The Fairbane Group
e: office@fairbane.com.au | w: www.fairbane.com.au | t: +61 (0)408202401
Fountain Plaza, 17a/158 The Entrance Rd, Erina NSW 2250 | PO Box 5060 Erina Fair 2250
SYDNEY | MELBOURNE | BRISBANE | SINGAPORE | TORONTO

23 July 2020

Office of the Information Commissioner
GPO Box 5218
Sydney NSW 2001

Sent by email to: foidr@oaic.gov.au

Dear Sir/Madam,

DISCUSSION PAPER ON THE REVIEW OF FEDERAL FREEDOM OF INFORMATION LAWS - PART 9 OF THE FOI GUIDELINES (INTERNAL REVIEW)

We would like to extend our gratitude for the opportunity to provide a discussion paper to the ***Part 9 of The FOI Guidelines (Internal Review)*** by the Australian Office of the Information Commissioner.

ABOUT FAIRBANE

The Fairbane Group ("Fairbane") is a consulting and private investment group that provides advice and opinions on policy issues to various industry groups and interested stakeholders. Fairbane is the successor entity to a series of consulting and investment groups that date back to the early 2000s. With experience in finance, legal services, accounting, management consulting, our operations include in Australia, the United States of America, the United Kingdom of Great Britain, Canada, Dubai, as well as parts of South-East Asia and Europe.

Fairbane is fortunate enough to have had members work with organisations such as: Deloitte, Ernst & Young, the Australian Government in the Departments of Defence, Trade, Health and Aged Care, the United Kingdom Departments of Defence, and National Health Service, various

medium to large companies in industries ranging from Finance, Aerospace, Biotechnology, Communications, Computing, Construction and Resources.

Fairbane is a truly future-oriented organisation with a unique vision for the world. Fairbane's vision is to push the boundaries and reach out to the horizons of scientific and technological boundaries and do so by ensuring there is the freedom and flexibility available to individual businesses and their industries as a whole to compete and prosper.

At Fairbane, the world in the year 2020 is seen through the lens of what the world could and may well be like in the year 2100 and 2200. This means encouraging development of new ideas and providing a foundation for the new technologies that come from them.

Fairbane provides advice to various companies and individuals in the media industry, primarily in the emerging sub-markets and emerging technologies and platforms, particularly start-ups. Our expertise comes from a management consulting perspective and from legal advice to clients and partners, and policy advice to various entities.

REVIEW OF THE FOI GUIDELINES (INTERNAL REVIEW)

After having read the proposed consultation draft, Fairbane is broadly supportive of the proposed draft in its current form. The main concerns arise out of the following issues:

1. Weighing the needs of the public interest in retaining the volume of information that is currently retained by Governments (and applicable organisations) against the needs of the private citizens, both in terms of privacy and in terms of the economic cost to the citizen as a taxpayer funding the retention and processing of their information.
2. The extent to which determination of facts and procedural issues related to those determinations and any subsequent analysis, consideration and reviews (both internal reviews and later judicial reviews) would have on the expediency of meeting the overarching needs of the aggrieved party and the administration of justice.

3. The extent to which private citizens subordinate their rights (and in particular privacy rights) by way of contractual obligations with Government or Private entities.
4. The extent to which private citizens are able to prosecute any claims to privacy under any contractual or tortious liability in respect of Government or Private entities.

The overarching issue of privacy and its place in the modern common law system is a vexing one to say the least. The absence of a tort of privacy and the absence generally of privacy as its own specie of law has become more of a pressing issue in the 21st century. This is understandable given that in the 17th century, even the rise of equitable jurisdictions from common law systems would not have been able to contemplate a world 400 years later that comprised of handheld devices that played visual, audio and other media and that could be transmissible across the world.

However, a legislated system of privacy laws does not of itself justify further administration by the state over the privacy rights of its citizens. In fact, the best way to displace the civil freedoms of the individual is to hand the administration of their personal information in the hands of a third party to whom "governing those citizens" is something that they [governments] are increasingly accustomed to and unsettlingly comfortable with.

