



Australian Network of Environmental  
Defender's Offices Inc

## **Submission to the independent review of the *Freedom of Information Act 1982 (Cth)***

**7 December 2012**

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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## Introduction

The Australian Network of Environmental Defender's Offices (**ANEDO**) welcomes the opportunity to provide comment on the two-year review of the *Freedom of Information Act 1982 (FOI Act)* and the *Australian Information Commissioner Act 2010 (AIC Act)*.<sup>1</sup> ANEDO is a network of community legal centres with over 25 years' experience specialising in public interest environmental and planning law.

As ANEDO operates within the field of public interest environmental law, one of our key priority areas is access to justice for community members and groups. Government accountability and transparency play an integral role in facilitating access to justice through the provision of information to the community. The United Nations has long acknowledged freedom of information as a fundamental human right.<sup>2</sup> The revised FOI Act represents the Government and Parliament's renewed intent to emphasise this right.

As the Act's objects make clear, access to information assists the community in protecting democratic rights, participating in policy making and understanding government decisions. ANEDO therefore welcomes the review of Commonwealth FOI laws to ensure they 'continue to provide an effective framework for access to government information.'<sup>3</sup>

ANEDO supported and commented on the FOI reforms in 2009-10, when the Office of the Australian Information Commissioner (**OAIC**) was established. Our lawyers also have experience in making FOI applications on behalf of individuals and non-government organisation (**NGO**) clients, both at the Commonwealth and state/territory levels. This includes experience before and after the federal reforms took place.

Our FOI clients are usually individuals, local community groups or peak environment bodies who seek access to information on government policy development and decision making, rather than personal information about themselves. We understand that these public policy-focused processes represent a small minority of FOI requests and reviews. Yet, as the ALRC has noted, 'it could be said that these requests provide the real test of whether the Act is serving its purpose of keeping the government accountable and facilitating participation in government.'<sup>4</sup>

To the extent that public and personal categories of information can be distinguished, ANEDO submits that the independent review should canvas specific issues and recommendations relating to scrutiny of public policy processes, and the ongoing availability of such information, to inform the community and keep agencies accountable. Noting the objects of the Act, we also submit that cost efficiencies should not be used to justify a diminution of scrutiny of governments and agencies. Indeed, as noted below, there are signs that a cultural change for 'open government' within agencies has a long way to go.

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<sup>1</sup> Australian Government Attorney-General's Department webpage, 'Review of FOI laws', <http://www.ag.gov.au/Consultationsreformsandreviews/Pages/ReviewofFOIlaws.aspx> (November 2012).

<sup>2</sup> See, for example, United Nations Resolution 59(1) (1946): 'Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated...'

<sup>3</sup> The Hon Nicola Roxon MP, Attorney-General, 'Review of the FOI Act', media release, 31 October 2012.

<sup>4</sup> See Australian Law Reform Commission (**ALRC**), Report 77 (1995), *Open government*, para 2.11.

This submission focuses on four terms of reference for the independent review:<sup>5</sup>

- **Impact of the 2009-10 FOI reforms, including new structures and processes**
- **Reformulation of exemptions, including application of the new public interest test**
- **Fees and charges, including Information Commissioner recommendations**
- **Effectiveness of the two-tier merits review system for FOI refusal decisions.**

In sum, ANEDO continues to support the revised Act and the role of the OAIC in driving open government and access to information. However, the review should consider how to maintain and renew momentum to implement the spirit of the FOI reforms, and ensure agencies and governments do not lapse into a reactive and 'business as usual' approach to FOI. Instead, we seek a genuine commitment to open government and policy making.

## **Impact of FOI reforms including new structures & processes**

### ***Previous comments on the FOI reforms***

ANEDO has previously commented on the bills to amend the FOI Act and establish the OAIC.<sup>6</sup> In its 2009 submission, ANEDO supported the reforms towards more open government, including:

- the stronger wording of the objects clause in favour of disclosure, 'requiring agencies to publish the information' they hold and 'providing for a right of access to documents';<sup>7</sup>
- abolition of all application fees for access requests under Part III of the Act;
- development of the Information Publication Scheme (**IPS**) and the requirement for all government agencies to develop an IPS;
- the re-formulation of the public-interest test;<sup>8</sup>
- the introduction of guiding principles for assessing the 'public interest' – both the 'Factors favouring access' and 'Irrelevant factors';<sup>9</sup>
- that exemptions including for personal privacy, business affairs, national economy, and research be conditional (subject to the public interest test).<sup>10</sup>

ANEDO further submitted that the *FOI Amendment (Reform) Bill 2009* be amended to:

- better operationalise the objects within the Act, particularly where discretion is afforded;
- allow for expedited information access requests;
- allow, in special circumstances, external review without the prerequisite of an internal review (the final amendments allow the applicant to elect either or both review paths);
- remove 'deemed refusals' (or deemed affirmation of original decisions) when the relevant decision (or internal review) period expires, and encourage responsiveness;
- require each agency to review its IPS every two years, as opposed to every five.<sup>11</sup>

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<sup>5</sup> Terms of reference 1(a), 1(d), 1(f) and 1(c), respectively (see review website for full terms of reference).

