Ombudsman
Victoria

Review of the Freedom of Information Act

June 2006

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Report of Ombudsman Victoria

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To

The Honourable the President of Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

I have the honour to present a review of the *Freedom of Information Act 1982*. The report is made pursuant to section 25 of the *Ombudsman Act 1973*.

G E Brouwer
OMBUDSMAN

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EXECUTIVE SUMMARY

In May 2005 I published a discussion paper resulting from an own motion investigation into the performance of the 10 departments and Victoria Police in implementing the *Freedom of Information Act 1982* (the Act), including a wider review of the Act itself.

My investigation focused on the freedom of information (FOI) policies, practices and procedures of the departments and Victoria Police and other legislative aspects of FOI.

Together with the submissions to my discussion paper, my office examined written materials provided to me by the departments and Victoria Police and my investigation officers interviewed key stakeholders and examined selected FOI files.

My investigation revealed that delay in processing FOI requests is still a major issue within the departments and Victoria Police. I am also concerned about the lack of quality in reasons for decisions, the poor level of assistance to applicants and some internal practices.

I have made recommendations regarding some legislative change that I believe is required. I have also made recommendations that the Department of Justice has a stronger leadership role in providing guidance to FOI agencies, particularly by way of practice notes and guidelines.

KEY FINDINGS

Statistics

- The 10 departments and Victoria Police receive 18 per cent of all FOI requests but are responsible for more than 67 per cent of applications to VCAT.
- The great majority of FOI requests are for information for private purposes, with only a relatively small number being for political or media use. Full access is given in response to 77 per cent of all requests. However, only 36 per cent of requests to departments and 31.5 per cent of requests to Victoria Police are given full access.
- Delay was a key issue. Only 56 per cent of FOI decisions by government departments in 2003-2004 were made within the statutory time frame of 45 days. Nearly 21 per cent of decisions took more than 90 days. Of requests dealt with by the Department of Human Services in 2003-4, 42 per cent of decisions were made within the statutory time limit and 37 per cent took over 90 days. This has improved however and since early 2005, the Department of Human Services has made over 65 per cent of decisions within the statutory time limit.
- Victoria Police has been unable to meet the statutory time requirement in a large proportion of cases. In the period from January to September 2005, Victoria Police had on average 365 active files of which, on average 147, or over 40 per cent, were more than 45 days old (the percentage over 45 days at any

time varied between 24 per cent to 52 per cent.).

– Its 10 officers each handle an average of 200 requests per annum compared with an average of about 48.5 for other departments.

File examination

– In many of the files examined requests were handled promptly, diligently and well. However, many files demonstrated undue delay.

– The Attorney-General's Guidelines advise five days should be allowed for noting by the Minister's office of decisions on sensitive FOI requests, but this was exceeded in many cases, often exacerbating delays.

– In several cases examined the reasons given for claiming exemptions were misleading. In some cases departments asserted requests were unclear or voluminous with little or no justification. In many cases they failed to give proper assistance to applicants in amending their requests. The effect was to delay answering the request without appearing to exceed the time limits of the Act.

– In a number of cases, requests were said to be unclear when it appeared they were 'voluminous'. This extended the time available to the agency.

– Some decisions showed little regard for the objects of the Act. Some responses provided material that might technically be relevant to the request but was of little or no value to the applicant. Some took advantage of every available exemption to provide as little material as possible.

– In many cases statements of reason were inadequate. The material facts on which the decision was based were not stated and the documents for which exemption was claimed were not identified or linked to the reasons given. The reasons given for denial of access upon internal review were generally more considered and careful than the initial reasons for the decision.

– My officers' examination of cases indicated little evidence that multiple requests overwhelmed the resources of the department. It did not support the need for an extension of time available to agencies to respond.

– The files examined did not suggest that third party consultation was necessarily a source of undue delay.

Conclusions

– Many of the difficulties experienced by applicants and FOI officers relate to the interpretation of requests and whether they are valid under section 17(2).

– While multiple requests and complex requests for sensitive documents can be demanding, I consider that is part of the general flow of work for departments and other agencies for which their FOI units should be adequately resourced.

– The 45 days allowed for processing under the Act is already longer than is allowed by most Australian jurisdictions and I do not see grounds for the time

to be extended for multiple requests. However, I recommend that up to a further 30 days be allowed for the purpose of consultation with affected third parties.

- If there is a reason that a decision cannot be made within 45 days, the agency should immediately advise the applicant in writing, providing details.
- At present few Victorian agencies fully comply with the publication requirements of Part II statements. This affects applicants' knowledge of the documents available and their ability to clearly frame requests.
- Departmental record management systems are often not designed or sufficiently well maintained to be an efficient tool for an FOI search.
- Victoria Police, the Department of Human Services, and some other departments have acquired software that enables them to edit electronically scanned copies of documents with a considerable saving in time over the previous manual methods. This would be a useful tool for other agencies and should be explored by them.
- Departments frequently claim exemptions on grounds of confidentiality or personal information without contacting the third parties whose interests are involved to establish and/or confirm the grounds for those exemptions.
- In many cases information about the reasons for exemption is prepared for internal use and advice but is not given to the applicant. In most cases where information such as a schedule of documents and the reasons for exemption is already prepared for advice to management or the Minister's office, it should be provided to the applicant.
- Some departments have pro forma documents and procedures that do not correctly reflect the requirements of the Act.

Legislative review

- I do not believe it is necessary for the effective operation of the Act to establish a single legislative regime covering both access and privacy, but I recommend the Act be amended to use the expression 'personal information', consistent with the Information Privacy Act.
- I have identified a number of sections of the Act which require review and amendment to ensure greater clarity about jurisdiction and improved ability to meet the objects of the Act. The Department of Justice has a key leadership role to provide support and guidance to benchmark the performance of all agencies.

SUMMARY OF RECOMMENDATIONS

Legislative recommendations

I recommend that:

- Section 25 of the Act be amended in terms similar to section 22 of the Commonwealth FOI Act to enable agencies to delete material that is

not within the scope of the request where deletion is both practicable and not contrary to the applicant's known wishes.

– Section 21 of the Act be amended in terms similar to section 15(5) and 15(6) of the Commonwealth Act, so that where an agency or Minister determines in writing that the requirements of section 34 make it appropriate to extend the period referred to in section 21:

a. the period is taken to be extended by a further period of 30 days; and

b. the agency or Minister must, as soon as practicable, inform the applicant that the period has been extended.

– Section 21 of the Act be amended to extend the period for making a decision by up to 30 days where:

a. a document which may be exempt under section 33 by reason of information that may be disclosed relating to the personal affairs of a person (including a deceased person), to enable the agency to seek the views of the person who is the subject of that information (or in the case of a deceased person, their next-of-kin); and

b. where there is reason to believe that a document may be exempt under section 35, to enable the agency to seek the views of the person or government by or on behalf of whom the information was communicated, for the purpose of determining if the information was disclosed in confidence and, in the case of sub-section 35(1)(b), whether in all the circumstances it is against the public interest for the information to be disclosed.

– The expression 'personal affairs' in section 33 of the Act be amended to 'personal information' to be consistent with the *Information Privacy Act 2001*.

– Section 25A(8) of the Act be repealed.

– The Ombudsman Act be amended to expressly provide that, subject to the provisions of the Act, the functions of my office include enquiring into or investigating administrative actions taken in any agency within the meaning of the Act and in connection with the Act.

– Section 50(2)(e) be amended to provide that a person who has consented to the release of a document may not apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of the decision to release that document, so that the 60 day reverse-FOI period will not apply.

– Section 33 be amended to adopt the definition of 'next of kin' in section 3 of the *Human Tissue Act 1982*.

– The Act be amended to clarify that where the decision is that no documents exist relevant to a request, a complaint can be made to the Ombudsman and there is no right of review.

– As part of any wider review of the Act, consideration be given to review the burden placed on the RSPCA by its declaration as a prescribed authority

– As part of any wider review of the Act, consideration be given to the possibility of amendments to allow FOI obligations for non-government bodies declared as prescribed authorities to be limited to those functions or activities which are supported, directly or indirectly, by government funds or other assistance.

Process recommendations

I recommend that:

– Victorian FOI agencies adopt the following practices, to be supported by practice notes issued by the Department of Justice:

a. where an agency finds uncertainty or ambiguity in interpreting a request, it advises the applicant as soon as possible. Consultation with applicants by telephone or in person, where appropriate, is encouraged to expedite the process;

b. where applications are unclear or potentially voluminous the agency, where appropriate, assist the applicant to make a valid and non-voluminous request. This is to be done by giving information such as a fair indication of the documents or classes of documents it holds that may relate to the subject of the request or of the type of information recorded by the agency and the way in which it is kept;

c. agencies not adopt artificial definitions or constructions of the terms in which a request is expressed. Any reasonable doubt is to be clarified as soon as it is identified. The applicant is to be advised if an exclusionary definition is applied and the documents or classes of documents excluded;

d. subject to my recommendation that section 25 of the Act be amended, where only part of a document appears relevant to the topic, the agency is not to delete the irrelevant information unless it is clear the applicant would be satisfied with the relevant part only of the document. Except with the agreement of the applicant, only discrete parts or sections of documents are to be deleted for irrelevance;

e. where documents do not exist or cannot, after a thorough and diligent search, be located, a notice under section 27 is to advise the applicant of what searches have been conducted and/or what other steps have been taken to establish that the document does not exist or cannot be located and, in the case of a document that has existed, when and where it is last known to have been. This is in addition to the section 27(1)(e) requirement to notify the applicant of the right to complain to the Ombudsman;

f. where a schedule or similar descriptive material is prepared in relation to those documents to which access is denied, it is to be provided as a part of the section 27 notice except to the extent that it would provide information which itself would be exempt or where it is proper, having regard to section 27(2) and section 33(6), to withhold the information; and

g. where an agency receives multiple requests and believes it will not be reasonably able to resolve them in

45 days, the agency consult with the applicant over the priority of the various requests and if appropriate negotiate to reduce the scope of the requests.

– DOJ prepare a practice note for the guidance of Victorian FOI agencies, detailing:

a. what is required for compliance with the section 27 obligation to provide reasons for any decision that an applicant is not entitled to access (in whole or in part) to a document, that access be deferred, or that a document does not exist;

b. what information should be provided to applicants as a matter of proper administrative practice; and

c. when it is proper for information to be withheld.

– DOJ issue practice notes setting acceptable standards for handling FOI requests, including decision letter and a set of standard-form letters.

– DOJ provide advice to all FOI agencies on any significant developments in FOI including legislative changes and decisions interpreting the Act.

– In addition to holding monthly meetings of department FOI managers, DOJ facilitate the sharing of experience and expertise amongst other FOI agencies.

– Victoria Police maintain more detailed data on FOI requests, particularly in relation to timeliness.

Administrative recommendations

I recommend that:

– Guidelines are issued indicating that where government agencies engage non-government entities to carry out functions prescribed by statute, they ensure that the terms of contract give the agency the right of access to documents produced in the course of performing those functions.

– A mechanism is implemented to collect and record the level of officers involved and the time spent responding to FOI requests.

– Agencies provide access to documents in electronic form where requested by applicants, unless it would be unreasonable to do so.

– Either a guideline is issued or the Act amended to define the expression 'routine request'.

– Either a guideline is issued or the Act amended in relation to applying and waiving charges.

– VCAT be given power to declare a person a vexatious applicant, with the effect that further applications by that person may be made only with the consent of VCAT.

– Government departments and agencies review their compliance with Part II of the Act.

– Part II is reviewed as a matter of urgency, giving consideration to adopting a system of publication schemes on the model of the United Kingdom FOI Act.

– DOJ should monitor the compliance by agencies with Part II.

OWN MOTION INVESTIGATION

In September 2003 this office completed a report concerning allegations of undue delay by departments in responding to FOI requests. When I commenced as Ombudsman I learned that the intention had been to conduct a follow up to the 2003 report. I also learned that the government was considering some amendments to the Act arising from recommendations in the 2003 report. Also, a number of complaints to my office had raised various allegations of delay and other conduct aimed at frustrating the purposes of the Act.

I therefore decided to conduct a more wide-ranging investigation under section 14 of the *Ombudsman Act 1973* of the performance of departments and of Victoria Police than had been possible in the earlier investigation. The following departments were the subject of my investigation.

- Department of Education and Training (DET).
- Department of Human Services (DHS).
- Department of Infrastructure (DOI).
- Department of Innovation, Industry and Regional Development (DIIRD).
- Department of Justice (DOJ).
- Department of Premier and Cabinet (DPC).
- Department of Primary Industry (DPI).
- Department of Sustainability and Environment (DSE).
- Department of Treasury and Finance (DTF).
- Department for Victorian Communities (DVC).

I commenced my investigation in August 2004 having regard to:

- The timeliness and adequacy of responses to FOI requests.
- The policies and practices adopted by departments and agencies for handling FOI requests.
- The adequacy and effect of protocols and arrangements between the departments and contractors on the keeping and availability of documents where public functions are performed by bodies other than departments or agencies.
- Obligations under other legislation including the *Public Records Act 1973*, the *Health Records Act 2001* and the *Information Privacy Act 2000*.
- The legislative requirements imposed on departments and agencies.

At the same time I commenced an investigation in my then capacity as Police Ombudsman into the policies, practices and procedures of Victoria Police in relation to the Act, having regard to:

- The timeliness and adequacy of responses to FOI requests
- The provision of services by contractors and the adequacy and effect of protocols and arrangements between the police force and contractors on the keeping and availability of documents
- The legislative requirements imposed for the police force

– Obligations under other legislation including the Public Records Act and the Information Privacy Act.

I have continued the investigation in my office as Director, Office of Police Integrity, following the creation of that office.[1]

Discussion paper

In May 2005 I released a discussion paper as part of my investigation and invited submissions. I received 63 submissions from agencies with obligations under the Act and from organisations and individuals with a particular interest in FOI.

DOJ prepared a submission on behalf of the 10 departments, the 'Whole of Victorian Government' submission, and I have made references to that submission. In addition, I received separate submissions from DOJ, DHS, DOI, DPC, DTF, DVC and Victoria Police. I have also made particular references to other specific submissions and references to submissions generally. I provide a summary below of the submissions from the larger agency sectors.

I received submissions from: 12 councils; nine health agencies; two universities; one media outlet; two legal authorities; 12 applicants and users of FOI; and 17 other agencies.

The submissions from all councils generally agreed that the Act works well, but still welcomed a comprehensive review of the Act. Many stated that it could be amended to better suit local government. Some of the issues that the majority agreed with were that:

– Part II of the Act should be amended or repealed.

– Some improvement was required regarding the issues raised in relation to processing requests.

– Reasons for decisions should be provided.

– Protocols should be established to ensure access to records of contractors.

– DOJ should provide greater leadership and direction.

– The statutory time frame of 45 days is sufficient, with additional time required only where third party consultation is necessary.

The majority of the applicants and users who provided submissions were mostly concerned with issues surrounding charges, the level of information available to them, and the quality of the responses outlining a decision to a request. Most of them also expressed their dissatisfaction with the appeal mechanisms under the Act and favored intervention by an independent authority, such as the Ombudsman.

