

ACT Auditor-General's Office

Performance Audit Report

Administration of the Freedom of Information Act 1989

September 2008



ACT AUDITOR-GENERAL'S OFFICE



PA 07/16

The Speaker
ACT Legislative Assembly
Civic Square, London Circuit
CANBERRA ACT 2601

Dear Mr Speaker

I am pleased to present to you a Performance Audit Report titled '**Administration of the Freedom of Information Act 1989**', pursuant to Section 17(5) of the *Auditor-General Act 1996*.

Yours sincerely

Tu Pham
Auditor-General
16 September 2008

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LIST OF ABBREVIATIONS

ACTGS	Australian Capital Territory Government Solicitor
AAT	Administrative Appeals Tribunal
ACT	Australian Capital Territory
ANAO	Australian National Audit Office
CMD	Chief Minister's Department
DET	Department of Education and Training
DHCS	Department of Disability, Housing and Community Services
FOI	Freedom of Information
TAMS	Department of Territory and Municipal Services

1. REPORT SUMMARY AND AUDIT OPINION

INTRODUCTION

- 1.1 This report presents the results of a performance audit that reviewed arrangements in several ACT agencies for administering requests for information and other obligations under the *Freedom of Information Act 1989* (FOI Act).

BACKGROUND

- 1.2 The FOI Act commenced in May 1989 and was largely adapted from the Australian Government *Freedom of Information Act 1982*. Since 1989, the FOI Act has been subject to several amendments.
- 1.3 The object of the Act is ‘to extend as far as possible the right of the Australian community, and in particular, the citizens of the Territory, to access information in the possession of the Territory by ... making available to the public information about the operations of agencies ... and creating a general right of access to information in documentary form in the possession of Ministers and agencies’.¹
- 1.4 Section 2 of the FOI Act provides for access to a document of an agency or an official document of a Minister. The term ‘document’ is defined in the *Legislation Act 2001* to be ‘anything on which there is writing; or anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them; or anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or a drawing, map, photograph or plan’.² For the purposes of the FOI Act, a document is ‘a document in the possession of an agency, whether created in the agency or received by the agency’.
- 1.5 Each agency is separately responsible for administering the Act in regard to its own operations. The Public Law Group in the Department of Justice and Community Safety (JACS) is the central area responsible for the administration of the FOI Act. JACS also collates agency information on the operation of the FOI Act for inclusion in its annual report, which it tables in the Legislative Assembly each year. In addition, each agency is required to provide, in its own annual report, information on FOI activity.

¹ *Freedom of Information Act, 1989*, Section 2

² Section 3 of the FOI Act.

- 1.6 According to the annual JACS section report on FOI, during 2006-07, ACT Government agencies received 347 requests for information (450 in 2005-06), under section 14 of the FOI Act.
- 1.7 Appendix B provides an overview of the contents of the FOI Act.
- 1.8 Freedom of information laws have been recognised as a fundamental element of accountability and modern democracy, and have been adopted by Governments worldwide. Administration of the legislation has been reviewed in many Australian jurisdictions, reflecting both the importance of the legislation to the community and the perception of difficulties with its administration.

AUDIT OBJECTIVES AND FOCUS

- 1.9 The objectives of the audit were to assess:
- the appropriateness of policies and procedures used by audited agencies in administering the *Freedom of Information Act 1989*; and
 - compliance by audited agencies with the provisions of the FOI Act, in relation to selected requests for information and other obligations.
- 1.10 The audit examined the extent to which audited agencies have fostered an environment conducive to effective and efficient administration of FOI requests and other obligations under the Act. In particular, the Audit examined whether:
- agencies have clearly articulated organisational and individual obligations under the FOI Act to all staff, and resultant administrative arrangements to meet these obligations;
 - agencies have allocated responsibility for FOI administration appropriately;
 - information to support an effective and efficient response to FOI requests is readily available to the public;
 - training in relation to FOI administration is made available to staff; and
 - Government agencies have complied with the provisions of the FOI Act, in relation to selected requests for information and other obligations.
- 1.11 In examining a sample of agency responses to the FOI requests, Audit did not review the merit or validity of decisions, but rather sought to assess whether agencies complied with the intent of the FOI legislation.
- 1.12 The audit was undertaken in three agencies. Each agency has a different profile in relation to the FOI requests received. The three agencies audited were:
- the Chief Minister's Department (CMD);
 - the Department of Education and Training (DET); and

- the Department of Territory and Municipal Services (TAMS).

1.13 Table 1.1 sets out the number of FOI requests received for each of the three audited agencies.

Table 1.1: FOI requests received by audited agencies, July 2005 - June 2008

	Chief Minister's Department	Department of Education and Training	Territory and Municipal Services
2005-06	36	36	50
2006-07	17	39	55
2007-08	21	24	45 (to 31 March 08)

Source: Annual reports 2005-06 and 2006-07 and agency information for 2007-08

1.14 Audit also reviewed the responsibilities of JACS in relation to policy and reporting requirements for the FOI Act.

AUDIT OPINION

1.15 The audit opinions drawn against the audit objectives are set out below:

Audited agencies had a good understanding of the requirements of the FOI legislation and had put in place a number of policies and procedures to support administration of the Act. In practice, agencies did not always fully discharge their responsibilities under the Act, particularly:

- the quality of FOI decision-making varied within agencies, and across agencies and there were inadequate mechanisms to monitor and report on the performance of agencies in delivering FOI services;
- the reasons to exempt certain documents were not always fully explained as required in decision notices;
- search procedures did not provide assurance that all relevant documents were identified and located; and
- consultation with third parties regarding release of information was inadequate.

There was a lack of whole-of-government guidance and advice to ensure consistency in application of the FOI law across ACT agencies and in the provision of information to the public.

KEY FINDINGS

1.16 The audit opinion is supported by the following key findings:

FOI administrative arrangements (Chapter 2)

- All audited agencies had in place agency specific guidance documents or information provided on agency intranets to support its FOI administrative arrangements. Guidance documents of TAMS and CMD clearly articulated FOI obligations and outlined who was responsible for the individual elements of FOI administration within the agency.
- In all agencies, the Chief Executive of the agency issued authorisations, and each had written authorisations that identified and formally authorised officers to decide on FOI requests. The level of officer authorised to make decisions in agencies varied but generally they were managers or senior executives.
- DET was the only agency whose authorisation clearly provided for authorised officers to make a decision in respect of a request for internal review.
- To varying extents, each agency provided information through their websites to the public on administering FOI requests. DET and TAMS provided readily accessible information tailored for the public through FOI summary web pages.
- There is scope for all agencies to enhance the efficiency of processing FOI requests by including guidance for applicants with the FOI forms, or through other publications. Encouraging applicants to define the scope of their requests may assist in reducing the incidence of broad ranging or poorly defined requests.
- In contrast to the Australian Government and State jurisdictions, the ACT Government does not provide the public with co-ordinated FOI information through a single website.
- All agencies advised Audit that staff with direct responsibility for processing FOI requests had completed relevant training, although this was two or more years ago.
- With the exception of CMD, agencies could not provide details of FOI training for FOI decision-makers who typically are senior executives.

Agency systems and procedures (Chapter 3)

- Each audited agency had documentation to assist staff in responding to FOI requests, although the documentation could be improved in some aspects including searching for documents, answering requests with third party consultation and in decision-making.
- Each audited agency devolved the responsibility to line areas for identifying and locating requested documents and for confirmation that a

search had been conducted. However, with the exception of CMD, line areas are not advised of search requirements (for example, check paper files and electronic records) nor are they required to confirm the extent to which searches were conducted.

- Audit review of selected FOI files identified instances of incomplete searches. Current search practices may result in the exclusion of documents that, under the Act, must be provided.
- Agencies rarely imposed processing charges for FOI applications, and had not developed internal charging policies. Staff from several agencies commented that a decision had been made by Government not to impose charges. This understanding is incorrect.
- Agencies did not measure the cost of administering FOI requests nor specifically track staff and other costs associated with handling FOI requests.
- Agencies' concerns in relation to charging included difficulties in accurately estimating a charge within the required timeframe and finding the resources to calculate and estimate a charge. There was potential for inconsistent application of charges across agencies.
- Although the legislation has been amended on several occasions, JACS has not issued any general legal advice to agencies on the substance of the amendments, nor how they affect FOI practice.
- DET was the only agency with FOI guidance that outlined procedures for requests involving third party consultations. However, this guidance did not accurately reflect the extended statutory time limits under sub-section 18 (4).
- DET was the only audited agency to advise decision-makers on how to apply the exemption provisions of the FOI Act, including the application of the public interest test.
- All audited agencies used an electronic register, designed internally to meet individual agency needs, to assist in monitoring the status of FOI requests.
- TAMS' registers were not complete; had erroneous information recorded in them; and contained inconsistent and insufficient information for monitoring and compilation of data required by the Act.
- Each of the agencies had a recordkeeping program and training was available to staff. Agencies were generally aware of the deficiencies in their record keeping systems. All acknowledged that line area searches, and in particular searches of electronic documents, were not always complete.
- Agencies audited had not established formal mechanisms to assure the quality and consistency of decision-making. Neither had they conducted recent reviews: TAMS conducted an internal audit of its FOI administration in 2003, and scheduled a further internal audit for 2008.

- Only one agency, DET, formally reported the results of its routine monitoring of individual FOI requests.
- There is no ACT Government initiative for capturing and sharing information on changes to FOI law and practice. All audited agencies had some monitoring mechanisms in place to capture this information, but their FOI decision-makers were not routinely informed of these developments.

Responding to FOI requests (Chapter 4)

- Acknowledgement letters did not always clearly specify when the statutory timeframe commenced, having regard to section 151 of the *Legislation Act 2001*.
- A revised fees determination was drafted by JACS in August 2007, but has not yet been finalised. The current 1995 fees determination is outdated.
- It has not been the usual practice for agencies to charge for responding to FOI requests, although evidence indicated that it is Government policy to do so since April 2005. All audited agencies were not aware of any Government policy on charges.
- With the exception of DET, agencies' FOI guidance did not set out the procedural requirements for consultation with third parties, including the March 2007 amendment to the ACT legislation which requires agencies to consult in relation to personal information.
- Neither CMD nor TAMS fully met the third party consultation requirements under the Act.
- Each agency prepared and provided to applicants a schedule to identify and record documents for release under FOI, and the decision for each document. However, there was limited evidence on files to demonstrate the consideration of a particular exemption, including consideration of the public interest test.
- Audited agencies processed in total 74 percent of FOI requests within the statutory timeframe of 30 days.
- Of the FOI files examined by Audit, the quality of decision notices varied both within and across the audited agencies. None of the audited agencies fully met section 25 requirements for the majority of requests examined.
- Agencies generally complied with the requirements for internal reviews. Some decision notices reviewed did not include adequate statement of reasons. In most cases, internal reviews resulted in additional documents being provided to the applicant.
- There have been few appeals to the AAT for further review of agencies decisions – 19 since 2005-06. Of the ten that proceeded to a hearing, the AAT did not agree with the agency decisions in four cases (40 percent)

and supported, partly supported or returned for reconsideration the remaining six decisions.

FOI reporting requirements and other obligations (Chapter 5)

- Each agency's annual report complied generally with legislative reporting requirements. However, there is scope for agencies to improve the report on their performance, including the results of internal and AAT reviews.
- Both CMD and DET had developed central FOI registers to support annual reporting on FOI activity, while TAMS had problems in providing complete information on FOI requests. Audit found that data contained in these FOI registers were consistent with data reported in their respective annual reports.
- All agencies updated and included a section 7 statement in their 2006-07 Annual Report and these statements complied with the content requirements set out in the FOI Act and the *Annual Report Directions*.
- Accessibility of section 7 statements could be further enhanced by including section 7 statements with FOI information on agency websites. CMD makes available both its section 7 and section 8 statements on its website.
- All agencies had prepared a section 8 statement, which included an index of documents used in making decisions and recommendations, and information on where these documents could be inspected and purchased. The audited agencies did not have, or did not see the necessity for, documented procedures for maintaining the currency of their section 8 statements.
- With the exception of information on existence of the statement and its availability, agencies did not provide the required statement of their compliance with section 8 of the Act.
- Information in annual reports was mainly numeric, with little or no supporting analysis to explain their performance in responding to FOI requests and other requirements of the Act.

Administering the FOI Act across Government (Chapter 6)

- There have been a number of amendments to the FOI Act, including important amendments concerning requests for documents containing personal information. JACS has not issued FOI guidance material to inform agencies of the nature and implications of the changes.
- To replace the current 1995 determination, JACS has drafted but not yet finalised a new *FOI (Fees and Charges) Determination 2007* and supporting guidelines for agencies.

- There is little co-ordination and sharing of information between the Government Solicitor Office and the Public Law Group in JACS to assist agencies in areas of the Act where agencies are experiencing difficulties.
- JACS guidance to agencies, in particular on the compilation of the section 79 FOI report, was not adequate. For example, current guidance to agencies does not specify how to report against extended statutory timeframes, or how to calculate timeframes, and when an applicant is sent notification of charges.
- All FOI Reports by JACS provided the minimum numerical data required under the legislation. The usefulness of this reporting is limited as there is no analysis of agencies' performance in providing FOI services.

RECOMMENDATIONS AND RESPONSE TO THE REPORT

1.17 The audit made 14 recommendations to address the audit findings detailed in this report.

1.18 In accordance with section 18 of the Auditor-General Act 1996, a final draft of this report was provided to the Chief Executives of the Chief Minister's Department, the Department of Justice and Community Safety, the Department of Education and Training, and the Department of Territories and Municipal Services, for their consideration and comments. The Chief Executives' overall response are shown below:

Response from the Chief Executive of the Chief Minister's Department

I believe the proposed report is comprehensive and will provide agencies with useful guidance in the way to improve our Freedom of Information (FOI) practices.

My Department has well established policies and procedures in relation to the processing of FOI applications. As part of an ongoing program to revise and improve the Department's governance arrangements, we have recently undertaken a number of steps to improve our internal processes for managing FOI requests, information available to potential FOI applicants and the information available to staff on the processing of FOI requests. A number of these will assist in addressing some of the issues identified in this Audit Report.

*It should be noted that the recently released discussion paper **Citizen Centred Governance** which outlines recommendations aimed at strengthening the ways that Canberrans engage with government, included a recommendation that the ACT Government review the outcomes of Queensland Government review of Freedom of Information.*

My Department is working with the Department of Justice and Community Safety to coordinate the review, and will be providing advice to the Government on possible improvements to ACT FOI legislation. It is likely that issues and recommendations raised in this Audit Report will be considered as part of the process.

The Commonwealth is also reviewing its approach to Freedom of Information, and we will take careful note of the outcomes of this review, particularly as the ACT legislation is based on the Commonwealth's Act.

Response from the Chief Executive of the Department of Justice and Community Safety

The report is a welcome contribution to the current consideration of freedom of information legislation generally and the sort of administrative concerns that should be considered when reforming the legislation. The agencies chosen for review also provide a representative sample of policy and operational work and are of sufficient size to provide findings of worth.

While the recommendations you make in relation to the Department of Justice and Community Services (JACS) will address concerns raised, the Department has, without specific funding for this work, sought to meet at least the minimum standard required under freedom of information (FOI) legislation. The report indicates a number of areas in which JACS can make immediate changes with minimal resource implications to facilitate outcomes consistent with the recommendations, for example, by providing a new fees determination and guidelines to agencies on FOI processing to improve service-wide delivery.

Although JACS has policy and legal responsibility for FOI legislation, the Freedom of Information Act 1989 (FOI Act) clearly identifies individual Agency Heads and Ministers as responsible for decision making in relation to FOI delivery. I am concerned that JACS not be burdened by taking on administrative and policy responsibilities that are better placed in agencies and for which it is not resourced. This is not to negate a role for JACS in underpinning the regime with service-wide policy and guidance, however, agencies are responsible for ensuring that their officers are equipped and trained to deliver outcomes compliant with statutory requirements even where there is no service-wide approach developed.

Response from the Chief Executive of the Department of Education and Training

The Report is a comprehensive document and one which will assist the Department to meet its obligations under the Freedom of Information Act. We will work to continue to improve our administrative practices with regard to these obligations consistent with the Audit Report's findings and recommendations.

Response from the Chief Executive of the Department of Territory and Municipal Services

It is through the work of your officers that inefficiencies are identified and corrective action can be taken. I have been advised that your staff provided officers of the Department constructive comments whilst conducting the audit. I would also like to acknowledge the valuable work performed by your staff.

- 1.19 In addition, the Chief Executives provided responses to each recommendation, as shown below.

Recommendation 1 (Chapter 2)

JACS should develop general and consistent information on FOI for the public, and make this accessible through an FOI website, linked to ACT Government and agency web portals. This should also include advice to the public on contacting the agency prior to lodging a formal FOI request, and on information to include in the request to aid in the identification of documents.

