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Department of the Prime Minister and Cabinet  
PO Box 6500  
CANBERRA ACT 2600

Dear Sir / Madam

## Freedom of Information Reform Submission

The Records Management Association of Australasia (the Association) welcomes the principles articulated in the reforms to the Freedom of Information (FOI) Act, 1982 and supports the spirit of the Bill to increase participation in the democratic process by the Australian citizenry through increased and earlier access to Australian government information.

Documentation of, preservation of and access to information are the pillars of democracy and the functions that underpin this Association. It is with this in mind that the Association responds with this submission, to seek clarification to excerpts of the proposed Bill and to illustrate how some of the reforms may impact on the work of members of the Association.

### Schedule 2 – Publication of Information

#### Part 2 - Information Publication Scheme

*Section 8A (1) An agency's **operational information** is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities). Example: the agency's rules, guidelines, practices and precedents relating to those decisions and recommendations.*

#### Point:

- While much of an agency's operational information, in terms of its rules, guidelines, practices and precedents, is published for internal use on its internal intranet sites, preparing and uploading this information for public consumption, with continual review to maintain currency is a burden most agencies are not equipped or resourced to undertake.

- Section 8E states the Commissioner ‘may provide appropriate assistance to an agency in (a) identifying and preparing information which is required to be published ... In this case, does ‘appropriate assistance’ include funding or resourcing?
- What is the compensation to agencies to develop and sustain a publishing program? FOI fees, although in many cases not collected, offered an avenue for cost recovery for agencies to operate in a transparent nature and maintain the spirit of the legislation.
- It is generally perceived by the public that published government information is cleansed and sanctioned for public consumption. The emphasis on publishing is unlikely to subdue public requests for information, as most FOI requests are on personal information and interactions with an agency.
- In terms of the processes and deliberations to make recommendations or decisions, much of the information is compiled in the form of files. Will there be a requirement to publish the contents of files?
- If there is a requirement for files to be published, in the light of a rigorous and timely publishing regime, will this have a bearing on the publication of the Harradine Senate Continuing Order No 8 – Order for the Production of Departmental and Agency File lists?
- This Order, which requires compliance twice yearly, states that each Minister issue ‘by not later than the tenth day of the spring and autumn sittings, a letter of advice that an indexed list of the titles of all relevant files, including new parts of existing files, created in the preceding six months commencing on 1 January and on 1 July, respectively, has been placed on the Internet.’
- Complying with this Order is cumbersome and relatively ineffectual. Intended to create transparency of an agency’s activities, it is an arduous overhead resulting, in general, in only a small percentage of file titles being published and available for public consumption. The interest by the community is, in general, a few days of hits on the website by journalists, with few FOI requests resulting (as all interesting titles have been expunged), with no further activity until 6 months later when the next sanitised list is published.
- With the introduction of a planned publishing scheme, it would seem the Harradine Senate Continuing Order No. 8 has been superseded and should cease.
- Operating in a pro-disclosure culture will have an impact on government recordkeeping. Even when protections are put in place in relation to published government information, the prospect of disclosure will, no doubt, create some degree of hesitation among record creators, particularly when information is of a sensitive nature. Do we run the risk of failing to capture these records in our corporate information systems? This situation also creates the potential for unauthorised destruction of information.
- The impost on small agency resources and budgets to meet the demands of information publishing scheme appears overwhelming under the current financial restraints placed on small government agencies.

## Schedule 3 – Exemptions

### Part 1 - Open Access Period Amendments

*The relevant sections in the Archives Act 1983 are repealed and replaced with:*

(7) For the purposes of this Act, subject to sections 22A and 22B, work out when a record is in the *open access period* in accordance with the following table:

#### Points:

- The table in this section presents an access regime to fast track Australian government agency information from 1980 to 2000 to be in the open period, with this information due to be available from 1 January 2021. From 1 January 2011 to 1 January 2020 multiple years are proposed to be prepared for open period access to enable ‘catch up’ by the year 2021.
- Agencies will also be required to fast track the examination of multiple releases of Cabinet records as part of the National Archives’ Cabinet Release on 1 January each year.
- Closely connected to the issue of accelerated access to records and information held at the National Archives is accelerated transfer of relevant documentation from Australian government agencies to the National Archives.
- The ramifications to agencies are similar to those of the National Archives. Agencies will need to accelerate the preparation of information for either transfer to the National Archives for public access through their avenues, or preparation for public access through the creating agency. Consequently, resources and funding are required to appoint officers to undertake this work at an accelerated pace.
- Australian government agencies produce large amounts of documentation, some of which, while not deemed significant enough to be classed as ‘Retain as National Archives’ (RNA), can be held in agencies for lengthy periods, e.g. 50 – 100 years and can even be classed as ‘Retain Permanently’ (RP) within an agency. While this material will never be transferred to the National Archives, it will reach the open period and will need to be prepared for public access. No doubt agencies will have to deal with the burden of preparation for accelerated access within existing resources.
- With such a dispersed collection of records in the open period, what guidance will be available to members of the public to assist them in locating government information? If the request originates at the National Archives, how will the public know which agency holds particular information and for how long?
- Agencies are generally not equipped to handle such access requests (including the regime to process the request) and there will need to be guidance on who take responsibility for such requests, e.g. the Australian government agencies, the National Archives or the Office of the Information Commissioner.

