



Audit of the implementation of the *Freedom of Information Act 1982* - the Department of the Attorney-General and the Office of the Australian Information Commissioner

This submission is attached to the ART's letter dated 12 October 2016. The matters raised have also been raised recently by the ART in the Commonwealth Election¹, and the preparation of Australia's National Action Plan as a participating Nation in the Open Government Partnership². They relate particularly to the performance and efficiency of the OAIC and the Attorney-General's Department in discharging their responsibilities under the FOI Act 1982.

1. Introduction and Overview

1.1 Guiding Principles.

..an open, inclusive economic system backed by open, political inclusive institutions – that is the best guarantor of success”

Democracy David Cameron, UK Prime Minister

A key guiding principle in assessing the performance of the current FOI system is the public office public trust principle³.

Information is held by government officials in public trust for the Australian people, not for the government. It is the people's information. For a well-functioning democracy, governments must resist the temptation to abuse their power over the information entrusted to them and ensure that it is exercised in the public interest.

The OAIC was established to play a crucial role in ensuring the Federal government upholds the democratic principles of openness and transparency but attempts to abolish the OAIC and government cuts to its funding have seriously undermined its capacity to perform this role. In the last Federal Election, ART sought the following commitments from the major parties in relation to the administration of the FOI Act;

¹ In support of Commitments sought from the major parties in the last Federal Election - <https://www.accountabilityrt.org/wp-content/uploads/2016/06/OAIC-background-issues-paper.htm>

² Submission made to the IWG of the Australian Open Partnership. (4 September 2016; <https://ogpau.govspace.gov.au/submission-from-the-accountability-round-table-to-the-interim-working-group/#more-593>

³ <http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/> ; <http://www.accountabilityrt.org/public-office-public-trust-a-new-contribution-by-david-lusty/> .

- Sufficient additional funding to enable the OAIC to adequately discharge its strategic, policy, complaints and review functions of FOI as well as Privacy
- Appointments to each of the three statutory Commissioner positions for FOI, Privacy and Information Policy
- A comprehensive, independent inquiry into the operation of the OAIC since its inception, as recommended by the Hawke review

1.2 Background summary

In 2010 the OAIC was established to reform the then failing FOI system. This independent body was given the power to review decisions, consider complaints and promote open government.

The 2013 Hawke inquiry found good progress but, while acknowledging the OAIC's "financial constraints", considered it "too early" to assess future needs. But resistance in government has persisted with recent examples of senior officials arguing for more exemptions to be provided to limit the disclosure of information.

In 2014, the Government moved to abolish the OAIC. Blocked by the Senate, it achieved de facto abolition of its FOI role by reducing its funding and transferring all its FOI functions elsewhere other than the review of government decisions refusing access to information. That was "streamlined", by enabling reviews to be conducted by the Administrative Appeal Tribunal (AAT). The funds provided for the OAIC for FOI work were halved in 2014/15. They do not appear to have been materially increased since then.

Privacy became its principal function. In addition, over most of that period, an Acting Information Commissioner has been appointed on 3-month terms to perform the duties of all three statutory Commissioner positions. This has handicapped the OAIC, particularly in the FOI area and compromised its independence. The last appointment occurred in July 2016. As from 18 October this year, the present Acting Information Commissioner will continue to be responsible for that office and the Privacy Commissioner office but not the FOI Commissioner office. The period of the two Commissioner appointments has not been stated.⁴

In May this year, all FOI functions were officially returned by Government to the OAIC but not its capacity to perform them. Funding was not materially increased and future Budget Estimates assume a reduction. Staff are to be increased by only three in this financial year.⁵

As from 18 October this year, the failure to appoint a person to the statutory office of FOI Commissioner is a further downgrading and weakening of the statutory FOI role of the OAIC by the Executive Government.