<sup>6</sup> *Freedom of Information Amendment (Reform) Bill 2009* and the *Information Commissioner Bill 2009*. See ANEDO, Submission to the *Privacy and FOI Policy Branch, Department of the Prime Minister and Cabinet*, 21 May 2009, available at <http://www.edo.org.au/policy/090522foi.pdf>.

<sup>7</sup> *Freedom of Information Act 1982* (Cth) (**FOI Act**), section 3(1); see also s 11.

<sup>8</sup> See for example FOI Act, s 11A(5).

<sup>9</sup> FOI Act 1982, s 11B(3) and (4).

<sup>10</sup> Among other exemptions, such as federal-state relations. See FOI Act, Part IV Division 3, ss 47B-47J.

The current FOI review provides an opportunity to further consider these suggestions, with the benefit of two years' operation, to the extent they have not been addressed.

### **General support for revised Act, but concern about a 'business as usual' approach**

ANEDO continues to support the revised FOI Act and the role of the OAIC in driving open government and access to information, in line with our previous submissions. On one hand, we believe the revised legislative provisions, guidance, proactive publication and review processes have improved the community's ability to access information held by Government agencies. On the other hand, we are concerned that without ongoing and renewed momentum to implement the revised Act, agencies may tend towards a 'business as usual' approach to (refusing) access to information, rather than a genuine commitment to open government. This concern extends to the level of openness and transparency of public policy making in the environmental law context.

### **Recent experience with ongoing COAG reforms to national environmental law**

In particular, our most recent experience with opaque policy-making processes involves the interaction of the Australian Government, the Council of Australian Governments (**COAG**), and COAG's Business Advisory Forum (**BAF**). In April 2012, the BAF made several proposals to 'streamline' environmental assessment and approvals at federal and state levels. Accepting these proposals 'overnight', without public consultation, COAG is now pursuing significant new delegations of environmental approvals to State/Territory governments under the national environmental law, the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.<sup>12</sup>

This reform process disrupted the Government's response to the Independent Review of the EPBC Act – a detailed, multi-staged and (importantly) transparent process that began in 2008. By contrast, the COAG reforms have been characterised by poor transparency, poor consultation, information asymmetry, and ad hoc deadlines that further limit public scrutiny.<sup>13</sup> COAG set two deadlines in its April reform announcement – December 2012 to finalise environmental standards; and March 2013 for signing 'approval bilateral' agreements with each State and Territory. However, by late August, COAG had provided no public detail on the content of likely environmental standards.

This lack of transparency meant that Humane Society International Australasia (**HSI**), on behalf of over 30 environment groups across Australia, had to resort to FOI processes to seek access to important draft documents, to allow interested stakeholders to understand and comment on the details of the reforms. In late September, the federal Environment Department refused access to a 'draft environmental standards' document, citing the conditional exemption of damage to Commonwealth-State relations.

EDO NSW, instructed by HSI, sought internal and external review of this refusal. Ultimately, the FOI request by EDO NSW on behalf of HSI led to the (separate) release

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<sup>11</sup> FOI Act 1982, s 9(1)(b).

<sup>12</sup> See COAG meeting outcomes, 13 April 2012, available at <http://www.coag.gov.au/node/313#BAF>.

<sup>13</sup> See ANEDO, *Submission on draft environmental standards to accredit State/Territory approval processes under the EPBC Act* (November 2012), p 4, 'Transparency and public engagement':

*Beginning with the surprise announcement in April 2012, ordinary transparency, participation and policy-making processes have been jeopardised by COAG's rapid, self-imposed timeframes. For example, public consultation on specific details has been limited and late; there has been significant 'information asymmetry' between stakeholders; COAG has provided no clear deadlines when it has sought public comment; and the taskforce has not published any submissions. These factors have combined to diminish community confidence. Such significant regulatory reforms deserve a more timely, inclusive evidence-based approach that puts all stakeholders on an equal footing.*

of draft environmental standards by the federal Environment Minister in early November 2012. The initial FOI decision was only overturned, at the internal review stage, following the public release of the document. On one interpretation, in this instance the revised FOI application and review process led to greater transparency (albeit delayed) that would otherwise have been lacking if the FOI process were not available.

Nevertheless, this example illustrates ANEDO's concerns with:

- a 'business as usual' approach to FOI requests, and interpretation of exemptions;
- the difficulties of making FOI applications in time-dependent situations (such as rapid public policy development); and
- the broader problem of proactive transparency and public participation in developing environmental law and public policy (including COAG processes).

