

# **'Needs to Know'**

Own motion investigation  
into the administration of the  
*Freedom of Information Act 1982*  
in Commonwealth agencies

Report under section 35A of the *Ombudsman Act 1976*

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June 1999



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## EXECUTIVE SUMMARY

1. The *Freedom of Information Act 1982* (the FOI Act) came into force on 1 December 1982.
2. In 1983, following consideration by the then Government of a report by the Senate Standing Committee on Constitutional and Legal Affairs, the Act was amended to give the Ombudsman a legislative role to monitor, and to act as rapporteur to the Act. The Ombudsman also had a role to assist FOI applicants in reviews before the Administrative Appeals Tribunal.
3. History shows that because of limited staffing resources, the Ombudsman was not able to fulfil the legislative requirements to monitor administration of the Act and the Act was further amended in 1991 to limit the role of the Ombudsman to the investigation of complaints about FOI.
4. In the absence of any agency having legislative responsibility for oversight of administration of the FOI Act and mounting material to suggest a decline in understanding within government agencies of the provisions of the Act, I decided to conduct an 'own motion' investigation into administration of FOI in Commonwealth agencies.
5. My investigation included visits by Ombudsman officers to a wide range of Commonwealth agencies to review, 'first hand', FOI administration. This review identified widespread problems in the recording of FOI decisions and probable misuse of exemptions to the disclosure of information under the legislation. This was more evident in agencies which receive FOI requests for government policy or decision making information than in agencies which typically deal with requests for personal information.
6. Problems were also identified in other aspects of FOI administration, including:
  - disclosure of personal information;
  - authorisations;
  - FOI training;
  - records management; and
  - completion of section 8 and 9 notices.
7. The report makes a number of recommendations for improvement in the administration of FOI within agencies and in other cases supports the conclusions and recommendations contained in the joint Australian Law Reform Commission; Report No 77, Administrative Review Council; Report No 40; Open Government: a review of federal *Freedom of Information Act 1982* (ALRC/ARC Report).

8. In particular, the report endorses the need for an agency to be given responsibility and resources for the ongoing oversight of FOI administration.

9. The report also highlights the increasing problems being encountered by agencies in recordkeeping and encourages the government to give early consideration to ALRC/ARC Reports No 77 and 40 and ALRC Report No 85 (Review of the *Archives Act 1983*).

10. It is recommended that:

1. **Where practicable, agencies adopt a centralised approach to the management of FOI, including decision making.**
2. **Agencies review procedures for the disclosure of information to encourage, where appropriate, the public disclosure of information without the need for recourse to the FOI Act.**
3. **Agencies introduce internal quality control procedures to ensure compliance with Attorney-General's Department FOI Memorandum No 26, in the completion of Statement of Reasons where exemptions to disclosure of information under the FOI Act are claimed.**
4. **Agencies review current procedures for the disclosure of personal information to provide, as far as is possible, for the informal disclosure of personal information about the applicant, outside the provisions of the FOI Act.**
5. **Agencies undertake a review of Instruments of Authorisation to ensure that Instruments reflect current FOI decision making arrangements.**
6. **Agencies review arrangements and authorisations for internal review of FOI decisions to ensure that the internal review of FOI decisions is discernibly at arms length to the initial decision maker.**
7. **Pending consideration of the ALRC/ARC Report by the Government, agencies review the FOI training needs of FOI practitioners and delegated FOI decision makers and develop appropriate FOI training programs.**
8. **The Attorney-General's Department re-commence the publication of FOI Memoranda and Decision Summaries.**
9. **The Attorney-General's Department make FOI Memoranda and Decision Summaries available on the Department's internet home page.**
10. **Agencies ensure that the Attorney-General's Department FOI**

**Memoranda and Decision Summaries are readily available to all FOI practitioners and decision makers.**

- 11. The Attorney-General's Department amend FOI reporting requirements to require agencies to distinguish between FOI requests for personal information and other information.**
- 12. The Attorney-General's Department identify a suitable software package for use by agencies in the management of FOI.**
- 13. Agencies review current practices for the recording and reporting of FOI activity to comply with Attorney-General's Department FOI Memorandum No 20.**
- 14. The statutory time limit for responding to FOI requests not be reduced from 30 days until such time as there is a reasonable prospect of agencies being able to retrieve the majority of requested information more quickly. Further consideration should then be given to reducing the time limit as recommended by the ALRC/ARC report.**
- 15. The Government give priority to the consideration of the matters and recommendations contained in ALRC/ARC Reports No 77 and 40 and ALRC Report No 85 in relation to Records Management.**
- 16. Agencies undertake a review of section 8 and 9 notices to better reflect the guidelines contained in Attorney-General's Department FOI Memoranda No 24 and 25.**
- 17. That the ALRC/ARC recommendation that no application fee be charged for access to personal information be adopted.**
- 18. Agencies introduce quality control procedures to monitor the notification of charges for FOI requests to ensure that charges notified are reasonable and within the provisions of FOI (Fees and Charges) Regulation No 4.**
- 19. The Government give priority to consideration of the matters and recommendations contained in this report together with ALRC/ARC Reports No 77 and 40 and ALRC Report No 85.**

## 1. INTRODUCTION

### Background

1.1. The FOI Act came into force on 1 December 1982 and was the first of its kind to be introduced by a government based on the Westminster traditions. The Act was one of a package of reform legislation including the Ombudsman Act, the Administrative Appeals Tribunal Act, the Privacy Act and the Administrative Decisions (Judicial Review) Act. Together these four pieces of legislation established a system designed to enable the public to gain the greatest possible access to government information and to obtain a review of administrative actions.

1.2. On introduction, the FOI Bill received bipartisan support, heralding increased transparency and accountability in government processes and decision making.

1.3. To further re-enforce the ideals of openness and accessibility to information, the FOI Act creates and promotes a general right of access to information held by government agencies, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private or business affairs of persons in respect of whom information is collected and held by government agencies.

### *Monitoring Arrangements for the Administration of FOI*

1.4. The following outlines the history of legislative arrangements for the ongoing monitoring of the administration of FOI in Commonwealth agencies.

1.5. The FOI Act came into force on 1 December 1982. It is clear from the report by the Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978, that the Senate Standing Committee and subsequently Parliament, intended that the Act provide mechanisms for the ongoing scrutiny and oversight of administration of the FOI Act.<sup>1</sup>

1.6. To effect these mechanisms, the *Freedom of Information Amendment Act 1983* repealed the previous section dealing with complaints to the Ombudsman (s57) and substituted a new Part VA (ss52A-F), the main provisions being:

- the Ombudsman was authorised to investigate complaints about the actions of agencies in exercising powers or performing functions under the FOI Act (s52B);

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<sup>1</sup> Senate Standing Committee on Legal and Constitutional Affairs; Report On the Freedom of Information Bill 1979 and aspects of the Archives Bill 1978; 1979; Chapter 29.



- the Ombudsman was required to provide details in annual reports of complaints made to the Ombudsman about FOI matters and the investigation of these complaints (s52D);
- the Ombudsman would have a general advisory and critical functions role with respect to the FOI Act (s52D(3)(b));
- if investigations uncovered misconduct by an officer, a report was to be made to the principal officer of the Department or the Minister and the Public Service Board was to be informed (s52D);
- the importance of the Ombudsman's role in relation to FOI was recognised by a legislative provision requiring that a Deputy Ombudsman be designated as responsible for FOI matters (s52C); and
- the Ombudsman was authorised to represent, or arrange for the representation of, an FOI applicant before the AAT.

1.7. In the Ombudsman's Annual Report 1983-84, the then Ombudsman, Professor J E Richardson in commenting on the operation of the Act<sup>2</sup>, said:

Because of these staffing problems, I have been unable to devote staffing resources to the 'monitoring' function required by s52D(3)(b) of the FOI Act. I am therefore unable to include, in this Report, observations on the operation of the FOI Act during the year or recommendations on ways in which public access to official documents might be better secured, other than those impressions which have been gained during the investigation of complaints and processing of requests to my office.

1.8. Professor Richardson went on to comment that because of staffing resources:

I have felt unable to take on several requests for assistance before the AAT that I believe met the threshold requirements of s52F of the FOI Act, and have done little to inform the public of the services the FOI Act directs me to provide.

