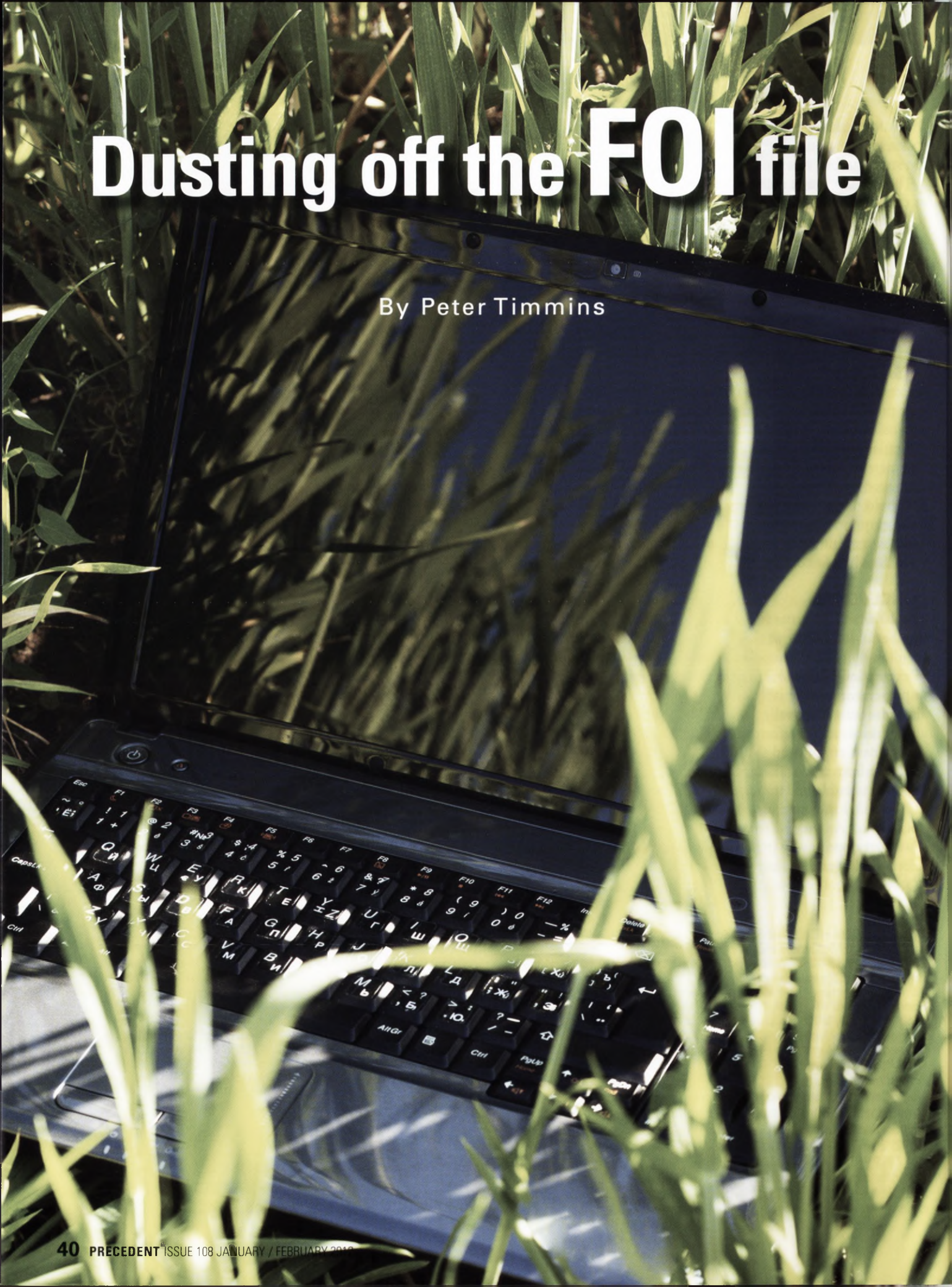
Dusting off the FOI file

By Peter Timmins



For most practitioners, the client who presents with a Freedom of Information (FOI) law matter is rare, but FOI has the potential to be used in a variety of circumstances to pursue client interests.