There are also other serious ongoing issues yet to be addressed:

- The Government's contravention of the fundamental constitutional principles of the separation of powers and the rule of law⁶, and

⁴ See the A-G's Department media release <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2016/ThirdQuarter/Appointment-of-Australian-Information-Commissioner-and-Privacy-Commissioner.aspx> ; but does the reference in the above Government media release link to "Third Quarter " reflect that the new appointment period is until 18 March 2017 (and so most of that quarter - i.e. for 6 months not 3? See also the OAIC web site item at <https://www.oaic.gov.au/>.

⁵ See paras 2.5 - 2.7 below

⁶ See text, para 3, p 11 and fn 24-26 below

- Australia’s breaches of its obligations as a member of the Open Government Partnership⁷.

A detailed analysis of the quality and efficiency of the performance since 2014 of the responsibilities of the OAIC and the Attorney- General’s Department based on publicly available information follows.

2. Performance and Efficiency of the OAIC and the Attorney-General’s Department ’s Office since May 2014

2.1 The de facto abolition of the OAIC since 2014 and the effect of the Government 2016/17 Budget

Over the last two years the Government failed in its attempt to have a Bill passed to abolish the OAIC. But for most of that time it achieved the de facto abolition of the OAIC’s FOI jurisdiction using its control of the Budget process.

In May this year, however, the Government announced in the 2016/17 Budget Papers that it was not proceeding with the abolition of the OAIC and was returning the FOI functions to it. It also stated that the OAIC would “have ongoing responsibility for privacy and FOI regulation”. As to funding it said that the “FOI funding is provided on the basis of the streamlined approach to FOI reviews adopted by the OAIC since the 2014/15 Budget”.

Those Budget Papers do not, however, detail:

- what the Government intended to happen in relation to the OAIC’s other major FOI responsibilities,
- whether the Budget would enable sufficient staff to be appointed to perform the FOI functions returned to it,
- whether the three vacant statutory Commissioner positions would be filled.

An examination of the OAIC Annual reports, the Budget Papers relating to the OAIC, and public statements, sheds light on these issues. We look first at the nature and extent of the intended return of the OAIC’s functions.

2.2 The OAIC FOI statutory functions⁸. What are they?

The OAIC has summarised its “three main functions” in its Annual Reports, the last being the 2014/15 Report, as⁹ follows;

“The three main functions of the OAIC are:

- *Information Commissioner functions — providing strategic advice on information policy and practice in the Australian Government*
- *privacy functions — ensuring proper handling of personal information in accordance with the Privacy Act and other legislation*

⁷ Ibid,

⁸ see also; Australian Information Commissioner Act 2010 - sections 7, 8, and 10

⁹ E.g. OAIC 2013 – 14 Annual Report (Chapter 2 p 12 – repeated in the 2014-15 Report, p 10)

- *freedom of information functions — protecting the public’s right of access to documents under the FOI Act.”*

It continued

“The OAIC carries out a range of activities in these three core areas, including monitoring statutory compliance, investigations, assessments, complaint handling, review of decisions, education and awareness, and providing advice to and promoting responsible information handling within government and the private sector”.

The performance of these functions and activities is still the statutory responsibility and obligation of the OAIC under its Act and the *Freedom of Information Act 1982*.

2.3 The statutory functions removed in 2014/15

In the May 2014 Budget, the Government began its attempt to abolish the OAIC. In its 2014/15 Annual Report, (p 8), the OAIC reported on the functions it had performed in that financial year as follows:

“As of 30 June 2015, the Freedom of Information Amendment (New Arrangements) Bill 2014 had not been considered by the Senate. As such, the OAIC continues to undertake the full breadth of privacy functions, and to carry out the FOI IC review function.

Resources have been provided to the OAIC for the exercise of the FOI IC review function for 2015–16. Funding for the privacy functions has been appropriated to the OAIC for the period 2015–16. The OAIC’s budget allocation for 2015–16 does not include activities in the area of information policy.”