1.9. In December 1987, the Senate Standing Committee on Legal and Constitutional Affairs reported on the operation and administration of the FOI Act.<sup>3</sup>

1.10. At paragraph 17.25, the Committee commented:

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<sup>2</sup> Commonwealth Ombudsman Annual Report 1983-1984;p.25.

<sup>3</sup> Senate Standing Committee on Legal and Constitutional Affairs; Report On The Operation And Administration Of The Freedom Of Information Legislation; December 1987; p.250.

The Committee does not believe that the Ombudsman should continue to have the role of monitor and rapporteur with respect to the FOI Act. The various aspects of this role appear to the Committee to be unnecessary.

1.11. At paragraph 17.28 of its report, the Committee further commented:

In fact, the Ombudsman had not performed the functions to any significant degree, largely because of a lack of resources. Other means have developed to fill any resulting gap. For example, the FOI Inter-Agency Consultative Committee has largely assumed the role envisaged for the Ombudsman of gathering experiences of individual agencies and considering freedom of information issues of wider interest. The Attorney-General's Department, which chairs this Committee, disseminates advice and conclusions upon points of general interest to all agencies.

1.12. The Committee went on to recommend repeal of sections 52C and 52D(3)(b) of the Act.

1.13. The *Freedom of Information Amendment Act 1991* repealed s52A-F and inserted new s57 which authorises the Ombudsman to investigate FOI matters, but not to carry out the role of monitor and rapporteur of the Act.

1.14. With repeal of sections 52C and 52D(3)(b), the Act makes no provision for the ongoing day to day monitoring of agency performance in administration of the Act.

### ***Attorney-General's Department***

1.15. Pursuant to section 93 of the Act, the Attorney General is required to report annually on administration of the Act. Sub-section 93(3) also requires the Minister to report upon:

(b) an identification of the guidelines, if any, issued during the year to which the report relates by the Minister administering this Act, or by the Department administered by that Minister, in relation to the manner in which agencies should comply with their obligations under this Act; and

(c) a description of any other efforts by the Department referred to in paragraph (b) to assist agencies to comply with their obligations under this Act.

1.16. The Attorney-General's Department has previously met these responsibilities through the publication of FOI Guidelines, the holding of FOI Practitioner Forums and the issue of FOI Memoranda and FOI Decision Summaries.

1.17. While the above initiatives have served to provide agencies with guidance on FOI administration, the role undertaken by the Attorney-General's Department over the years has not included the day to day monitoring of administration of the Act.

1.18. Further, the Attorney-General's Department ceased to issue FOI Memoranda in 1995 and Decision Summaries in early 1996. This has led to a growing void in the currency of FOI information available to departmental FOI practitioners.

1.19. Because of the diminishing mechanisms to monitor and foster administration of the Act, in my last Annual Report I foreshadowed my intention to further examine the issue of administration of FOI in Commonwealth agencies.

## 2. RELEVANT REVIEWS

### ALRC Report No. 77; ARC Report No 40

2.1. In December 1995, the ALRC, in conjunction with the ARC, presented the report of its review of the FOI Act. The principal aims of the Review were to 'determine whether the FOI Act has achieved the purposes and objectives it was designed to achieve'<sup>4</sup> and to 'recommend changes to improve its effectiveness'<sup>5</sup>.

2.2. The Review concluded that the FOI Act had become an integral part of Australia's democratic framework but considered there was room to improve the Act and its administration.

2.3. The main deficiencies in the operation of the FOI Act identified by the Review were as follows.

- There were no persons or organisations responsible for overseeing the administration of the Act;
- The culture of some agencies was not as supportive of the philosophy of open government and FOI as the Review considered it should have been;
- The conflict between the old 'secrecy regime' and the new culture of openness represented by the FOI Act had not been resolved;
- FOI requests can develop into legalistic, adversarial contests;
- The cost of using the Act can be prohibitive for some;
- The Act can be confusing for applicants and difficult to use;
- The exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act;
- Records management, which is fundamental to the effectiveness of the FOI Act, had not been given sufficient prominence;
- Current review mechanisms could be improved;
- There were uncertainties about the application of the Act as government agencies are corporatised; and

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<sup>4</sup> Australian Law Reform Commission; Report No 77; Administrative Review Council; Report No 40; Open government: a review of the federal *Freedom of Information Act 1982*; December 1995; p.7.

<sup>5</sup> Ibid.

- The interactions between the FOI Act and the *Privacy Act 1988* (the Privacy Act), and the potential conflicts they give rise to, had not been adequately addressed.

2.4. The Review responded to these issues with a range of recommendations aimed at improving the effectiveness of the FOI Act. They included:

- Creation of a new statutory office of FOI Commissioner;
- Revision of the object clause to further promote a pro-disclosure interpretation of the FOI Act;
- Amendments to the FOI and Privacy Acts to ensure the continued smooth operation of the overlap between the two Acts in respect of access to, and amendment of, personal information and to clarify the interaction between the two Acts in respect of the disclosure of third party personal information;
- Retention of the AAT as the sole determinative reviewer of FOI decisions;
- Not applying the FOI Act to the private sector or to government business enterprises that are engaged predominantly in commercial activities in a competitive market;
- Access to an applicant's personal information should be free; and
- Review of the Archives Act to improve APS record keeping and records management.

### **ALRC Report No. 85**

2.5. In May 1998, the ALRC reported on its review of the *Archives Act 1983* (Archives Act). The aim of the review was to 'identify what the basic purposes and principles of national archival legislation should be' and 'determine whether they have been achieved by the present Act'.<sup>6</sup>

2.6. The Commission recommended the introduction of a new federal archival authority to be known as 'National Archives of Australia', with increased functions and powers under the Archives Act for the management and archival of government records.

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<sup>6</sup>ALRC Report No 85; p. 9.

### **3. INVESTIGATION**

#### **FOI Administration Today**

3.1. Each year the Ombudsman's office receives approximately 300 complaints about the way Commonwealth agencies handle requests under the FOI Act.

3.2. Various FOI Annual Reports and Ombudsman Annual Reports have highlighted problems associated with the handling of FOI requests by government agencies. The Administrative Appeals Tribunal (AAT) has also criticised the administration of the Act in its decisions.

3.3. One of the developing trends illustrated in these reports is an apparent decline in understanding within government agencies of the provisions of the FOI Act. This diminished understanding may adversely impact on the objectives of the FOI Act, which are to:

- improve the quality of decision-making by government agencies in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process;
- enable groups and individuals to be kept informed of the functioning of the decision-making process as it affects them and to know the kinds of criteria that will be applied by government agencies in making those decisions;
- develop further the quality of political democracy by giving the opportunity to all Australians to participate fully in the political process; and
- enable individuals, except in very limited and exceptional circumstances, to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is untrue or misleading.

3.4. Against this background, it was decided to conduct an 'own motion' investigation into the administration of FOI in Commonwealth Departments and agencies.

## Investigation Methodology

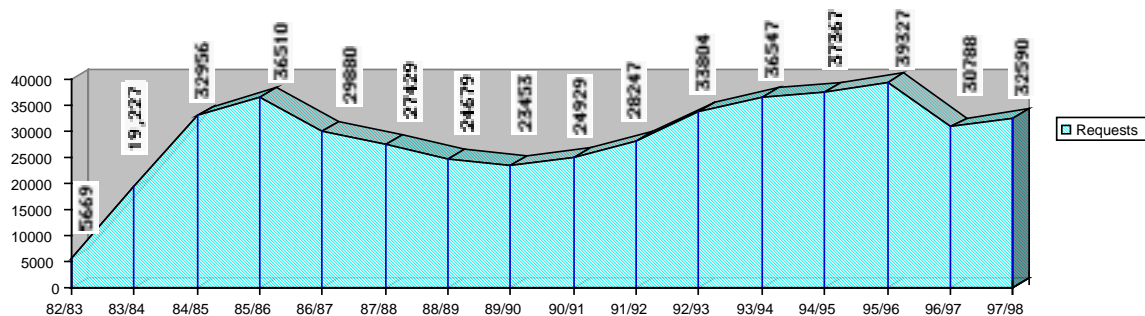
3.5. The investigation was conducted in four phases:

- a statistical overview of operation of the FOI Act;
- a performance audit by Ombudsman officers of FOI administrative processes by the departments and agencies responsible for handling of the majority of FOI requests;
- a desktop review of FOI procedures in smaller departments and agencies; and
- an examination of other related inquiries such as the ALRC/ARC Reports No 77 and 40; 'Open government: a review of the federal Freedom of Information Act 1982.'