Commonwealth, Queensland, NSW and Tasmanian laws affecting FOI have been amended or replaced in recent years. The ACT government took some practical steps in 2011 to provide greater access to government information, and introduced an amendment Bill to bring the law generally into line with the amended Commonwealth Act. The Bill was blocked in the Legislative Assembly at year end. In Victoria, where in opposition Ted Baillieu made much of the government's failings in this area, legislation to establish the position of Freedom of Information Commissioner was introduced but not debated in Parliament towards the end of 2011. Proposed reforms fall well short of more extensive changes to the law adopted elsewhere. South Australia and Western Australia have both shown little interest in reform to date.

This article looks at the use of access to information laws, how the reform movement came about, and the key elements of the changes to the *Freedom of Information Act* 1982 (Cth), concluding with some suggestions on how to improve prospects of FOI success.

FOI IN PURSUIT OF CLIENT INTERESTS

Most applicants who seek access to government information are individuals requesting access to information about themselves; their dealings with a government agency; or concerning matters in which they have a direct personal interest.

In 2010-2011, more than 82 per cent of the 23,000 FOI requests to federal government agencies were requests of this kind, with most lodged with the Department of Immigration and Citizenship, Veterans Affairs, Centrelink and the Australian Taxation Office. Around 90 per cent of requests were granted in full or in part, although the latter category covers a wide range and could amount to very little access.

In NSW, the police consistently receive around 700 applications each month under the relevant state FOI legislation. The Roads and Traffic Authority, Department of Education and area health services also receive a large number of requests. Some local councils, also covered by state law, receive many applications (often associated with planning, development and property matters).

Most of these FOI applicants appear to manage unaided. Lawyers are more often involved in internal and external review applications and processes, although overall there are relatively few. With regard to FOI external review matters that are the subject of published decisions, many involve a self-represented party.

FOI AND DISCOVERY

FOI can, however, prove to be a valuable tool in pursuing issues concerning client rights and entitlements, and in pre-litigation where action against a government agency is under consideration. Access to government documents can assist in determining whether a cause of action exists. Once litigation has commenced, FOI can provide a useful alternative or supplement to discovery. One advantage is that FOI involves no relevance test. The other may be relatively lower cost.

FOI processes, to date, have lacked the sophistication developing regarding discovery, particularly e-discovery. Issues such as whether metadata are part of a document, settled in the affirmative in the context of discovery,[1] have received little attention in FOI cases to date. FOI has no equivalent to the rule developing in some courts that the parties agree on a plan outlining the scope and extent of the search process.

The Commonwealth FOI Act is in fact silent about what steps must be taken to search for documents relevant to a request, although the courts stipulate that a reasonable search is required, including taking all reasonable steps to locate documents sought by the applicant.[2]

State laws are generally more specific. For example, in NSW an agency must undertake such reasonable searches as may be necessary. The searches must also be conducted using the most efficient means and any resources reasonably available, including those that facilitate the retrieval of information stored electronically. The Act stipulates that an agency is not required to search an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the *State Records Act* or contrary to the agency's established record management procedures.

The adequacy of search is often contested through review and appeal processes, although applicants often (at state level) encounter jurisdictional issues and in any event find it difficult to get behind agency claims that all reasonable steps have been taken. Sometimes persistence and argument pays off.

Deputy President Judge Hampel in the Victorian Civil and Administrative Tribunal commented recently, before awarding an applicant costs despite a failure to win the case on substantive grounds, that:

> "the respondent's searches were woefully inadequate (and)... unjustifiable". When an order to conduct further searches was mooted, "(w)ithin a week, it had identified, and provided a further 1,350 pages, which clearly fell within the terms of the search... Clearly, the bulk of the material should have been identified in a timely fashion after receipt of the request, and a more co-operative or responsive attitude to the applicant should have been displayed from the time it first raised its concerns about the inadequacy of the searches."[3]

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THE BACKGROUND TO REFORM

The improvements in access to information laws resulted from pressures that had been growing steadily since the mid 1990s.