The reality appears to have been that the OAIC FOI functions had been limited by the 2014/15 budget to cover 1 of the 9 activities identified above - conducting reviews of FOI decisions. That function came to be described by the OAIC and Government as “streamlined” – a reference to the practice of reviews being passed to the AAT where “ 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”.¹⁰

2.4 The functions intended by government to be returned and performed in 2016/17?

The Government having now arranged the return to the OAIC of all its statutory functions, does it intend that the OAIC will address them all? Or, may it in fact intend that the OAIC does no more than process complaints and reviews?

Other questions arise;

- What is intended to be done to ensure an adequate level of funding and staff numbers to enable the OAIC to discharge all its FOI functions?

¹⁰ s54W(b) Freedom of Information Act 1982

- What about the 3 Commissioner positions that have for some time been filled by one Acting Commissioner on three month appointments. Is it intended to restore them? This issue has recently been partially addressed by the Executive Government with the recent announcement referred to above¹¹ that now only 2 statutory Commissioner positions will be filled. The period of appointment is unstated but may only be for 6 months¹². The position that is not to be filled is the FOI Commissioner position. No public justification has been given. It is submitted that this is further evidence of a continuing intention to prevent the OAIC discharging the responsibilities of its statutory office other than the “streamlined “review of refusals of access to documents.

There does not appear to have been a detailed public statement of the Government’s intentions about the performance of the returned functions. There are, however, statements which shed light on the intention because of what is not said.

(a) The OAIC: The 2016/17 Budget Paper¹³ – “Strategic Direction Statement”

In previous years, including 2015/16, the Budget Papers relating to the OAIC have included a “Strategic Directions Statement”.

On each occasion, the first one listed had been

- “Information Commissioner functions – performing strategic functions relating to information management in the Australian government”

It had then been followed by the Privacy function, and then

- “freedom of information FOI functions – protecting the public’s right of access to documents under the Freedom of Information Act 1982 (the FOI Act)”.

The 2016/17 Budget Paper Statement abandoned that practice. While listing the second and third it omitted the first one listed –,¹⁴ “the Information Commissioner functions - performing strategic functions concerning information management in the Australian government”.

This Budget Paper also states:

“...the OAIC will have ongoing responsibility for privacy and FOI regulation. Ongoing funding for these functions is provided in the 2016 – 17 Budget. FOI Funding is provided on the basis of the streamlined approach to FOI by the OAIC since the 2014 – 15 Budget. In 2016 – 17 and the forward years, the OAIC will focus on its strategic goals of:

- *promoting and upholding information access rights*
- *promoting and upholding information privacy rights*
- *achieving organisational excellence by supporting and developing the OAIC’s people, systems and processes”*

¹¹ P 2 above

¹² Ibid.

¹³ Section 1, p261.

¹⁴ This pattern can be observed elsewhere in the same budget papers where they address outcomes and performance.

The omission of the first listed “main function” and the deliberate lack of detail in the Strategic Directions Statement suggests that the reality is that the necessary funding will not be provided.

Assuming that the main FOI functions are intended to be confined to “protecting the public’s right of access to documents under the Freedom of Information Act 1982”, while this is very important of course and can include a range of activities, it can also be said to be “taken up” by continuing with only the “streamlined” FOI refusal reviews.

(b) (i) A Statement of 4 May 2016 by the Acting Information Commissioner.

He said:

“I can confirm for you this morning that other key FOI functions will be restored to the OAIC from 1 July. So we will soon commence work on updating the FOI guidelines. We will start to handle FOI related complaints which have been handled by the Ombudsman for the last 18 months. We will take over management of the FOI statistics database and FOI reporting once our colleagues in AGD have completed the process for the 2015/16 annual report. We also have some work to do to update our website and other material to reflect these changes.

I note however that we are a much leaner version of the OAIC that existed in 2014 and so there will also be changes in how we approach these functions in this new iteration of the office.”¹⁵

While this is encouraging, the words are carefully chosen. It refers to “soon” commencing work on guidelines and starting to handle FOI related complaints. This may be contrasted with the next statement that the OAIC would “take over management” of the statistics database and FOI reporting (but that will not happen for some time). He also acknowledged that The OAIC is much “leaner” than it was in 2014 and will have to approach the delivery of the functions he mentioned accordingly.

