

### **Auditing for the Australian Capital Territory**

The Auditor-General is head of the Auditor-General's Office. He and his Office act independently of the Government. The Office assists the Auditor-General to carry out his duties, which are set out in the *Auditor-General Act 1996*, by undertaking audits of management performance and the financial statements of public sector bodies. The aim is to improve public sector management and accountability by firstly, ensuring the Legislative Assembly and the electorate are provided with accurate and useful information about the management of public sector resources and secondly, by providing independent advice and recommendations for improving the management of public resources.



AUDITOR-GENERAL  
AUSTRALIAN CAPITAL TERRITORY



PA 98/19

19 December 2001

The Speaker  
ACT Legislative Assembly  
South Building  
London Circuit  
CANBERRA ACT 2601

Dear Mr Speaker,

In accordance with the Authority contained in the *Auditor-General Act 1996*, I transmit to the Legislative Assembly my Report titled *The Freedom of Information Act*.

This audit was managed and conducted by David Hughes with the assistance of Jo-Anne Johnston of this office.

Yours sincerely,

John A Parkinson

**STRUCTURE OF THE REPORT**

This report is divided into two parts.

Part A presents a summary of the matters addressed by the Audit, the Audit opinion, significant findings and suggestions for future action.

Part B presents detailed discussion of the matters addressed by the Audit.

The 11 chapters in Part A (chapters A1 to A11) correspond to the 11 chapters in Part B (chapters B1 to B11).

It is recommended that the summary chapters in Part A be read before the detailed chapters in Part B.

**PART A**

**SUMMARY CHAPTERS**

# THE FREEDOM OF INFORMATION ACT

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## **A1. OVERVIEW OF THE AUDIT**

### **INTRODUCTION**

A1.1 This Performance Audit has been conducted under section 12 of the *Auditor-General Act 1996*.

A1.2 The objective of the Audit was to provide an independent opinion to the Legislative Assembly on whether government departments have complied with significant provisions of the *Freedom of Information Act 1989*.

### **AUDIT OPINION**

A1.3 The Audit examined a number of instances where the administration of the FOI Act was satisfactory or even exemplary. The Audit's examination, however, also identified a significant number of instances where the administration of the Act was poorly handled. The extent of these instances has led the Audit to the opinion that:

- *there was widespread failure by departments to comply with significant provisions of the Freedom of Information Act, and*
- *these failures were particularly noticeable in regard to politically sensitive requests handled by Chief Minister's and Treasury in 1999-2000.*

### **CONDUCT OF THE AUDIT**

A1.4 The Audit has examined compliance by the six departments of Chief Minister's, Treasury, Justice, Urban Services, Health, and Education.<sup>1</sup> These departments receive more than 90 per cent of all requests for information.

A1.5 A wide range of evidence was gathered and considered by the

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<sup>1</sup> In this report, short names are used for the six departments. The full names are: Chief Minister's Department; Department of Treasury (formerly Treasury and Infrastructure); Department of Justice and Community Safety; Department of Urban Services; Department of Health and Community Care (formerly Health, Housing and Community Care); and Department of Education and Community Services.

Audit, and expert opinion was sought where necessary. The Audit has examined a large number of requests, most of which were made in 1999-2000. Some of the requests examined have been presented in Part B of the report as case studies. The Audit has been conducted in accordance with Auditing Standards and the requirements of the Auditor-General's Act. The conduct of the Audit is described in detail in chapter B1.

## **BASES OF AUDIT OPINION**

A1.6 The Audit opinion is based on the significant negative findings reported in chapters A3 to A9, which are summarised in the following paragraph.

A1.7 Written guidance to applicants was of little use and departments did not always consult with or adequately assist applicants. Reasons statements were often poor. The decisions of authorised officials were not monitored. Responses to some applicants were incomplete. Exemption provisions were sometimes misused. Some responses were unnecessarily slow. The internal review process failed conspicuously in regard to some requests. Politically sensitive requests were handled poorly.

A1.8 The Audit also reviewed reporting on the administration of the Act (chapter A10) and the general provision of documents used in decision making (chapter A11). The Audit's view is that the reporting system provided little useful information on the administration of the Act and that not all departments had annually updated their indexes of documents used in decision making.

## **SUGGESTIONS FOR FUTURE ACTION**

A1.9 The Audit's significant findings identify areas for improvement in the administration of the Act. The Audit has made suggestions for future action to address the significant findings. While some of the Audit's suggestions involve changes to the Act, most require changes in the administration of the Act.

## **DEPARTMENTAL RESPONSES TO THE REPORT**

A1.10 In accordance with section 18 of the *Auditor-General Act 1996*, a final draft of the report was provided to the chief executives of the six departments covered by this report for their consideration and comment. Their responses are set out in Appendix A beginning on page 23.

## **A2. OVERVIEW OF THE FOI ACT**

### **INTRODUCTION**

A2.1 The *Freedom of Information Act 1989* is largely adapted from the Commonwealth *Freedom of Information Act 1982*.

A2.2 The Act requires certain information about the operation of government agencies to be generally available to the public and creates a general right of access to information in the possession of the Territory.

A2.3 Each government agency is separately responsible for administering the Act in regard to its own operations.

A2.4 In 1999-2000, about 273 principal requests for information were made.

*The Freedom of Information Act is discussed in detail in chapter B2.*

### **PROVISIONS OF THE FOI ACT**

A2.5 Part I of the Act provides various information for understanding the Act including a statement of the object of the Act.

A2.6 Part II of the Act deals with the requirement to make certain information generally available to the public. In particular, agencies are required to include a statement on their functions and documents in their annual reports (section 7) and to make certain documents available to the public for inspection and purchase (section 8). Compliance with this part of the Act is reviewed in chapter A11 of this report.

A2.7 The larger part of the Act (Parts III to VII), and of this report, 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.

A2.8 Part III of the Act deals with several matters in regard to requests for access to information. In particular, it deals with:

- assistance to be provided to applicants to make a request in the proper form and to the proper place (reviewed in chapter A3);

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- procedures to be followed by officials in handling a request, including notifying the applicant that a request has been received, ensuring decisions are made by an authorised decision maker, and providing reasons in writing for a decision to defer or refuse access to a document (reviewed in chapter A4);
- time limits for notifying applicants of decisions, including the extension of time in certain circumstances (reviewed in chapter A7); and
- procedures for applying and remitting fees and charges (which are not discussed in this report, see chapter B1).

A2.9 Part IV of the Act deals with 16 categories of exempt documents, to which a person does not have a right of access. Within each category there are often several sub-categories. As specific exemptions are referred to throughout this report, Part IV is reproduced as Appendix B. The use by officials of exemptions contained in Part IV is reviewed in chapter A6.

A2.10 Part V of the Act deals with the amendment of personal records. Compliance with Part V has not been examined in this report (see chapter B1).

A2.11 Part VI of the Act deals with the role of the Ombudsman in regard to complaints concerning action taken by an agency in exercising powers or performing functions under the Act. The performance of the Ombudsman has not been examined in this report (see chapter B1).

A2.12 Part VII of the Act deals with the review of decisions. Section 59 is concerned with internal reviews conducted by agencies (reviewed in chapter A8). The rest of Part VII deals with the role of the Administrative Appeals Tribunal. The performance of the Tribunal has not been examined in this report (see chapter B1).

A2.13 Part VIII of the Act contains a miscellany of sections including section 79 on the requirements for agencies to report to the Legislative Assembly on the operation of the Act (reviewed in chapter A10).

A2.14 Under the Act, it is expected that officials will diligently undertake the tasks of locating documents relevant to applicants' requests and subsequently advise the applicants of the located documents. This requirement is reviewed in chapter A5.

## **A3. ASSISTANCE IN MAKING A REQUEST**

### **INTRODUCTION**

A3.1 An applicant, or prospective applicant, may have little knowledge of the information that is available under the FOI Act or of how to prepare and submit a request. For this reason several sections of the Act require agencies to provide assistance to applicants.

A3.2 In particular, the Act requires agencies to assist applicants to make a request which is sufficiently detailed that the required information can be identified and sufficiently specific that the required information can be provided at a reasonable cost to the agency. The nature of this assistance is not specified but includes a duty to take reasonable steps to assist the applicant and a requirement to provide a reasonable opportunity of consultation. An agency should also assist a person to direct a request to the appropriate agency or minister, or, if necessary, may transfer the request to a more appropriate agency.

A3.3 This chapter reviews the quality and extent of the assistance provided to applicants in making a request.

*Assistance in making a request is discussed in detail in chapter B3.*

### **SIGNIFICANT FINDINGS**

- *The forms and guides prepared by agencies provided little guidance on how to identify the documents or type of information being sought.*
- *Departments did not always consult with applicants about the scope and nature of requests, even when such consultation was clearly of benefit.*

### **COMMENT**

A3.4 Most of the departments provided written assistance to applicants in hard copy or on their Internet sites. The provision of personal assistance, however, would appear to be of more use to applicants. In this regard, the ACT Government Solicitor has advised agencies that the 'key to effective and efficient administration of the Act is early consultation with the applicant(s)'.<sup>2</sup> Most requests examined by the Audit did not

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<sup>2</sup> Legal Bulletin 40, August 1999.

involve personal assistance by departments to applicants.

A3.5 Only a few transfers of requests were identified by the Audit. The handling of these was in some instances poor, resulting in lengthy and unnecessary delays to the applicant.

A3.6 The provision of personal assistance was particularly poor in regard to requests for information on the Bruce Stadium redevelopment (see chapter B9).

### **SUGGESTIONS FOR FUTURE ACTION**

1. All departments should ensure that guidance for applicants is provided in hard copy and on the departmental Internet site. This guidance should include advice to applicants on how to specify the documents or type of information being requested. It should also encourage applicants to seek advice from FOI contact officers before lodging requests.
2. All departments should ensure that FOI contact officers and decision makers are aware of the requirements for, and benefits of, consultation with applicants. Wherever there are concerns about the scope or meaning of a request, an officer should as a matter of course discuss the request with the applicant.

## **A4. PROCEDURES FOR HANDLING REQUESTS**

### **INTRODUCTION**

A4.1 Under the FOI Act, once a request has been made, certain procedures are to be followed. In particular, applicants are to be notified of the receipt of the request, decisions are to be made by authorised decision makers, and, if access to documents is deferred or refused, applicants are to be advised of the reasons.

A4.2 This chapter reviews compliance by departments with these legislated procedures. Attention is given to the reasons for decisions advised to applicants when access to requested documents is deferred or refused.

*Procedures for handling requests are discussed in detail in chapter B4.*

### **SIGNIFICANT FINDINGS**

- *Applicants were not always notified of the receipt of a request.*
- *Little or no attention was given to the appointment and monitoring of most authorised decision makers.*
- *Reasons statements provided by decision makers were often cursory and unhelpful.*
- *A number of inadequate reasons statements dealt with the use of sections 36, 39 and 40, which expressly provide for the consideration of the public interest in disclosure in deciding whether a document should be disclosed.*

### **COMMENT**

A4.3 The procedures for handling requests were often not observed or were dealt with in a cursory and unhelpful way.

A4.4 Acknowledging the receipt of a request is a courtesy, a requirement of the Act and an opportunity to explain the FOI process to the applicant. The failure to notify the applicant of the receipt of a request was a particular problem in Justice and Urban Services.

A4.5 A minister or chief executive may authorise other officers to make FOI decisions. Decision makers were properly authorised in written statements issued by chief executives or ministers. Officers, however, were often authorised to make FOI decisions on the basis of their positions

and without regard to their readiness to perform this task. There appeared to be no process in place in any department for monitoring the performance of authorised decision makers in regard to their responsibilities under the Act.

A4.6 Reasons statement should include ‘the findings on any material questions of fact, referring to the material on which those findings were based, and stating the reasons for the decision’.<sup>3</sup> Several reasons statements examined by the Audit provided an informative statement of the reasons for the decisions made. Many reasons statements, however, were of little use to applicants, often merely stating the section of the Act being used as the justification for exemption. Little information was supplied to inform the applicant as to why a particular exemption applied to a particular document. The quality of many reasons statements was so poor as to draw into question the quality of the reasons for the decisions.

### **SUGGESTIONS FOR FUTURE ACTION**

3. Acknowledgement letters should be sent to the applicants as soon as possible after the receipt of the requests. The letter should contain relevant information about the FOI process and give the name and contact details for the officer processing the request. The only reasonable exception to this requirement is where a response is made so quickly that an acknowledgement letter would be redundant.
4. Ministers and chief executives who authorise other officers to make FOI decisions should take responsibility for the selection of suitable officers and for monitoring the performance of these officers in regard to the Act.
5. Decision makers should take care to provide informative reasons statements which comply with section 25 of the Act. Departments should regularly review the reasons statements of decision makers to see that they comply with section 25.
6. Reasons statements should, where relevant, provide a clear statement of the factors considered by the decision maker in applying the public interest test. This may require an amendment to the Act.

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<sup>3</sup> Subsection 25 (1).

## A5. LOCATING DOCUMENTS

### INTRODUCTION

A5.1 The quality of the search for documents is very important to the success or failure of the FOI Act. To respond to requests effectively, officials must search for relevant documents and identify those documents to the applicants. Unfortunately, it is often difficult for applicants to know whether documents relevant to their requests have been located and identified by agencies.

A5.2 This chapter reviews whether officials searched for and identified relevant documents effectively. To reach its conclusions, the Audit examined the available documentation on a number of requests.

*Locating documents is discussed in detail in chapter B5.*

### SIGNIFICANT FINDINGS

- *Many of the files examined by the Audit provided little information on the level of search undertaken or on decision making about which documents should be identified to the applicant. The lack of documentation raises doubts about the quality of the searches undertaken.*
- *In some cases, relevant documents or files were missing. Responses to applicants were therefore incomplete.*

### COMMENT

A5.3 Many requests are for one or a few readily identifiable documents on a particular matter. The Audit examined a number of requests that fell into this category and which were apparently handled quickly and fully.

A5.4 Some requests for information can involve considerable search time sorting through a large number of widely dispersed files. The Audit examined several requests where the size or nature of the search undertaken or the number of documents identified suggest that a significant effort was made to meet the requests.

A5.5 It is difficult for an outside review body such as the Auditor-General's Office to test the searches undertaken by departments. In particular, the Audit has not replicated the searches undertaken by departments. Nevertheless, the Audit can draw the following conclusions.

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A5.6 The lack of documentation on file for some requests is understandable, as the documents requested were few, clearly identified and contained in one or a few files. However, there was also little documentation for complicated and extensive requests.

A5.7 The Audit noted several instances where documents or files were missing. A range of other evidence is available to the Audit to suggest that these cases are part of a larger problem of poor records management and retrieval in the ACT Government.

A5.8 In the case study on locating documents reported in chapter A9, the Chief Executive of Chief Minister's has identified significant shortcomings in the search process.

### SUGGESTIONS FOR FUTURE ACTION

7. Officials engaged in searching for documents should briefly but clearly document on file the search undertaken and the decisions made about which documents are to be identified to the applicant.
8. Officials should ensure that all documents examined during a search are identified to the applicant even if some of these documents are subsequently deemed to be irrelevant to the request or exempt.
9. Agencies need to improve significantly their records management systems for all documents held. This includes ensuring FOI requests and related documents are placed on registry files, which are properly stored.
10. Officials engaged in searching for documents should be willing and able to undertake a comprehensive search for documents relevant to FOI requests.

## **A6. CLASSIFYING DOCUMENTS AS EXEMPT**

### **INTRODUCTION**

A6.1 The FOI Act states that ‘every person has a legally enforceable right to obtain access’ to a document of an agency or an official document of a minister, other than an exempt document.<sup>4</sup> Exempt documents are defined in several places in the Act.

A6.2 This chapter reviews the classification of documents as exempt under Part IV of the Act. It does this by looking at two important concerns identified by the Administrative Appeals Tribunal (AAT): the making of unsupported assertions and the use of class claims. Part IV of the Act is reproduced at Appendix B.

*Classifying documents as exempt is discussed in detail in chapter B6.*

### **SIGNIFICANT FINDINGS**

- *In many cases, the poor quality of reasons statements and the lack of supporting documentation on file suggest that officials simply asserted that exemptions applied without any sound supporting reasons.*
- *Some officials used unacceptable class claim arguments for exemptions, even though the AAT had issued repeated statements against using class claim arguments, and the Government Solicitor had provided advice to agencies on the AAT’s position.*

### **COMMENT**

A6.3 Showing the reasons for a decision is a first step in establishing that the decision is sound. The ACT Government Solicitor advised agencies in 1995 that if ‘the decision-maker does not give any reason for the decision, [a] court may infer that he/she had no good reason’.<sup>5</sup>

A6.4 In most cases reviewed by the Audit there was no information on file to show how the use of a particular exemption was considered. This problem was compounded by the inadequacy of reasons statements provided to applicants (see chapter A4). This lack of evidence raises concerns as to whether exemption provisions were incorrectly used.

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<sup>4</sup> Section 10.

<sup>5</sup> Legal Bulletin No. 15.

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A6.5 A 'class claim' for an exemption is a claim that an entire class of documents is generally exempt. Such claims have arisen in particular in regard to sections 34, 36, 39 and 40 of the FOI Act, which expressly provide for consideration of the public interest in disclosure in deciding whether a document should be released.

A6.6 The ACT and Federal Administrative Appeals Tribunals have consistently rejected class claims advanced by government agencies as grounds for not releasing documents. Reasonable grounds for exemption under the Act must be found in the particular document in question and not in a claim that all documents of a particular class are exempt.

A6.7 The Audit identified several instances of the inappropriate use of class claims. The use of class claim arguments in claiming exemptions shows that some officials were either unaware of the legal decisions and advice on this matter or chose not to accept this considerable body of legal opinion in administering the Act.

### **SUGGESTIONS FOR FUTURE ACTION**

11. Officials should document and give to applicants the reasons for their decisions when using exemptions provided for in the Act.
12. Agencies should have a regular process of review of FOI decisions to ensure that decision makers do have sound reasons for their decisions and that these reasons are conveyed to applicants in an honest and straightforward way.
13. Officials should have regard to the decisions of the AAT in administering the Act.
14. If officials cannot be convinced to stop using class claims as an argument for exempting certain types of documents, consideration should be given to a change to the Act to identify more clearly the legitimate grounds for exemptions.

## A7. RESPONSE TIMES

### INTRODUCTION

A7.1 Under section 18 of the Act, applicants for information are to be notified of the decision on a request not later than 30 days after the request was received by or on behalf of the agency or Minister. The 30 day response period may be extended by 15 days if notification of third parties is required under sections 26 or 27. This chapter reviews compliance with these requirements.

*Response times are discussed in detail in chapter B7.*

### SIGNIFICANT FINDINGS

- *Some requests were unreasonably delayed for various reasons including administrative error and poor records management. Of greatest concern are the lengthy delays resulting from inadequate searches for documents and the incorrect use of exemptions.*
- *Some extensions of time were poorly handled.*

### COMMENT

A7.2 It is hard to assess the reasonableness of a response time without an understanding of the nature of the request, the quality of the search undertaken, and the decision. The Audit therefore examined and reported on a number of specific requests rather than rely on available data on response times.

A7.3 The Audit has examined requests that were handled quickly or that went over the statutory time limit with good reason. The Audit has also examined some responses that were unnecessarily slow, reflecting failures in the administration of the Act rather than difficulties inherent in the requests.

A7.4 Extensions of time to allow for consultation with third parties are rare. The Audit's review showed that some extensions were handled well and some were not. In one case, documentation on file suggests that one or more officials considered using the Act's provision for an extension of time as a means of delaying the release of documents in order not to preempt their tabling in the Legislative Assembly by the Chief Minister.

**SUGGESTIONS FOR FUTURE ACTION**

15. Applicants should be kept informed of the progress in processing requests. This could include negotiating an extension of time where it is necessary in order to make a complete response to a request. In such cases, documents should be provided to applicants in instalments.
16. Applicants should be notified of extensions under sections 26 and 27 as soon as it is apparent that third parties will be consulted and that this is likely to require an extension.
17. Agencies should improve administrative procedures and records management to reduce unnecessary delays.
18. Officials should not delay or prevent the release of documents by conducting inadequate searches or misusing exemption provisions in the Act.
19. Provisions for an extension of time should not be considered as an excuse for delaying the release of documents for political reasons.

## A8. INTERNAL REVIEWS

### INTRODUCTION

A8.1 Section 59 of the Freedom of Information Act provides for internal review of a decision where that decision has not been made by the responsible minister or principal officer of the agency. Internal reviews may be requested 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 which made the original decision. Section 25, which requires that a reasons statement be given for a decision to refuse or defer access, also applies to internal reviews. This chapter reviews the conduct of internal reviews of FOI decisions.

*Internal reviews are discussed in detail in chapter B8.*

### SIGNIFICANT FINDINGS

- *Two of the internal review files requested by the Audit could not be found or provided.*
- *Several of the internal reviews examined by the Audit failed to comply with significant provisions of the Act. In particular, some responses did not provide a reasons statement.*
- *In some cases, the documentation on file suggests that no serious attention was given by the decision maker to the conduct of the internal review.*

### COMMENT

A8.2 The Audit examined most of the internal reviews conducted in 1999-2000. Two of the internal review files requested by the Audit from Urban Services could not be provided.

A8.3 While the reviews conducted by Justice, Health and Education were not perfect, they did show serious consideration of the issues raised by applicants. This is reflected in the reasons statements and in other documentation on file.

A8.4 Three of the five reviews conducted by Urban Services raise concerns. No documentation is on the files for these reviews other than the request and the departmental response. Two of the response letters provide no information on the review process. As discussed in chapters A4 and A6, the quality of a reasons statement is indicative of the quality of the

reasons.

A8.5 The reviews conducted by Treasury raise the most serious issues. All four reviews had major flaws in process. In one case, if the Department's view is accepted that an internal review took place, then the review was conducted by the original decision maker. This would be in contravention of the Act. In the other three, a reasons statement was not provided, and the available documentation suggests that no serious review was undertaken by the decision maker. The two internal reviews in regard to the Bruce Stadium requests, discussed in chapter A9, were particularly cursory.

A8.6 Departmental responses did not always advise applicants of their rights to complain to the Ombudsman or appeal to the Administrative Appeals Tribunal. The conduct of reviews often did not conform to the principles outlined by the Administrative Review Council.

A8.7 The Audit notes that there is some uncertainty as to whether applicants have the right under section 59 to seek a review of the adequacy of the search for documents undertaken by an agency.

## **SUGGESTIONS FOR FUTURE ACTION**

20. Agencies should take particular care to ensure that internal reviews are not only conducted rigorously and impartially, but are seen to be conducted in such a fashion by the applicant.
21. Consideration should be given to reforming the review process. One possibility is that one senior official could be responsible for conducting all reviews presently conducted by agencies under section 59. That is, *internal* review would be replaced by *external* review. This suggestion is discussed in more detail in chapter B8, in order to stimulate discussion.
22. The FOI Act should be amended to make clear that an applicant may seek a review of the adequacy of the search for documents undertaken by an agency.

## **A9. THE BRUCE STADIUM REQUESTS**

### **INTRODUCTION**

A9.1 In 1999-2000, the Leader of the Opposition, Mr Jon Stanhope, made a series of FOI requests to Chief Minister's and Treasury on the Bruce Stadium redevelopment. This chapter reviews these requests against the major issues raised in the previous chapters. The reasons for examining the Bruce Stadium requests in detail are discussed in chapter B1.

*The Bruce Stadium requests are discussed in detail in chapter B9.*

### **SIGNIFICANT FINDINGS**

- *Officials were unhelpful to the applicant and appear to have misled him as to the location and availability of documents.*
- *Reasons provided for decisions were superficial and uninformative.*
- *A large number of relevant and available documents were not found and identified to the applicant.*
- *Documents were exempted from release on grounds that were unsupported by reasons or based on incomplete reasoning.*
- *Much of the information was released over a year after it was requested, and only following an application to the Administrative Appeals Tribunal and the release of the Auditor-General's reports on the Bruce Stadium redevelopment.*
- *Internal reviews were cursory at best.*

### **COMMENT**

A9.2 The Bruce Stadium requests raise concerns about all of the major issues identified in the previous chapters. Taken together, the Bruce Stadium requests suggest a concerted effort to thwart the applicant in his efforts to gain information on a matter of significant public interest.

A9.3 The Audit's general view is that non-compliance with the FOI Act is more likely to occur for difficult and sensitive requests. This view is consistent with research on the administration of the Act in other jurisdictions. The Bruce Stadium requests are evidence for this view.

A9.4 The definition of 'agency' in the FOI Act excludes incorporated companies such as Bruce Operations Pty Ltd. The Audit notes that the

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exclusion of such entities from the Act provides a convenient means for governments to attempt to avoid the Act.

### **SUGGESTIONS FOR FUTURE ACTION**

23. Departments should ensure that all officers are aware of their responsibilities under the FOI Act.
24. Departments should examine procedures to ensure that difficult and sensitive FOI requests are responded to in compliance with the Act.
25. The definition of ‘agency’ in the Act should be changed to include any entity over which the government exercises a controlling interest.<sup>6</sup>

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<sup>6</sup> A model for this amendment is contained in the Auditor-General Act. Under section 11, the Auditor-General may audit public sector companies, joint ventures and trusts in which the Territory or a Territory entity has a controlling interest. If the controlling interest test were applied, then entities such as the former Bruce Operations Pty Ltd would not be exempt.

