

## The Office of the Australian Information Commissioner (OAIC) Saga. Will it end with the 2015 Budget?

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Let me tell you about an ongoing saga that has been largely ignored. As you follow my account, please think of the current predicament of Professor McMillan, the Australian Information Commissioner, (the head of the Office of the Australian Information Commissioner (OAIC)). Contemplate him working for yet another month from home with no staff in Canberra and just a few remaining in Sydney. He will be having to triage elsewhere, the applications to review the Government's refusals of access to information held for us under the Freedom of Information Act. He will be unable to adequately address his other statutory responsibilities such as reporting to the Attorney-General on how public sector information is collected, disclosed, and accessed and how the Government can be more open and accountable. His appointment expires on 31 October this year. He has had to deal with the uncertainty of whether, and how, he and the OAIC can or will continue to function. Professor McMillan deserves the profound thanks of the Australian people for keeping this vital office operating.

The story begins in May last year when the Commonwealth Government's Budget for 2014-15 only provided funding for the OAIC's operations until 31 December 2014 and did so on the basis that it would be abolished as from 1 January 2015.

To carry out its plan, the government needed Parliament to pass legislation to amend three Acts, including the FOI Act, and to repeal the Australian Information Commissioner Act; for under our Constitution, and the Rule of Law, only the Commonwealth Parliament can legislate. On 2 October, five months later, recognising that obligation, the government introduced its Bill to abolish the OAIC into Parliament. It reached the Senate on 30 October and was considered by the Legal and Constitutional Affairs Committee. An overwhelming case against the abolition of the OAIC emerged from the Committee's hearing and is outlined in the dissenting Reports. On 25 November 2014, the 8th sitting day before Christmas, the Committee reported. It then became clear that the Senate would not pass the Bill.

The Government could have withdrawn the Bill or put it to a vote in December's or this year's sittings. Instead the Bill has been allowed to sink in the list of Government Business from number 9 to 14 where it will not be reached. Notwithstanding the Prime Minister's assurance on 10 February that "Good Government starts today", the Government does not appear to have accepted that reality or addressed the funding needed by the OAIC to meet its statutory responsibilities.

Since the Senate deadlock emerged, the Government has not explained its actions or intentions to the Parliament or the people. It cannot be budgetary needs. On its own figures, the additional annual budgetary amount required for the OAIC to continue its vital role is \$2.55m. Such a sum can be easily

found for things that governments want to support – a recent example being the \$4m. found for the Bjorn Lomborg Centre.

By what principle should the actions of Governments and Ministers be assessed? Is it not the long forgotten ethical and legal principle that applies to all public officers to whom we have entrusted power particularly members of parliament - our elected public trustees. It states that in making decisions as public officers, they must at all times put the public interest ahead of any personal or other private interests.

Where does the public interest lie in this matter?

Clearly, it does not lie with the abolition of the OAIC. Its establishment in 2010 was a crucial best practice reform of the failed FOI system. It strengthened open and accountable government, thereby also improving the prospects of “good government” and the potential for economic growth. It also reduced the risk of corruption. As to the OAIC’s performance, the 2013 Hawke Review of its operations had been positive and supportive.

If the Bill were to be passed, it would bring back the old failed FOI system. It would also give the supervisory and reporting powers of the independent Commissioner to the Attorney-General, thereby placing that Officer in a conflict of interest position. To describe the Bill as a giant step backwards for the Commonwealth government integrity system is, to put it mildly, an understatement.

As to the Government’s handling of the matter, as soon as it became clear that the Senate would not pass the Bill, the public interest required that the Constitution and the Rule of Law be respected by the Government, either by putting the Bill to a vote in the Senate, or withdrawing it immediately. It also required the Government to arrange the necessary funding for the OAIC for at least the entire financial year. Instead, the FOI system has been severely handicapped because the government has either overlooked or deliberately delayed its decisions. “Good government” may have started on 10 February but not yet for our government integrity system.

But there is another serious consequence flowing from the government’s inaction. If it is allowed to achieve the de facto elimination of the OAIC that Parliament enacted, a precedent will exist for it and future governments to ignore the Constitution and the Rule of Law to achieve highly questionable policy outcomes otherwise denied them when they fail to gain the required legislative support of our Parliament’s House of Review, the Senate.

The Government has the opportunity in the imminent Budget Session to act in the public interest and put this unacceptable saga to rest. We should know if it has on Budget day, Tuesday. If it does not, the Senate must act. And we the people, as the beneficiaries under the public trust, must take up the issues to ensure the public interest is served. It is time we all brought an end to this saga.