to the Federal Court Rules.[16] Where the agency could demonstrate that the searches of electronic documents were unreasonably costly and/or were unlikely to produce relevant documents, the Tribunal was inclined to decline to exercise its power to require they be produced in answer to the FOI request.[17]

In 2005, the Federal Court in *Chu v Telstra Corporation Limited*[18] set a new minimum standard required before an agency could be excused from retrieval of a document falling within the scope of an FOI request.[19] In that case, Finn J held:

> A person requesting access to a document that has been in that agency's or Minister's possession should only be able to be denied on the s 24A ground when the agency (or the Minister) is properly satisfied that it has done all that could reasonably be required of it to find the document in question. Taking the steps necessary to do this may in some circumstances require the agency or Minister to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered or disorganised.

This decision does not appear to have materially changed the way agencies search for and disclose electronic documents in response to FOI requests.

The role of the Office of the Australian Information Commissioner

The amendments to the FOI Act which commenced on 1 November 2010, not only provided for external review of FOI decisions by the Information Commissioner but also for the investigation of complaints relating to the handling of FOI matters under Part VIIB of the Act. This extends to requests lodged prior to 1 November 2010.[20]

Such investigations are not limited to the actions or processes of one agency; the Information Commissioner can also investigate recurring or systemic problems relating to FOI processes. The OAIC Guidelines set out in detail the processes associated with investigations as well as the Information Commissioner's powers.[21]

The Commissioner's Guidelines also make it clear that he has the power under s 55V(2) of the *FOI Act* to order an agency to undertake further searches for documents. Relevantly, in the case of electronic documents, he also has the power to order an agency to disclose a document in an alternate format.[22] This could extend to an order to disclose metadata associated with a document on the basis that this information itself is a document within the meaning of s 4 of the Act or part of a document falling within the scope of a request.

A higher standard for FOI requests for electronic documents?

Currently, the Information Commissioner's Guidelines do not provide any detail of the standards expected in search and retrieval or the handling of electronic documents by an agency, nor do they discuss the application of the *FOI Act* to electronic documents.

Presumably, the Commissioner in investigating complaints and reviewing decisions will be mindful, before ordering further searches be undertaken, of any evidence the agency can provide on the relevance of searches of electronic documents and, if relevant, the possible unreasonable diversion of resources of the agency if such searches are required.[23] It is too early to say.

A very recent decision of the United States District Court (*National Day Laborer Organizing Network et al and United States Immigration and Customs Enforcement Agency*[24]) has the potential to tempt the Information Commissioner as well as the Administrative Appeals Tribunal and the Federal Court to fundamentally change the way in which agencies search for electronic documents in response to an FOI request as well as the form in which those documents are disclosed to an FOI applicant.

The FOI applicants in this case sought documents pursuant to the *Freedom of Information Act* (US) ('*FOIA*') from 4 government agencies. The documents related to an interagency immigration enforcement program administered by the United States Immigration and Customs Enforcement Agency and the Department of Justice.

The case centred around 2 key issues, namely:

- the agencies' efforts to identify documents that were the subject of the request (search and retrieval); and
- the format in which the documents were produced (in static PDF format as opposed to a responsive (native) format with metadata that could be searched).

The agencies claimed that the processing of all documents relevant to the request would require the production of millions of pages for the applicant.

The agencies also claimed that production of the documents in native format would amount to an unreasonable burden on the agencies' resources.

The Court held, per Judge Scheindlin (USDJ),:

- certain metadata is an integral or intrinsic part of an electronic record;
- where metadata is maintained by an agency as part of an electronic record it is presumptively producible under *FOIA* unless the agency demonstrates such metadata is not readily reproducible;
- whether or not an *FOIA* request specifically requests metadata, the production of documents in static form without any means of permitting the use of electronic search

tools is an inappropriate downgrading of the electronically stored record for the purposes of the *FOIA*;

- future production of electronically stored documents pursuant to the request must include load files that contain minimum fields of information to enable them to be searched;
- the *FOIA* was not intended to supplant discovery. Nonetheless the goals for both processes is the same - to facilitate the exchange of information; common sense requires that the parties incorporate the spirit if not the letter of the rules of discovery in the course of *FOIA* litigation (in this case the Federal Rules of Civil Procedure which require that documents be produced in a reasonably useable form); and
- the Court approved the production of a list or schedule by the agencies for the purpose of negotiating with the applicant with a view to prioritising documents and if possible to narrow the scope of the FOI request.