The various health agencies all had differing opinions on the issues raised concerning the Information Privacy Act, the Health Records Act and the Information Privacy Act. All health agencies that provided submissions agreed that FOI requests should be handled centrally by the FOI officer/Unit.

1 *See Police Regulation Act 1958, section 102A(2), 133(2) came into effect on 16 November 2004*

Investigation process

From August 2004 to November 2004 I gathered relevant information, including statistics, policies and procedures, FOI resources, and staff resources. The information gathered provided me with an understanding of the FOI framework within each of the departments and Victoria Police.

In December 2004 and January 2005 my investigation officers interviewed 20 FOI professionals, including FOI managers and officers in each of the 10 departments and Victoria Police, journalists and opposition politicians. The information they provided was essential in arriving at a balanced view of the FOI process.

In May 2005 I published a discussion paper following those interviews and further research and received and analysed submissions. My office reached a number of preliminary views which were tested by the examination of a number of files.

From June to August 2005 my investigation officers examined over 100 FOI files from each of the departments and from Victoria Police. I consider this to be important in assisting to arrive at conclusions about difficulties experienced in the operation of the Act and its administration by departments, and the outcome of those file examinations is set out in this report.

Files were selected on the basis that the requests involved policy sensitive documents or had taken more than 45 days to determine. The examination enabled me to assess the causes of delay and other issues in the handling of FOI requests. Some of the important findings from the file examination were:

- There were many cases of avoidable delay and in several cases notification of the decision to the applicant was deliberately delayed.
- There were some cases where the file suggests that the reasons given for refusal of access were incorrect, wrong grounds were claimed for exemption, or statutory criteria were not considered.
- In many cases the reasons given for decision were inadequate, both at first instance and upon internal review.
- In some cases requests were given a deliberately narrow or unusual construction which caused the request to be found to be invalid or minimised the range of documents produced
- Applicants are frequently denied information which would help them in re-formulating their requests or in understanding the response to their request, leading to some inappropriate outcomes.
- Inappropriate procedures and, in some cases, poor or incorrectly used precedent cases affected the outcome in many cases.

The examination supported the conclusion that many departments have systemic problems in responding to FOI requests for sensitive information, a view supported by comments made by frequent users of FOI and by the complaints examined by this office.

Generally, the handling of the request by both FOI officers and relevant program areas was prompt and diligent and FOI officers were respecting the spirit of the Act. In some cases they released documents against the preference of other officers and minimised delays in the processing of requests.

In the files examined, DTF stood out for its speedy and helpful responses. It avoided technical or unmeritorious grounds for claiming exemptions. It also provided contextual information to assist applicants to know what use had been made of documents or their relationship to the department's decision-making processes.

These good examples show that delay, misinterpretation, limited responses and poor reasons for decisions cannot be solely attributed to the legislation and that agencies need not react defensively to requests aimed at sensitive areas of agency programs.

I provide the findings of the examination of these files throughout my report, together with case studies.

HISTORY OF THE FOI ACT

In Victoria, the first Freedom of Information Bill was introduced into the Victorian Parliament by the Thompson Government in 1981, followed by several unsuccessful attempts to introduce the Act. In 1982 the Commonwealth Government passed the first Freedom of Information Act in Australia, commencing on 1 December 1982. The present Act was then introduced into Parliament by the Cain Government in 1982 and was passed by the Victorian Parliament, coming into operation on 5 July 1983 except for Part II, which commenced on 5 July 1984. Other states and territories introduced FOI legislation from the late 1980s[2].

The Act has been amended on 23 occasions in the 22 years since it commenced. During this time, the number of requests for information under the Act has constantly grown, with over 20,000 requests recorded in 2003-2004 and nearly 22,500 in 2004-2005. At the same time, technology has greatly changed the way in which information can be managed and stored, as has the means of giving the public access to information about government activities. Government practices in dealing with the public have also changed. More recently there has been increased recognition of the importance of privacy, in particular with the passing of the Information Privacy Act, limiting the collection by Victorian government agencies of personal information and restricting access to such information.

Significant changes to the Act have included:

- Replacing the County Court by the Administrative Appeals Tribunal and later by the Victorian Civil and Administrative Appeals Tribunal to review disputed decisions on FOI requests
- Expansion of the Act's coverage to include local government.
- The introduction of exclusions for repeated requests and voluminous requests.
- The introduction of an application fee and an amended charges regime to provide greater cost recovery in processing requests.
- Narrowing exemptions for Cabinet documents and commercial confidentiality and expansion of the exemption for personal information.
- The inclusion of provisions reflecting the introduction of the Health Records Act.
- Introduction of a new exemption reflecting the *Terrorism (Community Protection) Act 2003*.

Purposes and Objects

In his *Second Reading Speech* on the Act, Premier Cain identified as the three major premises of FOI:

- The right of the individual to know what information is contained in government records about him or herself.
- Accountability of government through openness to public scrutiny.

2 Freedom of Information Act 1989 (NSW); Freedom of Information Act 1989 (ACT); Freedom of Information Act 1991 (SA); Freedom of Information Act 1991 (TAS); Freedom of Information Act 1992 (Qld); Freedom of Information Act 1992 (WA); Information Act 2003 (NT).

– The ability of people informed about government policies to participate in policy making and in government itself.

To these ends, the Act provided for:

– A right of access to government documents except where there are stated exemptions.

– A right to request correction of information on personal files where that information is inaccurate or incomplete.

– Exemption from disclosure to protect interests such as personal privacy, Cabinet discussions, trade and business secrets and law enforcement.

– A right of appeal to an independent body where access to a document is denied.

Premier Cain also said,

"If freedom of information legislation is to work effectively, two fundamental problems must be overcome. Firstly, persons must be aware of the existence of documents that might be of interest to them. Secondly, persons must be able to identify what they need to inspect by first being able to make a wider search."

Part II of the Act addressed those problems by requiring government agencies to publish statements concerning the organisation and functions of the agency (s.7), the documents used in making decisions affecting persons and in enforcing Acts and schemes administered by the agency (s.8) and reports, advice and recommendations created within or for the agency (s.11).

Statistical outline

The Attorney-General's FOI Report for 2004-2005[3] records information from 490 government agencies which are subject to the Act. The report shows that the 10 departments and Victoria Police received less than 18 per cent of all FOI requests. The remaining 82 per cent were received by agencies such as public hospitals, the Victorian Workcover Authority, the Transport Accident Commission, universities, local government bodies including councils, and numerous statutory authorities.

A list of the 'Top 30' FOI agencies includes Victoria Police and 4 of the 10 departments – DHS, DOI, DOJ and DET. Victoria Police received more requests than any other agency. The 'Top 30' agencies received in total 81 per cent of all FOI requests. Many other agencies received no requests at all.

DOJ collects data from FOI agencies on the numbers of requests by applicants for data about themselves ('personal requests') and other ('non-personal') requests. Of 22,493 FOI requests in 2004-2005, 35.5 per cent were recorded as being for personal information. Of the 2,092 requests to the 10 departments, 1,071 (51 per cent) were for personal information, and of the 1,949 requests to Victoria Police 1,028 (53 per cent) were for personal information. Requests for personal information are therefore a significant percentage of the total number of FOI requests. Although separate figures are not available, the indications are that the great majority of FOI requests, including the majority

3 *Annual Report by the Attorney-General of Victoria on Freedom of Information for 2005 ("2005 FOI Report").*

of non-personal requests, are made for private purposes. Only a small proportion of requests are for 'public' purposes such as media reporting, use by politicians or for participation in public debates and policy development.

An FOI request may result in access being granted in full to the requested documents, in partial access[4] or complete refusal. In 2004-2005, for decisions by all agencies, access was granted in full in 77 per cent of requests and partial access was granted in 20 per cent. Only three per cent of requests were completely refused.

The outcomes were markedly different for requests made to departments and Victoria Police. The 10 departments granted 36 per cent of requests full access, 57 per cent partial access and 7 per cent were completely refused access. Victoria Police granted 31.5 per cent access in full, 54 per cent partial access and 14.5 per cent were completely refused access.[5]

Where access is refused, the applicant may request an internal review of the decision and, if still dissatisfied, may apply to VCAT for review of the decision.

The departments and Victoria Police are significantly over-represented in requests for internal review and applications to VCAT. In 2004-2005 the 10 departments together with Victoria Police received 18 per cent of all FOI requests. However, they were subject to 54 per cent of requests for internal review and 68 per cent of all FOI applications to VCAT.

Of 93 applications to VCAT in 2004-2005 for review of FOI decisions, 63 concerned FOI decisions of the 10 Departments and Victoria Police. Of these, 27 proceeded to determination by VCAT with the remaining 36 applications being settled, withdrawn or otherwise resolved. In the 27 decisions, VCAT upheld the denial of access in 18 cases, granted partial access in eight cases and full access in one case.

The 2005 FOI Report also records the exemptions cited in refusing access to documents. At times, more than one exemption is applied to a document, and depending on the nature of the exemption, a document may be released with exempt material deleted, or may be entirely withheld. By far the most frequently used exemption, cited in 3,293 cases, was for personal affairs[6]. This however often results only in the deletion of names or other information which may identify individuals (including public servants), with access being granted to the remainder of the document. Other frequently-cited exemptions were for internal working documents[7] (1055 cases), confidential information[8] (881 cases), documents made exempt by other enactments[9] (812 cases), and legal professional privilege[10] (701 cases).

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4 FOI Act section 25 requires that, where a document is exempt, an agency should grant access to a copy with such deletions as to make the copy not an exempt document, where it is practicable to do so and it appears the applicant would wish to have access to such a copy.
5 2005 FOI Report by DOJ.
6 See FOI Act section 33.
7 FOI Act section 30.
8 FOI Act section 35.
9 FOI Act section 38.
10 FOI Act section 32.

The available information suggests:

- The great majority of FOI requests are for access to documents for private purposes (including use in court or other proceeding).
- The great majority of FOI requests are granted in full or with minor exclusions only.
- The majority of requests that have a political, media or other 'public' purpose are made to the 10 departments and Victoria Police.
- A disproportionate number of requests for review of decisions, applications to VCAT, and complaints to my office, concern requests made for such 'public' purposes.

These findings are not surprising since requests for a public purpose are often for politically sensitive documents.

EXAMINATION OF FOI PROCESSES IN DEPARTMENTS AND VICTORIA POLICE

The concerns that led to this investigation included allegations by applicants of:

- Delay in processing FOI requests, including delay in the release of documents for political reasons.
- Unreasonable claims that requests are unclear or voluminous.
- A lack of assistance to applicants in trying to re-formulate requests.
- Inadequate or misleading advice.
- Misuse of exemptions to deny access to sensitive documents.
- Use of internal review and VCAT as mechanisms for delay, with documents released on the eve of hearing by VCAT.

FOI agencies and FOI officers also voiced concerns about aspects of the operation of the Act. These included:

- The time and difficulties in clarifying requests.
- Difficulties caused by voluminous requests.
- Unreasonable burdens caused by multiple requests by an applicant.
- Time taken for consultation with third parties in relation to the release of personal information, commercial information and confidential information.

DELAY

Delay in handling FOI requests is the largest single cause for complaint to my office about the administration of FOI. In the consultations carried out with the frequent users of FOI, delay was also one of the main sources of grievance, in particular by media and opposition members of parliament. Concern about delay was a major reason I commenced this investigation. It also prompted the earlier investigation by my office in 2003[11].

Agencies are required to provide a decision on FOI requests within 45 days of receipt of the request[12]. Of the FOI decisions by government departments in 2003-2004, only 56 per cent were made within 45 days. A further 23 per cent of decisions were made in between 46 and 90 days and 21 per cent of decisions took more than 90 days[13]. DHS was responsible for the greatest number of requests not determined within 45 days. If it is excluded, the number of requests determined within 45 days by the remaining departments increases to 70 per cent, with 27 per cent decided between 45 and 90 days and only three per cent of decisions taking over 90 days.

DHS receives by far the most requests of any government department, with 1,051 requests or about 44.5 per cent of all requests to government departments in the 2003-4 year. In that year it made 43 per cent of its decisions within 45 days and took over 90 days to make 37.5 per cent of its decisions.

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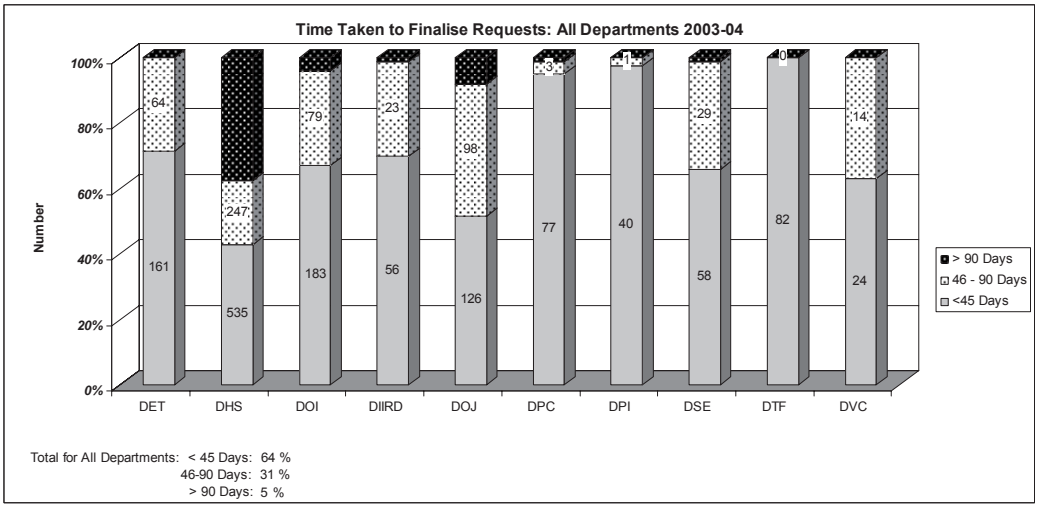
11 This report was not made public.
12 FOI Act section 21 requires agencies to "take all reasonable steps to enable an applicant to be notified of a decision on a request as soon as possible but in any case not later than 45 days after the day on which the request is received."
13 Figures provided to my office by DOJ.

Table 1



Other departments struggled to meet the 45-day period. DOJ resolved 52 per cent of requests within 45 days, while DVC, DSE, and DOI determined less than 70 per cent of requests within 45 days (see Table 1).

Since the commencement of my investigation, DHS's performance has improved significantly with approximately 65 per cent of requests now being determined within 45 days. I welcome this improvement.

I also note that:

- at the end of February in the 2005-2006 financial year, 69 per cent of FOI decisions by government departments have been made within the 45 days statutory time frame
- Since April 2004 DET has processed all requests it received within the statutory time frame
- Sine 1 July 2005 DPC has processed all requests it received within the statutory time frame and recorded its lowest average finalization time of 18 days for August 2005
- DOJ has improved on the number of requests processed within 45 days increasing from 52 per cent in 2003-2004, to 60 per cent in 2004-2005 and up to 66 per cent in 2005-2006 to date.

