



**Australian Government**

**Office of the Australian Information Commissioner**

# **Disclosure log**

Discussion paper

March 2011

## Foreword

From 1 May 2011, agencies and ministers are required by the *Freedom of Information Act 1982* to publish a register of information that has been released under the FOI Act. The register is described in this paper as a 'disclosure log'.

The purpose of the disclosure log is to provide the public with ready access to information that has already been publicly released by an agency or minister. This advances in a practical way the open government objective of the FOI Act. Disclosure logs, together with the Information Publication Scheme that also commences on 1 May 2011, will facilitate a pro-disclosure culture across government.

Transparency in government is vital to democratic accountability and to community participation in policy formulation, decision making and service delivery. Government information, as the FOI Act declares (s 3), is also a national resource that can foster innovation and social engagement.

The disclosure log mechanism will better achieve those objectives if agencies and ministers plan ahead and adopt a consistent approach across government. This discussion paper contains preliminary guidance on the FOI Act provisions, and highlights many practical choices that arise in designing and implementing a disclosure log. The paper poses a number of questions for comment by agencies, ministers and the public.

I invite written comments on any matter raised in this paper by close of business **Monday 28 March 2011**. Any comments will assist me in formulating guidelines that will be issued under s 93A of the FOI Act prior to 1 May 2011.

Prof John McMillan  
Australian Information Commissioner  
March 2011

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## Introduction

From 1 May 2011 agencies and ministers must publish information that has been released in response to each freedom of information (FOI) access request, subject to certain exceptions (s 11C). The Information Commissioner proposes that this publication be known as a 'disclosure log' (see Part 2, *Disclosure log* on page 9).

The disclosure log requirement complements the establishment of the Information Publication Scheme (IPS) which also commences on 1 May 2011. Together, these reforms require agencies and, for the disclosure log, ministers, to publish a greater range of government information.

The disclosure log facilitates publication to the world at large of information released under FOI to individual applicants. This reinforces the objective of the FOI Act to promote a pro-disclosure culture across government and to increase recognition that information held by government is a national resource.

In time, disclosure log publication may limit the burden on agencies and ministers of dealing with multiple requests for access to the same documents. It will also improve access to government resources that are of interest to the community.

The purpose of this discussion paper is to:

- provide preliminary guidance to agencies and ministers about the disclosure log requirement
- invite comments about particular aspects of this requirement, or other issues associated with its implementation or administration.

Comments are requested by close of business on Monday 28 March 2011 and may be sent to the Office of the Australian Information Commissioner (OAIC) via email to [consultation@oaic.gov.au](mailto:consultation@oaic.gov.au) or you may contribute to a blog run by the OAIC at <http://oaic.govspace.gov.au>.

References in this paper to ss 11C and 8(2)(g) of the FOI Act refer to sections that commence operation on 1 May 2011. Those sections are reprinted in Appendix B to this paper, and are also published in a Schedule to the current compilation of the FOI Act available on ComLaw.<sup>1</sup>

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<sup>1</sup> See [www.comlaw.gov.au/](http://www.comlaw.gov.au/).

## Part 1 — Preliminary guidance

### (a) Disclosure log

From 1 May 2011 agencies and ministers must publish a disclosure log on their websites. The disclosure log lists information that has been released in response to an FOI access request for documents held by the agency or minister. There are certain categories of information that do not have to be included in a disclosure log. Three options for publishing information are specified in s 11C(3):

- making the information available for downloading from the agency's or minister's website
- linking to another website where the information can be downloaded, or
- giving details of how the information may be obtained.

The preferred method of access is for the information to be published to the public on a website.<sup>2</sup> The alternative is to give details of how the information may be obtained. Part 2 of this paper invites comments on the design of the disclosure log.

Agencies and ministers must publish this information within ten working days of giving the FOI applicant access to the information (s 11C(6)).