With HSI's permission, we have attached the review request and the initial FOI refusal as **Attachments A and B** to this submission. We would welcome the FOI review's consideration of this case study, and hope it assists in identifying causes, determinants and solutions for an effective FOI framework, and a commitment to open government.

### Reformulated exemptions & applying the public interest test

As noted above, ANEDO supported relevant aspects of the 2009-10 reforms, including:

- the re-formulation of the public interest test;
- the introduction of guiding principles for assessing the public interest – both the 'Factors favouring access' and 'Irrelevant factors'; and
- subjecting certain exemptions such as personal privacy, business affairs, national economy, and research to the public interest test.

Enumerating the public interest factors has made the decision-making process, and agencies' explanations of that process, more transparent.<sup>14</sup> ANEDO noted the material differences between a previous case and the post-2010 regime in its recent application on behalf of HSI (see **Attachment A**, para 21):

*The Arnold case<sup>15</sup> was determined in 1987, under the previous FOI regime, which has since been reformed in recognition of the benefits of more open government. This extends to the recalibration of exemptions, objects, and the explicit exclusion of irrelevant factors (including government embarrassment, loss of confidence, misunderstanding, public confusion or unnecessary debate – see s 11B(4)).*

However, there remains a question as to whether agencies' interpretation of exemptions has shifted in accordance with these legislative changes. For example, interpretations and principles established in previous FOI cases may no longer be applicable (or apply in the same way) given the more recent changes to the FOI Act; yet agencies may seek to rely on previous interpretations to refuse access under the revised law.

The FOI review should consider methods to maintain and increase momentum for cultural change towards open government (including in the use of exemptions), in a way that truly reflects the Act's objects. For example, this may include:

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<sup>14</sup> See for example FOI Act, ss 11B and 26.

<sup>15</sup> *Arnold (on behalf of Australians for Animals) v Queensland (1987) 73 ALR 607*, to which the decision being reviewed, and the OAI Guidelines under s 93A of the FOI Act, referred.

- additional, updated guidance from the OAIC on applying the exemptions (based on evolving decisions and interpretation of the revised provisions);
- amendments to further operationalise the Act's objects in substantive provisions (ensuring that decision making functions are exercised to achieve the objects).

## Fees, charges & costs, including OAIC recommendations

### ***Recent experience and general policy position***

ANEDO clients have had mixed experiences regarding FOI Act fees and charges. In one instance, Airservices Australia provided a range of environmental assessment-related documents for no charge (although application and receipt took almost 3 months).

In another instance, the federal Department of Transport & Infrastructure refused to waive or reduce charges (\$458 for consideration of 70 pages) for an application for the Department's briefing, and Minister's reasons for approval, of the Gold Coast Airport Master Plan. The waiver was refused based on the view that EDO NSW had not made out that the documents were of benefit to the public, or a substantial section of the public. This was despite the Master Plan being subject to community consultation. EDO NSW is currently seeking internal review. This example may be relevant to the OAIC proposal that fees could be waived if release is of 'special' benefit to the public (OAIC, *Review of Charges* report (2012), recommendation 7, 'Waiver'). It is important that any test for waiving fees does not undercut the FOI Act's broader rationale for encouraging open government and public scrutiny.

ANEDO is generally of the view that, to the extent practicable, fees and charges should not be imposed for accessing government information. This view is predicated on the importance of access to information to a functioning democracy.<sup>16</sup> In recognition of this important right, ANEDO offices have supported reforms to charges associated with obtaining information, consistent with our focus on access to justice.<sup>17</sup> In 2009 we supported the abolition of all application fees for requests under Part III of the FOI Act,<sup>18</sup> and the provision for not-for-profit community groups to receive the first five hours of decision-making time free of charge.

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<sup>16</sup> As former High Court Justice, Michael Kirby, has stated:

*It is important for governments, whatever their political complexion, to understand that some basic activities of government simply have to be provided at the general cost to the taxpayer. They represent the price of governing a civilised community. To expect the user to pay fully for basic government services, such as a day in court, is surely wrong. The same is true of FOI charges.*

M. Kirby, *Freedom of Information: The Seven Deadly Sins*, British Section of the International Commission of Jurists, Forthieth Anniversary Lecture Series, London. Available at:

[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_justice.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_justice.htm).

<sup>17</sup> See, eg, Tasmanian EDO *Submission to the State FOI Review* available at

[http://www.edo.org.au/edotas/pdf/foi\\_review\\_0902.pdf](http://www.edo.org.au/edotas/pdf/foi_review_0902.pdf); Environmental Defenders Office (QLD) Inc. and Environmental Defender's Office of Northern Queensland Inc., *Submission on the Right to Information Bill 2009* (QLD), available at: <http://www.edo.org.au/edoqld/edoqld/new/Submission-DraftNewFOILaws.pdf>; EDO NSW, *Submission on Fees and Charges under the Government Information (Public Access) Act 2009*, 17 February 2012, available at <http://www.edo.org.au/edonsw/site/pdf/subs/120217oic.pdf>.