JACS' response:

Agreed in principle – A central entry point to information on FOI in the Territory will improve the public's access to government information and decision making. In supporting this recommendation, JACS notes that the development of such an information gateway will need to be undertaken in the context of other priorities for the Department and the availability of resources.

CMD's response:

Agreed – CMD would utilise any whole-of-government FOI information document(s) on its website or through a link to the home site of the document(s).

DET's response:

DET would be willing to contribute to the development of such information.

Recommendation 2 (Chapter 2)

Audit recommends that all agencies review their training needs to ensure:

- relevant staff have a general awareness of the FOI Act, and their obligations and responsibilities under the Act; and
- officers with direct responsibility for responding to, and deciding on, FOI requests have received comprehensive initial training and regular refresher sessions.

CMD's response:

Agreed – The Department regularly holds FOI training courses available to all staff, including executives. Three have been held since December 2006 and another is scheduled for October 2008. Attendees have included six staff from the Corporate Management Branch that coordinates FOI activities within the Department, as well as a number of executives from across the Department.

JACS' response:

Agreed – In its role as lead agency, JACS intends to examine the delivery of FOI training in the ACT and consider possible options for improving opportunities for officers to undertake training and refresh skills.

DET's response:

Agreed – Training needs in DET will be reviewed. In relation to officers with direct responsibility for FOI, those responsible for managing FOI requests have completed training and keep up to date by regular management of FOI cases and regular checks of relevant websites, including Austlii, the Commonwealth's FOI site and the legislation register. Advice is provided to decision-makers as appropriate and they are provided with the FOI manual. DET's senior management group last attended training in 2007. Further training will be arranged for decision-makers. The Department will review the information and training provided to staff generally about their obligations and responsibilities under the FOI Act.

TAMS' response:

TAMS will conduct ongoing refresher training of all relevant staff. For decision-makers, it is planned to hold this training in November 2008.

Recommendation 3 (Chapter 3)

JACS should:

- develop a whole-of-government charge policy and guidelines to be applied to FOI requests, noting that fee exemptions can be provided for public interest and other relevant grounds; and
- update the section 80 fees and charges determination.

JACS' response:

Agreed – An updating of the section 80 fees and charges determination will be undertaken within the first half of 2009. A service-wide government charge policy and guidelines will also be considered. The content and timing of such a policy will need to be determined by the Government.

CMD's response:

Agreed – The Department would support a whole-of-government charging policy and guidelines.

DET's response:

DET has prepared material that could be adapted as part of the policy, including the ambit of the public interest test for charging.

Recommendation 4 (Chapter 3)

Agencies should consistently adopt any new charging policy in the development of their own internal policy and supporting guidance on the application of charges.

CMD's response:

Agreed.

JACS' response:

Agreed.

DET's response:

Agreed.

TAMS' response:

TAMS has reviewed its procedures and its internal guidance manual to ensure that due consideration is given to the imposition of processing charges early in the processing of FOI requests.

Recommendation 5 (Chapter 3)

Agencies should regularly evaluate the processes used to reach FOI decisions to ensure future decisions are well based; properly documented, and conveyed to applicants clearly and comprehensively.

CMD's response:

Agreed – The Department is supportive of mechanisms to ensure the adequacy of the processes undertaken in discovery, consideration and documentation of decisions. The CMD FOI coordination area does, as a matter of course, either assist in the preparation of responses in conjunction with the decision-maker, or reviews the processes undertaken prior to release to ensure adequacy and proper documentation. Briefings on consultation requirements, exemptions and statements of reasons are also provided to business units and decision-makers.

The area also endeavours to carry out a quality control of correspondence provided to applicants to ensure the information provided is comprehensive and clearly communicated.

JACS' response:

Agreed in principle – It would be beneficial to ensure that decision makers are supported with training and material which provides guidance on the responsibilities and obligations of administrative decision makers. JACS will investigate whether there is a centralised role in providing such support in relation to administrative decision making generally. This will need to be considered in the context of other priorities for the Department and the availability of resources.

DET's response:

Agreed – As noted in the report, DET decision letters are prepared in conjunction with Governance and Legal Liaison staff, who provide a quality check on the documentation and dissemination of decisions. DET agrees to work to continually improve the quality of the decision making documentation.

TAMS' response:

The TAMS revised guidelines provide clear direction on the construction of decision letters. A new checklist for decision makers is being developed. In addition, an FOI status report will be submitted monthly to the Department's Senior Management Team.

Recommendation 6 (Chapter 4)

Agencies should issue better practice guidelines and search checklists to help with searching for documents relevant to FOI requests.

JACS should assist agencies to develop and maintain such guidelines through assembling better practice for distribution to agencies.

CMD's response:

***Agreed** – The Department has already has Guidelines For Decision-Makers and Action Officers which informs action officers and decision-makers about the ACT Freedom of Information Act 1989 (the Act) and their roles in managing responses to applications in accordance with the Act in a comprehensive and timely way. Current checklists and factsheets include guides to searching for documents and the scheduling of documents, and business units are provided with a detailed timeline document for each FOI request that sets out critical dates, roles and responsibilities.*

The Guidelines and factsheets will be further reviewed, including consideration of recommendations in the Audit Report.

JACS' response:

***Agreed in principle** – In supporting this recommendation JACS notes that development and maintenance of guidelines will need to be undertaken in the context of other priorities for the Department and the availability of resources.*

DET's response:

***Agreed** – DET's proforma request to line areas will be updated to include this advice.*

TAMS' response:

TAMS is currently reviewing its practice guidelines and checklists, particularly in relation to document searches.

Recommendation 7 (Chapter 4)

Agencies should specify in correspondence to applicants when the statutory periods commence and finish, having regard to section 151 of the *Legislation Act 2001*.

CMD's response:

Agreed – The current Departmental acknowledgment letter states the date the request was received and that the Department is required to make decision on access within 30 days. The letter will be modified to include that actual date by which the access decision is required.

JACS' response:

Agreed – This recommendation will be taken up immediately in JACS. Guidance will be provided to Agencies on the determination of the statutory periods.

DET's response:

Agreed – DET's proforma acknowledgement letter sets out the date the request was received and notes the response must be provided in 30 days. This will be amended to specify the actual date by which the decision should be made.

TAMS' response:

TAMS has revised its standard response letters to applicants to address this issue.

Recommendation 8 (Chapter 4)

Agencies should record decisions and reasons for decisions, including a comprehensive list of the documents or parts of documents disclosed, on the FOI request file.

CMD's response:

Agreed – In responding to FOI requests, the Department provides schedules to applicants listing documents and decisions on access. The schedule also identifies the source of the documents, e.g. registry file; emails from an individual. Details on access decision and the reasons for decision are described in the decision-maker's letter to the applicant.

Current practice is that copies of all letters, schedules and documents are kept on the FOI files.

JACS' response:

Agreed – Agencies are currently undertaking this. JACS will remind agencies of their obligations to record and document decisions.

DET's response:

Agreed – DET already does this, and maintains the schedule of documents, together with highlighted deletions and a complete set of documents sent to the applicant on the file. The decision-maker's letters contain a record of decisions, together with the reasons for those decisions.

TAMS' response:

The TAMS FOI guidance material contains information and instruction on how to compile a schedule of released documentation. This will also be covered in training provided to administrative staff.

Recommendation 9 (Chapter 4)

JACS advise Government of the merit of a provision in the ACT FOI Act equivalent to section 24A in the Australian Government's *Freedom of Information Act 1982*; that allows agencies to 'refuse a request' where documents cannot be found or do not exist.

JACS' response:

Agreed – The necessary amendment will be proposed to Government.

CMD's response:

Agreed in principle.

DET's response:

In practice, DET currently makes a technical refusal in such circumstances and provides appeal rights to applicants.

Recommendation 10 (Chapter 5)

Agencies should include an analysis of information on FOI services in annual reports. Such analysis could include information on compliance, times taken to respond, types of requests, any issues with FOI administration, or with the legislation itself.

CMD's response:

Agreed in principle – The Department's reporting on FOI services is consistent with the requirements of the FOI Act and the Chief Minister's Annual Report Directions. The Department will comply with any changes to reporting requirements, but notes there needs to be a balance between the resource and time implications of collecting and analysing further information and the likely benefits to readers.

The Annual Report Directions requirement will be reviewed in line with any further review of section 79 of the Act.

JACS' response:

Agreed in principle – Agencies already comply with the FOI Act by reporting annually on a range of FOI statistics. JACS agrees that analysis of data would improve the reporting process and inform future development of FOI administration and legislation. At this time, reporting is confined to statutory requirements and these requirements are reflected in the Annual reporting guidelines issued under the Annual Report (Government Agencies) Act 2004. The

guidelines are due for review in 2010. JACS will consider providing more detailed analysis of collected statistics in the 2008-2009 annual report with the parameters of the current requirements under section 79(1).

DET's response:

Agreed in principle – DET complies with the FOI Act provisions and the Chief Minister's Annual Report Directions in the preparation of material for publication in its annual reports.

TAMS' response:

TAMS has centralised its record keeping for FOI statistics and will provide an analysis of information on FOI services as part of its 2008-09 Annual Report.

Recommendation 11 (Chapter 5)

Agencies should include a link to their FOI Act sections 7 and 8 statements (regarding publication of information, and making documents available for inspection and purchase), in their agency websites.

CMD's response:

Agreed – CMD's section 7 and 8 statements are available on the Department's website.

JACS' response:

Agreed

DET's response:

As noted by Audit, there is a link to the section 8 statement from the FOI page on DET's website. The section 7 statement is contained in DET's annual report which is also on the DET website. DET's website now has a direct link for the FOI page to the section 7 statement.

TAMS' response:

TAMS has included a link to its sections 7 and 8 statements on its intranet site.

Recommendation 12 (Chapter 6)

To support the consistent and effective administration of the FOI Act, JACS should provide adequate policy and administrative support, including training; legal advice; guidance and reference information; and routine monitoring of FOI administration.

JACS' response:

Agreed in principle – While the recommendation will underpin improved administration of FOI, the Department has, without specific funding for this work,

sought to meet at least the minimum requirements needed for such support. Increasing and improving the delivery of administration and policy support as recommended will need to be considered in the context of other priorities for the Department and the availability of resources.

CMD's response:

Agreed.

Recommendation 13 (Chapter 6)

JACS should develop annually a full list of all agencies and Ministers subject to the FOI Act to ensure that they are included in the compilation of data, and review the accuracy of data received.

CMD's response:

Agreed in principle.

JACS' response:

Disagreed – It is the responsibility of agencies to provide accurate reporting. JACS will however write to all portfolios to seek confirmation of the status of all agencies within individual portfolios as either a prescribed authority or falling under the decision making powers of the Departmental Chief Executive. This will be undertaken at the end of the financial year within the context of requests for FOI annual report data.

Recommendation 14 (Chapter 6)

JACS should review its section 79 report to determine if it is meeting the information needs of potential users. In particular, JACS should analyse the data provided by agencies and report on the efficiency and effectiveness of FOI services.

JACS' response:

Agreed – JACS will undertake a review of its section 79 report as part of preparation for 2008-09 reporting.

CMD's response:

Agreed in principle.

2. FOI ADMINISTRATIVE ARRANGEMENTS

INTRODUCTION

2.1 This Chapter describes audit findings on agencies' arrangements to support the administration of FOI requests.

KEY FINDINGS

- All audited agencies had in place agency specific guidance documents or information provided on agency intranets to support its FOI administrative arrangements. Guidance documents of TAMS and CMD clearly articulated FOI obligations and outlined who was responsible for the individual elements of FOI administration within the agency.
- In all agencies, the Chief Executive of the agency issued authorisations, and each had written authorisations that identified and formally authorised officers to decide on FOI requests. The level of officer authorised to make decisions in agencies varied but generally they were managers or senior executives.
- DET was the only agency whose authorisation clearly provided for authorised officers to make a decision in respect of a request for internal review.
- To varying extents, each agency provided information through their websites to the public on administering FOI requests. DET and TAMS provided readily accessible information tailored for the public through FOI summary web pages.
- There is scope for all agencies to enhance the efficiency of processing FOI requests by including guidance for applicants with the FOI forms, or through other publications. Encouraging applicants to define the scope of their requests may assist in reducing the incidence of broad ranging or poorly defined requests.
- In contrast to the Australian Government and State jurisdictions, the ACT Government does not provide the public with co-ordinated FOI information through a single website.
- All agencies advised Audit that staff with direct responsibility for processing FOI requests had completed relevant training, although this was two or more years ago.
- With the exception of CMD, agencies could not provide details of FOI training for FOI decision-makers who typically are senior executives.

BACKGROUND

2.2 The ACT FOI Act was enacted in 1989, the year self government was enacted in the ACT. It was largely adapted from the Australian Government's *Freedom of Information Act, 1982*. Since 1989, the ACT FOI Act has been amended on several occasions.

2.3 JACS does not maintain a document which compares the ACT and Australian Government FOI legislation.

2.4 The object of the FOI Act is ‘to extend as far as possible the right of the Australian community, and in particular, the citizens of the Territory, to access information in the possession of the Territory by ... making available to the public information about the operations of agencies ... and creating a general right of access to information in documentary form in the possession of Ministers and agencies’.³

2.5 The FOI Act creates a right for persons to access information⁴ in the possession of the Territory by requiring agencies to:

- provide access to documents in their possession unless the document falls within an exemption or exception specified in the legislation; and
- publish information about their operations and powers affecting members of the public, as well as their rules and practices used in making decisions affecting the public.

2.6 The FOI Act further provides:

- for access to a document of an agency or an official document of a Minister. The definition of the word ‘document’ is refined in the FOI Act to be ‘a document in the possession of the agency, whether created in the agency or received by the agency’. A document is defined in the Legislation Act 2001 to be anything on which there is writing; or anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them; or anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or a drawing, map, photograph or plan;
- that a person need not establish a special interest or ‘need to know’ before seeking access to documents;
- details of the circumstances under which access to documents can be denied as a matter of discretion; and
- provides for the Administrative Appeals Tribunal (AAT) to review decisions made by agencies, and for the Ombudsman to investigate complaints about how agencies have handled FOI requests.

³ *Freedom of Information Act, 1989*, Section 2

⁴ The FOI Act provides access to information held by an agency. However, an agency is not generally required to make available information which is not in its possession in a documentary form; or to collate information from a number of documents in its possession to create a new document.

- 2.7 The ACT had maintained a central office in the then Attorney-General's Department for responding to all FOI requests. In December 1995, administration of the Act was devolved to individual agencies. Each agency became responsible for ensuring that its FOI administration met the goals of the FOI Act. JACS did not respond to Audit's queries on the reasons for devolution, and whether these reasons remained valid.
- 2.8 The Public Law Group in JACS is responsible for the general administration of the FOI Act. Pursuant to section 79 of the FOI Act, JACS collates agency information on the operation of the FOI Act for inclusion in its annual report, which it tables in the Legislative Assembly each year. In addition, each agency is required to provide, in its own annual report, information on FOI activity.
- 2.9 According to the JACS annual section 79 report, during the 2006-07 financial year, agencies received 347 requests for information (450 in 2005-06), under section 14 of the FOI Act. Appendix C provides more information on requests under the FOI Act in 2005-06 and 2006-07.

FOI ADMINISTRATIVE ARRANGEMENTS

- 2.10 It is essential that agencies clearly articulate their approach to FOI administration to foster consistency, and to support compliance with all the requirements of the FOI Act. This is particularly important in agencies where FOI administration is decentralised administratively or geographically.
- 2.11 In seeking to identify whether audited agencies fostered an overall environment conducive to good administration of FOI requests, Audit considered whether they:
- had clearly articulated to all staff their commitment to the objectives of the FOI Act, sound FOI practice, organisational and individual obligations, and administrative arrangements;
 - had appropriately allocated responsibility for FOI administration;
 - made available to the public a range of information to support effective and efficient responses to FOI requests; and
 - made available to staff adequate training in relation to FOI administration.

Agency arrangements

- 2.12 All audited agencies had established administrative arrangements to support the administration of FOI requests received.
- 2.13 In each audited agency, FOI requests are managed by an FOI co-ordinator and central support team. In TAMS, responsibility for responding to FOI requests is devolved to four FOI co-ordinators in the three business units (networks) of the

agency. These TAMS co-ordinators perform the same functions of an agency FOI coordinator as described above.

- 2.14 The decision-maker for an FOI request is located in the line area relevant to the subject of the request. The line area is responsible for identifying and collecting documents relevant to a request. The FOI Coordinator and central support team may also advise and support the decision-maker on exemptions and other procedural requirements under the Act.
- 2.15 Each audited agency had articulated its approach to administering FOI requests through the promulgation of agency-specific guidance and/or information on agency intranets. Guidance from TAMS and CMD clearly articulated FOI obligations and outlined who was responsible for the individual elements of FOI administration.
- 2.16 DET had produced both a comprehensive manual on processing of FOI requests and an FOI Page on its intranet. Distribution of the manual is limited to FOI processing staff and FOI decision-makers. DET is considering uploading the manual to the DET intranet.
- 2.17 Through Audit interviews, senior executive officers and FOI practitioners in each agency indicated their commitment to processing FOI requests in accordance with the spirit and requirements of the Act. In DET, this commitment was also reflected in the FOI central co-ordination area's planning documents, including its risk management plan.

