

## THE OAIC FOI EXPERIMENT

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On 13 May 2014, the Australian Government announced that it intends to disband the Office of the Australian Information Commissioner (OAIC). The OAIC has had freedom of information, privacy and information policy functions since it was established on 1 November 2010.

The Attorney-General announced in a Budget media release that, from 1 January 2015, the OAIC's FOI merits review function will be transferred to the Administrative Appeals Tribunal (the AAT). The AAT will be the first avenue of external merits review of FOI decisions, as it was prior to the 2010 reforms. This change will be part of the amalgamation of various merits review bodies into a single 'super-tribunal'.<sup>1</sup> The Commonwealth Ombudsman will resume sole responsibility for investigating FOI complaints. The Attorney-General's Department (AGD) will take on the OAIC's function of issuing FOI guidance material for agencies and collecting and collating FOI statistics. An Office of the Privacy Commissioner will be re-established as an independent statutory office to administer the OAIC's privacy functions. The OAIC's information policy functions will not be transferred to any other body. The positions of Information Commissioner and Freedom of Information Commissioner will be abolished.

This article discusses how the FOI landscape in Australia was changed by the 2010 reforms, and how it will change again when the Government's announcement is implemented. With data for three full financial years (plus the first eight months) of the OAIC's operations, it is not too early to reflect on how well the OAIC has performed in the exercise of its FOI functions. This article also does that: it undertakes a (pre-mortem) evaluation of the OAIC FOI experiment—admittedly, not from a completely impartial position.

### **A new model for FOI review and complaint handling**

On 1 November 2010, the *Freedom of Information Act 1982 (FOI Act)* was amended in the most significant way since it was first enacted.<sup>2</sup> Those amendments made it simpler for people to request access to government documents. Application fees were abolished. Charges were reduced, and removed entirely where a person requests access to their own personal information. Some of the exemptions were recast and narrowed. The emphasis of the *FOI Act* shifted from a reactive model of disclosure in response to individual requests, to a proactive model of publication of public sector information.<sup>3</sup> The guiding principle underlying the amended *FOI Act* is that information held by the Government is to be managed for public purposes, and is a national resource.<sup>4</sup>

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At the same time that these reforms commenced, the *Australian Information Commissioner Act 2010* (the *AIC Act*) established the OAIC to oversee the operation of the *FOI Act* and the *Privacy Act 1988*, and to exercise strategic functions concerning government information management.<sup>5</sup> This was the first time that responsibility for these three functions at the Commonwealth level had been brought together under the one independent statutory office. In relation to FOI, the explanatory memorandum explained:

... the Australian Information Commissioner, supported by the FOI Commissioner, will act as an independent monitor for FOI and will be entrusted with a range of functions designed to make the Office of the Australian Information Commissioner both a clearing house for FOI matters and a centre for the promotion of the objects of the FOI Act.<sup>6</sup>

The idea of an independent FOI regulator was not a new one. A joint report of the Australian Law Reform Commission (ALRC) and Administrative Review Council (ARC) in 1995 had recommended the appointment of an FOI Commissioner to provide independent oversight of, and guidance about, the *FOI Act*.<sup>7</sup> The ALRC/ARC view was that the arrangements at the time, with FOI oversight provided 'to some extent' by AGD and the Ombudsman, was fragmented and (in relation to AGD) not sufficiently independent of Government.<sup>8</sup> Their proposal would have seen the establishment of an independent statutory office of the FOI Commissioner with functions falling into two broad categories: monitoring agency compliance with the *FOI Act*; and promoting and providing advice and assistance to agencies and the public about the Act.

An interesting point of commonality between the ALRC/ARC proposal and the 2010 amendments was the connection between FOI and broader government information-handling practices and trends. As the ALRC and ARC put it:

The administration and operation of the FOI Act is only one aspect of what might loosely be referred to as 'information policy'—the way the government manages, provides access to, publishes and charges for its information, and how this might be affected by changes in technology. The Review considers that it would be valuable for the FOI Commissioner to take an active interest in information policy.<sup>9</sup>

One area of difference between the ALRC/ARC proposal and the 2010 amendments relates to guidelines. The *FOI Act* gives the Information Commissioner the power to issue guidelines to which regard must be had for the purposes of performing a function, or exercising a power, under the Act.<sup>10</sup> The ALRC and ARC argued that combining FOI advisory and review functions in a single statutory body could give rise to a perceived conflict of interest and lack of independence.<sup>11</sup>

Under the ALRC/ARC proposal, FOI review and complaint functions would have remained with the AAT and the Commonwealth Ombudsman, respectively, although the proposal envisaged that the FOI Commissioner could play a role in improving communications between applicants, agencies and third parties at any stage of an FOI request.<sup>12</sup> Since the 2010 amendments, the OAIC has been the first avenue of external merits review of FOI decisions. An applicant for review cannot go to the AAT until the application for review has been finalised by the OAIC, or the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the decision under review be considered by the AAT.<sup>13</sup> In practice, the AAT currently offers a second tier of external merits review of FOI decisions, the OAIC having provided the first.<sup>14</sup> Similarly, since 2010, the OAIC has been the first avenue for FOI complaints. The Ombudsman and the OAIC each has the jurisdiction to investigate FOI complaints, and the power to transfer a complaint to the other body.<sup>15</sup> In practice, most FOI complaints are investigated by the OAIC.

