



Mr Nigel Waters
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Dear Nigel

Thank you for your letter of 20 November 2011, and for your sentiments about the success of the Information Policy Conference hosted by the Office of the Australian Information Commissioner (OAIC). Though we do not agree with most of the concerns you express about the importance attached to privacy protection since the OAIC was established, we are pleased that you have set out the APF's concerns so that we can respond to them in writing.

It will be simpler if we respond to the issues in the same order as in your letter.

1. We disagree that the conference addressed two of the three OAIC functions (information policy and freedom of information) but not the third (privacy). The conference theme, program and speaker faculty were directed to one only of the OAIC's functions – information policy. Freedom of information was mentioned prominently by the Minister in the opening speech and by the FOI Commissioner in his brief report on the OAIC's development, but otherwise was mentioned only in passing. Privacy was equally mentioned by many speakers as an important element of information management and policy. It was also addressed through an update on privacy developments delivered by the Privacy Commissioner who specifically noted its place in information policy.
2. You express the view that 'the "new" government information policy function is not appropriate for an independent rights/watchdog body'. This was Parliament's design, but naturally we support it and believe that the wisdom of this step has been demonstrated in the development and work of the OAIC in the first year. We have been struck by the degree of interest in and outside government for the more comprehensive focus that we can bring to information policy issues. The fact that our first information policy conference was 'sold out' and attended by close to 300 people is an indication of this interest. We have had similarly strong support for many of the other initiatives that we have commenced over the past year that have addressed all aspects of information management in government. Another exciting element of the new information policy framework is the creation of an independent Information Advisory Committee to provide advice to the OAIC and government on information policy and practice. In short, we feel that Australia is at the forefront in implementing a new approach to information policy rather than going backwards.
3. We do not understand the view you put that a privacy function sits uneasily with an information policy function. Nor do we agree that there is a direct conflict between an open government/open data program and privacy protection. There are a host of reasons why information should be shared and re-used, and there are equally a host of reasons why

certain categories of information should be protected or managed securely. Just as there is a need to protect personal information there is equally a need to protect information relating to national security, law enforcement, business confidentiality, budgetary management and so on. In the Parliament's view (which we share) the best way of striking an appropriate balance between the competing objectives and tensions is to integrate all aspects of information policy and management in a comprehensive new scheme.

We note with interest a recent comment from the NSW Information Commissioner that 'We have received an overwhelming response from right to information and privacy practitioners keen to attend our "Overlap between information access and privacy rights" seminar on 15 December 2011. The seminar was fully subscribed within 40 minutes of the invitation being issued.' That example confirms our broader experience that the integration of open government policy and privacy protection is a welcome step that has accentuated rather than marginalised the importance of privacy issues.

4. It follows that we disagree with your suggestion that the OAIC should affirm 'that for personal information, the otherwise admirable default presumption of openness should be reversed'. That would contradict the larger message we have sought to convey that there is a need to identify that information management is a complex and important task in which an appropriate balance has to be struck between a range of different principles and practical considerations. Nor does your suggestion sit easily with the legislative framework for information management that sets out the criteria that the OAIC must apply. We refer, for example, to the objects clause in the *Freedom of Information Act 1982* ss 3, 3A; to the personal privacy exemption in the FOI Act (s 47F) which provides that personal information is exempt only if it would be an 'unreasonable disclosure' and would be contrary to the public interest; to the requirement in the *Privacy Act 1988* s 29 that the OAIC 'have due regard for ... societal interests that compete with privacy, including the general desirability of a free flow of information ... and the recognition of the right of government and business to achieve their objectives in an efficient way'; and to the detailed requirements of the Information Privacy Principles and National Privacy Principles as to how personal information should be managed.
5. We reject your assessment that OAIC publications tend to mention privacy only as a secondary constraint or factor and do not reflect 'the full "information life cycle" scope of privacy principles'. It is true that some publications make only a brief reference to protecting personal information and do not elaborate on the other points you mention (such as secondary uses, collection limitation, data minimisation and proportionality). In the same vein, most of our publications contain only a brief summary of other relevant and crucial considerations, such as national security, archival retention, IT security and administrative efficiency. The depth of analysis is a style and presentation issue, not a prioritisation issue. We feel that this is clear upon a fair reading of our publications. OAIC publications that are specifically focussed on privacy issues appropriately go into the topic in greater depth.

6. You believe that 'a strong privacy message has been an unintended casualty' of the new information policy scheme; you seek the OAIC's 'reassurance that there is no deliberate playing down of the full importance of privacy principles'; and you urge that we 'maintain the Privacy Commissioner brand in public communications'. We reject this premise. The privacy promotion role of the former Office of the Privacy Commissioner has continued unabated in the OAIC. This is clear from the annual report, public submissions to government, and media and other statements reported on the OAIC website. It should be apparent to anyone following the work of the OAIC that each of the three Commissioners has a distinct public profile. Indeed, the media has reported statements by the Privacy Commissioner far more numerously than statements by the other two Commissioners.

7. We were surprised at your comment that we have not 'expressly recognised civil society as stakeholders'. It is true that we have not used the term 'civil society'. It is a term that has less currency in Australia than in some other countries. But on numerous occasions and frequently in publications we speak about 'the community', 'the public', 'non-government organisations' and specific groups such as academics, the media and business. Again, we think a fair analysis of our work will show that we have emphasised the importance of engagement and consultation between government and external stakeholders, and have ourselves respected that principle. Indeed, in defining open government we have made the point that 'civic engagement and collaboration' is a third theme along with 'public access to government held information upon request' and 'open data through proactive publication of public sector information'.

We are happy to follow up on the suggestion at the end of your letter to hold further discussions about your concerns. We have no objection to this reply being posted on the APF website if you wish to follow that practice on this occasion.

Yours sincerely



John McMillan
Australian Information Commissioner



Timothy Pilgrim
Privacy Commissioner