

7 March 2011

Office of the Australian Information Commissioner Issues Paper
GPO Box 2999
CANBERRA ACT 2600

By email: issuespaper1@oaic.gov.au

Dear Sir/Madam

ISSUES PAPER 1 – TOWARDS AN AUSTRALIAN GOVERNMENT INFORMATION POLICY

The National Film and Sound Archive (**NFSA**) is a statutory authority established by the *National Film and Sound Archive Act 2008*. It is Australia's national audiovisual archive, responsible for collecting, preserving, interpreting and providing access to the nation's moving image and recorded sound heritage (the **National Collection**).

The NFSA has considered the Issues Paper and welcomes this opportunity to comment, particularly about the Draft Principles on Open Public Sector Information (**Principles**).

SUMMARY

The NFSA is concerned that, in view of the broad way that public sector information (**PSI**) is defined in the Issue Paper and the lack of a consistent definition as to what PSI is, many items in the National Collection (e.g. Government owned archival works, digitised/restored works and collection metadata on its databases) could be regarded as PSI.

If so, this raises issues for the NFSA's management of those items as complying with the Principles in this regard would expose it to heightened copyright risks, jeopardise its stakeholder relationships and undermine its revenue raising initiatives. It would also impose a considerable burden on the NFSA's resources, especially in obtaining rights holders' consents to publish legacy material under open, irrevocable licences. This could inhibit the NFSA's ability to conduct its other statutory functions.

The NFSA already contributes considerable resources to maximise access to the National Collection and separate government information. However, it is concerned that the lack of an accepted definition of PSI means that some material may be categorised inappropriately as content which should be made available for access and reuse according to the Principles.

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The NFSA also believes that agencies not subject to the *Financial Management Accountability Act 1997* should be able to apply the Principles selectively, having regard to their particular operational needs and statutory functions.

ISSUES

The NFSA believes the following aspects of the Principles present difficulties for cultural institutions:

1. the absence of a consistent and exclusive definition of PSI; and
2. the resource implications of implementing the Principles.

RECOMMENDATIONS

Many of the NFSA's concerns could be addressed through the formulation of a clear and consistent definition of PSI acknowledging there are certain types of material that should not be regarded as PSI.

In relation to material that is PSI, the NFSA believes that the Principles should acknowledge that resource constraints on publicly funded cultural institutions may inhibit their ability to comply with the Principles and yet fulfil their mandates.

The above issues could be addressed if amending the Principles in the following ways:

1. by providing a whole-of-government definition of PSI which clearly distinguishes content that is not PSI or subject to the Principles; and
2. by minimising the impact on cultural institutions and other agencies in implementing the Principles through taking a coordinated and efficient approach to shared PSI issues.

PSI AT THE NATIONAL FILM AND SOUND ARCHIVE

The NFSA produces or holds content which it considers could reasonably be regarded as PSI, including reports, documentaries, news material, promotional material, policy documents, some business documents, and databases.

The NFSA also produces or holds commercially valuable content which may not be considered to be PSI, including in interpretive texts, commentaries, educational notes, technical documents, research outputs, commercial products and some business documents.

The National Collection

A major concern for the NFSA is that, under the definition of PSI used in the Issues Paper, some items in the National Collection could also be regarded as PSI. These would include audiovisual content, documents and artefacts that:

1. were originally created or commissioned by the Government to promote Government services or policy; or
2. have been maintained, digitised, preserved or restored with government funds.

For the reasons given below, the NFSA believes that the whole of the National Collection should be excluded from the definition of PSI and that access to it should not be subject to the Principles.

ISSUE 1: DEFINITION OF PSI

It is the strong view of the NFSA that a whole-of-government definition of PSI is crucial to further discourse and policy formulation on this issue.

In defining PSI, the Issues Paper refers to similarly defined terms in other sources, including the Organisation for Economic Co-operation and Development (OECD), the *Freedom of Information Act 1982* (Cth) and the *Australian Information Commissioner Act 2010* (Cth). However, it does not acknowledge important qualifications to those definitions.

The OECD definition

The paper observes that a key distinction is that the OECD definition includes information funded by Government. The Government 2.0 Taskforce took a similar approach in partially quoting the same part of the OECD definition.¹ The Taskforce noted that Australia, as an OECD member, contributed and was a signatory to the Recommendation.