Responsibility for FOI Administration

- 2.18 Under section 22 of the FOI Act, decisions on a request to an agency are made on behalf of the agency by the responsible Minister, the Principal Officer of the agency, or an officer of the agency authorised by the responsible Minister or Principal Officer.
- 2.19 Under sub-section 59 (2) of the FOI Act, officers cannot review their own decisions, so authorisations should provide for review of decisions by other officers usually (but not necessarily) senior to the initial decision-maker.
- 2.20 Audit requested of each audited agency a copy of recent authorisations for decision-makers under the Act. All agencies had written authorisations in place that identified and formally authorised officers to make decisions on FOI requests. The level of officer authorised to make decisions varied, but was generally a manager or senior executive officer. In all agencies the Chief Executive of the agency issued the authorisations under the Act.
- 2.21 Audit noted that the then current authorisation applied by TAMS was dated May 2004 and referred to the Department of Urban Services; (that is, it did not

reflect the current structure of the Department). TAMS advised that it has taken steps to update this FOI Authorisation.

- 2.22 DET was the only agency where authorisations provided clearly for authorised officers to make a decision on a request for internal review.

FOI INFORMATION PROVIDED TO THE PUBLIC

- 2.23 To varying extents, all agencies had provided information to the public on FOI legislation and practice. This information was made available to the public via agency websites. Table 2.1 below summarises the information provided by each agency covered in the audit.

Table 2.1: Information provided to the public on FOI

Nature of Information provided	CMD	DET	TAMS	Audit Comment
Does the agency have an FOI Page on its agency website?	✘	✓	✓	There is a link to FOI publications on the CMD homepage, but there is no separate FOI web page.
Does information include guidance for applicants on how to make a valid FOI request?	✓	✓	✓	In CMD, other information provided (CMD Guidelines) has not been designed for public use.
Does information include guidance for applicants on the FOI process (e.g. processing timeframes)?	✓	✓	✓	
Does information include advice for applicants on charges which may be applied?	✓	✓	✓	
Does information include an FOI Application Form?	✓	✓	✓	The forms for all agencies could be improved to facilitate the identification of documents sought
Does information include contact details for further enquires?	✓	✓	✓	In CMD, contact details are not readily accessible. These are on the back of the FOI Application Form and in internal guidance information.
Does information include additional information about FOI (e.g. exemptions and appeal rights)?	✓	✓	✓	

FOI administrative arrangements

Nature of Information provided	CMD	DET	TAMS	Audit Comment
Is there a link to FOI Act?	✗	✗	✗	DET advised that a link has been installed on the website.
Is there a link to section 7 and 8 statements?	✓	Partial	✗	DET provides a link to its section 8 statement only. DET advised that a link to the Section 7 statement has been installed. DET's section 7 statement is in its annual report which is on the website. TAMS advised that a link has been since installed.

Source: Audit analyses of agencies' websites

- 2.24 Two agencies, DET and TAMS, provided readily accessible information to the public via their agency websites. Each agency had developed an FOI Summary Page that contained information about FOI, and how to request access to documents. Contacts for further enquiries were also provided.
- 2.25 Also, each agency told applicants to contact the agency prior to lodging a formal FOI request, as documents may be available through other avenues. Audit considers this to be a good practice and consistent with section 13 of the Act, which makes clear that the FOI Act is not intended to be the sole means of access to documents held by agencies.
- 2.26 CMD has not developed an FOI page for its website. It provides a link on its agency website to its internal guidelines, an FOI Application Form and the Department's section 7 and 8 statements. The FOI Application Form contains brief information about FOI, and the requirements for making a valid request. While CMD Guidelines contain information about FOI, they are not designed for the purpose of helping the public to understand CMD's FOI policy and practice.
- 2.27 CMD advised that since the Audit it has reviewed the format and content of the information available on the website. It has separated general information to applicants from the FOI request form and has expanded the content of the applicant information. The internal Guidelines have been removed from the webpage, and are now available to staff on the Department's intranet.
- 2.28 In making an FOI request, there is no requirement to use a particular form, such as a standard request form. Moreover, an agency cannot refuse a request solely on the grounds that the applicant failed to observe its published FOI procedures.
- 2.29 However, responses to FOI requests may be improved if applicants are encouraged to follow particular procedures in making requests for access. To this

end, each audited agency had prepared an FOI application form. Of the three agencies, only the CMD form indicated that processing charges may be levied for certain requests, while the DET application form included a provision for the applicant to seek the remission of charges. Audit notes that at application stage, charges would not have been estimated, nor advised, to the applicant. Audit considers that a consistent approach to charges across agencies should be developed and incorporated in information provided to the public.

- 2.30 A person requesting documents under the FOI Act is required only to provide enough information about the documents to permit a responsible officer of the agency concerned (or the Minister) to identify them (sub-section 14 (2)). Notwithstanding, Audit considers that FOI administration would be more efficient if applicants knew the nature and scope of information they were seeking. Encouraging applicants to detail their requests at this stage could assist in reducing the frequency of broad ranging or poorly defined requests.
- 2.31 Amongst other things, Section 7 of the FOI Act requires the publication of information on the functions, structure, decision-making powers and categories of documents of agencies. Sub-section 7 (2) requires the statement to be published in the annual report of agencies. Section 8 requires that certain documents be made available for inspection and purchase. Both sections 7 and 8 are intended to help the public to access FOI policy and administrative guidelines. Agency compliance with the provisions of sections 7 and 8 statements is addressed in Chapter 5.
- 2.32 In contrast to the Australian Government and State jurisdictions, the ACT Government does not provide complete and up-to-date FOI information through a single website. Audit found that the lead agency with administrative responsibility for the FOI legislation for the Australian Government and all State jurisdictions provided comprehensive information on FOI, including links to individual agencies and, in most cases, FOI annual reports. This facilitates consistency across agencies in the provision of information, processing forms, and approaches to administering the FOI Act. Audit considers there is considerable benefit in adopting such an approach within the ACT.

Recommendation 1

JACS should develop general and consistent information on FOI for the public, and make this accessible through an FOI website, linked to ACT Government and agency web portals. This should also include advice to the public on contacting the agency prior to lodging a formal FOI request, and on information to include in the request to aid in the identification of documents.

FOI AWARENESS AND TRAINING

FOI awareness training for all staff

- 2.33 Staff need a general awareness of the FOI Act, their responsibilities and obligations under the Act, and agency activities in administering the Act. This will encourage a more informed understanding of the legislation and consistency in the application of its provisions.
- 2.34 With the exception of CMD that periodically offered non-compulsory introductory FOI training to all staff, agencies did not routinely provide staff with general awareness training in relation to the FOI Act or its administration. Audit found that DET provided two non-compulsory training sessions in FOI and records management in 2006. These were in response to management concerns regarding staff awareness of appropriate record-keeping practices.
- 2.35 None of the agencies audited included FOI awareness training as part of staff induction programs, although there is a brief mention of the FOI Act in the ACTPS Induction Manual issued by the Shared Services Centre in September 2007.

Training for FOI staff

- 2.36 All agencies advised Audit that staff with direct responsibility for processing FOI requests had completed relevant training, although most training was provided two or more years ago. Training was primarily FOI-specific courses provided by the Australian Government Solicitor, as there was no formal scheduled training provided or co-ordinated by the ACT Government Solicitors Office (ACTGS) or the Public Law Group in JACS.
- 2.37 ACTGS advised that it provided targeted FOI training to agencies if requested, where this could be undertaken consistently with the performance by ACTGS of other legal functions. ACTGS will provide training to TAMS in November this year.
- 2.38 The ACTGS was established by the *Government Solicitor Act 1989* to act as legal practitioner for the Australian Capital Territory, its Ministers, agencies and officers. It provides advice to ensure that the Territory and its agencies and officers are aware of their legal rights and obligations, including under the FOI Act, and act within the limits of their powers and in accordance with the law.
- 2.39 Although FOI processing staff were provided with initial training, Audit considers that refresher training is important to enable them to maintain their knowledge and to be informed of changes to FOI law and practice. At a minimum, this should occur whenever significant amendments are made to either the legislation or the agency's FOI administrative arrangements.

Training for FOI decision-makers

- 2.40 Audit found that for FOI co-ordinators and decision-makers, the amount of FOI training and the currency of the training varied between agencies. Some decision-makers advised Audit they had received training in other jurisdictions; others felt that their extensive experience in the public sector was adequate training.
- 2.41 Agencies advised Audit that to mitigate any attendant risk, centralised support and advice was provided to FOI decision-makers. Those persons interviewed by Audit confirmed the availability of such support and advice.
- 2.42 Audit considers that agencies should ensure all FOI decision-makers have, and maintain, the knowledge and skills to make appropriate decisions as required under the FOI Act. This is particularly relevant as administrative arrangements for handling FOI requests for all audited agencies (and many others across the ACT public sector) have devolved decision-making to line areas.

Recommendation 2

Audit recommends that all agencies review their training needs to ensure:

- relevant staff have a general awareness of the FOI Act, and their obligations and responsibilities under the Act; and
- officers with direct responsibility for responding to, and deciding on, FOI requests have received comprehensive initial training and regular refresher sessions.

CONCLUSION

- 2.43 All agencies had established organisational and procedural arrangements, which generally supported the administration of the FOI legislation, although more could be done to foster an understanding of the legislation. Existing arrangements could be enhanced through:
- agency communication to all staff of the organisational commitment to meeting FOI obligations and FOI administrative arrangements;
 - the establishment of agency systems to ensure all staff responsible for administering FOI requests, including decision-makers, receive an appropriate training; and
 - the provision of readily accessible and tailored public information on FOI.

3. AGENCY SYSTEMS AND PROCEDURES

INTRODUCTION

- 3.1 This Chapter describes audit findings on the systems and procedures implemented by agencies to support the administration of requests for information under the FOI Act.

KEY FINDINGS

- Each audited agency had documentation to assist staff in responding to FOI requests, although the documentation could be improved in some aspects including searching for documents, answering requests with third party consultation and in decision-making.
- Each audited agency devolved the responsibility to line areas for identifying and locating requested documents and for confirmation that a search had been conducted. However, with the exception of CMD, line areas are not advised of search requirements (for example, check paper files and electronic records) nor are they required to confirm the extent to which searches were conducted.
- Audit review of selected FOI files identified instances of incomplete searches. Current search practices may result in the exclusion of documents that, under the Act, must be provided.
- Agencies rarely imposed processing charges for FOI applications, and had not developed internal charging policies. Several agencies commented that a decision had been made by Government not to impose charges. This understanding is incorrect.
- Agencies did not measure the cost of administering FOI requests nor specifically track staff and other costs associated with handling FOI requests.
- Agencies' concerns in relation to charging included difficulties in accurately estimating a charge within the required timeframe and finding the resources to calculate and estimate a charge. There was potential for inconsistent application of charges across agencies.
- Although the legislation has been amended on several occasions, JACS has not issued any general legal advice to agencies on the substance of the amendments, nor how they affect FOI practice.
- DET was the only agency with FOI guidance that outlined procedures for requests involving third party consultations. However, this guidance did not accurately reflect the extended statutory time limits under sub-section 18 (4).
- DET was the only audited agency to advise decision-makers on how to apply the exemption provisions of the FOI Act, including the application of the public interest test.
- All audited agencies used an electronic register, designed internally to meet individual agency needs, to assist in monitoring the status of FOI requests.

- TAMS' registers were not complete; had erroneous information recorded in them; and contained inconsistent and insufficient information for monitoring and compilation of data required by the Act.
- Each of the agencies had a recordkeeping program and training was available to staff. Agencies were generally aware of the deficiencies in their record keeping systems. All acknowledged that line area searches, and in particular searches of electronic documents, were not always complete.
- Agencies audited had not established formal mechanisms to assure the quality and consistency of decision-making. Neither had they conducted recent reviews: TAMS conducted an internal audit of its FOI administration in 2003, and scheduled a further internal audit for 2008.
- Only one agency, DET, formally reported the results of its routine monitoring of individual FOI requests.
- There is no ACT Government initiative for capturing and sharing information on changes to FOI law and practice. All audited agencies had some monitoring mechanisms in place to capture this information, but their FOI decision-makers were not routinely informed of these developments.

BACKGROUND

- 3.2 The FOI Act and subsidiary legislation specify how agencies should respond to FOI requests.
- 3.3 The ACT Government Solicitor's Office (ACTGS) developed and issued guidance to agencies on administering FOI requests in 1989. The guidance took the form of a five part series of Legal Bulletins. Since then, the legislation has been the subject of a number of amendments, but the ACTGS has not issued further guidance, or revisions to existing guidance. ACTGS advised Audit that a new bulletin on the changes will be published in September 2008.
- 3.4 Audit examined the extent to which audited agencies had developed systems and procedures to support the consistent and appropriate administration of FOI requests. In particular, Audit examined whether:
- agencies had developed and communicated to FOI practitioners procedures and guidance to support the processing of FOI requests; and
 - agencies were effectively monitoring and reviewing their administration of FOI requests.

FOI PROCEDURES AND GUIDANCE

- 3.5 Comprehensive FOI guidance should be readily available to all agency staff who are responsible for responding to FOI requests. Guidance should reflect and expand on the key provisions of the legislation. This is discussed at Chapter 2.

3.6 Audit's review of agencies' FOI documentation found that all audited agencies had documentation to assist staff responsible for processing FOI requests. Table 3.1 below sets out the nature of the information contained in audited agencies' guidance. Of the three participating agencies:

- DET had developed comprehensive agency procedures and guidance manual for staff processing FOI requests: *Processing FOI Requests*. The manual outlines agency procedures for each key step in responding to FOI applications, including guidance on exemptions and, to a lesser extent, on preparing decision notices.
- CMD had developed and documented broad agency procedures for staff processing FOI requests - *CMD Guidelines for Decision-Makers and Action Officers* - and an information-pack containing standard letter templates and an extract from the Act on exemptions.
- TAMS had developed and documented broad agency procedures for processing FOI requests - *Guidelines on the ACT Freedom on Information Act, 1989* - and each business unit had developed standard letter templates and proformas. The latter were not consistent across business units. In one business unit, the Audit found the standard decision notice to applicants incorrectly advised that a fee applied to internal reviews.

3.7 Audit notes that TAMS developed comprehensive draft FOI guidelines about two years ago, but these are yet to be finalised and issued to business units and agency staff.

Table 3.1: Content of FOI guidance in audited agencies.

Does agency guidance include information on:	CMD	DET	TAMS	Audit comment
Statutory timeframes.	✓	✓	✓	
Scoping and acknowledgement of requests (e.g. <i>consultation requirements</i>).	✓	✓	✓	
Searching for documents (e.g. <i>guidance on process and standards for searching and locating documents</i>).	✓	Partial	✗	DET: Extent of required search is reflected in the DET FOI Manual but not in the search request to line areas.
Handling requests involving third party consultation.	✗	✓	✗	DET: Incorrect guidance regarding extension of statutory timeframe.
Application of fees and charges (e.g. <i>when to apply charges, estimating charges, notifying the applicant, remission of charges</i>).	Partial	Partial	✗	In CMD and DET, the guidance is only focussed on templates to support the estimation and calculation of charges.
Decision-making considerations (e.g. <i>required documentation; preparation of decision notices; application of exemptions</i>).	✓	✓	✗	
Internal Review (for example, <i>required authorised officer</i>).	✓	✓	✗	
Templates for notices issued to applicants.	✓	Partial	✓	Templates in TAMS are not consistent across all TAMS' business units. DET: Some pro-forma letters developed; decision letters are tailored to the request.

Source: Audit review of audited agencies' FOI guidance for staff

Guidance on the application of fees and charges

3.8 Under section 28 of the FOI Act, agencies are responsible for determining whether to impose a processing charge. The *Freedom of Information (Fees and Charges) Determination, 1995* sets out the regime of charges to support the processing of an FOI request. Application fees were abolished in 2001.