Expert opinion concluded that FOI 'mark 1' laws enacted in the 80s and early 90s had failed to achieve the objective of open and transparent government. The Australian Law Reform Commission, in its report, *Open Government*,[4] recommended 106 changes to Commonwealth law. These were ignored by the Howard government.

Commonwealth, NSW and Victorian ombudsmen and parliamentary committees in various jurisdictions similarly documented problems and weaknesses in FOI laws and the way in which they had been implemented. A significant catalyst, with wide-ranging impact, was the Queensland *Right to Information* report of 2008, commissioned by incoming Premier Bligh within days of taking office, and undertaken by a panel chaired by Dr David Solomon.[5]

Public awareness about, and dissatisfaction over, government secrecy also increased as media reports drew attention to unsuccessful applications for government information that seemed hard to justify. Jack Waterford of the *Canberra Times*, Michael McKinnon (now with the Seven Network), and Matthew Moore of the *Sydney Morning Herald*, among others, made interesting and compelling stories out of FOI failures, as well as successes.[6]

McKinnon, a winner of a Walkley Award for journalism for leadership in this field, challenged ministerial and agency decisions strongly and often in the courts and tribunals; in one case, unsuccessfully, all the way to the High Court.[7]

Media frustration with FOI and concern about other constraints on freedom of speech culminated in 2007 in the report of the Independent Audit of Free Speech in Australia, chaired by former NSW Ombudsman, Irene Moss, and commissioned by Australia's 'Right to Know', a coalition of major media organisations. The report played a role in getting the issue on the agenda of the incoming Rudd government, and again at the now almost-forgotten 2020 Summit in early 2008.

The coming of the information age also raised public expectations about the right to access government information and for improvements in the way government shared information and engaged with the community.

New leaders and new governments (Rudd/Gillard in Canberra; Bligh in Queensland; Rees in NSW; Bartlett in Tasmania; Gallagher in the ACT) committed to increased transparency and FOI reform prior to coming to office, or early in their term, in order to differentiate or distance themselves from governments or predecessors who were regarded as excessively secretive.

A final influence was the challenge to secrecy elsewhere. In 2009, President Obama gave transparency new profile, issuing a memorandum to heads of government agencies on his second day in office, which begins:

> 'My Administration is committed to creating an unprecedented level of openness in government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in government.'[8]

The Coalition Agreement between the Conservatives and Liberal Democrats in the UK included a commitment to FOI reform. Thirteen countries had FOI laws in 1990. By 2011, there were close to 90. Ideas about good or best practice are constantly being exchanged around the world.

Criticism of Australia's FOI laws at the end of the first decade of the 21st century was widespread. The laws were complex and left too much room to withhold information that was sensitive or embarrassing to government, or to the agency concerned. Governments had failed to address an enduring culture of secrecy in many agencies. Perceptions of political interference in deciding what should be released were high. Delays, high costs, and the absence of prompt independent review of decisions added to the gloomy picture.

CONSISTENT APPROACH

Queensland set the ball rolling and took the lead on reform in 2008-2009, acting on most recommendations from the Solomon review. New South Wales, Tasmania and the Commonwealth followed.

Commonwealth reforms delivered on 2007 election commitments but did not involve a comprehensive review. A review is scheduled within the next 12 months.

The reform states, on the other hand, went for a complete rewrite, mostly in improved plain English. None thought the title 'freedom of information' was worth retaining.[9]

However, there was consistency in the general approach (as well as many differences in the detail) in the laws that emerged: a greater emphasis on proactive publication of documents, including a requirement for a publication scheme and a disclosure log of information released to a particular applicant to facilitate wider community access; a general principle of disclosure, unless release would be contrary to the public interest; encouragement

to release information in response to an informal request; and a new or enhanced role for an independent office-holder to provide leadership and guidance on implementation, to monitor performance, and to undertake merits review.

