

The Hon John Howard MP
Prime Minister of Australia
Parliament House
Canberra ACT
AUSTRALIA 2600
Fax: +61 (0)2 6273 4100

19 April 2006

Dear Sir,

Re: Endorsement of Commonwealth Ombudsman's recommendations concerning implementation of the Freedom of Information Act 1982

I am writing from the Commonwealth Human Rights Initiative (CHRI), an independent, non-partisan, international non-government organisation mandated to ensure the practical realisation of human rights in the lives of the people of the Commonwealth. CHRI's Right to Information Programme supports member states throughout the Commonwealth to develop and implement strong freedom of information (FOI) laws.

I recently received a copy of the Commonwealth Ombudsman's FOI report, *Scrutinising Government - Administration of the Freedom of Information Act 1982 in Australian Agencies*. I would like to encourage your Government to take forward amendments to the national *Freedom of Information Act 1982* (FOI Act) as a priority, in line with the recommendations set out in the Ombudsman's Report, and the previous recommendations of the Australian Law Reform Commission and the Australian Senate Legal and Constitutional Committee Inquiry into FOI.

The right to information is a fundamental precursor to meaningful participatory democracy. Access to information is essential if the public are to be able to hold their elected representatives and officials accountable for their actions. As you would no doubt be aware from your experience with the development initiatives Australia is leading in the Pacific, transparency is crucial to good governance. This holds true in Australia as elsewhere in the region.

In this context, I would note my concern at comments earlier in the year by the Australian Treasurer that FOI is concerned only with enabling the public to review and amend their personal records. The failure of a leading Government figure to acknowledge the broader democratic value of the right to information is troubling and sets a poor precedent for Australia's Pacific neighbours. Freedom of information promotes government accountability in policy development, decision-making and financial management, reduces corruption, promotes

public participation in governance and development and strengthens the national economic framework.

It is disappointing that the Ombudsman's Report noted that, despite more than 20 years of FOI in Australia, there remains resistance within the Australian bureaucracy towards information openness (see Annex 1 for more details). In particular, it is of concern that bureaucrats continue to delay responding to requests and often pedantically impose formal requirements on requesters with a view to discouraging access to information. Australia has one of the oldest FOI laws in the Commonwealth and is therefore considered a leader in the field. As more member states consider implementing openness legislation, it is unfortunate that Australian bureaucrats are not setting a better example for other jurisdictions.

The Ombudsman's Report is to be commended for underlining the need to strengthen monitoring of the FOI Act in order to ensure that all government agencies implement the law in a consistent manner and in the spirit of openness and transparency which underpins the Act. CHRI strongly urges you to implement the Commonwealth Ombudsman's principal recommendation to establish an Information Commissioner, which would function as an independent oversight body for the Act (see Annex 2 for a list of the Commissioner's proposed powers). At the very least, a Commissioner or compliance Unit could be established within the office of the Commonwealth Ombudsman, which would help guarantee its independence, adequate funding and resources and protection against bureaucratic 'capture'.

I would like to take this opportunity to encourage you to consider more fundamentally overhauling the independent appeal processes available under the FOI Act. Currently, aggrieved requesters can apply both to the Administrative Appeals Tribunal and the Commonwealth Ombudsman, the former of which can make a binding decision regarding disclosure and the latter of which can make only recommendations. The recommended Information Commissioner would operate in parallel with these bodies – which could lead to confusion amongst the public and officials as to who does what.

In line with good practice evidenced in jurisdictions such as the United Kingdom, Scotland, Ireland, India Mexico, and the states of Queensland, Western Australian and the Northern Territory, consideration should be given to consolidating all of the appeal powers, monitoring duties and promotion obligations into one body – a Federal Information Commissioner. A Federal Information Commissioner would be independent of government and would have strong investigation and decision-making powers. In addition, consideration would need to be given to revising the current penalty provisions in the FOI Act to enable the imposition of fines for offences such as unreasonable delay in provision information, unreasonable refusal to accept and application and obstruction of access. I have set out in Annex 3 international

best practice standards for the complete role and functions of an Information Commission.