## The effect of the 2010 reforms

The 2010 reforms had a significant impact on the FOI landscape in Australia:<sup>16</sup>

- The number of FOI requests increased. Between 2009–10 (the last full year before the reforms) and 2013–14, the number of FOI requests made to Australian Government agencies and ministers increased by 31.9%: from 21,587 to 28,463. Over those four years there was a 108.9% increase in the number of requests for information other than personal information. These requests are typically more complex to finalise than requests for personal information. The proportion of all FOI requests that were for personal information decreased from 87.2% to 79.7%. This decrease probably reflected the increased availability of online Government services allowing individuals to more easily access and amend their personal information. Other aspects of the 2009–10 reforms, such as the removal of the application fee for FOI requests and the reduction in charges, may also have contributed to the increase in the proportion of FOI requests for non-personal information.
- The number of applications for external merits review increased greatly. In 2009–10, the AAT received 110 applications for review of FOI decisions.<sup>17</sup> In 2011–12 (the first full year after the reforms), the OAIC received 456 applications for review; in 2013–14, it received 524 applications—increases of 314.5% and 376.4%, respectively, over the 2009–10 number. No doubt the principal reason for this increasing use of external merits review of FOI decisions was the reduction in cost to applicants. In 2009–10, the AAT's application fee was \$682;<sup>18</sup> there has been no application fee for review by the OAIC.
- The number of FOI complaints fluctuated. In 2009–10, the Commonwealth Ombudsman received 137 FOI complaints.<sup>19</sup> In 2011–12, the Ombudsman and the OAIC together received 171 complaints; in 2013–14, they together received 127 complaints—an increase of 24.8% and a decrease of 7.3%, respectively, over the 2009–10 number.
- The cost to government increased. Between 2009–10 and 2013–14 the cost that agencies attributed to the *FOI Act* increased from \$27.5 million to \$41.8 million, an increase of 52.2% over four years.

## OAIC performance

The OAIC's principal FOI functions are merits review (IC review) of FOI decisions made by Commonwealth ministers and agencies; investigation of complaints about agency action under the *FOI Act*; granting extensions of time for agencies to process FOI requests, and for applicants to seek IC review; and promoting awareness and understanding of the Act and its objects. Its performance in each of these areas is considered below.

### *Merits review of FOI decisions*

Between 1 November 2010 and 30 June 2014, the OAIC received 1,663 applications for IC review and finalised 1,347 or 81.0% of them. Of the IC reviews finalised:

- 13% were invalid or out of jurisdiction and did not satisfy the requirements of s 54N of the *FOI Act*;
- 39% were closed under s 54W because, for example, the IC review applicant failed to cooperate or could not be contacted; or the application was frivolous, vexatious or an abuse of process (many of these were discontinued after the applicant was advised of the OAIC's preliminary assessment of their review, or received additional documents following the OAIC's involvement);

- 31% were withdrawn by the IC review applicant; or the original decision was varied by agreement between the parties, or by the original decision maker so as to be more favourable to the IC review applicant (ss 54R, 55F and 55G);
- 16% were finalised under s 55K with a written decision by a Commissioner affirming or varying the IC reviewable decision, or setting it aside and making a decision in substitution.

Table 1 gives details of the numbers of IC review applications that the OAIC received and finalised. In its first twenty months of operation, the OAIC received significantly more applications for IC review than it finalised, resulting in a backlog. But the rate of finalisation improved with each reporting year until, in 2013–14, the OAIC finalised 23.3% more IC reviews than it received.

*Table 1: IC review applications received and finalised*

<i>Year</i>	<i>Applications received / change* (%)</i>	<i>Reviews finalised / change* (%)</i>	<i>Reviews finalised as a proportion of apps received (%) / change (%)</i>	<i>Reviews on hand / change (%)</i>
2010–11	176	29	16.5%	147
2011–12	456 +72.7%	253 +481.6%	55.5% +236.7%	350 +138.1%
2012–13	507 +11.2%	419 +65.6%	82.6% +49.0%	438 +25.1%
2013–14	524 +3.4%	646 +54.2%	123.3% +49.2%	316 -27.9%
<i>Total</i>	1,663	1,347	81.0%	

\* The rates of change for 2011–12 have been calculated on a pro-rata basis: they show the change from the 2010–11 figures multiplied by  $\frac{12}{8}$  (because the OAIC operated for the last eight months of that year).

The significant improvement in 2012–13 was the result of the introduction of new internal processes; secondments to the OAIC from other Australian Government agencies; and the assignment of non-ongoing staff to work on IC reviews. At the time, the OAIC pointed out that this level of improvement was unlikely to be sustainable without additional resourcing for the OAIC or changes to the legislative framework (discussed below).<sup>20</sup>

Further changes to internal processes resulted in further significant improvements in 2013–14. A concerted effort was made to finalise older matters still on hand while also prioritising the early resolution of new matters, so that a smaller proportion of matters remained on hand for long periods of time. As at 30 June 2013, the oldest unactioned IC review was 206 days old; as at 30 June 2014, the oldest such matter was 40 days old. As noted above, during 2013–14, the OAIC reached an important tipping point in its processing of IC reviews, finalising more matters than it received.