Victoria Police

Victoria Police, which receives more FOI requests than any other government agency, has been unable to meet the statutory time requirement in a large proportion of cases. Victoria Police does not keep records of the number or percentage of requests decided in less than 45 days and over 90 days, so direct comparison with the performance of government departments is not possible. However it does track the number of active FOI files which are overdue (that is, not decided within 45 days).

In the period from January to September 2005, Victoria Police had on average 365

active files of which, on average 147, or over 40 per cent, were more than 45 days old – the percentage over 45 days at any time varied between 24 per cent to 52 per cent.

Where delays occur

Each department has its own procedures for handling FOI requests but the broad approach is similar for all. The basic steps are:

1. Request is received by the FOI Unit which checks that it is valid (that is, the request appears clear and the application fee is paid).
2. The FOI Unit notifies the relevant program areas of the request.
3. The program areas conduct a document search and report to the FOI Unit and advise of any concerns about the release of the documents.
4. The FOI Unit assesses the documents for possible exemptions, which may lead to further searches or inquiries.
5. The FOI Unit conducts any third-party consultation.
6. The FOI Unit prepare a decision.
7. For policy sensitive requests, the FOI Unit advises the department, executive and the relevant Minister's office of the proposed decision for noting.
8. The FOI Unit notifies the applicant of the decision.

The files examined disclosed unnecessary delays resulting from factors such as inappropriate decisions in handling the request, poor internal procedures, and lack of resources. For example, in one case there was a failure to consult with the Minister's office at an early stage on the possible release of a Cabinet document. In several cases decisions were made to delay notifying the decision to the applicant.

The practice of most departments before releasing potentially sensitive documents is to send a briefing note to the relevant Minister. The briefing note includes a copy of the proposed decision. The department then awaits 'noting' of the proposed decision by the Minister before advising the applicant of the decision. In some cases the Minister's office may take weeks to note the proposed decision. In some cases, decisions were delayed while ministerial briefings and 'possible parliamentary questions' (PPQs) were prepared.

In many cases, internal review decisions were unduly delayed. Although the Act does not stipulate a time in which internal reviews must be completed, it is clear that they should be conducted with reasonable expedition. Application to VCAT is allowed if the internal review is not completed within 14 days[14].

There were cases identified where departments delayed notifying decisions on internal review for excessive periods while they waited for 'noting' by the Minister's office. In other cases there was little or no indication on file of any action being taken for lengthy periods.

14 *Section 51(2) allows an applicant to apply to VCAT if an internal review decision has not notified within 14 days after the request for internal review.*

Table 2

ACTIVITY	MINIMUM TIME	MAXIMUM TIME	AVERAGE TIME
Search and report by program area	1 day	66 days	19 days
Third-party consultation	1 day	76 days	12.5 days*
Assessment and decision	1 day	94 days	21.5 days
Noting	1 day	66 days	11.5 days
Total time	3 days	153 days	54.5 days

* See footnote 15.

As previously discussed of the files examined over 100 were selected on the basis that they had taken more than 45 days to process and/or that they involved policy-sensitive requests and were thought likely to display more of the causes of processing difficulties and delays than average. For those files:

- The average time to notify a decision was 54.5 days
- The average time for the program area search and report was 19 days
- The average time for third party consultation was 12.5 days[15].
- The average time was 11.5 days from advice of the decision being given to department executives and Ministers' offices until it was notified to the applicant.

Table 2 shows the range in the times taken for the various phases of file handling[16].

The following features emerged from the analysis of files.

Document searches

In most cases program areas were asked to provide any relevant material within 14 days. The 14-day search period was exceeded in about 62 per cent of those cases where the search time could be identified from the file, with an average response time of 19 days. The initial responses from the program areas were generally complete although follow-up searches were required in some cases. Delays in the document search usually resulted from difficulties in identifying relevant material, often because the request was framed in terms that did not fit well with the way information was recorded by the department. In a

15 Third-party consultation occurred in only a small number of cases; the average time stated is for those cases where consultation did take place. Contact was generally initially by telephone and in most cases the response was received within one day. Although in one case consultations took place over 76 days, third-party responses were mostly quick and time waiting for them contributed little to the total of 106 days taken by the department to make and notify its decision to the applicant.

16 Some files did not allow all the response times to be accurately determined and they were excluded from the statistical analysis, but are included in the qualitative assessments.

few cases there appeared to be a lack of cooperation by officers in the program area.

The evidence indicated that program areas generally did their best to provide all relevant documents within the time requested. They also cooperated with any follow-up searches or requests for information relevant to the possible application of exemptions. In a few cases the program area appeared to be reluctant to provide the documents or were unable or unwilling to devote time to the document search.

Third party consultation

Third party consultation was in the main satisfactory. In those cases in which consultation took a long time, it was because of the time taken in identifying and contacting the third parties rather than any undue delay in response by those third parties. I note that in the cases examined the third parties were either commercial ventures or professionals who had prepared or contributed to reports. They therefore represent a different group from those who might be consulted in relation to requests for personal information and may be expected to be less concerned about the possible release of information.

The 2003 report by my office on allegations of delays in handling FOI reports recommended that, where consultation took place with an undertaking pursuant to section 34(3)(a) of the Act, the undertaking should be advised that in the absence of a response by a nominated date, not exceeding seven days, it will be assumed that there is no objection to the release of the documents. I was pleased to see that in most cases this recommendation had been followed. Moreover, in almost all cases, the FOI officer initially contacted the third party by telephone. It seems likely that such telephone contact helped to ensure that little or no delay occurred.

The files examined did not support a view that third party consultation is generally unduly arduous or a significant cause of delay. The combination of telephone contact with the third party and giving a short time in which to respond was generally effective, although the consultation process was prolonged in a few cases where there were a larger number of third parties to be contacted.

Assessment

Factors contributing to lengthy assessment and decision times included internal consultation about the sensitivity of documents, consideration of possible exemptions, and ensuring the completeness of the document search with following up of references within documents to other potentially relevant material. Occasionally workload factors were evident. These were likely also to be relevant in many of the cases where the reason for delay in the assessing and decision process was not apparent from the file. In other cases internal consultation and negotiation over the proposed outcome contributed significantly to the time taken to reach a decision.

In a number of cases there were significant delays in obtaining information from

other departmental officers relevant to the assessment and release of documents. At times this was because of competing time pressures. In some cases there appeared to be a concerted effort to find grounds either to narrow the scope of the request or to find grounds to claim exemption for relevant documents.

Noting by executive and ministers' offices

It is common practice that before a proposed decision to release documents relating to policy-sensitive topics is sent to the applicant, it is first forwarded to the department executive and then to the relevant Minister's office for noting.

The Attorney-General's Improved Accountability Guidelines for FOI, issued in 2003 in response to concerns expressed by my office on issues of timeliness, stated:

> In all instances where documents relate to a Minister's portfolio (except personal requests) and / or where the Minister could be asked by the media or in Parliament to comment or explain, the agency will provide a brief to the Minister. This is done 5 days prior to the proposed release... It is not the responsibility of the FOI officer to follow up the Chief of Staff or the Premier's Office if no input is received by the proposed release date.

The guidelines make clear that the noting process is quite separate from the proper consultation with the department executive, Ministers' offices and other departments and agencies which may be required as part of the assessment and decision process.

I am disappointed to see that in many of the files the time taken for noting exceeded the five days provided in the Attorney-General's guidelines. Although the figures given above include noting time for both executive and Ministers' officers, the noting time for Minister's offices alone exceeded 20 days in quite a few cases.

In a few cases the noting process resulted in the discovery of further relevant documents, indicating an initial failure to make enquiries of those people, including on occasion the executive and the Minister's office who may have relevant information about the documents held by the department.[17] There were also instances where indications that members of the executive or of the Minister's staff had suggested changes to the proposed decision. This is not consistent with the purpose of the noting process and could lend support to the allegation of some journalists and politicians that the decision making process is open to manipulation. However, I note that some of the suggested changes were appropriate. There were also cases where FOI officers resisted suggestions that exemptions be claimed for documents and released documents in accordance with their original decision.

17 I am only referring here to information that the Minister's office may have. An applicant would still be required to lodge a separate request for an official document of a Minister.

Case studies

Case 1

A request for access to a report commissioned by a department, regarding a survey for a project, took about 35 days to process to the point of preparation of a proposed decision. The program area had recommended access be denied, in part because it believed the report was liable to be misinterpreted. The FOI officer decided to release the report. The proposed decision was then sent to the Minister's office for noting. The FOI officer then waited 26 days for advice that the Minister had been fully briefed on the sensitivities of the report. Release of the decision and the report was then further delayed until the return from leave of an officer who was thought best able to handle any press reaction to the document. The final notification of decision was 23 days overdue.

Case 2

Internal review took 160 days. The proposed internal review decision remained with first the department's executive and then the Minister's office for lengthy periods. The decision was further delayed waiting on the preparation of PPQs. The original decision to refuse access to documents had obvious problems and was most likely incorrect. One of the problems identified included the decision to exempt certain information because a third party who was consulted objected to its release, despite having no reason or basis for the objection. There was no reference on file to these problems, which appear to have been completely overlooked in the internal review.

Case 3

A department took 83 days to give a decision on an FOI request and then took a further 85 days to complete an internal review of the decision. It appears that little or nothing was done to action the request for internal review for the first two months after it was received. The internal review did not result in the release of any additional material, but added another claimed ground of exemption.

Conclusion

I am particularly concerned by delays in waiting for 'noting' of decisions by Ministers' offices. The Act requires decisions to be notified to the applicant as soon as practicable[18]. The Act does not authorise agencies to wait for noting of the proposed decision by the relevant Minister. The Improved Accountability guidelines issued by the Attorney-General suggest that the FOI officer should wait only five days for noting by Ministers so that decisions are not unduly delayed.

I consider that undue delay for noting by a Minister is not only inappropriate but may lead to the perception that decisions are being delayed for political reasons. The Improved Accountability Guidelines observe that the person making an FOI decision is exercising a statutory power and may not be subjected to any direction as to how to exercise that

18 FOI Act section 21.

power[19]. Departments should be careful to avoid any implication that FOI officers are put under pressure to reach politically convenient decisions.

In my view the average of 11.5 days for noting is excessive. Undue delays for noting are unacceptable, particularly in cases where the response is already overdue. The FOI officers in all departments are aware of the time by which a response is due on each request and of when a request is overdue.

It is appropriate at times for the FOI officer to seek comment from the office of the relevant Minister on the possible release of sensitive documents. The Improved Accountability Guidelines set out a procedure for this. Any need for consultation with the Minister's office should be considered early in the FOI process to prevent it becoming a source of delay.

FOI decisions should be provided promptly without undue delay for ministerial noting. Requests for internal review should be considered and determined speedily by experienced senior staff. I expect departmental executives to ensure there is no significant delay in these areas in future.

One of the frequent complaints of those who use the Act for public purposes, such as politicians and the media, is that delays in answering requests (including delays around clarification of requests) are such that, even if the information is obtained, sometimes only after application to VCAT, it is no longer of use. The public debate has moved on or decisions have been made long before the document is released.

I understand that the United States Freedom of Information Act provides for expedited requests where the applicant is a person primarily engaged in disseminating information to the public and the information is sought to inform the public[20].

Many media and politician requests in Victoria seek sensitive documents but do not necessarily seek access to the names of individuals or other third-party information. Subject to any proper matters of clarification, many such requests can be handled quickly. Although some of the files examined in my investigation demonstrated rapid responses to such requests, there were other examples of excessive delay.

In my opinion it is the statutory obligation of agencies to process such requests speedily where they are able to. Failure to do so is a proper cause for complaint and censure.

Recommendations

Agencies must adopt practices which comply with the requirement in the Act to notify decisions to applicants as soon as practicable[21] and should comply with the Attorney-General's guidelines.

19 Attorney-General's Improved Accountability Guidelines for FoI.
20 5 USC section 552(a)(6)(E)(v)(II)
21 Section 21

INTERPRETATION OF REQUESTS

Consultation and assistance

How agencies approach interpreting and clarifying requests is crucial in minimising delay and ensuring that requests are properly answered for the following reasons:

- An agency is not required to process a request until it is able to identify the document/s sought (i.e. a 'valid' request)[22].
- The agency must advise the applicant and assist the applicant to make the request in a valid form if a request appears unclear[23]. The day a clarified request is received is then treated as the start of the 45-day period within which a decision must be made.
- The agency may reject the request as 'voluminous' and must give the applicant notice in writing of the intention to refuse access and provide a reasonable opportunity for the applicant to consult[24]. The 45-day period is suspended while the request is re-scoped.

The examination of files revealed examples of departments seeking clarification of requests that were quite clear in their terms. These clarifications suggested that requests should be rephrased to avoid their being voluminous with no evidence that the request could not reasonably be answered.

Departments at times construed requests in unusual ways which minimised the number of documents that might be disclosed. On other occasions, requests were said to be 'unclear' but a later revision of the request, almost identical in its terms was accepted. Typically in cases where clarification was required, the department took no active steps to assist the applicant.

Where consultation occurred on the terms of the request it mostly appeared perfunctory. Reasons given for decision rarely characterised the documents to which access was denied. Most commonly they said no more than 'access has been denied to (x number of) documents'. The applicant had little information as to the documents or types of documents to which access was denied, and therefore did not see the effect of the interpretations and other decisions applied to the request.

There were instances where more information was provided. In some cases where requests were unclear, departments advised the applicant of the types of documents held to assist the applicant to make a valid request. In some cases, departments listed or gave details of documents to which access was denied and advised the reasons in relation to the identified documents, or gave some contextual information to assist the applicant in understanding documents to which access was granted. As previously noted, DTF stood out in this regard.

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22 Section 21 imposes the 45 day period. A valid request must be in writing (section 17(1)), providing such information as is reasonably necessary to enable a responsible officer to identify the document (section 17(2)) and be accompanied by the fee (section 17(2A)), unless the fee is waived.
23 FOI Act section 17(3); see also section 25A(6), for the assistance that must be given to an applicant where a request is voluminous.
24 FOI Act section 25A(1) & (6).

Requests may be unclear for many reasons. Applicants often lack the information to clearly identify the documents they seek. They may not know how the information they are interested in is recorded, or the way the department classifies that information. Some requests are simply 'fishing' to see if there are any documents of interest to the applicant. Some applicants, including some frequent users of FOI, repeatedly make requests that are poorly framed and difficult to understand. In one case an applicant admitted he had requested a large but poorly-defined category of documents in the hope the responsible Minister would not be alerted to the one document he wanted.

FOI officers often give media and political requests the narrowest meaning possible, while requests for personal documents are more commonly interpreted in a way intended to assist the applicant. Departments have applied unusual or special definitions to the terms of requests without advising the applicant of the definitions used. In some cases the particular definitions used and their effect were noted on file but this information was not given to the applicant.

Where consultation does occur it is with the FOI officer. I have not seen any cases where the applicants were able to consult directly with the officers in the program areas who have ownership of the documents they seek.

A number of FOI officers reported to me a different approach to giving assistance to applicants seeking personal information as against political and media requests. They advised that where a request for personal information is unclear, the FOI officer will often contact the applicant by telephone and offer guidance on how to reformulate the request. They stated that there is a reluctance to contact media and political applicants by telephone and it is more common for departments to only write to them.