He did not include a statement as to the appointment of people to the three Commissioner posts. If it was part of the plans for the next financial year, it would presumably have been mentioned.

(ii) The OAIC Corporate Plan 2016/17¹⁶

It confirms the primacy being given to Privacy issues¹⁷

Positive statements are made about the carrying out of the FOI functions but there does not appear to be any contemplation of “monitoring statutory

¹⁵ Speech to an FOI and Privacy forum by Acting Commissioner Pilgrim; <https://www.oaic.gov.au/media-and-speeches/speeches/the-value-of-public-sector-information>

¹⁶ https://www.oaic.gov.au/resources/about-us/corporate-information/key-documents/OAIC_corporateplan_2016_Acc.pdf

¹⁷ op. cit.: “Challenge 1: Promote, uphold and shape Australian Information privacy rights” (pages 9 to 18; “Challenge 2: Promote and uphold Australian information access rights” (pages 19 to 24); Challenge 3: Develop the personal information management capabilities of Australian businesses and government agencies”(pages 25-27

compliance” (the first main function listed in the 2014/15 OAIC Report) only an “offer” to provide “advice and guidance on complying with the FOI Act” to “Australian Government agencies and ministers”¹⁸. The critical proactive role has been abandoned?

The above material suggests that the funding being provided in the present financial year for the performance of the FOI responsibilities has not been, and is not planned to be, increased to bring it back to the level that existed prior to the 2014/15 budget (which was prepared on the basis that the OAIC would be abolished by the end of 2014). If that be so, then it would follow that it is presently not intended to provide sufficient funds to enable the OAIC to do much more than conduct “streamlined” FOI reviews.

There is further evidence relevant to that conclusion.

2.5 Budgeted provisions for the OAIC

(a) The Budget provisions – past and future

According to the Budget papers, the estimated actual Expenditure of the OAIC had declined from \$14.356 million in 2012/13¹⁹ to \$13.183 million in 2015/16²⁰. While the Budget estimates for 2016/17²¹ record estimated total expenses of \$14.992 million, that figure is made up principally of a departmental appropriation of \$10.622 million and retained revenues of \$3.777 million.

The Forward estimates in that budget suggest a further decline. They propose a departmental appropriation in 2017/2018 of \$10.567 million, \$10.597 million in 2018-19 and \$9.3 million in 2019/20 with estimated actual expenditure dropping from \$11.333 million in 2017 – 18 to \$9.940 million in 2019/20.

(b) Statements of the Information Commissioner and the Attorney-General

They recently described the funding reality for all the OAIC functions for the next 4 years as the provision of \$37M - an average of \$9.25 million each year.²²

The above suggests an intent that there be no real increase in funding in the next financial year and a decline in the three years that follow. We have a situation where the functions to be discharged by the OAIC are significantly increased from what they were in 2014/15 but the funding has not and is intended to decline. Sufficient funds will not be provided. In addition, it cannot be assumed that the funding available to the OAIC to discharge its FOI functions will even match the level to which it was reduced in 2014/15. There is detailed information available about what occurred then.

¹⁸ p17.

¹⁹ <https://www.ag.gov.au/Publications/Budgets/Budget2013-14/Pages/PortfolioBudgetStatements201314.aspx>

²⁰ <https://www.ag.gov.au/Publications/Budgets/Budget2016-17/Documents/Portfolio-budget-statements/PBS-OAIC-2016-17.pdf>

²¹ *ibid*

²² (<https://www.oaic.gov.au/media-and-speeches/statements/oaic-forward-funding-in-2016-17-federal-budget>
Office of the Australian Information Commissioner

“The Government has decided not to proceed with the new arrangements for privacy and Freedom of Information (FOI) regulation, including the proposed changes to the Office of the Australian Information Commissioner (OAIC).

Accordingly, the OAIC will receive ongoing funding of \$37 million over four years to continue its privacy and FOI functions. FOI funding is provided on the basis of the “streamlined” approach to FOI reviews adopted by the OAIC since the 2014–15 Budget.”