The Commonwealth reforms of 2010 followed earlier legislation[10] to abolish conclusive certificates, long-seen to be an unwarranted limitation on access rights.

The changes noted here are primarily to the Commonwealth Act as amended by the *Freedom of Information Amendment (Reform) Act* 2010. Most amendments commenced on 1 November 2010, except for publication requirements (1 May 2011).

The state and territory access to information laws currently in force are:

- *Right to Information Act* 2009 (Qld), commenced 1 July 2009;
- *Government Information (Public Access) Act* 2009 (NSW), commenced 1 July 2010;
- *Right to Information Act* 2009 (Tas), commenced 1 July 2010;
- *Freedom of Information Act* 1991 (SA);
- *Freedom of Information Act* 1992 (Vic);
- *Freedom of Information Act* 1992 (WA);
- Freedom of Information Act 1989 (ACT); and
- *Information Act* 2002 (NT).

KEY ELEMENTS OF COMMONWEALTH REFORMS

Objects

The Act now gives the right of access to government information a purpose: to promote representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision-making; increasing scrutiny, discussion, comment and review of government activity; and to increase recognition that government information is to be managed for public purposes and is a national resource.

While the objects won't influence interpretation where the meaning is clear, they signify a clear tilt in the direction of disclosure.

Leadership and oversight

The reforms included the establishment of the Office of the Australian Information Commissioner under the *Australian Information Commissioner Act* 2010. Freedom of information functions includes leadership, oversight of the operation of the Act and review of decisions made by agencies and ministers.

Former Commonwealth Ombudsman, Professor John McMillan, who has many years of experience and involvement in the field, was appointed Information Commissioner; and Dr James Popple has been appointed Freedom of Information Commissioner.

When first enacted in Queensland and Western Australia, FOI legislation created information commissioner positions. New legislation expanded the Queensland Commissioner's role and functions, created a similar position in NSW, and gave similar functions to the Ombudsman in Tasmania.

Publication requirements

Each agency must adopt and publish a Publication Scheme and Disclosure Log containing information about documents released to an applicant, subject to a limitation regarding information of a privacy or commercial character, or information the Commissioner determines would be unreasonable to publish.

Fees and charges

Application fees were abolished and there is no charge for search and provision of access when dealing with a request for the applicant's personal information. All applicants for other documents are entitled to up to five hours decision-making time free of charge. Additional charge concessions are available on financial hardship and public interest grounds.

Importantly, no charge can be imposed for work involved in dealing >>

with an application where the request is not dealt with within the statutory time frame, or any extended time agreed with the applicant or extended by the Information Commissioner.

In October 2011, the Minister for Privacy and Freedom of Information, Brendan O'Connor, announced that the Australian Information Commissioner, Professor John McMillan, would undertake a review of fees and charges. The review will consider the role of fees and charges in FOI, the impact on applicants and agencies of the current charging regime, and options for changes and report by the end of January 2012.

Fee and charge regimes vary in the states. Tasmania, for example, retains a small application fee, but no processing charges are payable.

Time limits

Time limits are unchanged: a maximum of 30 days for dealing with requests and up to an additional 30 days where the Act requires consultation with a third party prior to disclosure. Victoria still allows 45 days. NSW reform legislation stipulates 20 working days, a step backward from the pre-reform 21 days.

Extended scope

Rights extend beyond access to a document held by a minister or agency to a document held by a contractor performing a service for the public on behalf of an agency. An agency must take contractual measures to ensure that, if an FOI request is made for relevant documents, the agency can insist on access to specified types of documents held by the contractor that relate to the performance of the contract.

Exemptions

The Act largely retains the original FOI exemptions, with modifications. Some documents are subject to an absolute exemption, others to a conditional exemption which incorporates a public interest test.