They gave several reasons for this. FOI officers are generally familiar with the type of personal information the agency holds and feel confident to guide applicants. They have less knowledge about the types of information involved in media and political requests and where and how it may be recorded. FOI officers also indicated a reluctance to assist to reframe requests that are seen as 'fishing' as this might involve them and the department in the political process.

Several expressed the view that it is not appropriate for an FOI officer to deliberately steer media or political applicants toward or away from documents that may be used to give adverse publicity to departments or the government. They suggested that such applicants must take responsibility for properly framing their requests. In some departments FOI officers are discouraged from contacting media and political applicants by telephone. The departments preferred written communication with such applicants to ensure there is a clear record of communications and to minimise the potential for confusion.

Examination of files disclosed examples of needless delay in raising objections to requests as being unclear or potentially voluminous, often only near the end of the

45-day period. In some cases the amended request was also rejected after lengthy delay. Often the applicant was given little or no assistance in reframing the request.

These delays in raising the question of validity greatly prolong the time before any substantive response is given to the request. In some cases the circumstances suggest that assertions that requests were unclear or voluminous were merely a tactic to delay the response to a request without exceeding the Act's time limits.

As with unclear requests, many voluminous requests result because applicants do not know how to identify the documents of interest that the agency holds. In many cases the solution is also the same. By advising the applicant of the types or classes of documents it holds, or of the way in which its records are made and kept, the agency may enable the applicant to make a request which is valid, accurate and not voluminous. This is consistent with the concern stated by some FOI officers not to 'steer' applicants toward or away from documents, but would allow applicants to make properly informed requests.

Where a request is seen to be unclear or potentially voluminous, the agency has an obligation to assist the applicant to make a request in a manner that is clear and not voluminous and to give the applicant a reasonably opportunity of consultation for that purpose[25]. I consider this requires agencies to provide sufficient information to enable the applicant, acting reasonably, to make a valid request[26].

In some cases there is disagreement whether a request is sufficiently clear. My office receives and investigates complaints from time to time that FOI requests have been unreasonably refused. Where an agency rejects a request on the ground that it is unclear, the applicant is also able, once 45 days have passed after the date of the request, to apply to VCAT for review on the basis of a deemed refusal of the request.

In the discussion paper I asked whether applicants should have a right to consult directly with the managers responsible for the relevant program areas for the purpose of clarifying or varying the scope of requests.

Submissions by some smaller agencies support discussions direct between applicants and program officers. However larger agencies said the potential for a breakdown in coordination or for misunderstandings or inconsistencies to arise is greater in larger agencies, particularly where the documents relevant to a request may be held in a number of different program areas. In my view where an agency has dedicated FOI officers, it is appropriate that they should continue to coordinate any communication between the applicant and the agency.

Excision of irrelevant material

The discussion paper also raised the issue of whether an agency is required to release

25 FOI Act section 17(3) and 17(4).

26 See Re Kelly and Department of Treasury and Finance [2001] VCAT 419: the Tribunal ordered that an index prepared in the course of sampling documents which were potentially relevant to a request should be released to the applicant as part of the Department's obligation to facilitate access and to consult under section 25A(6); on appeal the Court of Appeal declined leave to appeal against that order: Secretary, Department of Treasury and Finance v Kelly (2001) 4 VR 595.

entire documents or only to release those parts of documents that relate to the subject of the request[27]. By excluding the parts of a document that do not relate to the subject of a request an agency may be spared the work of assessing the irrelevant parts for possible exempt material, and from having to consult with third parties. This may lead to quicker decisions and release of documents.

My investigation revealed that some departments and other agencies have the practice of deleting or not providing copies of distinct parts or sections of documents that are not relevant to the request. On occasion, some agencies delete or blank out any material, including single sentences in short documents such as emails, which do not relate directly to the topic of the request. The latter is an extreme approach that does not seem to find any basis in the Act and which risks the release of material that is distorted or misleading by reason of the deletions. In some cases it clearly required more time and effort to edit and delete the 'irrelevant' material than would have been involved in releasing the entire document.

A number of agencies said in their submissions that they would welcome either an amendment to the Act or guidance on when a part of a document need not be provided to an applicant because it is irrelevant to the request.

I note that section 22(1) of the Commonwealth FOI Act provides that an agency should provide an edited copy of a document where the document contains 'information that would reasonably be regarded as irrelevant' to the request. If it is reasonably practicable for the agency to provide a copy of the document edited to remove that information and it does not appear that the applicant would not want an edited copy, the agency is required to provide a copy edited in that manner[28].

Case studies

Case 4

A department decided that a request for documents detailing expenditure on office improvements including art and furniture did not include in its scope expenditure on promotional posters and hire furniture. The applicant was not made aware of the decision to exclude these specific items.

As a result, the released documents gave a misleading impression to the applicant. In my opinion the applicant should have been made aware of the interpretation that was being applied and should have been allowed to ask for the further material. Deliberate withholding of information and documents on spurious and technical

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27 Re Wilson and Department of Premier and Cabinet (2001) 18 VAR 217; [2001] VCAT 1769. Senior Member Ball said, "having regard to the facts of this application, it is appropriate to read Section 20 as creating an obligation relating to the relevant parts of the document" (emphasis in original) (at [24]). FOI Act section 20(1) relevantly provides:
"(1) Subject to this Act, where –
(a) a request is duly made by a person ... for access to a document ...; and
(b) ...;
the person shall be given access to the document in accordance with this Act."
FOI Act section 25 expressly provides for deletion of exempt material from a document so that access may be given to the (non-exempt) remainder of the document. "Document" is defined in broad terms in section 5 of the Act. There is no suggestion in the terms of the definition that a document is to be regarded as divisible into parts, based on relevance to the request.
28 The agency must consider whether disclosure of the material "might reasonably, as opposed to irrationally or absurdly, be considered or looked on as irrelevant to the request for access": Re Russell Island Development Association Inc and Department of Primary Industries and Energy (1994) 33 ALD 683

grounds betrays the public's trust in the FOI process.

Case 5

A request was made for reports or results produced from a survey carried out for a department. Having photocopied some thousands of pages of raw survey results, the department then advised the applicant that assessing the material might be 'voluminous' and sought clarification of the request.

The suggestion that the original request was voluminous was inappropriate. It should have been evident that the applicant was requesting reports prepared on the data and not the raw data itself. Moreover, the raw data did not contain exempt material and would have been easy to assess.

The applicant amended the request, in part to seek a summary report for only the most recent quarter, but a decision was made to release documents including a report summarising the survey data for the year. After the proposed decision had been sent to the Minister's office for noting, a discussion between the FOI officer and a member of the Minister's office led to an amended decision to provide a quarterly survey report only, and not the annual report that had initially been proposed. While the narrowed response met the terms of the amended request, it provided less information than the decision originally proposed, and required additional work and delay in revising the decision and copying the documents to be released. Although justification was found by reference to the applicant's request, the only motivation for this seemed to be to minimise the information provided.

Case 6

A request sought access to documents relating to consultancy services provided by a specified company. The department adopted a definition of "consultancy services" taken from the Victorian Government Purchasing Board's (VGPB) Supply Policies and Guidelines which excluded "contracts". The applicant was not made aware of the definition that had been applied or that a number of documents were then treated as irrelevant on the basis that they related to 'contracts' and not 'consultancy services'. A file note referred to the exclusion of some documents as 'lucky'.

The VGPB's definition of 'consultancy services' may be appropriate in its context but was irrelevant to the request as made. In my opinion the response was misleading.

Case 7

On the 44th day after a request was received, the department asked the applicant to clarify it and suggested that, if not clarified, the request might be voluminous.

The request appeared quite clear in its terms. No information was recorded on the file to indicate how the request was unclear or to justify the assertion that the request was potentially voluminous, or to show any assessment of the resources needed to process it.

Conclusion

I believe requests should be clarified at the earliest practicable time and appropriate

assistance should be offered to applicants. I urge departments to be more open to direct discussions with applicants. It may also be appropriate at times for the FOI officer to involve officers from the relevant program area to ensure the applicant is properly informed of the types of documents that are available and that the agency has a real understanding of what the applicant seeks. Such discussions can be confirmed in writing to avoid any misunderstandings.

It is inappropriate for an agency to apply artificial constructions to requests, to interpret them in terms that are unduly narrow or to apply special definitions to the terms of requests. There may be occasions when it is appropriate to use special meanings, particularly in technical contexts. I consider that where an agency does apply a special definition or construction to a request, it should advise the applicant of that fact and, so far as it reasonably can, of the effect of that definition and whether any documents or classes of documents are excluded by that definition.

Subject to the proper application of exemptions, agencies ought not to be reluctant to reveal the existence of sensitive documents or to play a cat-and-mouse game with applicants. A file note was seen which asked, of a non-exempt document, 'How did [the applicant] know this document existed?'. Other notes demonstrated that there is in some agencies a culture of concealment rather than of openness.

In many cases a telephone call to the applicant would resolve any real question in the mind of the FOI officer as to the applicant's intended meaning. By providing useful information about the documents it holds, an agency may assist the applicant to refine a request to reduce the time, cost and resources otherwise needed to answer it. Moreover, mere assertion that a clear request is unclear or asking the applicant to reconsider the terms of the request does not have the effect of resetting the 45-day period for processing the request. The agency is not relieved of the requirement to answer the request within 45 days unless objectively it is unclear or voluminous[29].

Where appropriate, an agency should provide a fair indication of the types or classes of documents that it holds that relate to the subject matter of the request or the way in which information is recorded or stored. This does not require an agency to provide complete lists or indexes of documents, or to conduct some form of preliminary search, but simply to provide the information to enable the applicant to make an informed request that enables the agency to identify the relevant documents. In my opinion, that is one of the obligations imposed by subsection 17(3):

> It is the duty of an agency or Minister, as the case may be, to assist a person who wishes to make a request, or has made a request that does not comply with this section ... to make a request in a manner that complies with this section ... (emphasis added).

29 *Re Kelly and Department of Treasury and Finance [2002] VCAT 1019.*

A similar obligation exists in relation to potentially voluminous requests[30].

I recognise that FOI officers will experience difficulties when consulting with applicants and that some requests will require considerable effort to resolve. However, adoption of these practices should reduce both the level of conflict with applicants and the number of justified complaints about the handling of FOI requests by agencies.

Consistent with a focus on providing information relevant to the applicant's request, I believe that applicants should be encouraged, where appropriate, to frame requests in terms of information. In some cases this will not be appropriate and it would not substitute for the right of applicants, for example, to access all documents relating to their personal affairs. However, there are times when applicants do not really want 'all documents' relating to a topic and would be satisfied with a document or an extract from a document that provides specific information. An applicant who did not want documents edited could state that in the request or, having received an edited copy of a document, could request an unedited version.

Recommendation

I recommended that departments and agencies should:

- consult with applicants by telephone or in person, where appropriate, to expedite the process; and
- take into consideration all relevant sections of the Act, including section 25A, to ensure requests are processed in a prompt manner.

I further recommend amendment of section 25 of the Act to include a power to delete irrelevant material, in terms similar to section 22 of the Commonwealth FOI Act. This would both confirm the ability of agencies to delete unrelated material and provide the necessary guidance as to when such deletion could take place. That is, when it is both practicable and not contrary to the applicant's known wishes.

MULTIPLE REQUESTS

Multiple requests are typically for sensitive documents and frequently come from opposition MPs. FOI officers reported that in some cases multiple requests have a major impact on their workload and can also affect the program area/s which has to conduct the document search. My investigation officers have seen cases of more than 20 FOI requests on related topics being lodged over one or two days. Another example of multiple requests is where several journalists make similar requests on a topical issue.

In 2003 my predecessor recommended that the Attorney-General consider amending the Act to include a provision similar to the voluminous request provisions of section 25A of the Act, but adapted to deal with multiple requests[31]. A further recommendation was to allow agencies to extend the processing time by up to a further 45 days for multiple requests.

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30 FOI Act section 27(6); and see footnote 25 above.
31 Report on an Investigation Concerning Allegations that Departments are Unduly Delaying Responding to FOI Requests, 2003. The report has not been made public.

However, the files my officers examined showed little evidence that multiple requests overwhelmed the resources of departments.

Although it is evident that multiple requests can cause some strain on departmental resources, there are problems in seeking to exclude them in the same way as 'voluminous' requests. Requests could be staggered over several days or weeks, or be lodged by a number of people. That does not make the requests necessarily improper and, for example, several journalists could make similar requests in good faith. It may be appropriate for the agency to negotiate with the applicants in such cases about the terms of the requests and the time in which a response may be provided.

I have noted that many FOI requests can be demanding on agency resources. A number of agencies, including DHS and Victoria Police, frequently accept requests for personal information involving large volumes of material (at times well over a thousand pages) relating to personal information of the applicant which at times take much more than 45 days to process. Multiple requests are usually for media or political purposes, and as such relate to an equally fundamental object of the Act. The ability of politicians and the media to obtain information for public purposes could be stifled by excluding so-called multiple requests.

Case study

Case 8

An opposition MP lodged 13 FOI requests with a department on one day. The requests all related to reviews that had been conducted in a single program area. Four of the requests took more than 45 days to determine, with the longest time being 78 days. The average time to determine all 13 requests was 36 days, with several being completed in only 15 days.

Of the four overdue decisions, one was delayed because the Minister's office wanted to receive PPQs before noting the decision and the second was delayed first over internal communications and then awaiting noting. The third was delayed after the decision had been made, in part because of the perceived sensitivity of the document, and in the last it took 19 days to make a decision following an in-principle agreement within the department that the document would be released, and a further 15 days waiting on noting by the Minister's office, leading to the decision being 19 days overdue.

Conclusion

I do not believe that the problem of multiple requests is either frequent enough or severe enough in its impact to warrant statutory amendment.

Following recommendations I have previously made, many departments and other agencies have developed the practice of advising applicants if it is apparent that a request will not be decided within 45 days. If the agency provides a reason for this or an estimate of how much extra time will be needed, applicants are usually willing to accept the delay. If they are not, they have the choice of applying to VCAT or of complaining to my office.

Recommendation

Where an agency receives multiple requests and believes it will not be reasonably able to resolve them in 45 days, I recommend the agency consult with the applicant over the priority of the various requests and if appropriate negotiate to reduce the scope of the requests.

RESOURCES

Examination of selected departmental FOI files disclosed several significant factors contributing to delays in responding to requests. This section of my report considers the resources used in handling FOI requests.

Staff resources

I have identified three groups involved in processing FOI requests:

- FOI officers who receive the request make an initial determination of its validity, refer it to the relevant program areas to conduct a document search, consider whether any exemptions apply, and prepare the decision.
- The staff in the relevant program area, who conduct the document search and who may provide comment on any difficulties if the documents are released.
- Executive officers and ministerial staff who see the proposed decisions of requests for sensitive documents before it is notified to the applicant.

Departments do not keep records of the time staff spend in handling requests, except in those cases where a processing charge may be applied. Although the number of FOI officers is known[32], the number of other staff involved and the amount of time spent by them in carrying out the document search and related activities is not recorded.