- 3.9 Audit observed that agencies have seldom imposed processing charges for FOI applications. Indeed, several FOI practitioners from the audited agencies commented to Audit that it was their understanding that a decision had been made across Government not to impose charges. This is not correct, and as detailed at paragraph 3.12, the Attorney General some years ago urged each agency to fully implement the existing fee structure.
- 3.10 The agencies audited had not developed a policy on charging. Although without a policy, CMD and DET had templates for calculating the estimated charges for requests, and CMD required decision-makers to calculate and estimate charges for all FOI requests received. CMD's and DET's guidance did not cover applications for remission of charges. TAMS' guidance made no reference to charging and managers advised that the practice was not to estimate or apply charges for FOI requests.
- 3.11 Interviews with FOI practitioners from all audited agencies highlighted a number of concerns in relation to charging including:
- perceived and actual difficulties in accurately estimating a charge within the legislative timeframe;
 - the resources required to calculate and estimate a charge; and
 - the potential for inconsistent application of charges across agencies.
- 3.12 Audit notes that the purpose of the current charging regime is to ensure users of the FOI Act make a contribution towards the costs of providing FOI access to documents. This point was taken up in an April 2005 letter from the then Attorney-General that strongly encouraged all agencies to fully implement existing charges for processing requests. Since that time, JACS has proposed a revision of the fees and charges regime and developed a new draft Determination and supporting guidelines for its application. This draft has not yet been finalised. This is discussed in Chapter 4.
- 3.13 Audit considers that agencies should prepare their policies on charging, and include guidance for decision-makers on the factors that should be considered when making a decision on whether to impose a processing charge. An ANAO FOI Audit Report from 2003-04⁵ identified a number of factors that could be considered in determining whether to impose a processing charge, including:
- whether the request is for the individual's own personal information;
 - ease of access to the information;
 - volume of review – for example, the number and complexity of documents to be reviewed;

5 ANAO, *Administration of Freedom of Information Requests*, Audit Report No.57, 2003-04, pg 58

- size of released material;
- relationship management – for example, applicant’s broader dealings with the agency;
- internal costs – for example, internal costs are greater than the charge to be imposed; and
- external timeframes.

3.14 The ACT Government has announced that it intends to review the ACT FOI law in light of a Queensland Government report, released in June 2008.⁶ The Queensland report makes some recommendations regarding charging, including charging of uncommitted, nuisance and vexatious applicants.

Recommendation 3

JACS should:

- develop a whole-of-government charge policy and guidelines to be applied to FOI requests, noting that fee exemptions can be provided for public interest and other relevant grounds; and
- update the section 80 fees and charges determination.

Recommendation 4

Agencies should consistently adopt any new charging policy in the development of their own internal policy and supporting guidance on the application of charges.

Guidance on third party consultation

3.15 Under sections 26, 27 and 27A⁷ of the FOI Act, agencies must consult State Governments, commercial organisations and individuals where their interests may be adversely affected by the release of a document.

3.16 DET was the only agency where guidance material outlined procedures for requests involving third party consultations. However, this guidance did not accurately reflect the extended statutory time frame under section 18 of the Act.

⁶ *The Right to Information: Reviewing Queensland's Freedom of Information Act – the report of the Independent Review Panel*, June 2008. The report is available at <http://www.foireview.qld.gov.au/>

⁷ Section 27A came into effect in March 2007. It details the procedure on request in relation to document(s) containing personal information.

Although the guidance in CMD and TAMS outlined the requirement for third party consultation, there was no detail on how to respond to these requests. More importantly, guidance did not include the requirement to consult with third parties whose personal information is included in requested documents.

- 3.17 CMD advised that its guidelines have since been revised to include procedural requirements for third party consultation, and a factsheet on consultation requirements will be published. It further advised that the FOI Co-ordination area briefs and advises decision-makers, including on consultation requirements, and prepares consultation requests and advice to applicants.

Guidance to support decision-making

- 3.18 The FOI Act sets out a number of exclusions (under section 11) and exemptions (under part 4) to be considered when determining whether to release or refuse access to documents. Access to documents is restricted if they:

- are Executive documents (section 35);
- are internal working documents (section 36);
- affect enforcement of the law and the protection of public safety (section 37);
- affect national security, defence or international relations (section 37A);
- are of the type to which secrecy provisions of enactments apply (section 38);
- affect financial or property interests of the Territory (section 39);
- concern the certain operations of agencies (section 40);
- affect personal privacy (section 41);
- are subject to legal professional privilege (section 42);
- relate to business affairs (section 43);
- affect the Government's ability to manage the economy (section 44);
- contain material obtained in confidence (section 45);
- would, if disclosed, be in contempt of a court or the Legislative Assembly (section 46);
- arise from companies and securities legislation (section 47); and
- are considered, under certain circumstances, an electoral roll (section 47A).

- 3.19 By including exemption provisions, the Legislative Assembly recognises there are reasons why access to some documents held by Government must be limited. On the other hand, the misuse of exemption provisions may undermine the intention of the Act. It is important then that decision-makers understand the Act, and that

guidance that incorporates the decisions of the courts and the AAT, particularly regarding the application of exemptions, is available to decision-makers.

- 3.20 The AAT often reviewed the non-release of documents for which exemptions were claimed. This is discussed further in Chapter 4.
- 3.21 DET was the only agency whose guidance included advice to decision-makers on how to apply exemptions, including application of the public interest test. Key requirements for documenting decisions and preparing decision-notice for applicants were also broadly addressed, with procedures for handling requests involving third party consultation. FOI Guidance for both CMD and TAMS did not include guidance to support decision-making.
- 3.22 Audit noted that decision-makers did not always adequately document their considerations, and that decision notices were of varying quality. Detailing the reasons for a decision is a first step in establishing that the decision is sound. As the ACT Government Solicitor has advised agencies, if ‘the decision-maker does not give any reason for the decision, [a] court may infer that he/she had no good reason’.⁸
- 3.23 All agencies should provide decision-makers with guidance on the application of exemptions, documentation requirements and standards for decision notices. Such guidance will encourage consistency in decision-making and enhance the quality of decision notices. Audit notes that the Australian Government’s Attorney-General’s Department has issued better practice guidance on the preparation of decision notices and the statement of reasons. These may be readily adaptable for use by ACT agencies.

Conclusion – agency guidance

- 3.24 Audit considers there is scope for all agencies to improve FOI guidance material, especially for decision-makers, in the following key areas:
- development of procedures to confirm that an extensive search for documents has been conducted;
 - charging – a statement of the agencies’ policy in relation to charging and procedures to be followed, including the timeframe for notifying the applicant;
 - circumstances where consultation with third parties is or is not necessary; and
 - criteria and checklist on documentation requirements, in particular the content of a good decision letter, and statement of reasons.

⁸ Legal Bulletin No. 15 of 1995 – *Statement of Reasons for Decisions*

- 3.25 Audit considers that TAMS and CMD should also address the following in their FOI guidance documents:
- agency procedures for consulting with third parties;
 - decision-making considerations, (e.g. consideration and use of exemptions; consideration of third party views);
 - information to be placed on FOI files (for example, decision-making considerations); and
 - ensuring guidance reflects the current legislation, including the May 2007 amendments.

SYSTEMS TO SUPPORT RESPONSES TO FOI REQUESTS

FOI Registers

- 3.26 The Act requires agencies to collect certain numerical information needed for reporting on the operation of the FOI Act. This information also allows agencies to track responses to FOI requests, and other requirements of the Act, especially statutory time limits. Agencies should monitor how many current FOI requests they have; who is responding to each request, and the current status of responses.
- 3.27 Each audited agency used an internally designed electronic register to assist in monitoring the status of FOI requests. Audit found that the registers used by CMD and DET captured enough information to allow easy identification of the number of requests received; the officer responsible for processing the request, and the current status of requests against statutory time limits. In addition, information on each FOI decision, applicant type, and fees and charges were input to these Registers. The information contained within both the CMD and DET Register enabled the compilation of information required to meet statutory reporting requirements.
- 3.28 TAMS used a central FOI register to record the details of all new FOI requests received. However, once requests are registered in the central FOI Register, they are forwarded to one of the three business units (networks) for processing. No further details are recorded in the central FOI register. Each network established its own FOI register to monitor the progress of each FOI request.
- 3.29 Audit's review of the networks' registers found:
- errors in the information recorded in registers and their completeness;
 - inconsistencies in the type of information captured by the four registers; and
 - insufficient capture of information to support central monitoring and compilation of data required for statutory reporting.

3.30 During the course of the audit, TAMS advised that information reported in its 2006-07 Annual Report was not consistent with the information contained in its four subsidiary network FOI registers. This problem would be addressed for its next Annual Report. TAMS further advised that from July 2008 a single FOI register would facilitate central monitoring of FOI requests and the compilation of accurate FOI data for the annual report.

Recordkeeping systems

3.31 Previous reviews of FOI administration have highlighted the importance of sound recordkeeping in identifying information requested through FOI. Without it, agencies will have difficulties in complying with the FOI Act. Good records are also important to good decision making and management.

3.32 The Auditor-General has recently reported on records management in ACT Government agencies⁹. Relevantly, the report noted that:

- records management policies and programs were not implemented consistently across business units in all agencies, resulting in some poor records management practices;
- records management tools used in audited agencies were often unable to provide assurance that full and accurate records were captured and maintained over time; and
- some agencies had difficulty locating a number of files required by the audit within a reasonable timeframe due to the poor recording of file movement details. Delays in locating files, or the failure to locate them at all, can have implications for agencies' compliance with the *Territory Records Act 2002* and the *Freedom of Information Act 1989*.

3.33 Audit did not further review the adequacy of audited agencies' record-keeping practices and systems in the current audit. Instead, Audit sought to establish if agencies had a recordkeeping system in place; and to seek agency's views on the adequacy of their recordkeeping.

3.34 Each of the agencies included in this FOI audit had a recordkeeping program and training in record-keeping was available. Agencies were generally aware of deficiencies in their recordkeeping systems: all acknowledged that improvement can be made and that line-area searches for requested documents may not always be complete, particularly searches of electronic and email documents.

⁹ Report 2008/3, *Records Management in ACT Government agencies*, ACT AGO, 2008

MONITORING AND REVIEW ACTIVITIES

- 3.35 Monitoring and review is a key element in continuous performance improvement. Effective monitoring and review is based on an established chain of accountability; and includes periodic reviews and built-in review mechanisms.
- 3.36 Audit examined monitoring and review procedures established in audited agencies to support FOI administration, and focussed on establishing whether agencies:
- routinely monitor or review individual requests for information;
 - report the results of monitoring or review activities; and
 - routinely monitor or review general FOI administrative and judicial developments.

Monitoring and review of individual FOI requests

- 3.37 Two agencies, CMD and DET, had established systems to monitor individual FOI requests. As discussed above, both agencies had developed FOI registers to support the routine capture and monitoring of information on various aspects of individual FOI requests.
- 3.38 Audit identified limitations with the central and individual FOI registers used by TAMS. As discussed earlier, these registers do not currently support central monitoring and reporting on the status of individual FOI requests and related outcomes.
- 3.39 Although none of the agencies audited had established formal mechanisms to provide assurance of the quality and consistency of decision-making, they had established informal arrangements:
- DET advised that all decision notices are prepared in consultation with the Department's central FOI processing area which provides quality assurance;
 - CMD advised that most decision notices and documents were prepared or informally reviewed centrally prior to their release; and
 - TAMS advised that requests which are sensitive and complex are checked centrally by the Government Policy and Legislative Co-ordination section. Routine applications, such as release of details from the Register of Domestic Animals, are not reviewed.
- 3.40 The number of requests for internal review in itself may not provide assurance of the quality and consistency of decision-making on FOI requests. Although an applicant may be dissatisfied with the outcome of their FOI request, or a decision to impose charges, he or she may not seek an internal review under the Act. Similarly, a request for an internal review is not an indicator per se that the initial

decision lacked quality. Further, it is possible that a decision – or the processes leading to it - will lack quality even if, on face value, it appears reasonable.

- 3.41 To provide assurance on the administration of the FOI Act, and opportunities for improvement, Audit considers that agencies should routinely reassess processes used in FOI decisions to ensure decision-makers have sound reasons for their decisions; that decisions are properly documented; and that reasons for decisions are conveyed to applicants in a comprehensive and straightforward way.
- 3.42 Appropriate feedback should be provided to decision-makers. Such reviews should particularly consider the outcome of any internal or external reviews of FOI decisions undertaken pursuant to the Act.
- 3.43 Except for TAMS, audited agencies had not conducted recent reviews, such as internal audits or evaluations of their administration of FOI requests. TAMS conducted an internal audit of its FOI administration in 2003, and scheduled a further internal audit for 2008 (which was deferred pending the outcome of this audit). To provide assurance of the efficiency and effectiveness of FOI administration, Audit considers that agencies should supplement their routine monitoring activities, with periodic reviews or evaluations.

Reporting on individual FOI Requests

- 3.44 Only one agency, DET, formally reported the results of its routine monitoring of individual FOI requests. This was a fortnightly report to the DET senior executive on the status of FOI requests. Reporting to the senior executive also included information on the outcomes of AAT decisions. TAMS advised that it has now included a progress report on FOI matters in the agenda of the monthly Senior Management Team meeting.
- 3.45 Audit considers that agencies should have established systems to monitor individual FOI requests and report on progress in the delivery of FOI services to agency senior executive.

Recommendation 5

Agencies should regularly evaluate the processes used to reach FOI decisions to ensure future decisions are well based; properly documented, and conveyed to applicants clearly and comprehensively.

Monitoring and reporting on general FOI administration issues

- 3.46 Audit found that all audited agencies had some monitoring mechanisms in place to capture information on broader FOI administrative or judicial developments. These mechanisms included the routine monitoring of relevant internet sites and publications, and attendance at quarterly Australian Government FOI Practitioners

Forums by central FOI co-ordinators and managers. However Audit found that there was no information flowing to FOI decision-makers on broader judicial or administrative developments.

- 3.47 In contrast to the administration of FOI requests in the Australian Government, there are no ACT Government-wide mechanisms for capturing and sharing information on changes to FOI law, practice and policy. JACS could play a greater role through the establishment of an ACT FOI Practitioners Forum and the provision of feedback on FOI judicial and administrative trends and issues. JACS support to agencies is examined in Chapter 6.

CONCLUSION

- 3.48 Agencies had to varying extents developed FOI guidance and procedures to support FOI practitioners responsible for processing FOI requests. DET had produced a comprehensive FOI Manual that may be useful for other agencies.
- 3.49 Audit identified scope for CMD and TAMS to develop guidance for decision-makers on third party consultation, and the application of exemptions, including preparation of decision-notices. The administration of FOI requests in all agencies could be strengthened by developing and communicating policy and procedures for charging, a search checklist and sign-off, and guidance on documenting decisions and preparing statements of reasons.
- 3.50 All agencies had established FOI registers to support the routine monitoring and management of FOI requests received. However, a number of deficiencies were identified in the FOI registers used by TAMS that reduced their ability to compile and report reliable FOI data and monitor FOI requests centrally.
- 3.51 All agencies monitored the progress of FOI requests. However, only one agency, DET, routinely reported the results of its FOI monitoring to senior executive management. Agencies' approaches to monitoring and review could be enhanced through the establishment of systems to review and provide feedback on the quality of access decisions and supporting notices, and through the conduct of periodic evaluations of FOI administration.

4. RESPONDING TO FOI REQUESTS

INTRODUCTION

4.1 This chapter describes audit findings on agencies' compliance with significant provisions of the FOI Act in relation to the processing of FOI requests.

KEY FINDINGS

- Acknowledgement letters did not always clearly specify when the statutory timeframe commenced, having regard to section 151 of the *Legislation Act 2001*.
- A revised fees determination was drafted by JACS in August 2007, but has not yet been finalised. The current 1995 fees determination is outdated.
- It has not been the usual practice for agencies to charge for responding to FOI requests, although evidence indicated that it is Government policy to do so since April 2005. All audited agencies were not aware of any Government policy on charges.
- With the exception of DET, agencies' FOI guidance did not set out the procedural requirements for consultation with third parties, including the March 2007 amendment to the ACT legislation which requires agencies to consult in relation to personal information.
- Neither CMD nor TAMS fully met the third party consultation requirements under the Act.
- Each agency prepared and provided to applicants a schedule to identify and record documents for release under FOI, and the decision for each document. However, there was limited evidence on files to demonstrate the consideration of a particular exemption, including consideration of the public interest test.
- Audited agencies processed in total 74 percent of FOI requests within the statutory timeframe of 30 days.
- Of the FOI files examined by Audit, the quality of decision notices varied both within and across the audited agencies. None of the audited agencies fully met section 25 requirements for the majority of requests examined.
- Agencies generally complied with the requirements for internal reviews. Some decision notices reviewed did not include adequate statement of reasons. In most cases, internal reviews resulted in additional documents being provided to the applicant.
- There have been few appeals to the AAT for further review of agencies decisions – 19 since 2005-06. Of the ten that proceeded to a hearing, the AAT did not agree with the agency decisions in four cases (40 percent) and supported, partly supported or returned for reconsideration the remaining six decisions.

BACKGROUND

- 4.2 Amongst other matters, the FOI Act provides specific direction on:
- decision-making authority;
 - procedures for making an FOI request;
 - categories of documents that are exempt from release;
 - requirements for notifying applicants;
 - applicants' rights of review;
 - application fees and processing charges; and
 - third party consultation.
- 4.3 Audit reviewed a number of determined FOI cases and assessed the extent to which agencies' examination complied with the key requirements and intent of the FOI Act.