### *Disclosure log exceptions*

The disclosure log requirement does not apply to:

- personal information about any person if publication of that information would be 'unreasonable' (s 11C(1)(a))
- information about the business, commercial, financial or professional affairs of any person if publication of that information would be 'unreasonable' (s 11C(1)(b))
- other information of a kind determined by the Information Commissioner if publication of that information would be 'unreasonable' (ss 11C(1)(c) and 11C(2))
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that would need to be made to delete information listed in one of the above dot points (s 11C(1)(d)).

It would generally be 'unreasonable' to include in the disclosure log information about an individual or business that was released in response to an FOI request from that individual or business. The same applies to information about a person or business that was released to another FOI applicant, where the person or business was consulted under ss 27 or 27A of the FOI Act and did not object to the release to that particular FOI applicant.<sup>3</sup>

As a general guide, it would not be unreasonable to publish in the disclosure log the name of a Commonwealth official who is mentioned, in connection with their duties, in a

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<sup>2</sup> Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009, p 14.

<sup>3</sup> Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009, p 7.

document that was released under the FOI Act.<sup>4</sup> Nor, for the same reason, would it be unreasonable to publish the name of an official who signed a letter to an FOI applicant explaining a decision to release a document.

## **(b) Making information publicly available**

The disclosure log is intended to facilitate public access to government information where there has been a demonstrated FOI interest in that information. To fulfil this objective it is important that the disclosure log and attached documents are easy to find on an agency's or minister's website.

More generally, agencies and ministers are encouraged to design a disclosure log (including attached documents) that is:

- easily discoverable and understandable
- machine-readable and, for the disclosure log itself, in tabular form
- accessible – in particular, it should meet the Web Content Accessibility Guidelines version 2.0 (WCAG 2.0) (see *Accessibility* on page 6)
- so far as possible, made available for reuse on open licensing terms, so as to enhance the economic and social value of the information.<sup>5</sup>

These features, which should be integrated into all stages of the design and ongoing administration of the disclosure log, are briefly discussed below.

To ensure that the disclosure log is easily discoverable, the Information Commissioner proposes that agencies and ministers use an easily identifiable disclosure log icon, which links from an IPS or FOI webpage through to the disclosure log. The OAIC will provide further guidance about a disclosure log icon in the near future.

Agencies and ministers should also clearly, though briefly, explain what the disclosure log is, to help make the information understandable – for example 'publicly available information, released after an FOI access request'.

Some agencies and ministers already publish on their website information released in response to FOI requests. This has been done on a voluntary basis, while the disclosure log is a legal requirement that applies after 1 May 2011 to all agencies and ministers that are subject to the FOI Act. It is therefore important that, after 1 May 2011, all disclosure logs are clearly identified and contain the features discussed in this paper as required by s 11C. It is open to an agency or minister to incorporate information published prior to that date, provided that the different basis for publication is made clear.

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<sup>4</sup> Explanatory Memorandum to the *Freedom of Information Amendment (Reform) Bill 2009*, p 7.

<sup>5</sup> See the draft [Guidelines on Licensing Public Sector Information for Australian Government Agencies](#), Attorney-General's Department, 2011. See also, the draft *Principles on open public sector information in Issues Paper 1 – Towards an Australian Government Information Policy*, published by the OAIC.

**Note:** the Information Commissioner is seeking policy advice from key agencies in relation to third party copyright issues for reuse of government information.

When designing or updating a disclosure log, agencies and ministers are encouraged to use the draft disclosure log template annexed to this paper to provide a consistent appearance across government.

### **Accessibility**

Information that forms part of the disclosure log must be published to 'members of the public generally' (s 11C(3)). Accessibility of published information by all members of the community is therefore an important issue for agencies and ministers to consider when establishing a disclosure log.

The Australian Government Information Management Office (AGIMO) advises that agencies and, in some circumstances, ministers,<sup>6</sup> in publishing information on their websites are required to conform to the Web Content Accessibility Guidelines (Version 2) (WCAG 2.0).<sup>7</sup> A staged compliance model requires agencies (and in some circumstances, ministers) to conform to Level A by December 2012 and Level AA by December 2014.<sup>8</sup> Any new web content needs to conform to these standards as much as possible from the outset. This means that web content included in the disclosure log needs to be published in WCAG 2.0 conforming HTML.

