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Irène Bouhadana & William Gilles

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IMODEV
49 rue Brancion 75015 Paris – France
www.imodev.org
ojs.imodev.org

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À PROPOS DE NOUS

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Irène Bouhadana, docteur en droit, est maître de conférences en droit du numérique et droit des gouvernements ouverts à l'Université Paris 1 Panthéon-Sorbonne où elle dirige le master Droit des données, des administrations numériques et des gouvernements ouverts au sein de l'École de droit de la Sorbonne. Elle est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Elle est aussi fondatrice et Secrétaire générale de l'IMODEV.

William Gilles, docteur en droit, est maître de conférences (HDR) en droit du numérique et en droit des gouvernements ouverts, habilité à diriger les recherches, à l'Université Paris 1 Panthéon-Sorbonne où il dirige le master Droit des données, des administrations numériques et des gouvernements ouverts. Il est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Il est aussi fondateur et Président de l'IMODEV.

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

Irène Bouhadana, PhD in Law, is an Associate professor in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where she is the director of the master's degree in data law, digital administrations, and open governments at the Sorbonne Law School. She is a member of the Institut de recherche juridique de la Sorbonne (IRJS). She is also the founder and Secretary General of IMODEV.

William Gilles, PhD in Law, is an Associate professor (HDR) in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where he is the director of the master's degree in data law, digital administration and open government. He is a member of the Institut de recherche juridique de la Sorbonne (IRJS). He is also founder and President of IMODEV.

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FREEDOM OF INFORMATION LEGISLATION IN AUSTRALIA: A REVIEW

by **Margaret ALLARS**, Professor, Faculty of Law, University of Sydney (Australia).

Freedom of information legislation was introduced at the federal level in Australia in enactment of the Freedom of Information Act 1982 (“FOI Act”). Within the decade that followed, freedom of information legislation was introduced in each State and Territory in Australia, substantially based on the original model of the federal *FOI Act*.¹ The federal and New South Wales (“NSW”) legislation underwent substantial changes in 2009 to 2010. In May 2013, the federal Attorney-General announced that Australia had joined the Open Government Partnership (“OGP”). After a change of government, Australia’s commitment to the OGP was not progressed. In November 2015 after a change of Prime Minister, the new Prime Minister stated that Australia remained committed to the OGP. However, Australia failed to provide a national action plan for three plan cycles, from 2014 to 2016.

By letter dated 13 November 2016, the Chief Executive Officer of the OGP advised Australia that its failure to provide a national action plan was a breach of the OGP process and the breach had been referred to the Criteria and Standards Committee of the OGP Steering Committee for review of Australia’s performance.² The letter warned that if Australia did not submit a plan it would be designated an inactive member of the OGP.

On 31 October 2016 the federal government released for public consultation over a period of less than three weeks, the draft of *Australia’s First Open Government National Action Plan 2016-18* (“*Draft NAP*”), containing 14 commitments for open government in the future. This is a draft, not yet finalised, although the OGP meeting commences this week.

In light of the relevant commitments in the *Draft NAP*, this paper addresses four topics: (i) the administration, monitoring and review of decisions under the *FOI Act*; (ii) exemptions and grounds for refusing access; (iii) recent consideration of refusal of access on the “voluminous request” ground; and (iv) the Information Publication Scheme (“IPS”).

¹ *Freedom of Information Act* 1982 (Vic); *Freedom of Information Act* 1989 (ACT); *Freedom of Information Act* 1989 (NSW), replaced by the *Government Information (Public Access) Act* 2009 (NSW); *Freedom of Information Act* 1991 (SA); *Freedom of Information Act* 1992 (WA); *Right to Information Act* 2009 (Tas); *Right to Information Act* 2009 (Qld); *Information Act* (NT).

² <http://www.opengovpartnership.org/sites/default/files/Australia%20-%20Steven%20Kennedy%20-%20November%202016.pdf>.