## Statistical Overview of FOI Activity

3.6. The FOI Act came into operation on 1 December 1982. After an initial surge in the number of requests (36,510 - 85/86), the number of requests over the period 1986 to 1992 reduced markedly (average 26,436). From 1993, the number of requests steadily increased until 1995/96 when numbers peaked at 39,327.

Chart 1: Total number of FOI requests per annum since 1982-98.



3.7. Although the number of FOI requests reduced to 30,788 in 96/97, this was in the main due to a change of practice within the Australian Taxation Office (ATO). The ATO had previously required persons who wished to obtain certain documents relating to them to apply under the FOI Act for those documents but is now making the documents available outside of the Act. This change in practice reduced the number of formal FOI applications received by the ATO in 1996/97 by 8302, accounting for the reduction in overall FOI numbers from 39,327 in 1995/96 to 30,788 in 1996/97.

## **Performance Audits**

3.8. To gain an appreciation of FOI administration in Departments, two Ombudsman officers visited a wide selection of departmental and agency offices in Canberra, Melbourne, Brisbane and Sydney.

3.9. Departments and Agencies visited included:

Australian Customs	Department of Defence
Australian Federal Police	Department of Health and Aged Care
Australian Postal Corporation	Department of Immigration and Multicultural Affairs
Australian Taxation Office	Telstra Corporation Limited
Centrelink	Department of the Treasury
Comcare	Department of Veterans' Affairs

3.10. The purpose of the visits was to review FOI procedures and to discuss FOI administration with FOI practitioners, with a view to identifying the degree of compliance with the requirements of the Act as outlined in the FOI guidelines and FOI memoranda issued by the Attorney-General's Department.

3.11. The Ombudsman's officers also took the opportunity to identify administrative processes that might constitute best practice.

3.12. In cases where it was evident that the practice was inconsistent with best practice, informal guidance was provided on the spot to the FOI practitioner concerned.

3.13. The audits revealed a number of shortcomings in administrative practices related to the handling of FOI requests and significant variation in practices between the respective agencies visited. In some instances, there appeared to be considerable variation in practice between the different regions of the same agency. Observations arising from the visits are outlined below.

### ***FOI Co-ordination***

3.14. Two main FOI management methods emerged during our review of departmental FOI administration:

- agencies with centralised and/or regionalised specialist FOI Unit(s) responsible for the handling of all FOI matters including FOI decisions;



- agencies with a central and/or regionalised FOI coordinator responsible for the oversight of FOI with FOI decisions being made by managers in line areas;

3.15. In the Ombudsman's view, agencies with a centralised specialist FOI unit with responsibility for the overall management of FOI, including FOI decisions, generally had better FOI administrative practices than agencies with fragmented decision making arrangements, or where decisions resided with line managers.

3.16. It was also apparent that FOI practitioners in centralised units with decision making responsibilities generally had a greater understanding of FOI.

3.17. In agencies where FOI coordinators are removed from the decision making process, a common problem observed is the ongoing training of line managers in FOI. As a result, difficulties are experienced in meeting deadlines and there is inconsistency in decision making.

3.18. While a centralised dedicated FOI Unit may not be necessary for every agency, there would appear to be advantages in the centralisation of FOI management and in particular, FOI decision making.

### ***Recommendation***

- 1. Where practicable, agencies adopt a centralised approach to the management of FOI, including decision making.**

### ***Culture***

3.19. From visits by Ombudsman officers to various agencies and review of agency guidelines, it would appear that most agencies are approaching the issue of FOI in a responsive manner. This suggests that FOI is an accepted element of administration.

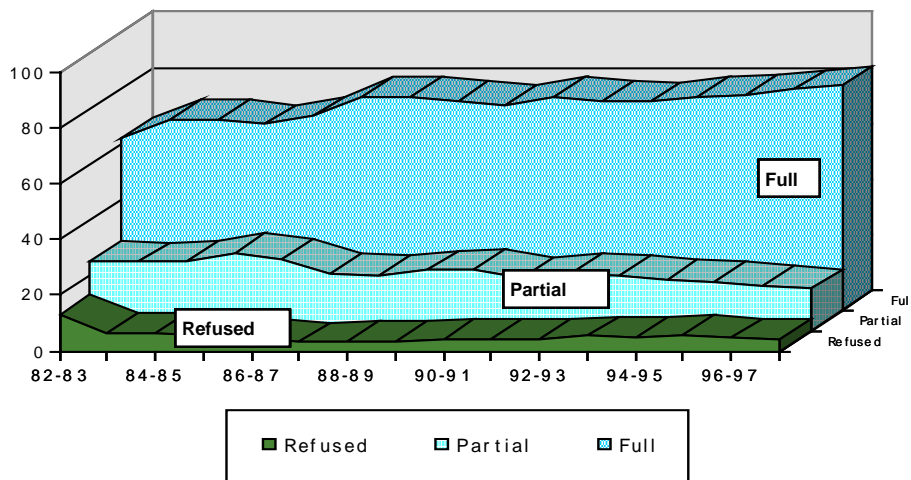
3.20. It was encouraging to find that the majority of FOI coordinators were advocates of 'open government' and access to information. Curiously, although there was general acceptance of the need for openness and access to information, few agencies had mechanisms in place which encouraged or promoted the disclosure of information, without recourse to the FOI Act. One of the factors for this is likely to be because of the protections afforded by the Act. There were also signs in some agencies that some FOI decision-makers continue to experience difficulty with the aim of the Act and have adopted at times a minimalist approach to disclosure through the inappropriate application of exemptions.

3.21. This was more prevalent in agencies which received FOI requests for policy information than agencies which deal in the main with requests for what amounts to personal information about the applicant.

### ***Disclosure Trends***

3.22. The following graph depicts a gradual but sustained growth in the disclosure of information since introduction of the Act. While the increasing trend in disclosure is encouraging, the improvement has largely been achieved in agencies which receive requests predominantly for disclosure of personal information about the applicant.

Chart 2: Percentage of FOI requests granted in full, partial or refused for the period 1982-83 to 1987-98



3.23. The Attorney-General's Department does not collect statistics on the types of FOI requests. However, it is generally accepted that requests for personal information account for in excess of 90% of all FOI activity across the Commonwealth jurisdiction.<sup>7</sup>

3.24. Historically, four agencies, the Department's of Veteran's Affairs, Immigration and Multicultural Affairs, Centrelink and, until recently, the Australian Taxation Office receive 90% of all FOI requests.<sup>8</sup> Collectively, the above agencies disclose approximately 78% of requests in full.

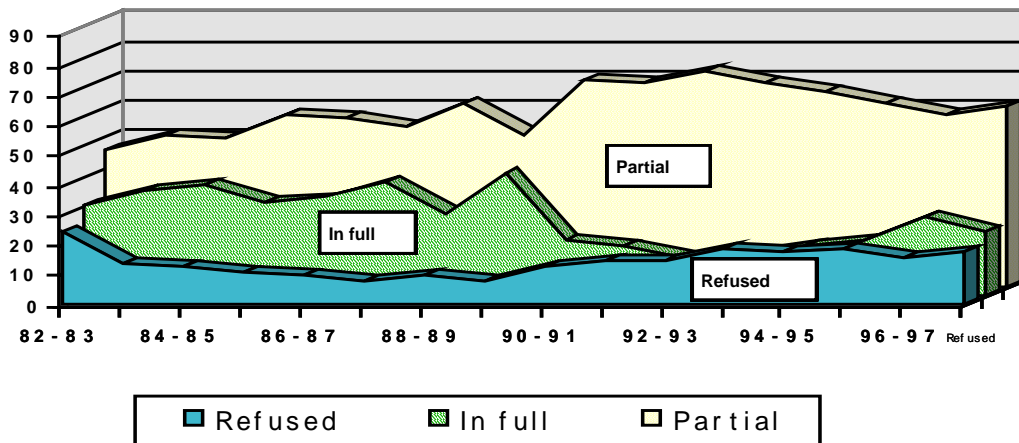
<sup>7</sup> Attorney-General's 1997/98 Annual report on FOI; p.5.