Where this is not possible within ten working days of an FOI release, an agency or minister should consider publishing information in multiple accessible formats. This is especially important to ensure effective access by people with a sight disability. It is unlawful for a person to provide services to a person with a disability less favourably than to a person without that disability (s 24 of the *Disability Discrimination Act 1992*).

The Information Commissioner is aware that complete WCAG 2.0 compliance may not be possible or practicable in respect of 'legacy' documents, that is, documents created prior to the enactment of the new FOI requirements in 2010. Where this is the case, agencies and ministers should state on their websites that if a person is unable to access a document in the format provided they can contact an agency contact officer to arrange access in another format. Upon receipt of a request for access in another format, an agency or minister should respond promptly and at the lowest reasonable cost.

Similar considerations apply to accessible publication under the IPS. AGIMO and the OAIC will publish joint guidance about accessibility under the IPS prior to 1 May 2011.

### **Charges**

The intention of s 11C is that information published or made available under a disclosure log should be freely accessible by the community (s 11C(4)). An agency may charge to provide information in another form if the charge is to reimburse the agency for a specific reproduction or incidental cost in providing the information in another way (s 11C(4)(b)).

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<sup>6</sup> Generally, ministerial sites managed by departments or agencies need to conform to WCAG 2.0, but this requirement does not apply to ministers' personal sites and party political sites.

<sup>7</sup> See <http://www.finance.gov.au/publications/wcag-2-implementation/index.html>.

<sup>8</sup> The requirements of each level are explained in the Web Content Accessibility Guidelines (Version 2), available at <http://www.w3.org/TR/WCAG20/>.

In determining whether or not to charge members of the public for information made available in another format, agencies and ministers should take account of the 'lowest reasonable cost' objective in the FOI Act (s 3(4)).

Details of any charges that an agency or minister will apply must be published on their website (s 11C(5)).<sup>9</sup> This should include the categories of information to which a charge may apply, the scale of the charge and an explanation for the charge.

### **(c) Information Commissioner's functions and powers**

The Information Commissioner has a role in monitoring the administration of the disclosure log requirement by agencies and ministers.

The Commissioner's function of investigating complaints about agency FOI administration extends to complaints about an agency's disclosure log (s 70). The Commissioner can also undertake an own motion investigation into an agency's FOI actions (s 69(2)). These complaint and investigation functions do not extend to the actions of ministers. Nor can disclosure log actions of an agency or minister be the subject of an IC review under Part VII of the Act.

To facilitate Information Commissioner oversight of agency disclosure log actions, agencies are encouraged to keep an internal register which lists, in respect of every FOI request:

- whether documents requested by the FOI applicant were released
- whether any such documents, or the information contained within them, are listed in the agency disclosure log, in full or in part
- if there is a listing, whether the information can be downloaded from the agency's website or another linked website (or, instead, if details are given as to how the information may be obtained)
- if there is no listing, the reason for not including the information in the agency's disclosure log.

The Information Commissioner is also required to prepare an annual report on the operations of his office during the year (s 30 of the *Australian Information Commissioner Act 2010*). It is the intention of the Commissioner to include information on the administration of the disclosure log by agencies and ministers.

Section 93 of the FOI Act requires agencies and ministers to provide the Information Commissioner with information required by the Commissioner to prepare an annual report. Agencies and ministers will be required to provide the following information as part of their quarterly and annual statistical returns:

- the number of FOI requests resolved during that period that are listed in the agency's or minister's disclosure log

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<sup>9</sup> This is similar to the requirement to publish information about charges and information under the IPS, see sections 11C(5) and 8D(5).



- for each listing, whether all (or only part) of the information provided to the FOI applicant is published in the disclosure log
- the number of FOI requests resolved during that period that are not listed in the disclosure log, and the reason for not doing so.

The Information Commissioner welcomes feedback from agencies and ministers about these requirements (see Part 2, *Statistical information* on page 11).

#### **(d) Routinely accessed information**

Agencies have obligations under the IPS which are similar to the requirement to publish a disclosure log.