§ 1 – ADMINISTRATION, MONITORING AND REVIEW

In 2010 major reforms were introduced, by the enactment of the *Australian Information Commissioner Act 2010* (Cth) (“*AIC Act*”), and amendments to the *FOI Act* made by the *Freedom of Information Amendment (Reform) Act 2010* (Cth) (“*FOI Amendment Act*”). Administrative and policy functions connected with the *FOI Act* were for the first time centralised and formalised by the establishment of an independent statutory agency, the Office of Australian Information Commissioner (“*OAIC*”).³ The Australian Information Commissioner was given overarching policy and advisory functions with respect to information collection, use, disclosure and storage.⁴ More specialised functions were conferred upon two further office-holders, the Freedom of Information Commissioner (“*FOI Commissioner*”) and the Privacy Commissioner. The office of Privacy Commissioner already existed but was brought within the structure of the *OAIC*.⁵

The *FOI Commissioner*’s functions are to promote awareness and understanding of the *FOI Act* and its objects, assist agencies to publish information under the *IPS*, issue guidelines under s 93A of the *FOI Act*, make recommendations relating to legislative change or desirable administrative action, monitor compliance by agencies, and collect statistics about *FOI* matters. Most importantly, the new *FOI Commissioner* was given power to review an “*IC reviewable decision*”, being an agency decision to refuse access to documents requested, with investigative powers including a broad discretion to conduct the review on the papers, and power to make a determinative decision on the merits.⁶ There is no necessity for the agency decision to have been previously the subject of an internal review.

External merits review of *FOI* determinations had been available in the Administrative Appeals Tribunal (“*AAT*”) since the *FOI Act* commenced.⁷ Review by the *AAT* was available only after an internal review within the agency. A further avenue of review of an *FOI* determination was by making a complaint to the Commonwealth Ombudsman. The *AAT* now has jurisdiction to provide second tier merits review, of a determination made by the *FOI Commissioner* in an *IC* review, or a decision by the *FOI Commissioner* not to review an *IC* reviewable decision.⁸ Appeals

³ *Australian Information Commissioner Act 2010* (Cth) ss 5, 14 (1).

⁴ *Australian Information Commissioner Act 2010* (Cth) s 7.

⁵ *Australian Information Commissioner Act 2010* (Cth) ss 14 (2), 14 (4).

⁶ *Australian Information Commissioner Act 2010* (Cth); *FOI Act* ss 55, 55A-55G, 55K, 55R-55Z. The model of an information commissioner, already adopted in Queensland and Western Australia, had been recommended by the Australian Law Reform Commission as a preferred form of review of *FOI* determinations: Australian Law Reform Commission and Administrative Review Council *Open Government – A Review of the Federal FOI Act 1982* ALRC Report No 77 (20 January 1996) Chapter 6; Appendix D Recommendations 18-27.

⁷ *FOI Act* ss 57 – 58AA; *Archives Act* s 43.

⁸ *FOI Act* s 57A (1). The *FOI Commissioner* may decide not to undertake an *IC* review or not continue it, where, inter alia, the Commissioner is satisfied that the interests of administration of the *FOI Act* make it desirable that the decision be considered by the *AAT*: *FOI Act* s 54W (b).

on questions of law lie to the Federal Court, either directly from the FOI Commissioner or from the AAT.⁹

In practice external merits review has been diverted from the AAT to the FOI Commissioner. With the establishment of the two-tier system of external review, the volume of cases coming before the AAT has markedly reduced.¹⁰ While no fee applied in the case of an IC review, an application for review by the AAT attracted a filing fee of \$861. On the other hand, there developed a significant backlog of cases pending before the FOI Commissioner.

The *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (July 2013) (“*Hawke Review*”) recorded positive responses by agencies as to the contribution made by the OAIC. The Hawke Review found that the funding of the OAIC was adequate. It noted complaints about delay in its investigation and adjudication of FOI complaints, without appreciating the seriousness of the backlog.¹¹ The *Hawke Review* recommended that a comprehensive review of the *FOI Act* be undertaken, including the two-tier system of external review.¹² The government has yet to respond to the Hawke Review.

In November 2014, the government introduced into Parliament the *Freedom of Information (New Arrangements) Bill 2014* (Cth) (“*New Arrangements Bill*”), which provided for the abolition of the offices of Australian Information Commissioner and the FOI Commissioner. The Privacy Commissioner was to be retained but relocated, to operate within the Human Rights and Equal Opportunity Commission. A Senate committee, split along party lines, recommended by majority that the Bill be passed.¹³ Some submissions to the committee claimed that the information commissioner model represents international best practice and that the OAIC was under-resourced from the outset, and bound to fail by developing a backlog in adjudications.¹⁴ Some FOI advocates, however, preferred the AAT as an avenue for review, criticising the IC review by the FOI Commissioner as too slow and as potentially denying procedural fairness because of its non-adversarial procedure.¹⁵ The Bill was passed by the House of Representatives, but it became clear that it would not pass through the Senate of the

⁹ *FOI Act* s 56; *Administrative Appeals Tribunal Act 1975* (Cth) s 44 (1). The FOI Commissioner may also refer a question of law arising in an IC review to the Federal Court: *FOI Act* s 55H.