It is difficult to compare case-loads of FOI officers between agencies because of the differences in the nature, complexity and volume of material involved in the requests different agencies handle, and the different ways they divide the tasks between officers in their FOI units. The following table indicates there is no direct link between the number of FOI officers and the time taken to process requests within each of the departments.

There was an average of 48.5 requests per FOI officer across the departments and only 56 per cent of requests were completed within 45 days[33]. DOJ, DVC and DSE each completed less than 70 per cent of requests in less than 45 days although they have less than the average number of requests per FOI officer. These are grounds for continuing concern and for monitoring of departmental performance.

In 2004 DHS had the highest percentage of requests outstanding after 45 days. Since then it has effectively doubled its number of FOI officers from 9 to 20. From early 2005 it has improved its processing time so that now over 65 per cent of FOI requests are completed within 45 days. Of those not finalised within 45 days, most

32 Many FOI officers are also be involved in handling privacy and other related issues.
33 See Table 1, above. Excluding DHS, 70 per cent of requests were completed within 45 days.

REQUESTS PER FOI OFFICER BY DEPARTMENT 2003 – 2004

DEPARTMENT	No. OF FOI OFFICERS*	No. OF FOI REQUESTS**	No. PER OFFICER	per cent WITHIN 45 DAYS
DTF	2	87	43.5	100
DIIRD	3	76	25	70
DSE	2.5	98	39	66
DPI	1	50	50	98
DHS	20	1051	52.5	43
DOJ	6	270	45	52
DOI	4	297	74.25	67
DPC	4	106	26.5	95
DVC	2	66	33	63
DET	4	254	63.5	72

* The number of FOI officers in some departments varied over the year and some FOI officers had responsibilities for other matters.

** From DOJ 2003-2004 FOI Annual Report.

Table 3

	VICPOL	DHS	DOI	DOJ	DVC	DET	DTF	DIIRD	DPC	DSE	DPI
04*	36	14	9	8	6	5	4	3	2	2	0
05*	27	14	10	9	0	2	1	1	2	2	0

*The figures represent complaints for the calendar years of 2004 and 2005

involve requests for access to very large volumes of material.

Victoria Police receives the largest number of FOI requests of any Victorian FOI agency. Victoria Police has also consistently had large numbers of requests outstanding after 45 days, and has been the subject of more complaints to my office about delay than any other agency. The number of FOI complaints I have received against the departments and Victoria Police is detailed at table 3.

In 2004, 15 out of a total of 36 complaints against Victoria Police concerned delay. In 2005, this figure reduced slightly to 10 out of 27 complaints being about delay.

Victoria Police does not maintain figures of the time taken to process requests in the same way as the departments. However, its records show that in the period from January to September 2005 Victoria Police had on average 365 active files of which, on average 147, or over 40 per cent, were more than 45 days old (the percentage over 45 days ranged between 24 per cent to 52 per cent).

Although many of the requests it receives are inherently complex and time consuming, there is reason to think that the Victoria Police FOI Unit may be understaffed. By contrast with the ratio of about 48.5 requests per FOI officer within the 10 departments, the Victoria Police FOI Unit has about 10 officers handling in excess of 2000 requests each year. Victoria Police has advised that it is increasing its FOI Unit by, in effect, two full time officers. If the rate of new requests does not increase I expect that the number of requests processed within the statutory 45-day period would improve.

IT resources

Departmental records management systems are designed for use as a management tool. FOI officers stated that the information recorded on them is often not adequate to pick up the search terms that may be used in FOI requests and the records themselves are often not well maintained. For these reasons FOI officers stated they do not rely on the records management systems, although they continue to use them as an adjunct to other inquiries.

With the growing use of electronic communications, including email messages and attached electronic documents, paper files often do not contain all the records of a department. Many departments are moving toward an electronic file regime, in which officers will largely work with electronic files rather than the traditional hard-copy files.

Some electronic records are formally recognised as part of the ordinary records of agencies, and these generally are able to be searched and retrieved. Less formal records such as email, which are often deleted after a short time, are usually not readily searchable other than by the person who sent or received them. In a submission to my investigation the Public Records Office Victoria (PROV) recorded its experience that some electronic records such as emails are not considered part of the record system except where they are printed to file.

The Victorian Electronic Records Strategy ('VERS'), developed by PROV, is in part intended to assist the FOI process by providing a uniform system for search and recovery of records[34]. VERS-compliant systems may be expected to assist in the search for documents, including email. It should reduce the time spent by program-area staff in document searches and may improve the reliability of searches. It is unlikely to wholly replace the need for program areas to be involved in locating documents, particularly where the terms of the request do not match well with terms used in creating VERS records.

34 See the PROV website at: http://www.prov.vic.gov.au/vers//vers/default.htm

VERS-compliant records management systems can assist further in meeting the objects of the Act. They can allow for public access to departmental records to levels determined by the system design. This may improve the transparency of department operations. It may also be integrated with an amended Part II regime to assist applicants in formulating FOI requests.

The introduction of VERS-compliant document management systems is an expensive exercise. In embarking on it, departments should be mindful of their FOI obligations and ensure that their systems are designed to give the maximum assistance in meeting them.

The existing government commitment to the introduction of VERS-compliant systems should overtake concerns over the effectiveness of the existing records management systems.

Computer technology can assist the FOI process in other ways. Since late 2003, Victoria Police, DHS and some other departments have acquired software that enables them to edit electronically scanned copies of documents, with a considerable saving in time over the previous manual methods. This is particularly useful where there are large volumes of material to be edited before release, and has helped to improve processing times within those agencies.

Conclusion

I consider it would be appropriate and useful for agencies to record the level of officers involved and the time spent in responding to FOI requests, to enable both the extent of the resources devoted to FOI and an imputed cost to be determined.[35] I recommend a mechanism be implemented to collect and record this information.

Although I remain concerned that nearly 35 per cent of requests to DHS are not completed within the statutory period, I am satisfied that many of these requests involve such a volume of material that they can not reasonably be finalised in less than 45 days and that DHS is generally showing diligence in handling these difficult matters.

While I recognise the many competing demands for Victoria Police in staff resources, I urge it to monitor the FOI staffing aspect of its timeliness of FOI responses and to make further increases to FOI resources to ensure it is able to process requests within the statutory period.

I am mindful that it may be necessary to monitor compliance with PROV standards to ensure the integrity of the public records system and of the ability to conduct FOI searches efficiently and effectively.

Recommendation

I recommend that Victoria Police maintain more detailed data on FOI requests, particularly in relation to timeliness.

I also encourage other agencies with large volumes of material requiring editing

35 The Commonwealth collates information on the actual time spent in handling all FOI requests, and its annual FOI reports provide an imputed cost for handling requests as well recording the amounts recovered in fees and charges.

to consider using software that enables electronic editing of scanned documents.

PROCEDURES

Document search

My investigation found existing document search procedures are generally effective. However I receive complaints either that a relevant document was not disclosed or that an agency has found no relevant documents in relation to a request. On a number of occasions my officers have been able to locate such 'missing' documents within the agency. Of these complaints, about 18 per cent have been sustained while in about 48 per cent of cases the agency was found to have conducted a proper search.

The standard procedure within departments is for the FOI Unit to notify the request to those program areas thought likely to hold relevant documents, and for the manager of the relevant areas to sign off a report to the FOI Unit accompanying any documents that have been found. In most cases there is no record of which officers have been involved in the search or where searches have been conducted. Although there is 'sign-off' to provide accountability, not all departments keep a record of which officers have been involved in the search or where searches have been conducted.

Third party consultation

The Act provides exemptions which recognise the rights of third-parties in relation to personal information[36], trade secrets and other commercial information[37], and information obtained in confidence[38].

The Act requires agencies to consult with third party providers of commercial information before deciding whether to disclose documents containing that information[39]. While not expressly required by the Act, agencies also sometimes consult before deciding to release documents containing personal information or information provided in confidence.

Before releasing documents containing personal or commercial information, an agency must notify the relevant third party of their right to apply for review of the decision (so-called 'reverse FOI' rights). The third party then has 60 days in which to apply to VCAT for review of the decision[40].

In each case, the agency must have regard to the public interest before deciding whether to release the document[41].

There are a number of practical difficulties experienced as a result of these provisions:

– Agencies are open to criticism if they decide not to release personal or confidential information without consulting with the relevant third party.

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36 FOI Act section 33.
37 FOI Act section 34.
38 FOI Act section 35.
39 FOI Act section 34(3).
40 FOI Act sections 50(2)(e) and 52.
41 FOI Act sections 34(2)(d) and 35(1)(b) set out public interest tests in relation to commercial information and confidential information respectively; section 33(1), in referring to "unreasonable disclosure" of personal information, has been said to contain an implied public interest test. In Re AB and Department of Human Services [2001] VCAT 2020 (Judge Strong VP) at [38] said of the section 33 exemption for personal information that an agency could not assume that disclosure is unreasonable but must be "affirmatively satisfied, for some tangible reason, that disclosure would be unreasonable in the particular circumstances of the case."

- The need for consultation may not emerge until after relevant documents have been located and assessed, by which time much of the 45 day decision period may have passed.
- Agencies say that consultation can be lengthy and difficult, and in particular that it can be upsetting to individuals who are told that a request has been made under FOI for information which identifies them but who cannot be told, on privacy grounds, who has made the application.
- It is unclear whether the 60-day 'reverse-FOI' period applies in those cases where the applicant has indicated consent to the release of information and practices vary between agencies, with some releasing documents where the third party has agreed and others waiting until the expiry of the 60-day period. The 60 days adds to the time before an applicant can gain access to the requested documents.

I am concerned about the reasons given for decision in many of the files my officers examined in this investigation. In particular, I have noted the failure to state relevant material facts in notices of decision. In a number of cases exemption was claimed on grounds such as:

- It was unreasonable to release personal information (in some cases, the name of public servants who had signed a letter or sent and email, or whose name otherwise appeared in the ordinary course of correspondence), with no indication why it was unreasonable
- Information had been provided to the department in confidence but with no statement of details supporting that conclusion.

In most of these cases there had been no consultation with the third party to determine if there was any basis to object to release of the information. In some cases the reasons for decision referred to consultation with third parties but did not identify the material facts which emerged from the consultation that were relied on.

There is often no clear factual basis articulated for exemptions claimed under sections 33 and 35. Section 34 requires consultation in the case of commercial information where its disclosure may expose the undertaking unreasonably to disadvantage, but not where the information relates to 'trade secrets'. In the cases examined, exemptions claimed for commercial information generally had a clear factual basis which was usually stated in the reasons given for the decision. In at least one case where exemption was claimed for 'trade secrets' there was no consultation and no basis apparent from the file for asserting that any trade secret was involved.

There are occasions when it may not be appropriate to consult with third parties, for example if consultation is likely to be upsetting or unnecessarily intrusive, or if the third party's views are already well known, or if the agency itself has reason to treat information as confidential.

I consider however that where these exemptions are claimed under sections 33, 34 or 35 there should be:

– A clear record on file of the factual basis for claiming the exemption

– A clear record on the file of any decision *not* to consult with any third party stating the reason for that decision

– A statement in the reasons for decision of the material facts for the decision, of whether consultation was undertaken and, if it was not, the reason.

The files examined did not suggest that third party consultation was necessarily a source of undue delay. For the most part, third parties responded quickly to consultation and generally provided helpful responses. In the case of personal information, many applicants already express their willingness for names and similar identifying information to be deleted so that consultation may be required only where it appears the applicant does want access to information concerning the personal affairs of another person.

The need for consultation is often not known until after documents have been received from the program area and assessed by the FOI officer, so that it inevitably occurs relatively late in the process. As a result, any delays that have already occurred are then compounded by the consultation process, often with the effect that the FOI determination will be outside the 45-day period.

My predecessor in 2003 recommended that agencies, in seeking advice from a business, commercial or financial undertaking under section 34(3)(a) of the Act, should advise the undertaking that in the absence of a response by a nominated date, not exceeding seven days, it would be assumed that there is no objection to the release of the document. In most cases examined where consultation had occurred, departments had implemented that recommendation and it appeared effective in reducing delay.

In most of the cases examined the initial contact with third parties was by telephone, followed by letter which resulted in speedy responses. The process of consulting with third parties by telephone or by letter is not unduly onerous[42]. Agencies are not bound by the views of the third parties and the agency may make a decision on the basis of the information then available to it if the third party has not responded within a reasonable time.

Conclusion

It should be standard practice to record which officers have been involved in the document search and where searches have been conducted, so the FOI officer can review the search process and to create an audit trail if the applicant makes a later complaint. I also consider that, in those cases where the request results in a decision that no documents can be found, the statement of reasons[43] should indicate the nature and extent of the document search that has been conducted.

42 In Asher v Department of Innovation, Industry and Regional Development [2005] VCAT 1734, VCAT did not accept that consultation with over 100 entities was so onerous that section 25A would apply, and ordered the department to dispatch letters to the entities by way of consultation.
43 FOI Act section 27(1) requires notice in writing of a decision that a requested document does not exist, stating the material facts on which the findings were based and the reasons for the decision.

I recognise that third party consultation may extend the time needed to process FOI requests, particularly where there are a large number of third parties involved. Workload factors often impact on the time taken to consult especially with persons outside the agency.

In 2003 my predecessor recommended that the period for responding to a request be increased by a further period of 45 days where third-party consultation is required[44]. Allowing 45 days to process a request and a further 45 days for third party consultation would be consistent with the model of the Commonwealth Act, which requires a decision to be made within 30 days with a further 30 days allowed where third-party consultation is required. While the principle is accepted, the evidence gathered in this current investigation does not support so long an extension of the time for making a decision.

The 45 days allowed for processing under the Victorian Act is already longer than is allowed by most Australian jurisdictions[45]. In the cases I examined third party consultations took on average only 14.5 days. I consider that it would be reasonable to allow up to a further 30 days in those cases where consultation is required in order to enable a properly informed decision to be made. Although the time in which the decision is to be made would be extended, section 21 would continue to require agencies to take all reasonable steps to provide a decision as soon as practicable.

The Attorney-General may consider it appropriate also to amend sections 33, 34 and 35 of the Act to require that agencies consult, where reasonably practicable, with the relevant third party before making a decision on access, consistent with the consultation requirement in section 34(3)[46]. This would provide a consistent regime for consultation with affected third parties, although mandatory consultation on information relating to personal affairs could be very demanding on FOI resources.

Recommendation

I recommend that section 21 be amended to extend the period for making a decision by up to 30 days where consultation is required under section 34.

The agency can seek the views of the person or government agency by or on behalf of whom the information was communicated, for the purpose of determining if the information was disclosed in confidence and if it is against the public interest for the information to be disclosed.