Curiously, neither of the papers referred to the complete OECD definition, which sets some significant boundaries around what the Australian Government has agreed at an international level to be PSI. The definition reads as follows (emphasis added in **bold**):

““Public sector information” is broadly defined for purposes of this Recommendation as “information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the Government or public institution”, **taking into account ... legal requirements and restrictions, including intellectual property rights and trade secrets, effective and secure management of personal information, confidentiality and national security concerns, and fundamental principles including democracy, human rights and freedom of information and that, consequently, certain principles contained in this Recommendation regarding in particular openness and re-use, can be applied to a different extent to different categories of public sector information**”²

This complete definition recognises that policies for accessing government information must ensure a balance of interests, including those of cultural institutions and their stakeholders.

The NFSA believes the definition of PSI should be based on the one endorsed by the Australian Government at an international level, which recognises that the “opening” of any additional government information must be subject to public interest exceptions, including those protecting the viability of cultural institutions.

Taking this approach could serve to address the already complex content regulation regime, especially for agencies responsible for licensing content that is subject to a variety of underlying rights, including the rights of third parties. It would also cater to the potential changes precipitated by other reviews and initiatives underway (e.g. the Convergence Review by the Convergence Review Committee), which could impact on the Principles.

¹ *Towards Government 2.0 : an Issues Paper*, 23 July 2009, p 8, <http://gov2.net.au/files/2009/07/Towards-Government-2.0-An-Issues-Paper.pdf>

² *OECD Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*, 2008, p 4, <http://www.oecd.org/dataoecd/0/27/40826024.pdf>

The FOI Act

In defining PSI, the Issues Paper refers to provisions of the FOI Act, which apply the FOI access regime to information held by the Government. However, it does not note that section 13 of that Act specifically exempts the collections of certain cultural institutions (including the NFSA) from that regime.

This exemption recognises that cultural institutions should not be required to provide access to collection material in response to an FOI request. This is because disclosing that material could cause harm by:

1. causing cultural offence and exposing members of Indigenous communities to retribution for failing to protect secret/sacred material from inappropriate viewing;
2. inhibiting voluntary deposits and donations to those institutions and damaging their reputations as trusted repositories; and
3. exposing them to legal claims for breaches of confidentiality and of other restrictions under acquisition-related agreements.

Just as the FOI Act exempts the collections of cultural institutions from its access regime, the Principles should also recognise that those collections should be exempt from its access requirements as well.

The Australian Newspapers Digitisation Program as an ‘example’ of PSI

The Issues Paper showcases many examples of PSI publications, including the Australian Newspapers Digitisation Program at the National Library of Australia.³

The NFSA strongly disagrees that the newspaper articles—especially ones having no connection with Government information—digitised by a Government funded cultural institution should be considered as PSI for free public use and reuse. There is no reason why out of copyright material should be regarded as PSI simply because it was digitised by or for a Government agency.

Without wishing to detract from the enormous public benefit of such an initiative, the NFSA is concerned that the absence of a realistic definition of PSI could lead to similar projects of cultural institutions becoming unsustainable.

In many cases, the legal requirements and restrictions around the rights of third parties make free licensing very difficult from a financial and legal perspective. Furthermore, in some cases, it may not be in the commercial interests of statutory authorities with a mandate to charge fees to give open access to all the material they produce (see Issue 2).

Other definitions of PSI

There are other definitions of PSI that the Issues Paper should consider.

As the issues Paper notes,⁴ the *Intellectual Property Principles for Australian Government Agencies* are “based on the understanding that the purpose for which an agency creates information is relevant to the terms on which it is released.” In light of those principles, the Attorney-General’s Department has drafted guidelines for licensing PSI. These guidelines provide various definitions of PSI, but they essentially describe it as “material with the essential purpose of providing Government information to

³ Chapter 6

⁴ Page 28

the public”, but excluding “material with the essential purpose of artistic expression (e.g. an art work held by a public institution or a film that does not provide Government information)”.

This definition—which limits PSI to material created for the essential purpose of informing the public of government information and excludes most creative works—is not consistent with the open definition used in the Issue Paper, which would seem to apply to all information created, collected, processed, preserved or funded by or for the Government, regardless of the purpose for which it was produced.

The NFSA believes that this definition could lead to large amounts of information being inappropriately treated as PSI and that its inconsistency with other definitions needs to be addressed if agencies are to implement the Principles effectively.

ISSUE 2: RESOURCE IMPLICATIONS

The Issues Paper refers to previous reports and initiatives on government information policy in Australia (including the report of the Government 2.0 Taskforce) tending to support the view that the advantage to the public of making more government information publicly available outweighs any disadvantages. But, unlike some of those other reports, it does not acknowledge that strict compliance with some of those policies will have major resource implications for some agencies, especially cultural institutions.