<sup>18</sup> Repeal of ss 29(1) and 30A of the former *FOI Act 1982*.

### **OAIC review of fees and charges**

More recently, we note that the OAIC has made several recommendations to reform the current FOI charging regime.<sup>19</sup> While we have not been able to canvass these in detail, we support the four broad principles outlined in the OAIC's review.<sup>20</sup> In addition, we suggest the charges regime (or the Act more generally) needs to:

- provide additional incentives for *proactive* disclosure of government information – which would in turn reduce the number of FOI requests, and the need (and cost) to process them;
- better deal with urgent review applications, including waiving fees that may be intended to promote sequential review;
- ensure that the public can transparently compare agency performance (decisions to give or refuse access, use of exemptions, timeliness, and general compliance).

Addressing these matters would also help 'build an open and responsive culture' within agencies.<sup>21</sup> Finally, the FOI review or the Information Commissioner could examine whether and how improved information systems could, over time, reduce the administrative burden and cost of providing access to information.

We will comment briefly on some more specific OAIC recommendations to reform FOI charges. Firstly, while we agree that agencies should develop informal access methods, in advance of assessing such methods' effectiveness, we would not support unfettered discretion for agencies to impose a \$50 FOI application fee where no prior informal request is made.<sup>22</sup> Secondly, we agree that *internal review* applications should continue to be free, along with subsequent applications for Information Commissioner review. However, we reiterate the need to consider how to deal with urgent review applications.

Above all, the current review should ensure that any changes to FOI charges do not deter community members and groups from scrutinising government policy and decision making on important matters of public interest. As Michael Kirby has noted, 'It would be a sad irony if FOI were attained but at a price which frightened off deserving users.'<sup>23</sup> In environmental law and policy, there is often no personal information and limited private interests at stake. Those acting on behalf of the public should not be unfairly burdened or deterred, especially where proactive disclosure and participatory policy making is limited.

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<sup>19</sup> Office of the Australian Information Commissioner (OAIC), *Review of Charges under the Freedom of Information Act 1982* (February 2012), available at [http://www.oaic.gov.au/publications/reports/2012\\_Charges\\_review\\_report\\_FINAL.html](http://www.oaic.gov.au/publications/reports/2012_Charges_review_report_FINAL.html).

<sup>20</sup> In brief: 'Support of a democratic right', 'Lowest reasonable cost', 'Uncomplicated administration' and 'Free informal access as a primary avenue'. OAIC, *Review of Charges* report (2012), Executive summary.

<sup>21</sup> OAIC *Review of Charges* report, Executive Summary, 'Explanation of the proposed changes'.

<sup>22</sup> (Particularly without further guidelines or limitations on exercising that discretion – such as in circumstances of urgency, financial hardship, or for not-for-profit community groups.)

<sup>23</sup> M. Kirby, *Ibid*, at: [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_justice.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_justice.htm).

## Effectiveness of two-tier merits review system for FOI refusals

Although we have experience with these processes prior to the 2009-10 reforms, ANEDO members have not been involved in FOI merits review proceedings before the Administrative Appeals Tribunal (**AAT**) since those amendments were passed.<sup>24</sup> Nevertheless, in the interests of access to justice and accountable decision-making, we support the retention of a two-tier system involving both the OAIC and the AAT.<sup>25</sup>

### Attachment A: Request for internal review of FOI decision – refusal of access to document: *Draft Framework of Standards for Accreditation of Environmental Approvals under the Environment Protection & Biodiversity Conservation Act 1999*



121005 COAG  
reforms - request for :

### Attachment B: Initial refusal decision – federal Department of Sustainability, Environment, Water Population & Communities



120921 SEWPAC FOI  
re COAG enviro stds -

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<sup>24</sup> ANEDO's 2009 submission on FOI reforms (p 8) notes, as a case study, EDO NSW's representation in *WWF-Australia v Department of Agriculture, Fisheries and Forestry* in 2007-08.

<sup>25</sup> See further, Cabinet Secretary, The Hon John Faulkner, *FOI Reform – Companion Guide* (2009), pp 8-9: 'The AAT, as an experienced review body, has the expertise to deal with highly contested matters involving extensive evidence. The retention of the AAT also provides FOI applicants with a cost effective option for a review of the Information Commissioner's decision, without bearing a costs risk.' Available at [www.dpmc.gov.au/consultation/foi\\_reform/.../companion\\_guide.pdf](http://www.dpmc.gov.au/consultation/foi_reform/.../companion_guide.pdf).