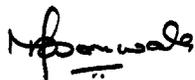
Even if the Information Commissioner model is not adopted, the FOI Act's penalties should be reviewed because the Administrative Appeals Tribunal currently has no power to issue penalties for non-compliance. Penalties are an essential part of any law, because with sanctions for poor performance, officials may continue to resist openness, safe in the knowledge that they cannot be disciplined for non-compliance with the law.

For your information, CHRI has been working on RTI issues in the Commonwealth for more than eight years, during which time we have accumulated considerable best practice expertise in terms of legal drafting and implementation. This was collected in our 2003 publication, *Open Sesame: Looking for the Right to Information in the Commonwealth*, a copy of which is enclosed for your information. I have also enclosed a copy of a comparative table of national access regimes across the Commonwealth prepared by CHRI.

If you wish to discuss this letter, please feel free to contact me by email at majadhun@vsnl.com or Ms Charmaine Rodrigues, Co-Coordinator, Right to Information Programme at charmaine@humanrightsinitiative, or telephone on +91 11 2685 0523 or +91 9810 199 754.

Thank you for your kind consideration of this letter.

Yours sincerely



Maja Daruwala
Director

Cc

The Hon Mark Vaile
Deputy Prime Minister
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600
Fax: +61 (0)2 6273 4128

The Hon Philip Ruddock MP
Attorney-General
Robert Garran Offices
National Circuit

BARTON ACT 2600
AUSTRALIA
Fax: +61 (0)2 6250 5900

The Hon Peter Costello
Treasurer
Treasurer's Office
Room MG47
Parliament House
CANBERRA ACT 2600
Fax: +61 (0)3 9650 0242

Mr Michael McKinnon
FOI Editor
The Australian Newspaper
GPO Box 4245
Sydney NSW 2001
Australia
Fax: +61(0)2 9288 2250

Matthew Moore
Sydney Morning Herald
GPO Box 506
Sydney NSW 2001
Fax: +61 (0)2 9282 3253

ANNEX 1
Current FOI implementation problems –
as set out by the Commonwealth Ombudsman’s Report

- Excessive delay in the processing of some FOI requests.
- The requirements of section 9 of the FOI Act not being met (s.9 refers to the requirements for Government Agencies to make available for purchase and inspection certain documents - including manuals or other documents containing interpretations, rules, guidelines, practices or precedents - and for the principal officer of an agency to make available a regularly updated statement specifying the documents available for purchase and inspection under the FOI Act).
- Lack of consistency in acknowledging requests in a timely fashion.
- Delay in notifying charges and inconsistencies in their application.
- Variable quality in the standard of decision letters, particularly regarding the explanation of exemptions imposed.
- Discrepancies between agencies concerning the way they process FOI requests, especially concerning their overall ability to process FOI requests within the required 30-day period.

ANNEX 2
**Recommended responsibilities for new Australian Information
Commissioner - as set out in the Commonwealth Ombudsman's Report**

- Audit the compliance of agencies with the FOI Act.
- Collect statistics on FOI requests and decisions and preparing an annual report on FOI (currently an A-G's responsibility).
- Publicise the Act in the community.
- Issue guidelines on how to administer the FOI Act.
- Make determinations about the scale of charges applying to requests for access to information under the FOI Act.
- Provide or oversee FOI training to agencies.
- Provide information, advice and assistance in respect of FOI requests.
- Provide legislative policy advice on the FOI Act.

ANNEX 3
CHRI's Recommendations for the Establishment of an Information Commission

1. The current framework for appeals under the Australia's Freedom of Information Act 2000 requires that a second appeal be handled by the Administrative Appeals Tribunal. However, the Tribunal has no powers to issue penalties for any non-compliance of the Act. In addition, currently, the Minister has the power to monitor the law (for example by producing annual reports for parliament), which can lead to conflict of interest issues because a Government Minister is responsible for monitoring Government performance. Also, there is no provision for the promotion of the law through, for example, training officials and conducting public awareness activities.
2. International best practice in a number of jurisdictions shows that the establishment of an independent Information Commission responsible for processing second appeals, monitoring the law and promoting the law is the best means of ensuring that an access law is implemented effectively. In particular, the Commissioner should have the power to make binding determinations, compel parties to take action, enforce compliance with orders and impose penalties as appropriate. Without these strong powers, the Commissioner could easily be ignored and sidelined by a bureaucratic establishment, which is determined to remain closed. Overall, the Commission should act as an "information champion," ensuring that Australian citizens have the transparent and accountable governance they deserve.