### ***Investigation of FOI complaints***

Between 1 November 2010 and 30 June 2014, the OAIC received 439 FOI complaints and finalised 407 or 92.7% of them. The main issues raised in complaints have been agencies' processing delay, unsatisfactory customer service, failure to acknowledge FOI requests, and failure to assist FOI applicants. In finalising complaints, the OAIC has made many recommendations, including 10 formal recommendations under s 86 of the *FOI Act*, for agency action. The OAIC also undertook an own motion investigation of the FOI processes of one agency.<sup>21</sup>

Table 2 gives details of the numbers of FOI complaints that the OAIC received and finalised. As it did with IC reviews, the OAIC received more FOI complaints than it finalised in its first twenty months of operation. But the rate of finalisation improved and the OAIC reached the tipping point (finalising more FOI complaints than were received) in 2012–13.

*Table 2: FOI complaints received and finalised*

<i>Year</i>	<i>Complaints received / change* (%)</i>		<i>Complaints finalised / change* (%)</i>		<i>Complaints finalised as a proportion of complaints rcvd (%) / change (%)</i>		<i>Complaints on hand / change (%)</i>	
2010–11	88		39		44.3%		49	
2011–12	126	-4.5%	100	+70.9%	79.4%	+79.1%	75	+53.1%
2012–13	148	+17.5%	149	+49.0%	100.7%	+26.9%	74	-1.3%
2013–14	77	-48.0%	119	-20.1%	154.5%	+53.5%	32	-56.8%
<i>Total</i>	439		407		92.7%			

\* The rates of change for 2011–12 have been calculated on a pro-rata basis: they show the change from the 2010–11 figures multiplied by  $\frac{12}{8}$  (because the OAIC operated for the last eight months of that year).

### ***Other FOI activity***

Between 1 November 2010 and 30 June 2014, in addition to this FOI review- and complaint-handling activity, the OAIC:

- received and finalised 8,028 requests for, or notifications of, extensions of time;
- declared six times that a person was a vexatious applicant under s 89K of the FOI Act;
- made and renewed a disclosure log determination under s 11C(2) of the Act;
- published and updated clear and comprehensive FOI guidelines (250 pages), 16 fact sheets for the public, and over 30 detailed agency guides on processing times, calculating charges, administrative access, third party objections, anonymous requests, statements of reasons, redaction, FOI training, website publication, disclosure logs, sample letters and frequently asked questions;
- responded to 3,544 phone enquiries and 1,728 written enquiries about FOI;
- conducted a public consultation on FOI charges and prepared a lengthy report to Government in 2012;<sup>22</sup>
- held 13 meetings of the Information Contact Officers Network, a forum for FOI and privacy officers across all agencies; and
- provided 17 FOI reform training courses for Australian Government agencies and the Norfolk Island Administration.

### **Proposals for legislative reform**

The OAIC adopted two approaches to dealing with its FOI workload: improving its administrative processes (as discussed above) and suggesting legislative reform.

On 31 October 2012, the then Attorney-General announced that she had asked Dr Allan Hawke AC to conduct a review of the *FOI Act* and the *AIC Act*. The OAIC made two substantial submissions to the review, proposing a series of changes that would have improved the FOI system as a whole and the OAIC's effectiveness in dealing with its FOI workload.<sup>23</sup> These proposals included:

- introducing a \$100 application fee for IC review of agency FOI decisions in cases where the applicant had not first sought internal review, to encourage greater use of internal review before external review;
- providing clearer powers to achieve early resolution of IC reviews by agreement between review parties;
- permitting the delegation of the IC review decision-making power from the Information Commissioner, FOI Commissioner and Privacy Commissioner to senior OAIC staff in relation to certain kinds of IC review decisions;
- introducing remittal powers for the Information Commissioner, to avoid situations where the Commissioner was effectively the original decision maker;
- simplifying the *FOI Act*'s overly complex and burdensome third party review provisions, to allow more efficient resolution of reviews of access grant decisions; and
- making AAT review of FOI decisions available only on a point of law after an IC review decision, or for a decision referred to the AAT by the Information Commissioner under s 54W(b) of the *FOI Act*.

The OAIC's submissions also reiterated recommendations from the Information Commissioner's February 2012 *Review of Charges under the Freedom of Information Act 1982*. Those recommendations placed a greater emphasis on providing access in a speedy and flexible manner through administrative options (rather than formal FOI processes).<sup>24</sup> The submissions also detailed the OAIC's resourcing difficulties, notably its inability to fund staffing at a level to match initial workload projections prepared before the OAIC was established—projections which soon proved optimistic.

Dr Hawke's report was tabled in Parliament on 2 August 2013.<sup>25</sup> He made 40 recommendations for changes to the FOI framework. He adopted some of the OAIC's recommendations, including those relating to easier resolution of IC reviews by agreement, delegation and remittal powers, and third party review rights. While Dr Hawke supported the idea of an IC review application fee, he argued that the fee should be set at \$400 (reduced to \$100 in cases of financial hardship). He declined to consider possible reforms to the two-tier system of external review, recommending that it be considered in a future comprehensive review of the *FOI Act*. Government has not yet responded to the Hawke Review.