¹⁰ The Ombudsman retains jurisdiction to investigate complaints about FOI determinations: *FOI Act* s 89F.

¹¹ *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (July 2013) (“*Hawke Review*”) pp 21-4.

¹² *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (July 2013) (“*Hawke Review*”) pp 16, 36.

¹³ Australian Parliament, Senate Legal and Constitutional Affairs Legislation Committee *Freedom of Information Amendment (New Arrangements) Bill 2014* (Commonwealth, November 2014).

¹⁴ Australian Parliament, Senate Legal and Constitutional Affairs Legislation Committee *Freedom of Information Amendment (New Arrangements) Bill 2014* (Commonwealth, November 2014) [2.3], [2.19].

¹⁵ Australian Parliament, Senate Legal and Constitutional Affairs Legislation Committee *Freedom of Information Amendment (New Arrangements) Bill 2014* (Commonwealth, November 2014) [2.3].

Australian Parliament, where the government did not enjoy a majority.

In the meantime, the federal budget announced in May 2014 provided funding for the OAIC only to the end of 2014, projecting savings of \$10.2 million over four years by the abolition of the OAIC. In December 2014 the FOI Commissioner resigned to take an appointment as a member of the AAT. From 2015 the Canberra office of the OAIC was closed. The Australian Information Commissioner worked from home with minimal administrative support from two remaining staff members in Sydney, until his resignation in June 2015. The 2015 budget restored half the funding of the OAIC, but directed most of it to privacy functions. The Privacy Commissioner had remained in office and performed the additional function of reviewing agency FOI decisions.¹⁶

When Parliament was prorogued for federal elections on 17 April 2016, the *New Arrangements Bill* lapsed. In the May 2016 federal budget, funding for the OAIC was restored. The *Draft NAP* states that the OAIC will be involved in implementing Commitment 3.2. Although the *AIC Act* remains unamended, still providing for the existence of the OAIC and three commissioners, one person currently holds the positions of Privacy Commissioner and Acting Australian Information Commissioner. The position of FOI Commissioner is vacant.

With regard specifically to FOI, the *Draft NAP* includes as “Commitment 3.2: Understand the Use of Freedom of Information” that the Commonwealth work with the States and Territories in order to develop, so far as possible, coordinated measures for the operation of FOI legislation in Australia. That is a desirable objective. There will always be some differences between the States and Territories, even if only with regard to the inevitable exemption of particular agencies which will differ in each State and Territory. Harmonisation of FOI legislation in Australia is not desirable in itself. A net benefit in terms of transparency needs to be expected from any uniformity. Commitment 3.2 also aims to increase public awareness regarding the right to access government information under FOI legislation. This is, of course, a desirable objective. Practical steps including resourcing need to be identified in order to realise it.

What needs to be embraced within Commitment 3.2 is an objective of ensuring that the functions of educational and policy work, and monitoring of the *FOI Act*, these being functions of the OAIC and the FOI Commissioner, be placed on a stable, sound statutory and administrative basis, be adequately funded, and appropriate appointments made to statutory offices.

The *Draft NAP* “Commitment 3.1: Information Management and Access Laws for the 21st Century” proposes that the *FOI Act* be reviewed to ensure that it is adapted to the digital era of government and that it is providing a coherent framework for

¹⁶ The FOI Commissioner and the Privacy Commissioner are empowered to exercise each other’s functions: *Australian Information Commissioner Act* 2010 (Cth) ss 11 (2), 12 (2).

managing and accessing government information. The reference in Commitment 3.1 to a coherent framework appears to reflect an objective of improving efficiency in the processing of FOI requests. This includes adjudicative decision-making, both internal to agencies and by external review, and the policy-making aspects of administration of the *FOI Act*. While no doubt directed to improving efficiency in the processing of FOI requests, Commitment 3.1 also refers to, and apparently approves, a general recommendation made by the *Independent Review of Whole-of-Government Internal Regulation: Report to the Secretaries Committee on Transformation* (August 2015) (“*Belcher Red Tape Review*”) for a simpler and more coherent legislative framework for managing and accessing government information in a digital environment, through staged reforms. This approval may indicate a goal of implementing the limited number of recommendations made in the *Belcher Red Tape Review* specific to the topic of FOI.