Under the IPS, agencies must publish information in documents to which the agency routinely gives access in response to FOI access requests (s 8(2)(g)), except:

- personal information about any person
- information about the business, commercial or financial or professional affairs of any person
- other information of a kind determined by the Information Commissioner (ss 8(2)(g)(iii) and 8(3))

if publication of that information would be unreasonable.

Publication of information in a disclosure log will, in many instances, satisfy this IPS publication requirement. If so, the IPS should nevertheless contain a clear link to the disclosure log and an explanation that it contains information to which the agency has routinely given access in response to FOI requests. On the other hand, an agency may decide that it is preferable, in complying with s 8(2)(g), for the IPS to contain either an extract from the disclosure log or a separate summary of information that is routinely released by the agency in response to FOI requests. Whichever approach is adopted, agencies must observe the additional requirement in s 8(2)(g) that the IPS must identify items of information that are 'routinely' disclosed by the agency in response to FOI requests.

The guidelines about the IPS, to be released by the Information Commissioner, will contain more detail about s 8(2)(g) and the IPS generally.

## Part 2 — Request for comments

### (e) Disclosure log

In a number of jurisdictions, government authorities use the term ‘disclosure log’ to describe the public register of information released in response to FOI access requests.<sup>10</sup>

While the obligations and guidance about publishing information in these jurisdictions differ from s 11C, for ease of reference the Australian Information Commissioner proposes to refer to each agency’s and minister’s publication of information under s 11C as a ‘disclosure log’.

#### Consultation question

Q1. Is it appropriate to refer to each agency’s and minister’s publication of information under s 11C as a ‘disclosure log’?

### (f) Deciding to publish and consultation

Agencies and ministers will in practice make two separate decisions before publishing information in a disclosure log:

- a decision will firstly be made under s 11A to grant access (in part or in full) to documents requested by an FOI applicant
- a decision must then be made as to whether the information released should be published under s 11C.

Different requirements apply under the FOI Act to both decisions, of which two should be noted. First, a decision to grant or refuse FOI access must be made by an ‘authorised person’ under s 23. There is no similar requirement applying to s 11C, although ‘authorised persons’ may be well placed to make these kinds of decisions given their familiarity with requests under the FOI Act. Individual agencies and ministers will nevertheless need to establish their own processes for making decisions under s 11C.

Secondly, consultation requirements apply before a decision can be made under s 11A to release documents affecting Commonwealth-State relations, business documents and documents affecting personal privacy (ss 26A, 27, 27A). There is no similar consultation requirement applying to s 11C, even though s 11C recognises that publication of personal, business and other information may be unreasonable. It is open to an agency or minister to consult an applicant or third party before deciding whether to publish information under

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<sup>10</sup> See for example, the UK Information Commissioner’s Office’s disclosure log [at www.ico.gov.uk/about us/what we do/request information from us/disclosure log.aspx](http://www.ico.gov.uk/about_us/what_we_do/request_information_from_us/disclosure_log.aspx), Queensland Treasury’s disclosure log [at www.treasury.qld.gov.au/about/right-to-information/disclosure-log/index.shtml](http://www.treasury.qld.gov.au/about/right-to-information/disclosure-log/index.shtml) (published under s 78 of the *Right to Information Act 2009* (Qld)) and the NSW Department of Health’s disclosure log at [www.health.nsw.gov.au/gipaa/disclosures.asp](http://www.health.nsw.gov.au/gipaa/disclosures.asp) (published under s 25 of the *Government Information (Public Access) Act 2009* (NSW)).

s 11C, although it may not always be possible to do this, or to do so in a formal manner, within the period of ten working days stipulated in s 11(6).

An alternative approach is for agencies and ministers to provide advance notice that information released under the FOI Act may later be published in a disclosure log (subject to certain exceptions). This advance notice could be given to FOI applicants in the notice under s 15(5) that the person's FOI request has been received, and to affected third parties during a consultation process under ss 26A, 27 or 27A. The applicant or third party may choose to express a view on this issue and to identify personal or business information that in their view would be unreasonable to publish. However, it is important that applicants and third parties are also made aware of the pro-disclosure policy of the FOI Act embodied in s 11C.

