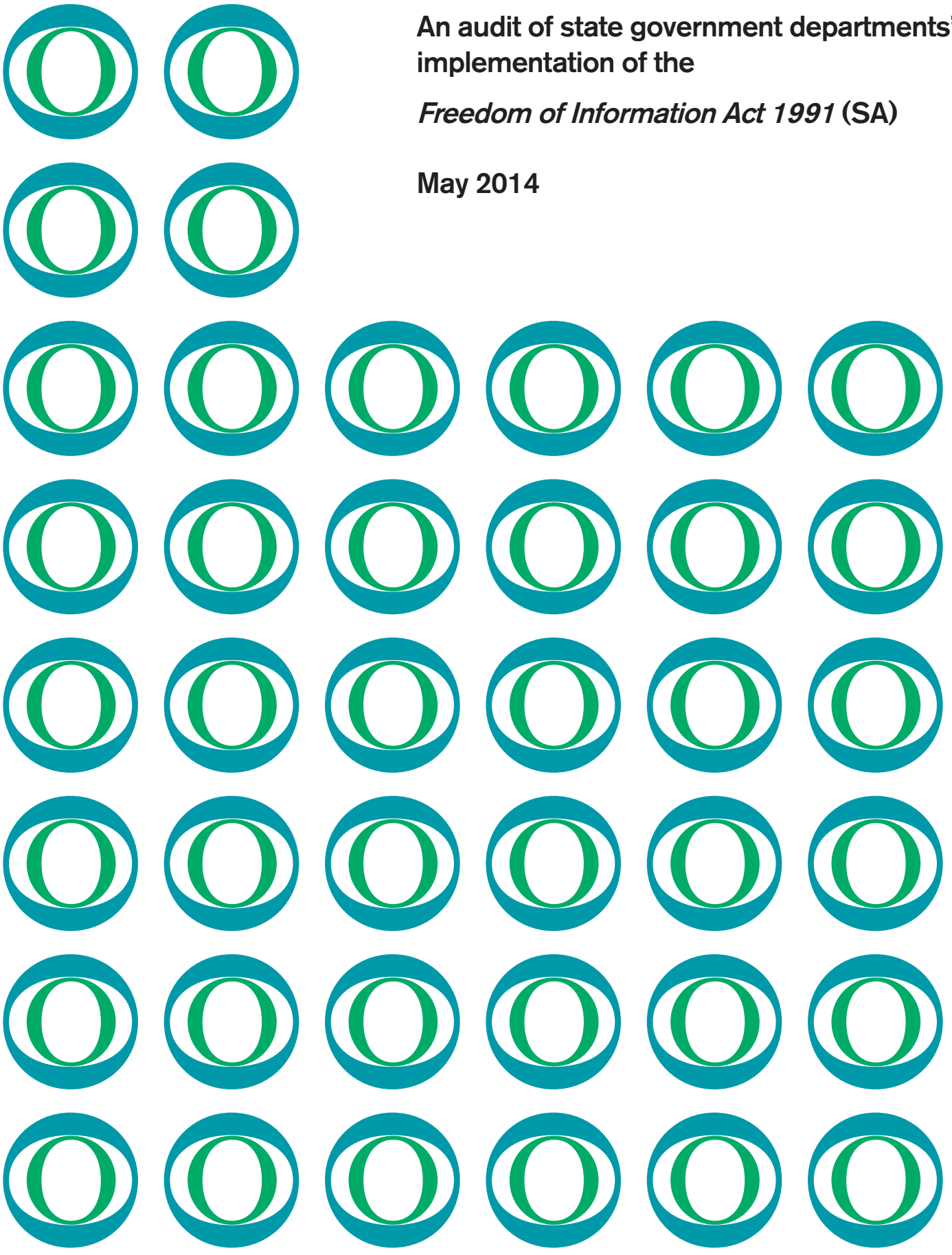
Ombudsman SA

An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA)

May 2014



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EXECUTIVE SUMMARY

Government-held information is a public resource; and the public's right to access to this information is central to the functioning of a participative democracy. Freedom of information (**FOI**) legislation is one means by which the public can understand, review and participate in government decision-making.[1] However, it should only have to be used as a last resort.

The *Freedom of Information Act 1991* (SA) has now been in operation in this state for two decades.

This audit is a snapshot of how 12 government departments (agencies) are managing their responsibilities under the Act, focussing principally on the 2012-13 financial year. It also draws in part on the Ombudsman's experiences as a review authority under the Act.

The state government's recent policy initiatives on proactive release of information are timely, and relevant to the digital age. However, there is a 'disconnect' between these initiatives and the Act, and what the audit generally found to be the agencies' approach to information disclosure under the Act:

- the Act is outdated and its processes belong to pre-electronic times
- the agencies' implementation of the Act is wanting, and demonstrates a lack of understanding or commitment to the democratic principles which underpin the Act.

The audit revealed that:

- most of the agencies are not coping with the volume and complex nature of recent FOI requests
- six of the 12 agencies failed to determine over 50 percent of access applications within the timeframe required by the Act
- most of the agencies do not understand how to apply the exemptions and the public interest test under the Act
- it is common practice across all of the agencies to provide copies of FOI applications, determinations (draft or otherwise) and documents to their Minister to 'get the green light' prior to finalisation of access requests. While the Act permits a Minister to direct their agency's determination, evidence provided to the audit strongly suggests that ministerial or political influence is brought to bear on agencies' FOI officers, and that FOI officers may have been pressured to change their determinations in particular instances. If a ministerial decision or direction is involved, it should be clearly set out in the agencies' determinations
- the agencies' Chief Executives are not providing FOI or pro-information disclosure leadership. In nine out of the 12 agencies, there is no directive at all from the Chief Executive, senior management or the Minister about the operation or implementation of the Act
- only one agency stated that it has ever released an exempt document, despite the discretion to do so under the Act.

There needs to be an integrated approach to information access in this state, which includes FOI and privacy; proactive release of information (with FOI as a last resort); and necessarily, records management.