COST OF ADMINISTERING FOI REQUESTS

- 4.4 Agencies did not measure the cost of administering FOI requests nor specifically track staff and other costs associated with handling FOI requests. One agency, DET, estimated the cost of responding to a large requests (comprising over 15 000 documents) to be about \$250 000, not including senior executive time. These estimates were not based on any analysis of the resources expended.
- 4.5 To manage FOI successfully requires information on resources which are devoted to it. The costs of FOI are included in the usual business of an agency – and consist mainly of staff salaries, on-costs and overhead allocations. Cost information assists the development of policy for fees for FOI services, and the management of resources of agencies.
- 4.6 Audit sought information from audited agencies as a basis for estimating the cost of FOI to agencies for 2006-07. Audit used Treasury costing methods (as contained in Treasury Circular 2008/1) to estimate the on-costs and overheads which, together with salary, compose the full cost of employing staff. Other costs, such as legal fees, were also taken into account.
- 4.7 The total costs of providing FOI services for the three audited agencies in 2006-07 was broadly estimated at \$1.2 million to \$1.3 million. The average cost per application – there were 111 in total – was estimated at \$10 900 to \$12 000 per application. Average staffing devoted to FOI in the 3 agencies was 3.8 full time equivalent staff.

- 4.8 If these average costs per application were extrapolated across all applications received by the ACT Government in 2006-07, the total cost of providing FOI services would be in the range of \$4.5 million to \$5.0 million.
- 4.9 In making this estimate, Audit assumes that cost factor for all agencies is similar to the three agencies audited – CMD, DET and TAMS – and that the average cost per application can be extrapolated to all applications received throughout the ACT Government during the 2006-07 year.
- 4.10 Audit observed that many FOI requests are made when the applicants are not able to get access to the relevant information publicly, or when there was concern about the lack of transparency in government decisions or dealings with the community. It is therefore possible that these costs could have been reduced if more information on Government activities were available publicly, or on request, especially information on topics of current public interest. The Queensland review of the FOI legislation advocated public disclosure as an alternative to FOI in meeting the public’s right to know.
- 4.11 Although the ACT Government is incurring significant costs in providing FOI services in accordance with the legislation, the audited agencies did not collect any revenue to partly and fully recover costs for cases where remission of charges were not justified.

RESPONDING TO FOI REQUESTS

- 4.12 Table 4.1 sets out the reported outcomes of FOI received by audited agencies.

Table 4.1: Reported outcomes of FOI requests received during 2006-07

Category	Chief Minister's Department	Department of Education & Training	Department of Territory and Municipal Services
Requests received	17	39	55
Requests decided (including requests carried over):			
Full release	4	4	10
Partial release	6	27	40
Entire exemption	3	1	1
Technical refusal (no documents)	5	2	2
Refusal	-	-	-
Transfer	-	-	-
Withdrawn	-	2	2
In progress at 30/6/07	3	3	-

Source: Audit analysis of departmental annual reports 2006-07.

4.13 All agencies advised Audit that there have not been any noticeable changes to the nature and type of requests received over the last three years. However, DET had received a number of large FOI requests following the Government's announcement of its public education policy document *Towards 2020*, and the Department had acquired external resources to respond to these requests.

4.14 In discussions with Audit, agencies identified a number of factors that they considered to impact on the efficiency and effectiveness of their responses to FOI requests:

- lack of whole-of-government FOI guidance;
- statutory timeframe for handling FOI requests is based on calendar days and not working days. Agencies may lose several days to respond to requests, should public holidays be included in the statutory response periods under part 3 of the Act; and
- ability to estimate and notify the applicant of charges that may be imposed within the statutory response period.

Receipt and acknowledgement of requests

4.15 FOI requests must be valid, if the agency is to respond them. Section 14 of the FOI Act outlines the requirements for a valid request. An FOI request must:

- be in writing;

- provide enough information to enable the identification of document(s) sought; and
 - specify an address for notices.
- 4.16 Where a person makes a request that does not comply with the requirements of section 14, it is the duty of the agency to take reasonable steps to assist the person to make a request in a manner that complies with section 14. Without first giving the applicant a reasonable opportunity for consultation, an agency cannot refuse an application if the scope of the request is too wide or there is insufficient information.
- 4.17 Paragraph 18 (1) (c) of the Act, requires the agency or Minister to take, as soon as practicable, all reasonable steps to notify the applicant that the request has been received, but in any case within fourteen days of receiving a valid request.
- 4.18 Audit reviewed selected FOI request files to assess agencies' compliance with these requirements. With one exception, all requests examined by Audit were treated as valid by the audited agencies. For the one 'invalid' request, there was evidence of appropriate consultation to assist the applicant to make a valid request.
- 4.19 All audited agencies acknowledged valid requests within the specified timeframe, with two exceptions. Audit found that agency acknowledgement letters generally advised applicants the request had been received and that the agency had 30 calendar days to provide a decision on the request. The acknowledgement letters did not always clearly specify when the statutory timeframe commenced, having regard to section 151 of the *Legislation Act 2001*.
- 4.20 The FOI Act obliges an agency that receives a request that should have been directed to another agency or to a Minister, to take reasonable steps to assist the person to re-direct the request. The Act also allows for the transfer of a request to another agency if that agency is in possession of the requested document or where the subject matter of the document is more closely connected with the functions of that agency.
- 4.21 Audit found that a number of requests received by CMD should have been directed to another agency or were not connected to its functions and operations. In these cases, CMD appropriately considered the likelihood of another agency holding documents relevant to the request and either arranged for a partial transfer in accordance with the requirements under the Act, or assisted the applicant to direct their request to the other agency.

Identifying and locating requested documents

- 4.22 Under the FOI Act, it is expected that officials will undertake the tasks of locating documents relevant to applicant's requests and subsequently advise applicants of

the located documents. This is implied by the object of the Act, which is to extend the right of access to documents as far as possible.

4.23 The FOI Act provides for access to ‘documents’. The term ‘document’ is not defined in the FOI Act, however it is defined in the *Legislation Act 2001* to mean any record of information, including

- anything on which there is writing; or
- anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them; or
- anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or
- a drawing, map, photograph or plan.

4.24 Therefore, all information held on a server, a hard disk, a floppy disk or a CD-ROM (unless part of library material maintained for reference purposes) is potentially subject to access under the FOI Act. All such information relevant to an FOI request must be identified in the same way as for paper documents. Particularly, this would include information in email accounts.

4.25 The extent to which searches must be conducted to respond to requests varies considerably. Some requests are for one or a few readily identifiable documents; others may involve considerable search time sorting through a large number of widely dispersed files and other sources. It seems clear that an important aspect of responding to FOI requests is documentation of the search undertaken.

4.26 In CMD, there was evidence that a search for requested documents had been conducted for all FOI requests examined. There was not always evidence on files to verify that a search for documents had been conducted in TAMS and, to a lesser extent, in DET.

4.27 None of the agencies (excepting in one case) recorded which file locations, type of files or other details of the search for the requested documents. The lack of documentation raises doubts about the quality of the searches undertaken.

4.28 In its review of selected FOI files, Audit found a number of instances in which subsequent review activity identified documents additional to the initial search conducted. An example is set out in Case Study 4.1.

Case Study 4.1 Example of an inadequate search for requested documents

In responding to an FOI request, TAMS conducted a search for documents and located 286 documents relevant to the request. An access decision covering those documents was issued and the applicant subsequently requested an internal review of that decision for several reasons. One reason was the ‘general scarcity of documents from 2000 onwards, lack of email/electronic documents’. As part of the internal review, TAMS conducted another search and additional 26 documents were identified.

- 4.29 Audit considers that all agencies should develop a checklist to assist staff in locating and subsequently identifying documents relevant to the FOI request. The checklist should indicate places to be searched when responding to an FOI request, including, but not limited to, paper records and files, electronic files, and emails. Such a checklist can provide assurance that a thorough search has been conducted.
- 4.30 Further, the officer responsible for undertaking the search should be required to certify that the search has been conducted thoroughly, consistent with the checklist, and that all relevant documents have been identified and located.
- 4.31 Audit notes that DET has developed a search checklist to support the conduct of AAT reviews, which could be readily applied to all FOI requests received.
- 4.32 One line area of DET adopted a good practice in providing a signed memo back to the FOI Coordinator advising that he or she had carried out a thorough search of files, emails and correspondence held by the area of the Department where documents requested were kept.

Recommendation 6

Agencies should issue better practice guidelines and search checklists to help with searching for documents relevant to FOI requests.

JACS should assist agencies to develop and maintain such guidelines through assembling better practice for distribution to agencies.

Recommendation 7

Agencies should specify in correspondence to applicants when the statutory periods commence and finish, having regard to section 151 of the *Legislation Act 2001*.

Application of Fees and Charges

- 4.33 Under section 80 of the Act, the Attorney-General may determine the amount of application fees and charges for the purposes of the Act. Under the *Freedom of Information (Fees and Charges) Determination 1995*, a fee of \$15 applied to a request for access to a document and to a request for an internal review of a decision. Application fees were removed in March 2001.
- 4.34 Audit notes that the recent Queensland review of FOI administration recommended that application fees be retained for requests that do not include personal information.¹⁰
- 4.35 In the ACT the regime of charges to support the processing of an FOI request remains unchanged from what was set out in the 1995 Determination:
- search and retrieval time - \$15.00 per hour;
 - decision-making time - \$20.00 per hour;
 - document inspection - \$6.25 per half hour (or part thereof); and
 - document photocopying - free for first 200 pages and thereafter 20 cents per page.
- 4.36 Under section 28 of the Act, an agency may choose to impose charges for processing a request. Before the request is processed, the agency must notify the applicant in writing and estimate the charges to be paid, and how they were calculated.
- 4.37 An applicant may then seek the reduction or non-imposition of those charges, and an agency may remit all or part of it if satisfied that:
- payment would cause financial hardship to the applicant, and
 - if the document sought relates to his or her personal affairs or its release would be in the public interest (section 29).
- 4.38 The agency must also notify the applicant of the decision as soon as practicable, and in any event within 28 days, or the agency will be taken to have refused to remit the charge (sub-section 29 (4)).
- 4.39 An examination of 2006-07 FOI reporting for all ACT Government indicated that revenue was not collected for responding to requests, with the possible exception of CMD. As shown in Table 4.2 below, 9 applications for remissions were

¹⁰ *The Right to Information: Reviewing Queensland's Freedom of Information Act – the report of the Independent Review Panel*, June 2008. The report is available at <http://www.foireview.qld.gov.au/>

accepted in 2006-07. There was no mention of any FOI revenue received in other CMD cases.

Table 4.2: Revenue from FOI charging for processing FOI requests

Department	2004-05 \$	2005-06 \$	2006-07 \$
Chief Minister's	0	Note 1	Note 2
Education and Training	0	0	0
Territory & Municipal Services	Note 3	0	0

Source: Audit analysis of departmental annual reports

Note 1: Charges collected for one request; amount not identified.

Note 2: There were nine requests for remission; all were accepted. No receipts from charging identified.

Note 3: One charge requested but not paid; FOI request considered withdrawn.

- 4.40 Two agencies, CMD and DET, make reference to charges in their FOI guidance. CMD guidance requires decision-makers to estimate and consider charges for all requests received, however, audit review of selected FOI files found limited evidence of charges being considered. Although DET advised it has recently imposed charges for processing large requests, it has not been the usual practice of audited agencies to impose a charge for responding to FOI requests.
- 4.41 In April 2005, the Attorney-General wrote to agencies asking them to fully implement existing fee structures, which involves charges but not application fees. Audit was unable to locate a record of this advice and JACS, from where the advice originated, likewise was unable to locate a copy of it.
- 4.42 Charges were calculated and applied for only two FOI requests examined by Audit in the three audited agencies. There was insufficient evidence on file to support how these charges were calculated.
- 4.43 Audit was advised by the ACTGS that private law firms are making increased use of FOI to obtain documents for use in legal proceedings. Where documentation obtained through FOI is put to commercial use, Audit considers that there is justification for recovering the cost of providing documents under FOI.
- 4.44 Audit notes that a revised fees determination was drafted by JACS in August 2007, but has not yet been finalised. The reason for the delay in finalising the determination is unclear. JACS should revise and update the Determination, as the charges reflecting the labour costs in the 1995 Determination are no longer realistic.

Consultation with third parties

- 4.45 Under sections 26, 27 and 27A¹¹ of the Act, state governments, commercial organisations and private individuals must be consulted where their interests may be adversely affected by the release of document.
- 4.46 When undertaking consultation with third parties, agencies must write and invite them to comment on the release of the document. Third parties do not have to power to veto the release of documents. The agency takes into account the submission made by a third party when making a decision on release.
- 4.47 Should an agency decide to release documents against the objections of the third party, that party should be notified in writing at the same time the applicant is notified of the decision. The third party then has 30 days in which to appeal for an internal review of the decision or apply to the AAT. Access should not be granted to the applicant until the 30 day time limit has expired.
- 4.48 Sub-section 18 (4) of the Act provides that the time to respond to an FOI request can be extended by 30 days when third party consultation is necessary. The applicant must be informed of the extension as soon as possible after the agency determines that an extension is required.
- 4.49 Of the total number of requests examined by Audit, eight requests from CMD and TAMS involved consultation with third parties. Neither CMD nor TAMS fully met the third party consultation requirements under the Act. The problems identified included:
- For one request, CMD did not inform the applicant of the extension to the decision-making timeframe. For various reasons, including the necessity to consult with an Australian Government Department, this request took over four months to finalise;
 - TAMS did not always consult with the third party when required by the Act; and
 - TAMS did not inform applicants of the extension to the decision making timeframe, for any of the requests examined.
- 4.50 Audit observed that, with the exception of DET, agencies' FOI guidance did not set out the procedural requirements for consultation with third parties, including the March 2007 amendment to the ACT legislation which requires agencies to consult in relation to personal information, under section 27A. The ACTGS advised Audit that, in response to a number of agency queries, it was planning to develop a Legal Bulletin on third party consultation requirements, particularly

¹¹ Section 27A came into effect in March 2007. It details the procedure on request in relation to document(s) containing personal information.

section 27A. This advice would have been more useful and timely if it were issued when the amendment took effect some 15 months ago. ACTGS advised that a new bulletin on the changes is being prepared.

- 4.51 Audit is concerned that the ACTGS and the Public Law Group in JACS were not active in providing advice to all agencies on the impact of ACT legislative changes on FOI obligations to be complied by agencies.

DECISION-MAKING

Decisions made by authorised officers

- 4.52 As addressed in Chapter 2, under section 22 of the Act, officers making decisions on requests must be authorised by the principal officer of the agency. Officers can be authorised to:

- grant, deny or defer access documents;
- grant access in another form;
- delete matter from a document;
- impose or remit a charge or application fee;
- grant or refuse a request to amend a personal record;
- extend time limits; or
- defer access.

- 4.53 In each audited agency, authorised officers made decisions regarding access to documents. In CMD, two instances were noted where no documents relevant to the request were identified. The subsequent letter to the applicant was not signed by an authorised officer. Although these letters were not section 25 notices, as discussed below at paragraph 4.64, there is a risk that non-authorized officers do not have the relevant understanding and knowledge of the FOI to prepare such notices.

Evidence of decision-making considerations

- 4.54 Although not a specific requirement under the Act, Audit considers it sound administrative practice for the access decision and reasons for that decision to be recorded on the FOI request files. This should include a comprehensive list of the documents or parts of documents disclosed. This practice may also support subsequent review activity. For AAT reviews, agencies are required to produce evidence as to how an exemption applied to requested documents.

- 4.55 Audit found that each agency used a schedule to identify and record the access decision for each document identified. This schedule was provided to the applicant as part of their notification on the access decision. However, there was

limited evidence to demonstrate how the use of a particular exemption was considered, including consideration of the public interest test. The lack of documentation on decision-making considerations was also raised as an issue in the previous audit of administration of the FOI Act undertaken by Audit in 2001.¹²

Recommendation 8

Agencies should record decisions and reasons for decisions, including a comprehensive list of the documents or parts of documents disclosed, on the FOI request file.

Advising the applicant of the access decision

Response times

- 4.56 Under section 18 of the Act, applicants are to be notified no later than 30 calendar days after the request was received by or on behalf of the agency or Minister. The 30 day response period may be extended by an additional 30 days if notification of third parties is required under sections 26, 27 or 27A, and the agency or Ministers record in writing that an extension of time is appropriate.
- 4.57 Table 4.3 below sets out agency data, compiled by JACS and reported in the JACS Annual Report, on response times for all departments and agencies. The data suggests that all agencies, with the exception of Treasury, processed most FOI requests within statutory timeframes; 74 percent of all finalised requests were responded to within 30 days.
- 4.58 There is no commentary provided in the annual report to indicate the nature of a request, and hence to assess the reasonableness of a response time. A response time exceeding 30 days may occur if a request was large and complicated, or involved an extensive search across different parts of an agency.
- 4.59 It is difficult to assess the timeliness of responses, in particular, any significant delay, without an understanding of the nature of the request, the quality of the search undertaken, and the decision. Agency reporting to management and to the public could be improved to explain the reasons for delay in responding to over 20 percent requests.