I further recommend that section 21 be amended to extend the period for making a decision by up to 30 days where:

– information relating to the personal affairs of a person (including a deceased person) may be disclosed to enable the

44 Report on an Investigation Concerning Allegations that Departments are Unduly Delaying Responding to FOI Requests, 2003.
45 The Victorian, West Australian and Queensland FOI Acts allow 45 days. The Commonwealth, South Australia, Tasmania, Northern Territory and Australian Capital Territories allow 30 days. New South Wales allows only 21 days. Queensland, South Australia, Western Australia and the Northern Territory allow extension by a further period where necessary.
46 FOI Act section 33(3) requires consultation only in relation to the ground set out in section 34(1)(b), relating to matters of a business, commercial or financial nature the disclosure of which would be likely to expose the undertaking unreasonably to disadvantage; it does not require consultation in relation to the ground in section 34(1)(a), of trade secrets. In practical terms and agency is likely to need to consult with the relevant undertaking to establish if a matter is a trade secret, unless it has already been alerted to that fact.

agency to seek the views of the person who is the subject of that information (or in the case of a deceased person, their next-of-kin); or

– there is reason to believe that disclosure of a document would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister:

(a) which would be exempt matter if it were generated by an agency or a Minister; or

(b) the disclosure of which would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future,

Decision-making process

The evidence my office has gathered suggests that undue delay occurs in a minority of cases. I accept that the decision making process is often difficult. The Act and the case law built up since it came into operation in 1982 is complex and can be difficult to apply in the circumstances of a particular request. There are occasions where the sheer volume of material is such that reviewing, editing for exemptions and documenting the decision will extend beyond 45 days. Where the request is for sensitive information, the FOI officer may feel the weight of the concerns (real or imputed) of program managers, departmental executives and, at times, the Minister's office, as well as of any third party who may be involved.

There are several steps that an agency may take to reduce delay at this stage of the FOI process.

First, if there is a reason why a decision cannot be made within 45 days, the agency should immediately advise the applicant in writing of that reason. The applicant then has a choice of accepting the delay and waiting, of applying to VCAT on a deemed refusal of the request[47] or of complaining to my office of unreasonable delay[48].

Second, the guidance in the Attorney-General's Improved Accountability Guidelines that Minister' offices be given only five days to note a proposed decision should be given effect. Once the proposed decision has been sent to the Minister's office for noting, unless new information appears, the decision should be notified to the applicant at the end of the five day period.

Third, both departmental executives and the Attorney-General should enforce compliance with the requirements of section 21.

At present the DOJ FOI Coordinator provides departmental secretaries with information about emerging trends for departments in FOI, including analyses of numbers of outstanding FOI requests and the time taken to process them. This information provides a means for assessing the performance of departments against basic criteria such as the 45-

47 FOI Act section 53(1).
48 FOI Act section 53(2).

day processing period and for setting performance benchmarks. I believe the failure of some departments on an ongoing basis to meet a statutory obligation in over 30 per cent of cases ought not to be so readily accepted. I consider that it should be taken as an indication of under-resourcing or of procedural failure, except where special circumstances can be identified.

Some of the decisions examined showed little regard for the objects of the Act. Others provided material that might technically be responsive to the request but was obviously of limited or no value to the applicant, or took advantage of every arguable exemption to provide as little material as possible.

In a number of cases the reasons given for claiming exemptions were either wrong or misleading. In some cases it was clear the department had real concerns about the effect of release of a document and had sought a plausible ground for exemption. In other cases carelessness, inexperience or pressures of work may have been to blame. There were also occasions when documents that were identified in the initial search process were, for no clear reason, rejected as irrelevant or were omitted without explanation from the documents disclosed to the applicant.

Conclusion

My discussion paper asked whether agencies should release documents identified as relevant to a request within a reasonable time, even if some documents are yet to be located and assessed. I am satisfied that this would be of little benefit to applicants and would risk decisions being made without full information and applicants being misled by incomplete responses. It would also raise difficulties in knowing when the time to seek internal review or to apply to VCAT commenced.

The discussion paper also asked if my office should actively monitor the time taken by departments or agencies to process requests and intervene when necessary to ensure requests are handled expeditiously and without unnecessary delay. I consider that it is sufficient that I take action on the basis of complaints or when I have reason to inquire or investigate matters of my own motion. The Attorney-General, departmental secretaries and the principal officers of other agencies are best placed to monitor the performance of departments and agencies on an ongoing basis.

Case studies

Case 9

A document was said to be exempt under section 30(1) as an 'internal working document' because it was under consideration by a review which might lead to legislative change. Release while deliberations were under way was said to be against the public interest because it would undermine the effectiveness of the process. In fact it was intended that the document would be publicly released as part of the review process but there was concern at the effect of releasing it under FOI before key stakeholders had seen it.

Case 10

Some trivial administrative emails about meeting or interview times were said to be exempt under section 31(1)(d), on the grounds that they were likely to disclose methods or procedures for preventing, detecting, investigating or dealing with breaches or evasions of the law, the disclosure of which might prejudice the effectiveness of those methods. The reasons for refusal of access did not give any real indication of the nature of these documents so the applicant could not form any view whether they were relevant to the request but exempt, irrelevant, or documents of interest on which the decision to refuse access should be challenged.

Case 11

Exemption was claimed under section 34(1)(a), which relates to trade secrets. The information clearly was not in the nature of trade secrets. The statement of reasons also said that disclosure of the information would be likely to expose the undertaking which had provided the information unreasonably to disadvantage. This relates to section 34(1)(b), which was not cited as a ground for exemption. Exemption under section 34(1)(b) requires consideration of factors set out in section 34(2) and consultation with the undertaking that provided the information. There was no evidence that either of these had occurred. I am doubtful that release of the information would in fact have tended to cause disadvantage to the undertaking which had provided it, but the failure to consult or to consider the statutory factors meant this issue was never properly examined. In summary, the wrong section of the Act was cited. The procedures appropriate to the ground of exemption actually intended were not followed and there is good reason to doubt that the documents were exempt.

Case 12

A request was made for access to a report that had been provided to a department. Access to the main body of the report was denied because it was said that it contained opinions and recommendations that were 'still being considered and could be taken out of context. However access was given to several appendices. The applicant was advised that the appendices were available on payment of an access charge but was given no indication of the nature of the appendices. The applicant paid the charge, but found that they contained technical information relevant to the report but which, on their own, was self-evidently of no interest to the applicant.

Case 13

Access was provided to a document but with all parts of the document not directly relevant to the subject of the request deleted. The applicant was provided with a patch-work document of odd paragraphs or parts of paragraphs, from which the surrounding contextual material had been deleted, purportedly on the basis of an earlier VCAT decision that, where a document relates to a number of subjects, only those parts which are relevant to the terms of the request need be provided[49].

49 *Re Wilson and Department of Premier and Cabinet (2001) 18 VAR 217; [2001] VCAT 1769, at [24].*

REASONS FOR DECISION

The Act requires agencies to give notice in writing for any decision to deny or defer access to a document or that a document does not exist. The notice must state the findings on any material question of fact, referring to the material on which those findings were based and the reasons for the decision[50].

Examination of files revealed that in most cases there was no attempt to set out the material findings of fact in the statement of reasons. Some departments provided carefully reasoned statements that drew the necessary links between the Act, the material facts and the information to which access was denied. In most cases the reasons for decision were perfunctory, formulaic, failed to state material facts and failed to disclose the reasoning process. In a few cases the reasons lacked candour or were misleading.

The most common and serious fault was the failure to state the material facts relied on. Typically, the applicant was not given any description of documents to which access is denied. If exemption was claimed for several documents, the reasons most often did not specify which exemptions applied to each document. As a consequence the reasons did not indicate which exemption applied to which document. While decisions of VCAT and the courts were often cited in support of the claimed exemptions, the relevance of those cases was not established because the material facts were not given.

By far the most common exemption claimed is the personal affairs exemption under section 33. However, access is given to many documents subject only to deletion of personal names or other identifying information. The statement of reasons usually states only the conclusion that disclosure would be unreasonable with no other explanation.

Some exemptions require consideration of the public interest. Section 30(5) expressly requires the section 27 statement to state the public interest considerations for a decision that a document is exempt under section 30(1). In other cases the requirement to state the public interest considerations is implicit in the section 27(1) requirement to state the material facts and reasons for decision. It is not sufficient to state, for example, that a disclosure could 'inhibit future frankness and candour on the part of departmental officers'. Some factual basis should be put forward as to why the disclosure might have that effect and why that effect is sufficiently significant to outweigh the public interest in disclosure of information under the Act.

The consequence is the absence of any reasoning process linking material facts to the exemptions claimed. Exemptions are often discussed in the abstract so that it is impossible to know to which documents they apply. The applicant could not know whether access was denied to information that the applicant might wish to pursue by way of review or application to VCAT.

Such inadequate statements of reasons invite mistrust of the decisions and the

50 FOI Act section 27(1)(a).

motives behind them. By contrast, a proper and well thought out statement of reasons is likely both to ensure the decision is soundly based and to convince the applicant of that fact. It helps to redress the imbalance of knowledge between the applicant and the agency and in doing so is likely to limit the scope of any dispute between the applicant and the agency. As one agency stated in a submission to my investigation, 'anxiety and mystery can often be removed if a simple explanation is provided.'

The reasons given for denial of access upon internal review were often more considered and careful than the reasons at first instance. This is to be expected. Internal review of the original decision is usually by a more senior officer, often a legal officer, and the request for internal review itself suggests that extra care should be taken. Unfortunately, in some cases the internal review simply overlooked obvious weaknesses or manifest omissions in the original decision. At times the internal review process appeared to be merely justificatory of the original decision (see *Case 2*). In other cases it was demonstrably a genuine, independent reconsideration of the original decision.

Although decisions on internal review often result in the release of some further material, in most of the cases examined such material was trivial or inconsequential, or added little to the information already disclosed.

In its submission in response to the discussion paper DOJ proposed the development of a practice note to ensure that decision letters are of a consistent and appropriate standard. I welcome this initiative[51].

My discussion paper drew attention to the similarity of the requirements for reasons for decision under section 27 of the Act and sections 46 and 49 of the VCAT Act, and the requirements of VCAT for the content of a statement of reasons including a schedule of documents to which the claimed exemptions relate[52]. My discussion paper asked whether agencies should provide a statement of reasons in a form similar to the VCAT statement and schedule. In its submissions on behalf of all Victorian departments, DOJ said:

While schedules of documents may be of assistance in explaining decisions in some instances it would be onerous to dictate that they be provided in all instances. Agencies have only finite resources available to them. The production of schedules of documents on the basis that such schedules are produced for VCAT hearings does not constitute the most efficient use of the available resources. VCAT appeals account for only one half of one percent of all requests made and to produce schedules for all decisions would be overly burdensome. Schedules of documents should only be produced where the work involved in producing them is justified by the fact that the decision cannot be properly explained without such a schedule included. It should be noted that there is no requirement in the Act to create a document to satisfy a request. Indeed the second reading speech stated that:

51 *A useful model for such a Practice Note exists at the Commonwealth level as a memorandum on Statements of Reasons under the Commonwealth FOI Act: New FOI Memorandum No. 26: Section 26 Notices: Statements of Reasons at www.ag.gov.au/agd/FOI/FOIMemoranda/foi_memo_26.htm.*
52 *See VCAT Practice Note of April 2004.*

Clause 13 of the Bill confers on the public a legally enforceable right to obtain documents. It should be noted that the Bill provides access to documents and not to information which does not exist in documentary form.

I do not believe that the reference to the Second Reading Speech assists the argument. The Act itself requires a statement of reasons to be provided. The question is what content should be provided consistent with the Act and with proper administration of the Act, and in what form that content should be provided.

In many cases, departments already prepare a schedule of documents as part of the information brief to the executive and the Minister's office on requests for policy-sensitive information. That brief also usually provides relevant background information which, typically, is not provided to the applicant. In those cases where a schedule is already prepared, it is no additional burden to provide it to the applicant. In many cases where a schedule does not exist, it would be easy to prepare. In some cases it would be a significant added burden or would provide to the applicant information which itself would be exempt under the Act.

Case studies

Case 14

A request was made for access to a report commissioned by a department. Access was denied to the body of the report on the grounds that it was 'not necessarily representative of final decision that may be taken ... release ... would give rise to unnecessary conjecture, could be misleading and is capable of causing mischief and undermining the integrity of the decision-making process' and that the document contained information relating to the personal affairs of individuals. The reasons stated that many comments made to the person who prepared the report 'were informal in nature and some were expressed to be confidential. It would therefore be unreasonable to disclose the personal affairs information of those persons.'

These reasons exemplify the formulaic responses often given for denial of access which fail to reflect the real nature and content of the document. For the most part the references in the report to comments and submissions were paraphrased and anonymous, and the few identifiable references to individuals could have been deleted. Whether release of the document would have led to the predicted ills is hard to say, but nothing in the reasons explained why it was likely, reflected the content of the report, or indicated any balancing of factors in favour of release. Other applicants also requested the report and, following an application to VCAT, the report was released, but by then decisions on the report's implementation had been made.

Conclusion

It is my view that, where possible, those documents for which exemption is claimed in whole or in part should be identified and the exemptions claimed for them should be specified. In some cases this cannot be done without disclosing exempt information and it is necessary to neither

confirm nor deny the existence of any document[53]. A decision may properly state why a document would be exempt if it did exist, without confirming its existence. Even so, in many cases it is possible and reasonable to disclose that an exempt document exists without disclosing the content of the document.

An adequate statement of reasons will provide sufficient information to enable the applicant to know what facts have been taken into account, the reasoning process applied to those facts, and (in most cases) the nature of any document to which access has been denied. That same information assists the agency to ensure that a soundly based decision has been made, to conduct an internal review if requested, and to defend the decision if an application is made to VCAT.

I also consider the decision-maker should set out the material facts that lead to the stated conclusions. Without the material facts, there is no evidence that there has been any weighing up of the factors for and against disclosure, including the presumption in favour of disclosure created by the Act itself. Moreover, these reasons reflect on the purposes for which the Act was first introduced, which include transparency of government decision-making and to enable participation in the debates on policy formulation. In some cases it may be difficult to fully state the material facts without disclosing exempt information, but in most instances there seemed to be no attempt to state the material facts at all.

In my opinion an adequate statement under section 27 will:

- Set out the scope of the request as interpreted by the agency.
- Detail any relevant consultations, statutory or otherwise, that have taken place.
- State the findings of fact on which the decision is based.
- Indicate the weight given to questions of fact relevant to the decision.
- Based on the above, give the reasons why any document has not been released in whole or part, showing how decision is based on findings of fact and how decision maker reached decision, relating facts to all relevant statutory criteria.
- Identify any guidelines or policy directions relied on.
- Where a document is not released, give a brief identifying description of the document, where that is possible without disclosing information that would be exempt[54].
- Where a document cannot be located, state when and where it was last known to exist and what searches have

53 Section 27(2)(b) provides that a notice of decision need not disclose whether any document exists where the exemption arises under section 28 (cabinet documents), 29A (documents affecting national security, defence or international relations), section 31 (the administration and enforcement of the law). Section 33(6) provides that an agency or Minister is not required to give information which confirms or denies the existence of a document if that confirmation or denial would itself unreasonably disclose personal information.
54 Section 27(2) (b) and section 33(6) set out circumstances in which an agency or Minister is not required to confirm or deny the existence of a document.

been conducted. Where a document is thought not to exist, state the reasons why and any factual enquiries that have been conducted to support that conclusion.

– To the extent reasonable in the circumstances, state whether other related information is available publicly or is potentially available by FOI request to the same or any other FOI agency.

In most cases these matters can be quickly and easily stated. Without this process, the decision maker cannot be confident of having reached a correct decision.