Richard Bingham
SA OMBUDSMAN

[1] The *Freedom of Information Act 1991* applies to both state and local government agencies.

SUMMARY OF PROPOSED RECOMMENDATIONS

RECOMMENDATION 1

The objects and intent of the FOI Act should expressly establish that:

- the Act is based on the principles of representative democracy
- the Act is to enable community scrutiny, comment and review of government's activities
- government and FOI agencies are mere 'custodians' of the documents and information which they hold on trust for the benefit of the public
- documents and information held by government and FOI agencies are a public resource
- the public has a right of access to government-held information, unless disclosure would, on balance, be contrary to the public interest.

RECOMMENDATION 2

The Act should expressly clarify that an accredited FOI officer (or the principal officer) must make the agency's initial determination.

RECOMMENDATION 3

To comply with the definition of 'accredited FOI officer' in the Act, the agencies must ensure that they have appropriate designations by the principal officer of their FOI staff who have undergone training approved by the Minister.

RECOMMENDATION 4

Accredited FOI officers of the agencies should undertake refresher training on a 12 monthly basis, as a matter of policy. This training needs to be appropriately funded.

RECOMMENDATION 5

Principal officers and senior management in the agencies should undertake appropriately tailored FOI induction and training.

This should be a matter of policy across the agencies.

RECOMMENDATION 6

All agencies should ensure that their FOI policies and procedures are up to date, and comply with the requirements of the Act.

RECOMMENDATION 7

The status of the officer required to conduct an internal review should be clarified in the Act, as well as the principal officer's ability to delegate their power.

RECOMMENDATION 8

The Act should require agencies to promptly acknowledge receipt of an access application and an application for internal review. Both acknowledgements should inform the applicant of the relevant review and appeal rights and timelines, particularly in the event of the agency failing to make an active determination within the statutory time frames.

In the meantime. the agencies should adopt this practice as a matter of policy.

RECOMMENDATION 9

The Act should allow applicants and agencies to negotiate extensions of time to deal with an access application, both at the initial determination and internal review level. However, applicants' rights of review and appeal must be preserved.

RECOMMENDATION 10

The Act should provide that:

- agencies must refund the fees to an applicant if they exceed the initial determination or internal review time limitations under the Act
- agencies have a discretion to impose a ceiling of 40 hours for processing access applications following consultation with the applicant.

RECOMMENDATION 11

The Act should allow an external review authority to remit deemed or inadequate determinations back to the agency for consideration.

RECOMMENDATION 12

The Act should be updated to recognise technological advancements in electronic communications and storage, and modern records management practices.

RECOMMENDATION 13

The Act should include a provision similar to section 26 of the *Freedom of Information Act 1992* (WA), that an agency can determine to refuse access on the basis that 'documents cannot be found or do not exist'.

A determination of this nature should be subject to review and appeal.

RECOMMENDATION 14

Chief Executives of the agencies should issue a written directive to all of their staff about the need for them to respond promptly and thoroughly to FOI internal searches for documents.

The directive should remind staff of their compliance obligations with the South Australian Public Sector Code of Ethics and the *State Records Act 1997*.

RECOMMENDATION 15

As a matter of policy, senior management in the agencies should be required to sign off on the searches undertaken by agency staff in response to an internal request for documents from FOI officers.

RECOMMENDATION 16

In the event of being unable to locate requested documents under the Act, agencies need to be able to demonstrate to applicants in their determination that they have conducted reasonable and sufficient searches, showing:

- how, when and where the searches were conducted
- the records management systems and databases searched, along with a relevant description of the contents of these databases, and any search terms used.

As a matter of policy, the agencies should have regard to the State Records of South Australia's 'sufficiency of search' guideline.

RECOMMENDATION 17

The agencies should develop an information disclosure policy highlighting, in the context of the objects and intent of the FOI Act:

- their discretion to give access even if a requested document is exempt
- the fact that merely because a document might satisfy an exemption does not mean that access to the document must be refused.

RECOMMENDATION 18

The Act should expressly provide that nothing prevents an agency making a determination to give access to an exempt document.

RECOMMENDATION 19

The Act should be amended to:

- lessen the number of exemption provisions
- provide that information must be disclosed unless, on balance, disclosure would be counter to the public interest
- expressly direct agencies to consider the objects and discretions in the Act before applying exemption provisions.

The agencies should in the meantime, adopt a policy that, in the context of the objects and intent of the Act:

- discretions under the Act must be exercised in a way that favours disclosure of requested documents
- documents requested under the Act should be released, unless release would cause real harm.

RECOMMENDATION 20

The Act should provide that a schedule of documents must be developed to accompany a notice of determination.

The schedule should indicate, as a minimum:

- a number attributed to the document
- the date of the document
- the author of the document and recipient of the document (where relevant)
- a substantial description of the document
- the exempt status or otherwise of the document.

The Act should expressly state that the schedule is not a substitute for a determination; and that where access to documents is refused, section 23(2)(f) must be followed.

In the meantime, the agencies should adopt this as a matter of policy.

RECOMMENDATION 21

There should be an integrated approach to privacy concerns and access to government-held information in this state.

Local government and universities should be bound by the same privacy rules as state government.

There needs to be congruency between the meaning of private information in the FOI Act and the Information Privacy Principles.

The Act should expressly provide for the publication of FOI applicants' names and the nature of their applications, in terms similar to the practice of publishing applicants' names in disclosure logs under the *Right to Information Act 2009* (Qld).

RECOMMENDATION 22

Agencies should note the legal position that merely satisfying the initial criteria in an exemption clause with a public interest test under the Act, is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest.

RECOMMENDATION 23

The agencies should develop a policy that in assessing the public interest test in their FOI determinations, they should reject the *Howard* factors and focus on the actual content of the requested documents.

The Act should be amended to provide that the following matters are irrelevant when assessing if disclosure of particular information would, on balance, be contrary to the public interest:

- the author of the document was or is of high seniority
- that disclosure would confuse the public or that there is a possibility that the public might misinterpret the information
- disclosure of the information could reasonably be expected to cause embarrassment to the government or to cause loss of confidence in the government.