### **Consultation question**

Q2. Should agencies and ministers inform FOI applicants and third parties of the requirements in s 11C and invite comments about whether an exception applies?

### **(g) Determinations**

The Information Commissioner may make a determination that s 11C does not apply to information of a particular kind, if it would be unreasonable to publish the information (ss 11C(1)(c) and 11C(2)). A determination of this kind is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

In deciding whether to make a determination, the Information Commissioner will have regard to various factors including:

- the extent to which publication of the information would further the objects of the FOI Act
- whether there is an established and reasonable demand for the information
- if an agency has requested the Commissioner to make a determination applying specifically to information held by that agency – whether the agency has established to the Commissioner's satisfaction that it would be unreasonable to require publication of that information under s 11C.

One class of information which may be unreasonable to publish is information contained in personal case files. These generally contain a substantial amount of personal information, and may not contain information that is of general public interest. If made, this determination would cover a significant proportion of documents released under the FOI Act – presently, around 85 to 90 per cent of FOI requests annually are for personal information.<sup>11</sup>

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<sup>11</sup> Explanatory Memorandum to the *Freedom of Information Amendment (Reform) Bill 2009*, p 7.

### **Consultation questions**

Q3. Should the Information Commissioner make a determination that s 11C does not apply to personal case files? The Information Commissioner welcomes comment on how such a determination should be worded.

Q4. What other classes of information should be exempted from the operation of s 11C by a determination made by the Information Commissioner?

### **(h) Statistical information**

As discussed above, the Information Commissioner will seek the following information from agencies and ministers as part of their quarterly and annual statistical returns:

- the number of FOI requests resolved during that period that are listed in the agency's or minister's disclosure log
- for each listing, whether all (or only part) of the information provided to the FOI applicant is published in the disclosure log
- the number of FOI requests resolved during that period that are not listed in the disclosure log, and the reason for not listing them.

### **Consultation questions**

Q5. Do agencies or ministers foresee difficulties in providing this kind of information to the Information Commissioner?

Q6. Are there better ways of informing the Information Commissioner about the operation of agencies' and ministers' disclosure logs?

### **(i) Design and contents of the disclosure log**

A disclosure log can have three parts:

- the log (or table) published on an agency's or minister's website, listing the information that is available for public access
- that information, which may be accessible in different ways – for example, directly through the log as an attachment that can be downloaded, from another website, or upon request
- a search facility applying to both the log and any attached information.

A fourth issue to be considered is the length of time that information listed on the log will be made publicly available by an agency or minister.

#### ***Design of the disclosure log***

The FOI Act does not prescribe the form of a disclosure log. In the Information Commissioner's view, it is desirable that agencies and ministers adopt a common approach,

so that disclosure logs have a consistent appearance across government and can be understood easily by the community.

A draft template for a disclosure log is annexed to this paper. Two of the columns in the draft template are discussed later in this paper – the column for summarising the FOI applicant’s request (discussed immediately below in *Content*), and for indicating when information will be removed from the disclosure log (see *Length of time information will be accessible* on page 13).

### **Consultation questions**

Q7. Should all agencies and ministers adopt the same template for their disclosure log?

Q8. Should a disclosure log contain the headings and information specified in the draft template annexed to this paper?

### ***Content***

Information that is made available to the public under s 11C should, as a general rule, be released in the same form that it was released to the FOI applicant under s 11A. For example, if the FOI applicant was given a copy of an agency document, the same document should be available under s 11C, whether by download from a website or in some other manner. Similarly, if the document provided to an FOI applicant contained deletions, the same copy of the document should be available under s 11C.

A departure from that principle may be necessary for practical reasons. For example, if the FOI applicant inspected a document or viewed a video it may be necessary to make a different publication arrangement in the disclosure log. As a general rule, however, it is expected that the same information provided to an FOI applicant should be made publicly available under s 11C, rather than a summary or paraphrase of the document given to the FOI applicant.