## **A10. REPORTED DATA**

### **INTRODUCTION**

A10.1 Under section 79 each minister is required to prepare an annual statistical 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 statistical reports are included in the annual reports of agencies. In addition, the Attorney-General is required to produce an overview report on the operation of the Act.

A10.2 This chapter reviews compliance with these requirements. In particular, it examines whether the data provided by agencies are accurate and useful.

A10.3 Officials have also drawn conclusions about the successful administration of the Act from the number of complaints to the Ombudsman and applications to the Administrative Appeals Tribunal (AAT). This chapter reviews whether such statistics provide useful information about the administration of the Act.

*Reported data are considered in detail in chapter B10.*

### **SIGNIFICANT FINDINGS**

- *Annual reports of agencies generally met the requirements of section 79 to report on the administration of the Act, although in several cases the data reported by agencies were inaccurate or unverifiable.*
- *The reporting system provided little useful information on the administration of the Act.*
- *Available statistical data on the outcomes of requests do not provide information on the quality of the deliberative process in handling FOI requests or of the search undertaken for documents.*
- *The small number of complaints to the Ombudsman and applications to the Administrative Appeals Tribunal is not strong evidence that the administration of the Act is working well.*

### **COMMENT**

A10.4 The *Chief Minister's Annual Reports Directions for 1999-2000* comments that annual reports are 'the principal way in which agencies account for management performance through ministers to the Legislative

## THE FREEDOM OF INFORMATION ACT

Assembly and the community'. Any failure in annual reports to provide accurate and useful information is therefore a matter to be addressed.

A10.5 The figures presented in annual reports, including the Justice overview, should be regarded as no more than reasonable estimates.

A10.6 More significantly, little can be concluded on the administration of the Act from the available data on the outcomes of requests, the number of requests for internal review, the number of complaints to the Ombudsman and the number of applications to the AAT.

A10.7 Generally speaking, the provision of useful information on the administration of the Act would require a more sophisticated approach, in which actual decisions are reviewed against the key provisions of the Act. The results of the reviews would be publicly reported.

### **SUGGESTIONS FOR FUTURE ACTION**

26. Agencies need to take more care in collecting and compiling FOI data.
27. Justice should implement procedures to ensure the FOI data it reports are accurate and complete.
28. Reports on FOI data should provide a clear explanation of the limitations of such data as indicators of compliance with the Act.
29. Consideration should be given to a more sophisticated form of reporting in which actual decisions are reviewed against the key provisions of the Act. Such reports might be produced annually by the independent reviewer discussed in chapter B8.

## **A11. GENERALLY AVAILABLE INFORMATION**

### **INTRODUCTION**

A11.1 The object of the FOI Act is to extend public access to information in the possession of the Territory. This object is to be achieved by two means. First, certain information is to be made generally available to the public. Second, every person has a right to apply for access to information held by ministers and agencies, limited by certain exceptions and exemptions.

A11.2 Most discussion of the FOI Act focuses on the public's right to apply for access to particular information. The sections of the Act that require certain information to be made generally available to the public are less prominent but still important.

A11.3 Under section 7 of the Act, each agency should include a statement on its functions and documents in its annual report. Under section 8 all 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 index should be updated at least every year.

A11.4 Compliance with these sections would provide the public with a convenient guide to the functions, documents and decision making procedures of departments. This chapter reviews compliance by the six departments with the requirements of sections 7 and 8 of the Act.

*Generally available information is considered in detail in chapter B11.*

### **SIGNIFICANT FINDINGS**

- *All departments' annual reports included a section 7 statement on their functions and documents, but the coverage and level of detail varied.*
- *All departments have a section 8 index of documents used in making decisions and recommendations, and make the listed documents available to the public, but not all departments have updated their indexes annually.*
- *Departments have made reasonable use of their Internet sites to present information to the public, but the full potential of this technology has yet to be realised.*

**COMMENT**

A11.5 Following recent improvements, the departments' overall standard of reporting under section 7 is now satisfactory, although there is room for further improvements in the depth of coverage.

A11.6 Section 8 indexes have been updated recently by all departments. Given the volume of documents that could be included under section 8, it is likely that section 8 indexes are not as complete as they could be. The Audit did not carry out a detailed examination of departmental files and procedures to establish to what extent section 8 indexes are a reasonably complete listing of relevant documents.

A11.7 Departments are not required under the Act to make section 7 statements and section 8 indexes and documents available on their Internet sites. This technology has great potential for disseminating such information.

**SUGGESTIONS FOR FUTURE ACTION**

30. A clearer and more detailed statement of the Government's expectations on the standard of section 7 reporting should be prepared, and distributed with the Chief Minister's Annual Reports Directions.
31. Regular comprehensive assessment should be undertaken by each department to see that all relevant documents are identified in the section 8 indexes. Reports on these assessments should be made public.
32. All departments should ensure that their section 7 statements and section 8 indexes, and the documents listed in the indexes, are available and prominently displayed on departmental Internet sites.

**APPENDIX A**

**DEPARTMENTAL RESPONSES**

**THE FREEDOM OF INFORMATION ACT**

## DEPARTMENTAL RESPONSES TO THE REPORT

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 six departments for their consideration and comment. Their responses are set in the following paragraphs.

### Health

The following response was provided by the Chief Executive of Health.

I refer to your letter of 22 November 2001 regarding the audit being conducted by the Auditor General's Office on the Freedom of Information Act. Thank you for the opportunity to comment on the final report.

I wish to advise that I will not be providing any comments on the final report. As previously stated, the Department of Health and Community Care has always made every effort to assist applicants making an FOI request. After examining the Health and Community Care component of the report, I consider that these efforts have been adequately reflected in the audit.

### Education

The following response was provided by the Chief Executive of Education.

Thank you for your letter of 22 November 2001 to the Chief Executive enclosing a copy of your Office's final report arising from the audit of compliance with the *Freedom of Information Act 1989*.

I am responding on behalf of the Chief Executive and wish to advise that we have no comments to make on the final report.

## Urban Services

The following response was provided by the Chief Executive of Urban Services.

I refer to the final report of the audit and your letter of 22 November 2001.

I note the changes to the report and your clarification regarding the matter of "class claims". I support the findings of the audit in relation to the Department of Urban Services and the suggestions for future action. I confirm the Department will aim to ensure:

- timely provision of information to applicants, including consulting with them about requests and keeping them informed of progress,
- ensuring that decision makers understand their role and communicate their reasons for making decisions, and
- the documentation of certain processes, such as record searches and review decisions.

Thank you for the opportunity to provide input to the report.

## Treasury

The following response was provided by the Chief Executive of Treasury.

The report identifies a range of practices concerning the management of FOI applications, particularly in relation to Bruce Stadium. It would be inaccurate to conclude from the report that poorly handled practices identified in the Bruce Stadium case studies have continued in Treasury.

In 2000-01, the Department has sought to improve its advice to applicants and decision-makers and its processing of applications. Inter alia, this includes working with the Government Solicitor's Office in relation to legal questions that arise in the interpretation of the Act.

The Department, however, welcomes guidance about improving the management of FOI processes and will seek to address recommended actions arising from this audit, where relevant.

## Justice

The following response was provided by the Chief Executive of Justice.

The Department of Justice and Community Safety takes seriously its responsibilities as an agency for the purposes of the Freedom of Information Act 1989. This department has always attempted to handle freedom of information applications within the spirit of the law. As an example, some years ago, prior to a formal declaration being made by Government, this Department made a conscious decision not to charge application fees.

The Department's positive attitude towards freedom of information applications has resulted in a relatively small number of reviews from initial decisions. Whilst it is conceded that the clerical handling of applications has not been as consistent and always as appropriate as it should have been, the outcomes have nevertheless been appropriately favourable to applicants. I am also informed that, although there appears to have been a lack of written acknowledgment of applications received, on a number of occasions, although not noted on file, telephone contact was made with the applicant by the responsible officer and assistance provided verbally.

The Department has, at my direction, put in place procedures which address the deficiencies identified in the draft report. A Departmental manual will be prepared in relation to the handling of freedom of information requests for the guidance of all staff. Of particular relevance to report, the manual will stress the need for consistency in the clerical and record keeping aspects of freedom of information administration.

It is pleasing to note that all files inspected by the Auditor-General relating to reviews of initial decisions concerning the Department of Justice and Community Safety indicate that those reviews were handled appropriately. Indeed, the Audit notes in Chapter B8.11 that the internal reviews conducted within this department "suggest serious consideration by the reviewer".

The draft report rejects the proposition that the number of complaints to the Ombudsman and appeals to the Administrative Appeals Tribunal is evidence that the freedom of information system is working satisfactorily. Chapter B10.32 of the draft report speculates as to the possible reasons why applicants do not lodge complaints or appeals. However, no real evidence is presented in the draft report to support that speculation.

## THE FREEDOM OF INFORMATION ACT

Canberra is a city in which a high proportion of freedom of information applicants work, or have worked, in the public sector. Many freedom of information requests relate to personal information. The Audit notes that half of the applications received by this department in 1999-2000 were from current or former employees of the department (Chapter B2.22). These are reasonable indicators that people in this city are aware of their rights should they have grievances about the general attitude in responding to freedom of information applications. Were there a higher number of complaints or appeals to the AAT it would no doubt be offered as evidence of dissatisfaction with the decision making process and attitude by Departments to compliance with the Act.

In addition, the Audit comments (at Chapter B8.11) that the internal reviews conducted by this department “suggest serious consideration by the reviewer”. This supports the notion that the lack of complaints and appeals is the result of the majority of freedom of information decisions being decided by the Department within the spirit of the legislation.

I appreciate the opportunity to comment on the report.

### *Audit Comment*

The Audit maintains its view that the small number of complaints to the Ombudsman and applications to the Administrative Appeals Tribunal is not strong evidence that the administration of the Act is working well. The reasons for this are set out in paragraphs B10.29 to B10.31 and B10.35 to B10.36.

### **Chief Minister’s**

The following response was provided by the Chief Executive of Chief Minister’s.

I refer to your letter of 22 November 2001 which provided a copy of the final draft of the proposed audit report.

I note that the issues addressed in this report primarily relate to freedom of information requests which were submitted and addressed during 1999-2000. The findings set out in the report need to be viewed in that context. As this report, and related report by the ACT Ombudsman illustrates, there has been a significant change in approach since that time.

## THE FREEDOM OF INFORMATION ACT

Within the Chief Minister's Department I am confident that FOI applications are now managed diligently, that appropriate policies and procedures are in place and that applications are assessed in accordance with the objectives of the FOI Act. This does not mean that there cannot be further improvement particularly with regard to raising staff awareness about the objectives of the Act, substantially improved record keeping, the documentation of complex FOI searches, and the timeliness of responses.

Apart from some specific issues referred to below, the significant findings and suggested actions set out in the report are supported.

Suggested Action No. 8 may not achieve the intended effect. A complex FOI request may require the examination of a great number of documents, many of which are likely to prove to be irrelevant to the request. Providing a listing of such documents to the applicant is likely to prove counter-productive as it may encourage subsequent correspondence seeking reasons why such documents have been deemed not to be relevant. Appropriate documentation of the search should be sufficient, as this will assist in any subsequent review of the treatment of the particular application. In addition, guidance on the handling of FOI requests could be revised to stress that there should be a fundamental predisposition to disclose a document where there is doubt as to relevance. Such an approach would be consistent with the "general right of access" objective of the Act.

There will be limits to the practical effect of Suggested Action No. 10. As provided for under Section 23 of the Act there are limits to the scale of resources which can reasonably be devoted to a particular application. In such circumstances it is appropriate to consult with the applicant with a view to refining the scope of the application.

Paragraph A7.4 raises a serious implication in relation to considering a delay in the release of document for political purposes. What the report does not make clear is that the decision maker in this case was not influenced by these considerations and that the requested information was made available in accordance with the statutory time limits.

The presentation of the significant findings at Chapter A9, and the comments which follow at paragraph A9.2 fail to distinguish between the approach which may have been adopted prior to the middle of 2000, and the approach which has been followed since. The approach adopted with the Chief Minister's Department over the last 18 months does not have these deficiencies.

## THE FREEDOM OF INFORMATION ACT

The one remaining issue that I wish to address concerns the discussion at paragraphs B9.48 to B9.55 of the report.

I do not consider that I was raising a class claim for the exemption of particular documents, namely advice provided by officials to Ministers, when I wrote to Mr Stanhope, nor was I unclear about how to handle this aspect of his FOI request.

As I was addressing a matter of principle in general terms I referred, for convenience, to a particular type or class of document. I was fully aware that each requested document needed to be assessed on its merits. That is how the response was actioned with, in this instance, each of the requested documents being released.

The concerns that I was seeking to address are set out in the excerpt of my letter at paragraph B9.49.

I believe that there is a need to ensure that the Public Service is able to provide full and frank advice to Ministers and that such advice should be fully documented. If such advice is routinely to be made available under FOI - while the particular issue remains current - then there is a danger that the nature and means of transmission of such advice may be affected. For example, there could be an inclination or pressure for such advice to be less frank or more political in nature or for the advice to be provided verbally rather than on the record. In my view, such outcomes would not be in the public interest.

The same considerations are effectively acknowledged in the current exemptions under the FOI Act in relation to Cabinet documents and legal professional privilege.

There may be merit in reviewing the application of the Act to the release of documents relating to advice from officials to Ministers, perhaps with such documents being exempt from release (subject to the usual public interest test) for a limited period (say three or six months).

### *Audit Comment*

The Chief Executive has expressed doubt about the efficacy of one of the Audit's suggestions for future action (number 8 on page 10). The Audit notes that the suggestions for future action arise from the findings of the Audit. It is acknowledged that those with management responsibility for the FOI Act may identify more effective approaches to address the Audit's findings. The Audit's main concern is that its findings are addressed effectively.

## THE FREEDOM OF INFORMATION ACT

The Chief Executive has stated that there is a limit to the practical effect of one of the Audit's suggestions for future action (number 10 on page 10). The Audit has discussed section 23 of the FOI Act in chapter B5. This section states that an agency or minister may refuse to grant access to documents where this would substantially and unreasonably divert the resource of the agency or interfere substantially and unreasonably with the performance by the minister of his functions. The Audit believes that its suggestion number 10 is consistent with section 23 of the Act.

The Chief Executive has stated that paragraph A7.4 does not make clear that 'the decision maker in this case was not influenced by these [political] considerations and that the requested information was made available in accordance with the statutory time limits'. The Audit notes that paragraphs B7.27 to B7.30 address these points.

The Chief Executive has commented on the Audit's discussion of class claims at paragraphs B9.48 to B9.55 of the Report. The Audit believes that its view is adequately expressed in these paragraphs and in paragraphs B6.15 to B6.25. The Audit notes the Chief Executive's suggested change to the Act. This is a matter for the Legislative Assembly to decide.

**PART B**

**DETAILED CHAPTERS**

**THE FREEDOM OF INFORMATION ACT**

# THE FREEDOM OF INFORMATION ACT

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## **B1. CONDUCT OF THE AUDIT**

*Chapter A1 should be read before this chapter. It contains a summary of this chapter, the Audit opinion and a summary of the bases for the opinion.*

### **BACKGROUND**

B1.1 In 1998 the Legislative Assembly Standing Committee on Justice and Community Safety began an inquiry into the Freedom of Information (Amendment) Bill 1998. The inquiry was aimed at improving the contents of the Bill in order that ACT citizens might gain quicker and cheaper access to government-held information. It was also intended to examine the use of the ‘commercial-in-confidence’ exemption as a ground for not releasing government-held information.

B1.2 In this context, on 13 July 1998 the Chair of the Standing Committee asked the Auditor-General to conduct a performance audit of compliance by government agencies with the Freedom of Information Act. An audit was commenced in response to that request under section 12 of the *Auditor-General Act 1996*.

B1.3 Owing to the considerable demands on the Auditor-General’s Office arising from the performance audit in 1999 and 2000 of the Bruce Stadium redevelopment, the Audit of the Freedom of Information Act was set aside. Work on the Audit resumed in late 2000. The report of the Standing Committee was similarly held up by other activities of the Committee. By late 2000 the Committee had also decided to redraft significant parts of the Freedom of Information Bill. The Committee’s report was tabled in August 2001.<sup>7</sup>

### **OBJECTIVE**

B1.4 The objective of the Audit was to provide an independent opinion to the Legislative Assembly on whether government departments have complied with significant provisions of the *Freedom of Information Act 1989*. In particular, the Audit has examined compliance by agencies in regard to:

- assisting applicants to make a request for access to information in the proper form and to the proper place (chapters A3 and B3);

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<sup>7</sup> *The Freedom of Information (Amendment) Bill 1998* (Report No. 17).

## THE FREEDOM OF INFORMATION ACT

- processing requests, including giving reasons for decisions where necessary (chapters A4 and B4);
- locating relevant documents (chapters A5 and B5);
- making reasonable decisions on the use of exemptions (chapters A6 and B6);
- making decisions in a timely manner (chapters A7 and B7);
- conducting internal reviews of decisions (chapters A8 and B8);
- reporting on the operation of the Act (chapters A10 and B10); and
- making certain information generally available to the public (chapters A11 and B11).

### SCOPE

#### Matters Considered

B1.5 In line with its objective, the Audit has focussed on the administration of significant provisions within the FOI Act. The Audit has not presented a wide-ranging discussion of the principles of FOI legislation; nor has it conducted an examination of the openness of the Government. Further, the Audit does not address all aspects of the Act.

B1.6 The amendment of personal records under Part V of the Act has not been examined. The Act provides for the amendment of personal records if the records are incomplete, incorrect, out of date or misleading, and have been used, are used or are available for use by the agency or minister for administrative purposes. A request for an amendment of personal records must be preceded by a request for that information under section 14 of the Act. This scheme is supplemented by provisions in the *Privacy Act 1988*. In 1999-2000 only three people requested an amendment of personal records.<sup>8</sup> Only one request has been reported for 2000-01.

B1.7 The performance of the Ombudsman under Part VI of the Act has not been examined, although information on complaints to the Ombudsman has been used to shed light on compliance by agencies with the Act.

B1.8 The performance of the ACT Administrative Appeals Tribunal (AAT) under Part VII (sections 60–76) of the Act has not been examined. The decisions of the AAT have, however, been used to shed light on compliance by agencies with the Act.

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<sup>8</sup> There were seven requests for amendments, five of which were made by the one person (see chapter B2).

B1.9 Finally, the Audit has not examined the regime of fees and charges briefly described in chapter B2. A brief comment on the recent determination to remove fees is, however, made in regard to response times in chapter B7.

### **Agencies Examined**

B1.10 The FOI Act applies to all agencies, which are either administrative units or prescribed authorities under the Act. The administrative units are the six departments of Chief Minister's; Treasury; Justice; Urban Services; Health; and Education. Prescribed authorities include, with exceptions, various bodies 'established for a public purpose by, or in accordance with the provisions of, an enactment'; any other body declared by the regulations to be a prescribed authority; and Territory owned corporations and subsidiaries.<sup>9</sup>

B1.11 It should be noted that the Australian Federal Police operates under the Commonwealth *Freedom of Information Act 1982* and is not subject to the ACT's Act.<sup>10</sup>

B1.12 This report focuses on the six departments, which in 1999-2000 accounted for over 90 per cent of all requests for access under section 14 of the Act. The Audit has reviewed a large number of requests to these departments, most of which were made in 1999-2000. This has involved reviewing parts of the three departments that receive the most requests. In regard to Urban Services, the Audit reviewed requests to Planning and Land Management, and City Management. The review of Education excluded Family Services. The review of Health excluded Housing, which was transferred to Health from Urban Services and then back again during the Audit.

## **APPROACH**

### **Evidence Gathered**

B1.13 The conduct of the Audit has included an examination of:

- the *Freedom of Information Act 1989*;
- reports and other material on the operation of similar legislation in other jurisdictions, including reports by the Commonwealth

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<sup>9</sup> Subsection 4 (1).

<sup>10</sup> Australian Federal Police, *ACT Policing Annual Report 1999-2000*, p. 103.

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Ombudsman, New South Wales Ombudsman, and Australian Law Reform Commission;

- acts, bills and guidelines related to the Act including *Privacy Act 1988*; *Public Access to Government Contracts Act 2000*; Territory Records Bill 2001; Legal Bulletins 40 to 45 prepared by the Government Solicitor; and *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* issued by the Chief Minister's Department;
- the Freedom of Information (Amendment) Bill 1998, submissions to the Standing Committee on Justice and Community Safety, and other material gathered or prepared by the Committee including its report on the Bill (Report No. 17, August 2001);
- the *Report on government contracting and procurement processes in the Australian Capital Territory*, Select Committee on Government and Procurement Processes, July 2000;
- guidelines published by the Administrative Review Council on the preparation of statements of reasons and the conduct of internal reviews;
- annual reports and other relevant material prepared by agencies;
- a number of requests for access to documents held by agencies and the decisions made in respect of these requests;
- a number of internal reviews of decisions by agencies;
- responses from agencies on the Act and its operation;
- responses to a survey of applicants;
- reports on FOI matters prepared by the ACT Ombudsman; and
- decisions on FOI matters by the ACT and Federal Administrative Appeals Tribunals and the courts.

B1.14 In addition, interviews were held with selected staff from agencies, including FOI contact officers, and written and oral comments were received from a range of interested persons within the ACT. The Audit also engaged Mr Peter Bayne, Reader in Law at the Australian National University, to provide expert opinion where required on the conduct of the Audit.<sup>11</sup>

B1.15 The Audit believes that its approach to gathering evidence, outlined above, has been in accordance with Auditing Standards, which require that the Auditor 'should obtain sufficient appropriate audit

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<sup>11</sup> This engagement was made in accordance with Auditing Standard AUS 808 (Planning Performance Audits), paragraphs 25–6.

evidence to be able to draw reasonable conclusions on which to base the Audit report'.<sup>12</sup>

### **Audit Methodology**

B1.16 The Audit developed a number of criteria for testing compliance with the Act. The Audit believes that these criteria are reasonable and attainable standards of performance for agencies in administering their responsibilities under the Act.<sup>13</sup>

B1.17 In examining compliance by agencies with the Act, the Audit has been particularly mindful of the considerable differences between FOI requests. Many requests for information are relatively commonplace and uncontroversial. Some are not. This distinction is of importance in assessing compliance with the Act. Agencies may deal well with the general run of requests but fail when confronted with difficult or potentially embarrassing requests. The Audit has taken the view that such a result would not show general compliance with the Act but rather compliance only where it suited or was easy for agencies to comply. For this reason, the Audit has been conducted at two levels. First, a general examination of a large number of requests has been conducted. A number of specific cases from this examination are presented in the report. Second, a close examination has been conducted of several difficult and sensitive requests made by the Leader of the Opposition in the Legislative Assembly in regard to the Bruce Stadium redevelopment. The results from this examination are presented in chapters A9 and B9.

B1.18 The Audit's methodology is broadly consistent with research suggesting that access to information relating to the personal affairs of the applicant was usually 'timely, unproblematic and generally successful' but access to non-personal information such as policy documents was 'delayed, contested and rarely successful'.<sup>14</sup>

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<sup>12</sup> AUS 806 (Performance Auditing), paragraph 26.

<sup>13</sup> The development of criteria is discussed in Auditing Standard AUS 808, paragraphs 27–36.

<sup>14</sup> Rick Snell, 'Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand', <http://www.ucc.ie/ucc/depts/law/foi/conference/snell99.html>, 1999, p. 3. The Commonwealth Ombudsman has also identified 'widespread problems in the recording of FOI decisions and probable misuse of exemptions' that were 'more evident in agencies which receive FOI requests for government policy or decision making information than in agencies which typically deal with requests for personal information' (*'Needs to know': Own Motion Investigation into the administration of the Freedom of Information Act 1982 in Commonwealth Agencies*, 1999, p. 1). This observation is not presented by the Audit as a universal rule. Some requests for personal information, for example, can be complex and sensitive. The Audit takes the more general view that compliance with the Act is inversely related to the difficulty and potential

B1.19 The Audit methodology is also consistent with Auditing Standards which require the auditor to 'identify those areas of the entity that are material and/or high risk to assist in identifying or assessing... the matters subject to audit'.<sup>15</sup> In this regard, the Audit would note that how agencies deal with requests for documents on policy development and decision making is a central test of compliance with the Act.<sup>16</sup>

B1.20 The requests on the Bruce Stadium redevelopment are particularly suitable as a case study as the Audit has available to it a significant body of material on the redevelopment with which to assess the actions and decisions of officials in regard to requests under the FOI Act. These requests have also been subject to internal review and comment by chief executives of Chief Minister's, to consideration by the Ombudsman, and to an AAT application. Further, given the public knowledge of these requests and of the information being sought, the requests can be reported in detail without infringing on the privacy of the applicant.

### **Communication with Departments**

B1.21 A letter advising departments of the recommencement of the Audit was sent on 24 January 2001. This letter requested that the chief executive of each department nominate an officer to serve as contact between the Audit and the department. Meetings were subsequently held with each officer to outline the objective, scope and approach of the Audit. At these meetings, each officer was provided with a document prepared by the Audit listing the matters to be examined by the Audit and the evidence to be provided by the department in regard to each matter. The Audit believes that it has complied with Auditing Standards on communicating pertinent information on the Audit to the management of the departments covered by the Audit.<sup>17</sup>

B1.22 The Audit also complied with section 18 of the Auditor-General Act, which requires that a copy of a proposed report be given to the responsible chief executives for their comments. These comments were taken into account when finalising the report.

