FREEDOM OF INFORMATION REFORM – THE AUSTRALIAN GOVERNMENT

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In this paper I discuss five prominent features of the role of the new Office of the Australian Information Commissioner. These features highlight the significance of the legal, governmental and cultural change that is occurring.

Integration of Privacy and FOI

The enactment of the *Freedom of Information Act 1982* (Cth) ('*FOI Act*') was not accompanied by the creation of a new agency to administer the Act. Instead, administration of the Act was assigned to the Attorney-General's Department; complaints about FOI administration would be handled by the Ombudsman; and review of access denials would be undertaken by the Administrative Appeals Tribunal. By contrast, the enactment of the Privacy Act in 1988 was accompanied by the appointment of a Privacy Commissioner, initially as a member of the Human Rights and Equal Opportunity Commission and, from 2000, as head of an independent statutory Office of the Privacy Commissioner.

The new Office of the Australian Information Commissioner will be headed by three Commissioners – the Information Commissioner, the Freedom of Information Commissioner and the Privacy Commissioner. The projected staff number for the Office is about 90 positions, 60 of whom will come from the Privacy Commission; 30 others are to be newly created.

The integration of FOI, privacy and information policy in a single office is an exciting development, but one that presents many challenges. The objective is to create an office that is integrated at all levels – one website, one telephone number, one case management system, one certified agreement, one training and education section, a uniform suite of publications, a compliance section that handles both FOI and privacy complaints and reviews, and a policy section that handles all dimensions of information policy. As to FOI and information policy matters, none of those systems currently exist and must be newly created by 1 November. As to privacy matters, there are well-developed systems that have been developed over more than 20 years and must now be modified to operate in a different office. The fact that the Privacy Commission is based in Sydney, whereas the Information and FOI Commissioners will be based in Canberra, adds another logistical dimension to the integration challenge.

The new Office must also define a philosophy that reflects that integration. Hitherto the core privacy message has focussed on protection of personal information, whereas the FOI message is focussed on promoting open government. Those contrasting themes must be distilled into a simple but compelling vision statement that defines and guides the work of the Office. A unifying theme is that FOI and privacy are both concerned with responsible information management by government agencies[1], premised upon a recognition of the information rights that belong to members of the public.

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Comprehensive range of functions and powers

In its FOI work, the Office of the Information Commissioner will exercise a comprehensive range of functions. They include: investigating complaints about FOI administration; reviewing the correctness of agency decisions on access, charges, and amendment of personal records; promoting the pro-disclosure objectives of the FOI Act, within and outside government; publishing guidelines on the Act that agencies are required to have regard to; providing training for agencies; providing advice and assistance to members of the public; monitoring and reporting on the FOI performance of individual agencies; reviewing the operation of the FOI Act and providing advice to government on legislative change; advising government agencies on the development of the Information Publication Scheme and on measuring the economic and social utility of proactive disclosure of public sector information; and advising government on information policy and practice.

Each of those functions is an essential function that must be performed from time to time. This means that each function must be resourced and handled by staff with an appropriate diversity of expertise. This, too, will be a challenge for a relatively small office. A particular challenge for the Information and FOI Commissioners is that they cannot delegate the function of making a decision on an application for review of an agency decision about access to a document. Moreover, the Act requires the Commissioners (subject to limited exceptions) to conclude a review by making a formal decision setting aside, affirming or varying the agency decision. If the Commissioners receive – as could be expected – more than the 140 review applications currently received each year by the AAT, the workload could be considerable, especially alongside the other functions that will require the personal attention of the Commissioners.

Some of the specialist powers of the Office are also novel in a scheme of this kind. One such power is the ability to make a vexatious applicant declaration, either upon application by an agency or upon the Information Commissioner's own motion. The development and exercise of this power is sure to arouse great interest within agencies! Another power is the ability to extend the time period for an agency to process an FOI request. This is likely to be a regular function of the Office, since an agency that fails to comply with the statutory time limits cannot impose an access charge if it has not obtained an extension of time from the Information Commissioner. A third power that can be exercised following investigation of an FOI complaint is the ability to issue an implementation notice requiring an agency to specify the action it will take to implement a recommendation of the Commissioner. This adds extra strength to the accustomed power of ombudsman offices to make a recommendation to an agency following an investigation that has found defective administration.

Combination of differing roles in the one office

As noted earlier, some of the functions of the Information Commissioner have hitherto been discharged separately by other agencies. The complaint investigation function has been performed by the Commonwealth Ombudsman; merit review of access denials has been undertaken by the Administrative Appeals Tribunal; policy advice to government on information issues has been provided by the Department of the Prime Minister and Cabinet; and training and advice on FOI legislation has largely been undertaken by the Australian Government Solicitor.

Bringing those and other functions together in a single office is an atypical if not unique step. A new model of administrative oversight and dispute resolution is being implemented. Difficult questions are sure to arise. In particular, it will be expected of the staff involved in merit review of agency decisions that they bring an independent and objective mind to the task, and resolve each case on the basis of the evidence and submissions that have been presented. Alongside that function, the Office will be interacting with agencies and the

community in encouraging greater disclosure by agencies, assisting people to make requests, and providing advice and training on FOI issues. It may not be practicable or sensible to have those functions discharged discretely within the Office. Moreover, it is expected that the Commissioners – who formally make each review decision – will be actively engaged in every function of the Office.