Belcher Recommendation 17.3 (i) is that reporting by agencies to the OAIC should be done on an annual rather than a quarterly basis. This appears to be a reasonable proposal for change to current administrative practice.

Belcher Recommendation 17.3 (ii) is to prioritise implementation of recommendations made by the *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (July 2013) (“*Hawke Review*”) to reduce the regulatory burden imposed on agencies by the operation of the *FOI Act*. The recommendations specifically mentioned are Hawke Recommendations 21 (a), 7, 8 and 9. Hawke Recommendation 21 (a) is for the introduction of “administrative access schemes”, by which information of a kind that is regularly released is made available on request, without the need for any formal access application under the *FOI Act*. Such arrangements are to be encouraged, provided that they do not entail any loss of rights of review in a case where the agency does not actually release the information sought.

Hawke Recommendations 7, 8 and 9 are that procedures for seeking an extension of the 30-day period for processing a request should be streamlined, including by removing the need to notify the OAIC when the requester agrees to an extension; restricting the OAIC’s role in approving extensions; amending s 15AA of the *FOI Act* to enable extensions beyond an additional 30 days, with the agreement of the requester; calculation of “days” as working days rather than calendar days; and extensions of time by up to 30 days without the need for agreement in cases where the cabinet document exemption is claimed.

Procedures for obtaining an extension of time should not be cumbersome. However, no justification has been offered for facilitating extensions of the period of time allowed for processing FOI requests. The goal of achieving transparency may in many circumstances be largely defeated by lengthy processing periods.

Belcher Recommendation 17.1 (i) is that agencies subject to the *FOI Act* should examine their FOI practices to ensure that they impose the least burdensome mechanisms for responding to FOI requests. The concern here is with efficiency and good administration rather than any proposal that the *FOI Act* be amended.

§ 2 – EXEMPTIONS AND GROUNDS FOR REFUSING ACCESS TO DOCUMENTS

The *FOI Amendment Act* clarified the provisions relating to exemptions. Exemptions are listed in Divisions 2 and 3 respectively of Part IV of the *FOI Act*. Division 2 lists classes of documents that are simply exempt and contain no public interest test.¹⁷ These were exemptions left untouched by the *FOI Amendment Act*.¹⁸ The exemptions in this group are: documents affecting national security, defence or international relations;¹⁹ cabinet documents;²⁰ documents affecting law enforcement and protection of public safety;²¹ documents to which breach of secrecy provisions of specified other statutes apply;²² documents subject to legal professional privilege;²³ documents whose disclosure would constitute an actionable breach of confidence;²⁴ parliamentary budget office documents;²⁵ documents disclosure of which would be contempt of court or infringe parliamentary privilege;²⁶ documents disclosing trade secrets or commercially valuable information;²⁷ and electoral rolls and related documents.²⁸ Division 3 of Part IV lists classes of “conditionally exempt” documents. A conditionally exempt document is exempt if, applying the public interest test in s 11A (5), access to the document “would, on balance, be contrary to the public interest”.²⁹ These classes of documents are: Commonwealth–State relations;³⁰ deliberative process documents;³¹ financial and property interests of the Commonwealth;³² certain operations of agencies;³³ personal privacy;³⁴ business affairs;³⁵ research;³⁶ and the economy.³⁷

¹⁷ *FOI Act* ss 4 (1), 11A (4), table in s 31A, 31B (a).

¹⁸ Section 33 (a) (i) of the *FOI Act* provides that a document is exempt if its disclosure “would, or could reasonably be expected to, cause damage to the security of the Commonwealth”.

¹⁹ *FOI Act* s 33.

²⁰ *FOI Act* s 34.

²¹ *FOI Act* s 37.

²² *FOI Act* s 38, Sch 3.

²³ *FOI Act* s 42.

²⁴ *FOI Act* s 45.

²⁵ *FOI Act* s 45A.

²⁶ *FOI Act* s 46.

²⁷ *FOI Act* s 47.

²⁸ *FOI Act* s 47A.

²⁹ *FOI Act* ss 4(1) (definition of “exempt document”), 11A(5), 11B, 31A.