<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2016/SecondQuarter/3-May-2016-Attorney-Generals-Portfolio-Budget-Measures-2016-17.aspx>

2.6 The reduction of the share of funds for FOI Functions in 2014/15

The Annual Reports of the OAIC contain relevant details of the level of that funding in 2013/14 (the year prior to the attempted abolition of the OAIC) and the year of the attempted abolition (2014/15)

(a) The 2013/14 Budget (page 159)²³

The OAIC's total expenditure was \$13.634 million. It was estimated that -

- 35% of it was directed to its FOI functions (\$4.772 million)
- \$42,689 was "spent on processing" FOI requests made in that year
- the total departmental appropriation was \$14.995 million of which \$2.278 million remained unspent at the end of that financial year. (Appendix 1, page 162)

In the previous year, the appropriation received was \$17.680 million of which \$15.168 million was spent.²⁴

(b) The 2014/15 Budget (page 138)²⁵

During the first year of the attempted abolition, significant funding reduction occurred in relation to the FOI functions. The OAIC's total expenditure was \$13.430 million, very close to the previous year. There had, however, been significant changes to the level of expenditure for the FOI functions. The Report stated

"From January 2015, in accordance with the proposed legislative change outlined previously, the OAIC's FOI functions were reduced commensurate with resources".

The following estimates were made:

- 18% of its resources were directed towards its FOI functions (\$2.417 million)
- \$14,158 was spent on processing FOI requests (down 67%)
- the total departmental appropriation was \$16.843 million of which \$4.560 million remained at the end of that financial year. (Appendix 1, page 140)

Thus, total expenditure over the year on the FOI functions, was halved as the FOI functions were transferred and expenditure on the "processing" of FOI reviews was reduced by two thirds, presumably helped by the "streamlining".

It would appear that the bulk of the work being done by the OAIC from at least 2013/14 concerned its Privacy function. It was stated in the 2014/15 Report (P8) that as of 30 June 2015, the OAIC "continues to undertake the full breadth of privacy

²³ <https://www.oaic.gov.au/images/documents/about-us/corporate-information/annual-reports/annual-report-2013-14/Office-of-the-Australian-Information-Commissioner-Annual-report-2013-14.pdf>

²⁴ https://www.oaic.gov.au/images/documents/about-us/corporate-information/annual-reports/Annual-report-2012-13/Complete_pdf_AR_2012-13.pdf

²⁵ <https://www.oaic.gov.au/resources/about-us/corporate-information/annual-reports/oaic-annual-report-201415/oaic-annual-report-2014-15.pdf>

functions, and to carry out the FOI IC review function”. It was also stated that, the OAIC budget allocation for 2015/16 “does not include activities in the area of information policy” and that additional funding had been provided for additional Privacy functions.

Unless there is information pointing to, for example, some other plan to secure a significant increase in staff members, it appears the OAIC will not have the capacity to discharge more than the FOI functions it was able to in 2014/15.

2.7 Past, present and future staff numbers

What light do the records of staff numbers shed on the staff needed, and the availability of staff this year, and in the future, to pick up and work on the returned FOI functions?

According to the Budget papers, the highest staff number, 85, occurred in the year 2012/13. In the first abolition year, 2014/15, the number fell to 64 and in 2015/16 it rose to 72. In both those periods, however, the reality was that the FOI work being done concerned the review of FOI decisions and that had been “streamlined”. As revealed in the Budget Papers and elsewhere, including the OAIC website, since the addition in March 2014 of the Privacy functions, there has been a profound shift of focus from the OAIC’s FOI responsibilities to its Privacy responsibilities and that is likely to continue.

But it appears that it is proposed to increase the staff in the current financial year. Will that enable all the FOI statutory functions to be performed?

The Budget staff prediction for 2016/17; 3 additional staff, from 72 to 75 an increase of 1.7%. There does not appear to be a statement about their intended role. It cannot be assumed that they would all be allocated to FOI work; for there will be competition for them between the demands of the Privacy and FOI functions. But even if all three were allocated to FOI work, how would that be enough to enable the OAIC to make a serious impression on the work it needs to do in performing all the FOI functions. And the experience appears to have been that the demand for the OAIC services has constantly grown.