Recommendation: Establish an independent Information Commissioner which should take over the review role of both the Administrative Appeals Tribunal and the Ombudsman, as well as undertaking monitoring and promotion of the Act.

Strong investigation and decision-making powers

3. In terms of the Information Commission's role in processing appeals, the powers granted to the Canadian Information Commissioner under s.36 of the Canadian *Access to Information Act 1982* provide a model that meets international best practice:

(1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power:

(a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

- (b) *to administer oaths;*
- (c) *to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;*
- (d) *to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;*
- (e) *to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and*
- (f) *to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.*

(2) *Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.*

(3) *The Information Tribunal has the power to:*

- (a) *require the public authority to take any such steps as may be necessary to bring it into compliance with the Act, including by:*
 - (i) *providing access to information, including in a particular form;*
 - (ii) *appointing an information officer;*
 - (iii) *publishing certain information and/or categories of information;*
 - (iv) *making certain changes to its practices in relation to the keeping, management and destruction of records;*
 - (v) *enhancing the provision of training on the right to information for its officials;*
 - (vi) *providing him or her with an annual report, in compliance with section X;*
- (b) *require the public body to compensate the complainant for any loss or other detriment suffered;*
- (c) *impose any of the penalties available under this Act;*
- (d) *reject the application.*

Recommendation: Ensure that the Information Commissioner has strong investigation and decision-making powers.

Own motion investigations

4. The Information Commissioner should be given the power to initiate its own investigations, even in the absence of a complaint. Section 30(3) of the *Canadian Access to Information Act 1982* gives the Canadian Information Commissioner this power, and has been effectively used to draw attention to whole-of-government problems with implementation as well as department-specific shortcomings. In practice, this power will be useful in allowing the

Information Commissioner to investigate delays in providing information, because these cases will often not reach the Commissioner as a complaint if the information is finally handed over, but may still be worthy of review and the imposition of a penalty, particularly if the Commissioner uncovers a pattern of non-compliant behaviour.

Recommendation: Empower the Information Commissioner to initiate its own investigations, particularly into cases which suggest a departmental pattern of non-compliant behaviour.

Imposing penalties

5. The Act is seriously weakened by the absence of comprehensive offences and penalties provisions. Sanctions for non-compliance are particularly important incentives for timely disclosure in jurisdictions where the bureaucracy is unused to hurrying at the request of public. Most Acts contain combined offences and penalty provisions. Section 49 of the Article 19 Model Law; s.54 of the UK *Freedom of Information Act 2000*; s.34 of the Jamaican *Access to Information Act 2002*; and s42 of the Trinidad & Tobago *Freedom of Information Act 1999* all provide useful models.
6. In the first instance, it is always important to clearly detail what activities will be considered offences under the Act. The Act currently does not provide for penalties for certain acts of non-compliance. The Act needs to sanction practical problems like a refusal to accept an application, unreasonable delay or withholding of information, and knowingly providing incorrect, incomplete or misleading information. These problems could all seriously undermine the implementation of the law in practice and should be sanctioned to discourage bad behaviour by resistant officials. Offences also need to be created for willful non-compliance, such as concealment or falsification of records, willful destruction of records without lawful authority, obstruction of the work of any public body under the Act and/or non-compliance with the Ombudsman orders.
7. Consideration should also be given to imposing departmental penalties for persistent non-compliance with the law. If an officer fails to comply with the Act, this should be recorded on their public service record because providing access to information should be considered a key indicator of a public servant's commitment to discharging their duties properly. Poorly performing public authorities should be sanctioned with penalties for persistent non-compliance with the Act and their bad behaviour even brought to the attention of their Minister who should have to table an explanation in Parliament.
8. Once the offences are detailed, sanctions need to be available to punish offences. International best practice demonstrates that punishment for serious offences can include imprisonment, as well as substantial fines. Notably, fines need to be sufficiently large to act as a serious disincentive to

bad behaviour. Corruption – the scourge that access laws assist to tackle – can result in huge windfalls for bureaucrats. The threat of fines and imprisonment can be an important deterrent, but must be large enough to balance out the gains from corrupt practices.