¹² Audit Report 12/2001 *The Freedom of information Act*

Table 4.3: Published FOI response times for departments and agencies 2006-07

Department/ Portfolio	Number received	1-30 days	31-45 days	46-60 days	61-90 days	91+ days	Not finalised
Auditor-General's Office	1	1	-	-	-	-	-
CMD	23	11	1	2	2	2	3
Rest of portfolio	12	12	-	-	-	-	-
DHCS	101	86	14	2	4	3	4
DET	39	25	6	3	2	1	2
Rest of portfolio	5	3	-	-	-	-	-
Health (ACT Health)	26	20	3	3	-	-	4
JACS	24	22	-	-	-	-	-
Rest of portfolio	9	5	-	-	-	4	-
TAMS	56	44	6	4	2	-	-
ACTPLA	72	54	2	4	-	-	-
Treasury	27	9	11	2	-	-	5
Rest of portfolio	6	5	-	-	-	-	1
Applications withdrawn	16						
Total	417	297	43	20	10	10	19

Source: Department of Justice & Community Safety Annual Report 2006-07, pp 162-168.

Notes: Number received includes requests carried over and finalised from previous year, and includes 16 withdrawn applications.

4.60 For the FOI requests examined by Audit from the three agencies:

- all agencies responded to the majority of the FOI requests examined by Audit, within the required statutory timeframe; and
- each agency (TAMS, DET and CMD) had instances of late decisions; and in CMD, there were four instances where responses to requests for large quantities of documents took over 90 days to complete. In two of these cases, extensions of time were agreed with applicants.

Decision notices to applicants

4.61 Section 25 of the FOI Act requires the applicant to be given notice of the decision in writing when:

- access is to be deferred;
- the document is not a document of the agency;
- the document is an exempt document;
- the document is available by other means;

- responding to the request would be an unreasonable diversion of resources; or
 - access will be given in a different form.
- 4.62 In advising applicants of the access decision, it is not sufficient to claim an exemption by quoting the relevant section of the Act. The decision-maker is required to give full reasons under section 25 of the Act, stating:
- the findings on any material questions of fact, referring to the material on which those findings were based;
 - the reasons for the decision;
 - the name and the designation of the person giving the decision; and
 - information on the applicant's right of review and right to complain to the Ombudsman.
- 4.63 If notices do not comply with the above requirements, the applicant can apply to the AAT for a declaration that the notice of the decision is inadequate (subsection 72 (2)).
- 4.64 In most cases, agencies provided applicants, where applicable, with a section 25 decision notice. In two instances, CMD wrote to applicants informing them that documents relevant to the request could not be located, but did not send section 25 notices, as section 25 does not apply where documents cannot be located.
- 4.65 The ACTGS advised Audit that where documents are not able to be located, applicants should be advised that no documents are available, and that, in the absence of a notice of a decision on the request under section 25, the applicant may request the AAT to review the outcome.
- 4.66 The Australian Government's FOI Act contains provisions (section 24A) that allow an agency to 'refuse a request' where documents cannot be found or do not exist. By contrast, in the ACT, where documents are not found or they do not exist, it is not possible to make a decision on the application. Thus, an applicant is unable to request an internal review, and must approach the AAT to review the outcome of the FOI request.
- 4.67 Section 25 decision notices varied in quality within and across the audited agencies. None of the agencies fully met Section 25 requirements for the majority of requests examined. The most common problems included:
- insufficient descriptions of the documents under consideration;
 - the evidence that was considered in making the decision was not always included; and
 - the reasons for exemptions were not always fully or adequately explained.

4.68 There were also a number of instances of inadequate consideration of the public interest test, where this was applicable. Public interest is not defined by the FOI Act, and some classifications of documents are exempt subject to the public interest.

4.69 In particular, statements of reasons did not display a consideration of arguments favouring release on the grounds of public interest, as well as arguments against release. Other problem areas included:

- appeal rights were not always mentioned; and
- for one agency, TAMS, there were several instances where incorrect advice was provided to applicants that an application fee applied to requests for internal review. Audit notes that application fees for all requests were abolished in 2001.

4.70 Case Studies 4.3, 4.4 and 4.5 below set out some examples of section 25 notices.

Case Study 4.2 Inadequate identification of documents

In responding to a request, DET exempted a number of documents because they:

- had an adverse effect of the operations of the agency (para 40 (1) (c));
- concerned personal privacy (ss 41 (1));
- were protected by legal professional privilege (s42); and
- contained material obtained in confidence (ss 45 (1)).

In DET's decision letter and the attached schedule, the description of the documents exempted did not provide sufficient information to the applicant to assess the nature or relevance of the exempted documents.

Audit comment

DET's decision exempted 19 of the 37 documents relevant to this request but did not provide the applicant with a sufficient description of any of those exempted documents. Document descriptions such as 'short-hand notes'; 'note for file' and 'email correspondence' do not provide sufficient detail to enable the applicant to know if the non-disclosure of those documents is justified. DET should have provided details of the authors and addressees of all documents (where applicable and where this information is not itself exempt) and a brief description indicating the nature of the documents, if they are not themselves exempt material.

If the applicant is provided scant details of documents declared exempt, it could impede subsequent judicial review of the access decision.

The AAT has commented:

For the purposes of the hearing and the submissions to be made by the respondent, the actual documents to which exemption is claimed were provided to the Tribunal. As is invariably the case in FOI hearings those documents were not made available to the applicant or its legal advisers. This necessarily means that the applicant is often left fighting a case based on general principles rather than by reference to the documents to be reviewed.¹³

Case Study 4.3 Inadequate statement of reasons

In responding to a request, TAMS advised the applicant:

... 252 documents have been located on our file. However, there were 22 documents on that file that have been withheld, as they do not relate to your request. I refer you to the attached schedule, which outlines my decisions in relation to the release and exemption of the documents.

The schedule attached to the decision listed each document and whether they were Full Release, Part Release or Withheld. The reasons given on the schedule explaining exemptions included:

Section 41 Folio contains deletions of personal details. It would be unreasonable to release this folio information without the deletion of personal information.

Paragraph 45 (2) (b) Folio contains details provided in confidence. It would be unreasonable to release this information.

Audit comment

TAMS' decision did not provide the applicant with an explanation of why the documents met the criteria for exemption nor did the decision explain the legislative basis for the decision. Relevant exemption sections of the FOI Act, with other relevant explanations, should be included in the body of the decision or attached as an annex.

Case Study 4.4 Full and adequate statement of reasons

TAMS received a request for documentation relating to a dog attack in which the applicant and her dog were injured. In response to that application TAMS made a decision to fully release some documents and partially release others with deletions on the basis that the documents contained details of personal privacy (the owner of the other dog).

¹³ Capital Property Finance Pty Limited and the Minister for Planning [2007] ACTAAT 16 (2 August 2007)

In responding to a request for internal review the authorised decision-maker provided detailed reasons for upholding the original decision. There were a number of documents exempted in this decision on the basis that the release of those documents would be an unreasonable disclosure of a persons' affairs (ss 41 (1) FOI Act). The decision letter provided an explanation to the applicant of the application of ss 41(1) and the factors taken into account when considering if it would be unreasonable to release those documents. The decision also explained that the decision-maker considered the public interest of having the information released.

Audit Comment

Agencies are obliged to make every effort to assist applicants who are seeking access to documents under the FOI Act. This internal review decision was clearly written and the applicant was provided with a good explanation of the basis for the decision. This good practice should be applied across the agency at the original decision stage to reduce the number of requests for internal reviews.

Recommendation 9

JACS advise Government of the merit of a provision in the ACT FOI Act equivalent to section 24A in the Australian Government's *Freedom of Information Act 1982*; that allows agencies to 'refuse a request' where documents cannot be found or do not exist.

SUBSEQUENT REVIEW ACTIVITY

Internal reviews

- 4.71 Section 59 of the FOI Act provides for the applicant to request an internal review of a decision, within 28 days of a decision, in regard to a decision to refuse or defer access to a document and in regard to fees and charges. Each internal review is handled within the agency that made the original decision. The agency must arrange for another decision-maker to review the decision within 14 days of receipt of the request. Section 25, which requires that a decision notice be given to refuse or defer access, also applies to internal reviews.
- 4.72 Table 4.4 below sets out annual report data for all departments on the number of internal reviews conducted and the results, where applicable or provided. Less than six percent of the 417 requests received in the 2006-07 financial year were subject to internal review, although Audit observed that information on the results of internal review activity is not always reported by agencies. Audited agencies' annual reporting is examined further in Chapter 5.

Table 4.4: Requests and results for internal reviews by department 2006-07

Department (excludes rest of portfolio)	Requests for Internal Review	Original Decision Affirmed	Partial Release (extra material released)	Original Decision Over- turned	Ongoing as at 30 June 2007
Chief Minister's	2	1	1	-	
Disability, Housing & Community Services	3 ^{Note 2}	1	-	-	1
Education & Training	6	1	5	-	-
ACT Health	2	2	-	-	-
Justice & Community Safety	0	-	-	-	-
Territory & Municipal Services	5	NA	NA	NA	NA
Treasury	8 ^{Note 1}	7	-	-	-

Source: Audit analysis of departmental annual reports

Note 1: Treasury annual report 2006-07 p61 indicates that one request was treated as withdrawn when the applicant did not provide an explanation for seeking internal review within the statutory period.

Note 2: DHCS annual report 2006-07 p161 is not clear. It shows 3 requests, 1 for Internal Review, 1 affirmed, 1 ongoing.

NA – not available – TAMS annual report 2006-07 p162 does not indicate the results of the 5 requests received.

- 4.73 TAMS did not provide the results of internal review activity for the 2006-07 financial year in its annual report.
- 4.74 Audit notes that the primary decision-maker in many of DET's requests assessed a large number of documents (in one case more than 15 000 folios). In those circumstances, it is more likely that internal review would result in the release of more documents, as the internal reviewer can focus on a smaller number of withheld documents.
- 4.75 Two agencies, CMD and DET, completed their internal reviews within or very close to the statutory timeframe. Audit observed that while DET took 16 days to complete one of their internal reviews, it comprised a review of over 4 000 folios. TAMS did not complete any of the internal reviews within the statutory timeframe. Finalisation of internal reviews examined from all audited agencies ranged from between one month and over four months. TAMS advised Audit that it understood the FOI Act required internal reviewers to consider the FOI request afresh. Thus for large requests, TAMS had difficulty in reconsidering the application within the 14 day time period allowed by the Act.
- 4.76 Audit found that all internal reviews were conducted by an authorised officer who was not the original decision-maker.

- 4.77 Most internal review decision notices included an adequate statement of reasons and all provided appropriate information on further avenues for appeal. Audit notes the following results for internal reviews examined by Audit:
- DET - two primary decisions were upheld and one was partially confirmed and resulted in the release of additional documents;
 - CMD - one primary decision was partially confirmed, and resulted in the release of additional document; and
 - TAMS - one primary decision was upheld; and two were partially confirmed with additional documents released.

Review by the Administrative Appeals Tribunal (AAT)

- 4.78 If an applicant is not satisfied with the decision of an internal review, the applicant can then apply to the AAT for a further review under section 60 of the FOI Act. This application should be within 28 days and there are provisions for an extension of time.
- 4.79 The applicant can also apply to the AAT for a review of a decision refusing an extension of time for an application for internal review; if the decision on internal review has not been communicated to the applicant within 14 days; or if the notice of the decision does not contain the findings and reasons. The AAT can make any decision that the agency could make, and can make orders for costs.
- 4.80 The AAT advised that from 2005-06 to 2007-08, it had received 19 of applications for review under the Act. These applications were finalised as follows:

Table 4.5: Cases referred to the AAT 2005-06 to 2007-08 by result.

Agency	Case withdrawn (no.)	Consent agreements (no.) ^{Note 1}	Case heard (no.)	Total cases (no.)
ACTPLA	1	2	2	5
CMD			1	1
DET	1		3	4
DHCS	2			2
ACTGS			1	1
LDA	1	1		2
Minister for Planning			1	1
TAMS	1		1	2
University of Canberra			1	1
TOTAL	6	3	10	19

Source: ACT AAT

Note 1: A consent agreement is where the applicant and respondent have reached agreement on access to documents, without the case proceeding to hearing.

4.81 Audit examined the annual reports of agencies, and noted that information on the results of AAT review activity is not always reported by agencies. Agencies' compliance with annual reporting requirements is examined in Chapter 5.

4.82 Of the ten cases heard in Table 4.5 above:

- four were set aside, meaning that the AAT did not agree with the decision and made another decision in the matter;
- two were affirmed. (The AAT agreed with the decision);
- two were dismissed (Not considered by the AAT);
- one was remitted (Returned to the agency for decision); and
- one was varied (The Tribunal varied but did not set the decision aside).

4.83 This categorisation is not mutually exclusive: for example, it is possible for decisions to be affirmed, but not in their entirety. The AAT may vary a decision, but still affirm it overall.

4.84 Thus, the AAT did not agree with agency decisions in 4 of the 10 cases heard from 2005-06 to 2007-08. The remaining 6 were supported, partly supported or returned for reconsideration by the agency.

4.85 As set out in the case study below, Audit found that DET made available to all agency staff the results of its AAT cases. This is an example of better practice. Although CMD did not communicate the results of its AAT case to all agency

staff, some of the lessons learned from its AAT case contributed to changed administrative practices (see Case Study 4.6).

Case Study 4.5 Good communication/feedback on AAT cases within an agency.

Dunne and Barden v ACT Department of Education ([2007] ACTAAT 26 (17 December 2007))

Following the announcement of the Government's Schools Renewal Program consultation process (*Towards 2020*) the Department of Education received 12 FOI requests. Each of these requests was processed by DET and decisions were made to release a large number of documents relevant to the requests, but some documents were withheld on the basis of exemptions. DET subsequently received requests for internal reviews for four of those decisions and three of these requests were then disputed in the AAT during 2007. These applications were all heard together.

The AAT handed down its decision on 17 December 2007 and found that there were reasonable grounds for the release of an additional nine of the 813 folios that were in dispute.

DET has systems in place to update management and staff on the progress and status of cases in the AAT. During 2007 and 2008, DET issued several fact sheets that provided management and staff with some background about outstanding AAT cases including the outcome of this case.

Fortnightly reports to the Chief Executive and other senior executives include an update on the status and outcome of matters before the AAT. DET also briefed the Minister of Education and Training regarding the outcomes of the AAT decision.

Case Study 4.6

Coe v ACT Chief Ministers' Department [2007] ACTSC 15 (7 March 2007)

In May 2005 CMD received an FOI request for a large number of documents relating to Native Title in the ACT. Due to the significant scope of the request, CMD consulted with the applicant to clarify which documents the applicant was seeking. This consultation was not successful and did not result in a reduction of the size or scope of the request.

CMD estimated that it would take one staff member approximately three months to prepare a response to the request, and refused the request. It considered that providing the documents would substantially and unreasonably divert the resources of the agency. The applicant requested an internal review. The decision was upheld.

The applicant subsequently requested a review of the decision by the AAT and on 22 March 2006 the AAT set aside CMD's decision and directed CMD to process the request and assess whether the requested documents should be released or exempted. CMD's appeal to the ACT Supreme Court was dismissed.

CMD then realised that it was not able to apply processing charges to this request as the applicant had not been notified that charges would apply within 30 days of the original application.

As a result of this experience, CMD changed its FOI procedures to ensure that processing charges could be applied if appropriate. It amended its FOI application form to delete the facility for applicants to request the remission of charges at the time of application. CMD also amended its standard acknowledgement letter to include a paragraph notifying applicants that charges may apply.

The FOI co-ordinator now requests line areas to make a preliminary assessment of the resources and time required to process new FOI requests, and provides line areas with guidance and a charging calculation template.

Complaints to the Ombudsman

4.86 Under sub-section 54 (1), an applicant can complain to the ACT Ombudsman on 'a matter of administration' arising under the FOI Act.

4.87 Table 4.6 below sets out the number of FOI complaints made to the ACT Ombudsman.

Table 4.6: FOI complaints to the ACT Ombudsman under ss53 (3) of the FOI Act

	2004-05	2005-06	2006-07
Complaints received	15	9	9
Agencies involved	9	7	6

Source: Source: Audit analysis of ACT Ombudsman's annual reports.

4.88 The Ombudsman's annual report noted that the complaints mostly related to concern about delays in providing documents and reasons for exemption. Frequently, the purpose of the Ombudsman's intervention is to 'have the agency expedite a response'.

CONCLUSION

4.89 All agencies generally complied with statutory timeframes for acknowledging FOI requests and advising applicants on their access decisions. However, for the majority of FOI requests reviewed, agencies did not provide applicants with

adequate decision notices, particularly the reasons for refusing access to requested documents. There was also insufficient evidence on FOI request files of the reasons for the decision.