Recommendation

I recommend that DOJ should proceed with its proposal to develop a practice note on the standard of decision letters, taking into account the matters raised in my report.

PART II STATEMENTS

Part II of the Act requires every agency to publish annual statements setting out:

- Details of the agency's organisation and functions.
- Categories of documents kept by the agency and how they may be accessed.
- A list of any advisory bodies to the agency the transactions of which are open to the public.
- Manuals and other documents used by the agency to make decisions affecting the rights of members of the public.
- Documents used by the agency in administering laws or schemes affecting members of the public.
- Any reports received by the agency[55].

My investigation revealed that at present few Victorian agencies fully comply with the publication requirements of Part II statements. Some Part II information is published in annual reports and some is available on the websites of departments and other agencies. Although it is generally not set out in the manner envisaged by Part II, a person who is interested in particular program or policy activities may be able to obtain considerable information from these sources.

Departments and other agencies receive occasional requests for Part II statements, mainly from the media and opposition MPs. The departments stated that their usual response is to refer the requestor to the agency's annual report or other publications.

The problem is not unique to Victoria. There are similar publication requirements under both the Commonwealth and New South Wales FOI Acts and problems with compliance have also existed under those Acts[56].

In their initial responses to my investigation, departments said that strict compliance with Part II of the Act is neither practical nor of use to the public and that very few requests were received for Part II statements. I recognised that government departments and agencies already publish a wide range of material that is of use or interest to the public. For example, departments and agencies publish much information about the services they provide to the public and various program activities being undertaken. Much of this information is available on their websites.

The Minister for Finance gives directions under the *Financial Management Act 1994*[57]. These require disclosures in the annual reports of departments and other public bodies which overlap with some of the requirements of Part II, particularly in reporting on the objectives, functions, powers and duties and a summary of its activities, the nature and range of service provision, and the organisation of the body[58].

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55 FOI Act sections 7, 8 and 11.
56 See The 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, at p.8.
57 Financial Reporting Directions issued under section 8 of the Financial Management Act 1994 and Regulation 12 of the Financial Management Regulations 1994.
58 Financial Reporting Direction 22 (June 2003), Standard Disclosures in the Report of Operations.

A number of agencies expressed support for repeal of Part II in their submissions to me. Submissions made in support of this included:

- Requests for Part II statements are very infrequent
- Part II statements are onerous to produce, of little relevance in their current form and of limited value
- Applicants seeking access to documents of local government tend to be able to describe the documents and do not need access to indexes or databases
- Agency publications and websites currently provide a wide range of information, far more than was available when Part II was introduced.

Other agencies favoured retaining Part II but with a full review to ensure it was aimed at providing relevant and useful information without imposing an unreasonable burden on agencies, and to allow publication of Part II statements in alternative media such as on websites. Some agencies regard websites as a key method for dissemination of information and would welcome the ability to fulfil the Part II requirement by internet publication.

PROV pointed to the effects of a lack of information, observing that the number of requests to series of records for which there is no publicly available index is negligible. PROV also observed that section 13 of the *Public Records Act 1973* requires agencies to keep full and accurate records of the business of the office[59]. Maintaining Part II statements may be seen as part of the fulfilment of that obligation as well as helping the public to know what information is potentially available under FOI and to make better targeted requests.

During my investigation I noted a potentially useful model in the UK's *Freedom of Information Act 2000*. Section 19 of that Act requires every public authority to adopt a publication scheme, to be approved by an information commissioner. The publication scheme sets out classes of information which the agency publishes or intends to publish and specifies whether it is or will be available to the public. In adopting a publication scheme, the agency must have regard to factors including the public interest in allowing access to information.

One aspect of the UK approach is its flexibility. The legislation does not attempt to prescribe the range of information to be published, but rather allows each agency to prepare its own scheme, subject to approval by an information commissioner. Many of the publication schemes adopted by government agencies in the UK provide comprehensive information on the nature and functions of the agency, the members of any board or governing council and details of any constituent bodies, any relevant funding arrangements and the various documents made available. Typically those documents include annual reports, minutes of any directing council, documents and guidelines relating to the performance of the functions of the agency, policy and strategy statements, calendars of events and public notices, together with details of how these

59 *Submission to this investigation by the Public Records Office Victoria.*

documents may be obtained both on the internet and in hard copy[60].

While there is no equivalent to the information commissioner under the Victorian legislation, the Attorney-General might consider issuing or approving guidelines for publication requirements for departments and other agencies within broad guidelines that could be prescribed by legislation. In this way Part II statements might be issued in a form that is useful and accessible to the public but not excessively onerous for agencies to maintain. I note that this was recommended by the Scrutiny of Acts and Regulations Committee (SARC) of the Victorian Parliament on its *Inquiry into Electronic Democracy*.[61]

The maintenance of Part II statements would also be assisted by the introduction of records management systems within departments and other agencies compliant with the standards of VERS.

Conclusion

It is not acceptable for departments and other agencies to ignore statutory provisions or to choose to implement those provisions as they see fit and not in accordance with the statute. However, I consider it sensible to review the requirements of Part II to determine if they would benefit the public, if compliance with them is impracticable, and whether the public interest could be better served by other forms of public disclosure.

In my opinion, there is a continuing need for publication of information as envisaged by Part II of the Act, but there is need to review Part II to ensure both that the information to be published is relevant and useful to members of the community, and that the administrative burden imposed on departments and other agencies is not excessive.

DOJ is well placed to monitor the compliance by agencies with Part II and I consider that it should take steps to do so, including requiring agencies to confirm, as part of their annual reporting on FOI to DOJ, that they have so complied or to state the reasons for any non-compliance.

Recommendations

I recommend that government departments and agencies review their compliance with Part II of the Act and that DOJ should monitor the compliance by agencies with Part II. I also recommend that Part II is reviewed as a matter of urgency, giving consideration to adopting a system of publication schemes on the model of the UK FOI Act.

60 *See for example the publication scheme for the Department of Trade and Industry at http://www.dti.gov.uk/about/foi/pubscheme.html.*
61 *Final Report of the Scrutiny of Acts and Regulations Committee of the 55th Parliament, issued April 2005.*

LEADERSHIP AND OPEN GOVERNMENT

The examination of FOI files and discussions with FOI managers has highlighted the importance of leadership in setting the culture within which FOI requests are dealt with.

In investigating the openness of departments to FOI requests I have had regard to the expressed attitudes of FOI officers, the degree to which they assist applicants with their requests, the thoroughness of document searches, the adequacy of reasons for decision and of internal reviews and the timeliness of responses to FOI requests.

The Act has a major role in supporting an open government which is an important democratic principle. The executive managers of departments and other agencies therefore have a critical role in ensuring that the objects of the Act are met in reality and is not given mere lip service.

That is not to suggest that all FOI requests can or should be granted, or that both genuine disputes and mistakes do not occur from time to time. There are examples of times when granting an FOI request has been inappropriate and has caused real harm. Some applicants, including some 'professional' applicants, repeatedly generate requests that are unclear and lacking in focus and which are frequently either invalid or voluminous.

The challenge for agencies therefore is to maintain the openness which is a part of the objects of the Act while still protecting the interests of the public and of business and individuals in relation to confidential and private matters. In reaching that balance FOI officers inevitably are subject to pressures both from within the agency and from applicants.

In general, the attitudes expressed by FOI officers in relation to requests for personal information were admirable. They generally expressed a real commitment to providing useful information and to the sensitivities and needs of applicants. Departments were very willing to assist applicants seeking access to personal information about themselves or to documents about issues directly affecting them.

Attitudes toward journalists and MPs were more ambivalent, with some tending toward an 'us and them' mentality and a number gave instances of times when they felt some of these applicants had subjected them to unreasonable pressure or threats of adverse publicity, or had made allegations which they regarded as deliberate misrepresentation. This did not apply to their relations with all journalists or MPs and its extent varied between departments.

In my report I have criticised the failure to assist applicants with policy sensitive requests. In one department an oral instruction was given to the FOI manager by an executive officer that FOI officers were to contact media and politician applicants only by letter. The reason given for that instruction was to avoid confusion and to ensure proper documentation of all communications. Whatever the motivation, it discriminated between the different types of applicants and its effect was to limit the assistance given to media and politician applicants and slow down the processing of their requests.

Criticism has also been made of the inadequacy of reasons for refusal of access both at first instance and upon internal review. This may result in part from an unwillingness to disclose any information to an applicant, as well as from inadequate guidelines given to FOI officers as to how they should provide reasons.

DOJ leadership

For some years after the introduction of the Act, DOJ issued guidelines and other material to assist agencies in understanding and implementing the Act, but that practice ended some time ago. While each department and agency is responsible for its compliance with the Act and for the training, procedures and protocols it implements, the evidence suggests that greater support from DOJ could help both benchmark and improve the performance of all agencies by providing a leadership role.

The quality and extent of guidance given to FOI officers varied considerably between departments. Some, such as DOJ and DHS, had extensive and carefully prepared manuals and precedent documents. Others had minimal material for the guidance of their officers. One department stated that it had no training manual or practice manual or standard for letters, and that it recruited experienced FOI professionals who drew on their professional expertise and experience to process applications.

Examining the practices of departments revealed a number of errors, often replicated across several departments. For example:

- A number of departments frequently confuse requests that are invalid under section 17(2) with those that are voluminous under section 25A
- Several departments have guidelines that refer to the need to give reasons for a decision that an applicant is not entitled to access to documents, but fail to state the need for reasons for a decision that a document does not exist[62]
- Some departments have pro forma letters to advise that processing a request has been delayed beyond 45 days, but fail to advise of the applicant's right to apply to VCAT for review[63].

It is reasonable to expect that departments which handle some hundreds or more requests each year should have properly established and documented procedures and precedent documents to ensure that basic errors are not committed and that applicants are properly advised of their entitlements. Such documentation would also ensure proper continuity and consistency where there are several FOI officers or where there is a change in FOI personnel.

The submissions to my investigation from agencies other than departments generally sought greater direction and leadership from DOJ. One city council noted the contrast with the wide range of guidelines, training material and other information issued by the Privacy Commissioner. Some

62 FOI Act section 27(1).
63 FOI Act section 53.

other agencies expressed frustration at the failure of DOJ to issue timely information on such matters as the Health Records Act.

In responding to the investigation by my office in 2002-2003 of allegations of delay in responding to FOI requests, the DOJ Secretary advised that she had created a new position of FOI Coordinator, with duties including:

- Monitoring the FOI performance of departments and advising departmental secretaries of emerging trends for departments.
- Issuing guidelines on issues to be considered by departments where the same specific request is made to all or most departments.
- Issuing practice notes on the general administration and interpretation issues concerned with requests.
- Arranging the development of regular FOI training courses for new and inexperienced FOI officers.

DOJ has reported that actions since the appointment of the coordinator have included:

- The development of a protocol and guidelines for 'whole of government requests' (that is, identical requests sent to a number of departments).
- The provision of a revised monthly topical FOI report and a new monthly statistical report in relation to FOI requests to all departments.
- Conducting monthly meetings of all departmental FOI managers to discuss matters of mutual interest and whole of government coordination issues.
- A review of the Act from the perspective of departmental FOI managers for input to proposed amendments to the Act.
- Holding training activities including a seminar for all FOI officers from the 10 departments updating FOI developments, and a presentation by staff from the Health Services Commission regarding FOI and the Health Records Act.

DOJ has advised my office that it intends to start issuing practice notes. It has identified a number of suitable topics for practice notes in its submission to my review. This initiative is welcomed.

DOJ advised that it had conducted some investigation of training needs but no formal training plan had been established. DOJ observed that each department arranged its own FOI training to meet the particular needs of their officers, with training available from the Leo Cussens Institute and private training providers.

While I acknowledge the need for each agency to take steps to meet its obligations under the Act, DOJ is well placed to provide leadership, in particular through guidelines and practice notes and by notifying significant changes or decisions in VCAT or the courts. The DOJ FOI Coordinator hosts a regular forum for departmental FOI managers and other officers, and it is clear that many agencies outside the 10 departments would welcome the assistance and expertise that DOJ could offer. This would also assist in ensuring a common base from

which training needs might be assessed in different agencies.

I note that with the maturing of the Act, FOI practitioners now have many precedents of courts and VCAT decisions interpreting the Act, and some FOI specific texts are now available.

Conclusion

I believe it is appropriate for DOJ to provide both practice notes which indicate a best-practice approach to handling FOI requests, and include sample proforma documents which might be adopted by FOI agencies. This would improve efficiency given that many FOI agencies handle only a small number of requests and are unlikely to have the resources or expertise of a full-time FOI officer. DOJ could also provide a useful role in coordinating and sharing expertise by providing precedent forms and letters which comply with the Act for use by departments and other agencies.

The Commonwealth Attorney-General has published on its website a number of memoranda providing guidance on the implementation and interpretation of the Commonwealth FOI Act[64]. Given the similarities between the Victorian and the Commonwealth Acts, these memoranda could provide a useful starting point for the preparation of practice notes for Victorian FOI agencies.

Recommendations

I recommend that DOJ prepare and make available proforma forms and letters suitable for use by all FOI agencies and which meet the requirements of the Act.

I recommend that DOJ prepare and publish practice notes providing a detailed guide to the application of the Act, and continue to review and update such notes to meet the needs of all FOI agencies.

I also recommend that DOJ maintain a current awareness service for all FOI agencies advising of new developments in legislation and case law.

64 www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWPFED7D0EEA4CC24DECA25707C001F9030

LEGISLATIVE REVIEW

Privacy and health records

Aspects of the right to access documents and the right to privacy are dealt with under the FOI Act, the *Information Privacy Act 2000* (IPA) and the *Health Records Act 2001* (HRA). In general, the provisions of the IPA and the HRA are subordinated to the FOI Act[65]. For example, a person's right to access personal information held by government agencies, including health records held by public hospitals, is governed by the FOI Act. Access to personal health records held by non-government organisations, including by medical practitioners, is governed by the HRA.

The IPA is expressly made subject to the FOI Act so that an agency, considering the release of a document under the FOI Act, need not take account of the IPA. If however the agency determines to release a document outside the FOI Act, the IPA will apply[66]. The *Commonwealth Privacy Act 1988* applies to personal information held by federal government agencies and by many private organisations.

The IPA sets out a number of Information Privacy Principles (IPPs) that, subject to the FOI Act, apply to 'personal information' held by most Victorian government organisations. The HRA sets out Health Privacy Principles (HPPs) that apply to health records held by public organisations and by private health service providers.

The FOI Act is primarily a means of ensuring general public access to documents held by government. The IPA and HRA are primarily concerned to protect privacy interests by limiting the collection and storage of information and access to personal information to only the individual to whom the information relates.

Despite these potentially opposing purposes, there is little conflict between the FOI Act and the IPA and HRA in their practical operation.

The operation of the separate Acts appears to be well understood by government agencies and in particular by FOI managers, who frequently also have responsibility for management of privacy issues. Both the Privacy Commissioner and the Health Services Commissioner have taken considerable steps to raise awareness of the privacy legislation and to educate government agencies and other affected organisations about their obligations.