There is, on the other hand, nothing to prevent an agency or minister from supplementing the information made available under s 11C. In the Information Commissioner’s view, it will advance the purpose of the disclosure log and the objects of the FOI Act if the following additional information is provided:

- the terms of the FOI request that prompted the release of the information (this could be provided in a summary form, rather than as a copy of the FOI request)
- whether the FOI applicant was given access to all documents that were requested, and if not, the exemption or other basis on which partial access was granted
- whether all the information provided to the FOI applicant has been made publicly available under s 11C, and if not, the nature of the information that has not been made available.

Those details will assist the public to understand the information made available by an agency or minister in its disclosure log. For example, the topic or theme that unites a

collection of papers may not be readily apparent unless the terms of the FOI request and the scope of the FOI disclosure is explained.

A practical design issue that arises is whether additional information of the kind described above should be listed in the disclosure log register, or provided as an attachment or as a preface to the information made available under the disclosure log. The draft template annexed to this paper contains a column for summarising the relevant FOI request, so that all relevant information is provided in a single table. However, this will increase the size of the table, and another approach may be preferable.

It is also open to an agency or minister to supplement the disclosure log in other ways. For example, an agency may wish to point out that a document released under the disclosure log has been revised and published by the agency in a different form, or that the information provides only a partial picture of an issue. Any supplementation of this kind should be distinct from the information published in the disclosure log. The disclosure log should provide an accurate historical record of information released by an agency or minister under the FOI Act.

#### **Consultation questions**

Q9. Should the disclosure log contain a summary of an FOI applicant's request, whether the documents requested were provided in full or in part, and whether all information provided to the FOI applicant is made available under the disclosure log?

Q10. Should this information be provided in the disclosure log register or in some other manner (also see question 8 above)?

Q11. Should it be open to an agency or minister to supplement a disclosure log entry with comment or explanation?

#### ***Search facility***

The purpose of a disclosure log is to enable the public to easily find information that is publicly available from an agency or minister. Agencies are encouraged to build appropriate search facilities (or where possible, utilise existing search facilities) to enable information in the log to be searched – for example by reference to particular words, categories or subject matter.

#### **Consultation question**

Q12. What steps can be taken by agencies to make information in a disclosure log easily discoverable, understandable, machine-readable and accessible for members of the public?

#### ***Length of time information will be accessible***

The disclosure log should be retained as a permanent document of an agency or minister, and be available on its website. It is likely that the register will grow in length over time and provide an historical as well as a current record of information released by an agency or

minister under the FOI Act. Where an agency ceases to exist or is restructured, or a minister ceases to hold office, an adjustment may be necessary in accordance with change of government procedures applying at that time.

Although the disclosure log should be a permanent document of an agency or minister, there is no similar expectation or requirement in the FOI Act that information attached or referred to in the register will be available indefinitely. In the course of routine maintenance or updating of a website an agency may decide to withdraw some s 11C content and make the information available in another form, for example, on request. Another possibility is that an agency may later transfer to the National Archives of Australia (NAA) information that was made available under s 11C, or destroy or dispose of that information under an arrangement approved by the NAA under s 24 of the *Archives Act 1983*. Similarly, an agency may decide that it is inappropriate to publish particular information on its website following a change of government or a ministerial or portfolio reshuffle. Conversely, an agency may find that information listed in the disclosure log that is available only on request should instead be published on the agency website because of frequent requests for that information.

Routine monitoring by agencies and ministers of disclosure log activity will assist them in deciding the best measures to adopt in furtherance of the FOI Act objective of facilitating public access to government information.

A disclosure log should indicate if information published on an agency's or minister's website is earmarked for removal at a future date. As a guide, the Information Commissioner recommends that information could be removed after 12 months. Details should be provided if information will thereafter be available in some other manner. Equally, if the information is no longer available from the agency (for example, it has been archived or destroyed) an annotation on the register should note this fact.

#### **Consultation question**

Q13. Is 12 months a reasonable period for agencies and ministers to make available, by website download or otherwise, information that is listed in a disclosure log register?

Q14. Should the disclosure log register indicate when information is likely to be removed from an agency's or minister's website, or the date on which information was in fact removed?