RECOMMENDATION 24

Following Commonwealth and interstate FOI legislation, the Act should give express guidance on what factors should and should not be taken into account in determining whether disclosure of documents would, on balance, be contrary to the public interest.

RECOMMENDATION 25

If ministerial 'noting' is to occur, the process should be established by a formal written policy, common to all state government agencies.

The policy should:

- expressly recognise section 29(6) of the Act
- provide that if the Minister has directed that the agency's determination be made in certain terms, the agency should ensure that this is clearly stated in the determination
- provide that if the Minister or their staff has had any involvement in the 'noting' of a determination, then this fact and the extent of the noting should be stated in the determination
- provide that the ministerial 'noting' process must be managed in a way that does not impact on statutory time frames.

RECOMMENDATION 26

The Act should create offences of improperly directing or influencing a decision or determination made under the Act.

A uniform protocol should be created for use across all agencies which codifies the requirements for accountable and transparent communication between ministerial offices and agency FOI officers in relation to access applications under the Act.

RECOMMENDATION 27

Agencies should publish their FOI information statement on their website.

RECOMMENDATION 28

The Chief Executive of the agencies should promote information disclosure and issue a written directive to all staff about the need for compliance with the objects and operation of the FOI Act.

RECOMMENDATION 29

All of the agencies should, as a matter of policy, provide on their website:

- the postal and electronic addresses to which access applications may be sent
- the telephone number of an FOI officer
- a link to an access and internal review application form
- links to the FOI Act and State Records of South Australia
- details of external review and appeal rights, and a link to Ombudsman SA/or the Police Ombudsman (whichever is the relevant review authority) and the District Court.

RECOMMENDATION 30

Information disclosure initiatives should be enshrined in legislation, to harness the strength of legislative force and to capture local government councils, universities and other agencies which are subject to the FOI Act.

However, this should not interfere with proper access being provided outside of the FOI Act and other legislation. Prescribing information that should be released in legislation can create a culture of risk aversion when providing access to information through administrative schemes.

RECOMMENDATION 31

Performance agreements of Chief Executives and senior management in the agencies should contain a provision requiring a responsibility to ensure appropriate practices and performance in respect of access to government-held information, including FOI.

RECOMMENDATION 32

After the passing of the amendment to the *Civil Liability Act 1936* (SA), Chief Executives in the agencies should issue a memorandum to all staff explaining the consequences of the amendment and the protections described by the Attorney-General in his second reading speech.

The memorandum should also emphasise that the FOI process is a last resort option only.

RECOMMENDATION 33

There should be an independent oversight body with investigation, audit and recommendatory powers to:

- issue FOI guidelines
- ensure public awareness of FOI legislation
- give FOI advice and conduct FOI training for agencies
- address complaints about the FOI process
- monitor and audit agencies' FOI performance
- conduct merits reviews (with determinative powers)
- recommend administrative and legislative reform
- report to the parliament on the operation of the legislation

This body should also be responsible for the oversight of state privacy policies and legislation.

PART 1

THE AUDIT PROCESS

Ombudsman jurisdiction

1. Through my role as an external review authority under section 39 of the *Freedom of Information Act 1991*, it is apparent that some agencies do not meet their obligations under the Act. There are likely to be many reasons for this, but the main ones appear to be a lack of understanding of the Act, resourcing, or a culture of fear or prejudgement within agencies.

2. For this reason and as part of my role to promote administrative improvement in the public sector, I considered it was in the public interest to conduct an audit under section 14A of the *Ombudsman Act 1972* of the practices and processes of agencies in dealing with FOI.

3. I selected the 12 state government departments (**the agencies**) as the subjects of the audit. I anticipated that the audit would highlight these agencies':
   - understanding of the Act
   - commitment to FOI principles of openness and accountability
   - difficulties in meeting FOI obligations and the reasons for these difficulties.

4. I also anticipated that the audit would assist these agencies and agencies subject to the FOI Act generally, to identify where they may need to improve the discharging of their FOI responsibilities.

The audit group

5. The audit group consisted of the following agencies:
   - Attorney-General's Department (**AGD**)
   - Department for Communities and Social Inclusion (**DCSI**)
   - Department for Correctional Services (**DCS**)
   - Department for Education and Child Development (**DECD**)
   - Department for Health and Ageing (**DHA**)
   - Department of Environment, Water and Natural Resources (**DEWNR**)
   - Department of Further Education, Employment, Science and Technology (**DFEEST**)
   - Department for Manufacturing, Innovation, Trade, Resources and Energy (**DMITRE**)
   - Department of Planning, Transport and Infrastructure (**DPTI**)
   - Department of Primary Industries and Regions (**PIRSA**)
   - Department of the Premier and Cabinet (**DPC**)
   - Department of Treasury and Finance (**DTF**).

Terms of reference

6. The subjects requiring response in the audit questionnaire covered each agency's:
   - staffing for FOI
   - number of FOI applications and response times
   - policies, procedures and templates relating to FOI
   - understanding obligations and training under the FOI Act
   - FOI searching for documents
   - use of FOI exemptions in determinations and understanding of 'the public interest'
   - ministerial 'noting' of FOI determinations

- promoting the principles of FOI and information disclosure.

Audit stages

7. In the audit document dated 13 June 2013, I proposed to the agencies that the audit would be conducted in four stages:

Stage 1
- send out the audit questionnaire to each agency, allowing a four week response time (this was extended to six weeks)
- consider the Freedom of Information Annual Report for 2012-2013 and the previous financial year
- consider each agency's responses during Ombudsman external reviews under the Act, in light of their FOI obligations

Stage 2
- assess each agency's response to the audit, and consider the documentation they provided to the audit

Stage 3
- take evidence on oath/affirmation under the Ombudsman Act and *Royal Commissions Act 1917* from officers of various agencies, about their experiences in administering the Act

Stage 4
- provide the agencies and State Records of South Australia (**State Records**) with a 'provisional' written report on my tentative findings and recommendations, for their comment
- consider any comments or suggested amendments made in response to my provisional report
- provide the agencies and State Records with my final report
- table my final report in the state parliament, and publish it online on the Ombudsman SA and AustLII websites.