### **Criticism of the OAIC**

Criticism of the OAIC, and of the model for FOI adopted by the 2010 reforms, has tended to fall into one or more of the following categories:

- criticism of delay;
- arguments preferring AAT review to IC review;
- arguments against a specialist FOI regulator; and
- criticism of the integrated model for FOI, privacy and information policy.

### **Delay**

The OAIC has been criticised for delays in its FOI processing, especially in finalising IC reviews.<sup>26</sup> Some critics have asserted that external merits review by the OAIC takes longer than it does in the AAT: that IC reviews take longer than AAT FOI appeals.<sup>27</sup> Between 1 November 2010 and 30 June 2014, the AAT finalised six appeals from IC review decisions.<sup>28</sup> Each appeal took an average of 251.5 days to finalise.<sup>29</sup> During the same period, each IC review took an average of 251.7 days to finalise. With such a small number of AAT FOI appeals, any comparison with the OAIC's performance would be invidious. But, these numbers are strikingly similar.

Delay was clearly one reason for the Government's decision to disband the OAIC. In his Budget media release, the Attorney-General said:

The complex and multilevel merits review system for FOI matters has contributed to significant processing delays. Simplifying and streamlining FOI review processes by transferring these functions from the OAIC to the AAT will improve administrative efficiencies and reduce the burden on FOI applicants. The AAT will receive a funding boost to assist with the backlog and to better meet acceptable timeframes.<sup>30</sup>

Regardless of the relative efficiencies of the OAIC and the AAT, the criticism of the OAIC for its delay in processing IC reviews is valid—at least, it was valid for the first couple of years of the OAIC's operations. As detailed above, there was a significant improvement in the OAIC's processing of IC reviews in each of 2012–13 and 2013–14. In the latter of those reporting periods, the OAIC finalised 71.5% of IC reviews within 12 months of receiving them: 24.4% were open for fewer than 90 days; 16.8% were open for 91–180 days; 30.2% were open for 181–365 days; only 28.5% were open for more than 365 days. There is, of course, still room for improvement. But these figures demonstrate that delay is no longer a significant issue.<sup>31</sup>

### **AAT review and IC review**

As noted above, an applicant for merits review of an FOI decision cannot go to the AAT until their review has been finalised by the OAIC, or the Information Commissioner is satisfied that the interests of the administration of the *FOI Act* make it desirable that the decision be considered by the AAT. This aspect of the 2010 reforms has been criticised, on the basis that AAT review is preferable to review by the OAIC.

An article in the Media and Entertainment and Arts Alliance's 2014 *State of Press Freedom in Australia* argued that FOI applicants should have a direct right of review by the AAT following internal review.<sup>32</sup> The article referred to the timeliness of the OAIC's processes (discussed above), and asserted that the OAIC's decisions are 'leading to greater secrecy and the appeals process is simply unfair'.<sup>33</sup> The basis of this assertion would seem to be that an applicant for review will more likely have a hearing, at which they can make oral submissions, before the AAT than before the OAIC.<sup>34</sup> The *FOI Act* gives the OAIC the power to conduct an oral hearing, but that power has not yet been exercised.

Since its establishment, the OAIC has endeavoured to resolve IC reviews through conciliation rather than by making formal decisions. This is not always possible. But, where it is possible, it can lead to a better result, and more quickly than would otherwise have been the case. The AAT takes a similar approach, but matters before the AAT that cannot be conciliated usually go to a hearing. No doubt some applicants—those who are well resourced and experienced—welcome the opportunity to participate in such a hearing. But, for those applicants who lack resources and experience, a conciliated outcome or an IC review decision 'on the papers' will usually be preferable.

The vast bulk of FOI merits review since 2010 has been conducted by the OAIC. This has meant that the OAIC has been uniquely able to develop a consistent jurisprudence that is informed by the pro-disclosure objects of the *FOI Act* and by the practical realities of FOI processing. A specialist merits review body will, sometimes, come to a different view than that of a generalist merits review body. One such difference in views occurred after the AAT made two decisions (in 2011 and 2012) about who qualifies as a 'person' eligible to make an FOI request.<sup>35</sup> Both cases arose under provisions of the *FOI Act* that were in operation prior to the 2010 amendments. Because of uncertainty about the applicability of those cases to the amended Act, the Information Commissioner issued a statement on the issue. The issue is one on which reasonable minds may differ. But what is most notable about the view that the Information Commissioner expressed in his statement is that it was not based solely on principles of statutory construction. It also took account of the operation of the *FOI Act* on a practical level across government and the interaction of the *FOI Act* with the *Privacy Act*. The OAIC is uniquely placed to factor aspects like these into its decision making, because of its engagement with the FOI system as a whole and its privacy functions.

### ***A specialist FOI regulator***

The Productivity Commission, in its April 2014 draft report on *Access to Justice Arrangements*, said that FOI and privacy regulators 'receive very small numbers of disputes ... and have very high average costs per complaint'.<sup>36</sup> The draft report recommended that governments rationalise ombudsmen services (such as FOI and privacy regulators) to improve efficiency and reduce costs. This recommendation was based on estimates that the Productivity Commission made of the comparative cost of a matter being processed by (amongst other bodies) the OAIC and the Commonwealth Ombudsman: the OAIC was estimated to be more than 13 times more expensive. However, when enquiries as well as complaints are counted for the OAIC (as they would appear to have been in relation to the Ombudsman) the cost per matter is the same for each body.<sup>37</sup> Cost per matter is a crude metric, but (when properly calculated) it suggests that the OAIC and the Ombudsman are comparable in their efficiency.<sup>38</sup>

As noted above, a specialist FOI regulator is better placed to factor into its decision making an understanding of the practical operation of the *FOI Act* across government. The OAIC has brought this practical understanding to its IC review decision making.