If the current financial plan is maintained, it would appear inevitable that the staff needed by the OAIC to discharge both its statutory Privacy and FOI functions will not be provided. Further, assuming the proposed three staff will focus entirely on the returned FOI functions, that is likely to be ineffective in enabling the OAIC to address the returned functions.

3. Conclusion

Appropriately resourced and staffed, the OAIC would significantly strengthen the openness and accountability of our Commonwealth Government.

The reality appears to be that if matters are left as they are

- the proposed funding
- the addition of only 3 staff and
- the provision of only one Commissioner,

will prevent the OAIC discharging most, if not all, of its returned statutory functions this year and significantly limit its performance of those functions that it attempts to perform. At best, the experience of the last 2 years for our Commonwealth “streamlined” FOI system will continue.

There are practical limits to what can be done by “streamlining”. Its use is limited unless outsourcing is used (as had been done with the Ombudsman, the Attorney- General and the AAT since late 2014). Only the AAT outsourcing has been mentioned as continuing.

The information available, including the government statements, and the recent failure to appoint an FOI Commissioner, point to the processing of FOI reviews as the FOI function that the Executive Government intends will be carried out. The other FOI functions are likely to receive little or no attention because of the lack of resources for that function including an FOI Commissioner.

Until significant sufficient additional funding is provided, including for 3 Commissioners, the effective de facto abolition of the OAIC as an independent statutory FOI body created by the Parliament will continue. The FOI system will remain in its failed state and severely weaken open and accountable government.

It also needs to be borne in mind that there have been other serious concerns flowing from the continuing de facto abolition of the FOI role of the OAIC. It has resulted in the ongoing breach of

- the ethical and common-law public office public trust principle that applies to all holders of public office²⁶ and
- Australia’s commitments under the international agreement, the Open Government Partnership,²⁷ in particular, the commitments of

‘promoting increased access to information and disclosure about governmental activities at all levels of government,’

‘providing access to effective remedies when information or the corresponding records are improperly withheld,’ and

Making “concrete commitments that are ambitious and go beyond a country’s current practice”.²⁸

There is also another serious concern – breach of the fundamental constitutional principles of the Separation of Powers and the Rule of Law²⁹.

Our Democracy and its guiding principles, and Australia’s reputation, are being damaged as long as this situation is allowed to continue. It is critical that it be addressed soon as is possible.

²⁶ <http://www.accountabilityrt.org/integrity-awards/sir-geard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/> ; <http://www.accountabilityrt.org/public-office-public-trust-a-new-contribution-by-david-lusty/> .

²⁷ <http://www.opengovpartnership.org/Articles>

²⁸ Op.cit. pp.20 and 3

²⁹ <http://icivictoria.com.au/wp-content/uploads/2015/08/OAIC-letter.pdf> and <http://www.theguardian.com/australia-news/2015/aug/17/george-brandis-urged-to-respect-rule-of-law-by-former-liberal-attorney-general>;

<http://www.canberratimes.com.au/comment/senates-last-chance-to-save-foi-watchdog-and-protect-the-rule-of-law-20150618-ghr6vw> .

Bearing in mind this submission's concluding remarks and

- the timeframe the Performance Audit needs to cover, and
- the audit's focus on efficiency and effective

the ART submits that, as a minimum, it will be necessary that the ANAO examine:

- changes in resourcing of the OAIC over the period 2010 to date and its implications;
- reallocations of resources to other agencies and their implications;
- the effectiveness of the OAIC in meeting its statutory objectives including its enabling legislation and related regulations, its corporate plans, its Service Charter and any related internal strategies and policies.

The ART thanks the Auditor-General and his Office for the opportunity to contribute to the audit of these important accountability functions.

19 October 2016



Hon Tim Smith QC

Chair Accountability Round Table