8. My office also:
- met with members of the Attorney General's Accountable Government Project Team
- requested information from State Records, and sought informal views from FOI officers across government about the operation of the Act
- researched FOI literature
- communicated with FOI commentators and Commonwealth and interstate agencies and oversight bodies about their experiences, and the strengths and weaknesses of their respective FOI legislation.

9. I awaited finalisation of my provisional report until after the Freedom of Information Annual Report 2012-2013 was tabled in the parliament in December 2013.

Comment

10. This report focusses, in the main, on the agencies' responses to the audit questionnaire (see Appendix 2). The questionnaire concentrated on the access provisions of the Act, and not, for example, on the fees and charges or amendment to personal records provisions.

11. For ease of reference in the report, I have used the acronyms commonly understood across the state sector, to describe the agencies. These and the other abbreviations used in the report are set out in Appendix 1.

12. Importantly, neither the audit, nor this report is a review of the FOI Act. However, because of the nature and content of some of the agencies' responses to the audit, I have at times proposed recommendations to amend the Act.

Provisional report and responses

13. I released a copy of my provisional report to the agencies in December 2013, seeking comment. I appreciated that the agencies may have had difficulty in responding during the caretaker provisions, and accordingly withheld publication of this report until after the state government elections on 15 March 2014. I received the last response from DPC on 23 April 2014.

14. Five agencies (DFEEST, DECD, PIRSA, DTF and AGD) noted my proposed recommendations and advised that they would not be making any further submissions.

15. Two agencies (DCS and DCSI) did not respond to my provisional report.

16. Five agencies (DHA, DMITRE, DEWNR, DPC and DPTI) and State Records provided more detailed submissions in response to my provisional report. I have included the more salient submissions in this report.

17. My recommendations substantially mirror those proposed in my provisional report.

Publication of report

18. Under section 26(2) of the *Ombudsman Act 1972*, I consider it is in the public interest to release the report to the parliament and the public:
    - the parliament and the public are entitled to know whether state government agencies
        - have a sound understanding of the FOI Act
        - correctly follow the provisions of the Act in responding to applications
        - adhere to the Act's objects and its spirit of openness and accountability
    - the report may also provide a resource for agencies in developing their understanding of the operation of the FOI Act.

19. I intend to forward the report to the President of the Legislative Council and to the Speaker of the House of Assembly, in addition to a general release on the Ombudsman SA and AustLII websites.

PART 2

THE FOI ACT AND DEVELOPMENTS

Overview of developments of the FOI Act

20. The FOI Act has been in operation in South Australia for 20 years. It is a key safeguard of representative democracy and accountable government in this state.

21. On 11 December 1990, the Hon Greg Crafter MP introduced the *Freedom of Information Bill (No. 2)* into the House of Assembly.[2] This was just under a decade after the Commonwealth and Victoria enacted their FOI legislation, but around a similar time as other Australian states and territories.

22. A year later in his explanatory speech in the Legislative Council on the Bill, the then Attorney-General, the Hon Chris Sumner MLC talked of the three major premises on which the Bill was based, namely:

> (1) The individual has a right to know what information is contained in Government records about him or herself;
>
> (2) A Government that is open to public scrutiny is more accountable to the people who elect it;
>
> (3) Where people are informed about Government policies, they are more likely to become involved in policy making and in Government itself.[3]

23. The Act commenced operation on 1 January 1992. Since that time there have been sporadic amendments to the Act, and ad hoc and rather fragmented policy development. These have been in response to concerns raised within the public sector and other sectors (such as the media and Members of Parliament) and growing demands within the community for increased government openness and accountability.

Legislative Review Committee 2000

24. The first assessment of the functioning of the Act was carried out by the Legislative Review Committee of the SA parliament. In February 1997, the Legislative Council passed a resolution requesting the committee to inquire into and report on the operation of the Act. The committee completed its report in 2000.

25. In relation to the first premise above, the committee considered that the Act had been successful to some degree. However, in relation to the other two premises, the committee considered that:

> [T]he overwhelming impact of the evidence and examination by the Committee of all Australian and many international models of the operation of freedom of information legislation reveals that the Act is not working and stands in need of a complete overhaul.[4]

26. The committee described the Act as:

> … a complex scheme of provisions setting out a range of exempt agencies, exempt documents and involved procedures which often make the implementation of the basic objectives of the Act cumbersome, complex and in some cases, the very antithesis of the objects of the Act. Indeed as one witness put it, the Act should be renamed the 'Freedom from Information Act' having regard to their experiences.[5]

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2 South Australia, *Parliamentary Debates*, House of Assembly, 11 December 1990, 2591 (Hon Greg Crafter MP).
3 South Australia, *Parliamentary Debates*, Legislative Council,14 February 1991, 2391 (Hon Chris Sumner MLC).
4 Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee concerning the Freedom of Information Act 1991* (2000) 3.
5 Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee concerning the Freedom of Information Act 1991* (2000) 1.

27. The committee noted several deficiencies in the Act, but identified three basic concerns:
    - the uncertainty of the Act - 'the Act is subject to a range of complex and uncertain provisions, which have the capacity to deter all but the most determined and well-resourced applicants …'
    - the culture within the public sector - 'the achievement of the objects of the Act is largely dependent upon those within the public sector who are responsible for its administration. The Committee heard evidence from a number of witnesses that there is a public service culture of antipathy and even antagonism to the concept of open government. The role of freedom of information responsibilities is frequently given the lowest priority both in terms of appointment and training.'
    - the procedures associated with applications, including the internal and external review process.[6]

28. In relation to these three concerns the committee recommended *inter alia* that:
    - the current list of exemptions be subject to a single simple test i.e. is it contrary to the public interest to release the requested information?
    - the implementation of a centrally coordinated program of education, training and accreditation, and that the training program be approved by the Ombudsman and (former) Police Complaints Authority[7]
    - removal of the internal review process and limiting the right of appeal to the courts to questions of law only.