I asked in my discussion paper if there should be a single statutory regime governing access to information. My review has not led me to the conclusion that it is necessary for the effective operation of the Act to establish a single legislative regime covering both access and privacy, whatever the policy arguments in favour of such a regime might be.

However, a number of submissions urged the adoption in the Act of the term 'personal information' for information to be protected for privacy reasons. The IPA refers to 'personal information', defined as meaning:

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65 IPA section 6(2) provides that nothing in the IPA affects the operation of the FOI Act. The FOI Act therefore governs the release of personal information by an "agency" as defined in the FOI Act. HRA section 7(2) similarly provides that the HRA has no effect on the operation of the FOI Act. HRA section 16 provides that access to health records which are subject to the FOI Act is only in accord with the FOI Act.

66 See for example, Smith v Victoria Police [2005] VCAT 654, concerning the media release of a "mug shot".

information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion[67].

The HRA also uses the expression personal information' with a similar definition[68]. Both the IPA and the HRA are concerned to protect such personal information.

The Act uses a different expression, 'personal affairs'. Section 33 of the Act exempts from disclosure any document that would 'involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)'. A number of cases have drawn a distinction between 'personal affairs' and the performance of employment duties, including duties as a public servant[69].

It would seem logical to harmonise the expressions to help ensure they have the same reach and effect.

Recommendation

I recommend that the Act be amended to include the definition of 'personal information' as defined in the IPA[70].

Jurisdiction of Ombudsman

My office receives and investigates complaints about the handling of FOI requests. The power to receive and investigate such complaints appears to be based in part on the Ombudsman Act and in part on the Act. This results in some potential anomalies as to the extent of my office's jurisdiction in respect of FOI complaints.

The Act makes specific reference to the Ombudsman in relation to:

- Voluminous requests (section 25A(8)).
- Lost documents (section 27(1)(e)).
- Charges certificates (section 50(2)(c)).
- Delay (section 53(2)) and delay certificates (section 53(3)).
- Intervention before VCAT (section 57).

In relation to delay sub-sections 53(2) and 53(3) of the Act refer to 'a complaint is made to the Ombudsman under the Ombudsman Act'. The other references to the Ombudsman do not refer to the Ombudsman Act.

My power under the Ombudsman Act is limited to the provisions specified in section 13 of that Act[71]. The Act gives the public rights of access in relation to documents 'of an agency' and official documents of Ministers[72]. An 'agency'

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67 IPA section 3.
68 HRA section 3.
69 Re Williams and Registrar of the Federal Court of Australia (1985) 8 ALD 219 at 221; University of Melbourne v Robinson [1993] 2 VR 177 at 187 per Eames J.
70 The expression "personal information" was substituted in the Commonwealth FOI Act in 1991.
71 Ombudsman Act, section 13(1) gives my office power to enquire into or investigate administrative action taken in any Government Department or Public Statutory Body, or by any member of staff of a municipal council; there are other specific inclusions and exclusions from the jurisdiction of my office: section 13(3A) expressly excludes any enquiry into or investigation of any administrative action taken by a member of Victoria Police other than in certain specified matters which do not include FOI. "Government Department" is defined to include a department within the meaning of the Public Administration Act 2004, and "Public Statutory Body" is defined to mean a body constituted under and Act for a public purpose in respect of which the Governor in Council or a Minister has a right to appoint some or all of its members.
72 FOI Act section 13.

is defined as 'a department, council or a prescribed authority'[73]. The different definitions give rise to the possibility that a body may be subject to the Act but fall outside my jurisdiction under the Ombudsman Act. For example, Racing Victoria Limited is a prescribed authority pursuant to Part 2 of the *Freedom of Information Regulations 1988*, but is not an authority for the purposes of section 2 of the Ombudsman Act.

This would have the consequence that my office could investigate a complaint of delay under section 53 only if it related to a body within the jurisdiction of the Ombudsman Act. Investigation by my office of FOI agencies that are not within jurisdiction under the Ombudsman Act would depend on implied power under the FOI Act[74].

Recommendation

I recommend that the Ombudsman Act be amended to expressly provide that, subject to the provisions of the FOI Act, the functions of my office include to enquire into or investigate administrative actions taken in any agency within the meaning of the FOI Act in connection with that Act.

Documents in outsourced arrangements

The Act creates a right of access to documents of an agency and to official documents of a Minister, other than exempt documents[75]. A 'document of an agency' is defined as a document in the possession of an agency, whether created in the agency or received in the agency[76]. VCAT and its predecessors have held that possession includes 'constructive possession', being 'the right and power to deal with a document in question. It is not confined to actual or physical possession.'[77]

Government today has a wide range of means of carrying out its functions. Some functions that traditionally were performed by the public sector now are done in part by government and in part by the private sector, or by the private sector alone, with varying degrees of oversight and regulation by government.

It seems anomalous that the ability to access documents created in the course of performing government functions should depend on the chance that they have been created by a government agency rather than a contracted private entity.

The government has taken significant steps toward providing information on government contracting, in particular requiring publication of details of government contracts with a value in excess of $100,000, and publishing in full contracts with a value in excess of $10,000,000, subject to any exemptions that would apply under the Act.

The Victorian Government Purchasing Board has also released draft guidelines on the conduct of commercial engagements requiring that within any commercial engagement process, consideration be

73 FOI Act section 5. "Prescribed authority" is in turn defined
74 See for example Norton v Long [1968] VR 221.
75 FOI Act s.13.
76 FOI Act s.5.
77 Guide Dog Owners' and Friends Association and Commissioner for Corporate Affairs (1982) 2 VAR 205, Judge Jones, at 408.

given to confidentiality and disclosure within the provisions of the Act[78].

A converse situation exists for the RSPCA. Under the *Freedom of Information Regulations 1998*, the RSPCA is declared as a prescribed authority for the purposes of the Act, with the consequence that it has the same obligations of publication and to provide documents in answer to requests as other government agencies.

The RSPCA has a role in inspections and prosecutions under the *Prevention of Cruelty to Animals Act 1986* and the Victorian Government makes contributions to the RSPCA in support of that role and in relation to other activities, such as the construction of animal shelters. However, the RSPCA's obligations under FOI are not limited to its statutory role or to the activities supported by government assistance and extend to all documents held by it.

The RSPCA made a submission to my investigation, saying that its obligations under the Act are onerous and that many other private organisations receive government funding but are not made subject to the Act.

The situation of the RSPCA appears anomalous but is not easily changed. The definition of 'prescribed authority' does not allow for a body to be prescribed in respect only of certain activities and the structure of the Act does not lend itself to a division of that sort.

Recommendation

I recommend that where government agencies engage non-government entities to carry out functions prescribed by statute, they should ensure that the terms of contract give the agency a right of access to all documents produced in the course of performing those functions. In this way, FOI access should be available as if the functions were performed directly by the agency.

As part of any wider review of the Act, the Attorney-General may wish to take into account the burden placed on the RSPCA by its declaration as a prescribed authority, and to consider the possibility of amendments to allow FOI obligations for non-Government bodies declared as prescribed authorities to be limited to those functions or activities which are supported, directly or indirectly, by government funds or other assistance.

Electronic documents

The Act was enacted before the development of widespread electronic communication, including the internet and other media. A consequence is that, although the expression 'document' is defined in wide terms which are capable of including information stored in electronic form (including on tapes, hard disks and CD formats and computer memory), the Act does not refer to access to electronic copies of documents.

Section 23(1) provides that access may be given in a variety of forms and

78 *Draft Good Practice Guidelines for Commercial Engagements in Government 2005 published by the Victorian Government Purchasing Board.*

section 23(2) requires, subject to certain provisions, that access be given in any form requested by the applicant. Section 23(3) sets out some circumstances in which a request for access in a particular form may be refused, including where the form of access would unreasonably interfere with the operation of the agency. VCAT has directed the provision of a document of a CD-ROM of film footage and has considered an application for access to a printed document in the form of a CD-ROM but refused on the ground it would unreasonably interfere with the operations of the department.[79]

In many cases agencies are able to provide documents in electronic form and some applicants have expressed frustration at not being provided with access in that form. As noted elsewhere in this report a number of agencies, including Victoria Police, are now using computer programs that allow editing of electronically scanned documents rather than manual cut-and-paste methods and therefore produce electronic copies of documents in the assessment process. Where applicants are able and willing to receive electronic copies of documents, this should be allowed.

Conclusion

I consider electronic access should not depend on the document being in electronic form at the time the request is made. The particular format should be appropriate to the request. Applicants should be able to request access in electronic form where this is reasonably practicable. The Act does provide for access to be given to a 'copy' of a document, and this should enable a copy in electronic form[80]. The Office of the Chief Information Officer may wish to be involved in recommending a whole of government standard.

Recommendation

Agencies should provide access to documents in electronic form where requested by applicants, unless to do so would fall within one of the exceptions in section 23(3) of the Act. This does not appear to require legislative amendment but simply administrative accommodation by agencies.

Charges

Section 22(1)(g) provides for the waiver of access charges 'if a request is a routine request for access to a document'. The Act does not give any guidance as to what is meant by a 'routine request'. Some agencies, in their submissions, said most requests are 'routine'. Others said that 'the mere fact that someone is compelled to seek access via FOI means that it is no longer 'routine' in the ordinary sense of the word.' It does not appear that the departments recognise any categories of 'routine request'.

My investigation has disclosed that departments frequently waive charges in circumstances where they are chargeable. The criteria on which charges are waived vary between departments. Many have adopted, in practice, a minimum charge,

79 *Re Williams and Victoria Police [2005] VCAT 2516; see also Re Minogue and Department of Justice [2004] VCAT 1194 where provision of a CD-ROM version of a looseleaf manual was considered but refused.*
80 *FOI Act section 23(1)(b).*

so that they do not attempt to recover amounts of less than $5 or $10. Some departments do not charge a charge or charge a reduced charge, where documents are provided later than 45 days after the request.

The legislation contemplates that there should be a uniform approach to the imposition of charges. Section 22 of the Act and the *Freedom of Information (Access Charges) Regulations 2004* set out the basis on which access charges are to be determined. Sub-section 22(8) states that, subject to section 22, 'the charges set by the regulations shall be uniform for all agencies and there shall be no variation of charges as between different applications in respect of like services.'

Recommendation

I consider it is desirable that the expression 'routine request' should be given a definition. It is also desirable that there be consistency of approach between agencies in applying or waiving charges. I recommend that the Attorney- General consider providing for this by way of direction or amendment.

Vexatious applicants

There are instances where persons have submitted numerous requests to an agency in circumstances which show the requests are not made in good faith. In one case one person made 60 requests to an agency. While these are rare cases, they have the potential to cause a great waste of time and resources within the agency or agencies to which they are directed.

Recommendation

I recommend that VCAT be given power to declare a person a vexatious applicant, with the effect that further requests by that person for access to documents under the Act may be made only with the consent of VCAT.

Reverse FOI

The Act recognises the interests of third parties in relation to personal information or business information, and provides a 'reverse-FOI process under which the third party is to be notified of a decision to release such information[81]. The third party then has 60 days in which to apply to VCAT for review of the decision[82]. In those cases where the third party has already consented to the release of the information, it is anomalous that the applicant should be made to wait for a further 60 days.

Recommendation

I recommend that section 50(2)(e) be amended to provide that a person who has consented to the release of a document may not apply to VCAT for review of the decision to release that document, so that the 60-day reverse-FOI period will not apply.

Next of kin

Section 33 requires an agency to notify a deceased person's 'next-of-kin' of a decision to release information relating to the personal affairs of the deceased person. There is no definition of 'next-of-

81 FOI Act ss. 33(3), 34(3) and 50(2)(e).
82 FOI Act s. 52.

kin, and several agencies have expressed their concern at the uncertainty created by this. Section 3 of the *Human Tissue Act 1982* has a suitable definition.

Recommendation

I recommend that section 33 be amended to adopt the definition of 'next of kin' in section 3 of the *Human Tissue Act 1982*.

No documents findings

At present there is uncertainty whether an applicant has a right to seek internal review or review by VCAT of a decision that no documents exist relevant to a request[83], or if the only right is to complain to the Ombudsman. I consider that this should be clarified. As VCAT is not in a position to examine the records of an agency, I consider it is appropriate that a finding that no documents exist should be a matter for inquiry or investigation by my office.

Section 25A investigations

Section 25A provides that an agency may refuse to grant access to documents without processing the request if the work in processing the request would substantially and unreasonably divert the resources of the agency from its other operations – voluminous requests – or if it is apparent from the nature of the documents described in the request that they are exempt.

Sub-section 25A(8) states that where a complaint is made to me about a decision to refuse access to a document under section 25A, I 'must deal with the complaint within 28 days.' The complainant may, after the expiry of 28 days after making the complaint to me, apply to VCAT to review the decision of the agency and, if application is made to VCAT, I must provide a written report to VCAT.

I receive and investigate a small number of complaints each year about agency decisions that requests are voluminous. In my experience and from the past experience of my office, it is rarely possible to conclude these investigations within 28 days.

Typically, my investigation of these complaints requires an officer to examine the information which has led the agency to conclude that the request is voluminous and, if appropriate, to carry out a sampling of the relevant records to establish how much work would be involved in responding to the request.

I consider that the requirement in subsection 25A(8) that I 'deal with' such complaints within 28 days is impracticable and inappropriate. I note that sub-section 25A(9) would maintain the right of the applicant to apply to VCAT 28 days after having made a complaint to me, and sub-section 25A(10) would still require that I provide a written report to VCAT, so that the complainant's substantive rights would be preserved.

Recommendation

I recommend that the requirement for my office to deal with a complaint about a decision to refuse access to a document

83 See Re Tovarloza and Ministry of Housing and Construction Victoria (unreported, Vic AAT, Judge Smith P, 9 October 1990); Kyrou & Pizer at [2276] and [2490]

under section 25A (within 28 days) be repealed.

Comprehensive review

Submissions from departments and other agencies, as well as some from users of the Act, identified a range of minor drafting issues. In addition, many submissions addressed a range of particular concerns and possible unintended consequences of the Act, which might be addressed in a comprehensive review of the Act. For the most part, these latter issues would require consideration of the balance the existing Act strikes between the right of members of the public to gain access to documents, the interests of the public in restricting access to certain types of documents, and the privacy and commercial interests of third parties.

Aspects of that balance will always be contentious, and in this report I have not sought to change the policy expressed by the legislature but rather to find ways to ensure effect is given to the existing policy as expressed in the Act. The outcomes of my investigation lead me to conclude that the present Act is able to operate effectively with some minor amendments, subject to proper leadership and direction from departmental and agency executives.

RESPONSE TO THE REVIEW

I provided all departments and Victoria Police with an opportunity to comment on my review and they responded positively to my conclusions and recommendations. In particular, DOJ accepted my recommendations and was encouraged by my comments that it undertake a greater leadership role.

Victoria Police also supported the outcomes of my review. It advised that it is 'constantly assessing the placement of its finite resources against competing priorities across a range of statutory obligations and service delivery areas. A review of the resource requirements for the Victoria Police is currently underway. In relation to my recommendation that it provide more detailed data on FOI requests, Victoria Police stated that it has recently upgraded the database used by its FOI Unit, which will provide more detailed data on FOI requests.

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