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embarrassment of providing a response, regardless of whether the request is for personal or non-personal information.

<sup>15</sup> AUS 808, paragraphs 16–17.

<sup>16</sup> The Australian Law Reform Commission and Administrative Review Council have stated 'it could be said that these requests provide the real test of whether the Act is serving its purpose of keeping the government accountable and facilitating participation in government' (*Open government: a review of the federal Freedom of Information Act 1982, 1995*, p. 17).

<sup>17</sup> AUS 808, paragraph 38.

## **THE FREEDOM OF INFORMATION ACT**

B1.23 Finally, as part of its review of its procedures the Auditor-General's Office will distribute a survey on the conduct of the Audit to the chief executives of the six departments after the report has been tabled. The overall results of these surveys will be reported in the Office's annual report.

## **B2. THE FREEDOM OF INFORMATION ACT**

*Chapter A2 should be read before this chapter. It contains a summary of this chapter and of the main provisions of the Act.*

### **BACKGROUND**

B2.1 The ACT Freedom of Information Act was enacted in 1989, the year self-government began in the ACT. It was largely adapted from the Commonwealth *Freedom of Information Act 1982*. Since 1989, the ACT FOI Act has been subject to several amendments.

B2.2 The Act is one of several acts that deal with access to information held by the Government. The *Privacy Act 1988* is a Commonwealth act that operates in the ACT. It limits the FOI Act by restricting the release of personal information to third parties. The *Health Records (Privacy and Access) Act 1997* creates a separate information access regime in regard to personal health information. Recently, a number of ACT acts and bills dealing with access to information have been introduced, including the *Public Access to Government Contracts Act 2000*, the *Executive Documents Release Act 2001*, and the Territory Records Bill 2001.

B2.3 The operation of the FOI Act is discussed in several documents including Legal Bulletins 40 to 45 issued by the Government Solicitor in 1999 and 2000, and in *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* issued by Chief Minister's in 1999.

### **OBJECT OF THE FOI ACT**

B2.4 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 to information in the possession of the Territory'. This object is to be achieved by:

- making certain information about the operation of government 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

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the protection of the public interest and privacy.<sup>18</sup> The ‘general right of access to information’ is described elsewhere in the Act as ‘a legally enforceable right’.<sup>19</sup>

B2.5 The Act applies to all ACT Government ministers and agencies. The Act excludes, among other things, incorporated companies or associations, but includes Territory owned corporations, which are, however, exempt in respect of their ‘competitive commercial activities’.<sup>20</sup>

### ADMINISTRATION OF THE ACT

#### Departmental Arrangements

B2.6 Until 1995, the ACT had a central office in the Attorney-General’s Department for dealing with all FOI requests. In December 1995, administration of the Act was decentralised. Government agencies became responsible for receiving and processing requests. The Attorney-General’s Department (now the Department of Justice and Community Safety) retained only a responsibility to report on certain aspects of the Act.<sup>21</sup>

B2.7 There are six departments (or administrative units) within the ACT Government: Chief Minister’s, Treasury, Justice, Urban Services, Health and Education. The FOI arrangements in place in these departments vary somewhat but are broadly similar, with the exception of Urban Services.

B2.8 Each department has a central FOI co-ordinator who provides advice to applicants, receives requests and co-ordinates their processing. The decision maker for a request is located in the ‘line area’ of the department concerned with the subject of the request. The line area is responsible for identifying and collecting documents relevant to the request. The FOI co-ordinator may provide assistance and advice on the use of exemptions or the need to consult third parties.

B2.9 The above arrangements apply with the following variations. Corporate Services in Chief Minister’s provides FOI co-ordination for that department and for Treasury. In Education, there are two central FOI processing areas: one for the Children’s, Youth and Family Services Division and another for the rest of the Department. In Health, there were two central FOI processing areas: one for ACT Housing and one for the

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<sup>18</sup> Section 3.

<sup>19</sup> Section 10.

<sup>20</sup> Sections 4 and 6.

<sup>21</sup> Attorney-General’s Department, *Annual Report 1996-97*, p. 180.

rest of the Department. This will change with the return of Housing to Urban Services.

B2.10 The one exception to the system described above is Urban Services, which received over half of all FOI requests in 1999-2000. Urban Services has further devolved responsibility to FOI co-ordinators within business units of the Department. These co-ordinators perform the functions of the departmental co-ordinators described above. The Department also has a central FOI officer who processes internal reviews and prepares annual reports under the Act.

### **Fees and Charges**

B2.11 Under section 80 of the Act, the Minister responsible for the Act, or a delegate, may by notice in the *Gazette* determine the amounts of application fees and charges. Under the 1995 determination, a fee of \$15 applied to a request for access to a document and to a request for an internal review of a decision. Fees were not levied on requests for documents related to the personal affairs of the applicant.

B2.12 All fees were removed in March 2001. The regime of charges under the 1995 determination remains. Under this regime, the first 10 hours spent on processing a request are free, as are the first 200 pages of photocopying of documents. Thereafter, the charges are \$15 per hour for searching for and retrieving documents; \$20 per hour for deciding on access; and 20 cents per page for photocopying.<sup>22</sup> As in the 1995 determination, charges do not apply to requests for personal documents.<sup>23</sup>

B2.13 In 1999-2000, total fees and charges collected by all agencies were less than \$2,500. This was an insignificant part of the cost of administering the Act. Most agencies are unable to provide an estimate of this cost. Based on information available to it, the Audit estimates that it is about \$1m, excluding the time of decision makers.

## **USE OF THE ACT**

### **Number of Applicants**

B2.14 In 1999-2000 there were about 273 principal requests (see Table

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<sup>22</sup> Determination 132, 19 September 1995; Determination 168, 21 July 1996; Variation of Determination 37, 7 March 2001.

<sup>23</sup> The Audit notes that there is some confusion about this determination, with some officials advising the Audit that they believe the determination has also removed charges. This is not the case.

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B2.1). This is an estimate based on data prepared by agencies. The Audit has found a number of problems in the preparation of data by agencies (see chapters A10 and B10). The table below therefore differs somewhat from the data reported in the overview on the Act presented in Justice's annual report for 1999-2000.

**Table B2.1: FOI Requests in 1999-2000**

Agency	Principal Requests	Requests for Amendments	Internal Reviews
<i>Departments</i>			
Urban Services	142	–	7
Education	43	2	7
Health	24	–	3
Justice	22	–	4
Treasury	11	–	4
Chief Minister's	10	–	–
	<b>252</b>	<b>2</b>	<b>25</b>
<i>Other Agencies</i>			
ACTEW	13	5	5
Community and Health Services Complaints Commissioner	5	–	1
Ombudsman	3	–	–
	<b>21</b>	<b>5</b>	<b>6</b>
<b>Total</b>	<b>273</b>	<b>7</b>	<b>31</b>

B2.15 As in the past, over half of the requests in 1999-2000 – 142 in all – were received by Urban Services. Education had the second highest number of applications (43), followed by Health (24), Justice (22), Treasury (11) and Chief Minister's (10). The proportion of requests received by Urban Services fell in 2000-01 with the transfer of ACT Housing to Health. ACT Housing received 31 requests in 1999-2000.

B2.16 The six departments received 92 per cent of all requests to agencies in 1999-2000. The number of requests received by other agencies is small in total and can fluctuate considerably for individual agencies. ACTEW received 13 requests in 1999-2000, compared with 6 requests in 1998-99 and 4 in 1997-98. The high figure for 1999-2000 was due to 6 requests received from one applicant. ACTEW received four applications in 2000-01. Similarly, other agencies which received no applications in 1999-2000 have received applications in other years. For example, Totalcare had 7 applications in 1997-98 but none in 1998-99 or 1999-2000. Canberra Tourism and Events Corporation, and ACTTAB, had 2 applications each in 1998-99 but none in 1999-2000.

B2.17 The total number of requests has been relatively high in the last two years. From 1992-93 to 1997-98, the number of requests ranged from 188 to 224. In 1998-99, 249 requests were received, rising again to 273 in 1999-2000. The number of requests increased by 26 percent from 1997-98 to 1999-2000. In 2000-01 the reported number of requests fell to 247.

B2.18 In line with experience during the 1990s, the number of requests for amendment of personal records was very low in 1999-2000. Seven requests were received from three applicants. In 2000-01 only one request was received. The five requests received by ACTEW in 1999-2000 were made by one applicant.

B2.19 The number of requests for internal review – 31 – was relatively high in 1999-2000. From 1992-93 to 1998-99, the number ranged from 9 to 22. The number of requests for internal review fell in 2000-01 to sixteen. The five requests for internal review to ACTEW in 1999-2000 were from the one applicant.

B2.20 Fourteen complaints to the Ombudsman and eight applications to the Administrative Appeals Tribunal were also made in 1999-2000 (see chapter B10). The figures for 2000-01 were seven and three respectively.

### **Profile of Applicants**

B2.21 The Audit has collected various information on who uses the Act and why. The majority of applicants are individuals rather than businesses or other organisations. Information from Urban Services shows that about three quarters of all requests are lodged by individuals. Similar results are found for the other departments.

B2.22 Requests may be broadly divided into those seeking personal information on the applicant and those seeking non-personal information. The majority of requests in Health, Education and Justice are for personal information. Applicants for personal information can include staff or former staff engaged in a dispute over some aspect of their employment. This is particularly so in Justice, where half of the requests were from present or former employees.<sup>24</sup>

B2.23 The majority of requests in Chief Minister's and Treasury are for

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<sup>24</sup> Section 15A of the Commonwealth FOI Act provides that present or former employees must, where possible, use procedures established for applying for personnel information before they can apply for access through the FOI Act. No similar provision exists in the ACT Act.

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non-personal information. In particular, these departments receive a high proportion of requests from members of the Legislative Assembly. In 2000-01, 9 of 17 requests received by Chief Minister's were from MLAs. The corresponding figures for Treasury were 7 from 11. A significant number of requests to Urban Services are also for non-personal information.

B2.24 The Audit notes that many requests for non-personal information may be motivated by a direct personal interest in the effects of a particular government activity. For example, residents in a suburb may seek information on a property redevelopment from Planning and Land Management in Urban Services.

## **B3. ASSISTANCE IN MAKING A REQUEST**

*Chapter A3 contains a summary of this chapter and should be read first.*

### **LEGISLATIVE REQUIREMENTS**

B3.1 The FOI Act requires that a request for access to a document should be made in writing, to the appropriate minister or agency, with sufficient information to enable the minister or responsible officer to identify the document being requested, and accompanied by the appropriate application fee.

B3.2 It is ‘the duty’ of an agency to take reasonable steps to assist an applicant to make a request that complies with the requirements mentioned in the previous paragraph. This duty applies when a person wishes to make a request or has already made a request.<sup>25</sup>

B3.3 The Act also states that the applicant must be offered ‘a reasonable opportunity of consultation’ to improve the specification of the request in order to avoid refusal on the grounds that either it does not provide sufficient information to identify the document being requested, or it is so broad in scope that it would ‘substantially and unreasonably divert the resources of the agency from its other operations or would interfere substantially and unreasonably with the performance by the Minister of his or her functions’.<sup>26</sup>

B3.4 The Act further states that:

Where a person has directed to an agency a request that should have been directed to another agency or to a Minister, it is the duty of the first-mentioned agency to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister.

B3.5 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. The agency making the transfer is required to inform the applicant and to send the request to the other agency where

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<sup>25</sup> Subsections 14 (1) to 14 (3).

<sup>26</sup> Subsection 23 (3).

necessary.<sup>27</sup>

B3.6 The provisions of the FOI Act need to be considered in the context of the *Public Sector Management Act 1994*, which requires public employees to treat members of the public with courtesy and sensitivity to their rights, duties and aspirations, and to make all reasonable efforts to assist them to understand their entitlements under the laws of the Territory.<sup>28</sup>

### **AUDIT REVIEW OF COMPLIANCE WITH THE LEGISLATION**

B3.7 All departments advised the Audit that procedures are in place for assisting applicants to make a request in the right form and to the right place. Assistance to the applicant takes various forms, including the provision of written material such as a brochure or a form for making an application, and personal assistance provided by an officer to the applicant.

B3.8 It is not a legislative requirement that agencies or the government produce guides or forms for applicants. Most of the departments, however, have guides and forms available to applicants. Health provides these on its Internet site as well as in hard copy. Chief Minister's and Treasury have also placed their guides on their Internet sites. Urban Services provides a form and guide in hard copy. Justice provides a form (but not a guide) in hard copy and on its Internet site. Education has a one-page guide to the Act and has advised the Audit that it is planning to provide a guide and form on its Internet site.

B3.9 All departments have FOI contact officers who are available to provide assistance to applicants or prospective applicants. All departmental annual reports provide the address and telephone number of an FOI contact officer. All departments have a contact telephone number listed under Freedom of Information in the ACT Government section of the White Pages. All departments have written material available to guide staff handling FOI requests. This material includes guidelines and prepared standard letters.

B3.10 The Audit tested for compliance with the legislation in regard to the following matters:

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<sup>27</sup> Subsections 14 (4) and 15 (4).

<sup>28</sup> Section 9.

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- the adequacy of available forms and guides in assisting applicants to frame requests; and
- evidence of personal assistance to applicants.

### **Adequacy of Forms and Guides**

B3.11 The forms and guides prepared by agencies provided little guidance on how an applicant should frame a request. In particular, there was little guidance on the ways in which an applicant could attempt to identify the documents or type of information being sought. The guides did, however, make it clear to applicants that personal assistance is available on making a request. Procedures are in place for FOI contacts to provide assistance.

B3.12 A survey of applicants conducted by the Audit supports the view that the agencies' forms and guides provided little assistance. Applicants were asked 'Were you satisfied with the assistance and information available to you for making your application?'. Half of the respondents to the Audit survey said yes and half said no. A few comments were received. These were that 'Details on how to apply are very unclear' and 'No advice as to the wording of the application was offered'.

### **Evidence of Personal Assistance to Applicants**

B3.13 Most requests examined by the Audit did not involve personal assistance by departments to applicants.

B3.14 Of those requests that did involve assistance the Audit noted instances where officers telephoned applicants to clarify requests, especially with a view to narrowing the scope of the request to more manageable proportions. On the other hand, the Audit noted instances where officials did not contact the applicant even though such contact was clearly warranted.

B3.15 In the few instances where transferring requests to another agency was required, the results were similarly mixed. The case study below shows how a simple administrative mistake delayed a request being transferred to another agency by three months.

### **Case Study B3.1**

B3.16 In 1998, Urban Services received a request for two clearly

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specified documents. By letter dated 13 May 1998, Urban Services provided one of the documents to the applicant and advised that the request had been transferred to Chief Minister's in regard to the second document. The applicant was informed by the decision maker: 'I have arranged to provide the Chief Minister's Department with a copy of your request'.

B3.17 After the lapse of some time, during which the applicant had not been contacted by Chief Minister's, the applicant contacted the Ombudsman. The Ombudsman in turn contacted Chief Minister's on 19 August 1998 about the progress of the request. It was only at this point that Chief Minister's became aware of the request. The request had not been transferred by Urban Services as promised to the applicant. A copy of the letter of 13 May 1998 was faxed to Chief Minister's on 19 August and the requested document was released on 2 September.

### ***Audit Comment***

B3.18 A simple administrative failure had delayed the release of a document by three months and drawn the Ombudsman into the matter. The apparent explanation for this failure, according to a file note, is that the decision maker at Urban Services had left the Department after the letter of 13 May 1998 had been sent.

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A3.*

## **B4. PROCEDURES FOR HANDLING REQUESTS**

*Chapter A4 contains a summary of this chapter and should be read first.*

### **NOTIFICATION OF RECEIPT OF APPLICATION**

#### **Legislative Requirement**

B4.1 Under subsection 18 (1) of the Act, the applicant is to be notified of the day on which the request was received by or on behalf of the agency or minister. This notification is to be given not later than 14 days after the receipt of the request.

#### **Audit Review of Compliance with the Legislation**

B4.2 The practice in regard to acknowledgement letters varied between departments in 1999-2000.

B4.3 Except for three requests, Health sent acknowledgement letters to all applicants. In the case of the three exceptions, the applicants were notified of a decision on their requests in 2 to 3 days. An acknowledgement letter was therefore unnecessary.

B4.4 All requests to Chief Minister's were acknowledged, as were most requests to Treasury.

B4.5 Most requests to Education received an acknowledgment letter. Of those requests which did not, most were responded to with a decision within 14 days.

B4.6 Urban Services and Justice did not send an acknowledgment letter on a number of occasions or, very occasionally, sent an acknowledgment well after the required period of 14 days. The practice in the two departments varied depending on the unit handling the request.

#### ***Audit Comment***

B4.7 Applicants were not always notified of the receipt of a request. This was a particular problem in Justice and Urban Services, where the devolved nature of processing requests apparently led to differing practices in the various units within the departments. The other departments generally met this requirement of the Act.

B4.8 Acknowledging the receipt of a request is a courtesy as well as a

requirement of the Act. It is also an opportunity to explain the FOI process to the applicant and to provide the name and telephone number of a contact officer. This was the usual practice in acknowledgement letters sighted by the Audit.

B4.9 In making the preceding comments, the Audit recognises that sending an acknowledgement letter may be unnecessary when decisions are notified quickly. This was the case with some requests reviewed by the Audit. The Audit also recognises that acknowledgements are sometimes made by telephone.

## **AUTHORISED DECISION MAKERS**

### **Legislative Requirement**

B4.10 Under section 22, decisions on a request are to be made by the responsible minister, the principal officer of the agency, or an officer of the agency authorised by the responsible minister or principal officer.

B4.11 Under section 81, the Executive (that is, Cabinet) may make regulations 'in particular, making provision for or in relation to the officers who may give decisions on behalf of an agency'. No such regulations have been made. Authority for officers to make decisions must therefore be established under the arrangements outlined in section 22. These arrangements apply to decision making on initial requests and internal reviews.

### **Audit Review of Compliance with the Legislation**

B4.12 The Audit requested each department to provide a copy of recent authorisations for decision makers under the FOI Act. All six departments had written authorisations in place in respect to decisions made in 1999-2000 and after. In five of the six departments, authorisations were issued by the chief executive of the department. The exception was Health, where the authorisation was issued by the minister.

B4.13 In regard to internal reviews, Education has a system whereby the chief executive delegates her powers to another officer in respect of each individual request. The issuing of delegations to particular officers arising from particular FOI requests has occurred occasionally in other departments. Education has advised the Audit that it is revising its FOI authorisations and anticipates that members of the Executive will hold specific delegations to conduct internal reviews.

*Audit Comment*

B4.14 The Audit compared a selection of requests made in 1999-2000 with the authorisations then current to see whether decisions were being made by authorised officers. This was the case in all of the requests examined, indicating full compliance with this aspect of the Act.

B4.15 The Audit would note that the responsibilities of ministers and chief executives in regard to the Act are not adequately met simply by issuing written authorisations to decision makers. They must ensure that authorised officers are capable of administering the Act and that the decisions of authorised officers are monitored effectively.

B4.16 The evidence available to the Audit suggests that officers were often authorised to make FOI decisions on the basis of their positions and without regard to their readiness to perform this task. There appeared to be no process in place in any department for monitoring the performance of authorised officers in regard to their responsibilities under the FOI Act. These observations are particularly relevant given the numerous instances found by the Audit of authorised decision makers failing to meet adequately the requirements of the Act.

B4.17 The Audit would further note that the responsibilities of ministers and chief executives in regard to authorising decision makers are not adequately met simply by authorising *senior* officials to exercise decision making powers under the Act. The Commonwealth Ombudsman has noted 'that many of the complaints to my office concern delay at the more senior levels and there would be benefit in agencies reviewing authorisations with this in mind'.<sup>29</sup>

B4.18 The concern of the Commonwealth Ombudsman is worth noting. There is no guarantee that placing FOI decision making in the hands of senior officials will result in quicker or better quality decisions. Indeed, senior officials may well be under pressures which make for slower and poorer quality decisions. The Audit notes that executives were the decision makers for most of the requests identified in this report as raising issues about the quality of decision making.<sup>30</sup>

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<sup>29</sup> *'Needs to know'*, p. 20.

<sup>30</sup> The Audit noted that the level of officer authorised to make decisions varies between departments. Chief Minister's and Treasury have generally authorised directors and executive directors (that is, executives) to make FOI decisions. Urban Services authorised all executives in an authorisation of 13 February 1997. An authorisation of 7 April 2000 widened this to include three managers (senior

## **REASONS TO BE GIVEN FOR REFUSING REQUESTS**

### **Legislative Requirements**

B4.19 Section 25 requires that, if a decision has been made to defer or refuse access to a document, the applicant should be given notice in writing of:

- ‘the findings on any material questions of fact, referring to the material on which those findings were based, and stating the reasons for the decision’;<sup>31</sup>
- the name and designation of the decision-making officer; and
- the applicant’s rights to seek a review of the decision or to complain to the Ombudsman, and the procedures for exercising these rights.

B4.20 Where access has been deferred, the notification of the reasons for the decision should also be accompanied by an indication, as far as is practicable, of the period of the deferment.<sup>32</sup> The notifications of reasons are known as ‘reasons statements’.

B4.21 It should be noted that section 25 is not mandatory where there has been a partial release of a document, that is, the document has been released with exempt matter deleted. In such cases, a reasons statement in the form prescribed in section 25 must be provided only if the applicant requests it.<sup>33</sup> Agencies, however, have not recognised this distinction in their responses.

### **Guidance Available to Decision Makers**

B4.22 Guidance is available from a number of sources on the preparation

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officer grade A) in three areas of the department which were not being managed by executive level officials. Health’s current authorisation of 21 October 1999 authorises chief executive officers, executive directors and one director. Education has authorised a much wider group of officers at the following levels: executive director, director, manager (Senior Officer Grade A and B), Senior Officer Grade C and Professional Officer Grade 2. Justice has authorised a range of directors, executive directors, assistant directors, managers and other officers. The arrangements in place in the ACT are similar to those found in the Commonwealth. The Commonwealth Ombudsman’s recent report on the *Freedom of Information Act 1982* found that some agencies have delegated all FOI decision-making to senior executive service level officials while others have delegated decision making to more junior levels, such as Administrative Service Officers 4 to 6 (see ‘Needs to know’, p. 20).

<sup>31</sup> These elements of a reasons statement are also stated in section 179 of the *Legislation Act 2001*.

<sup>32</sup> Subsection 20 (2).

<sup>33</sup> Paragraph 21 (2) (b).

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of reasons statements. The Commonwealth Attorney-General's Department has prepared a detailed guide on corresponding requirements in the Commonwealth FOI Act.<sup>34</sup> The Administrative Review Council has prepared guidelines for reasons statements in general, including statements prepared under freedom of information legislation.<sup>35</sup> The ACT Government Solicitor has produced a brief guide on reasons statements as well.<sup>36</sup>

B4.23 The Administrative Review Council, for example, advises decision makers:

You must set out those critical matters of fact that were taken into account in making your decision. If a fact is relied on, it must be set out. If a matter is considered, then your findings of fact in relation to it must be set out...

Your statement must refer to the evidence or other material upon which the findings of fact are based...

State the real reasons for your decision... Your statement must contain all steps of reasoning, linking the facts to your decision, so that the person seeking the statement can understand how your decision was reached.<sup>37</sup>

### Concerns Expressed in Several Jurisdictions

B4.24 Strong concerns have been expressed in other jurisdictions about the quality of reasons statements.

B4.25 At the Commonwealth level, the Ombudsman has identified a 'considerable number of cases... across agencies where exemption(s) had been applied to documents without the reason(s) for the exemption being recorded or advised to the applicant, other than to simply paraphrase the legislative provision for the particular exemption'. The poor recording of decisions 'suggests that exemptions may have been inappropriately

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<sup>34</sup> 'Freedom of Information Memo No. 26 – Statement of Reasons', [http://law.gov.au/foi/memos/memo\\_26.html](http://law.gov.au/foi/memos/memo_26.html), 1993. See also comment and analysis in *Anthony Ian Luton v. Commissioner of Taxation* No. A95/238 [1995] AAT 10751.

<sup>35</sup> 'Practical Guidelines for preparing statements of reasons' and 'Commentary on the Practical Guidelines', <http://law.gov.au/aghome/other/arc/arcnews/publications.html>.

<sup>36</sup> Legal Bulletin No. 15 of 1995.

<sup>37</sup> 'Practical Guidelines for preparing statements of reasons', section 3.

applied'.<sup>38</sup>

B4.26 The New South Wales Ombudsman has similarly reported on the 'common problem' of 'insufficient reasons' being given to explain decisions to refuse access to documents or parts of documents. The experience of the Ombudsman's Office is that 'reasons are often too brief and do not adequately justify the decision. The practice of many agencies of just restating the words of the exemption clause they have relied on is inadequate'.<sup>39</sup>

B4.27 In the ACT, the AAT has on occasion criticised the standard of reasons statements. One reasons statement was criticised for stating a finding of fact without any reference to the material on which that finding was based.<sup>40</sup>

### **Audit Review of Reasons Statements**

B4.28 The Audit examined a number of reasons statements. Several of these provided an informative statement of the reasons for the decisions made. The Audit also observed other reasons statements that merely repeated the sections of the Act containing the exemption provisions being used. These statements included little or no information informing the applicant as to why the particular exemption applied to the particular document.