29. The committee's Bill was introduced by the Hon Ian Gilfillan MLC who, in his speech referred to a commentator's description of the Act as 'a set of instructions for withholding all but the most innocuous information'.[8] The Bill was not supported by the government.

Freedom of Information (Miscellaneous) Amendment Act 2001

30. The *Freedom of Information (Miscellaneous) Amendment Act 2001* was subsequently passed. It did not 'overhaul' the Act, but it did address some of the committee's concerns. The more significant amendments included:
    - formalising the appointment of accredited FOI officers who:
        - had completed training approved by the Minister
        - had been designated to the role by the agency's principal officer
        - held a senior position in the agency[9]
    - the Minister developing training programs in consultation with the Ombudsman and the (former) Police Complaints Authority to assist agencies in complying with the Act
    - decreasing the time in which an agency could deal with an application and in which parties could seek an internal or external review and appeal
    - bringing local government councils and universities under the Act.

Publication of a Citizens' Charter - 2002

31. In October 2002, the Premier and the Minister for Administrative Services released the Citizens' Rights to Information Charter, which committed the SA government 'to making information in Government documents and records readily accessible to the citizens of South Australia'.

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6 Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee concerning the Freedom of Information Act 1991* (2000) 2.

7 The name of the Police Complaints Authority was recently changed to Police Ombudsman under the *Independent Commissioner Against Corruption Act 2012*, Schedule 3.

8 South Australia, *Parliamentary Debates*, Legislative Council, 11 October 2000, 133 (the Hon Ian Gilfillan MLC).

9 *Freedom of Information (Miscellaneous) Amendment Act 2001* (no 61 of 2001), section 4(a).

Freedom of Information (Miscellaneous) Amendment Act 2004

32. Following a later review of the Act by the former Department of Administrative and Information Services, the *Freedom of Information (Miscellaneous) Amendment Act 2004* came into operation on 1 January 2005. The more significant amendments included:
    - abolishing ministerial and agency certificates
    - allowing for release of Cabinet documents, with approval
    - changes to fees and charges and the external review process
    - amendment to the business affairs exemption to allow access to contract documents entered into by an agency, unless the contract contained a confidentiality clause.

Disclosure of government contracts - 2005

33. At the end of 2005, the state government introduced a contract disclosure policy that applied to all public authorities subject to the *Public Finance and Audit Act 1987*, for the public disclosure of certain contracts involving government expenditure and the sale of government assets, and for the management of contract information.[10]

Disclosure of Cabinet documents 10 years or older

34. A Cabinet document disclosure policy was later released by the state government, which provides for selected Cabinet documents to be disclosed on the DPC website and considered for release through the FOI Act process, if 10 years have passed since the end of the calendar year in which they came into existence.[11]

State Records' Proactive Disclosure Strategy initiatives - 2012-13

35. In the reporting year 2011-12, State Records developed the government's policy for the publication of selected Cabinet documents 10 years or older online and facilitated its implementation.[12]

36. Another initiative in 2013 was State Records' assessment of state government department's Information Statements under the FOI Act. A summary of the results were published in the 2012-13 FOI Annual Report which was published in December 2013.

37. Further, Cabinet approved a policy in April 2013 to require state government departments and SA Police to publicly disclose information that is regularly requested and released under the FOI Act. The information is to be published on agency websites, and includes details about the government's expenditure on credit cards, mobile phones, capital works projects, consultants, and Ministers' overseas travel. It also includes agency gift registers and procurement policies and procedures.[13] A policy to assist with this implementation was approved by Cabinet in August 2013; and State Records has the responsibility for implementing this policy.[14]

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10 PC027 - December 2005.
11 PC031 - revised January 2013.
12 FOI Annual Report 2012-13, p17.
13 PC035 - September 2013.
14 FOI Annual Report 2012-13, p17.

Attorney-General's Accountable Government Project - 2013

38. In April 2013, Cabinet approved the establishment of an Accountable Government Project. This project is being led by the Attorney-General's Department. One aspect of the project identified in the project brief in July 2013, is to review the current operation of the FOI Act and other legislation affecting the release of information, and to make recommendations about potential reforms. The project will consider the release of government-held information through FOI applications, and develop short and longer term strategies to achieve greater government openness and accountability.[15]

Declaration of Open Data - 2013

39. As part of the Accountable Government Project, in September 2013, the Premier released an 'open data' declaration requiring government agencies to ensure that their data is publicly accessible.[16]

Role of State Records

40. In accordance with section 7(j) of the *State Records Act 1997*, State Records supports the Attorney-General in the administration of the FOI Act (and the Information Privacy Principles).

41. State Records' function in FOI (and privacy) is to:
    - provide advice and assistance to the Minister, agencies and the public
    - provide executive support to the Privacy Committee of South Australia
    - develop and promulgate policies and guidelines
    - administer an across-government freedom of information management system
    - develop and deliver training for accredited FOI officers.[17]

[15] Project Brief 'Accountable Government' approved by the Chief Executive of the Attorney-General's Department, dated 4 July 2013.
[16] http://www.premier.sa.gov.au/images/news_releases/13_08Aug/data.pdf (accessed at 30 November 2013). The Commonwealth, Queensland, NSW and Victoria have also established data portals, similar to South Australia's portal at http://data.sa.gov.au.
[17] FOI Annual Report 2012-13, p6.

PART 3

OBJECTS OF THE FOI ACT

Fulfilling the objects of the Act

42. The FOI Act is legislative recognition of the need for democracy to be supported by a government guarantee that it will hold all information for the public interest:

> It is implicit that citizens in a representative democracy have a right to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them (whether or not they choose to exercise the right). The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.[18]

43. The objects of the Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.

44. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:

> (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
>
> (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...

45. Section 3A(1) under 'Principles of administration' says that the parliament has intended:

> (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
>
> (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.