9. Rights need remedies and without the ability to compel compliance with the decisions of the appeal authority and impose penalties, recalcitrant public authorities may simply choose to ignore appeal decisions they disagree with. In reality, without penalty provisions, public authorities may just deny access to information in the first instance, secure in the knowledge that no negative consequences will follow for them if their decision is eventually overturned on appeal.

Recommendation: Arm the Information Commissioner with the power to issue penalties to discipline officials and/or authorities failing to comply with the terms of the law.

Public education and training

10. It is increasingly common to include provisions in the law itself mandating a body not only to monitor implementation of the Act, but also to actively promote the concept of open governance and the right to information within the bureaucracy and amongst the public. Sections 83 and 10 of the South African *Promotion of Access to Information Act 2000*, which are set out below, together provide a very good model. The Information Commissioner would be best suited to do this job as part of his/her role as a champion of openness. Nevertheless, internationally, there are examples where special government bodies have been set up to take on this role. For example, in Jamaica and Trinidad & Tobago, Access to Information Units have been specifically set up to provide public education and training services. In South Africa, this has been done by the national Human Rights Commission, while in the UK, this role has been filled by the Department of Constitutional Affairs.
11. Section 88 of the Queensland *Freedom of Information Act 1992*, as well as ss.42-43 of the Article 19 Model FOI Law and s.83 of the South African *Promotion of Access to Information Act* below provide very useful examples of what functions the promotion of the law should cover:

South Africa: 83(2) [*Insert name*], to the extent that financial and other resources are available--

- (a) *develop and conduct educational programmes to advance the understanding of the public, in particular of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act;*
- (b) *encourage public and private bodies to participate in the development and conduct of programmes referred to in paragraph (a) and to undertake such programmes themselves; and*

- (c) *promote timely and effective dissemination of accurate information by public bodies about their activities.*
- (3) *[Insert name of body] may--*
- (a) *make recommendations for--*
 - (i) *the development, improvement, modernisation, reform or amendment of this Act or other legislation or common law having a bearing on access to information held by public and private bodies, respectively; and*
 - (ii) *procedures by which public and private bodies make information electronically available;*
 - (b) *monitor the implementation of this Act;*
 - (c) *if reasonably possible, on request, assist any person wishing to exercise a right [under] this Act;*
 - (d) *recommend to a public or private body that the body make such changes in the manner in which it administers this Act as [insert name of body] considers advisable;*
 - (e) *train information officers of public bodies;*
 - (f) *consult with and receive reports from public and private bodies on the problems encountered in complying with this Act;*
- 10(1) *The [Insert name of body] must, within 18 months...compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act.*
- (2) *The guide must, without limiting the generality of subsection (1), include a description of--*
- (a) *the objects of this Act;*
 - (b) *the postal and street address, phone and fax number and, if available, electronic mail address of:*
 - (i) *the information officer of every public body; and*
 - (ii) *every deputy information officer of every public body...;*
 - (d) *the manner and form of a request for...access to a record of a public body...[or] a private body...;*
 - (e) *the assistance available from [and the duties of] the Information Officer of a public body in terms of this Act;*
 - (f) *the assistance available from the [Insert name of body] in terms of this Act;*
 - (g) *all remedies in law available regarding an act or failure to act in respect of a right or duty conferred or imposed by this Act, including the manner of lodging--*
 - (i) *an application with [the Ombudsman and] a court against a decision by the information officer of a public body, a decision on internal appeal or a decision of the head of a private body;...*
 - (i) *the provisions...providing for the voluntary disclosure of categories of records...;*
 - (j) *the notices...regarding fees to be paid in relation to requests for access; and*
 - (k) *the regulations made in terms of [under the Act].*

(3) The [Insert name of body] must, if necessary, update and publish the guide at intervals of not more than two years.

Recommendation: Grant the Information Commissioner the power and resources to raise awareness among both the public and officials and to train officials about good governance and the right to information.