- The Association would expect an increase in requests under the new legislation, but with continuing staff resource issues this may well become a problem.
- The Association is concerned with how Australian government agencies will deal with electronic records and the volume of these records that will escalate enormously as time goes on. Guidance is needed on methods of provision of information, including document formats (e.g. PDF, MS Word etc), methods of transmission (e.g. email, compact discs etc) and software compatibility issues.

## **Part 2 – Main Exemption Amendments**

- The Association believes there is reasonable protection for intelligence agencies in proposed reform of the FOI Act. Further to this, documents that contain information provided by intelligence agencies are also excluded. The Association also acknowledges that the exclusion will only apply to the part of the document that contains the information from the intelligence agency source.
- There is a proposed amendment to the *Archives Act* which safeguards the exemption of information that is communicated in confidence by a foreign government (or ‘foreign entity’) to the Australian Government. However, in relation to the disclosure of older material (30 years plus) the decision maker (National Archives) must be satisfied that a reasonable basis exists for maintaining the confidence of the information in order to invoke the exemption. This amendment gives National Archives the authority to overturn an exemption on a matter that may still be regarded as highly sensitive by a foreign entity, particularly when the National Archives is not satisfied that ‘a reasonable basis exists’.
- When tensions do arise between a foreign government and the National Archives over the release of older material, who will adjudicate?

## **Schedule 4 – Information Commissioner Amendments**

*The Association supports the additional avenues provided by the proposed reforms to the Freedom of Information Act for members of the public to be able to review decisions made by agencies on the release of information. However, these additional avenues do raise issues which need to be carefully managed to ensure a smooth and timely resolution of a review process.*

### **Points**

- There is some confusion over the role of the Information Commissioner in relation to the internal review process following an access refusal decision. Since the Information Commissioner will have similar powers to the Ombudsman to investigate compliance by agencies, will members of the public become confused over whom to go to when making a complaint?

- If members of the public approach both bodies, will there be two separate investigations on the same case, which would tie up agency resources?
- Which outcome will take precedence if there are different outcomes, i.e. who is the final arbiter?
- Is the Ombudsman able to investigate complaints against the Information Commissioner, in either gaining access to the Commissioner's own records or how the Commissioner is handling a complaint that has been made?
- There is also the role of the Administrative Appeals Tribunal (AAT) and the Federal Court to be considered and matters can become quite complex if both the Information Commissioner and Ombudsman become involved. This can delay the process greatly while the matter of law is settled. This is contrary to the spirit of the Act.
- There is an opportunity for mischief makers and potential for conflict in the review process by playing one body against another. Further clarification on respective roles in a practical sense is necessary to mitigate or prevent such conflict arising.

## **Schedule 6 – Other Amendments**

### **Points:**

- The proposed changes to the Acts may impact on information covered by other legislation not specifically listed in the FOI Bill.
- While the legislation retains reference to the '*Patents Act 1990*, paragraph 56(1) and subsection 173(a) prohibition of publication of information about inventions', the Association would like to reiterate that intellectual property (IP), such as patents, plant breeders' rights, trade marks etc. is generally protected up to 20 years for patents and most plant breeders' rights, with some up to 25 years, as in the case of plant breeders' rights relating to trees and vines.
- The proposed changes to the *Archives Act* will mean records associated with IP will come under the open access provisions of the Act while still being active records.
- Both the FOI (section 43) and Archives (s 33) Acts currently have explicit exemptions for trade secrets and information having commercial value. However, the fact these records will now come under the open access period is of concern.
- It is expected there may be other cases where other legislation may now cause conflict with the earlier exposure proposed in the reforms and the Association believes these should be identified, as far as possible, to ensure information is not inadvertently released.

The Association thanks you for the opportunity to provide input into the reform process.

Sincerely

*KWalker*

Kate Walker  
**Chief Executive Officer**