B4.29 The following are case studies of this common problem. The first case study illustrates reasons statements which are no more than assertion. The second case study illustrates the unacceptable use of 'class claims' for exemptions. The exemption provisions discussed below are reproduced in full in Appendix B.

#### **Case Study B4.1**

B4.30 In responding to a request, Justice exempted a document on the grounds that its disclosure 'would, or could reasonably be expected to –... have a substantial adverse effect on the conduct by or on behalf of the Territory or an agency of industrial relations'. The document in question was a report on the appointment of an officer, that officer also being the applicant under the FOI Act. The exemption provision on industrial

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<sup>38</sup> *'Needs to know'*, 1999, p. 16.

<sup>39</sup> *1999/2000 Annual Report*, p. 114.

<sup>40</sup> *Re Munday and Commissioner for Housing* [1996] ACTAAT 162.

relations is contained in paragraph 40 (1) (e) of the Act.

***Audit Comment***

B4.31 No explanation was given in the reasons statement as to why the release of the requested document would have a substantial adverse effect on the industrial relations of the Territory or an agency.

B4.32 Further, section 40 ‘does not apply to a document the disclosure of matter in which under this Act would, on balance, be in the public interest’. It was incumbent on the decision maker to explain in the reasons statement how the public interest had been assessed in reaching the decision. This was not done. The Audit notes that, following an internal review, which was conducted at the request of the applicant, the requested document was released.

**Case Study 4B.2**

B4.33 A request to Health for documents on supported accommodation services resulted in the Department releasing a large number of documents to the applicant. A number of documents, however, were not released under sections 36, 41 and 46. The reasons were provided in the response letter. A description of each document was given in an attached schedule of documents.

B4.34 Seven documents were not released under section 36 (dealing with internal working documents). The response letter reproduced paragraph 36 (1) (a) and noted that the ‘documents contain advice from Government Department officers to the Minister’. The response continued that ‘Where a claim has been made for exemption of documents from disclosure under section 36, I am required to demonstrate that the disclosure of the documents is against the public interest’. A general argument against release was then provided as follows:

The confidentiality of any recommendations needs to be preserved so that it can be tendered in an unfettered manner and so that departmental officers do not need to be circumspect in the views they provide for fear that their advice may be open to the public gaze.

***Audit Comment***

B4.35 Explanations of this type have been held to be unacceptable by the Administrative Appeals Tribunal as they constitute a ‘class claim’ for all

documents containing advice, rather than provide a statement of the reasons for exempting the particular documents identified. This is an important matter discussed further in chapters A6 and B6.

### **General Comment**

B4.36 A further example of inadequate reasons statements is provided in chapter B9. This example illustrates the fundamental problem of unsubstantiated assertion discussed above.

B4.37 Helpful statements of the reasons for decisions are an important part of assisting applicants to understand the FOI process and the handling of their requests. Poor quality reasons statements are therefore of concern. Further, the quality of the reasons statement is indicative of the quality of the reasons. If decisions have been well made, it is likely that the decision maker will be able to explain those decisions well.

B4.38 As the ACT Government Solicitor advised agencies in 1995:

If any of the elements [of a reasons statement] is omitted from the decision, the AAT or the court may draw certain inferences. If a relevant matter is not dealt with in the statement, it may be inferred that it was not considered. If the decision-maker does not give any reason for the decision, the court may infer that he/she had no good reason.<sup>41</sup>

### **THE PUBLIC INTEREST**

B4.39 The Audit has observed that a number of inadequate reasons statements dealt with the use of sections 34, 36, 39 and 40. These sections expressly provide for the consideration of the public interest in the disclosure of the document in deciding whether the document should be released. The two case studies discussed above are examples of inadequate consideration of the public interest in providing reasons statements. Further examples are presented in chapters B6 and B9.

B4.40 The Australian Law Reform Commission has described the public interest as 'an amorphous concept'.<sup>42</sup> It is not defined in either the Commonwealth or ACT FOI acts.

B4.41 The Commission has counselled against attempting to define the

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<sup>41</sup> Legal Bulletin No. 15.

<sup>42</sup> *Open government*, p. 95.

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public interest within FOI legislation. This is because the ‘public interest will change over time and according to the circumstances of each situation. It would be impossible to define the public interest yet allow the necessary flexibility’.<sup>43</sup> Nevertheless, the Commission believes that guidelines could be developed to guide decision makers. The Commission identifies the following factors that might be relevant to the public interest:

- ‘the general public interest in government information being accessible’;
- ‘whether the document would disclose the reasons for a decision’;
- ‘whether disclosure would contribute to debate on a matter of public interest’; and
- ‘whether disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation’.

B4.42 The Commission also presents some factors that might be listed as irrelevant to the public interest, including:

- ‘the seniority of the person who is involved in preparing the document or who is the subject of the document’;
- ‘that disclosure would confuse the public’; and
- ‘that disclosure would cause a loss of confidence in the government’.

B4.43 While the Commission considers that administrative guidelines are preferable to legislative guidelines, it does recommend that the Commonwealth FOI Act be amended to provide that, ‘for the purpose of determining whether release of a document would be contrary to the public interest, it is irrelevant that the disclosure may cause embarrassment to the government’. The NSW FOI Act already includes this provision and also provides that it is irrelevant whether disclosure would cause a loss of confidence in the government or cause the applicant to misinterpret or misunderstand the information contained in the document.<sup>44</sup>

### ***Audit Comment***

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<sup>43</sup> *Open government*, p. 96.

<sup>44</sup> Section 59A, *Freedom of Information Act 1989*.

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B4.44 The Commission's recommendation and the NSW FOI Act suggest that there is some scope for incorporating guidance on the public interest in the ACT's FOI Act. Negative guidance (that is, making clear those matters that are irrelevant to decision making) might be most appropriate. At the very least, issuing guidelines of the sort envisaged by the Commission could be helpful to decision makers. An appropriate body to issue these guidelines might be the external review agency suggested by the Audit in chapters A8 and B8.

B4.45 The Commission also recommends that the Commonwealth FOI Act should be amended 'to require an agency to include in its statement of reasons, where relevant, the factors it took into account in applying the public interest test'. The Audit agrees that a clear statement of the factors considered in applying the public interest test is, where relevant, an essential part of an adequate reasons statement. As well as informing the applicant of the reasons for the decision, it provides a basis for any subsequent internal or external review. The Audit notes that section 36 of the ACT FOI Act already includes the requirement that a reasons statement should state the public interest grounds for the decision. This requirement is not contained in sections 34, 39 and 40, and therefore may require an amendment to the Act.

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A4.*

## **B5. LOCATING DOCUMENTS**

*Chapter A5 contains a summary of this chapter and should be read first.*

### **REQUIREMENT TO LOCATE AND IDENTIFY DOCUMENTS**

#### **Legislative Requirements**

B5.1 Under the FOI Act, it is expected that officials will diligently undertake the tasks of locating documents relevant to applicants' requests and subsequently advise the 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. The implication is reinforced by the requirement that any discretions conferred by the Act are to be exercised to facilitate and promote the disclosure of information.<sup>45</sup>

B5.2 There is a legislative requirement to identify relevant documents found during a search, even if access to these documents is subsequently refused. As previously mentioned, section 25 requires that where a decision has been made to refuse access to a document, a statement of reasons shall be given for the decision. Clearly to meet a requirement of this nature means that all existing relevant documents must first be identified.

B5.3 Under the Act, identification of the existence of a document to an applicant may not be required where such an acknowledgment would affect relations with the Commonwealth and states, or where it would affect enforcement of the law and the protection of public safety.<sup>46</sup>

#### **Concerns Raised in Other Jurisdictions**

B5.4 Concerns about the search for and identification of relevant documents have been raised in jurisdictions other than the ACT.

B5.5 In New South Wales, the Ombudsman has reported 'an increasing

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<sup>45</sup> Section 3. The Act's chief exemption in regard to searching for documents is in subsection 23 (1), where an agency or minister may refuse to grant access to documents where the request relates to all documents of a specified class and giving access to these documents would substantially and unreasonably divert the resources of the agency or interfere substantially and unreasonably with the performance by the minister of his functions. The Government Solicitor's Office advised the Office of Financial Management on 12 August 1999 that several Federal AAT decisions on the corresponding section of the Commonwealth FOI Act suggest that the amount of time spent on a request would have to be 'substantially longer than 4 person days' to be unreasonable.

<sup>46</sup> Section 24.

number of complaints alleging that documents held by agencies have been lost or are being improperly concealed'.<sup>47</sup>

B5.6 The problem of lost documents is part of a wider problem of poor record keeping and retrieval. The Commonwealth Ombudsman has raised these concerns in regard to Commonwealth agencies. In larger agencies 'record keeping has become so fragmented that it would be an extremely difficult task to identify all agency records'. Poor records management is a particular problem where an applicant cannot provide specific details of the documents sought, or wishes to access all documents of a particular category or class held by the agency. 'In these circumstances, poor agency records management may serve to neutralise the right of access provided by the Act as agencies claim lost or no documents, or even unreasonable diversion of resources.' The Ombudsman notes that 'It would be unreasonable for an agency to refuse a request... if the problem in locating documents resides in poor recordkeeping'.<sup>48</sup>

B5.7 Concerns about improper concealment of relevant documents have also been aired. Some reports have noted practices such as chief executive officers removing documents, and officials taking documents from files during the handling of a request and then reassembling the files following completion of the request.<sup>49</sup>

B5.8 The New South Wales Auditor-General has reported a case where an agency handling an FOI request was advised by the relevant minister's office that the minister 'would be "more comfortable" with a response that deleted three memoranda' which the agency had intended to provide the applicant (a shadow minister). These memoranda were not provided to the applicant. The Auditor-General presented the view that 'there can be no reasonable doubt that some of these documents fell within the Shadow Minister's request and were not exempt' under the Act. 'They thus should have been provided to the Shadow Minister... notwithstanding any ministerial discomfort.'<sup>50</sup>

### **The ACT Situation**

B5.9 Little information is available on these problems in the ACT. No

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<sup>47</sup> NSW Ombudsman, *1999/2000 Annual Report*, p. 114.

<sup>48</sup> 'Needs to know', pp. 26-7.

<sup>49</sup> Reported in Rick Snell, 'Administrative Compliance and Freedom of Information in Three Jurisdictions: Australia, Canada and New Zealand', pp. 9-12.

<sup>50</sup> *New South Wales Auditor-General's Report to Parliament for 1998*, Volume Two, pp. 250-1.

reports similar to those mentioned above have been prepared on the FOI Act in the ACT. The AAT has heard few cases on the quality of the search undertaken or on whether officials have concealed the existence of relevant documents from applicants.

### **AUDIT REVIEW OF THE SEARCH FOR DOCUMENTS**

B5.10 The Audit has not replicated searches undertaken by departments. The following comments are based on a review of the request files examined by the Audit.

B5.11 Many of the files examined by the Audit provided little information on the level of search undertaken or on decision making about which documents should be identified to the applicant. Often this was understandable, as the documents requested were few, clearly identified and contained in one or a few files. However, there was also little documentation on file for complicated and extensive requests. The lack of documentation raises doubts about the quality of the searches undertaken.

#### **Extent of Searches Undertaken**

B5.12 The level of search required to respond to requests varies considerably. Many requests are for one or a few readily identifiable documents on a particular matter. The Audit examined a number of requests which fell into this category. These were apparently handled quickly and fully.

B5.13 Some requests for information can involve considerable search time sorting through a large number of widely dispersed files. Examples include a request for all documents on a person who has been in institutional care for a long time, or a request for all documents, wherever held, on a current political issue.

B5.14 The Audit examined several requests where the size or nature of the search undertaken or the number of documents identified suggest that a significant effort was made to meet the requests. For example:

- a request to Chief Minister's for a range of documents on arts grants was replied to in two instalments, the second instalment being made 23 days after the receipt of the request. The search identified documents from 42 files as well as some loose folios;

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- a request to Urban Services for notes of meetings on a planning matter involved seeking information from 12 members of staff about the existence of diary notes or other records;
- a request to Health for documents on supported accommodation involved a search through 9 files containing over 1,700 pages of documents. Detailed schedules of all documents searched were prepared and provided to the applicant; and
- a request to Justice for documents on certain businesses involved searching 10 files in five different agencies within the Justice portfolio. The response, in two instalments, contained approximately 800 pages of documents and was 11 centimetres thick.

### **Determining the Relevance of Documents**

B5.15 In responding to FOI requests officials must decide which documents are relevant to each request.

B5.16 Strong disagreement among officials about the relevance of certain documents to a request was evidenced in the documentation for one request handled by Health. The request involved a large number of documents contained in several files (and is mentioned above as an example of an extensive search). An officer wrote a detailed memorandum criticising the proposed release of documents on a number of grounds including that some of the documents had been mistakenly classed as 'irrelevant' or 'out of scope' of the request.

B5.17 This request highlights the difficulty in some cases of making judgements about the relevance of documents. The Audit notes that all of the documents that were deemed irrelevant or out of scope were listed in schedules attached to the response to the applicant. That is, although not supplied with these documents, the applicant was advised of their existence.

### **Missing Documents**

B5.18 The Administrative Appeals Tribunal has reported instances where relevant documents were missing from government files and could not be

found by officials.<sup>51</sup> The Audit also noted this problem in several of the request files examined.

- Urban Services advised one applicant that, in some cases, searches ‘failed to identify the relevant files’ or ‘the files were unable to be located’. In another case, the Department advised the applicant that, following a ‘thorough search’, a part of a file (that is, one of several folders constituting the file) could not be found. The Department advised that the search would continue and the applicant would be advised if the folder were found.
- Justice made a partial release of documents in one case because of an inability to locate a file identified as containing information relevant to a request. In another case, Justice officials were unable to locate a document regarded by the applicant as of great significance. The applicant was advised that ‘despite having checked with all agencies that might have reason to have a copy... I have been unable to locate either the original or a copy’. Correspondence between officials states that ‘we all agree [the document] must have existed’.
- Health responded to one request with certain information but noted that some information could not be found and would therefore be forwarded to the applicant as soon as it was located.

B5.19 Difficulties in searching for documents also caused problems in making decisions on the use of exemptions. In deciding whether a particular consultant’s report should be exempted, Chief Minister’s sought advice from the Government Solicitor. In order to provide its advice, the Government Solicitor requested a copy of the contract between the consultant and the Department. The contract could not be found and the Government Solicitor’s advice was therefore given without the benefit of this document.

B5.20 In addition to the evidence above, other evidence available to the Audit suggests that poor records management is a widespread problem. For example:

- In responding to the Audit, Justice had problems finding files on particular requests and there was confusion among officials about

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<sup>51</sup> *Re Smedley. and Department of Business, the Arts, Sports and Tourism* [1996] ACTAAT 144; *Re Lamb and Department of Environment, Land and Planning* [1996] ACTAAT 156.

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whether some requests had been made or not. In many instances, no file was created for a request and documents for several requests were simply kept in a pile.

- Urban Services was unable to find several initial request and internal review files and the registers of requests were also incomplete.
- During the course of the Audit, Chief Minister's discovered a further request in addition to those identified in reports for 1999-2000. After the Audit provided a draft report to the Department, three further relevant files were found containing a number of significant documents including a number of original documents. These files were not registry files and had been stored in a cabinet in Corporate Services.
- The Bruce Stadium redevelopment audit highlighted considerable problems in record keeping and management.<sup>52</sup> The need for improvement in this regard is discussed further in a recent audit report.<sup>53</sup> The concerns expressed in these reports are supported by the identification, during the course of the present audit, of five registry files and three unregistered files which were of significance to the Bruce Stadium audit and which were not identified by officials during the conduct of that audit.

### *Audit Comment*

B5.21 Good practices in creating and handling records are an important part of good administration. Without it, agencies will have problems complying with statutory requirements such as the FOI Act, and they will be less accountable to the Legislative Assembly and the public. Good records are also important to good decision making and management.

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A5.*

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<sup>52</sup> Auditor-General's Reports Nos 1 to 12, 2000.

<sup>53</sup> Auditor-General's Report No. 2, 2001, *Enhancing Professionalism and Accountability*, pp. 64-6.

## **B6. CLASSIFYING DOCUMENTS AS EXEMPT**

*Chapter A6 contains a summary of this chapter and should be read first.*

### **LEGISLATIVE PROVISIONS**

B6.1 Part IV of the Act provides for a wide range of exemptions. These are reproduced for the information of readers in Appendix B. In addition to Part IV, section 6 provides that a Territory owned corporation or a subsidiary is exempt in relation to documents in respect of its competitive commercial activities. Section 6 also allows for regulations to be issued exempting specified bodies, persons or documents. Finally, an official document of a minister that contains some matter that does not relate to the affairs of an agency is also an exempt document.<sup>54</sup>

B6.2 Exemptions commonly used by departments in responses reviewed by the Audit were in regard to documents:

- of the Executive, that is, Cabinet (section 35);
- on the deliberative processes of an agency, minister or the Territory, known as internal working documents (section 36);
- affecting enforcement of the law and protection of public safety (section 37);
- affecting financial or property interests of the Territory (section 39);
- concerning certain operations of agencies, such as the management or assessment of personnel or the conduct of industrial relations (section 40);
- affecting personal privacy (section 41);
- subject to legal professional privilege (section 42);
- relating to business affairs (section 43); and
- containing material obtained in confidence (section 45).

B6.3 ‘The purpose of the exemptions provisions is to balance the objective of providing access to government information against legitimate claims for protection.’<sup>55</sup> The use of exemptions by decision makers is therefore a quite legitimate and essential part of the sound administration of the Act. On the other hand, the misuse of exemption provisions, whether through ignorance or deliberately, will seriously undermine the operation

<sup>54</sup> Subsection 4 (1).

<sup>55</sup> Australian Law Reform Commission, *Open government*, p. 91.

of the Act.

### **Guidance Available to Officials**

B6.4 Over time, a body of principles has been developed to assist officials in making decisions about the use of exemptions. Of importance are relevant decisions of the Federal Court, Federal Administrative Appeals Tribunal and ACT Administrative Appeals Tribunal (AAT). General advice is also given to agencies on the use of exemptions in legal bulletins issued by the Government Solicitor in 1999 and 2000.<sup>56</sup>

### **UNSUPPORTED ASSERTIONS THAT EXEMPTIONS APPLY**

B6.5 Under section 71 of the Act, the onus of establishing that a decision on a request was justified rests with the agency. In this regard the AAT has been critical of agencies making unsupported assertions during AAT proceedings that certain exemptions applied.

B6.6 In 1998 the AAT criticised the ‘ritual incantation of the words “personal affairs” or the mere reference to section 41 of the Act without any showing how the matter in question constitutes an unreasonable disclosure’.<sup>57</sup>

B6.7 In 2000, the AAT stated that a ‘mere statement of reliance upon certain grounds of exemption contained in the FOI Act in making a decision to refuse access to documents is clearly insufficient, itself, to discharge the onus imposed by section 71 of the FOI Act’.<sup>58</sup>

B6.8 The onus of supporting an assertion that a particular exemption applies is not restricted to AAT proceedings. Clearly, if an agency is to comply with the Act it must consider the evidence in regard to each document. It cannot simply assert that a particular exemption applies to a particular document. It must be able to show how the exemption applies. Showing 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’.<sup>59</sup>

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<sup>56</sup> Legal Bulletin Nos 42–44.

<sup>57</sup> *Re Munday and Commissioner for Housing* [1998] ACTAAT 237.

<sup>58</sup> *Re Schofield and ACT Workcover* [2000] ACTAAT 30.

<sup>59</sup> Legal Bulletin No. 15 of 1995.

## **Audit Review of Exemptions Claimed**

B6.9 Two main forms of evidence can be examined to see whether an agency has reasonably explained its use of a particular exemption in a particular case. The first form of evidence is the documentary evidence on request files showing how the decision maker and other officers considered the use of exemptions. The second form of evidence is the reasons statement provided to applicants, which should show ‘the findings on any material questions of fact, referring to the material on which those findings were based, and stating the reasons for the decision’.<sup>60</sup>

### ***Documentary Evidence on Request Files***

B6.10 As discussed elsewhere in this report, documentation on many request files was limited. In particular, there was often little or no documentation on the search undertaken or the decision making on the relevance of documents to the request (see chapters A5 and A8). There was a similar lack of documentation showing the decision making process in regard to the use of exemptions.

B6.11 On occasion, officers have sought professional advice from the Government Solicitor. For example, Chief Minister’s received detailed advice on the use of sections 36, 40 and 45 in regard to the release of a report on arrangements for ACT senior executives. The Government Solicitor’s advice argued against the use of these exemptions as grounds for not releasing the report. The report was subsequently released. Such advice was, however, rarely sought. In most cases there was no information on file to show how the use of a particular exemption was considered.

### ***Reasons Statements***

B6.12 The problem with limited documentation was compounded by the inadequacy of reasons statements. As noted in chapters A4 and B4, reasons statements are often no more than assertions that certain exemptions apply to certain documents. In many cases, the poor quality of reasons statements and the lack of supporting documentation on file suggest that officials simply asserted that exemptions applied without any sound supporting reasons. This problem applied to internal reviews as well as initial requests.

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<sup>60</sup> Section 25.

B6.13 The failure to give and document sound reasons for a decision is not corrected by giving reasons which merely sound reasonable. Chapter B9 presents a request where this appears to have been the case.

***Audit Comment***

B6.14 Exemptions were often asserted by officials with little or no evidence on file of serious consideration of whether a particular exemption applied to a particular document. This lack of evidence raises concerns as to whether exemption provisions were incorrectly used.

**CLASS CLAIMS TO SUPPORT EXEMPTIONS**

**Background**

B6.15 A class claim for an exemption is a claim that an entire class of documents is generally exempt. Such claims have arisen in particular in regard to sections 34, 36, 39 and 40 of the FOI Act, which expressly provide for consideration of the public interest in disclosure in deciding whether the document should be released.

B6.16 Section 36 deals with internal working documents. These are considered exempt documents if they contain ‘opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Territory’. To be an exempt document the document’s disclosure must be contrary to the public interest.

B6.17 Section 34 deals with documents affecting relations with the Commonwealth and the States. Section 39 deals with documents affecting financial or property interests of the Territory. Section 40 deals with a range of documents concerning certain operations of agencies. In these sections, it is stated that the section does not apply to a document the disclosure of matter in which ‘under this Act would, on balance, be in the public interest’.

**Guidance on Class Claims**

B6.18 The argument against making a class claim as a ground of public interest against disclosure was dealt with at length by the AAT in 1992 in *Re Weetangera Action Group and Department of Education and the*

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*Arts.*<sup>61</sup> In this decision, a number of claims by the Department that documents were exempt were determined to be in the nature of class claims, and, as such, were inadmissible. These claims were that:

- (a) The document was a communication between senior officials concerning politically sensitive issues;
- (b) The document was created in the course of development of policy;
- (c) Disclosure may inhibit frankness and candour in future pre-decisional communications;
- (d) Disclosure would impinge upon the confidentiality normally surrounding high level communications between a Minister and his or her senior advisors, without countervailing public benefit in disclosure, and
- (e) Disclosure would or could reasonably be expected to result in the Minister and the Cabinet being inclined to make decisions or participate in collective decisions without full deliberative advice in the knowledge that requests for such advice or responses to them could be made public.<sup>62</sup>

B6.19 At the heart of the AAT's concern about class claims is that reasonable grounds for exemption under the Act must be found in the particular document in question.<sup>63</sup>

B6.20 The AAT concluded that class claim grounds 'do not of themselves constitute reasonable grounds for a claim that disclosure of the documents or part documents in question would be contrary to the public interest'. The Tribunal noted that the Federal AAT had also consistently rejected such class claims.<sup>64</sup>

B6.21 The decision in *Re Weetangera Action Group* has been reaffirmed by the AAT in a number of decisions since. Indeed, the Tribunal has stated its disappointment, even exasperation, at being repeatedly presented with

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<sup>61</sup> C91/8, decision dated 31 January 1992.

<sup>62</sup> *Re Weetangera Action Group*, paragraph 7.

<sup>63</sup> The Audit notes that in *Re Weetangera Action Group*, the respondent procured a conclusive certificate pursuant to section 36 of the Act. The effect of the certificate was to confine the Tribunal's power of review to determining the question whether reasonable grounds existed for the claim that the disclosure of the documents or part documents would be contrary to the public interest. In the absence of a certificate, the Tribunal would have come to its own view about the weight of any justification for the class claim, and would not have been limited to asking only whether there was a reasonable basis for the claims.

<sup>64</sup> *Re Weetangera Action Group*, paragraphs 8–10.

class claims by agencies.<sup>65</sup> In 1998 the AAT was still explaining that:

An exemption under section 36 cannot be claimed on the ground that the document falls within a class of documents of which it might be said that disclosure would be contrary to the public interest; the agency must also establish that the claimed mischief would flow from the disclosure of the particular documents to which access is sought.

B6.22 The AAT said that the respondent had made a class claim argument which if accepted would in its effect have ‘subverted’ ‘the whole purpose of the FOI Act’.<sup>66</sup>

B6.23 The ACT Government Solicitor has advised agencies of the AAT’s position in Legal Bulletin No. 42 issued in December 1999.

### **Audit Review of the Use of Class Claims**

B6.24 The Audit identified several instances of the inappropriate use of class claims. One of these, involving Health, was commented upon in chapter B4. Education used a class claim argument in responding to a request in 1999. Class claims are discussed further in chapter B9.