46. Although the District Court in South Australia considers that the objects and intent of the Act do not create a legal presumption in favour of disclosure, it has nonetheless said that the objects provision 'suggests some bias in favour of giving the public rights of access to information and records held by the Government'.[19]

47. The District Court has also made it clear that in recognition of the objects of the Act and under the FOI scheme generally, the 'principal role' of a government department (or agency) is as 'the custodian of documents'.[20]

48. In *Department of Planning and Local Government v Chapman*, the District Court said that in this role of custodian:

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18 *Re Eccleston and Department of Family services and Aboriginal and Islander affairs* (1993) 1 QAR 60, 71.

19 *Ipex Information Technology Group Pty Ltd v Department of Information and Technology Services SA* (1997) 192 LSJS 54, 60-62; *Moore v The Registrar of the Medical Board* (2001) 215 LSJS 133, 147, in *Minister for Education and Child Development v Chapman* [2013] SADC130, unreported, (27 September 2013), [14].

20 *Department of Planning and Local Government v Chapman* [2012] SADC 120 (27 September 2012), [45].

> … the Department is subject to the rights of access conferred by the Act and charged with the function of deciding, upon receipt of an application, whether an exemption applies. … the role of the Department under the Act has no element of entitlement to the exclusive retention of any document or of interest in the non-disclosure of any document. An individual agency such as the Department is not charged, under the Act, with the representation of the pub[l]ic interest or the interest of the government of the day.[21]

49. As demonstrated later, the evidence presented to the audit casts doubt on the agencies' understanding and observance of the objects and intent of the Act.

50. In my view, it would assist agencies if there was express wording in the objects and intent sections of the Act to:
    - promote representative democracy
    - increase community scrutiny, comment and review of government's activities
    - increase public participation in government processes, with a view to promoting better informed decision making
    - recognise that government and agencies are mere custodians of the documents and information which they hold, and that documents and information are managed for public purposes and are a public resource
    - provide a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to provide the information.[22]

51. The preamble to the Queensland *Right to Information Act 2009* (Qld) firmly communicates that parliament's reasons in relation to that legislation:

> Parliament's reasons for enacting this Act are—
>
> 1 Parliament recognises that in a free and democratic society—
>
> (a) there should be open discussion of public affairs; and
>
> (b) information in the government's possession or under the government's control is a public resource; and
>
> (c) the community should be kept informed of government's operations, including, in particular, the rules and practice followed by government in its dealings with members of the community; and
>
> (d) openness in government enhances the accountability of government; and
>
> (e) openness in government increases the participation of members of the community in democratic processes leading to better informed decision-making; and
>
> (f) right to information legislation contributes to a healthier representative, democratic government and enhances its practice; and
>
> (g) right to information legislation improves public administration and the quality of government decision-making; and
>
> (h) right to information legislation is only 1 of a number of measures that should be adopted by government to increase the flow of information in the government's possession or under the government's control to the community.
>
> 2 The Government is proposing a new approach to access to information. Government information will be released administratively as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort.

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[21] *Department of Planning and Local Government v Chapman* [2012] SADC 120 (27 September 2012), [45].
[22] See *Freedom of Information Act 1982* (Cth) and *Right to Information Act 2009* (Qld).

3 It is Parliament's intention to emphasise and promote the right to government information. It is also Parliament's intention to provide a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to provide the information. This Act reflects Parliament's opinion about making information available and the public interest.

RECOMMENDATION 1

The objects and intent of the FOI Act should expressly establish that:

- the Act is based on the principles of representative democracy
- the Act is to enable community scrutiny, comment and review of government's activities
- government and FOI agencies are mere 'custodians' of the documents and information which they hold on trust for the benefit of the public
- documents and information held by government and FOI agencies are a public resource
- the public has a right of access to government-held information, unless disclosure would, on balance, be contrary to the public interest.

PART 4

FOI STAFFING, ACCREDITATION & POLICIES

FOI staffing in the agencies

52. To understand the ability of each of the agencies to deal with FOI, the audit sought the following figures:
    - number of staff employed by the agency
    - number of FOI FTE staff
    - classification levels of each FOI staff member (including accredited FOI officers and the FOI principal officer)
    - the percentage of each FOI staff member's time spent on FOI.

53. The following shows the number of FTE staff employed by each agency as at 30 June 2013.[23]

Agency	No of FTEs as at 30 June 2013
DFEEST	612.06
DECD	22,929.1[24]
DCS	1 643.5
PIRSA	867.4
DTF	684.79
DCSI	4 622.6
DHA	2 018.4
DMITRE	468.3[25]
AGD	1 330.2
DEWNR	1 670.1
DPC	2 329.1
DPTI	3 446.9[26]

54. In relation to the staff allocated to work on FOI, the agencies provided variable figures for the number of FOI FTE for both accredited FOI officers and other dedicated FOI staff. State Records provided the audit with statistics collected for its 2012-13 Annual Report. In particular, State Records informed the audit of the number and classification of FOI FTE in each agency.

55. The table below shows the number of FOI FTE in each agency by classification (both accredited FOI officers and other FOI staff).[27]

[23] Figures taken from the agencies' 2012-13 annual reports; and for those figures not yet available, by confirmation with the agency.
[24] Confirmed with Ombudsman SA by A/Manager, Business Services, Office of Chief Executive, DECD on 6 December 2013.
[25] Confirmed with Ombudsman SA by Director, Strategy and Performance, Strategy and Performance, Strategy People and Culture, DMITRE on 3 December 2013.
[26] Confirmed with Ombudsman SA by Senior Project officer, Executive Support, Corporate Services Division, DPTI on 3 December 2013.
[27] Data provided by State Records of South Australia, email to Ombudsman SA dated 2 December 2013, and response of DMITRE to Ombudsman provisional report dated 13 February 2014.