³⁰ *FOI Act* s 47B.

³¹ *FOI Act* s 47C.

³² *FOI Act* s 47D.

³³ *FOI Act* s 47E.

³⁴ *FOI Act* s 47F.

Section 11A (3) of the *FOI Act* provides that if a person makes a request in accordance with s 15 (2) and pays any charge, then the agency must give access. This is “mandatory access”. However, there is no duty to give access to an exempt document.³⁸ Pursuant to s 11A (5), where access is sought to a document that is conditionally exempt at a particular time, the agency is to give access to the document “unless access to the document at that time would, on balance, be contrary to the public interest”. Section 11B sets out factors favouring access and irrelevant factors that must not be taken into account in applying the test.³⁹ Effectively, in the case of the conditional exemptions there is a presumption in favour of disclosure, a position that had been rejected in the case-law under the unamended *FOI Act*.⁴⁰ Access may be given with exempt material deleted.⁴¹ A table in s 31A summarises the effect of s 11A.

The factors favouring access, set out in s 11B (3), are that access to the document would: “(a) promote the objects of Act (including all the matters set out in sections 3 and 3A; (b) inform debate on a matter of public importance; (c) promote effective oversight of public expenditure; or (d) allow a person to access his or her own personal information.” Section 11B (4) expressly requires that certain factors not be taken into account in determining whether access would on balance, be contrary to the public interest. These factors are that: (a) access could result in embarrassment to the Commonwealth government or cause a loss of confidence in the Commonwealth government⁴² (b) access could result in a person misinterpreting or misunderstanding the document; (c) the author of document is of high seniority in the agency to which the request was made; (d) access could result in confusion or unnecessary debate.

While not included in s 11B as an element of the public interest test, a further provision naturally forms part of it. This is the provision in s 11 (2) that subject to the *FOI Act*, a person’s right of access is not affected by any reasons the person gives for seeking access; or the agency’s belief as to what are the requester’s reasons for seeking access.

Belcher Recommendation 17.3 (iii) is that to enhance the operation of the *FOI Act* consideration should be given to issues raised about exemptions and the scope of access to information under the *FOI Act*. The only exemption specifically mentioned in the *Belcher Red Tape Review* is the exemption in s 47 with respect to

³⁵ *FOI Act* s 47G.

³⁶ *FOI Act* s 47H.

³⁷ *FOI Act* s 47J.

³⁸ *FOI Act* s 11A(4).

³⁹ As part of the public interest test, the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (December 2010, revised October 2013) (“the *Guidelines*”) must also be taken into account: *FOI Act* s 11B (5).

⁴⁰ *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 66; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163 at 167-8.

⁴¹ *FOI Act* s 22.

⁴² A similar factor operates with regard to the government of Norfolk Island: s 11B (4) (aa).

documents disclosing trade secrets or commercially valuable information. Section 47 is said to be too narrow and implementation of Hawke Recommendation 19 (a) is recommended. This is that s 47 should be expanded to cover any document that contains information about competitive commercial activities of agencies.

Such an amendment does not appear to be justified by the case-law. Section 47 contains no public interest test and is regularly successfully claimed by agencies for particular documents.⁴³

The *Hawke Review* recommended that the law enforcement exemption in s 37 of the *FOI Act* be revised to include the conduct of surveillance, intelligence gathering and monitoring activities, and be extended to exempt documents where FOI is used as an alternative to discovery in legal proceedings or investigations by regulatory agencies.⁴⁴ However, it is questionable whether the broad language of s 37 is inadequate to protect from disclosure modern surveillance and intelligence gathering activities. The scope of the exemption was recently tested when a request was made for information relating to investigations into Shapelle Corby, an Australian convicted under Indonesian law for importing cannabis into Bali in her boogy board bag.⁴⁵ The requester sought to establish whether the conviction was the result of criminal activities of baggage handlers at Sydney International Airport by placing the cannabis in the boogy board bag. The AAT accepted that the documents were created for the purpose of a criminal investigation and were likely to be used by the prosecution as evidence. Disclosure could therefore reasonably be expected to prejudice proper “administration of law” within s 37 (1) (a). The documents were also exempt under s 37 (2) (a) because disclosure could reasonably be expected to prejudice the fair trial of a person.⁴⁶

§ 3 – VOLUMINOUS REQUESTS

Another issue of current concern is the facility for refusing an access request on the ground that a “practical refusal reason” exists in relation to the request.⁴⁷ This means that either the work involved in processing the request would substantially and unreasonably divert the resources of the agency or the minister from the performance of functions, or the request does not provide information reasonably necessary to enable it to be

⁴³ See, for example, *Re The Wilderness Society South Australia Inc and Department of the Environment* [2016] AATA 653.