### ***Audit Comment***

B6.25 The use of class claim arguments in claiming exemptions shows that some officials were either unaware of the legal decisions and advice on this matter or chose not to accept this considerable body of legal opinion in administering the Act. Either way, the use of class claim arguments is of concern as it seriously undermines a basic tenet of the Act: that reasonable grounds for an exemption must be found in the particular document being sought by the applicant.

*The Audit’s significant findings and suggestions for future action arising from this chapter are presented in chapter A6.*

## **B7. RESPONSE TIMES**

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*Chapter A7 contains a summary of this chapter and should be read first.*

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<sup>65</sup> *Re Mann and Department of Health (ACT)* [1994] ACTAAT 73; *Re Carter and Department of Health* [1995] ACTAAT 101; *Re Munday and Commissioner for Housing* [1995] ACTAAT 109.

<sup>66</sup> *Re Lapham and Department of Education and Community Services*, [1998] ACTAAT 290, paragraphs 3, 11.

## **LEGISLATIVE REQUIREMENTS**

B7.1 Section 18 of the Act states that where a request is made under the Act to an agency or minister, the agency or minister:

shall take all reasonable steps to ensure that... the applicant is notified of a decision on the request... as soon as practicable but in any case not later than 30 days after the day on which the request is received by or on behalf of the agency or Minister.

## **PUBLISHED STATISTICS ON RESPONSE TIMES**

B7.2 Justice's annual report for 1999-2000 contains data on the time taken by agencies to respond to primary applications. These data have been reproduced in Table B7.1.<sup>67</sup>

<b>Table B7.1: Response Times on Principal Requests, 1999-2000</b>					
	<b>&lt; 31</b>	<b>31-45</b>	<b>&gt; 45</b>	<b>Carried Over</b>	<b>Total</b>
Urban Services	118	14	2	3	137
Education	34	2	3	3	42
Health	16	1	2	4	23
Justice	12	7	–	3	22
Chief Minister's	7	1	–	1	9
Treasury	8	2	1	–	11
Other	13	1	–	2	16
<b>Total</b>	<b>208</b>	<b>28</b>	<b>8</b>	<b>16</b>	<b>260</b>

Source: Justice, *Annual Report 1999-2000*, p. 102.

B7.3 Table B7.1 shows that of the 260 requests received and not subsequently withdrawn in 1999-2000, 208 (80%) were responded to not later than 30 days after the request was received. This is comparable with the result for the Commonwealth in 1996-97, when 76% of requests were responded to in not later than 30 days.<sup>68</sup> The ACT result in 1999-2000 (80%) is higher than the ACT result in 1994-95 (52%) and lower than the ACT result in 2000-01 (68%).<sup>69</sup>

<sup>67</sup> As discussed in chapter B10, the Justice data contain some mistakes and omissions. These do not significantly alter the reported results.

<sup>68</sup> Ombudsman, *'Needs to know'*, p. 25.

<sup>69</sup> Attorney-General's Department, *Annual Report 1994-95*, pp. 195, 200-201; Justice, *Annual Report 2000-01*, p. 112.

***Audit Comment***

B7.4 As with reported data on decisions (discussed in chapters A10 and B10), little can be drawn from these figures. An agency may report that a decision was made in not later than 30 days but this may be achieved by undertaking a cursory search for documents and therefore making an incomplete response. This would not be an example of successful administration of the Act.

B7.5 Equally, a response which takes longer than 30 days may not be an example of failure by the agency. The request could involve extensive searching for documents and require close assessment of the documents against a range of exemptions prior to release. A response may take longer than 30 days because the agency is doing a careful and comprehensive job.

B7.6 The Audit notes that, in such a case, placing too much emphasis on responding in not later than 30 days might be counterproductive, by encouraging the agency to make an incomplete response or to refuse the request under section 23 (on the grounds of unreasonable diversion of agency resources).

B7.7 In summary, it is hard to assess the reasonableness of a response time without an understanding of the nature of the request, the quality of the search undertaken, and the decision. The approach of the Audit has therefore been to examine and report on specific requests.

**RESPONSE TIMES IN SPECIFIC CASES**

B7.8 The Audit noted some requests where officials assisted applicants in meeting personal deadlines by releasing information quickly. For example:

- an applicant to Health noted the urgency in receiving a response, as the documents were required for legal proceedings. The applicant received the required documents within a fortnight and subsequently contacted the Department to thank the officer; and
- a fortnight after the receipt of an application to Chief Minister's on arts grants, the applicant was provided with 'a preliminary release of information assessed to date'. This was in order that the applicant could have all available information prior to a meeting the next day with the Chief Minister to discuss the subject of the request.

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B7.9 The Audit noted some large and complicated requests that were handled quickly by agencies. For example, the request handled by Chief Minister's on arts grants was responded to in 23 days. This was even though it required extensive searching through 42 files and a number of loose papers.

B7.10 The Audit also noted some requests that went over the statutory time limit with good reason. The extensive nature of some searches is one explanation. On occasion, an initial request by an applicant was followed by further requests, which were accepted by the responsible official as an extension of the original request. Such an approach can show a commendable willingness to assist the applicant but the result will be an extension of the response time.

B7.11 On the other hand, the Audit examined a number of requests where the response times were unnecessarily long. Some of these are mentioned elsewhere in this report. For example:

- in chapter B3 the Audit noted a response that was three months late due to Urban Services not transferring a request to Chief Minister's, as promised to the applicant;
- in chapter B5 the Audit noted a number of responses which were incomplete, as relevant documents and whole files were unable to be found by officials. These failures in records management usually resulted in delay. In the Bruce Stadium requests, examined in chapter B9, inadequate search resulted in a lengthy dispute and a delay of over a year before a more complete response was made;
- the incorrect use of class claim arguments (discussed in chapter A6) has required some applicants to pursue their requests in the AAT, adding many months to the response times in some cases;
- the Audit's examination of internal reviews in chapter B8 shows that in a number of cases the initial decision was substantially overturned. This usually resulted in the final response to the applicant being well after the 30 day limit. While such reversals of initial decisions might be a good result for the internal review process, they raise questions about the initial decisions and the unnecessary delays in providing documents; and
- in chapter B9 the Audit notes how FOI matters taken to the AAT had sometimes led to the release of a significant number of

documents prior to the hearing or decision by the Tribunal. This had led to lengthy delay and raises the question of why officials did not release the documents at the time of the initial request.

***Audit Comment***

B7.12 The timeliness of responses varied. Agencies responded quickly to some requests, even when they were large and complicated. Equally, some requests were unreasonably delayed for various reasons including administrative error and poor records management. Of greatest concern are the lengthy delays resulting from the inadequate search for documents and incorrect use of exemptions. These problems were only resolved, if ever, following internal review, disputation between the applicant and the agency or application to the AAT.

B7.13 The varied experiences of applicants evidenced in the files examined by the Audit are in keeping with the responses to the survey of applicants conducted by the Audit. Applicants were divided on the timeliness of responses. Adverse comments included: 'the department seemed to be unaware of its statutory obligations to advise me of its decision within certain time-frames'; 'Nearly 12 months to the day'; and 'It took my solicitor some months and two applications to get [the Department] to respond'. On the other hand, one praised the provision of information within a few days and another said 'it could not have been done more speedily'.

B7.14 The Audit notes that the recent removal of the application fee should improve actual (if not reported) response times as processing of requests was often held up by agencies seeking the fee, or an application for remission of the fee, from applicants. Agencies would often not commence processing the request until the fee was paid or remission sought. This could add a week or more to the processing time. The delays were made worse by the sometimes seemingly arbitrary nature of some decisions not to remit fees on public interest grounds.

B7.15 The Audit also notes that poor records management is a pervasive problem in the ACT Government, which may be addressed by the proposed introduction of a Territory Records Act. The importance of better record management in improving the administration of the Commonwealth FOI Act has been discussed by the Commonwealth

Ombudsman and the Australian Law Reform Commission.<sup>70</sup>

## **EXTENSIONS OF RESPONSE TIMES**

### **Relevant Legislation**

B7.16 Under section 18, the 30 day response period may be extended by 15 days if notification of third parties is required under sections 26 or 27. Section 26 is concerned with consultation with the Commonwealth or states where the Commonwealth or a state might reasonably wish to contend that a document is exempt under section 34 (which deals with documents affecting relations between the Territory and the Commonwealth or states). Section 27 is concerned with consultation with a person or organisation where the person or organisation might reasonably wish to contend that a document is exempt under section 43 (which deals with documents relating to the business affairs of a person or organisation).

B7.17 Under subsection 18 (4), if an agency or minister makes a determination that an extension of time to consult with third parties is appropriate, the applicant should be informed of the extension 'as soon as possible'.

### **Audit Review of Extensions**

B7.18 The Audit examined some requests where consultation with a third party under section 27 occurred. Under section 27 it is only necessary to consult a third party prior to a decision to grant access to a document. If the decision maker intends to exempt the document there is no need to contact the third party.

B7.19 Where the decision maker intends to release a document then the agency or minister should give the relevant third party 'a reasonable opportunity of making submissions in support of a contention that the document is an exempt document under section 43'. The decision maker should then have 'regard to any submission so made' before deciding on whether to release the document to the applicant.

B7.20 Where, following the receipt of submissions, the decision maker decides to release the document, both the third party and the applicant should be notified in writing of the decision and access will not be given to

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<sup>70</sup> 'Needs to know', pp. 26-8; *Open government*, p. 84.

the document until the time for applying to the AAT has expired, or, if an application is made to the AAT, a decision has been made by the Tribunal confirming the decision.

### ***Audit Comment***

B7.21 Dealing with third parties is often difficult for an agency. Nevertheless, the Audit examined requests where this requirement was handled well. The Audit also examined an extension of time that was poorly handled (see chapter B9) and another case that suggests that officials considered using sections 18 and 27 improperly (see the case study below).

### **Case Study B7.1**

B7.22 On 4 April 2000 the Leader of the Opposition, Mr Stanhope, made a request to Gary Humphries, as acting Chief Minister, for documents relating to Impulse Airlines. The decision maker was an officer in Chief Minister's.

B7.23 On Wednesday, 3 May 2000 the departmental FOI co-ordinator reminded the decision maker by email that 5 May was the due date for a response to the request. Later that morning, an officer reporting to the decision maker emailed the FOI co-ordinator with a proposed letter to Mr Stanhope. The officer also advised that 'For the purposes of s. 18 (3) (b) I suggest that it would be sufficient for [the] decision-maker to make a note by hand to the effect that "Time should be extended to allow for Impulse to make submissions on business affairs"'.

B7.24 Shortly after, the FOI co-ordinator emailed a senior officer in the Government Solicitor's Office. The message reads in part:

Just wanted to make sure with you that the following course of action was ok.

On 5 April we received an FOI request from Jon Stanhope for documents relating to Impulse Airlines. Currently, these documents are being collected, however the Chief Minister would like to be able to table them in the Assembly on Tuesday [9 May]. As the due date for a decision is this Friday [5 May] this makes it a bit difficult.

Unless we looked at extending the period for 15 days under s. 18 (3)...

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The main issue is political as the Chief Minister wants to be able to table these documents. The decision maker would like to take this course of action (ie invoking section 18 etc and then tabling the documents on Tuesday).

B7.25 Later that afternoon the FOI co-ordinator advised the decision maker and the officer reporting to the decision maker that:

After speaking to [the officer in the Government Solicitor's Office] there are a couple of issues:

1. If we extend the release of the documents under s. 18 (on the grounds that we need to receive a submission from Impulse) then it could open us up to criticism if these documents are then tabled by the Chief Minister on Tuesday.
2. Only those documents that relate to the business affairs of Impulse (and hence Sections 27 [and] 43 of the Act) are able to be extended over the 15 days. A decision must be made by Friday on all other documents...

I'm finding this a little confusing not knowing the documents the Chief Minister wants to table, which documents are possibly exempt and those that are ready to be released without being tabled. Any information would be appreciated.

As I understand it, this essentially has become a political decision over whether there is any stigma in releasing documents under the FOI Act.

B7.26 A letter from the decision maker to Mr Stanhope was faxed on 5 May advising that a number of documents were ready for release to him, but that:

Some of the documents relating to your request contain information concerning the business affairs of certain companies. It appears to me that those bodies might reasonably wish to contend that those documents, or parts of them, are exempt documents under s. 43 of the Act. In the circumstances I have written to them inviting their submission on the issue in accordance with s. 27 of the Act... Accordingly I shall inform you of my decision on the outstanding documents by Friday 19 May 2000.

B7.27 A number of documents, and a schedule of all documents found,

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were delivered to Mr Stanhope's office on 8 May. Allowing for the weekend (6–7 May), this was within the time limit of not more than 30 days from the date of receipt of the request (which was on 6 April).

B7.28 Letters were sent to Impulse and another company on 5 May, requesting their views on the release of six documents. Responses were received on 18 and 19 May. On 19 May the decision maker wrote to Mr Stanhope to advise that three of the documents would be withheld and three would be partially released at the request of the two companies.

### *Audit Comment*

B7.29 It was quite proper for the decision maker to seek the views of third parties under section 27 and to extend the response period by 15 days under section 18. However, the correspondence from the FOI co-ordinator suggests that one or more officials considered using the Act's provisions as a means of delaying the release of documents in order not to pre-empt their tabling in the Legislative Assembly by the Chief Minister. This is a political purpose not provided for in the Act.

B7.30 The decision maker has advised the Audit that the 'emails were not relevant to my decision-making processes' and 'the comment that there was a political motivation behind the delay in releasing documents is unfounded'.<sup>71</sup> The Audit notes it is not concluding that this was the case.

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A7.*

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<sup>71</sup> 27 September 2001.

## **B8. INTERNAL REVIEWS**

*Chapter A8 contains a summary of this chapter and should be read first.*

### **APPROACH**

B8.1 This chapter examines most of the internal reviews conducted in 1999-2000 against the following two criteria:

- Where required, was a satisfactory reasons statement provided to the applicant?; and
- Is there evidence of serious consideration by the decision maker of the request for internal review?

B8.2 Attention has been given by the Audit to the quality of the responses to the applicants and other evidence on files of the process of deliberation by the decision maker.

B8.3 The Audit also considered internal reviews against some general principles outlined by the Administrative Review Council. The internal reviews conducted in regard to the Bruce Stadium requests are considered in chapter B9.

### **JUSTICE**

B8.4 Four requests for internal review were made to Justice in 1999-2000. These have been examined by the Audit and are summarised as follows.

#### **Request 1**

B8.5 On 20 July 1999, an applicant requested documents in regard to employment with the Department. A response on 20 August released a range of documents with the exception of two documents, which were held to be exempt under section 42 (1) dealing with legal professional privilege. On 13 September 1999 the applicant wrote to 'seek a review of the FOI process on the basis that substantial documentation remains outstanding'. On 1 November 1999, the reviewer advised the applicant that documents from a file not referred to in the original decision would be released. In regard to one document previously released, the reviewer held that it was an exempt document. The reviewer therefore requested the applicant 'to return all copies of the document in your possession to the Department'.

## **Request 2**

B8.6 A request dated 13 August 1999 resulted in the release of 'correspondence from the [relevant] file which most clearly fits your request' on 17 August 1999. The applicant wrote again on 6 October 1999 as the response of 17 August 1999 suggested there were other documents that might be relevant to the affairs of the applicant. The reviewer replied on 18 October 1999. The response letter clarified some confusion arising from previous correspondence between the applicant and the Department. It also responded to the now broader request of the applicant by releasing all documents on the relevant file with the exception of two pieces of correspondence with the Government Solicitor which were held to be exempt on the grounds of legal professional privilege (section 42 of the Act).

## **Request 3**

B8.7 On 8 February 2000 an applicant sought an internal review of the decision not to release certain documents identified as relevant but exempt in the initial response of 20 January 2000. On 10 February 2000, the reviewer wrote to the applicant to advise that these remaining documents would be released in full.

## **Request 4**

B8.8 On 29 February 2000 an applicant sought an internal review of the decision not to release certain documents identified as relevant but exempt in the initial response of 17 February. These were a piece of correspondence on the assessment of Corrective Services trainees and several reports on an incident at the Periodic Detention Centre.

B8.9 On 10 February 2000, the reviewer advised the applicant that the conclusions of the correspondence would be released but not the names of the trainees to whom the assessments related. The response stated that 'to release their names would constitute an unreasonable disclosure of personal information' under subsection 41 (1). In regard to the incident reports, the reviewer advised that they were exempt under subsection 41 (1) as they related 'to the name and actions of a detainee'. The reviewer also considered the material to be exempt under paragraph 37 (2) (b) as it would disclose the methods and procedures of Corrective Services.

## ***Audit Comment***

B8.10 The four internal reviews conducted by Justice suggest serious

consideration by the reviewers. In request 1, further documents, not identified as relevant in the original response and unspecified by the applicant, were provided. In requests 2 and 3, the identified documents were released. In request 4, a further document, with names of people deleted, was released. The response letters explained why certain documents remained, or were now regarded as, exempt. The responses, however, varied in the extent to which they identified to the applicants their rights of appeal to the AAT or of complaint to the Ombudsman.

***Further Audit Comment***

B8.11 In regard to request 1, the Audit makes the following further comment. In the response to the applicant, the reviewer noted that the request for a review was not in regard to the two documents to which access was refused. The response stated:

Rather, you are seeking ‘a review of the FOI process’, which appears to contemplate a fuller review process than that provided for in section 59. I have therefore attempted to accommodate your request by considering your FOI application afresh in its entirety, rather than by limiting the review process, pursuant to section 59, to those documents to which you were denied access by the original decision maker.

B8.12 The reviewer was correct in saying that the applicant did not seek a review in regard to the two documents which were claimed to be exempt under section 42. If, as appears from the response, the reviewer was suggesting that the applicant could not under section 59 seek a review of the question whether there were other documents that had not been found, then the reviewer may be incorrect.

B8.13 Prior to the amendment of the Commonwealth FOI Act in 1991, the Commonwealth AAT decided that it could entertain an appeal against an agency response that the document did not exist. This was decided on the basis that such a response is a deemed refusal to provide access, once the relevant time for making a decision has expired. This did leave open the question whether the non-existence of documents could be raised in a request for an internal review.

B8.14 In order to remove any doubt on the scope of reviews, it would be helpful if the FOI Act were amended to make clear that reviews may be

sought in regard to the search undertaken.<sup>72</sup>

B8.15 The Audit would note again that, notwithstanding the reviewer's understanding of section 59, the review did deal with the question of whether other documents relevant to the request were available. Given that agencies do entertain requests for review of the search undertaken, the amendment to the Act proposed by the Audit would make no difference to the administration of the Act but would remove any confusion over whether agencies are required to conduct such a review.

B8.16 In regard to the document that had been released but which the reviewer now held to be exempt, the reviewer was quite entitled to request its return. The applicant was equally entitled not to return the document.

## **HEALTH**

B8.17 Health conducted three internal reviews in 1999-2000.

### **Request 1**

B8.18 An applicant sought documents in regard to food labelling on 11 June 1999. The Department released a number of documents in early July. The applicant sought a review on 14 July 1999. The Department replied on 4 August 1999. The concerns of the applicant and the responses of the Department were as follows.

- The applicant's concern was that not all relevant documents had been identified including certain documents and a file identified by the applicant. The Department's response provided a reply in regard to each matter raised by the applicant. One requested document was located and provided. The file identified by the applicant was examined: no documents relevant to the request were found.
- The applicant's concern was that the folio numbers had been written on the copies provided and may not therefore have been the folio numbers on the original documents. The Department replied

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<sup>72</sup> The 1991 amending Bill inserted a new section 24A into the Commonwealth FOI Act to provide that an agency may refuse a request for access to a document if the document requested does not exist or cannot be found. The Bill also inserted a new sub-section 55 (5) in the Act to make it clear that the AAT has power to require an agency to conduct further searches for a document if it is not satisfied with the agency's efforts to find the document. These amendments also had the effect of enabling an applicant to raise the issue of whether the document existed in a request for an internal review.

that this had been done because the original folio numbers had not shown up when photocopied.

- The applicant's concern was that a particular folio was incomplete or obscured. Another copy of the folio was provided.
- The applicant's concern was that Section 27 (consultation with third parties) was applied incorrectly in regard to two documents. The requested documents were provided to the applicant on 21 July.
- The applicant's concern was that Section 41 (personal affairs) was incorrectly applied in deleting some material from two folios. The Department provided the folios in full.

### **Request 2**

B8.19 An applicant's request in 2000 for information had been responded to with the release or partial release of several documents. The applicant requested a review of the decision to refuse access to two documents under sections 41 (personal privacy) and 45 (material obtained in confidence). The reviewer largely upheld the original decision and provided further information on why the material was exempt under the relevant sections. This included describing the condition of confidentiality under which one of the documents had been provided to the Department. Nevertheless, parts of both documents were released where privacy and confidentiality were not infringed.

### **Request 3**

B8.20 An applicant sought information on five matters dealing with disability programs. The Department's response included some information in the letter as well as some attached documents. The applicant sought an internal review in regard to one of the matters covered by the original request. The Department had provided a policy document in regard to this matter. The applicant, however, felt that the document did not provide the information requested. The Department's response to the request for internal review provided further documents and informed the applicant that information of the specific nature requested did not exist.

### ***Audit Comment***

B8.21 Health's reviews appear to have been thorough and considered. They responded to issues raised by the applicants, provided further

information where possible, and explained why certain documents were exempt or not available. In all three cases, the Department advised applicants of their right to appeal to the AAT but not of their right to complain to the Ombudsman.

## **EDUCATION**

B8.22 Seven internal reviews were conducted by Education in 1999-2000; five of these were in Family Services and two in the Department. Of these, additional documents or information within documents was provided in three of the five cases handled by Family Services and in both cases handled by the Department.

B8.23 The following request was one of the two internal review requests handled by the Department.

### **Request 1**

B8.24 On 6 October 1999 an applicant sought documents in regard to an educational unit. The documents were clearly identified in the applicant's letter as dealing with four specific matters, which were numbered 1 to 4. On 3 November 1999 the Department wrote to the applicant that no documents in regard to matter 3 existed and that a report in regard to matter 1 would be sent to all parents concerned with the educational unit when it became available.

B8.25 The applicant sought advice from the Ombudsman's Office and on 17 December wrote to the Department requesting a review of why the initial response made no mention of documents in regard to matters 2 and 4. This letter was noted as received by the Department on 4 January 2000. On 2 February 2000 the Department wrote to the applicant to advise of the release in full of all documents found in regard to matters 2 and 4.

### ***Audit Comment***

B8.26 Internal review resulted in the release of the requested documents, although the release appears to have been delayed by the holiday break.

## **URBAN SERVICES**

B8.27 The Audit sought to examine the seven internal reviews conducted by Urban Services in 1999-2000. As discussed in chapter B5, the Department was unable to find a number of files. Among these files were two of the internal reviews for 1999-2000.

B8.28 The Audit inspected the five files that were available. To summarise:

1. A request for information on an ACT Housing property had resulted in no documents being provided on privacy grounds. Following internal review, a number of documents were provided with the private information deleted.
2. An applicant requested an internal review in the belief that there were documents (unspecified by the applicant) missing from the original response. The reply assured the applicant that all documents had been released.
3. An applicant requested an internal review to see if certain specified documents were missing from the original response. The reply stated that each of the specified documents did not exist or had already been provided.
4. An applicant requested an internal review in the belief that certain documents on an abandoned vehicle were missing from the original response. The reply assured the applicant that all documents had been released.
5. A request for an internal review was made prior to the completion of the original request, and appears not to have been proceeded with by the applicant.

***Audit Comment***

B8.29 The internal review of request 1 appears to have been handled properly. About 35 pages of documents were provided with private information, such as names and addresses of individuals, deleted. Such a response was in conformity with section 21 of the Act, which requires an agency to provide documents in this form where practicable.<sup>73</sup>

B8.30 Requests 2 and 4 raise issues about the level of search undertaken in answering the original requests. The files for requests 2 and 4 contain no documentation showing how the reviews were conducted. The responses to the applicants similarly provide no information on the review process.

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<sup>73</sup> The failure of the agency to do this in the first place is another question. The AAT has commented on the failure of an agency to consider whether matter in a document that was exempt could be deleted under section 21 (*Re Lapham and Department of Education and Community Services* [1998] ACTAAT 289).

B8.31 In regard to request 2, an Urban Services officer advised the Audit that the applicant may have been approached for further details on the request for a review. This was not documented on the file. The Audit was also advised that the review was conducted by a manager in the relevant agency, who advised the decision maker. No documentation is on file of the manager's review or advice to the decision maker.

B8.32 Request 4 specified the documents the applicant had expected to be provided in the response to the original request: 'investigation papers/correspondence, minutes to senior staff/ministers, electronic correspondence between departmental officers pertaining to the case'. It is reasonable to expect that some evidence would be on file to show that these particular documents were searched for during the review. Similarly, it is reasonable to expect that a description of the search undertaken would have been provided to the applicant. It would have been particularly helpful to have explained why the documents the applicant expected to exist did not exist.

B8.33 In regard to requests 2 and 4, proper reviews may have been undertaken, however, the lack of any documentation on the files and the lack of substance in the responses to the applicants do not give any confidence that this was the case. The file on request 3 contains only the applicant's request and the Department's letter in response. This letter does provide some information on the process followed by the Department. The absence of any other documentation on file does, however, raise similar concerns to those expressed by the Audit in regard to requests 2 and 4.

B8.34 In all responses, the Department advised the applicants of their rights to complain to the Ombudsman but not of their rights to apply to the AAT.