Conclusion

The importance of the decision in *National Day Laborer Organizing Network et al and United States Immigration and Customs Enforcement Agency* cannot be overstated. It is important to bear in mind that nearly all requests currently lodged with Commonwealth agencies will cover a selection of electronic documents and that this decision makes it clear that an FOI request should be interpreted as including metadata for all documents stored electronically regardless of whether the applicant specifies this in his/her request.

It is unlikely that Commonwealth agencies would presently be in a position to easily comply with the requirements set down by Judge Scheindlin in response to FOI requests. However, will this difficulty translate into successful submissions to the Information Commissioner by agencies that they should not be obliged to comply with that standard?

The next generation of change in Commonwealth FOI practice for the handling of electronic documents will not be occurring as a direct result of the FOI reforms. The Information Commissioner, as the new regulator, will play a crucial role in shaping agencies' attitudes and responses to any changes in the law and further technological developments affecting how agencies create and store records and communicate with themselves, each other and the public. It will be interesting to see whether the standards being applied under the US *FOIA* will have any real impact here in Australia.

Endnotes

1 Solomon, Webb and McGann, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, June 2008.
2 Ibid. 6.
3 Ibid. 299 to 313.
4 Ibid. 22 to 29.
5 Solomon, Webb and McGann, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, June 2008, recommendations 4 and 5.
6 Western Australian Information Commissioner, 31 August 2010 *Report on the Administration of Freedom of Information in Western Australia* at 22.
7 Ibid. recommendation 4.
8 Freedom of Information Act 1982 (Cth) s 4.
9 See for example *Price and the Nominal Defendant,* decision of the Queensland Information Commissioner, S97/97, 24 November 1999 and more recently *Thomson and Lockyer Valley Regional Council*, decision of the Queensland Information Commissioner 23 September 2010. See also Re *Ross William Leighton and Shire of Kalamunda* [2008] WAICmr 52 (20 November 2008)
10 See the Freedom of Information Act 1982 (Cth) s 17 which deals with the provision of computer based documents, specifically information from databases.

11 Right To Information Act 2009 (Qld) s 28(1), expressly provides that an access application is taken not to include metadata for the documents within its scope, unless the application expressly covers metadata.
12 Australian Law Reform Commission and Administrative Review Council Report No 77 *Open Government: A Review of the Federal Freedom of Information Act 1982*, 1995.
13 See for example Western Australian Information Commissioner, 31 August 2010 *Report on the Administration of Freedom of Information in Western Australia* at 33 and Solomon, Webb and McGann, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, June 2008 at 24 and 25.
14 See *the Right To Information Act 2009* (Qld) ss 28, 29 and 52(2).
15 Compare *Right To Information Act 2009* (Qld) ss 29 and 52(2), which regulate searches of agency backup systems in response to requests made under that Act.
16 See for example *NT Power Generation Pty Ltd v Power and Water Authority* [1999] FCA per Mansfield J 1669 and more recently *Slick v Westpac Banking Corporation* [2006] FCA 1712.
17 See for example *Lawrance and CRS Australia*, unreported decision of the Administrative Appeals Tribunal 24 May 2005 and more recently *Edwards and Secretary, Department of Health and Ageing* [2011] AATA 147.
18 [2005] FCA 1730 at paragraph 35.
19 Freedom of Information Act 1982 (Cth) s 24A permits an agency to refuse a request where documents cannot be found do not exist or have not been received.
20 *Freedom of Information Act 1982* (Cth) s 70.
21 *Guidelines Issued by the Australian Information Commissioner under section 93A of the Freedom of Information Act 1982, Part 11 - Complaints and Investigation*s, December 2010.
22 *Freedom of Information Act 1982* (Cth) s 20.
23 *Freedom of Information Act 1982* (Cth) s 24.
24 United States District Court, 10 Civ.3488 (SAS), 7 February 2011.