⁴⁴ *Hawke Review* p 45; Recommendation 11.

⁴⁵ *Re Bradford and Australian Federal Police* [2016] AATA 775 at [30]-[36].

⁴⁶ Another AAT decision affirmed a deemed refusal by the Australian Federal Police to give access to one page of documents relating to the requester’s attempts to obtain a transfer as an office of the AFP to a new location as part of a particular project: *Re Smith and Australian Federal Police* [2016] AATA 531 at [20]-[21]. That page, containing details of staffing levels at a location, was exempt under s 37 (2) (c) because disclosure could reasonably be expected to prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

⁴⁷ *FOI Act* s 24.

identified.⁴⁸ An agency or minister determining whether there is a practical refusal reason, must have regard to the resources that would have to be used to identify, locate or collate the documents within the relevant filing system, in deciding whether to grant access, including examining the document or consulting with any person or body, making copies, and notifying a determination.⁴⁹

When the Attorney-General received a request from the shadow Attorney-General for access to his electronic diary for a period of 8 months in 2013 to 2014, he claimed that there was a practical refusal reason for refusing access. The diary entries were brief, giving limited information as to the date, time and identity of a person with whom the Attorney-General was to meet, in some cases with an additional description of the nature of the meeting, or booking references. The diary did not show related invitations, correspondence, or background or briefing documents. The principal argument was that there would be an unreasonable diversion of resources in that it would be necessary to go behind each of the 1930 diary entries and work out whether by disclosure of some pattern the entry might unreasonably disclose personal or business information of the kind that requires consultation with the person concerned.⁵⁰ This was claimed to require 228 to 630 hours. The AAT rejected the contention, holding that it was not necessary for the Attorney-General's FOI delegate to consult every one of the 263 persons and businesses named in the diary in relation to these brief and anodyne entries relating to appointments and work arrangements, now 18 months old.⁵¹

The Full Federal Court upheld the AAT's decision.⁵² The only relevant factual issue for the AAT in applying the test of substantial and unreasonable diversion of resources concerned the resources that would be required to comply with the consultation requirements. The question posed by the provision was whether it appeared to the AAT that a person "might reasonably wish to make an exemption contention".⁵³ The AAT did not err in concluding that there must be some rational basis which it could discern for the third party's belief that the disclosure of the document would, or could be expected to, unreasonably affect him or her in respect of his or her lawful business or professional affairs, and a rational basis for the agency or minister's opinion or

⁴⁸ *FOI Act* ss 15(2)(b), 24AA(1).

⁴⁹ *FOI Act* s 24AA(2).

⁵⁰ The *FOI Act* requires an agency or minister to consult with a person who might reasonably wish to contend that a document requested is conditionally exempt in that it contains that person's personal information and that access would on balance be contrary to the public interest: *FOI Act* s 27A (1). In a similar fashion consultation is required where a person, organisation or proprietor of an undertaking might reasonably wish to contend that a document requested is conditionally exempt under the business documents exemption and access would, on balance, be contrary to the public interest: *FOI Act* s 27.

⁵¹ *Re Dreyfus and Secretary, Attorney-General's Department* [2015] AATA 995 at [42], [46] per Jagot J.

⁵² *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119 per Besanko, Robertson and Griffiths JJ.

⁵³ *FOI Act* ss 27(1)(b), 27A(1)(b).

belief that the person might reasonably wish to make an exemption contention. It was not necessary in the case of every entry in the diary for the agency to consult the person in order to decide whether that person was to be given the opportunity to make an exemption contention.⁵⁴

Despite this recent encounter between the Attorney-General and the *FOI Act*, the *Draft NAP* contains no clear suggestion of any proposed change to the voluminous requests provision.

§ 4 – INFORMATION PUBLICATION SCHEME

When enacted in 1982, Part II of the *FOI Act* required agencies to publish information about their functions, the means by which individuals could participate in their policy-making processes, the kinds of documents they held and how individuals could make requests for access to them.⁵⁵ Agencies were also required to make available for inspection or purchase manuals, guidelines and certain other specified types of policies.⁵⁶ The scope of this requirement to publish policies was unclear.