## **TREASURY**

B8.35 Treasury conducted four internal reviews in 1999-2000, although there is some confusion over whether one of these cases was an internal review under section 59. In each case, the original decision was upheld. The Audit has reviewed the process of decision making in these cases and found several instances of failure to comply with significant provisions of the Act. Two of these cases are presented below. The other two are presented in chapter B9.

B8.36 The Audit notes that one of these reviews arose from an original

request when Treasury was called the Office of Financial Management and was a part of Chief Minister's. This review, discussed in chapter B9, was conducted by the then Chief Executive of Chief Minister's.

### **Request 1**

B8.37 A request for access to unclaimed money records made on 7 September 1999 was refused on 27 October 1999. The applicant sought a review of the decision in a letter dated 6 November 1999. A response to this request, confirming the original decision, was sent on 1 December 1999. The same officer signed both of the Treasury letters.

#### ***Audit Comment***

B8.38 Treasury has reported this case as an internal review. If this view is accepted, it means that the Treasury officer conducted a review of his own decision, in contravention of subsection 59 (2). Annotation on the file by the FOI co-ordinator, however, shows that the co-ordinator did not believe the applicant had requested 'a formal Internal Review'. Advice was sought from an officer of the Government Solicitor's Office who, according to a note written by the FOI co-ordinator, advised that the reply to the applicant 'should suffice as it is not a response to a formal Internal Review, merely re-explaining the earlier decision'.

### **Request 2**

B8.39 A request for information on licences issued for tobacco vending machines was made to the Chief Minister on 30 July 1999. On 3 September 1999 a response was made that the information could not be provided, under section 38 of the FOI Act, 'which provides that documents are exempt from disclosure if their disclosure is prohibited by virtue of another enactment'. The other enactment referred to was the *Taxation Administration Act 1999*, which prohibited information obtained under the Act from being disclosed without the permission of the parties to whom the information relates.

B8.40 On 17 October 1999 the applicant requested an internal review. On 27 October 1999, the reviewer responded that 'I have examined afresh all the documentation and material relating to the decision given by the decision maker... I affirm the findings and the reasons given for the decision as outlined in [the original] letter'.

***Audit Comment***

B8.41 The response was deficient against the requirements of section 25. It did not provide the findings on any material questions of fact, refer to the material on which those findings were based, or state the reasons for the decision. In particular, the response did not address any of the specific points made by the applicant in requesting a review, nor did the response use the detailed reasoning provided by the Government Solicitor's Office to the Department prior to the response to the original request. The applicant was advised of the right of appeal to the AAT but not of the right to complain to the Ombudsman.

B8.42 There is a further concern about the handling of this matter. Ten days prior to making the request to the Chief Minister on 30 July 1999, the applicant had made a similar request under the FOI Act to the principal officer of the Office of Financial Management (OFM).

B8.43 In this case another officer of OFM had responded to the applicant on 23 July 1999 that, 'As stated in previous correspondence, I am unable to supply location and ownership details of cigarette vending machines licensed for use in the ACT. Section 96 of the Taxation (Administration) Act 1999, prohibits a tax officer from supplying confidential information to other parties'. While this response provided the reason for the decision, it seems to have been written without regard to the requirements for a response under the FOI Act.

**GENERAL PRINCIPLES FOR INTERNAL REVIEW**

B8.44 A useful guide to general principles of internal review for decision making agencies is contained in a recent report by the Administrative Review Council.<sup>74</sup> These principles are applicable to the internal review of decisions under the FOI Act. The Audit notes the following recommendations of the report as particularly relevant:

- As far as possible, an internal reviewer should be removed from the primary decision maker. In particular, they should not be in close physical proximity or in the same section within the agency, and the internal reviewer should not be the supervisor of the primary decision maker.

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<sup>74</sup> Administrative Review Council, *Internal Review of Agency Decision Making*, Report No. 44, November 2000.

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- It is desirable that an internal reviewer should contact the applicant during the review. This is a matter of natural justice and a means of resolving issues arising from the review.
- A quality control system should be established which includes giving feedback to internal reviewers, and gathering and analysing detailed data of the conduct of internal reviews.

B8.45 The Commonwealth Ombudsman has expressed concerns at the conduct of internal reviews. In particular, he has identified the need to ensure that decisions are made at arm's length and that the original decision maker has no direct involvement in the internal review.<sup>75</sup>

### Comparison with ARC Principles

B8.46 A comparison of internal reviews with the three general principles presented by the Administrative Review Council raised concerns.

B8.47 First, in several cases there was a very close relationship between the original decision maker and the reviewer, with the latter often being the immediate supervisor of the former. This was often unavoidable because of the widespread practice of having executives as original decision makers and chief executives as reviewers. This would be avoided if the suggested reform of internal reviews described below were to be implemented.

B8.48 Second, while contact with the applicant occurred in some instances, consultation did not occur in several instances where it may have been of particular value. It should be noted that applicants may not take up the offer of consultation. This was the case in one of the Justice internal reviews examined by the Audit.

B8.49 Third, there is no system for monitoring the decisions of internal reviewers.

### A SUGGESTION FOR REFORMING INTERNAL REVIEW

B8.50 Chapter A8 raised the idea of replacing the present system of *internal* review with *external* review. Under this proposal a senior official outside of the agencies would be responsible for conducting all reviews presently conducted by agencies under section 59. This suggestion has

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<sup>75</sup> Ombudsman, 'Needs to know', 1999, p. 21.

been advanced by the Audit to stimulate discussion and is presented in further detail below.

- The official conducting reviews would be required to produce an annual public report with a summary of each internal review conducted, including the concerns of the applicant, the evidence sought and used in reaching a decision, the decision made and whether further action was taken by the applicant (such as taking the matter to the AAT). The annual report could also comment on the administration of the Act in general. This would replace the present statistical overview produced by Justice.
- The official could also produce guidelines for decision makers in agencies. For example, the official could produce a guideline to the use of the public interest test, as discussed in chapter B4, and provide summaries on recent AAT decisions. As the official would be reviewing a number of decisions each year, he would be in a position to identify problems in the administration of the Act and to bring those problems to the attention of agencies.
- The tasks described above could be undertaken by an existing office holder such as the Commissioner for Public Administration. The additional duties would require some additional resources, but the cost should be relatively small. The Audit would note that a consideration of this particular matter could prompt a wider examination of the range of offices in the ACT dealing with information and privacy matters and with complaints about public administration.

### ***Audit Comment***

B8.51 The Audit is conscious that the recommendations on internal review are significant changes to the Act and have wider implications for administrative arrangements. The point, however, is that while some internal reviews were conducted diligently, the existing process failed conspicuously in regard to several requests. It appears to the Audit to be crucial to have a review process with integrity. Crucial elements of such a process are the independence of the reviewer and a reporting mechanism that brings public scrutiny to bear on the original decision maker and the reviewer.

B8.52 The Audit notes that the Standing Committee on Justice and Community Safety has recommended the establishment of an Information

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Commissioner similar to the offices that operate in Western Australia and Queensland.<sup>76</sup> The Committee sees the conduct of reviews as a particular role for the Information Commissioner. The Audit suggests that placing this function in the hands of an existing office holder may achieve the same result at a lower cost.

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A8.*

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<sup>76</sup> *The Freedom of Information (Amendment) Bill 1998* (Report No. 17, August, 2001).

## **B9. THE BRUCE STADIUM REQUESTS**

*Chapter A9 contains a summary of this chapter and should be read first.*

### **BACKGROUND**

B9.1 On 6 July 1999 the then Leader of the Opposition, Mr Jon Stanhope, applied to Chief Minister's for:

- 'All correspondence and documents including contracts exchanged between the ACT Government and SOCOG [Sydney Organising Committee for the Olympic Games];
- All correspondence and documents relating to the tender by Lend Lease to project manage the redevelopment of Bruce Stadium; and
- All correspondence and documents including contracts relating to the current tenancy agreements executed with the Raiders, the Brumbies and Cosmos for the use of Bruce Stadium'.

B9.2 A first response was sent by the Executive Director of the Office of Financial Management (OFM)<sup>77</sup> to Mr Stanhope on 3 August 1999. This indicated that certain documents would not be released and that the remainder of the documents sought would take some time to collect. Mr Stanhope sought an internal review of the decision not to release certain documents on 9 August 1999. The decision was affirmed by the then Chief Executive of Chief Minister's<sup>78</sup> on 25 August 1999.

B9.3 In a letter received by Mr Stanhope on 25 August the then Chief Executive of Treasury<sup>79</sup> advised that the other documents requested would be made available on 27 August 1999. A further letter from the then Chief Executive of Treasury on 27 August 1999 advised that agreement was being sought from SOCOG for the release of certain documents. On 21 September 1999 a second response on the release of documents was sent to Mr Stanhope. An internal review was sought on 29 September 1999 on part of the decision of 21 September 1999, which refused access to a particular document. The decision in regard to this document was affirmed

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<sup>77</sup> Mr Mick Lilley. Mr Lilley subsequently became Chief Executive of Treasury later in August 1999, when OFM was replaced by the Department of Treasury.

<sup>78</sup> Mr Rod Gilmour.

<sup>79</sup> Mr Mick Lilley.

by the then Chief Executive of Chief Minister's<sup>80</sup> on 11 October 1999.

B9.4 In the meantime, Mr Stanhope had lodged an application with the Administrative Appeals Tribunal (AAT) to have the internal review decision of 25 August 1999 reviewed. The AAT application was also in respect of a 'deemed refusal' as no decision had been taken upon the remainder of Mr Stanhope's 6 July 1999 request within the statutory time limit. Mr Stanhope advised the then Chief Executive of Treasury<sup>81</sup> of the reasons for his AAT application on 29 September 1999. In that letter he also noted that the letters from the then Chief Executive of Treasury notifying decisions on his request had not complied with the requirements of the Act in regard to the provision of a reasons statement. He requested a reasons statement in compliance with the Act for each document. The Chief Executive of Treasury replied on 13 October 1999 that his letter of 21 September 1999 had provided relevant information. He nevertheless supplied a further explanation of his reasons in his letter.

B9.5 In addition to the file on Mr Stanhope's first request of 6 July 1999, there are two files on his AAT application. There are a further three files dealing with Mr Stanhope's request of 29 September 2000 for a review of the decisions in regard to his first request. This review was requested in the light of the Auditor-General's reports on the Bruce Stadium redevelopment, which referred to a number of documents not identified to Mr Stanhope in response to his original request.

B9.6 There are also six related files from separate requests made by Mr Stanhope on 27 August 1999, 13 October 1999, 19 October 1999, 19 March 2000, and 6 November 2000 (two requests). Finally, there is a file dealing with Mr Stanhope's complaint to the Ombudsman on the handling of his requests. In addition to the registry files listed above, a further three unregistered files of documents on Mr Stanhope's requests were identified to the Audit in November 2001.

B9.7 Mr Stanhope's AAT application was withdrawn on 26 October 2000, following the release of a large number of documents. The Ombudsman's report was provided to Mr Stanhope on 31 August 2001.

## **Ombudsman's Report**

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<sup>80</sup> Mr Rod Gilmour.

<sup>81</sup> Mr Mick Lilley.

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B9.8 The Ombudsman's report deals with some specific matters in regard to the handling of Mr Stanhope's original request of 6 July 1999 and his request for a review on 29 September 2000. The Ombudsman found, among other things, that:

- 'Departmental records on key aspects of processing and decision-making are either non-existent or inadequate';
- 'the Department's handling of the original FOI decision [in 1999] was not in accordance with the objectives of the FOI Act' or with departmental guidelines in place at the time;
- 'the department failed in November/December 2000 to identify appropriately the documents sought by Mr Stanhope' in late 2000;
- 'the Department did not comply with the requirements of section 27 of the FOI Act [on contacting third parties] in relation to the release of Lend Lease documents in September 1999'; and
- 'the Department did not meet the requirements of section 25 of the FOI Act' [on reasons statements] in any of the five documents examined by the Ombudsman.

B9.9 These findings by the Ombudsman are largely in accordance with the findings of the Audit on these particular matters. In regard to the September 2000 request, the Ombudsman found the 'request was handled appropriately and largely in accordance with the guidelines'.

### ASSISTANCE IN MAKING A REQUEST

B9.10 Chapter A3 reports that departments did not always consult with applicants about the scope and nature of requests, even when such consultation was clearly of benefit. Case study B9.1 demonstrates this point. Chapter A3 also reported that the handling of transfers of requests was in some instances poor. Case study B9.2 raises issues about the transfer of requests and about the provision of advice to an applicant as to the location and availability of documents.

#### Case Study B9.1: Request 99/9451

B9.11 On 9 July 1999 the decision maker<sup>82</sup> was advised of Mr Stanhope's request of 6 July 1999 by the FOI co-ordinator for Chief

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<sup>82</sup> Mr Mick Lilley, then Executive Director of OFM.

Minister's. The co-ordinator's minute to the decision maker advised that:

As the request appears to be quite extensive and broadranging there are a number of options available to the decision maker:

1. refuse the request under s23 of the Act on the grounds that the request is too resource intensive; and
2. approach Mr Stanhope requesting him to compartmentalise the request which will clarify the exact nature of the documents he is seeking and this may reduce the breadth of the request.

B9.12 On 13 July 1999, the co-ordinator wrote to Mr Stanhope to advise that 'Your request has been forwarded to the appropriate line areas of the Department for action. Under the Act we are obliged to notify you of a decision on access by 7 August 1999 unless an extension has been negotiated with you'. No mention was made of concerns over the scope of the request. On 20 July an official contacted the decision maker's office on the size of the request and again suggested 'the option of asking Stanhope to "refine" the request'. Two letters were drafted for the decision maker, requesting refining of the request and raising the prospect of refusal under section 23. Neither was sent.

B9.13 On 3 August 1999, the decision maker advised Mr Stanhope of his decision. This was not to release certain documents expressly identified by Mr Stanhope, but 'to release to you all documents associated with your request except those outlined' as exempt documents in the letter. The letter noted that the request was 'very broad'. 'A faster response to your request would be facilitated if we could have a personal discussion to refine the issues in which you are interested. Depending on your requirements, it may be necessary to extend the due date beyond 7 August'.

B9.14 Mr Stanhope wrote to the FOI co-ordinator on 9 August 1999 requesting an internal review of the decision not to release the documents identified in the decision maker's letter. Mr Stanhope noted that the decision maker 'also mentioned it might be necessary to extend the due date for material he has agreed to release beyond 7 August. As that date has passed, can you please tell me when I can expect to receive the material?'.

### ***Audit Comment***

B9.15 The decision maker was advised of the value of consultation with the applicant on 9 July 1999, but did not offer to discuss the request with

the applicant until 3 August 1999, a few days before the due date for a response. It would have been more helpful if the applicant had been approached soon after the receipt of the request. On the other hand, the Audit notes that the decision maker chose not to invoke section 23 of the Act to refuse access on the ground that the request would substantially and unreasonably divert the resources of the agency. Processing of the request continued and a release of documents was made on 21 September 1999.

### **Case Study B9.2: Request 00/4096**

B9.16 On 14 March 2000, Mr Stanhope made an FOI request to the then Treasurer, Gary Humphries, ‘for access to all documents in your possession, or in the possession of any other government agency, that relate to arrangements for the recent Ultimate Rock Symphony at Bruce Stadium’. Mr Stanhope wrote that he was ‘particularly interested in correspondence or contracts relating to the financial and insurance arrangements between the Territory, Bruce Operations Pty Ltd [BOPL] and the promoters of the concert’.

B9.17 The request was forwarded to the appropriate line area of Treasury. The decision maker was the then Director of Financial Management.<sup>83</sup> His response of 14 April 2000 informed Mr Stanhope that:

Enquiries reveal that no documents in relation to this request are in the possession of the Department. I believe that no such documents are in the possession of any other agency. However, I am aware that Bruce Operations Pty Ltd does hold such documents and therefore recommend that this request be forwarded to them. I am also aware, having spoken with representatives from Bruce Operations Pty Ltd, that they are making separate arrangements for the release of the contract in relation to the Ultimate Rock Symphony between Bruce Operations Pty Ltd and the International Touring Company. This release is separate to this FOI request but relates, as I understand it, to a request that has been made in the Legislative Assembly.

### ***Audit Comment***

B9.18 At the time of the decision maker’s response to Mr Stanhope, a large number of documents on the Symphony were in a filing cabinet outside the decision maker’s office in Treasury. These documents were in

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<sup>83</sup> Mr Andrew Clark.

constant use by the decision maker and other Treasury staff. The decision maker, in particular, was heavily involved with arrangements for the Symphony from its inception in May 1999 to June 2000.

B9.19 The decision maker apparently held the view that the requested documents, while physically located in the Treasury offices, and administered by himself and other officers of Treasury, were BOPL documents which Treasury was not in a position to provide to the applicant.

B9.20 The position taken by the decision maker is without substance. The ACT Government Solicitor's Legal Bulletin No. 40 (August 1999) advises that:

In determining whether a document is in the possession of an agency the considerations include:

- the purpose for which the documents are created;
- the capacity in which Territory officers create or handle the documents; and
- whether the agency is in a position to exercise control over the documents.

B9.21 Given that BOPL was wholly owned and operated by the Territory, all documents on BOPL files would appear to have been created for a Territory purpose.

B9.22 The capacity in which officers such as the decision maker created and handled the documents may appear more ambiguous, but, again, given that BOPL was wholly government owned and the Treasury officers handling and creating documents on the Symphony were full-time public servants, it would appear unrealistic to distinguish between their work as public servants in general and as public servants standing in some relationship to BOPL.

B9.23 The two points above are supported by the way that the documents were created and handled. Most of the documents inspected by the Audit on the Symphony passed through OFM/Treasury. Most of the letters and faxes sent by the then Director of Financial Management in managing arrangements for the Symphony were on OFM/Treasury letterhead. Incoming correspondence was often addressed to BOPL but was nevertheless largely directed to the OFM/Treasury mail and fax addresses, and was often stamped as received in the Under Treasurer's Office.

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B9.24 In relation to the third consideration of whether Treasury was in a position to exercise control over the documents, the Audit notes that the Department clearly did exercise this control. Both the then Chief Executive of Treasury and the then Director of Financial Management had previously searched BOPL files and released BOPL documents in response to other FOI requests by Mr Stanhope. In October 1999 the then Director of Financial Management provided the Auditor-General's Office with copies of documents prepared in the preliminary stages of contract negotiations for the Symphony. He faxed these to the Audit from Treasury under OFM cover sheets. Details of the Symphony and a copy of the contract with the promoter were provided by the Chief Executive of Treasury in a letter to the Audit on 13 January 2000. This letter was on Department of Treasury and Infrastructure letterhead. In all of these cases the officers were acting solely in their capacity as Treasury officials.

B9.25 The above paragraph shows that Treasury had exercised control over a range of BOPL files including files related to the Symphony. The Audit also notes that in providing its responses to the Bruce Stadium Audit, Treasury created new documents on the Symphony, which should have been considered for release in response to Mr Stanhope's request, in addition to the main body of documents discussed above.

B9.26 From the above comments, the Audit's view is that documents relevant to the applicant's request were in the possession of Treasury. Further, if the decision maker had concluded that this was not the case, he should have advised the applicant of this conclusion and of his reasons for it.

### *Further Audit Comment*

B9.27 Having decided that no documents on the Symphony were in the possession of Treasury, the decision maker advised the applicant to forward his FOI request to BOPL. The definition of 'agency' in the FOI Act, however, excludes incorporated companies such as BOPL. The applicant was therefore being advised to forward his FOI request to an entity which was not subject to the FOI Act and which was under no obligation under the Act to respond to the request.

B9.28 The Audit notes that the exclusion of incorporated companies such as BOPL from the Act provides a convenient means for governments to attempt to avoid the Act. The government can create an incorporated

company, which is completely under the control of the government, and yet which is not subject to the FOI Act.<sup>84</sup>

## **PROCEDURES FOR HANDLING REQUESTS**

B9.29 Chapter A4 reported that reasons statements provided by decision makers were often cursory and unhelpful. Case study B9.3 demonstrates this problem.

### **Case Study B9.3: Request 99/9451**

B9.30 Chief Minister's and Treasury made considerable use of section 39 as a reason for exempting documents requested by Mr Stanhope. Section 39 says:

39 (1) Subject to subsection (2), a document is an exempt document if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Territory or of an agency.

39 (2) This section does not apply to a document the disclosure of matter in which under this Act would, on balance, be in the public interest.

B9.31 In a response to Jon Stanhope on 3 August 1999, the decision maker<sup>85</sup> used section 39 as a reason for exempting certain documents from release. The reasons statement reproduces section 39 and states:

I am of the opinion that disclosure of the documents would have a substantial adverse effect on the revenue base of the Territory. No overriding public interest has been identified which would be satisfied through disclosure of the documents within the meaning of sub section 39(2) of the Act.

### ***Audit Comment***

B9.32 The reasons statement is no more than a quoting of section 39 and

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<sup>84</sup> The problem is therefore similar to the limitation on the FOI Act arising from the contracting out of government services. The Administrative Review Council has in this regard recommended that the Commonwealth FOI Act 'should be amended to provide that all documents in the possession of the contractor that relate directly to the performance of the contractor's obligations under the contract would be deemed to be in the possession of the government agency' ('The Contracting Out of Government Services', p. xiii).

<sup>85</sup> Mr Mick Lilley.

an assertion that subsection 39 (1) applies and subsection 39 (2) does not. Exactly the same words were used by the same decision maker in a response to Mr Stanhope on 21 September 1999 in regard to a different set of over 30 documents.

B9.33 Mr Stanhope wrote to the decision maker to ask for a reasons statement that complied with paragraph 25 (1) (a). The decision maker responded by quoting the paragraph and stating that 'In my letter I provided information regarding the nature of the exemption claimed and the reasons for my decision'. Nevertheless, the decision maker attached to his reply 'a further explanation of the reasons for the decision for the exemptions made under sections 37, 39 and 45'.

B9.34 The attachment states in regard to section 39: 'I do not consider that any public interest in making the contracts available would override the need to protect the Territory's financial interest'. This is an unsatisfactory explanation, which suggests little if any consideration of the public interest in the release of the documents or the financial and property interests of the Territory or a weighing of the two.

B9.35 Given the public discussion then current, an element of the public interest that should have been addressed by the decision maker was the public's interest in being informed of the matters under discussion. The Stadium redevelopment involved significant expenditure of public money. When the decision maker made his response, a vote of no-confidence in the Chief Minister had just been narrowly lost in the Legislative Assembly on the Stadium redevelopment.

## **LOCATING DOCUMENTS**

B9.36 Chapter A5 reported that a lack of documentation on the processing of requests raised doubts about the quality of searches undertaken. Case study B9.4 shows that a large number of relevant and available documents were not found and identified to Mr Stanhope.

### **Case Study B9.4: Request 99/9451**

B9.37 On 21 September 1999, the decision maker<sup>86</sup> provided Mr Stanhope with a schedule of 8 documents falling within the request for information in regard to the Lend Lease tender. A year later, on 29 September 2000, Mr Stanhope wrote to the Chief Executive of Chief

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<sup>86</sup> Mr Mick Lilley.

Minister's<sup>87</sup> in the light of the release of the Auditor-General's reports on the Bruce Stadium redevelopment. In that letter Mr Stanhope requested a review of the decision made about his original FOI request on the Stadium of 6 July 1999.

B9.38 On 3 November 2000, the Chief Executive of Chief Minister's provided about another hundred pages of documentation to Mr Stanhope. He advised that 'I have determined that these documents fall within the scope of your original request, and can be released in full'. He explained that the 'eight documents which were identified in response to your FOI request of 6 July 1999, are documents which were either sent directly to or from Lend Lease in relation to the process for the selection of the Bruce Project Manager'. He further stated:

While the provision of this direct correspondence with Lend Lease might be held to represent a literal response to your FOI request, I do not consider that this approach met the requirements or the objectives of the FOI Act. A more compliant approach would have been to identify all documents relating to the process for the selection of the Project Manager, and then to consider whether any of these documents or parts of these documents needed to be exempt from disclosure in accordance with the provisions of the FOI Act.

***Audit Comment***

B9.39 The Audit agrees with the Chief Executive of Chief Minister's that the original search conducted in 1999 for documents on the Lend Lease tender did not meet 'the requirements or the objectives of the FOI Act'. The Audit also agrees that the proper approach to an FOI request is to identify all documents relevant to the request and then consider whether any documents or parts of documents should be exempted. The Audit notes that the additional material supplied by the Chief Executive comes from the same file from which the original eight documents supplied by the decision maker in 1999 were identified. The additional material supplied by the Chief Executive was therefore readily identifiable by officials in 1999.

B9.40 Mr Stanhope's request of 6 July 1999 also included 'All correspondence and documents including contracts exchanged between the

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<sup>87</sup> Mr Robert Tonkin.

ACT Government and SOCOG'. The schedule sent by the decision maker on 21 September 1999 included documents identified in regard to the ACT's dealings with SOCOG. The Audit has examined the schedule provided by the decision maker and identified a number of files and documents as missing from the schedule. The original search for documents on SOCOG appears to have been deficient. This is in line with the conclusion of the Chief Executive of Chief Minister's in regard to the documents on the Lend Lease tender.

### **CLASSIFYING DOCUMENTS AS EXEMPT**

B9.41 Chapter A6 reported that in many cases the available evidence suggests that officials simply asserted that exemptions applied without any sound supporting reasons. In case study B9.5, the reason given for the use of an exemption merely sounded reasonable and ignored a compelling alternative argument.