The issue in '*AP*' and *Department of Human Services*<sup>39</sup> was whether the work involved in processing the FOI applicant's request would substantially or unreasonably divert the Department's resources from its other operations. The Department claimed that it would, based on its estimate of the work required. The OAIC obtained a sample of the documents at issue, and an OAIC officer assessed and edited that sample. Based on that assessment, a more reliable (and much lower) estimate was obtained. The IC review decision was that the amount of work involved in processing all of the documents would not substantially or unreasonably divert the Department's resources.

In '*BZ*' and *Department of Immigration and Border Protection*,<sup>40</sup> the Department declined to provide the FOI applicant with a copy of the video footage that he had sought, blurred so as to obscure the face of a third party. The Department said that it would cost almost \$4,000 to edit the footage. An OAIC officer prepared an edited copy of the footage in which the third party's face was obscured. This took less than an hour, using software that cost less than \$100. The IC review decision was that access be granted to the edited footage.<sup>41</sup>

Applying the crude metric of cost per matter, it seems that specialist FOI merits review can be provided at no greater cost than general merits review. And, in each of these examples,



the OAIC's practical experience and capacity informed its decision making in ways that might not have been available to a generalist merits review body.

### ***The integrated model***

The OAIC integrates FOI, privacy and information policy functions. This integrated model has been criticised. There are two aspects to this criticism: that the OAIC should not exercise both FOI advisory and FOI merits review functions; and that there can be a conflict between the proper exercise of the OAIC's various functions, especially its FOI and privacy functions.

The first aspect of this criticism echoes the argument of the 1995 report of the ALRC and the ARC, discussed above. In practice, however, the mix of review and advisory functions has proved to be mutually supporting, with the practical experience gained in reviewing FOI matters informing the preparation of guidelines, and the guidelines in turn providing a useful framework within which to conduct IC reviews.

Nonetheless, some agencies expressed concern, in submissions to the Hawke Review, about the OAIC's mix of FOI functions. Some also voiced concern that the OAIC was sometimes not willing to provide advice about specific matters for fear of compromising the Information Commissioner's ability to make a decision if the matter were later to come to the OAIC on review.<sup>42</sup> There have been occasions where this has been the case. But, the OAIC has responded to hundreds of written and verbal FOI queries from agencies since its establishment.<sup>43</sup> On 75 occasions over 2012–13 and 2013–14 the OAIC provided detailed policy advice to agencies in response to complex FOI queries. The OAIC also published a great deal of FOI guidance material—in particular, the Information Commissioner's guidelines—to assist agencies with technical issues and to achieve best FOI practice.<sup>44</sup> Agencies' concerns about a lack of specific FOI advice seem to have arisen from dissatisfaction that the OAIC was not able to tell agencies how to resolve particular FOI requests. But an FOI decision maker has a statutory obligation to decide each FOI request on its merits. No agency with whole-of-government FOI advisory functions could provide more than general advice about how to make that decision, whether or not that agency was also responsible for merits review.

The second aspect of this criticism focusses on a purported conflict between the OAIC's functions. For example, the Australian Privacy Foundation has said that FOI and information policy functions 'sit uneasily' beside privacy functions.<sup>45</sup> Carolyn Adams has argued that the OAIC model has the potential to 'mute the voices of the Privacy and Freedom of Information Commissioners in the information policy debate', and that the creation of an individual statutory office for the FOI Commissioner would have been preferable.<sup>46</sup>

In practice, the FOI and privacy functions have not been in conflict: they are complementary aspects of the public sector information management landscape. The *FOI Act* encourages disclosure, but recognises the importance of protecting individual privacy (for example, through the personal privacy exemption in s 47F and the requirement in s 27A that a decision maker consult before disclosing personal information). The *Privacy Act* recognises the value of transparency through Australian Privacy Principle 1, which requires entities subject to the Act to manage personal information in an open and transparent way. The *FOI Act* and *Privacy Act* contain parallel mechanisms for giving individuals access to personal information about them that government agencies hold, or amending or annotating that information (through Part V of the *FOI Act*, and Australian Privacy Principles 12 and 13).