The *FOI Amendment Act* clarified and modernised Part II. Now the Information Publication Scheme (“IPS”), which is shorthand for the requirements of ss 8 and 8A and of the *FOI Act*, sets out requirements that are integral to the structure of *FOI Act*, designed to enable members of the public to know more about an agency and the information it holds, so that they are in a position to make FOI requests or otherwise participate in agency decision-making. The IPS is more specific as to the kinds of policy to be published, how it is to be published, including on the agency website, and extends the publication requirements. An agency must publish details of its organisation; its functions; appointments to positions; arrangements by which the public may make comments on policy proposals; information as to documents to which the agency routinely gives access; contact details of FOI officers; and “operational information”. Replacing the attempt to list policies with different labels, the “operational information” that is to be published is defined to cover information held by the agency to assist it in performing or exercising its functions or powers in making decisions or recommendations affecting members of the public or particular persons, entities or classes of persons or entities.⁵⁷ It plainly includes, but is not limited to, rules, guidelines, practices and precedents.

⁵⁴ *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119 at [56]-[60], [65]. See also *Re Dreyfus and Secretary, Attorney-General’s Department* [2015] AATA 962, where the shadow Attorney-General sought access to incoming brief prepared by the Secretary of the Attorney-General’s Department for the newly elected liberal government. Exemption was claimed on the ground that the brief contained deliberative matter conditionally exempt under s 47C. The AAT (constituted by Bennett J) varied slightly the refusal to release redacted parts of the brief, holding that some factual parts were not exempt, and that the balancing of factors in the public interest test under s 11B (3) favoured not disclosing the remaining parts: at [107], [123].

⁵⁵ Unamended *FOI Act* s 8.

⁵⁶ Unamended *FOI Act* s 9.

⁵⁷ *FOI Act* s 8A.

The intention behind the *Draft NAP* may possibly be found in Belcher Recommendations 17.1 (ii) and 17.2. Although the *Draft NAP* makes no specific reference to these recommendations, they are relevant to the IPS.

Belcher Recommendation 17.1 (ii) is that agencies should consider more active publication of information in order to decrease FOI requests. The objective here appears to have been efficiency and good administration in the agency when discharging its responsibilities under the *FOI Act*, rather than any proposal that the *FOI Act* be amended in order to enhance transparency. The recommendation may be intended to be directed to the way in which an agency manages its duty under s 8 (2) (g) of the *FOI Act*. This provision in the IPS requires an agency to publish automatically on its website information which it routinely releases in response to requests made by individuals, unless it is personal information, business affairs information or information of a kind that the FOI Commissioner has determined by legislative instrument that it would be unreasonable to publish.

Belcher Recommendation 17.2, apparently endorsed by the *Draft NAP*, is that consideration be given to whether the IPS could be consolidated with other government initiatives for enhancing public accessibility of government information, such as the digital transformation agenda.

There is a danger that implementation of this recommendation could reverse the benefits of the IPS. It would be inappropriate to relocate the IPS requirements to another Act, or to dilute them to the status of policy requirements.

§ 5 – POSTSCRIPT

On 6 December 2016, this paper was delivered as part of the “Academic Days on Open Government Issues” at the Sorbonne Law School, Paris. On 7 December 2016, the first day of the three-day OGP Global Summit held in Paris, the Australian Minister for Finance announced the finalisation of Australia’s first NAP, and publically released the document entitled *Australia’s First Open Government National Action Plan 2016-18 (Final NAP)*.

In the *Final NAP*, Commitment 3.1 is expressed in terms almost identical to those in the *Draft NAP*, with similar inconclusive references to the *Hawke Review* and the *Belcher Red Tape Review*.⁵⁸ One additional sentence states that “[t] he government is committed to ensuring the adequate resourcing of the OAIC to discharge its statutory functions, and provided funding for the purpose over the next four years in the 2016-17 Budget.”⁵⁹

Commitments 3.2 and 3.3 in the *Final NAP* are also in terms similar to Commitments 3.2 and 3.3 respectively in the *Draft NAP*.

⁵⁸ Australian Government *Australia’s First Open Government National Action Plan 2016-18* (Commonwealth of Australia, 2016) (*Final NAP*), p 36.

⁵⁹ *Final NAP*, pp 36-7.