<sup>8</sup> In 1996 the Australian Taxation Office revised procedures to handle requests for personal information outside of the FOI Act.

3.25. As reflected by the following chart, the percentage of partial disclosures is significantly higher once the majority of personal requests are excluded (DVA, Centrelink, DIMA and ATO). This suggests a greater use of exemptions in cases of FOI requests for policy information.

3.26. While there is an apparent decline in the number of full disclosures since 1991, with a similar increase in the number of partial releases for which exemptions were claimed, this may be as a result of amendments to exemption provisions in 1991, particularly in relation to new provisions requiring in certain cases consultation with a third party before release of his or her personal information.<sup>9</sup>

Chart 3: % of disclosures for all agencies minus personal for DVA, Centerlink, DIMA and ATO



**Exemptions**

3.27. Agencies were not subjected to a rigorous performance audit during our investigation, however cases were identified where it was clear that, at times, inappropriate exemptions had been applied.

3.28. For example, in one such case a senior officer applied an exemption on a departmental publication on the basis of ‘commercial interest’ under section 43(1)(c) of the Act. The senior officer did not provide any reasons for his decision and the applicant sought internal review. The publication was subsequently disclosed on review. However, what was not disclosed was that the publication was listed on the Department’s section 9 notice as a document

<sup>9</sup> Freedom of Information Amendment Act 1991.

publicly available for inspection or purchase and therefore available without recourse to the FOI Act.

3.29. A considerable number of cases were identified across agencies where exemption(s) had been applied to documents without the reason(s) for the exemption being recorded or advised to the applicant, other than to simply paraphrase the legislative provision for the particular exemption.<sup>10</sup>

3.30. In many cases, the statement of reasons did not even disclose in any detail the documents to which exemptions had been applied.

3.31. Without the benefit of reviewing recorded reasons for exemption decisions, it was not possible for Ombudsman officers to make a reasonable evaluation of the appropriateness of the exemptions in these cases.

3.32. Our examination of departmental FOI files indicated widespread misunderstanding of the decision recording requirements of s.26 of the FOI Act. The poor recording of decisions also suggests that exemptions may have been inappropriately applied.

3.33. Pleasingly, there were some notable exceptions, in particular the Department of Defence which is providing details of documents and comprehensive reasons for decisions to FOI applicants.

### ***Recommendation***

- 2. Agencies review procedures for the disclosure of information to encourage, where appropriate, the public disclosure of information without the need for recourse to the FOI Act.**
- 3. Agencies introduce internal quality control procedures to ensure compliance with Attorney-General's Department FOI Memorandum No 26, in the completion of Statement of Reasons where exemptions to disclosure of information under the FOI Act are claimed.**

### ***Personal Information***

3.34. Centrelink, the Department of Immigration and Multicultural Affairs and the Department of Veterans' Affairs currently account for about 90% of all FOI activity. The vast majority of requests handled by these three agencies are requests for personal information about the applicant.

3.35. It would appear that the primary reason why each of the above agencies handled the reported volume of requests for personal information under the FOI Act was because it provided an avenue for the exemption of documents, which might otherwise result in the unreasonable disclosure of

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<sup>10</sup> Attorney-General's Department FOI Memorandum No 26

personal information. The Departments also appeared to be concerned with the protection of material obtained in confidence.

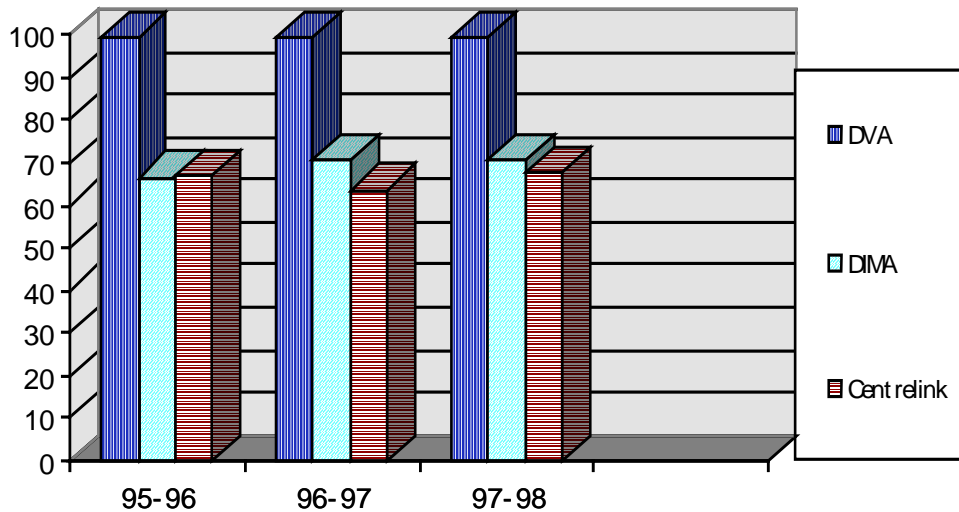
3.36. FOI practitioners told my investigators that often, at the time requests are made for personal information, it is not apparent to the agency whether its records will contain information which may warrant an exemption to be claimed. For these reasons, the agencies have adopted procedures that require requests for personal information to be made under the FOI Act. This also allows the agency to rely upon the protections afforded under the Act against actions such as defamation and breach of confidence which may arise from access to documents.

3.37. It is not possible to make an accurate assessment of the number of requests for personal information received by the three agencies that may have been suitable for disclosure to the applicant without recourse to the FOI Act.

3.38. Nevertheless it would appear reasonable to assume that the greater majority of the FOI requests which were subsequently fully disclosed may also have been suitable for disclosure outside of the Act.

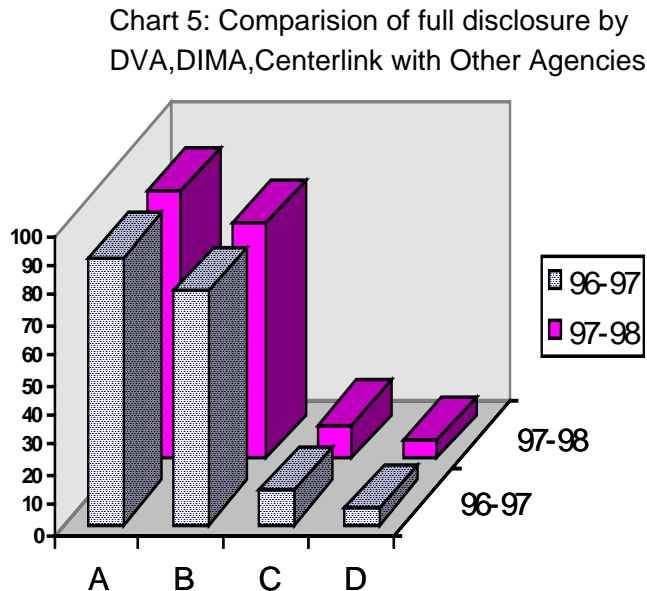
3.39. The following chart shows the number of FOI requests the three agencies handled which were fully disclosed over the last three years and potentially may have been provided to the applicant without recourse to the FOI Act.

Chart 4: Percentage of FOI requests which were disclosed in full by DVA,DIMA,Centerlink 1995-1998



<b>DVA</b>	99.3	99.4	99.6
<b>Centrelink</b>	66.6	70.9	70.7
<b>DIMA</b>	67.1	63.7	67.7

3.40. Chart 6 compares the percentage of full disclosures of all FOI requests received by DVA, DIMA and Centrelink, to the percentage of full disclosure by all other agencies.



A = DVA, DIMA, Centrelink FOI requests as a % of all requests.

B = % of DVA, DIMA, Centrelink FOI requests disclosed in full.

C = All other FOI requests as a % of total requests.