As Juliet Lucy has said:

... this distinction [between privacy and FOI] is more apparent than real. Both privacy and FOI concern the individual's relationship with the state and both are premised upon the idea that the state should have obligations to the citizen in terms of handling and disclosing information. Both include provisions to protect personal information. The Commonwealth's recent acknowledgement that government information is a 'national resource' encapsulates the idea that information held by government is not simply 'owned' by the bureaucracy but should be managed in the community's interests (including individuals' interests in privacy).<sup>47</sup>

The Hawke Review agreed that the combination of FOI, privacy and information policy functions in a single agency 'provides a logical basis for an integrated scheme for information management and policy'.<sup>48</sup> The integration of functions in the OAIC has facilitated consistent decision making in FOI and privacy. This integration of functions has also facilitated the preparation of consistent policy advice across FOI, privacy and information management. An example is the OAIC's guidance on de-identification, which discusses how agencies can balance transparency and privacy objectives by de-identifying personal information so that it can be shared or published without jeopardising personal privacy.<sup>49</sup> Another example is the OAIC's principles on open public sector information.<sup>50</sup> These were published early in the life of the OAIC, and build on the pro-disclosure principles enunciated in the *FOI Act* while promoting the protection of personal information. The OAIC applies the principles in its role of monitoring compliance by Australian Government agencies with the publication objectives of the *FOI Act*. The principles also inform the OAIC's promotion within government of open data, open licensing and proactive disclosure.

## Conclusion

The 2014–15 budget papers estimate that the disbandment of the OAIC will save \$10.2 million over four years, after the Office of the Privacy Commissioner has been re-established and funding has been provided to the AAT (to conduct external merits review of FOI decisions) and to AGD (to perform FOI guidance and statistics functions).<sup>51</sup> Implementing this reform will involve repealing the *AIC Act*, and amending the *FOI Act* and *Privacy Act*. The Government has not announced any changes to the *FOI Act* beyond those required to disband the OAIC and transfer responsibility for its FOI functions to other bodies.

So, what will be the effect of the proposed reforms? FOI applicants will still be able to complain about agency behaviour under the *FOI Act*, or seek independent external merits review of FOI decisions. Will there be any noticeable change to the FOI landscape?

One significant effect will be an increase in the cost of seeking merits review. There is no charge to seek IC review but, as Johan Lidberg points out:

The fee to lodge an appeal with the AAT is currently A\$816 [it has since risen to \$861]. Some of the FOI reviews could be exempt from the fee and part of the cost will be refundable if you win the appeal, but in most cases the fee will increase. Add to this the cost of legal representation needed before the AAT and most FOI applicants will probably think twice before they appeal.<sup>52</sup>

Peter Timmins has raised the issue of legal representation:

Putting things back to the Administrative Appeals Tribunal, it's lawyers at 10 paces ... I think John and Mary Citizen are going to find themselves in the AAT, looking at a barrister or solicitor at the other end of the table, representing a government agency.<sup>53</sup>

Increasing the cost of FOI merits review will benefit some applicants. As Richard Mulgan says:

... if re-imposing a significant fee leads, as it must, to a substantial reduction in the number of appeals, those who can afford to seek a review can expect a faster, more efficient service. For this reason, the changes have been welcomed by representatives of media businesses, which have chafed at the increasing delays caused by the flood of less well-off appellants.<sup>54</sup>

An increase in the cost of applying for FOI merits review may be beneficial for the FOI system as a whole, not just for the better-resourced applicants. There is no doubt that the introduction of free external merits review of FOI decisions was a significant contributor to the dramatic increase in applications for merits review after the 2010 reforms. Given the OAIC's level of resourcing, and the statutory framework within which it operates, it was always likely that the OAIC would find itself with a backlog of unprocessed IC reviews after the first year or two of its operations.

But that backlog has gone. The OAIC is now processing FOI matters in a timely way. In the absence of extra resourcing, there were a number of legislative changes that would have improved the OAIC's productivity still further. In addition, the introduction of an application fee for IC reviews (not necessarily one as high as that for the AAT) would have made the OAIC's workload more manageable, while being only a small barrier to access to review.

Independent merits review of FOI decisions and investigation of FOI complaints will still be available after the OAIC has been disbanded. But the many benefits of having a specialist FOI regulator will be lost. And the benefits that have been realised from having an integrated approach to information management issues—FOI, privacy and information policy—will be lost, too.

#### Endnotes

- 1 Senator the Hon George Brandis QC, Streamlined arrangements for external merits review (2014) <<http://www.attorneygeneral.gov.au/MediaReleases/Pages/2014/SecondQuarter/13May2014-Streamlinedarrangementsforexternalmeritsreview.aspx>>.
- 2 The FOI Act was amended by the *Freedom of Information Amendment (Reform) Act 2010* (Cth). For more on the extent and significance of those changes, see the OAIC's Guide to the Freedom of Information Act 1982 <<http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-guides/guide-to-the-freedom-of-information-act-1982>> and FOI law reform webpage <<http://www.oaic.gov.au/freedom-of-information/foi-law-reform>>.
- 3 See, for example, the provisions of Part II of the FOI Act, which implement the information publication scheme. These provisions commenced on 1 May 2011.
- 4 FOI Act, s 3(3).
- 5 *Australian Information Commissioner Act 2010* (Cth) s 4.
- 6 Explanatory Memorandum, Freedom of Information Amendment (Reform) Bill 2010 (Cth) 1.
- 7 Australian Law Reform Commission and Administrative Review Council, *Open Government—A review of the federal Freedom of Information Act 1982*, Report No 77 (1995) <<http://www.alrc.gov.au/report-77>> [6.4].
- 8 ALRC and ARC, above n 7, [6.2].
- 9 ALRC and ARC, above n 7, [6.23].
- 10 FOI Act, s 93A.
- 11 ALRC and ARC, above n 7, [6.20].
- 12 ALRC and ARC, above n 7, [6.16]–[6.20].
- 13 FOI Act, s 54W(b).
- 14 Between 1 November 2010 and 30 June 2014, the Information Commissioner was satisfied, under s 54W(b), that it was desirable that a decision under review be considered by the AAT in only 80 (or 4.8%) of the 1663 IC reviews lodged.
- 15 Ombudsman Act 1976 (Cth), s 6C; FOI Act, s 74.
- 16 Unless otherwise indicated, the figures in these four dot points are taken from: OAIC, *Freedom of Information Act 1982 Annual Report 2010–11* (2011); *OAIC Annual Report 2011–12* (2012); *OAIC Annual Report 2012–13* (2013); *OAIC Annual Report 2013–14* (2014). All are available at <<http://www.oaic.gov.au/about-us/corporate-information/annual-reports>>.