#### **(j) Publication arrangements**

Agencies and ministers must publish information in a disclosure log within ten working days after the FOI applicant was 'given access' to a document (s 11C(6)).

The date on which a person is given access may be later than the date of the decision to grant access. Before giving access, an agency or minister can require that a charge be paid (s 11A(1)(b), reg 11(1)), and must also be satisfied that all opportunities for review by third

parties have run out and that the decision to grant access still stands or was confirmed (ss 26A(4), 27(7) and 27A(6)).

The date on which a person is given access may vary according to the method by which access is given. For example, if a document was sent by email to an FOI applicant it is probable that it was received on the same day. If a document is instead sent by post it is presumed (unless the contrary is known) to have been received on the day it would be delivered in the ordinary course of post (*Acts Interpretation Act 1901 s 29*).

It is open to an agency or minister to publish information on a disclosure log earlier than the period of ten days stipulated in s 11C(6). Independently of the FOI Act an agency or minister may (subject to applicable secrecy provisions) publish information at any time and by any method. The FOI Act does not erode that discretion. It is therefore open to an agency or minister to publish information that is to be provided to an FOI applicant either at the same time that access is provided, or earlier.

In informal representations to the Information Commissioner, journalists have argued that it would be unreasonable for an agency or minister to publish information at the same that it is given to a journalist in response to an FOI request. They suggest a delay of at least a few days, to enable the journalist applicant time to analyse the information and possibly write a story for publication. They contend that allowing the public and other journalists to have simultaneous access disregards the work expended and costs incurred by the applicant in pursuing the FOI request. The objects of the FOI Act are, it is said, more likely to be achieved if experienced and interested journalists use the FOI Act. This use will be discouraged if the fruits of their labour are undercut by simultaneous release. Indeed, there is a risk that agencies will strategically use this device to discourage media interest in using FOI. Journalists have pointed to the Queensland *Right to Information Act 2009 (QLD) s 78(4)* which states 'nothing about a document (including a copy of the document) may be put on a disclosure log until at least 24 hours after the applicant accesses the document'. (There is no similar provision in the Commonwealth FOI Act.)

The Information Commissioner does not hold a firm view on this issue, but raises it to invite comment from agencies, journalists and the public. The 2010 FOI reforms were part of a broader policy change in government to encourage proactive publication by agencies, including at the earliest opportunity. A principle of equal public access rather than exclusive individual access is inherent in the Information Publication Scheme and the disclosure log mechanism. A key function of the Information Commissioner is to promote greater openness for the benefit of the public generally. It is always open to an individual applicant, including a journalist, to make special arrangements with an agency about the scope, form and time of access. It is not part of the Information Commissioner's role to script or endorse individual arrangements, beyond monitoring their consistency with the FOI Act.

On the other hand, the Commissioner is aware that FOI works more smoothly and effectively if there is cooperation and trust between agencies and applicants. This is important when the need arises to discuss the scope of a request or to agree upon an extension of time to process a request. There is a risk that a dispute about the date of



disclosure on a particular occasion will flow over and create an unhealthy climate for efficient FOI processing in the future.

Agencies and ministers are encouraged to consider this issue and to decide upon the approach they will adopt. It is advisable that a guiding principle or practice is adopted by each agency and minister as to when accessed information will be published under s 11C, so that applicants know of that practice in advance and that they will be treated similarly to other applicants. There is also a case for consistency across government in publication practices. Two possible approaches that should be considered are:

- An agency or minister could adopt the practice of updating the disclosure log on a particular day each week or fortnight. Applicants would thereby know in advance when publication would occur, and the public would also know when to search for newly published information. This may also benefit agencies in allocating appropriate resources to disclosure log publication to ensure adequate compliance with s 11C.
- Agencies and ministers could invite applicants to propose or negotiate the date of publication, provided this occurred within the ten working days stipulated in s 11C. The discretion would remain with the agency or minister to decide the actual date, but they would better understand any special concern of the applicant.

#### **Consultation questions**

Q15. Should agencies and ministers adopt a practice of updating their disclosure log on a particular day each week or fortnight?