Number of FOI FTEs in each agency by classification

	ASO1	ASO2	ASO3	ASO4	ASO5	ASO6	ASO7	ASO8	MAS1	MAS2	MAS3	EXEC	TOTAL
DFEEST	0.05	0.05	0	0.3	0.3	0.95	0	0.05	0	0	0.15	0.05	1.9
DECD	0	2	2	3	1	0.05	1	0	0	0	0.15	0.3	9.5
DCS	0	1.1	0	0.75	0	1.05	0	0	0	0	0	0.05	2.95
PIRSA	0	0	0	0	0	1	0	0	0	0.05	0	0.05	1.1
DTF	0	1	0	0	2	1	0	0	0	0	0.25	0.15	4.4
DCSI	0	0.1	0	1.35	2.25	0.75	0.1	0	0	0	0	0.15	4.7
DHA	0	0.15	0.3	0.2	0.55	2.25	0.5	0.5	0	0	0.3	0.6	5.35
DMITRE	0	0	0.01	1	0	1	0	0	0	0	0	0.31	2.32
AGD	0	0	0.05	0	1	0	0	0	0	0.25	0	0	1.3
DEWNR	0	0	0	0	2	0	0	0	0	0	0.15	0	2.15
DPC	0	0	1.95	2	0	1	0	0	0	0	0	0.05	5
DPTI	0	0.2	2.1	0.7	1.25	1	1.05	1.05	0	0.05	0.5	1.2	9.1
TOTAL	0.05	4.6	6.41	9.3	10.35	10.05	2.65	1.6	0	0.35	1.5	2.91	**49.77**

Accreditation of FOI officers - section 4

56. Legislative amendments requiring FOI officer seniority and accreditation were introduced after the report of the Legislative Review Committee in 2000, and the *Freedom of Information (Miscellaneous) Amendment Act 2001*.

57. Section 4 of the Act defines an 'accredited FOI officer' as:

> (a) the principal officer of the agency; or
>
> (b) an officer of the agency who–
>
> (i) has completed training of a type approved by the Minister for an accredited FOI officer; and
>
> (ii) has been designated by the principal officer of the agency as an accredited FOI officer of the agency; and
>
> (iii) …
>
> (A) in relation to an administrative unit of the Public Service–is an executive employee or an employee who usually reports to an executive employee; or
>
> (B) in relation to South Australia Police–is an officer in South Australia Police; or
>
> (C) in relation to any other agency–is employed in a position that usually reports to the principal officer of the agency or to the deputy or immediate delegate of the principal officer;

58. Section 4 continues to define 'principal officer' as:

> (a) if the agency consists of a single person (including a corporation sole but not any other body corporate)–that person;
>
> (b) if the agency consists of an unincorporated board or committee–the presiding officer;
>
> (c) in any other case–the chief executive officer of the agency or a person designated by the regulations as principal officer of the agency;

59. The following table shows the number of accredited FOI officers in each agency and their classification.[28]

Number of accredited FOI officers in each agency by classification

	ASO1	ASO2	ASO3	ASO4	ASO5	ASO6	ASO7	ASO8	MAS1	MAS2	MAS3	EXEC	TOTAL
DFEEST	0	0	0	0	1	0	0	0	0	0	2	0	3
DECD	0	0	0	0	0	1	1	0	0	0	3	2	7
DCS	0	1	0	0	0	1	0	0	0	0	0	0	2
PIRSA	0	0	0	0	0	0	0	0	0	1	0	1	2
DTF	0	0	0	0	0	1	0	0	0	0	1	3	5
DCSI	0	1	0	1	3	1	2	0	0	0	0	3	11
DHA	0	0	0	0	0	2	1	0	0	0	0	2	5
DMITRE	0	0	0	0	0	0	0	0	0	0	0	5	5
AGD	0	0	0	0	1	0	0	0	0	1	0	0	2
DEWNR	0	0	0	0	1	0	0	0	0	0	1	0	2
DPC	0	0	0	0	0	1	0	0	0	0	0	1	2
DPTI	0	0	0	0	0	0	1	1	0	0	1	1	4
TOTAL	0	2	0	1	6	6	5	1	0	2	8	18	50

60. The Act provides that an application is to be dealt with on behalf of an agency by an accredited FOI officer (section 14(1)). Curiously, the Act does not expressly provide that an accredited FOI officer must make the agency's determination under the Act. The Act simply states that the person making the determination needs to record their name and designation (section 23(2)(b)(i)).

61. While it is usually the practice of agencies for the accredited FOI officer or the principal officer to sign the determination, in my view, it would be helpful for the Act to expressly say so.

> **RECOMMENDATION 2**
>
> The Act should expressly clarify that an accredited FOI officer (or the principal officer) must make the agency's initial determination.

Designation of FOI officers - section 4

62. The audit questionnaire requested copies of documents showing the designation by the principal officer of each agency FOI officer who had undergone training approved by the Minister.[29] DCS failed to provide its designations, and DCSI and DPC could not locate all of their designations.

> **RECOMMENDATION 3**
>
> To comply with the definition of 'accredited FOI officer' in the Act, the agencies must ensure that they have appropriate designations by the principal officer of their FOI staff who have undergone training approved by the Minister.

[28] Figures provided by State Records of South Australia. Email to Ombudsman SA dated 2 December 2013. I understand that these figures do not include agencies' principal officers. I have relied on these figures, as some of the agencies' responses to the audit were unclear.

[29] *Freedom of Information Act 1991*, section 4(1)(b)(ii).

FOI training - section 4

63. Each agency provided details to the audit of the section 4 training undertaken by its FOI staff and principal officer.

64. These details show that 73 per cent completed their training in the last five years. In my view, accredited FOI officers should update their training on an annual basis.

65. In response to my provisional report, State Records commented that it has never received additional FTE resourcing to support FOI training administration, development and delivery.[30]

> **RECOMMENDATION 4**
>
> Accredited FOI officers of the agencies should undertake refresher training on a 12 monthly basis, as a matter of policy. This training needs to be appropriately funded.

66. Only one agency said that that its principal officer had completed FOI training, and this was before 2005.

67. None of the agencies require senior managers to complete FOI training. The majority of the agencies justified this by stating that there is a central FOI unit or FOI officer who handles FOI applications.