D = % of other FOI requests disclosed in full

3.41. Informal release of information outside of the FOI Act was addressed by the ALRC/ARC in its review of the FOI Act.<sup>11</sup> The ALRC/ARC report refers to s.14 of the FOI Act which makes it clear that the FOI Act is not intended to prevent or discourage disclosure of information, otherwise than as required by the Act, or where an agency can properly do so or are required by the law to do so.<sup>12</sup> The ALRC/ARC report refers to the ATO's submission to its review:

the 'greater proportion' of requests for information lodged with the ATO relate to personal information, for example, copies of tax returns, group certificates and notices of assessment and are provided within 30 days with no deletions.

3.42. The ATO submission noted:

<sup>11</sup> ALRC/ARC Report No 77 and 40; p.38.

<sup>12</sup> Subject to any restrictions imposed by other legislation.

[p]rior to the introduction of the FOI Act the ATO was providing these documents in accordance with its own internal administrative arrangements. The provision of these documents does not add anything to the objective of the FOI Act opening up the business of government nor are they records which an individual would require to be amended.

3.43. The ATO has since revised internal procedures for the handling of requests for personal information so that such requests are handled outside of the FOI Act. This resulted in a 93% reduction in annual FOI activity reported by the ATO (8,893 in 1995-96 dropping to 594 in 1996-97).

3.44. The unnecessary handling of requests for personal information under the FOI Act inflates reported FOI activity and would seem to serve no useful purpose, particularly in agencies which handle predominantly personal information.

3.45. The ALRC/ARC recommended that wherever possible, agencies should release information quickly and informally, outside of the provisions of the FOI Act. This approach is endorsed.

### ***Recommendation***

**3. Agencies review current procedures for the disclosure of personal information to provide, as far as is possible, for the informal disclosure of personal information about the applicant, outside of the provisions FOI Act.**

### ***Authorisations***

#### ***General***

3.46. On introduction of the FOI Act, guidance was provided through Attorney-General's Department FOI Memorandum that set out government policy on the classification level of FOI decision-makers.<sup>13</sup> While not being prescriptive, the government policy was that decisions to release documents should be devolved to as low a level of responsibility as is reasonable, with decisions concerning the denial of access to information being taken at a senior level.

3.47. The reason government policy restricted decision-making on the denial of access to documents to senior levels was to limit the number of people who were able to refuse disclosure, thereby encouraging disclosure at lower levels of responsibility.<sup>14</sup> The policy also recognised the importance of

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<sup>13</sup> Attorney-General's Department FOI Memorandum No 45.

<sup>14</sup> Senate Standing Committee on Constitutional and Legal Affairs Report on FOI Bill 1978 and aspect of Archives Bill 1979; para. 9.18.

some types of information and the attendant need for senior level consultation.

3.48. Although there has been a departure from the initial government policy, it is evident that there has been a gradual and sustained decline in the number of requests that are refused or only partially granted. Similarly, there has been an increase in the number of requests granted in full (see Chart 2).

3.49. During the course of the investigation, Ombudsman officers also took the opportunity to review authorisations for FOI decision-making of the agencies they visited. The review indicated that there was considerable departure from the above policy.

3.50. While some agencies have delegated all FOI decision-making only to very senior levels (SES), other agencies have taken the opposite approach and have delegated all FOI decision-making to more junior levels (ASO4-ASO6). This approach is more prevalent in agencies that have established specialist FOI units.

3.51. A number of Instruments of Authorisation were also quite old and did not reflect current arrangements.

3.52. In the circumstances, there would not appear to be sufficient cause to interfere with the arrangements agencies have in place for FOI authorisations. However, I note that many of the complaints to my office concern delay at the more senior levels and there would be benefit in agencies reviewing authorisations with this in mind.

### ***Recommendation***

#### **4. Agencies undertake a review of Instruments of Authorisation to ensure that Instruments reflect current FOI decision making arrangements.**

### ***Internal Review***

3.53. Currently, an applicant who is unhappy with the outcome of an FOI decision may apply for an internal review of that decision by the agency. If, after the internal review, the applicant remains dissatisfied, he or she may apply to the Administrative Appeals Tribunal (AAT) for external review. While the person may also complain to the Ombudsman about the outcome of an FOI application, the Ombudsman is only empowered to make recommendations to the agency concerned.

3.54. It is extremely important that agencies have in place effective review mechanisms which ensure an objective, fair and timely merits review of FOI decisions.

3.55. A number of larger agencies with specialist FOI units visited by Ombudsman officers, have established internal review procedures in such a



way that review decisions are made within the specialist FOI unit. Hence, it is not uncommon for one FOI practitioner to review the initial FOI decision of a colleague in the same unit. Ombudsman officers were advised that care is taken by the review officer and the initial decision maker not to discuss the review to ensure an arms length, impartial internal review decision.

3.56. However, while recognising the benefits of an internal review being conducted by a specialist FOI practitioner, review by another officer from the same FOI unit which made the initial decision may be viewed by some applicants as not being a truly impartial and objective reconsideration of their case. This approach also limits the opportunity for the agency to quality control FOI decisions and identify and correct systemic problems with its own decision-making processes.<sup>15</sup>

3.57. A number of cases were also observed where the initial FOI decision maker had been tasked with preparing a draft decision for an internal review. In these cases, although the initial decision maker did not make the internal review decision, it is clearly inappropriate and contrary to administrative law principles for the initial decision maker to have any direct involvement in the internal review.

### ***Recommendation***

## **5. Agencies review arrangements and authorisations for internal review of FOI decisions to ensure that the internal review of FOI decisions is discernibly at arms length to the initial decision maker.**

### ***FOI Training***

3.58. Of the agencies visited, only half of the FOI practitioners (includes FOI coordinators and decision makers) had attended some type of formal FOI training. Few practitioners had undertaken training during the past three years. In other cases, knowledge of FOI had been acquired solely 'on the job.'

3.59. Our officers found wide variation in FOI administration practices between agencies and in some cases within the same agency. In cases where the practices were inconsistent with the FOI Act or FOI Memoranda, it was not unusual for the FOI practitioner or decision makers to have received little or no formal training in FOI.

3.60. The Australian Government Solicitor (AGS) provides a number of FOI training courses and FOI training is also available from some tertiary institutions. While both of these training options are used by agencies from time to time, FOI training is generally ad-hoc and accorded a low priority.

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<sup>15</sup> Better Decisions para 6.49.

3.61. The ALRC/ARC report canvasses the need for a coordinated approach to FOI training and recommends that the new proposed office of FOI Commissioner should be responsible for the provision of FOI training.<sup>16</sup> The variation and inconsistency in FOI practices observed by our officers during this investigation supports the need for a coordinated approach to FOI training.

3.62. Should the Government appoint an FOI Commissioner, that office should also have responsibility for FOI training standards and monitoring of ongoing performance. Alternatively, if the Government elects to give responsibly for oversight of the Act to another body, I consider that body should have similar responsibility.

### ***Recommendation***

**6. Pending consideration of ALRC/ARC Report by the Government, agencies review the FOI training needs of FOI practitioners and authorised FOI decision makers and develop appropriate FOI training programs.**

### ***FOI Guidelines***

3.63. Most agencies have in place guidelines for the administration of FOI, however there is wide variation in the quality of the guidelines and in some cases the guidelines have become outdated. A small number of agencies have progressed to comprehensive plain English guidelines that are available in print and electronic forms.

3.64. The lack of uniformity in agency guidelines on substantive issues of FOI is of concern and is likely to be having some adverse effect on FOI administration. In this regard, the ALRC/ARC report recommended that an Office of the FOI Commissioner be responsible for the publishing of FOI guidelines. Again, this role should be undertaken by whichever body is given oversight of the FOI Act.

3.65. Until early 1997, FOI Memoranda and Decision Summaries issued by the Attorney-General's Department were the primary means for updating the knowledge of FOI practitioners and their agencies. Selected material was also reproduced by the Department in the annual FOI report tabled by the Attorney-General.

3.66. While a small number of FOI practitioners have access to all of Attorney-General's Department FOI Memoranda and Decision Summaries, the majority did not, although most had knowledge of their existence.

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<sup>16</sup> ALRC/ARC Report No 77 and 40; para. 6.15.

Ineffective internal agency distribution methods appear to be the chief reason for limited access to FOI Memoranda and Decision Summaries.

