Australian Privacy Foundation

e m a i l: enquiries@privacy.org.au
w e b : www.privacy.org.au

27 January 2010

Submission to the Senate Finance and Public Administration Committee regarding the Freedom of Information Amendment (Reform) Bill 2009 and Information Commissioner Bill 2009

Submission by the Australian Privacy Foundation

About the Australian Privacy Foundation

1. The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. Relying entirely on volunteer effort, the Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For information about the Foundation and the Charter, see www.privacy.org.au

General comments on the consultation

2. We welcome the opportunity to comment on these initiatives.

3. We have no objections to this submission being made public.

4. In preparing this submission, we have had the benefit of having access to the Cyberspace Law & Policy Centre's submission drafted by Nigel Waters. We endorse that submission, and in large parts our analysis draws upon the structure and content of that work.

5. The Australian Privacy Foundation encourages the proposed reform. However, at the same time, the proposed reform contains several areas of concern to us.

6. The proposed reform seeks to address two areas of fundamental importance for a working democratic society. In some situations, these two areas, society's right of accessing information and the individuals' right to privacy, are in direct competition. This will be the case in any instance of one person or organisation seeking access to another person's personal information.

7. It is crucially important that the proposed reform strikes a good balance between these two competing interests. In striking this balance, attention must be given to how digitalisation of information has changed the possibilities for individuals and organisations seeking access to information.

8. While we recognise the value of a system allowing for online FOI applications, we also envisage that this increased convenience will lead to an increase in FOI applications. It is of great importance that an increase in the number of application does not result in a lowering of the standard of protection of individuals' privacy. In other words, steps must be taken to avoid a scenario where the fact that agencies receive a greater number of FOI applications result in less care being taken in assessing the privacy implications of each of those applications.

Information Commissioner Bill

9. There is evidence of the model of office of an Information Commissioner (IC) working well in other jurisdictions, and we support this model. We also support the model of two subordinate Commissioners – one for privacy and one for FOI. However, as noted in the Cyberspace Law & Policy Centre's submission clarification is needed in relation to the details of how these Commissioners will interact.

10. Furthermore, as these are all crucial posts for a functioning system of privacy and FOI, the IC Bill should make provision for a parliamentary committee to have the role of approving proposed appointments to the three Commissioner positions.

11. We agree with the Cyberspace Law & Policy Centre's observation that:

> "It is inconsistent to require the FOI Commissioner, but not the IC or PC, to have legal qualifications (cl.14(3) & cl.21(3)), given that all three will be able to perform privacy and FOI functions. Legal expertise, while very important particularly for review functions, can be provided by senior staff. To ensure the best possible field of candidates, none of the three Commissioners should be required to have legal qualifications."

Freedom of Information Amendment (Reform) Bill

12. The proposed amendments are in line with the developments in Qld and NSW, and we generally see this move as something positive.

13. However, like the Cyberspace Law & Policy Centre, we are concerned that, if the law applies a formal public interest test to the release of *all* government information (not just to formal access applications), agencies may apply the test inappropriately to information which has traditionally been freely available, or to information which under the new regime should be made freely available. This concern is only partially addressed in the Bill (proposed s. 3A and s.11A) and we wish to emphasise the importance of explanatory and guidance material, including from the Information Commissioner, providing very clear guidance on this matter.

14. We have strong concerns about privacy being undervalued compared to FOI. Our concerns are expressed in great clarity in the Cyberspace Law & Policy Centre's analysis:

> "A balance must be struck. The single public interest test introduced by s11A(5) includes privacy as just one of a number of considerations to be taken into account (proposed s.47F). This is significantly different from the position under the current s.41 where documents are exempt if their disclosure would be involve an 'unreasonable disclosure of personal information'. In my view, and I suspect the view of most privacy regulators and experts, the proposed change would weight the scales too heavily against privacy – personal information would have to pass a double test to qualify for withholding. Firstly its disclosure would have to be 'unreasonable' and then 'contrary to the public interest'. It is difficult to see why a disclosure of personal information could be 'unreasonable' and yet in the public interest.
>
> I submit that personal privacy justifies a specific variation on the single public interest test - there should be a default presumption that personal information about third party individuals should not be released, unless the public interest in doing so substantially outweighs the privacy interests of the individuals concerned. (It may be that this test could also be the default public interest test for other conditional exemptions).

> There is an important qualification to my suggested default presumption. It is essential that personal information about public servants in the performance of their duties is not withheld – if this were allowed the accountability objectives of open government regime would be significantly constrained (as it has been in practice under many first generation FOI laws because of failure to address this issue). The solution is not, as is sometimes suggested, to exclude information about public servants from the definition of 'personal information' as they are as entitled as anyone else to the other protections of privacy laws, including rights of access and correction. Instead, there needs to be a specific 'clawback' from a default presumption of non-release, expressly for personal information about public servants in relation to performance of their official duties. Such information should not even be subject to a public interest test – it should be expressly be required to be disclosed if included in the response to a formal FOI request.
>
> There is of course a separate zone of human relations/personnel personal information about public servants to which the normal personal information exemption should apply. A definition of 'information about public servants in relation to the performance of their duties' would be needed to ensure this distinction."

Conclusion

15. In our submission, we have only focused on what we perceive as the most important privacy issues. To the extent it is not, expressly or impliedly, inconsistent with the views expressed in this submission, we endorse the Cyberspace Law & Policy Centre's submission is all other regards.

For further information contact:

Dr Dan Svantesson, (07) 5595 1418
E-mail: enquiries@privacy.org.au
APF Web site: http://www.privacy.org.au