Absolute exempt categories include cabinet documents and information impacting on law enforcement; and information that would endanger national security or international relations, subject to a claim of legal privilege, or where disclosure would give rise to an action for breach of confidence. There was no amendment to the list of secrecy provisions in other Acts that have the effect of overriding the FOI Act. Trade secrets and information of commercial value that would be diminished if disclosed remain subject to an absolute exemption.

Conditional exemptions are linked to a new standard provision that the agency 'must disclose unless at the time disclosure would on balance be contrary to the public interest'.

Categories of conditionally exempt documents subject to this test include documents concerning:

- Commonwealth-state relations;
- deliberative process (a new name for internal working documents);
- financial or property interests of the Commonwealth;
- certain operations of agencies;
- personal privacy (a new subsection lists matters that a decision-maker must take into account in deciding whether disclosure would be unreasonable, including whether the information is well-known or available from publicly accessible sources, and 'any other matters' considered relevant);
- business documents;
- research; and/or
- the economy (part repealed).

Public interest considerations

The Act lists considerations that must be taken into account in weighing the public interest in disclosure:

- whether disclosure would promote the objects of the Act;
- inform debate on matters of public importance;
- promote effective oversight of public expenditure; or
- allow a person to access his or her own personal information.

The Act also lists factors that must not to be taken into account in weighing the public interest: that access would result in embarrassment, confusion or unnecessary debate; cause a loss of confidence or result in misunderstanding; or that that the author of the document is or was of high seniority.

Any other relevant public interest factors against disclosure are to be considered before reaching a decision on whether access to any document would on balance be contrary to the public interest. An agency or Minister 'must have regard to' any information commissioner guidelines on the issue. Guidelines have been published at ‹http://www.oaic.gov.au/publications/guidelines.html#foi_guidelines›.

Review rights

Internal review is now optional before recourse to external review. An aggrieved person – an applicant or third party – may seek external review by the Information Commissioner. An agency, applicant, or third party may subsequently seek further review by the Administrative Appeals Tribunal (AAT) on the basis that the Commissioner's decision was wrong. In an Information Commissioner (IC) review, the agency or minister must establish that the decision under review was justified. In AAT proceedings, the agency or minister must establish that a decision adverse to the FOI applicant should be given.

Vexatious applicant

The IC can restrict an applicant's access rights by declaring the person to be a vexatious applicant. Such a decision requires a finding of 'abuse of process' (as defined) or a 'manifestly unreasonable' request or application.

Newspapers in August 2011 reported that Tim Wilson of the Institute of Public Affairs received a 'warning from the Department of Climate Change' that it was looking at the vexatious applicant provisions after he submitted 750 requests in four months, including 440 on one day.

ASSESSMENT

The reforms constitute good, positive and welcome change but don't put the Commonwealth at or near best practice territory. In an international survey by Access Info (Spain) and the Centre for Law and Democracy (Canada), published in October, the Commonwealth Act scored 86 out of a possible 150 points and in a comparative table of laws, ranked 39 in the laws of 89 countries.[11]

Professor McMillan was probably right in commenting that this did not reflect practical performance, but there remains considerable room for improvement. In some areas, the reformed state laws lead the way.

The amended Act requires a comprehensive review to be undertaken, to commence before November 2012. This parks until then criticism that:

- the new publication requirements are modest in scope;
- in grafting changes (extending to 130 pages) onto the existing Act, the opportunity was missed to rewrite the law in modern plain and comprehensive English;
- some agencies continue to enjoy a blanket exemption for all or some documents;
- secrecy provisions in other Acts have not been reviewed; and
- some best practice standards adopted by the Australian reform states have not been followed – for example, the creation of certain offences for improper interference in handling applications.

Anecdotal evidence – media articles based on documents released in response to requests – is that there has been an increase in the quantity and significance of disclosures. >>

But FOI has no equivalent to the rule developing in some courts that the parties agree to define the scope and extent of the search process.

TIPS FOR MORE EFFECTIVE USE OF FOI

Government is a somewhat accessible storehouse of information on just about every topic imaginable.