B9.42 Chapter A6 also reported that some officials used unacceptable class claim arguments for exemptions. In case study B9.6 a class claim argument is discussed.

#### **Case Study B9.5: Request 99/9451**

B9.43 In the two responses to Mr Stanhope's first request dated 3 August and 21 September 1999, the decision maker<sup>88</sup> made use of section 45 (documents containing material obtained in confidence) as a ground for exempting from release the tender by Lend Lease to manage the redevelopment of Bruce Stadium. The decision maker referred to the Australian Standard Code of Tendering, which stated that 'All information provided between tenderers and the Principal shall be treated as confidential information'. He continued: 'I am satisfied that the tenders were submitted and accepted on the basis that they be treated as being in confidence and disclosure would be a breach of that confidence'.

#### ***Audit Comment***

B9.44 The decision maker made no mention of the Expression of Interest (EOI) documentation sent to all tenderers in December 1996, which stated that:

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<sup>88</sup> Mr Mick Lilley.

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It is a condition of responding to this Expression of Interest that the Developer agrees as follows:

(1) Copyright in all material submitted to the Territory is assigned to the Territory. Where such copyright is owned by any person other than the Developer, the Developer shall ensure the assignment of that material to the Territory before submitting it.

(2) All material submitted to the Territory is free from any confidentiality or like restriction which may limit its use by the Territory.

B9.45 The tenders were submitted and accepted on these bases. The Audit notes that the decision maker was a member of the tender assessment panel and therefore would be expected to have been familiar with the EOI documentation.

B9.46 The Audit further notes that several other officials in 1999 were aware of these provisions in the EOI. On 27 August 1999, Mr Stanhope made a new request for, among other things, the confidentiality clauses in tender documentation lodged with the Government by Lend Lease. A file note between two officials engaged in responding to this request noted that, in regard to the Lend Lease documentation, ‘no confidentiality clause exists (this was in the Expression of Interest – no need to advise Stanhope of this)’ (underlined in original). A minute from an official to the decision maker for this request<sup>89</sup> stated that ‘I have been advised that there is no confidentiality clause in any documentation lodged by Lend Lease in their bid for the Stadium redevelopment tender and that in fact the call for Expressions of Interest released by the Department expressly prohibited such clauses’.

B9.47 The Audit’s concerns at the reasoning used to exempt the Lend Lease tender document are supported by later assessment by other officials. A file note of a meeting of three officials on 25 September 2000 confirms that the EOI was considered compelling evidence in releasing the Lend Lease tender documentation.

### **Case Study B9.6: Request 00/13697**

B9.48 On 29 September 2000, Mr Stanhope wrote to the Chief Executive

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<sup>89</sup> Mr Andrew Clark.

of Chief Minister's<sup>90</sup> in the light of the release of the Auditor-General's reports on the redevelopment of Bruce Stadium. In that letter Mr Stanhope requested a review of the decision on his original FOI request on the Stadium made on 6 July 1999. Among other things, he raised the provision of executive documents that had been identified in the Audit's reports.

B9.49 The Chief Executive's letter to Mr Stanhope of 3 November 2000 identified a number of documents that he had decided to release. He also noted that work was continuing to identify certain notes to and from ministers. These documents he considered could be regarded as exempt documents under section 36. His reasoning was that the public interest was served by keeping internal working documents private, in order 'to maintain and protect the frankness and freedom of advice from officials to Ministers'. The Chief Executive continued:

The release of such documents, particularly when the issues to which they relate are still current could give rise to difficulties in the relationship between Ministers and officials and might in some circumstances impact on the nature of advice that is offered or the proper documentation of such advice. It is for these reasons that there is a general convention that such advice is considered to be 'privileged' and thus not generally sought in forums such as Senate Estimates committees.

As this is an issue which affects successive Governments, I would appreciate your views on this matter, and in particular the circumstances in which you would consider that such material should not be withheld on public interest grounds. In the light of your response, I will consider whether the documents in this category which fall within the scope of your request should be released, or whether an exemption should be claimed.

B9.50 Mr Stanhope provided his views on this matter to the Chief Executive on 8 November 2000. Mr Stanhope stated:

In relation to your comments on section 36, including the public interest test, I understand that the Administrative Appeals Tribunal, particularly the Commonwealth Tribunal, has made a number of persuasive decisions outlining the application of this section.

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<sup>90</sup> Mr Robert Tonkin.

Furthermore, in relation to any claim for exemption, I understand that the decision-maker within the department is required to examine each document and determine whether or not it is to be released or not. If there is a public interest test, the decision-maker must take into account a range of factors concerning the particular document. There is no blanket rule covering all documents merely because they are between departments or ministers or indeed Cabinet Decisions or Submissions. A decision must be taken on each document bearing in mind its contents and context.

B9.51 On 8 December 2000 the Chief Executive provided the documents in question to Mr Stanhope.

*Audit Comment*

B9.52 The Chief Executive's letter of 3 November 2000 advances a class claim argument for exempting documents. As pointed out in chapter A6 and in Mr Stanhope's reply, such a view is contrary to a large body of legal decisions. It is also contrary to the advice of the Government Solicitor, who should have been consulted if the Chief Executive was unclear about how to handle the applicant's request. The Chief Executive appears to have sought the applicant's view because the applicant in this case might one day lead the Government. Asking Mr Stanhope's opinion simply because he was the Leader of the Opposition raises an important question of administrative practice. It is well established that the decision making process in regard to an FOI request should be unaffected by who the applicant is or the likely use of the information if it is provided.<sup>91</sup>

B9.53 Reliance on a convention as a ground for exemption was specifically dealt with and dismissed by the AAT in 1992 in *Re Weetangera Action Group*. The argument presented to the Tribunal was that there was a 'constitutional convention that deliberative documents of a former government are not available to a subsequent government, and that the requirement to observe this convention constituted reasonable grounds for a claim that disclosure would be contrary to the public interest'.

B9.54 The President of the Tribunal rejected this line of argument completely, citing what he had said in *Re Bartlett and Department of Prime Minister and Cabinet*:<sup>92</sup>

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<sup>91</sup> See, for example, *Re Waterford and Department of Health* [1995] ACTAAT 104.

<sup>92</sup> (1987) 12 ALD 659 at 666.

Yet the convention, unlike the FOI Act, is not based on the information contained in the document or documents in question, but is rather based on their source. It seems to me to follow that the convention ought to be left to be worked out as a convention operating as between outgoing and incoming Ministers of different political persuasions under a self-denying ordinance accepted by the latter. It cannot operate of itself to deny to citizens such rights as they otherwise have under the FOI Act. Given the existence of the FOI Act, it is, with respect, hard to predict how much life the convention could have left. For present purposes it is enough to say that in my opinion the existence of the convention does not constitute reasonable grounds for a claim that disclosure of the present documents would be contrary to the public interest.

B9.55 The Audit notes that while the Chief Executive's letter of 3 November 2000 advanced a class claim argument for exempting all internal working documents, the Chief Executive ultimately provided the documents in question to the applicant.

### **RESPONSE TIMES**

B9.56 Chapter A7 reported that some requests were unreasonably delayed for various reasons including inadequate search for documents and incorrect use of exemptions. These problems contributed to delays in responding to the Bruce Stadium requests.

B9.57 Chapter A7 also reported that some extensions of time under sections 18 and 27 were poorly handled. Case study B9.7 demonstrates this problem.

B9.58 More generally, the Audit would note that much of the information requested by Mr Stanhope was received more than a year after his first request was lodged. The Audit also notes that much of this material was released prior to a hearing of the AAT on the matter. Such behaviour suggests that officials no longer felt that the withholding of these documents was necessary or defensible. This raises the question of why officials did not release the documents at the time of the initial request, rather than forcing the applicant to undergo the lengthy and costly process of pursuing the documents through the AAT.<sup>93</sup>

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<sup>93</sup> Some AAT decisions also raise the problem of documents being made available prior to or during AAT hearings. See *Re E and Chief Executive under the Children & Young People Act 1999* [2000] ACTAAT 38; *Re Schofield and ACT WorkCover* [2000] ACTAAT 30.

**Case Study B9.7: Request 99/9451**

B9.59 The decision maker<sup>94</sup> was advised of Mr Stanhope's first request by the FOI co-ordinator for Chief Minister's on 9 July 1999. The co-ordinator's minute to the decision maker advised that:

Given that the release of some of [the] documents may adversely affect the business affairs of other parties, under s27 of the Act the Department is required to consult with those organisations before making a decision on the release of the documents. Utilisation of s27 will then automatically extend the deadline by 15 days to 24 August 1999.

B9.60 On 13 July 1999, the co-ordinator wrote to Mr Stanhope to advise that 'Your request has been forwarded to the appropriate line areas of the Department for action. Under the Act we are obliged to notify you of a decision on access by 7 August 1999 unless an extension has been negotiated with you'. No mention was made of a possible extension of time under section 18 in order to allow for consultation with third parties under section 27.

B9.61 On 3 August 1999, the decision maker advised Mr Stanhope of his decision, which was not to release certain documents expressly identified by Mr Stanhope, but 'to release to you all documents associated with your request except those outlined' as exempt documents in the letter. The letter noted that an extension of time might be necessary given the number of documents covered by the request. Again, however, no mention was made of a possible extension of time under sections 18 and 27.

B9.62 In mid-August a Treasury officer contacted Mr Stanhope's office seeking an extension for a response to 27 August 1999.<sup>95</sup> In an undated letter received by Mr Stanhope on 25 August 1999, the decision maker advised that the correspondence requested, including documents between the ACT Government and SOCOG, would be made available on 27 August 1999. Again, no mention was made of a possible extension of time under sections 18 and 27.

B9.63 According to one official, it was some time after 16 August 1999

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<sup>94</sup> Mr Mick Lilley.

<sup>95</sup> The OFM was split from Chief Minister's to form the new Department of Treasury and Infrastructure in August 1999. The handling of the request was therefore transferred from Chief Minister's to Treasury.

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that officials became aware of the provision in the memorandum of understanding (MOU) between SOCOG and the ACT that no documentation was to be released without SOCOG's approval.

B9.64 On 27 August 1999, the decision maker advised Mr Stanhope that the information requested by Mr Stanhope had been compiled, but that 'a large number of the documents are either from or to SOCOG. The MOU requires that any information related to SOCOG must not be released, except with the express agreement of SOCOG. This agreement is in the process of being sought, however given the large number of documents in question, this will take a few days'. The letter to SOCOG seeking agreement to the release of the documents was sent by the decision maker on 26 August 1999.

### *Audit Comment*

B9.65 The handling of this matter was poor. While the FOI co-ordinator had advised the decision maker at an early date of the need to consult third parties, this advice was not acted upon.

B9.66 The file shows no indication that third parties were consulted other than SOCOG, and this was seemingly only because the MOU with SOCOG required it and not because of any regard to section 27.

B9.67 Even though no mention was made of consulting with the Brumbies, Raiders, Cosmos or Lend Lease, the documents to be released in regard to these third parties were not released until approval had been received from SOCOG for the release of documents in relation to SOCOG.

B9.68 The failure to contact SOCOG at an early stage is likely to have resulted in an extension of the response time by about four weeks. While SOCOG may have asked to see which documents were involved, this could have been expedited by providing documents to SOCOG as they became available. This also would have presumably led to SOCOG reminding officials of the MOU provision which officials apparently had forgotten. Following the Opposition's call in April 1999 for the MOU to be released, the MOU's confidentiality provision had been closely discussed by senior officials. This was shortly before the request for documents was received.

B9.69 The legitimate interests of third parties (notably, the Brumbies, Raiders, Cosmos and Lend Lease) were ignored as none of these parties

was consulted about the request.<sup>96</sup> The failure to contact Lend Lease at this stage contributed to a problem that would not be resolved until late 2000 when Lend Lease documents were released to Mr Stanhope prior to an AAT hearing. Lend Lease appears not to have been contacted until 26 June 2000.

## INTERNAL REVIEWS

B9.70 Chapter A8 reported that some internal reviewers did not provide an adequate reasons statement for their decisions and apparently gave little serious attention to their task. Case studies B9.8 and B9.9 demonstrate this problem.

### Case Study B9.8: Request 99/9451

B9.71 The first response to Mr Stanhope on 3 August 1999 indicated that certain documents would not be released and that the remainder of the documents sought would take some time to collect. Mr Stanhope sought an internal review of the decision not to release certain documents on 9 August 1999. The decision was affirmed by the reviewer<sup>97</sup> on 25 August 1999.

B9.72 On 21 September 1999 a second response on the release of documents was sent to Mr Stanhope. An internal review was sought on 29 September on part of the decision of 21 September, which refused access to a particular document. The decision in regard to this document was affirmed by the reviewer<sup>98</sup> on 11 October 1999.

### *Audit Comment*

B9.73 The first review advised:

I have examined afresh all the documentation and material relating to the decision given by the decision maker, Mr Mick Lilley, on 3 August 1999. I affirm the findings and the reasons given for the decision.

B9.74 No reasons statement was given as required by the legislation. The

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<sup>96</sup> The hirers were contacted in September 1999 about the release to Mr Stanhope of the confidentiality clauses in the hiring agreements for Bruce Stadium. This was in response to a different request for information by Mr Stanhope. The hirers had also been contacted about the release of the hiring agreements to the Legislative Assembly in May and June 1999.

<sup>97</sup> Mr Rod Gilmour, Chief Executive of Chief Minister's.

<sup>98</sup> Mr Rod Gilmour, Chief Executive of Chief Minister's.

file containing this letter gives no indication of the ‘documentation and material’ examined by the reviewer.

B9.75 The file on the second internal review reveals the following process. The FOI co-ordinator wrote a minute on 30 September 1999 to the Chief Executive of Treasury<sup>99</sup> recommending that the Chief Executive of Chief Minister’s again be the reviewer. The minute included Mr Stanhope’s original request of 6 July 1999, the response letter of 21 September 1999 and Mr Stanhope’s request for an internal review. A copy of the minute was subsequently sent to the reviewer on 11 October 1999, with a note attached saying ‘Mick Lilley has requested that you undertake the Internal Review. The attached minute to Mick outlines the background to the request. A suggested response is attached for your signature’. The reviewer signed a letter that day stating ‘I have examined afresh all the documentation and material relating to the decision given by the decision maker, Mr Mick Lilley, on 21 September 1999. I affirm the findings and the reasons given for the decisions’.

B9.76 Again, no reasons statement was provided by the reviewer, and the other documentation on file suggests little consideration was given to the matter.

### **Case Study B9.9: Request 99/14712**

B9.77 On 12 November 1999, a decision maker<sup>100</sup> responded to a request by Mr Stanhope for documents on optimal seating arrangements at Bruce Stadium. Following a discussion between the decision maker and a member of Mr Stanhope’s staff, a further document was provided on 6 December 1999.

B9.78 On 8 December 1999 a request for internal review was received from Mr Stanhope. This letter stated, in part, that ‘in his decision, Mr Clark states that there are only three documents falling within the scope of my request. In discussion between Mr Clark and one of my staff, another seven documents were identified. I believe that there are still further documents that would fall within the request’.

B9.79 A minute dated 8 December 1999 from the FOI co-ordinator to the reviewer<sup>101</sup> provided a copy of the original request from Mr Stanhope, the

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<sup>99</sup> Mr Mick Lilley.

<sup>100</sup> Mr Andrew Clark.

<sup>101</sup> Mr Mick Lilley.

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response letter of 12 November 1999 and Mr Stanhope's request for review. The reviewer's response of 21 December 1999 stated 'I have examined all documentation and material relating to the original decision... I affirm the findings and the reasons given for the decision'.

### *Audit Comment*

B9.80 The reviewer's response did not provide a reasons statement. The material provided to the reviewer by the FOI co-ordinator was insufficient for an informed review. There is no evidence on file that any other material was considered by the reviewer. In particular, there is no evidence that the reviewer examined Mr Stanhope's claim that other documents had been identified by the original decision maker.

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A9.*

## **B10. REPORTED DATA**

*Chapter A10 contains a summary of this chapter and should be read first.*

### **LEGISLATIVE REQUIREMENTS**

#### **Reporting Requirements for All Agencies**

B10.1 Subsection 79 (2) of the FOI Act requires the responsible minister of each agency to prepare a report on the operation of the Act ‘in relation to that Minister’s official documents and in relation to each agency for which that Minister is responsible’. The minister is required to lay that report before the Legislative Assembly.

B10.2 A report under subsection 79 (2) shall set out 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 the document or documents requested, 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 a 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.

#### ***Audit Review of Compliance with the Legislation***

B10.3 The Audit reviewed the data on FOI requests presented in each department’s annual report for 1999-2000.

B10.4 As discussed in chapter B5, Justice and Urban Services had significant problems in identifying and locating files on FOI requests. There was confusion among officials about whether some requests had been made or whether they were or should have been counted as requests. Several initial request and internal review files were unable to be found and the registers of requests were incomplete or inconsistent. The Audit also identified minor errors in reporting by other departments.

*Audit Comment*

B10.5 Annual reports of agencies generally met the reporting requirements of section 79 of the Act, although in several cases the data reported by agencies were inaccurate or unverifiable. The figures presented in annual reports should be regarded as no more than reasonable estimates.

**Reporting Requirements for the Attorney-General**

B10.6 Section 79 details the particular reporting responsibilities of the minister responsible for the Act, in this case, the Attorney-General. Subsection 79 (1) requires the minister to prepare a report each year on the operation of the Act, for inclusion in the annual report of the department responsible for administering the Act. Subsection 79 (3) requires the responsible ministers of agencies to provide the minister responsible for the Act with the information required by the minister in the preparation of the overview report.

B10.7 Subsection 79 (3A) specifies that the overview report should contain:

- the number of requests for access to documents received during the year by each agency and responsible minister;
- the number of requests for the amendment of personal records received during the year by each agency and responsible minister;
- a breakdown of the time taken to notify the applicant of a decision in regard to requests for access to documents and amendment of personal records, by each agency and responsible minister;
- an identification of any guidelines issued during the year in relation to the manner in which agencies or responsible ministers should comply with their obligations under the Act; and
- a description of any other efforts to assist agencies or responsible ministers to comply with their obligations under the Act.

*Audit Review of Compliance with the Legislation*

B10.8 The Audit reviewed the overview provided in Justice's 1999-2000 annual report. The overview provided the statistical material required under subsection 79 (3A) and a very brief statement in fulfilment of its requirement to identify guidelines or assistance provided during the year. This statement simply said that no legislative amendments or changes to fees and charges were made during 1999-2000.

B10.9 The overview also provided information on the number of requests for internal review by agency, and a table of outcomes of primary requests by agency, for 1999-2000. This information was not required under the Act.

*Audit Comment*

B10.10 The overview in the Justice annual report generally met the requirements of the Act, although there are mistakes and omissions in the reported data. Moreover, the data reported by Justice in the overview can only be as accurate as the data received from the reporting agencies. As discussed above, there are concerns about these data. The figures presented in the overview should therefore be regarded as no more than reasonable estimates.

B10.11 The Audit notes that the data to be provided by agencies and in the Justice overview differ. Each agency is required to report on the decisions made but not the time taken, while the Justice overview is required to report on the time taken but not the decisions made. It would be simpler and more consistent if the data to be reported in the annual reports of agencies and in the Justice overview were the same. Such a change could be achieved through an amendment of the Act or through a change in the Chief Minister's annual report directions.

**DATA ON OUTCOMES OF REQUESTS IN 1999-2000**

B10.12 The Justice overview for 1999-2000 included a table on the results of requests. Data from the overview are reproduced as Table B10.1.

B10.13 As the table shows, the reported number of applications in 1999-2000 was 220<sup>102</sup>. Of these, 101 (46%) resulted in full release, 111 (50%) in partial release and 8 (4%) in refusals.

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<sup>102</sup> The total of 220 excludes requests carried over to the next year (that is, where no decision had been made by 30 June 2000), technical refusals (that is, the documents requested did not exist) and withdrawals.

<b>Table B10.1: Reported Outcomes of Requests Received During 1999-00</b>				
<b>Department</b>	<b>Full Release</b>	<b>Partial Release</b>	<b>Refusal</b>	<b>Total</b>
Urban Services	63	53	2	118
Education	10	27	1	38
Health	9	10	–	19
Justice	6	11	–	17
Treasury	2	5	3	10
Chief Minister's	3	4	1	8
Other	8	1	1	10
<b>Total</b>	<b>101</b>	<b>111</b>	<b>8</b>	<b>220</b>

Source: Justice, *Annual Report 1999-2000*, p. 102.

### **Conclusions to be Drawn from Reported Data**

B10.14 The published figures have been given prominence in public debate.<sup>103</sup> The Audit's view, however, is that little can be drawn from the figures for the following reasons

B10.15 Firstly, the Audit has observed a number of problems in records management and the reporting of statistical information by departments, including Justice (see previous comments and chapters A5 and B5).

B10.16 Secondly, the figures are not evidence of the extent of search undertaken or the level of release of documents. The figure for full release is only meaningful if agencies have made a reasonable search for relevant documents and have provided all of the relevant documents found. Both matters would need to be tested before accepting the reported figure. The same point applies to the figures for refusal and technical refusal. The partial refusal figure, even if accurate, conveys no meaningful information about the level of release. A partial refusal may involve very minor deletions and provide all the information the applicant wanted. Alternatively, it might involve such vigorous pruning that the material provided is useless to the applicant. For this half of the requests all that is reported is that the level of release was somewhere between nothing and everything.

B10.17 Thirdly, the reported figures provide no evidence that the decisions made were good decisions. Determining whether to release a document requires balancing a range of reasons for and against its release. Whether

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<sup>103</sup> See "FOI: 'fewer than half' fully filled", *The Canberra Times*, 23 February 2000, p. 4.

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this balance has been achieved is in no way indicated by the proportion of requests that receive full or partial release or are refused.

B10.18 Similarly little insight about the operation of the Act can be gained by comparing the results in the ACT in 1999-2000 with earlier years or with other jurisdictions. Such comparisons could only be meaningful if the quality of the data for each year or jurisdiction had been tested. Even then, comparisons could be misleading. For example, other legislation or administrative practices for the release of information could affect the overall results for FOI requests. One jurisdiction might require all requests for information to be made under FOI legislation while another jurisdiction might routinely make information available through other means. Under these circumstances, one would expect the first jurisdiction to have higher rates of full release of documents than the second jurisdiction. This is because the second jurisdiction has more open access in general and therefore fewer requests under FOI legislation. These fewer requests are, however, likely to be less routine and therefore more likely to fail.

B10.19 Similar problems apply to comparisons between departments. As pointed out in chapter B2, departments do not receive the same types of requests.

### *Audit Comment*

B10.20 Commonly used statistical data on the outcome of requests do not provide information on the quality of the deliberative process in handling FOI requests or of the searches undertaken for documents. This is not to say that the figures should not be reported, but simply to warn against placing any reliance on the figures as an indication of the quality of decisions or of compliance with the Act.

## NUMBER OF INTERNAL REVIEWS REPORTED

B10.21 The overview of the FOI Act in the Justice annual report for 1999-2000 includes a table showing the number of requests for internal review in that year. The table shows there were 31 requests for internal reviews of decisions. When compared with the total number of original requests for 1999-2000 of 273, this suggests that about 11% of all requests resulted in requests for internal review.

### **Conclusions to be Drawn from Reported Data**

B10.22 That 11% of all requests result in internal review might seem a small, moderate or large number depending on one's perspective.

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B10.23 The Audit is of the view that the number of requests for internal review is not a measure of the quality of the decisions made. That an applicant has sought an internal review is simply an indication of the views of the applicant. The Audit also notes that some internal reviews do not deal with decisions on the release of documents but with other matters, such as the levying of fees and charges.

B10.24 More generally, the number of requests for internal review is not necessarily an indication of the overall view of applicants. The 89% of applicants who did not seek an internal review may have been generally happy with the original decision. Alternatively, a large number may have been unhappy with the decision but unwilling to pursue the matter further with the agency.

### *Audit Comment*

B10.25 As with data on the outcome of requests, the number of internal reviews does not provide information on the quality of the deliberative process in handling FOI requests or of the searches undertaken for documents.

## COMPLAINTS TO THE OMBUDSMAN

B10.26 Under subsection 54 (1) of the FOI Act, 'a person may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under this Act'. The Ombudsman has an investigative and recommendatory role while the Administrative Appeals Tribunal, discussed later, has a deliberative and determinative role.

B10.27 In 1999-2000 the Ombudsman received 14 complaints in regard to FOI matters. This was a relatively high number. From 1995-96 to 1998-99, the number of complaints received ranged from 5 to 9. In 2000-01 seven complaints were received.

B10.28 In 1999, the then Attorney-General and the then Executive Director of the Policy and Regulatory Division in Justice advised the Standing Committee on Justice and Community Safety that the low numbers of complaints to the Ombudsman and appeals to the AAT are

‘very strong evidence that the [FOI] system is working’.<sup>104</sup>

### **Conclusions to be Drawn from Reported Data**

B10.29 The small number of complaints to the Ombudsman cannot be assumed to indicate a general satisfaction among applicants with FOI decisions or that the administration of the Act is working well. It might simply indicate that many applicants who are unhappy with decisions decide not to take their concerns to the Ombudsman. Other applicants may be unaware of failings in the handling of their requests or of their right to complain to the Ombudsman. Such concerns were acknowledged by officials of the Ombudsman’s Office to the Standing Committee on Justice and Community Safety. Applicants could be worn out by the time it came to consider complaining to the Ombudsman; they may accept the expression ‘commercial-in-confidence’ as a sufficient reason for refusing to release a document; and they may not be informed of their right to complain.<sup>105</sup>

B10.30 The Audit shares these concerns. Most of the failings in the handling of requests noted by the Audit did not result in a complaint to the Ombudsman. It would seem that applicants were unaware of these failings or chose not to pursue them with the Ombudsman. In requests examined by the Audit, departments usually notified applicants of their right to complain to the Ombudsman, but this was not always the case.