- 17 AAT *Annual Report 2009–10* (2010) <<http://aat.gov.au/Publications/AnnualReport/AnnualReport2010.htm>> 132.
- 18 AAT, above n 17, 142. The full fee was not always payable: for example, no fee applied for review of an FOI decision of the kind specified in Schedule 3 to the Administrative Appeals Tribunal Regulations. The AAT could also waive the fee in cases of financial hardship.
- 19 *Commonwealth Ombudsman Annual Report 2009-2010* (2010) <[http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2009-10/download/PDF/ombudsman\\_anrep\\_2009\\_2010\\_full.pdf](http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2009-10/download/PDF/ombudsman_anrep_2009_2010_full.pdf)> 83. Note that the scope of complaints made to the OAIC is narrower than that of complaints made to the Ombudsman, which can investigate complaints about the merits of a decision.
- 20 For more detail, see OAIC, below n 23.
- 21 OAIC, *Processing of non-routine FOI requests by the Department of Immigration and Citizenship: Report of an own motion investigation* (2012) <<http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-omi-report/processing-of-non-routine-foi-requests-by-the-department-of-immigration-and-citizenship>>.
- 22 OAIC, *Review of Charges under the Freedom of Information Act 1982* (2012) <<http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/review-of-charges-under-the-freedom-of-information-act-1982>>.
- 23 OAIC, *Submission to Dr Allan Hawke AC, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, December 2012 <<http://www.oaic.gov.au/news-and-events/submissions/foi-submissions/review-of-freedom-of-information-legislation>>; OAIC, *Supplementary Submission to Dr Allan Hawke AC, Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, February 2013 <<http://www.oaic.gov.au/news-and-events/submissions/foi-submissions/review-of-freedom-of-information-legislation-supplementary-submission>>.
- 24 OAIC, above n 22.
- 25 Allan Hawke, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (2013) <<http://www.ag.gov.au/Consultations/Pages/ReviewofFOI.aspx>>.
- 26 See for example Michael McKinnon, 'Secrecy amid a flawed watchdog' in Mike Dobbie (ed), *Secrecy and surveillance: the report into the state of press freedom in Australia in 2014* (Media, Entertainment & Arts Alliance, 2014) 19; Jack Waterford, 'FOI squared translates as delay' *The Canberra Times* (online), 5 April 2014 <<http://www.canberratimes.com.au/comment/foisquared-translates-as-delay-20140405-365ny.html>>.
- 27 Jonathan Holmes, 'Abbott cuts an accidental win for transparency', *The Age* (online), 3 June 2014 <<http://www.theage.com.au/comment/abbott-cuts-an-accidental-win-for-transparency-20140603-zrvpr.html>>; Waterford, above n 26.
- 28 *Re Kline and Official Secretary to the Governor-General* [2012] AATA 247; *Re Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited* [2012] AATA 914; *Re Australian Broadcasting Corporation and Tennant* [2012] AATA 914; *Re Lee and Minister for Immigration and Citizenship* [2013] AATA 532; *Re Pangilinan and Secretary, Department of Immigration and Citizenship* [2013] AATA 574; *Re Nikjoo and Minister for Immigration and Border Protection* [2013] AATA 921.
- 29 This assumes that each appeal was lodged 28 days after the IC review decision appealed from.
- 30 Brandis, above n 1.
- 31 Inevitably, since the announcement of the impending disbandment of the OAIC, many OAIC staff have already obtained employment elsewhere. In its last few months, the OAIC will not be able to maintain the high level of productivity that it has attained over the last twelve.
- 32 McKinnon, above n 26.
- 33 McKinnon, above n 26, 20.
- 34 The basis for this assertion is not completely clear. The assertion might be based upon the belief of the article's author that a particular IC review decision (in which he was the applicant) was wrongly decided.
- 35 *Re CKI Transmission Finance (Australia) Pty Ltd and Australian Taxation Office* [2011] AATA 654; *Re Apache Energy Pty Ltd and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AATA 296.
- 36 Productivity Commission, *Access to Justice Arrangements: Productivity Commission Draft Report* (2014) <<http://pc.gov.au/projects/inquiry/access-justice/draft>> 288–289.
- 37 The Productivity Commissioner estimated that it costs, on average, \$670 for the Commonwealth Ombudsman to resolve a complaint; its figure for the OAIC was \$9000. If enquiries and complaints were counted, the figure for the OAIC would be \$667. Even that figure is inflated. The Productivity Commission treated the OAIC's entire annual budget appropriation as being spent on FOI and privacy complaints and IC reviews. This ignores the OAIC's FOI and privacy advisory and guidance functions, and its information policy function. See OAIC, *Submission to Productivity Commission, Draft report on Access to Justice Arrangements* (2014) <<http://www.oaic.gov.au/news-and-events/submissions/productivity-commission-draft-report-on-access-to-justice-arrangements>>.
- 38 The Productivity Commission focused its analysis on comparisons between different types of ombudsmen, such as government and industry ombudsmen, privacy and FOI commissioners, and healthcare complaints bodies. However, a large proportion of the OAIC's FOI activity is its processing of IC reviews. To that extent, it would be more apt to compare the OAIC with the AAT. The Productivity Commission estimated that the average cost of resolving an application at the AAT is \$3538 for applications finalised without a hearing and \$16,641 for applications finalised with a hearing.