Impact on revenue-raising

If the NFSA was under a general requirement to publish collection items under open, irrevocable licences, its revenue raising ability would be undermined and it would not be able to sustain its operations.

As part of its role in providing access to the National Collection, and subject to licensing and copyright obligations, the NFSA provides many access services free of charge. Many collection items can be accessed for free through its websites and collection database, access centres, exhibitions, screenings and National Program events. Others are made available for free educational use through education sector partnerships. Where appropriate, and subject to rights holders giving consent, the NFSA already makes some of this material available under Creative Commons licences.

However, the NFSA also engages in revenue raising activities (e.g. operating a cinema and shop in its Canberra headquarters), as it is expected to do in performing its statutory functions. Project 6 of the Government 2.0 Taskforce acknowledged that budgetary pressures require cultural institutions (like the NFSA) to develop pricing policies to supplement their revenue sources notwithstanding the public benefit of free access.⁵

Principle 7 - Web accessibility standards

This principle states that information should so far as possible be published in a format that is open, machine-readable and searchable/indexable by common web search applications.

The NFSA agrees with this principle but acknowledges that there are difficulties in making all of its web content compliant with website accessibility standards. While most of the content on its corporate website and on the *australianscreen online* website does comply, there is some content that does not yet comply. This includes video clips on *australianscreen online* (totalling around 2000) and content on inherited websites that are currently maintained in an archival state only.

⁵ John Quiggin, *Project 6: The value of Public Sector Information for cultural institutions*, p 16, <http://gov2.net.au/projects/project-6/>

The NFSA is liaising with the Australian Government Information Management Office to make more of its content compliant, but there are resource constraints and technical difficulties that pose challenges in this regard.

The NFSA believes that Principle 7 should have regard to the practical difficulties like these that agencies may face in implementing this principle.

Principle 8 – Appropriate charging for access

This principle states that, the cost of access is not unreasonably restrictive, agencies should not charge more than the additional marginal cost of providing access or not impose charges at all except as authorised by law.

The NFSA believes that this principle needs to acknowledge that agencies not subject to the *Financial Management Accountability Act 1997* may sometimes need to impose reasonable charges for accessing certain information in order to fulfil their functions.

As noted above, the NFSA provides many access services free of charge. However it does charge usage fees for the commercial or public use of NFSA controlled material from the National Collection, including some orphan works (where the owner cannot be identified or located). These charges are made under section 6(4) of the *National Film and Sound Archive Act 2008*, which provides the NFSA can impose charges for performing its functions.

Charging usage fees generates revenue that enables the NFSA to acquire, preserve and make its collection available. It also moderates demand for access to the collection (particularly for commercial use) and ensures that the economic value of the collection is appreciated.

Usage fees are based on fair market rates and are in addition copying and handling fees. However, they are not generally charged for copies of collection material provided for private use, supplied as reference copies, or where permission for use has been given by the copyright owner. Fees may also be discounted or waived for some uses, especially uses promoting the NFSA, personal use and research.

The NFSA can also impose charges for other services including:

1. copying or lending items in the National Collection, including film prints
2. selected exhibitions, national programs and screenings, and
3. ticketed cinema screenings and performances.

These fees may also be discounted or waived where this meets the NFSA's strategic objectives.

The NFSA believes that, to the extent that any of these charges relate to the use of material including PSI, Principle 8 should have regard to the necessity for relevant agencies to impose appropriate charges in excess of cost recovery expenses.

Principle 9 – Clear reuse rights

The administrative burden in obtaining necessary consents (and renegotiating existing consents) from third party rights holders for irrevocable, open licences places a large burden of risk on the Government.

The NFSA's relationship with its stakeholders would also be compromised as rights holders would not be prepared to deposit or donate items to the National Collection if it was likely that the NFSA would be required to publish and license them in this way.

FOR MORE INFORMATION

We appreciate the OAIC's consideration of the issues and recommendations outlined in this submission. If you have any questions about this submission, please contact Adam Flynn, Senior Legal Officer, by phone on 02 6248 2056 or by email at adam.flynn@nfsa.gov.au.

Yours sincerely

A handwritten signature in black ink that reads "Ann Landrigan". The signature is written in a cursive, flowing style.

Ann Landrigan
Acting Chief Executive Officer