### ***Audit Comment***

B10.31 The small number of complaints to the Ombudsman is not strong evidence that the administration of the Act is working well. Similarly, no significance should be attached to the increases or decreases in the annual number of complaints.

## **APPLICATIONS TO THE AAT**

B10.32 The ACT Administrative Appeals Tribunal (AAT) reviews administrative decisions of ministers, statutory authorities and Territory officials operating under a wide range of acts and regulations. The FOI Act is an area of decision making subject to the AAT.

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<sup>104</sup> Oral submissions to the Standing Committee on Justice and Community Safety, pp. 38-9 and the Attorney-General’s Submission to the Standing Committee on Justice and Community Safety on the Freedom of Information (Amendment) Bill 1998, 12 May 1999, p. 2.

<sup>105</sup> See oral submissions to the Standing Committee on Justice and Community Safety, pp. 87-93.

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B10.33 In 1999-2000, 8 applications were lodged with the AAT on FOI matters. This number was broadly in line with the previous four years when the number of applications ranged from 5 to 12. In 2000-01, 3 applications were received.

B10.34 As mentioned above, officials have argued that the low number of applications to the AAT is a strong piece of evidence that the FOI system is working well.

### **Conclusions to be Drawn from Reported Data**

B10.35 As with complaints to the Ombudsman, the small number of appeals to the AAT cannot be assumed to indicate a general satisfaction among applicants with FOI decisions or that the administration of the Act is working well. Given the emotional and financial costs of taking legal action, many applicants with reasonable complaints may decide against such a course. As the President of the AAT has pointed out, the Tribunal 'has no means of measuring or estimating what proportion of those who may be aggrieved by decisions reviewable by the Tribunal take advantage of the opportunity for review'.<sup>106</sup> Other applicants may be unaware that their requests have been handled poorly.

### ***Audit Comment***

B10.36 The small number of applications to the AAT is not strong evidence that the administration of the Act is working well. Similarly, no significance should be attached to the increases or decreases in the annual number of applications

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A10.*

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<sup>106</sup> 'AAT Annual Report 1998-99', in Justice, *Annual Report 1998-99*, p. 153.

## **B11. GENERALLY AVAILABLE INFORMATION**

*Chapter A11 contains a summary of this chapter and should be read first.*

### **STATEMENTS OF FUNCTIONS AND DOCUMENTS**

#### **Legislative Requirements**

B11.1 Subsection 7(1) of the Act requires the responsible minister of an agency to direct the publication of statements of:

- 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 inquiries concerning access.

B11.2 Subsection 7(2) requires that, in approving the form of publication under subsection 7(1), the responsible minister shall have regard 'to the need to assist members of the public to exercise effectively their rights' under the Act.

B11.3 Subsection 7(3) prescribes that the information described in subsection 7 (1) is to be published in the annual report of the agency or, if the agency does not produce an annual report, 'in the annual report to which the affairs of the agency relate'.

B11.4 The legislative requirements for annual reports are contained in the *Annual Reports (Government Agencies) Act 1995*. The Chief Minister's Annual Reports Directions are issued each year to provide agencies with more detailed information on reporting requirements under the Annual Reports Act. These directions include information on the requirement under the FOI Act to provide a statement on the functions and documents of an agency in the agency's annual report. Justice also provides an annual reminder to other departments of this requirement.

### **Audit Review of Compliance with the Legislation**

B11.5 The Audit reviewed compliance by the departments in 1999-2000 with the legislated requirements for a section 7 statement.

B11.6 Justice provided a detailed statement for the department as a whole and for each of its organisational units. Health provided a comprehensive statement for the Department itself and for Canberra Hospital and ACT Community Care.<sup>107</sup>

B11.7 Urban Services and Education provided shorter statements, which broadly met the requirements of section 7. Further information relevant to FOI requirements was included in other parts of the annual reports of these departments. Education did not identify the facilities available to the public for obtaining physical access to its documents.

B11.8 Chief Minister's and Treasury (which was formerly a part of Chief Minister's) provided the most limited section 7 statements. In particular, they provided no information on organisation, functions and powers, or consultative procedures; and only limited information on the categories of documents in the possession of the departments. The omissions in these departments' section 7 statements were only partly addressed by information provided in other parts of the annual reports. Both departments have considerably expanded their section 7 statements in their 2000-01 annual reports and now provide information in accordance with the requirements of the Act.

B11.9 Annual reports are also available on departmental Internet sites. Chief Minister's and Treasury have also recently placed their new section 7 statements on their Internet sites.

### ***Audit Comment***

B11.10 All departments' annual reports included a section 7 statement on their functions and documents, but the coverage and level of detail varied. Justice and Health provided the most detailed section 7 statements. Following recent improvements to the statements prepared by Chief Minister's and Treasury, the overall standard for the departments is now satisfactory.

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<sup>107</sup> Canberra Hospital and ACT Community Care produce separate annual reports, which are published in a single volume. These reports have shorter and less complete section 7 statements.

## DOCUMENTS AVAILABLE FOR INSPECTION AND PURCHASE

### Legislative Requirements

B11.11 Section 8 of the Act requires agencies to make available to the public copies of certain documents for inspection and purchase. The documents covered by section 8 are those which:

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.

B11.12 These documents could contain information such as:

- interpretations, rules, guidelines, practices or precedents;
- particulars about a scheme;
- the manner in which a scheme or enactment is to be administered or enforced; and
- procedures to be followed in investigating breaches or evasions of an enactment or the law relating to a scheme.

B11.13 The thrust of this section is that agencies must make available the 'internal law' documents which officials use to make decisions.<sup>108</sup> The definition of such documents is potentially very wide and could, for example, include standard letters prepared for use by officers in dealing with the public.

B11.14 An agency is not required to make available a document covered by section 8 if it contains exempt matter (exempt documents are discussed in chapters A6 and B6). If the document is not made available, the agency must, if practicable, prepare a corresponding document with the exempt matter removed.

B11.15 Agencies are further required to provide an index specifying the documents that are available for inspection and purchase and where they may be inspected and purchased. This index is also to be available for inspection and purchase, and is to be updated at least every year.

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<sup>108</sup> Peter Bayne, *Freedom of Information*, Law Book Company, 1984, p. 29.

B11.16 Section 8 also requires that a statement concerning compliance with the requirements of the section be included in the appropriate annual report. The nature of this statement is not specified.

### **Audit Review of Compliance with the Legislation**

B11.17 The Audit tested for compliance in regard to whether:

- the internal law documents specified in section 8 were available;
- an index of these documents was available and whether this index had been updated; and
- annual reports had an appropriate statement on compliance with the requirements of section 8.

### ***Availability of Documents***

B11.18 All departments made certain section 8 internal law documents available to the public on request. However, given the very wide range of documents that could be made available under section 8, it is likely that additional documents could be provided.

B11.19 Section 8 documents could be made more accessible to the public via the Internet. Education and Health make a wide range of their internal law documents available on their Internet sites. Chief Minister's and Treasury provide direct access to documents through their section 8 statements on their Internet sites. Parts of Urban Services and Justice, such as, for example, Planning and Land Management, and the Director of Public Prosecutions, make policies available. There is, however, no central listing of policies for these two departments.

### ***Availability of an Up-to-date Index***

B11.20 All departments had a section 8 index, however, most did not make it as readily available as they could. Health was an exception in 1999-2000 as it published its index in its annual report, even though it was not required to do so by the Act. None of the other departments included an index in its annual report.

B11.21 Annual reports are available on departmental Internet sites; Health's section 8 index is therefore available on the Internet. While Chief Minister's, Treasury and Justice do not include their indexes in their annual reports, they have recently placed them on their Internet sites.

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B11.22 Education does not provide its index on its Internet site. This is an easily rectified omission as the site already provides a large number of the internal law documents which such an index would identify. Education has advised the Audit that it intends to publish its index on its Internet site in the near future. Urban Services does not provide its index on its Internet site.

B11.23 Section 8 indexes have been updated recently by all departments although updates had not been done annually by Chief Minister's, Treasury, Justice or Education.

### *Compliance Statements in Annual Reports*

B11.24 While the nature of the statement on compliance with section 8 to be included in annual reports is not specified, three departments clearly did not meet this requirement as their annual reports made no mention of section 8 whatsoever. As mentioned, only Health included a section 8 index in its annual report. Of the other departments, Urban Services noted the availability of its section 8 index and Justice provided an Internet site address for its index in its 2000-01 annual report. These comments in the annual reports, however, cannot be considered to be statements of compliance with the requirements of section 8 of the Act.

### *Audit Comment*

B11.25 All departments have a section 8 index of documents used in making decisions and recommendations, and make the listed documents available to the public. Given that a very wide range of internal law documents could be made available to the public under section 8, it is likely that these indexes are not as complete as they could be. This concern is heightened by the failure of most departments to update section 8 indexes regularly and by the absence of compliance statements on section 8 in departmental annual reports.

B11.26 Internet sites are a convenient place for making section 8 indexes and documents more accessible to the public. Departments have made reasonable use of the Internet to present information to the public, but the full potential of this technology has yet to be realised.

*The Audit's significant findings and suggestions for future action arising from this chapter are presented in chapter A11.*

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**APPENDIX B**

**PART IV OF THE FREEDOM OF INFORMATION  
ACT**

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## **Part 4 Exempt documents**

### **32 Interpretation for pt 4**

A provision of this part under which documents referred to in the provision are exempt documents—

- (a) shall not be construed as limited in its scope or operation in any way by any other provision of this part under which documents are exempt documents; and
- (b) shall not be construed as not applying to a particular document because another provision of this part of a kind mentioned in paragraph (a) also applies to that document.

### **33 Documents exempt under Commonwealth Act**

(1) Where—

- (a) a request is made to an agency or a Minister for access to a document; and
- (b) the principal officer of the agency, or the Minister, has reasonable grounds to believe that the document would, if it were in the possession of a Commonwealth agency, be an exempt document under the *Freedom of Information Act 1982* (Cwlth), section 33, 33A, 34, 35, 39, 44 or 47;

the document is an exempt document and the principal officer or the Minister shall transfer the request to the Commonwealth agency whose functions are most closely related to the subject of the request and send the document to that agency.

(2) Where a document is so transferred, the principal officer shall notify the applicant of the transfer.

### **34 Documents affecting relations with Commonwealth and States**

(1) Subject to subsection (5), a document is an exempt document if disclosure of the document under this Act—

- (a) would, or could reasonably be expected to, cause damage to relations between the Territory and the Commonwealth or the Territory and a State; or
- (b) would divulge information or matter communicated in confidence by or on behalf of the Commonwealth, a State or an authority of the Commonwealth or of a State to the Territory, to a Territory authority or to a person receiving the communication on behalf of the Territory or of a Territory authority.

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- (2) Where a Minister is satisfied that a document is an exempt document for a reason referred to in subsection (1), the Minister may sign a certificate to that effect specifying that reason and, subject to part 7, such a certificate, so long as it remains in force, establishes conclusively that the document is an exempt document.
- (3) Where a Minister is satisfied as mentioned in subsection (2) only because of matter contained in a particular part of a document, a certificate under that subsection in respect of the document shall identify that part of the document as containing that matter.
- (4) Where a Minister is satisfied that information as to the existence or non-existence of a document as described in a request would, if contained in a document of an agency, cause the last mentioned document to be an exempt document under this section because of a reason referred to in subsection (1), the Minister may sign a certificate to that effect, specifying that reason.
- (5) This section does not apply to a document in respect of matter in a document the disclosure of which under this Act would, on balance, be in the public interest.
- (6) The responsible Minister of an agency may, by signed instrument, delegate to the principal officer of the agency the Minister's powers under this section in respect of documents of the agency.

### 35 Executive documents

- (1) A document is an exempt document if it is—
  - (a) a document that has been submitted to the Executive for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Executive; or
  - (b) an official record of the Executive; or
  - (c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
  - (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Executive, other than a document by which a decision of the Executive was officially published.
- (2) This section does not apply to a document (a *relevant document*)—
  - (a) that is referred to in subsection (1) (a); or
  - (b) that is referred to in subsection (1) (b) or (c) and is a copy of, or of part of, or contains an extract from, a document that is referred to in subsection (1) (a);

to the extent that the relevant document contains purely factual material unless—

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- (c) the disclosure under this Act of that document would involve the disclosure of any deliberation or decision of the Executive; and
  - (d) the fact of that deliberation or decision has not been officially published.
- (3) For this Act, a certificate signed by the chief executive who has control of the administrative unit to which responsibility for the coordination of government administration is allocated under the *Public Sector Management Act 1994*, section 14 certifying that a document is of a kind referred to in a paragraph of subsection (1) establishes conclusively, subject to part 7, that it is an exempt document of that kind.
- (4) Where a document is a document referred to in subsection (1) (c) or (d) only because of matter contained in a particular part of the document, a certificate under subsection (3) in respect of the document shall identify that part of the document as containing that matter.
- (5) For this Act, a certificate signed by the chief executive who has control of the administrative unit to which responsibility for the coordination of government administration is allocated under the *Public Sector Management Act 1994*, section 14 certifying that a document as described in a request would, if it existed, be of a kind referred to in a paragraph of subsection (1) establishes conclusively, subject to part 7, that, if such a document exists, it is an exempt document of that kind.
- (6) Where a certificate under subsection (5) has been signed in respect of a document as described in a request, the decision on the request may be a decision that access to a document as described in the request is refused on the ground that, if such a document existed, it would be an exempt document referred to in the paragraph of subsection (1) that is specified in the certificate.
- (7) A reference in this section to the Executive includes a reference to a committee of the Executive.

### 36 Internal working documents

- (1) Subject to this section, a document is an exempt document if its disclosure under this Act—
- (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Territory; and
  - (b) would be contrary to the public interest.
- (2) In the case of a document of the kind referred to in section 8 (1), the matter referred to in subsection (1) (a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8 (1).

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- (3) Where a Minister is satisfied, in relation to a document to which subsection (1) (a) applies, that the disclosure of the document would be contrary to the public interest, the Minister may sign a certificate to that effect, specifying the ground of public interest in relation to which the certificate is given and, subject to part 7, such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest.
- (4) Where a Minister is satisfied as mentioned in subsection (3) only because of matter contained in a particular part of a document, a certificate under that subsection in respect of the document shall identify that part of the document as containing that matter.
- (5) This section does not apply to a document only because of purely factual material contained in the document.
- (6) This section does not apply to—
  - (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters; or
  - (b) reports of a prescribed body or organisation established within an agency; or
  - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.
- (7) Where a decision is made under part 3 that an applicant is not entitled to access to a document because of this section, the notice under section 25 shall state the ground of public interest on which the decision is based.
- (8) The responsible Minister of an agency may, by signed instrument, delegate to the principal officer of the agency the Minister's powers under this section in respect of documents of the agency.

### **37 Documents affecting enforcement of the law and protection of public safety**

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—
  - (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance; or
  - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law; or
  - (c) endanger the life or physical safety of any person.

- (2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—
- (a) prejudice the fair trial of a person or the impartial adjudication of a particular case; or
  - (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or could reasonably be expected to, prejudice the effectiveness of those methods or procedures; or
  - (c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.
- (3) In subsections (1) and (2):
- law* means a law in force in Australia.

### **38 Documents to which secrecy provisions of enactments apply**

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

### **39 Documents affecting financial or property interests of the Territory**

- (1) Subject to subsection (2), a document is an exempt document if its disclosure under this Act would have a substantial adverse effect on the financial or property interests of the Territory or of an agency.
- (2) This section does not apply to a document the disclosure of matter in which under this Act would, on balance, be in the public interest.

### **40 Documents concerning certain operations of agencies**

- (1) Subject to subsection (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—
- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency; or
  - (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency; or
  - (c) have a substantial adverse effect on the management or assessment of personnel by the Territory or by an agency; or

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency; or
  - (e) have a substantial adverse effect on the conduct by or on behalf of the Territory or an agency of industrial relations.
- (2) This section does not apply to a document the disclosure of matter in which under this Act would, on balance, be in the public interest.

#### **41 Documents affecting personal privacy**

- (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).
- (2) Subject to subsection (3), subsection (1) does not apply to a request by a person for access to a document only because of the inclusion in the document of matter relating to that person.
- (3) Where—
- (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information of a medical or psychiatric nature concerning the person making the request; and
  - (b) it appears to the principal officer of the agency, or to the Minister, as the case may be, that the disclosure of the information to that person might be prejudicial to the physical or mental health or wellbeing of that person;

the principal officer or Minister may direct that access to the document, so far as it contains that information, that would otherwise be given to that person is not to be given to that person but is to be given instead to a medical practitioner to be nominated by that person.

#### **42 Documents subject to legal professional privilege**

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document of the kind referred to in section 8 (1) is not an exempt document under subsection (1) of this section only because of the inclusion in the document of matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8 (1).

#### **43 Documents relating to business affairs etc**

- (1) A document is an exempt document if its disclosure under this Act would disclose—

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- (a) trade secrets; or
  - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
  - (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information—
    - (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
    - (ii) the disclosure of which under this Act could reasonably be expected to prejudice the future supply of information to the Territory or an agency for the purpose of the administration of a law or the administration of matters administered by an agency.
- (2) Subsection (1) does not apply to a request by a person for access to a document—
- (a) only because of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
  - (b) only because of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
  - (c) only because of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Territory, the Commonwealth, a State or by a local government authority.

**44 Documents affecting economy**

- (1) A document is an exempt document if its disclosure under this Act would be contrary to the public interest because it—
  - (a) would, or could reasonably be expected to, have a substantial adverse effect on the ability of the Government of the Territory to manage the economy of the Territory; or
  - (b) could reasonably be expected to result in an undue disturbance of the ordinary course of business in the community, or an undue benefit or detriment to any person or persons, by giving premature knowledge of or concerning proposed or possible action or inaction of the Government of the Territory or the Legislative Assembly.
- (2) The kinds of documents to which subsection (1) may apply include, but are not limited to, documents containing matter relating to—
  - (a) a fee or charge; or
  - (b) any kind of tax or duty; or
  - (c) proposals for expenditure; or
  - (d) borrowings or proposals to borrow by the Territory or an agency.

**45 Documents containing material obtained in confidence**

- (1) A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.
- (2) Subsection (1) does not apply to any document to the disclosure of which section 36 (1) (a) applies or would, but for section 36 (2), (5) or (6), apply, being a document prepared by—
  - (a) a Minister; or
  - (b) a member of the staff of a Minister or an officer of an agency in the course of his or her duties; or
  - (c) a prescribed authority in the performance of its functions;  
for purposes relating to the affairs of an agency or the official affairs of a Minister unless the disclosure would constitute a breach of confidence owed to a person or body other than—
    - (d) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or
    - (e) an agency or the Territory.

**46 Documents disclosure of which would be contempt of Legislative Assembly or a court**

A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown—

- (a) be in contempt of court; or
- (b) be contrary to an order made or direction given by a royal commission or by a tribunal or other person or body having power to take evidence on oath; or
- (c) infringe the privileges of the Legislative Assembly, of the Commonwealth Parliament, of the Parliament of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory or of Norfolk Island.

**47 Certain documents arising out of companies and securities legislation**

A document is an exempt document if it is, or is a copy of or of a part of, or contains an extract from—

- (a) a document for the purposes of the Ministerial Council for Corporations prepared by, or received by an agency or Minister from, the Commonwealth, a State or an authority of the Commonwealth or of a State; or
- (b) a document the disclosure of which would disclose the deliberations or decisions of the Ministerial Council for Corporations, other than a document by which a decision of that council was officially published; or
- (c) a document furnished to the Australian Securities and Investments Commission by the Territory, the Commonwealth, a State, a Territory authority or by an authority of the Commonwealth or a State and relating solely to the functions of the Commission in relation to the law of the Commonwealth or of a State.

**47A Electoral rolls and related documents**

- (1) In this section:

*electoral roll* means—

- (a) a roll of electors kept under the *Electoral Act 1992*; or
  - (b) a roll extract within the meaning of the *Electoral Act 1992*.
- (2) A reference in this section to an electoral roll in electronic form is a reference to a disk or tape from which the information contained in the roll may be reproduced by mechanical, electronic or other means.

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- (3) Subject to subsection (4), each of the following documents is an exempt document:
- (a) an electoral roll, whether in printed or electronic form or on microfiche or microfilm;
  - (b) a copy of a document referred to in paragraph (a);
  - (c) a document setting out particulars of only 1 enrolled person that was used in keeping an electoral roll;
  - (d) a copy of a document referred to in paragraph (c);
  - (e) a document containing only copies referred to in paragraph (d);
  - (f) a document derived from an electoral roll setting out particulars of enrolled persons.
- (4) A document referred to in subsection (3) is not an exempt document in relation to a person to the extent that it sets out only the particulars of the person.

## **Annexure**

### *Reports Published in 1996*

- 1 Legislative Assembly Members - Superannuation Payments/Members' Staff - Allowances and Severance Payments**
- 2 1995 Taxi Plates Auction**
- 3 VMO Contracts**
- 4 Land Joint Ventures**
- 5 Management of Former Sheep Dip Sites**
- 6 Collection of Court Fines**
- 7 Annual Management Report For Year Ended 30 June 1996**
- 8 Australian International Hotel School**
- 9 ACT Cultural Development Funding Program**
- 10 Implementation of 1994 Housing Review**
- 11 Financial Audits with Years Ending to 30 June 1996**

### *Reports Published in 1997*

- 1 Contracting Pool and Leisure Centres**
- 2 Road and Streetlight Maintenance**
- 3 1995-96 Territory Operating Loss**
- 4 ACT Public Hospitals - Same Day Admissions  
Non Government Organisation - Audit of Potential Conflict of Interest**
- 5 Management of Leave Liabilities**
- 6 The Canberra Hospital Management's Salaried Specialists Private Practice**
- 7 ACT Community Care - Disability Program and Community Nursing**
- 8 Salaried Specialists' Use of Private Practice Privileges**
- 9 Fleet Leasing Arrangements**
- 10 Public Interest Disclosures - Lease Variation Charges and Corrective Services**
- 11 Annual Management Report for Year Ended 30 June 1997**
- 12 Financial Audits with Years Ending to 30 June 1997**
- 13 Management of Nursing Services**

Annexure (continued)

*Reports Published in 1998*

- 1 Management of Preschool Education**
- 2 Lease Variation Charges - Follow-up Review**
- 3 Major IT Projects - Follow-up Review**
- 4 Annual Management Report for Year Ended 30 June 1998**
- 5 Management of Housing Assistance**
- 6 Assembly Members' Superannuation and Severance Payments to Former Members' Staffers**
- 7 Magistrates Court Bail Processes**
- 8 Territory Operating Losses and Financial Position**
- 9 Financial Audits with Years Ending To 30 June 1998**
- 10 Management of Schools Repairs and Maintenance**
- 11 Overtime Payment To A Former Legislative Assembly Member's Staffer**

*Reports Published in 1999*

- 1 Stamp Duty on Motor Vehicle Registrations**
- 2 The Management of Year 2000 Risks**
- 3 Annual Management Report for Year Ended 30 June 1999**
- 4 Financial Audits With Years Ending to 30 June 1999**

*Reports Published in 2000*

- 1 Bruce Stadium Redevelopment — Summary Report**
- 2 Bruce Stadium Redevelopment — Value for Money**
- 3 Bruce Stadium Redevelopment — Costs and Benefits**
- 4 Bruce Stadium Redevelopment — Decision to Redevelop the Stadium**
- 5 Bruce Stadium Redevelopment — Selection of the Project Manager**
- 6 Bruce Stadium Redevelopment — Financing Arrangements**
- 7 Bruce Stadium Redevelopment — Stadium Financial Model**
- 8 Bruce Stadium Redevelopment — Actual Costs and Cost Estimates**
- 9 Bruce Stadium Redevelopment — Market Research and Marketing**

Annexure (continued)

- 10 Bruce Stadium Redevelopment — Stadium Hiring Agreements**
- 11 Bruce Stadium Redevelopment — Lawfulness of Expenditure**
- 12 Bruce Stadium Redevelopment — Governance and Management**
- 13 Annual Management Report for the Year Ended 30 June 2000**

*Reports Published in 2001*

- 1. Financial Audits with Years Ending to 30 June 2000**
- 2. Enhancing Professionalism and Accountability**
- 3. Market Research and Marketing (Second Report)**
- 4. Peer-Based Drug Support Services Tender – 1998**
- 5. The Administration of Payroll Tax**
- 6. Annual Management Report for the Year Ended 30 June 2001**
- 7. Managing Canberra Urban Parks and Open Spaces**
- 8. Canberra Tourism and Events Corporation – Relocation to Brindabella Business Park**
- 9. Agents Board – Financial Administration of Training Grant Program**
- 10. Corrective Services – Review of Certain Allegations**
- 11. Financial Audits with Years Ending to 30 June 2001**

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