As corollary to this discussion paper it would be welcoming to see a more streamlined approach to privacy law, one that puts the power back in the hands of the private citizen. This could be achieved through an arbitration system removed from the unnecessarily procedural systems that are currently in place.

Notifying the applicant of an internal review decision

9.46 The agency must notify the internal review applicant of a decision within 30 calendar days of receiving the internal review application (ss 54C(3) and 54D). If the internal review applicant does not receive notice of the internal review decision within 30 days, the principal officer of the agency is deemed to have made and notified a decision on the 30th day affirming the original FOI decision (s 54D(2)). The applicant may then apply for IC review of the agency's deemed decision (see Part 10 of these Guidelines).

9.47 A decision affirming the refusal of access to a document, or deferring access to a document, must include the following particulars specified in s 26:

- the findings on any material questions of fact, referring to the material on which those findings were based and state the reasons for the decision
- the reasons for any public interest factors taken into account
- the name and designation of the person making the decision
- the applicant's review rights, right to complain to the Information Commissioner and the procedures for exercising those rights (this should be included because even if the internal review decision is

It is hard for government agencies and large proprietary entities to fully appreciate the cost to the consumer – and to the citizen – and more over the taxpayer. Weighing up public interest is said to be aggregated across the community as a whole, but how well are such considerations weighed against ideas such as commercial viability? They are not relevant to a decision maker and even in attempting to be empathetic, they cannot equate the hardship suffered by an individual who for example is disabled and the hardship suffered by a small business owner with a family. In both scenarios there are very different types of hardship. But aggregating their burdens is not something that can be reconciled by a decision maker, or any court or tribunal. The outcomes and consequences of such decisions will rarely by satisfying and will almost always be of some sort of compromise.

The difference is the hardship caused to a disabled or disadvantaged person is often remedied with some kind of attention from the state. Usually a financial dispensation for fees, or centrelink payments or community outreach. But what is there for the small business owner – the private citizen? They must continue to work and continue to pay the taxes that support both the courts and the government decision maker with whom they must wrestle through the bureaucracy with as well as any other disadvantaged person that is supported by the taxpayer funded system.

Surely someone, somewhere in the bureaucracy recognises that this system is not sustainable in the long run. More importantly, the psyche of the populous is being further dragged into competing tensions of moral and human rights – the retention and administration of their rights (in this case artificially legislated privacy rights) and the freedom to conduct their affairs with a certain level of appreciable risk that their personal information is relinquished to a host of entities in the course of any one day and they must bear the repercussions. These may be considerations for another discussion, but it is worth mentioning.

Fairbane is of the view, that in technical terms, the current legislation in its current operation is satisfactory enough, notwithstanding that less retention of information and less expansion in the powers and operation of government in people's persona lives is the ideal trajectory. That trajectory is not the one we are on at the present time. The issues relate to efficiency and probity of government data and information management functions and the justification of the cost of undertaking such functions.

It would be heartening to see more attempts to streamline information gathering and retention so as to reduce the extent of freedom of information requests. One would have thought that the reference in section 51 of the Enumerated Powers of the Australian Constitution that "good government" did not implied indicate over-government and that such good government would also mean limitation on both the amount of intrusion into the lives of its citizens as well as limitation on the amount of expense it incurred on their behalf.

We want to again express our gratitude for having an opportunity to comment. We would welcome the opportunity to both write and speak to the issues raised in this paper so any further discussion or public hearing would be gratefully appreciated.

If you have any questions or wish to invite us to talk on any issues, we welcome any further consultation. You can contact us at office@fairbane.com.au.

Yours faithfully

Fairbane

Francois "Frank" Brun
Director
B Bus Com, B Laws (Honours), GDLP, M Laws
The Fairbane Group
www.fairbane.com.au