3.67. These Memoranda and Summaries have served as one of the most valuable, (although limited in distribution) tools in the ongoing education of FOI practitioners. This is because the Memoranda and Summaries have been, in essence, the sole means of conveying FOI changes and guidance to agencies outside of the AGS FOI training courses.

3.68. As already outlined in this report, the Attorney-General's Department ceased to perform these functions in early 1997. As a result, there is a growing void in the availability of current FOI information for practitioners. This has been exacerbated by the limited distribution of even the existing Memoranda and Decision Summaries within agencies.

3.69. In the absence of any other body assuming responsibility for the functions envisaged by section 93 of the Act, consideration should be given to the Attorney-General's Department continuing to produce and distribute FOI Memoranda and Decision Summaries. The accessibility to FOI Memoranda would be considerably enhanced if they were available on the Department's internet home page.

### ***Recommendation***

- 7. The Attorney-General's Department re-commence the publication of FOI Memoranda and Decisions Summaries.**
- 8. The Attorney-General's Department make FOI Memoranda and Decision Summaries available on the Department's internet home page.**
- 9. Agencies ensure that the Attorney-General's Department FOI Memoranda and Decision Summaries are readily available to all FOI practitioners and decision makers.**

### ***FOI Statistical Reporting***

3.70. Agencies are required to furnish to the Attorney-General's Department an Annual Return of FOI activity.<sup>17</sup> These returns form the basis of the FOI Annual Report, pursuant to section 93(1) of the Act.

3.71. A recurring theme in past FOI Annual Reports has been concern with the timeliness and quality of agency reporting of FOI statistics to the Attorney-General's Department.

3.72. It was apparent from performance audits that a number of agencies

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<sup>17</sup> Regulation 6 of the Freedom of Information (Miscellaneous Provisions) Regulations 1982. Annual Returns are to be completed in accordance with Attorney-General's Department New FOI Memorandum 20.

are poorly placed to produce meaningful FOI statistics. In a small number of cases, reported statistics were less than sound because of a lack of any proper record keeping of FOI activity by the agency, or a lack of understanding of reporting requirements.

3.73. In many cases poor statistical reporting is attributable to inadequate computer software, or the manual recording of information relevant to the management of FOI requests.<sup>18</sup>

3.74. FOI activity is generally able to be categorised as requests for either personal information or requests which relate to policy and general government decision making. As outlined by the ALRC/ARC report, current statistics collected by the Attorney-General's Department do not distinguish between requests for the applicants' personal information and other requests.<sup>19</sup>

3.75. The ALRC/ARC report recommended that the FOI Commissioner review statistical reporting requirements to include categorisation of requests. The need for a review of FOI statistical requirements to be undertaken by the agency given responsibility for oversight of the FOI Act is supported.

3.76. It is also noted that the current high percentage of the number of requests for personal information (estimated to be over 90%)<sup>20</sup>, and the number of those requests which are subsequently disclosed in full (approximately 78%), serves to provide an unnecessarily inflated picture of FOI activity.

### ***Recommendations***

**10. The Attorney-General's Department amend FOI reporting requirements to require agencies to distinguish between FOI requests for personal information and other information.**

**11. The Attorney-General's Department identify a suitable software package for use by agencies in the management of FOI.**

**12. Agencies review current practices for the recording and reporting of FOI activity to comply with Attorney-General's FOI Memorandum No 20.**

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<sup>18</sup> A potentially suitable software package developed by the Dept of Defence and identified during the Ombudsman's review of FOI, has been provided to the Attorney-General's Department.

<sup>19</sup>ALRC/ARC Report No 77 and 40; p.65.

<sup>20</sup>ALRC/ARC Report No 77 and 40; p.17. Estimates that over 90% of all FOI requests are made to four agencies, Dept's of Veteran's Affairs, Immigration and Multicultural Affairs, ATO and Social Security (now Centrelink).

**FOI - Service Delivery**

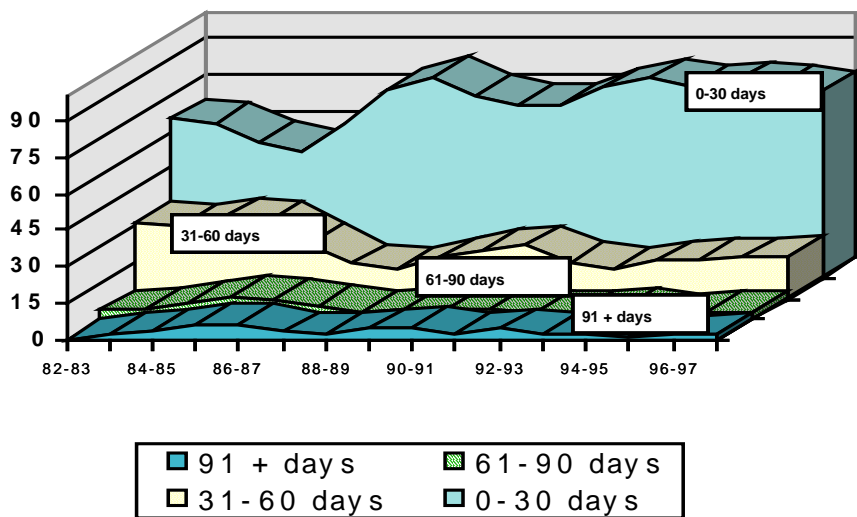
3.77. As earlier stated, each year this Office receives some 300 complaints concerning the handling of FOI applications. The majority of these complaints involve aspects of service delivery particularly in relation to timeliness and quality of advice to applicants.

3.78. On introduction of the FOI Act, the statutory time limit for processing of FOI requests was 60 days. This period was reduced to 45 days in 1984 and to 30 days in 1986.

3.79. The following chart shows an improvement since 1986 in the proportion of requests handled within 30 days, with a corresponding reduction in the percentage of requests handled within 60 days.

3.80. While some improvement was achieved in 1990/91, seemingly mainly due to a decrease in request numbers, there has been no improvement since. There has been little difference in overall request numbers since 1986. Significantly, on introduction of the Act in 1982, approximately 95% of all requests were responded to within the statutory time limit of 60 days, compared to 76% in 1996/97 under the current statutory time limit of 30 days.

**Chart 6: % of FOI Requests responded to within Statutory Time Limit**



3.81. The ALRC/ARC report in recognising advances in information technology and record management has recommended that in three years time the time limit for processing FOI requests be reduced to 14 days.<sup>21</sup> In

<sup>21</sup>ALRC/ARC Report No 77 and 40; p.84.

making this recommendation the ALRC/ARC review agreed that it was reasonable to expect agencies to take advantage of technological developments to improve their FOI administration.

3.82. Most agencies cited difficulties in the location of documents as being the main cause for delay in handling FOI requests. It would appear that these difficulties are often associated with poor record management practices within the agency and slow response to requests for documents. Record management is discussed later in this report.

3.83. Available data suggests that it would be most unlikely that agencies would be in a position to comply with a 14 day time limit until such time as considerable improvements have been achieved in record management.

3.84. While improvements in agency record management may be enhanced with a reduction in the minimum time limit for FOI requests, there is concern that a minimum time limit of 14 days will not give agencies sufficient time to identify, retrieve and assess documents in a work environment of often conflicting priorities. In the circumstances, it is considered that the minimum time limit should remain at 30 days until agencies have had time to improve their record management and management of FOI more generally.

### ***Recommendation***

**13. The statutory time limit for responding to FOI requests not be reduced from 30 days until such time as there is a reasonable prospect of agencies being able to retrieve the majority of requested information more quickly. Further consideration should then be given to reducing the time limit as recommended by the ALRC/ARC Report.**

### **Record Management**

3.85. A common concern expressed by FOI practitioners is the difficulty in identifying and obtaining agency records. It appears that few agencies have a central record of documentary or electronic records and in larger agencies record keeping has become so fragmented that it would be an extremely difficult task to identify all agency records. This is more so in the case of re-structured departments where the record audit trail is becoming increasingly faint.

3.86. This trend has implications for the accountability of agencies for their actions and general efficiency, quite apart from its impact on FOI compliance.

3.87. Because of the frequent inability to identify agency documents, greater reliance is being placed upon FOI applicants to provide specific details of documents sought.

3.88. Section 24 of the Act permits agencies to refuse a request where the work in processing a request would substantially and unreasonably divert

resources of the agency. Additionally, s.24A permits refusal of a request if reasonable steps are taken to find a document but it cannot be found or does not exist.