More information than ever before is publicly available on agency websites, including policy and other documents used to guide decision-makers in making decisions concerning rights and entitlements. Search functions on government websites are not perfect, however; ‹www.gov.au› provides a useful starting point.

Seeking access to specific information or documents is not complicated.

It requires an application in writing, describing what is sought, and an address in Australia. Each agency website has details of how to go about making an application. Agencies have an obligation to assist applicants. The Commonwealth Act authorises email applications (most states are still in snail mail territory and still want a cheque or money order) and there is no application fee (but other charges may apply).

Be specific. Ask the agency to call if there is uncertainty about what has been requested.

The temptation to ask for 'all documents', unbounded by time, including memoranda, emails, file notes, post-it-notes, records of conversation, research papers, briefings and correspondence, for example, on something as broad as the state of the universe since time immemorial, is strong because of concern that something framed more narrowly might just miss the target.

Open-ended general requests – 'fishing expeditions' – may be necessary in some circumstances, but have to pass through a number of hoops. Requests tailored specifically to what is sought are likely to be less problematic.

Broadly framed requests run the risk of high cost, although an estimate will be provided in most instances and there is an opportunity to scale back. In 2007, the National Tertiary Education Union was told that a Freedom of Information request for information about workplace changes at universities would cost $455,000.[12]

Another potential barrier is that an agency has a right (after consultation) to refuse to deal with an application because doing so would involve substantial and unreasonable diversion of resources.

The broader the request, the more likely an agency will seek consent to an extension of the time for processing the application. Remember, if time limits are exceeded there are no processing charges. The emerging standard seems to be to ask for an additional 30 days. Some agencies are clearly struggling with an increase in requests. Be reasonable but firm. Agree to 10 to 14 days extension. The agency can still seek permission to extend from the Office of Australian Information Commissioner (OAIC), which may have a better idea about the agency's reputation. Professor McMillan told *The Australian* in November that in the first year of the new laws, there had been more than 1,500 notifications of delays, or requests for an extension of time to the OAIC.

If the response is less than hoped, the search seems inadequate, the charges are more than expected, or the reasons for the decision implausible or not convincing, exercise rights of review and appeal. The statistics suggest one in three review applications result in some modification of the original decision.

Faced with an apparently determined applicant, an agency is likely to question the time and effort in staying the course, particularly on borderline claims. In addition, you may have the law on your side. ■

Notes: **1** *Jarra Creek Central Packing Shed v Amcor* [2006] FCA 1802. **2** *Chu v Telstra Corporation Limited* (2005) 89 ALD 39. **3** *Friends of Mallacoota Inc v Department of Planning and Community Development (General)* [2011] VCAT 1889 [82-83]. **4** ALRC Report 77, January 1996. **5** *The Right to Information: Reviewing Queensland's Freedom of Information Act Report*, Independent Review Panel, June 2008. **6** For example, 'Brumby's door yet to open', *The Age*, 29 October 2007; 'Censorship over gallery art works, *The Australian*, 27 October 2007; 'Long wait to learn so little', *Sydney Morning Herald*, 14 April 2008; 'Fuel for fans of keeping it all secret', *Sydney Morning Herald*, 2 June 2008; 'Bureaucrats take axe to logging data', *Sydney Morning Herald*, 7 July 2008; 'Government finally comes clean on dirty eateries', *Sydney Morning Herald*, 16 July 2008. **7** *McKinnon v Secretary, Department of Treasury* [2006] 229 ALR 187. **8** Memorandum for the Heads of Executive Departments and Agencies: *Transparency and Open Government*, The White House, January 2009. **9** The replacement Act in both Queensland and Tasmania is the *Right to Information Act*. In NSW, it is the *Government Information (Public Access) Act*. **10** *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act* 2009. **11** Centre for Law and Democracy: http://www.rti-rating.org/results.html. **12** 'Heavy charge for IR info', *The Age*, 29 May 2007.

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