- 39 [2013] AICmr 78.
- 40 [2014] AICmr 55.
- 41 When an access refusal decision is set aside on IC review, it is for the agency—not the OAIC—to provide the documents to the applicant. But, in this case, there was no need for the Department to edit the footage itself: the Department could give the applicant the OAIC-edited footage.
- 42 See, for example, submissions to the Hawke Review from the Department of Education, Employment and Workplace Relations, the Department of Finance and Deregulation, the Department of Foreign Affairs and Trade and the Department of Immigration and Citizenship, available at <http://www.ag.gov.au/Consultations/Pages/FOIReviewSubmissions.aspx>.
- 43 In 2013–14 alone, the OAIC responded to 488 FOI enquiries from agencies.
- 44 Many agencies have commended the quality of the FOI guidelines and other guidance material. See, for example, submissions to the Hawke Review from the Australian Transport Safety Bureau, the Commonwealth Ombudsman, the Commonwealth Scientific and Industrial Research Organisation, the Department of Defence, the Department of Health and Ageing and the Department of Human Services, available at <http://www.ag.gov.au/Consultations/Pages/FOIReviewSubmissions.aspx>.
- 45 Letter from Australian Privacy Foundation to the OAIC, 20 November 2011, correspondence to the Information Commissioner and Privacy Commissioner <<http://www.privacy.org.au/Papers/OAIC-Openness-111120.pdf>> 1.
- 46 Carolyn Adams, 'One office, three champions? Structural integration in the Office of the Australian Information Commissioner' (2014) 21 *Australian Journal of Administrative Law* 77.
- 47 Juliet Lucy, Privacy, GIPA and FOI: State and Commonwealth Regulation of Information (2013) <[http://media.wix.com/ugd/14df36\\_c0cb183143136081cb65e68924ea90e6.pdf](http://media.wix.com/ugd/14df36_c0cb183143136081cb65e68924ea90e6.pdf)> 7–8.
- 48 Hawke, above n 25, 19.
- 49 OAIC, *Information policy agency resource 1: de-identification of data and information* (2014) <<http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-agency-resources/information-policy-agency-resource-1-de-identification-of-data-and-information>>.
- 50 OAIC, Principles on open public sector information (2011) <<http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-agency-resources/principles-on-open-public-sector-information>>.
- 51 The Ombudsman will receive no additional funding to investigate FOI complaints. There was no reduction in funding for the Ombudsman when the 2010 reforms were implemented.
- 52 Johan Lidberg 2014, 'Transparency trade-off means FOI will get more expensive', *The Conversation* (online), 16 May 2014 <<http://theconversation.com/transparency-trade-off-means-foi-will-get-more-expensive-26742>>. For further examples, see Paul Farrell, 'Budget 2014: splitting watchdogs "would shut door on open government"', *The Guardian* (online), 12 May 2014 <<http://www.theguardian.com/world/2014/may/12/budget-2014-splitting-watchdogs-would-shut-door-on-open-government>>; Markus Mannheim, 'Abbott government's budget guts freedom of information watchdog as it switches focus to privacy', *The Canberra Times* (online), 15 May 2014 <<http://www.canberratimes.com.au/national/public-service/abbott-governments-budget-guts-freedom-of-information-watchdog-as-it-switches-focus-to-privacy-20140515-zrd81.html>>; Rodney Tiffin, 'The Abbott government's war on transparency', *Inside Story* (online), 5 June 2014 <<http://inside.org.au/the-abbott-governments-war-on-transparency/>>; Peter Timmins 'Abolish OAIC, evidence or no', *Open and Shut* (online), 27 May 2014 <<http://www.foi-privacy.blogspot.com.au/2014/05/abolish-oaic-evidence-or-no.html>>; Peter Timmins, 'The Time and cost equation for AAT review of FOI matters', *Open and Shut* (online), 5 June 2014 <<http://foi-privacy.blogspot.com.au/2014/06/the-time-and-cost-equation-for-aat.html>>.
- 53 ABC Radio National, 'Concerns about closure of FoI review office', PM, 15 May 2014 (Peter Timmins) <<http://www.abc.net.au/pm/content/2014/s4005459.htm>>.
- 54 Richard Mulgan, 'How the FOI watchdog was starved to death', *The Canberra Times* (online), 1 June 2014 <<http://www.canberratimes.com.au/national/public-service/how-the-foi-watchdog-was-starved-to-death-20140601-39ckf.html>>.