- 4.90 As noted in Chapter 3, agencies' procedures for identifying and locating requested documents do not provide assurance that a thorough search for all relevant documents has been conducted. Audit review of selected FOI request files confirmed this deficiency in document search.
- 4.91 Although agencies have some guidance and procedures to support the calculation of charges, it has not been the usual practice of agencies to impose a charge. Audit notes that the current charging regime provides for users of the FOI Act to contribute to some of the costs of processing and FOI request. It also allows users to seek the remittance or reduction of charges, on such grounds as financial hardship, or where the request related to personal information or is in the 'public interest'.
- 4.92 The FOI Act provides for the review of decisions made by agencies. Agencies generally complied with the requirements for internal reviews. In most cases, internal reviews resulted in additional documents being provided to the applicant.
- 4.93 There have been 19 appeals to the AAT for further review of agencies decisions in the three years 2005-06 to 2007-08. The AAT did not agree with the agency's decision in four of the ten cases so far heard.

5. FOI REPORTING REQUIREMENTS AND OTHER OBLIGATIONS

INTRODUCTION

5.1 This chapter covers audit findings on agencies' compliance with reporting requirements and other obligations under the FOI Act.

KEY FINDINGS

- Each agency's annual report complied generally with legislative reporting requirements. However, there is scope for agencies to improve the report on their performance, including the results of internal and AAT reviews.
- Both CMD and DET had developed central FOI registers to support annual reporting on FOI activity, while TAMS had problems in providing complete information on FOI requests. Audit found that data contained in these FOI registers were consistent with data reported in their respective annual reports.
- All agencies updated and included a section 7 statement in their 2006-07 Annual Report and these statements complied with the content requirements set out in the FOI Act and the *Annual Report Directions*.
- Accessibility of section 7 statements could be further enhanced by including section 7 statements with FOI information on agency websites. CMD makes available both its section 7 and section 8 statements on its website.
- All agencies had prepared a section 8 statement, which included an index of documents used in making decisions and recommendations, and information on where these documents could be inspected and purchased. The audited agencies did not have, or did not see the necessity for, documented procedures for maintaining the currency of their section 8 statements.
- With the exception of information on existence of the statement and its availability, agencies did not provide the required statement of their compliance with section 8 of the Act.
- Information in annual reports was mainly numeric, with little or no supporting analysis to explain their performance in responding to FOI requests and other requirements of the Act.

BACKGROUND

5.2 Under section 79 of the Act, each Minister is required to prepare an annual report on the operation of the Act in relation to the Minister's official documents and each agency for which the Minister is responsible. These reports are to be included in the annual reports of agencies.

5.3 Sections 7 and 8 of the Act require certain information to be made generally available to the public. In particular, section 7 requires each agency to include a statement on its functions and documents in its agency annual report. Section 8 requires agencies to prepare an index of documents used in making decisions and recommendations, and make the documents listed in the index available to the public for inspection and purchase.

FOI ANNUAL REPORTING

5.4 Agency reporting on the operation of the Act is to be included in its annual report. Under sub-section 79 (2), reports are required to contain particulars of the operations of the agency and responsible Minister under the Act during the year, including:

- the number of requests received under the Act;
- the number of decisions made to grant full access to document(s) requests, grant partial access, or refuse access;
- the number of requests for an internal review of decisions and the results of such reviews;
- the number of applications to the Administrative Appeals Tribunal for review of decisions and the results of such reviews;
- total charges and application fees collected in dealing with requests; and
- the number of requests received to amend personal records and the results of such requests.

5.5 This requirement is also reflected in the *Chief Minister's Annual Report Directions*.

5.6 Audit found that both CMD and DET had developed central FOI Registers for annual reporting on FOI activity. Audit found the data contained in these FOI registers to be consistent with the data reported in their respective annual reports.

5.7 TAMS had significant problems in providing complete information on FOI requests and resultant access decisions. TAMS advised Audit that information contained in its FOI registers was not consistent with information reported in its 2006-07 annual report, and as such reported data were considered unreliable.

5.8 TAMS problems notwithstanding, Audit found that each agency's annual report complied generally with legislative requirements. However, there is scope for agencies to improve reporting of internal and AAT reviews and operation of the Act generally.

Table 5.1: Compliance with sub-section 79 (2) reporting requirements – audited agencies – 2006-07

Reporting Requirement	DET	CMD	TAMS	Audit Comment
The number of requests received under the Act	✓	✓	✓	TAMS provided additional information on applicant type.
The number of decisions made to: grant full access to document(s) requests, grant partial access, or refuse access	✓	✓	✓	
The number of requests for an internal review of decisions and the results of such reviews	✓	✓	partial	TAMS provided the number of applications for internal review but not the results of these reviews.
The number of applications to the Administrative Appeals Tribunal for review of decisions and the results of such reviews	✓	✓	✓	CMD complied, but could improve reporting by including the results of an AAT review mentioned as ‘on-going’ in the previous annual report. DET cases were still current at 30 June 2007.
Total charges and application fees collected in dealing with requests	✓	partial	✓	CMD reported on the number of requests for remission only.
The number of requests received to amend personal records and the results of such requests	✓	✓	✗	TAMS did not report against this requirement.

Source: Audit analysis of audited agencies' 2006-07 annual reports

5.9 Audit found that information in annual reports was mainly numeric, with little or no supporting commentary. TAMS provided comparative data, and a table illustrating FOI requests by applicant type for the last three financial years. Audit considers the latter to be an example of good practice, which could be included in all agencies reporting on the delivery of FOI services under section 79.

Recommendation 10

Agencies should include an analysis of information on FOI services in annual reports. Such analysis could include information on compliance, times taken to respond, types of requests, any issues with FOI administration, or with the legislation itself.

PUBLICATION OF INFORMATION CONCERNING FUNCTIONS AND DOCUMENTS OF AGENCIES (SECTION 7 STATEMENT)

- 5.10 Section 7 of the FOI Act requires agencies to provide a statement detailing its functions and documents. The section 7 statement must include:
- the agency's organisation, functions and decision-making powers;
 - its consultative procedures with the public;
 - the categories of documents in its possession which are open to public access at a fee or charge, available for purchase, library material maintained for reference purposes, or available to the public free of charge upon request;
 - the facilities available to the public for obtaining physical access to the documents of the agency; and
 - information on procedures for accessing documents under the Act and the contact officer and location for initial enquiries concerning access.
- 5.11 Requirements for the section 7 statement are also set out in the *Chief Minister's Annual Report Directions*. Under sub-section 7 (3), agencies must publish the statement in their annual report.
- 5.12 Audit reviewed compliance by audited agencies with the requirements for the section 7 statement. Audit did not review the adequacy or completeness of the information provided.
- 5.13 Each agency updated and included a section 7 statement in their 2006-07 annual report and these statements complied with the content requirements set out in the FOI Act and the *Annual Report Directions*.
- 5.14 Each agency posted their annual reports, including the section 7 statement, to their agency websites. Audit considers that where they are not now included, the accessibility to section 7 statements could be further enhanced by including them with FOI information on agency websites.

DOCUMENTS AVAILABLE FOR INSPECTION AND PURCHASE (SECTION 8 STATEMENT)

- 5.15 Under section 8 of the FOI Act, agencies are required to prepare an index of documents used in making decisions and recommendations, and to make the documents listed in the index available to the public for inspection and purchase. The requirements for the section 8 statement are set out broadly in the *Chief Minister's Annual Report Directions*.
- 5.16 Section 8 requires the index to be updated at least every year, and preferably three-monthly. Section 8 applies to documents:

... that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to which persons are or may be entitled or subject.

- 5.17 The FOI Act does not state that the sub-section 8 (2) statement is to be published. Where it is not practicable to publish the statement in the annual report, the *Annual Report Directions* advise agencies to make a statement as to the availability of the section 8 statement, and methods for accessing it, in their annual report.
- 5.18 Agencies did not have documented procedures that outlined how they would maintain the currency of their section 8 statements. Each agency had prepared a section 8 statement, which included an index of documents used in making decisions and recommendations, and information on where these documents could be inspected and purchased.
- 5.19 CMD advised that, in preparing its annual report, it circulates the current section 8 statement to all business units for update. The activity is included in Corporate Management Business Plan.
- 5.20 Audit found that DET and CMD updated their indices in 2007 as part of annual report preparations. DET advised Audit that the 2007 update was the first update for two years. Although TAMS advised Audit that it continually updated its index to reflect organisational restructures, Audit found no evidence of completion of these updates.
- 5.21 Each agency included its section 8 statement in its Annual Reports. Audit found that both CMD and DET have made their section 8 statements readily available to the public through their agency websites, while TAMS' section 8 statement is accessible by contacting its FOI co-ordinator. Agency websites are a convenient and cost effective location for making section 8 statements accessible.
- 5.22 Under sub-section 8 (5) agencies are also required to include a statement of their compliance with the requirements of section 8 in their section 79 report on the operation of the Act. Audit found that with the exception of information regarding the existence of the statement and its availability, agencies did not provide a statement of their compliance with the requirements of section 8 of the Act.

Recommendation 11

Agencies should include a link to their FOI Act sections 7 and 8 statements (regarding publication of information, and making documents available for inspection and purchase), in their agency websites.

CONCLUSION

- 5.23 The Annual Report is a key accountability mechanism for agencies to demonstrate their performance and compliance with Government requirements. While audited agencies generally complied with FOI reporting requirements, there were instances where these requirements were not fully addressed. Moreover, as FOI reporting requirements are restricted to mainly reporting of numerical information, there is no information or analysis of the performance of agencies in meeting the FOI Act's intended objectives.
- 5.24 Most discussion of the FOI Act is focussed on the public's general right to documents held by agencies. The sections of the Act that require information to be provided to the public are also important. While agencies complied with the requirements of section 7 and 8, there was scope to improve the currency of section 8 statements and public accessibility of each statement.

6. ADMINISTERING THE FOI ACT ACROSS GOVERNMENT

INTRODUCTION

6.1 This chapter summarises audit findings on the role of JACS in administering its ‘central agency’ obligations under the Act.

KEY FINDINGS

- There have been a number of amendments to the FOI Act, including important amendments concerning requests for documents containing personal information. JACS has not issued FOI guidance material to inform agencies of the nature and implications of the changes.
- To replace the current 1995 determination, JACS has drafted but not yet finalised a new *FOI (Fees and Charges) Determination 2007* and supporting guidelines for agencies.
- There is little co-ordination and sharing of information between the Government Solicitor Office and the Public Law Group in JACS to assist agencies in areas of the Act where agencies are experiencing difficulties.
- JACS guidance to agencies, in particular on the compilation of the section 79 FOI report, was not adequate. For example, current guidance to agencies does not specify how to report against extended statutory timeframes, or how to calculate timeframes when an applicant is sent notification of charges.
- All FOI Reports by JACS provided the minimum numerical data required under the legislation. The usefulness of this reporting is limited as there is no analysis of agencies’ performance in providing FOI services.

BACKGROUND

6.2 Each agency is responsible for administering access to documents under the FOI Act. The Attorney-General and his Department, JACS, is responsible for administering the operation of the FOI Act.

6.3 Section 79 of the Act requires the Attorney-General to report annually ‘on the operation’ of the FOI Act. Section 79 (4) requires this report to include:

- the number of requests under sections 18 and 48 for access to documents or the amendment of personal records received during the year by each agency and each responsible Minister, including a breakdown of the processing time for requests;
- an identification of the guidelines (if any) issued by the Attorney-General, in relation to the manner in which agencies or responsible Ministers should comply with their obligations under the FOI Act; and

- a description of any efforts to assist agencies or responsible Ministers to comply with their obligations under the FOI Act.
- 6.4 In reviewing the administration of the FOI Act across Government, Audit examined reporting ‘on the operation’ of the Act, and the extent to which agencies are supported in their administration of the FOI Act. Audit focussed its review on:
- JACS’ policy and administrative guidance and support for agencies; and
 - public reporting, and its role in promoting understanding of the operation of the FOI Act.

SUPPORT PROVIDED TO AGENCIES

- 6.5 In accordance with its general responsibility to administer the operation of the FOI Act, Audit found that JACS:
- provides legal advice (through the ACTGS) to agencies when requested; and
 - responds to ad-hoc policy or administrative queries raised by agencies.
- 6.6 JACS through the ACTGS provided FOI guidance to agencies, in the form of a series of Legal Bulletins produced in 1999 and 2000. Since then, there have been a number of amendments to the FOI Act, including important amendments on access to documents containing personal information (section 27A). Neither the Public Law Group in JACS nor the ACTGS has revised the Legal Bulletins or released guidance on the amendments.
- 6.7 The ACTGS advised Audit that updates to the Legal Bulletins were planned, and that a bulletin on the March 2007 changes is being prepared. Also, in response to a number of queries from agencies, ACTGS advised that it was considering publishing a Legal Bulletin on section 27A, which took effect from 24 March 2007.
- 6.8 JACS was not pro-active in issuing general FOI guidance material to support agencies in their administration of FOI requests and related obligations. In response to a request from the Government, and later CMD, JACS undertook two reviews of the FOI fees and charges regime, in June 2005 and July 2007. The output of the reviews will be a new *FOI (Fees and Charges) Determination* and supporting guidelines for agencies. However, at the time of audit, these documents were not finalised. All agencies audited identified a clear need for whole-of-government direction and up-to-date guidance on charging. Particularly, an updated Determination is well overdue.
- 6.9 Given its responsibility to report on the operation of the Act, Audit expected JACS to routinely monitor FOI administration across agencies, including administrative and judicial trends and developments.

- 6.10 JACS has no mechanisms in place to:
- co-ordinate and identify potential difficulties with the operation of the Act; and
 - monitor and provide feedback or lessons learnt to agencies on the results of AAT and Ombudsman reviews. Audit notes that JACS has considered establishing an FOI Contact Officer Network to address this need.
- 6.11 Audit noted that there is little liaison and sharing of information between the ACTGS and the Public Law Group in JACS in the provisions of whole-of-government advice on the areas of the Act where agencies are experiencing difficulties. This reduces the opportunity to identify emerging issues faced by agencies, including opportunities for legislative improvements.
- 6.12 Audit was advised that the current practice of agencies directly requesting and receiving legal advice from the ACTGS, without consultation with the Public Law Group in JACS, did not allow for advice to consider whole-of-government policy perspectives. JACS advised that in other jurisdictions, agencies could not approach the ACTGS equivalent for legal advice on legislation administered without first approaching the agency responsible for administering the Act. The Public Law Group in JACS and the ACTGS should reach agreement on best ways to share information on their respective responsibilities, and particularly in relation to assisting agencies to fulfil their FOI services.
- 6.13 Audit found that ACTGS was filling a vacuum, created by the absence of centrally co-ordinated advice and information for support services to agencies.

Responsibilities

- 6.14 Audit found that JACS did not perform well its overall responsibility to administer the operation of the FOI Act. Feedback from agencies supported Audit views that there was scope for JACS to have a more active role in supporting agencies in administering the FOI Act across government. JACS could:
- establish and co-ordinate an ACT inter-agency networking forum for FOI practitioners which would, amongst other things, monitor and provide feedback or lessons learnt to agencies on the results of AAT and Ombudsman reviews;
 - provide or co-ordinate FOI training;
 - advise on policy and direction on matters facing agencies in administering the Act;
 - advise on changes to the legislation, including administrative and judicial developments; and
 - co-ordinate whole-of-government FOI requests.

6.15 Audit notes that, in the Australian Government sphere, the Department of Prime Minister and Cabinet¹⁴ supports agencies by:

- administration of an FOI website that contains a range of guidance material on the administration of FOI requests and related obligations. Information posted on the website includes:
 - the FOI Act and Regulations;
 - FOI Guidelines;
 - a list of FOI Contact Officers;
 - FOI Annual Reports;
 - links to other relevant sites; and
 - information for the public on how to make a FOI request to departments and agencies;
- administration of an electronic discussion list for FOI officers in agencies to discuss FOI matters and exchange information. This forum is also used by the Department to broadcast FOI policy information to agencies;¹⁵

6.16 The Australian Government Solicitor (AGS) convenes a quarterly FOI forum to keep FOI staff up-to-date with current FOI issues and AAT decisions. In addition, the AGS produces a quarterly newsletter, which provides general information on freedom of information issues as well as decision summaries for recent significant AAT decisions;¹⁶ and provision of a number of training courses on FOI administration.

6.17 Audit observed that whole-of-government FOI websites were common in other jurisdictions, and were used to support agencies in complying with the legislation, as well as to make available information such as FOI training material; guidelines; decision summaries and links to FOI annual reports. In addition, these websites are a key focal point for the provision of general information for the public.

Recommendation 12

To support the consistent and effective administration of the FOI Act, JACS should provide adequate policy and administrative support, including training; legal advice; guidance and reference information; and routine monitoring of FOI administration.

¹⁴ Under the Administrative Arrangements Order of 3 December 2007, responsibility for privacy and freedom of information, including administration of the Privacy Act 1988 and the Freedom of Information Act 1982, was transferred from the Attorney-General's portfolio to the portfolio of the Prime Minister and Cabinet.