The conduct of hearings will also pose difficult practical and legal choices. The intention is that hearings will mostly be held on the papers. This will include inspection by the FOI or Information Commissioner of documents for which an exemption claim is made. As a practical matter, it may be easier at times for the Office or the Commissioner to have a face-to-face meeting with the representatives of an agency to elaborate on a claim of exemption. That is likely to be more efficient than requiring detailed written submissions on every issue. There are distinct constraints on how much an applicant can be told about submissions on exemption claims passing between an agency and the Commissioner, and yet natural justice requires that the applicant be given a proper opportunity to participate in the proceedings.

It is not uncommon for courts and tribunals to receive confidential evidence and submissions, including in FOI cases. However, it can be easier for a court or tribunal to strike the right balance if that occurs as an exception to the normal practice of receiving all material in a public hearing where there is full participation by the adversaries in a dispute. Different pressures and cross-currents could arise for the Office of the Information Commissioner in developing a suitable practice for receiving confidential evidence.

Role of the Office in developing government information policy

For thirty years, FOI scheme architecture has followed what is dubbed the 'reactive' or 'pull' model of information disclosure. Disclosure of documents by agencies under the Act occurs in response to requests received from members of the public, who are entitled to be given access to non-exempt documents, and who can challenge access denials in an independent tribunal. That model was devised in an age when the prevailing tradition was that information held by government had been assembled by it for its own purposes and government ostensibly owned the information. It was an age too in which administrative decision making and official communication between government and the community mostly occurred on paper.

It is now a different world. We talk in terms of e-government, e-citizens, web 2.0 and Gov 2.0. This unstoppable revolution in information technology has transformed not only the way that government and the community interact, but the cultural attitude within government. There is now a strong conviction within government that policy development, decision making and service delivery can be undertaken more successfully if there is greater online engagement and sharing of government information with the community. This is reflected in the heavy and innovative reliance placed by nearly every government agency on its web presence. It is reflected too in the fact that over seventy per cent – heading for ninety per cent – of transactions between government and the community occur online.

This trend has been picked up in the FOI Act in two ways. The first is in a new objects clause, which declares that 'information held by the Government is to be managed for public purposes, and is a national resource' (s 3). The second is in an expanded Information Publication Scheme, which requires agencies to publish a greater range of information, including 'operational information' and a disclosure log of documents released in response to other FOI requests. Agencies are encouraged to publish other categories of information with a view to shifting to a 'proactive' or 'push' model of information disclosure.

The Office of the Australian Information Commissioner is to play a central role in furthering this new and different approach to open government. That explains the chosen model of

three Commissioners – an Information, FOI and Privacy Commissioner. They are to be joined by an Information Advisory Council which is to assist the Information Commissioner in providing advice to government on information policy and practice. The Information Commissioner has also been appointed to the Steering Group that is to implement the 2009 report of the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0.* More generally, there is an expectation that the Office of the Australian Information Commissioner will play a strategic role in the development of a national information policy.

Cooperation between information commissioners and other integrity bodies

Another major development is the formation of a national network of information commissioners. Officers with the title of Information Commissioner now exist in five jurisdictions – the Commonwealth, New South Wales, Northern Territory, Western Australia and Queensland. The Ombudsman in Tasmania has also been given much the same role and functions by the *Right to Information Act 2009* (Tas).

This trend is all the more significant because of the links that are fast developing between these different offices. The National Administrative Law Forum is the first Australian conference in which four information commissioners have appeared on the same panel. There is talk underway of a regular annual or bi-annual conference being staged jointly by the information commissioners. Close cooperation between the different offices is also being established. This will have an important impact on the development of government information policy and practice in Australia. Unquestionably, this will result in the adoption of national best practice standards arising from the work of each of the offices, which in turn will result in more open government in Australia.

A related development occurring within each jurisdiction is the emergence of a recognisable integrity branch structure. At the national level I foresee that the Office of the Information Commissioner will associate with other integrity bodies (ombudsman, commissioners and inspectors-general) to establish links, share experiences and develop shared objectives on government accountability and integrity. Notably, the Information Commissioner and the President of the Australian Human Rights Commission are to be appointed as ex-officio members of the Administrative Review Council, joining the Commonwealth Ombudsman, the President of the Administrative Appeals Tribunal and the President of the Australian Law Reform Commission.

A more advanced integrity system structure has recently been introduced in Tasmania. The *Integrity Commission Act 2009* establishes a Commission to be headed by a Chief Commissioner, and a Board of seven members that includes the Auditor-General, Ombudsman and State Service Commissioner. The principal functions of the Commission are to develop codes of conduct, educate public officers, and investigate complaints of misconduct or refer them to other investigatory bodies. The Act also establishes a Parliamentary Joint Standing Committee on Integrity. Victoria looks poised to follow the same path. In June 2010 the Government announced that it had accepted the recommendations of an independent report to government, *Review of Victoria's Integrity and Anti-Corruption System*. The Government has agreed to establish an Integrity Coordination Board, comprising the Auditor-General, Ombudsman, Public Sector Standards Commissioner, Public Sector Integrity Commissioner and Director of Police Integrity.

The future

Australia is currently undergoing the most active and far-reaching phase of open government reform to have occurred in nearly thirty years. This is not the first open government reform wave in Australia, but it augers well as the most effective and lasting reform wave.

There is a stronger government commitment to reform than we have witnessed before. That commitment has been made nationally and in some States. Information technology changes are also driving reform, as they place pressure on governments to manage information better, to use the web more dynamically to publish information, and to engage the community online in policy formulation and review of government performance. The appointment around Australia of independent information commissioners with strong enforcement powers is another key change that will make it harder for governments to backslide in their commitment to change.

Transparency in government is shaping as both the ideal and the reality.

Endnotes

1 Again, however, it must be recognised that a substantial part of Privacy Commission work deals with the application of the National Privacy Principles to private sector organisations.