Q16. What other steps should be adopted to ensure a consistent and suitable approach across government to disclosure log publication?

## Annexure A – Draft template disclosure log

### Freedom of information disclosure log

*Publicly available information released following an FOI access request*

The [agency/Minister] is required by the *Freedom of Information Act 1982* s 11C to publish a disclosure log on its website. The disclosure log lists information which has been released in response to an FOI access request. This requirement has applied since 1 May 2011.

The disclosure log requirement does not apply to:

- personal information about any person if publication of that information would be 'unreasonable'
- information about the business, commercial, financial or professional affairs of any person if publication of that information would be 'unreasonable'
- other information covered by a determination made by the Australian Information Commissioner if publication of that information would be 'unreasonable'
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that would need to be made to delete the information listed in the above dot points.

The information described in this register has been released by [agency/Minister] under the *Freedom of Information Act 1982* and is available for public access.

A link is provided if the information can be downloaded from this website or another website.

Information that is not available on a website may be obtained by writing to [address]. A charge may be imposed to reimburse the **agency/minister** for the cost incurred in copying or reproducing the information or sending it to you. There will be no charge for the time spent by the **agency/minister** in processing the FOI request that led to this information being made available. You will be notified if any charge is payable and required to pay the charge before the information is provided.

There may be documents in the disclosure log that are currently not available in html format. If you are unable to read the format provided please contact [insert FOI contact details]. We will try to meet all reasonable requests for an alternate format of the document in a timely manner and at the lowest reasonable cost to you.

Disclosure log no.	Date information listed in disclosure log	Summary of FOI request received by agency/minister	Description of information released under this disclosure log (and whether released in full or part)	Link to information that can be accessed from this website or another website*	Date when information may be deleted from a website	Other information**

\* If appropriate, indicate format and file size (or number of pages)

\*\* Other information – for example, if information is no longer available or has been revised by the agency or minister.

## **Annexure B — Sections 11C and 8(2)(g) FOI Act**

### **Section 11C Publication of information in accessed documents**

#### *Scope*

- (1) This section applies to information if an agency or Minister gives a person access to a document under section 11A containing the information, except in the case of any of the following:
  - (a) personal information about any person, if it would be unreasonable to publish the information
  - (b) information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information;
  - (c) other information of a kind determined by the Information Commissioner under subsection (2), if it would be unreasonable to publish the information;
  - (d) any information, if it is not reasonably practicable to publish the information under this section because of the extent of any modifications to a document (or documents) necessary to delete information mentioned in paragraphs (a) to (c).
- (2) The Information Commissioner may, by legislative instrument, make a determination for the purposes of paragraph (1)(c).

#### *Publication*

- (3) The agency, or the Minister, must publish the information to members of the public generally on a website by:
  - (a) making the information available for downloading from the website; or
  - (b) publishing on the website a link to another website, from which the information can be downloaded; or
  - (c) publishing on the website other details of how the information may be obtained.
- (4) The agency may impose a charge on a person for accessing the information only if:
  - (a) the person does not directly access the information by downloading it from the website (or another website); and
  - (b) the charge is to reimburse the agency for a specific reproduction cost, or other specific incidental costs, incurred in giving the person access to that particular information.
- (5) If there is a charge for accessing the information, the agency or Minister must publish details of the charge in the same way as the information is published under this section.

#### *Time limit for publication*

- (6) The agency or Minister must comply with this section within 10 working days after the day the person is given access to the document.

(7) In this section:

**working day** means a day that is not:

- (a) a Saturday; or
- (b) a Sunday; or
- (c) a public holiday in the place where the function of publishing the information under this section is to be performed.

## **Section 8 Information to be published – what information?**

...

(2) The agency must publish the following information:

...

- (g) information in documents to which the agency routinely gives access in response to requests under Part III (access to documents), except information of the following kinds:
  - (i) personal information about any individual, if it would be unreasonable to publish the information
  - (ii) information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information
  - (iii) other information of a kind determined by the Information Commissioner under subsection (3), if it would be unreasonable to publish the information