¹⁵ Attorney-General's Department, *Freedom of Information Act 1982, Annual Report 2006-07, Annual Report by the Attorney General to the Parliament on the operation of the Act*, pg 25

¹⁶ ANAO, *Administration of Freedom of Information Requests*, Audit Report No.57, 2003-04, pg 58

PUBLIC REPORTING ON THE OPERATION OF THE FOI ACT

- 6.18 Section 79 of the FOI Act requires JACS, on behalf of the Attorney-General, to prepare a report each year on the operation of the Act, for inclusion in its annual report. Sub-section 79 (3) requires agencies to provide JACS with the information required for the preparation of the FOI Annual Report and Sub-section 79 (4) lists specific matters to be reported (see paragraph 6.2).
- 6.19 Audit examined:
- the adequacy of the guidance and processes used by JACS to compile its FOI annual report; and
 - the adequacy of the FOI Annual Report, in relation to compliance with minimum reporting requirements, and in providing readers with an understanding of the effectiveness and workability of the FOI Act.

Process and guidance to support the compilation of the FOI Annual Report

- 6.20 The FOI Act requires agencies to provide JACS with numerical data for inclusion in the FOI Annual Report to inform the Legislative Assembly on the operation of the Act. This requirement is also reflected in the *Chief Minister's Annual Report Directions*.
- 6.21 To support its reporting requirement, JACS requests each department to collect and provide the required information for the FOI Annual Report as part of the annual reporting process. The request for information has taken the form of an email letter that outlines JACS reporting expectations, including a template table to complete on the time taken to notify an applicant of a decision in regard to requests for access to documents. As part of this process, JACS requires each department to identify all agencies and bodies within its portfolio.
- 6.22 JACS' approach to compiling the FOI Report was not satisfactory, and may impact on the accuracy and completeness of information reported. For example, current guidance to agencies does not specify how to report against extended statutory timeframes or how to calculate timeframes, when an applicant is sent notification of charges.
- 6.23 JACS is reliant on each department to identify and separately report the required information for each agency within its portfolio. JACS was unable to provide Audit with assurance that all agencies were included in the Report, or that the results for portfolio agencies were not counted twice: once for the portfolio agency, and again as part of the department. Audit considers that JACS should develop an annual comprehensive list of all agencies and Ministers subject to the FOI Act, and ensure the accuracy of the FOI information it receives from agencies.

Recommendation 13

JACS should develop annually a full list of all agencies and Ministers subject to the FOI Act to ensure that they are included in the compilation of data, and review the accuracy of data received.

Review of information provided in the FOI Report

- 6.24 Audit reviewed the FOI Reports provided in JACS' Annual Reports for the last 2 financial years, and compared them to data extracted from the Annual reports of the agencies listed. A summary of the data at Appendix C indicated that the numbers of applications reported by JACS varies from the number of applications reported by agencies in their annual reports.
- 6.25 Although the information in the FOI Report complies with the reporting requirements specified in the Act, its usefulness is limited as there is no analysis of agencies' performance in meeting statutory reporting timeframes or comparison with previous years' performance. Audit also observed that in contrast to earlier years, there was no additional information provided, for example a compilation of agency data on the nature of access decisions.
- 6.26 Audit considers that the ACT has fallen behind the Commonwealth and other jurisdictions in reporting publicly on agency performance and delivery of FOI services. The ACT's minimal report on numerical data gives no insight into the operation of the Act, particularly its key role of providing access to documents. This would require the compilation and analysis of agency data on access decisions and subsequent review activity. In addition, there is no discussion of emerging trends and issues and their current or potential impact on the workability of the Act.
- 6.27 Audit observed that the FOI annual reports produced by lead agencies of the Australian Government, and a number of state jurisdictions, provide more comprehensive information on the operation of the respective FOI legislation. For example, Australian Government level FOI reporting¹⁷ provides an indication as to why the FOI Act is being used, by identifying the number of requests for access to documents containing personal information versus the number of requests for documents containing other information, such as policy and other decision-making documents. The Australian Government's FOI annual report also reports on the outcomes of FOI requests for access and provides information on recent amendments to the Act.

¹⁷ Attorney-General's Department, *FOI Act 1982, Annual Report 2006-07, Annual Report by the Attorney General to the Parliament on the operation of the Act.*

- 6.28 Similarly, other jurisdictions report on a broader range of numerical data and include supporting analyses.
- The Western Australian FOI annual report sets out a broad range of data over a five year period and includes detailed comparisons of FOI performance by WA agency.
 - In several jurisdictions (for example, WA, Tasmania and the Northern Territory), noteworthy items are the number of times each agency used particular FOI Act exemption clauses, and data on revenues from fees and charges collected.
 - The Australian Government reports on the impact of administering the FOI legislation on agency resources.
- 6.29 To enhance the effectiveness of the FOI Report, JACS should undertake a review of its FOI annual reporting requirements. In this regard, an examination of Australian Government and State based annual reporting on FOI activity may be a useful starting point.

Recommendation 14

JACS should review its section 79 report to determine if it is meeting the information needs of potential users. In particular, JACS should analyse the data provided by agencies and report on the efficiency and effectiveness of FOI services.

CONCLUSION

- 6.30 Apart from the provision of legal advice, JACS, as the agency responsible for the operation of the FOI Act, provides limited whole-of-government guidance and support to ACT Government agencies to facilitate their compliance with FOI requirements. This is in contrast to the level of support provided to agencies by the equivalent co-ordinating agencies within the Australian Government and several State Governments.
- 6.31 Audit acknowledges that the ACT receives a smaller number of FOI requests compared with the Australian Government and other jurisdictions. However, as responsibility for FOI administration has been devolved to agencies, Audit considers JACS should provide better guidance material and support services to agencies. These could include the development and administration of a central FOI website for posting FOI guidance and reference information, and the establishment of FOI practitioner forums. Arrangements such as these would contribute to the understanding of agency staff who respond to FOI requests, and are consistent with JACS responsibilities contained in the legislation.
- 6.32 Annual reporting on the operation of the Act does not provide sufficient information to either the public or the Legislative Assembly on the operation of the Act, including its efficacy in allowing the public to access agency documents.

Audit considers that current reporting requirements should be reviewed. Better practices from both the Australian Government and State jurisdictions on reporting on the operation of the Act, could be used as the basis for such a review.

APPENDIX A AUDIT CRITERIA, APPROACH AND METHODOLOGY

AUDIT CRITERIA

The administration of, and compliance with, the FOI Act by agencies was assessed against the following criteria:

1. The agency fosters an overall environment conducive to good administration of FOI requests.
 - The agency has clearly articulated organisational and individual obligations under the FOI Act to staff, and resultant administrative arrangements to meet these obligations.
 - The agency has allocated responsibility for FOI administration appropriately.
 - Information to support the effective and efficient processing of FOI requests is readily available to the public.
 - Training in relation to FOI administration is made available to staff.
2. The agency has systems and procedures to support the consistent and appropriate administration of requests for information and other obligations.
 - The agency has developed systems and procedures that reflect the legislative requirements for processing FOI applications.
 - Procedures that reflect the legislative reporting requirements are in place, including section 8 and 9 of the Act.
 - Staff are aware of, and apply, agency systems and procedures for administering freedom of information requests.
 - The agency effectively monitors and reviews its administration of freedom of information requests and other obligations under the FOI Act (including consideration of internal and external reviews regarding FOI decisions).
3. Agency handling of selected FOI requests (and other general obligations) is compliant with the requirements and spirit of the FOI Act.
 - The agency complies with the requirements for reporting, including sections 7 and 8 requirements, under the FOI Act.
4. Agencies have access to adequate policy and administrative support to facilitate consistent and appropriate administration of the FOI Act across government.

- The Department of Justice and Community Safety provides adequate policy and administrative support, including (where appropriate) whole-of-government training, legal advice, administrative support functions, and monitoring of administration of the FOI Act across government.
- Public reporting facilitates an understanding of the operations of the FOI Act, particularly its efficacy in giving members of the public rights of access to official documents of the Territory.

AUDIT APPROACH

The methodology for the audit involved:

- an examination of the FOI Act and reports relevant to the operation of the legislation;
- an examination of audited agencies' annual reports and other relevant material published by audited agencies (to assess compliance with reporting and other general requirements, particularly section 7 and 8 statements);
- interviews with relevant FOI managers and staff from audited agencies;
- an assessment of the adequacy of audited agencies policies, systems and procedures relating to the administration of the FOI Act;
- an examination of audited agencies' files relevant to a sample of requests for information received, to assess agency compliance with key provisions of the FOI Act relating to the handling of requests. Selected agency samples were drawn from requests for information received by audited agencies for the 2005-06 and 2006-07 financial years; and
- interviews with relevant officers from the Public Law Group in JACS and the ACTGS in relation to operation of the Act and guidance provided to agencies.

APPENDIX B OVERVIEW OF THE FOI ACT

INTRODUCTION

The *Freedom of Information Act 1989* is largely adapted from the Australian Government *Freedom of Information Act 1982*.

The Act requires certain information about the operation of agencies to be generally available to the public, ensuring rules and practices affecting members of the public in their dealings with agencies are readily available to those persons affected. Some exemptions do apply and these are necessary to protect the public interest as well as the business affairs of persons in respect of whom information is collected and held by agencies.

Each agency is separately responsible for administering the Act in regard to its own operations.

PROVISIONS OF THE FOI ACT

The object of the FOI Act is ‘to extend as far as possible the right of the Australian community and, in particular, the citizens of the Territory, to access to information in the possession of the Territory’ (section 2). This object is to be achieved by:

- making certain information about the operation of agencies generally available to the public; and
- creating a general right of access to information held by ministers and agencies, limited by exceptions and exemptions necessary for the protection of the public interest and privacy.¹⁸ The ‘general right of access to information’ is described elsewhere in the Act as ‘a legally enforceable right’.¹⁹

The Act applies to all Ministers and agencies. The Act excludes, among other things, incorporated companies, but includes Territory owned corporations, which are, however, exempt in respect of their ‘competitive commercial activities’.²⁰

Part II of the Act deals with the publication of certain documents and information. In particular, agencies are required to include a statement on their functions and documents in their annual reports (s.7) and to make certain documents available to the public for inspection and purchase (s.8).

¹⁸ s.2(b)

¹⁹ s.10

²⁰ s.6

The larger part of the Act (Parts III to VII), deals with the right conferred on every person to obtain access to documents of an agency, or an official document of a Minister, other than exempt documents, and with the review of decisions in relation to requests for access. Below is a slightly more detailed overview of Parts III to VII.

Access to documents

At part 3, the Act creates a legally enforceable right to obtain access to a document of an agency, other than an exempt document; or an official document of a Minister, other than an exempt document

The main access provisions of the Act are as follows.

- A person is not entitled to a document that is open to public access, where that access is subject to a fee or charge; or the document is available for purchase in accordance with arrangements made by an agency; or the material is library material maintained for reference purposes (section 11).
- A person who wish to obtain access to a document may by application in writing, including email, request access to the document. The agency has a duty to assist the person to comply with the section in making the request (section 14).
- As soon as practicable, but within 14 days of receipt, the applicant should be notified when the FOI request was received by the agency. A decision on the application is due not later than 30 days after the day on which the request is received. This 30 day period may be extended at the Minister's discretion (section 18).
- Access to a document may be given through opportunity to inspect the document (including audio-visual documents), or the provision of copies or transcripts (or both) (section 19).
- The agency or Minister may copy a document with deletions of material, if the document is not then misleading (section 21).
- An agency may refuse to grant access to documents if the work involved would substantially and unreasonably divert the resources of the agency from its other operations. However, the applicant should be consulted to narrow the application (section 23).
- If documents are refused, the decision-maker will inform the applicant of the facts of the request, and provide information on review of FOI decisions, including review by the AAT (section 25).

- A decision to grant access to a document containing personal information must be held over until the person whose information is included in documents has a reasonable opportunity to submit that the document is exempt and is therefore not available under FOI (section 27A).

Fees and charges

No fees or charges are payable by an applicant in respect of requests for access to his or her own personal information. In other applications an agency may impose charges for processing an application (section 28, section 80).

Before the request is processed, an agency must give an applicant an estimate of the charges that must be paid. Agencies have a broad discretion to remit fees for any reason including financial hardship of the applicant or public interest (sections 29 & 30).

Applicants may then seek the reduction or non-imposition of those charges (section 29). A decision to refuse to remit a fee or reduce or waive a charge is reviewable by the Administrative Appeals Tribunal.

Exempt documents

Part IV of the FOI Act deals with exempt documents. Exempt documents include:

- Executive documents;
- internal working documents;
- documents affecting personal privacy;
- documents subject to legal professional privilege;
- documents relating to business affairs; and
- documents containing material obtained in confidence.

Amendment of personal records

Where an agency or Minister holds personal information about a person that is incomplete, incorrect, out-of-date or misleading, the person may request the agency or Minister to amend the record of that information.

Role of Ombudsman

A person may complain to the Ombudsman concerning action taken by agencies in the exercise of functions under the *FOI Act 1989* (s.54). In this case the applicant cannot apply to the Administrative Appeals Tribunal until the Ombudsman has dealt with the matter (s.54(3) 61(2)).

Review of decisions

An applicant may request an internal review on the following decisions:

- refusing to access a document;
- refusing access to a document;
- not to remit all or part of an application fee/or charge;
- that an applicant must pay a charge other than an application fee; and
- as to the amount of charge.

Review by the Administrative Appeals Tribunal

If the applicant is not satisfied with the decision on the internal review the applicant can then apply to the Administrative Appeals Tribunal for a further review (s.60).

APPENDIX C FOI REQUESTS

Table 1: Number of FOI requests: Comparison of Department and Agency annual report figures to JACS annual report – selected agencies.

Agency	2005-06 Total Requests – Annual Report	2005-06 Total Requests – JACS section 79 Report	2006-07 Total Requests – Annual Report	2006-07 Total Requests – JACS section 79 Report
<i>Departments</i>				
ACT Health	30	30	26	26
Chief Minister's	36	15	17	23
DHCS	141	141	101	101
Economic Development	4	4	NIA	NIA
Education and Training	36	36	39	39
JACS	24	18	24	NIA
TAMS	50	50	55	56
Treasury	15	15	27	27
<i>Other Agencies</i>				
ACTPLA	66	66	67	60
ACT Workcover	33	33	NIA	NIA
Arts Heritage and Environment	21	21	NIA	NIA
Land Development Agency	5	6	12	12
ESA	15	15	NIA	NIA
Office of Regulatory services	0	0	3	3
TOTAL	476	450	371	347

Source: JACS Annual Report 2005-06, 2006-07 and Departmental annual reports

Legend: NIA – No information available.

Agencies included in this table are only those for which information is available through an annual report, and the annual section 79 JACS report.

AUDIT REPORTS

Reports Published in 2008-09

Report No. 5 / 2008	Administration of the <i>Freedom of Information Act 1989</i>
Report No. 4 / 2008	Maintenance of Public Housing

Reports Published in 2007-08

Report No. 3 / 2008	Records Management in ACT Government Agencies
Report No. 2 / 2008	Management of Calvary Hospital Agreements
Report No. 1 / 2008	Chris21 Human Resource Management System: Procurement and Implementation
Report No. 8 / 2007	2006-07 Financial Audits
Report No. 7 / 2007	The Aged Care Assessment Program and the Home and Community Care Program
Report No. 6 / 2007	Annual Report 2006-07
Report No. 5 / 2007	The FireLink Project

Reports Published in 2006-07

Report No. 4 / 2007	Regulation of ACT Liquor Licences
Report No. 3 / 2007	Collection of Fees and Fines
Report No. 2 / 2007	Agency Implementation of Audit Recommendations
Report No. 1 / 2007	Credit Card Use, Hospitality and Sponsorship
Report No. 9 / 2006	Sale of Block 8, Section 48, Fyshwick
Report No. 8 / 2006	2005-06 Financial Audits
Report No. 7 / 2006	Annual Report 2005-06
Report No. 6 / 2006	Vocational Education and Training
Report No. 5 / 2006	Rhodium Asset Solutions Limited

Reports Published in 2005-06

Report No. 4 / 2006	Road Safety
Report No. 3 / 2006	Management of Trust Moneys and Other Non-Public Moneys
Report No. 2 / 2006	Public Housing
Report No. 1 / 2006	Regulation of Charitable Collections and Incorporated Associations
Report No. 7 / 2005	2004-05 Financial Audits
Report No. 6 / 2005	Government Procurement
Report No. 5 / 2005	Annual Management Report for the Year Ended 30 June 2005
Report No. 4 / 2005	Courts Administration
Report No. 3 / 2005	Reporting on Ecologically Sustainable Development

Details of reports published prior to 2005-06 can be obtained from the ACT Auditor-General's Office or the ACT Auditor-General's homepage: <http://www.audit.act.gov.au>.

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