3.89. It would be unreasonable for an agency to refuse a request on this basis if the problem in locating documents resides in poor recordkeeping.

3.90. At times, the applicant will not be able to provide specific details, or may simply wish to access all relevant documents held by the agency. In these circumstances, poor agency record management may serve to neutralise the right of access provided by the Act as agencies claim lost or no documents, or even unreasonable diversion of resources.

3.91. The ALRC/ARC in its report on the review of the FOI Act highlighted the lack of statutory regulation of recordkeeping in the federal public sector, and made a number of recommendations for amendment to the Archives Act to expand the role of the Director-General of Archives.<sup>22</sup>

3.92. The ALRC report of its review of the Archives Act<sup>23</sup>, commented:

In the Commission's view one of the main challenges for Commonwealth recordkeeping in the coming decade will be to maintain, and if possible enhance, the FOI and Archives access regimes in a way that makes information available effectively and economically unless there are justifiable grounds for withholding it.

3.93. Previous Ombudsmen have expressed similar concerns over the quality and problems encountered with Commonwealth recordkeeping.<sup>24</sup>

3.94. There is concern that if the issue of Commonwealth recordkeeping is not addressed in the near future with a view to establishing uniform guidelines and practices, then the existing inadequate practices are likely to have a sustained adverse impact upon the operation of both the FOI and Archives Acts. It also raises questions about the efficiency of an agency's current archives, if its recordkeeping activities are such that the agency is unable itself to fully draw on the repository of relevant knowledge it holds.

3.95. These issues will become increasingly important as Government services continue to be outsourced to Government Business Enterprises or contracted to the private sector. While the Government has undertaken to extend the provisions of the Privacy and Freedom of Information Acts where

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<sup>22</sup>ALRC/ARC Report No 77 and 40; p.54.

<sup>23</sup>ALRC Report No 85; A review of the federal *Archives Act 1983*; May 1998; p.34.

<sup>24</sup> Commonwealth Ombudsman Annual Report 1994-95; Commonwealth Ombudsman *Clients Beware* 1997.

government services are delivered by the private sector, it will be equally important to ensure compliance by these bodies with accepted standards of recordkeeping.<sup>25</sup>

3.96. These bodies are likely to rely on advice from the host agency as to best recordkeeping practice, yet the level of efficiency of recordkeeping in a number of agencies leaves considerable room for improvement.

### ***Recommendation***

**14. The Government give priority to consideration of the matters and recommendations contained in ALRC/ARC Reports No 77 and 40 and ALRC Report No 85 in relation to Records Management.**

### **Section 8 and 9 Notices**

3.97. Sections 8 and 9 of the Act are intended to keep the public informed of the workings of government departments and of the information held by Departments.

3.98. Section 8 of the Act requires agencies to publish certain information in their annual reports along with a statement of the categories of documents which are in the possession of the agency.<sup>26</sup>

3.99. Section 9 of the Act places obligations on agencies to make certain documents, publications and guidelines available for public inspection.<sup>27</sup> The agency is also required to make a list available to the nearest Information Access Office of documents available for purchase and inspection. Agencies are required to renew section 9 statements every 12 months. As reported in the 1996-1997 FOI Annual Report, many agencies have section 9 statements well outside of the 12 months renewal requirement.

3.100. In the course of the investigation, Ombudsman officers had the opportunity to review a considerable number of agency section 8 and 9 statements. While a small number of agencies are complying with the Act and guidance issued through Attorney-General's Department FOI Memoranda, the majority of notices are inadequate and appear to serve little purpose.

3.101. In particular, section 8 notices do not adequately convey to the public the organisation, functions and powers of the agency and in most cases the details of the categories of documents in the possession of the agency are so

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<sup>25</sup> FOI Annual Report 1997-98

<sup>26</sup> Attorney-General's Department FOI Memorandum No. 25.

<sup>27</sup> Attorney-General's Department FOI Memorandum No. 24.



broad as to be meaningless. These shortcomings are likely to be, in part, as a consequence of poor record management in many agencies.

3.102. A further difficulty, as outlined by the ALRC/ARC report, is that the notices are not easily accessible and are rarely used by the public.<sup>28</sup>

3.103. As outlined in Report by the Senate Standing Committee on Constitutional and Legal Affairs in 1979,<sup>29</sup>

An effective system of freedom of information demands not merely that members of the public have rights, but that they be able in practice to exercise them.

3.102. In this context, sections 8 and 9 of the Act play an important role in keeping the public informed of what information is available and where that information may be found. In addition, the Senate Finance and Public Administration References Committee Order of 30 May 1996 (as varied), that agencies provide on their internet home page an indexed list of all relevant files, is intended to further enhance public awareness of information held by Government agencies.<sup>30</sup>

3.103. The obligations placed upon agencies by sections 8 and 9 should also serve to cause each agency to examine and improve where necessary its own recordkeeping arrangements. If these essential elements of the Act are to be realised, then agencies must give greater attention to the completion of section 8 and 9 notices.

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<sup>28</sup>ALRC/ARC Report No 77 and 40; p.81.

<sup>29</sup> Senate Standing Committee on Constitutional and Legal Affairs Report on FOI Bill 1978 and aspect of Archives Bill 1979; p.87.

<sup>30</sup> The Senate Finance and Public Administration References Committee Review of the Operation of the Order for the Production of Indexed Lists of Department Files - Second Report

***Recommendation***

- 15. Agencies undertake a review of section 8 and 9 notices to better reflect the guidelines contained in Attorney-General's Department FOI Memoranda No 24 and 25.**

## 4. FEES AND CHARGES

### Application Fees

4.1. The FOI Act and Regulations provide that an application fee is payable except where the documents relate to claims concerning a prescribed income support payment such as a pension, allowance or benefit payable to the applicant.<sup>31</sup> An agency may also impose charges to meet the cost of processing the request and for various services such as photocopying and transcribing. Fees charges may be remitted having regard to public interest, hardship or any other relevant factors.

4.2. Government policy on FOI Fees and Charges, as enunciated in FOI Memorandum No 29 is that where they are applicable, fees and charges should be collected except where one or more of the reasons for remission of fees or for reduction or non-imposition of charges is established.

4.3. In 1997/98 application fees were collected for some 8,600 (26%) of 32,590 initial applications. The relatively low number of applications which attracted an application fee reflects the overall high number of applications for personal information. As previously stated, requests for personal information comprise approximately 90% of all FOI applications.

### *Fees and Charges for Personal Information*

4.4. Generally, the majority of agencies have adopted the practice of automatically remitting an application fee and any charges in cases where the applicant is seeking personal information. In agencies such as the Department of Veterans' Affairs and Centrelink, this practice accords with the intent of the Regulations which provides for exemption of the fee where the application seeks documents in support of an income payment.<sup>32</sup>

4.5. The only large agency which still routinely collects a fee for applications for personal information is the Department of Immigration and Multicultural Affairs. In 1997/98 this represented approximately 22% of all applications for personal information.

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<sup>31</sup> Freedom of Information (Fees and Charges) Regulations; No. 6.

<sup>32</sup> For example, applications for personal information to Centrelink and the Department of Veteran's Affairs. These two agencies receive approximately 75% of all requests for personal information.

4.6. The ALRC/ARC recommended that access to one's own personal information should generally be free.<sup>33</sup>

4.7. While this report recommends disclosure of requests for personal information outside of the FOI Act, there will always be a small number of requests which need to be handled under the FOI Act. The small number of these requests together with the recommendation of the ALRC/ARC report, leads to the view that the FOI Regulations should be amended to remove the requirement for an application fee in the case of FOI requests for personal information.

4.8. The option for Departments to levy a small charge for photocopying services should remain, however in practice most departments do not impose a charge on requests for personal information about the applicant.

### ***Recommendation***

**16. That the ALRC/ARC recommendation that no application fee be charged for access to personal information be adopted.**

### **Charges**

4.9. An increasing number of complaints to this Office are about the reasonableness of the charges notified by agencies to process FOI requests.

4.10. Section 29 of the Act provides that where an agency decides that an applicant is liable to pay a charge in respect of a request for access to a document, then the agency must advise the applicant in writing of details of the charge. Charges are able to be levied for search and retrieval time, time spent processing the request and other charges such as photocopying costs.

4.11. The applicant may then pay the charge, dispute the assessment of the charge or withdraw the FOI request. The applicant may also seek to have the charge waived, or reduced.

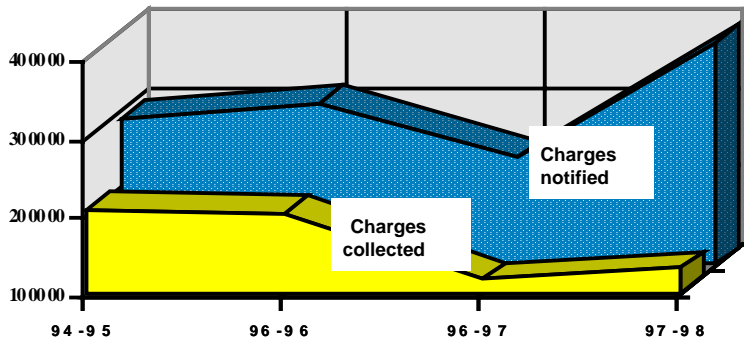
4.12. There is concern that charges are being unreasonably determined and applied by agencies as a means of deterring FOI requests.

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<sup>33</sup> ALRC/ARC Report No 77 and 40; p.182.

The following chart shows a sharp increase in the amount of charges notified to applicants, whereas the amount of charges subsequently collected, has decreased.

Chart 7: Comparison of charges notified and collected



4.13. Over the same period the average charge per request has increased from \$123 to \$239, yet the number of requests for which charges were notified has decreased from 6,085 in 1994-95 to 1,614 in 1997-98.

4.14. Collectively, the above data lends weight to the concern that some agencies may be setting unreasonably high charges to process FOI requests.

### ***Recommendation***

**17. Agencies introduce quality control procedures to monitor the notification of charges for FOI requests to ensure that charges notified are reasonable, and within the provisions of FOI (Fees and Charges) Regulation No 4 and accord with the purpose of the Act, and are determined consistent with the advice in the Attorney-General's Department FOI Memorandum No 29.**

## 5. FOI - THE FUTURE

5.1. Administration of FOI can be a complex and challenging task for government agencies. Federal Court and AAT FOI review decisions continue to clarify the legislation and to either directly or indirectly affect the implementation of the Act. In a similar vein, review decisions over the years have at times been impliedly critical of agencies' administration of the Act. Many of those criticisms are echoed in the matters raised in this report.

5.2. While progress in achieving some of the aims of the Act is encouraging, there are signs that unless vigilance is maintained, the gains achieved to date are likely to be lost.

5.3. Of particular concern are the consequences of poor record management on the operation of the Act. This Office intends to keep this under review.

5.4. The ALRC/ARC Report No 77 and 40 '*Open Government*' examines in detail, operation of the FOI Act and makes a number of recommendations for legislative amendment. The most significant recommendation being the appointment of an FOI Commissioner to monitor and promote the FOI Act. The role envisaged for the FOI Commissioner is not dissimilar to that given to the Ombudsman by the 1983 amendments to the original Act.

5.5. The FOI Act is an essential tool in the framework of democratic government. It creates a right for persons to know what information, subject to certain exemptions, is held in government records about them personally and to seek information, again subject to certain exemptions, about government policy and decisions.

5.6. The Act places a responsibility on government to be more open in its policy and decision making and therefore more accountable to the people. In support of this principle, the underlying thrust of the Act is for government agencies to make the maximum amount of information available to the public so that people will not need to resort to their legislative right to obtain information.

5.7. The former Prime Minister, The Right Honourable J M Fraser described the government responsibility for the disclosure of information as:

The principle of responsibility - to the electorate and the Parliament - is a vital one which must be maintained and strengthened because it is the basis of popular control over the direction of government and the destiny of the nation. To the extent that it is eroded, the people themselves are weakened. If the people cannot call to account the makers of government policy they ultimately have no way of controlling public policy on their own lives....

But just as fundamental are two further requirements... First, people and

Parliament must have the knowledge required to pass judgement on the government... Too much secrecy inhibits people's capacity to judge the government's performance.<sup>34</sup>

5.8. Administration of FOI is at a crossroad. While there appears to be a high level of disclosure of personal information by agencies, there are signs which suggest access to other types of information is at times being limited by the mis-use of exemptions provided for by the Act.

5.9. It would also appear that one of the principal aims of the Act, for government agencies to make the maximum amount of information publicly available, therefore removing the need for people to seek information under the FOI Act, is not being realised.

5.10. Collectively, the problems identified in this report are illustrative of a growing culture of passive resistance to the disclosure of information. These problems are unlikely to be overcome while ever there is no body or authority with oversight of administration of the FOI Act.

### ***Recommendation***

**18. The Government give priority to consideration of the matters and recommendations contained in this report together with ALRC/ARC Reports No 77 and 40 and ALRC Report No 85.**

*The Secretary of the Attorney-General's Department has made the following comments on the matters contained in this report:*

*I note that the draft report suggests that there are a wide range of administrative shortcomings in the way agencies are handling FOI requests and you have arrived at the conclusion that this is because there is no body or agency with responsibility for the oversight of administration of the Freedom of Information Act 1982 ('the FOI Act'). In this context, you have recommended that priority be given to consideration of matters raised in your report and earlier reports by the Australian Law Reform Commission and the Administrative Review Council, in particular, that an office of FOI Commissioner be established to monitor and promote the FOI Act. That proposal, to establish an FOI Commissioner, is under consideration by the Government.*

*However, as you know, this Government has a preference that Departments, should be the primary vehicle for ensuring the effective discharge of government responsibilities and obligations, which would, of course, include ensuring efficient and effective practices and performance in implementing the FOI Act. I have written to all Departmental Secretaries to remind them of their obligations under that Act and to*

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<sup>34</sup> M J Fraser, 'Responsibility in Government', Australian Journal of Public Administration, March 1978, pp.1-2.

*seek their assistance in ensuring the effective and efficient discharge of those obligations by their Departments and portfolio agencies.*

*In order to assist all agencies to do this, this Department provides legal advice on a billable basis. The Australian Government Solicitor provides a regular program of training for FOI coordinators and convenes FOI Practitioner Fora to discuss pertinent FOI issues, which this Department actively participates in. In those ways, this portfolio contributes to the ongoing education of FOI Practitioners.*

*In relation to some of the more specific recommendations in the report which are relevant to this Department, in particular draft recommendations 8, 9 and 10, as I have already mentioned above, this portfolio already contributes to the ongoing education of FOI Practitioners in a number of ways.*

*As regards draft recommendation 11, agencies currently provide statistics on the number of requests received by them, by completing statistical return forms and forwarding them to this Department on a quarterly basis. Question 2 of that form currently deals with request numbers but does not distinguish between requests for personal and other information. We are in the process of making the return forms available electronically for completion via the internet and revision of question 2 would be possible in that context. However, agencies would need to be informed of the change well before the commencement of a new reporting year (ie the financial year) to enable them to make any changes to their own systems.*

*We do not believe that it is appropriate for this Department to identify a suitable software package for use by all agencies in the management of FOI statistics. Almost two hundred agencies provide statistics to us for inclusion in the FOI Annual Report. It would not be feasible for this Department to identify a suitable software package to suit the needs of each of those agencies bearing in mind the diversity in size, number of requests received by them and their existing software. However, if we are aware of a potentially suitable software package, we would be happy to pass that information on to any agency which sought our advice.*

*As regards the government's consideration of the ALRC/ARC report, a number of the recommendations in that report have already been considered and taken into account in the development of Government policy. In particular, the comments and recommendations in Chapter 15 - Private Sector, are relevant in to the Government's recent decision to develop light-touch national data protection legislation to strengthen self-regulatory privacy protection in the private sector. Other recommendations relating to government outsourcing will no doubt be considered by the Inter Departmental Committee which is developing a government response to the Administrative Review Council's report 'Contracting Out of Government Services'. This Department will continue to consider and take into account other recommendation in the report as appropriate.*



**R N McLeod**

**Commonwealth Ombudsman**

## 5. REFERENCES

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