68. I consider that principal officers and senior management in agencies should be required to participate in FOI training. This would help to develop FOI understanding and compliance from the top down. It is curious that principal officers are not required to undertake training, as it is they who are usually signatories to an internal review determination. That they are not, is perhaps reflective of a general view in departments that FOI is not agencies' 'core business'.

69. Witnesses in the audit tended to agree; and one said:

> … Certainly there's been CEs where they
> probably, in my view, really should have undertaken the training.
> It's to be assumed the principal officer doesn't
> bring you the natural knowledge and skills you need to
> actually be able to understand what's been put in front of you in this space, because it is quite complex.
>
> My strong view is that there needs to be a training component, and it's obviously difficult for time, that needs to be provided to a CE when they come into that role because I have come across good and bad.[31]

> **RECOMMENDATION 5**
>
> Principal officers and senior management in the agencies should undertake appropriately tailored FOI induction and training.
>
> This should be a matter of policy across the agencies.

[30] Response from State Records to Ombudsman dated 12 February 2014.
[31] Transcript of evidence, p16.

FOI policies and procedures

70. State Records has produced information sheets and the following FOI procedures and guidelines:
    - Processing FOI applications
    - Across-government FOI applications
    - FOI and the charging of fees
    - Consultation and the FOI Act
    - FOI and the public interest test
    - Freedom of Information and 'sufficiency of search'
    - Cabinet documents exemption guideline
    - Administrative release of information.[32]

71. It is appropriate for agencies to seek to rely on State Records' guidelines. On the question of whether the agencies have their own current documented policies regarding FOI, five of the 12 do not. Further, all agencies but one have their own documented FOI procedures.

72. I observe that the nature and contents of each agency's policies and procedures are varied. Some are not in accordance with the Act and do not provide up to date information.

73. Some of the agencies' policies lack currency. One, for example, lists an outdated application fee and principal officer.[33]

74. Some suggest that a waiver of fees can only be given where a person liable to pay a fee or charge under the Act satisfies the agency:
    - that he or she is a concession card holder; or
    - that payment of the fee or charge would cause financial hardship to the person. [34]

75. This is wrong and fails to take into account section 53(2a) which provides that an agency may, as it thinks fit, waive, reduce or remit a fee or charge in circumstances other than those provided for under the regulations (as above). I note that State Records 'Processing FOI Applications Guidelines' on its website provides the correct details.

76. While I recognise that the different agencies may have different considerations which may require a unique FOI policy or procedure, there should be basic uniformity across all agencies.

> **RECOMMENDATION 6**
>
> All agencies should ensure that their FOI policies and procedures are up to date, and comply with the requirements of the Act.

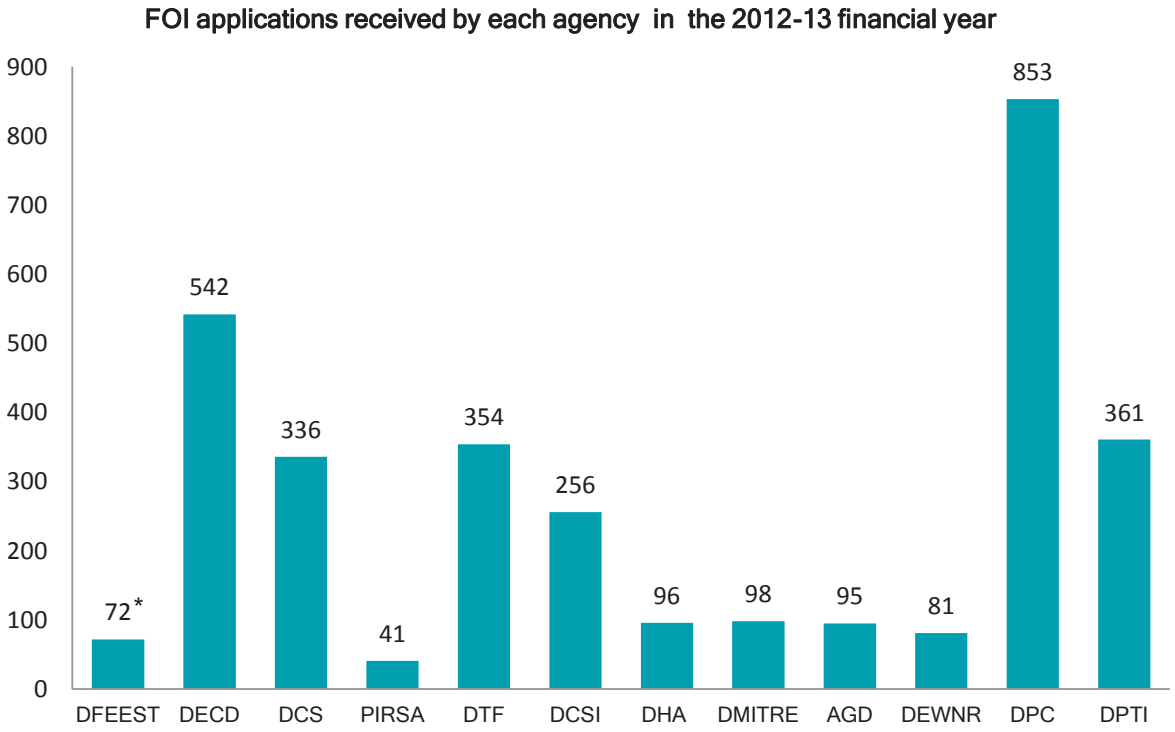
[32] http://www.archives.sa.gov.au/foi/foiadmin/guidelines.html#Processing_FOI_applications_guideline (as at 4 December 2013).
[33] DECD - Families SA Freedom of Information Manual p5 and p15.
[34] DECD - Families SA Freedom of Information Manual, p 6; DCSI - Responding for FOI requests, Domiciliary Care - Freedom of Information Procedure p2; DCSI - Freedom of Information (FOI) - Access to Records Guidelines June 2013, point 3.2.4.

PART 5

FOI APPLICATION NUMBERS & RESPONSE TIMES

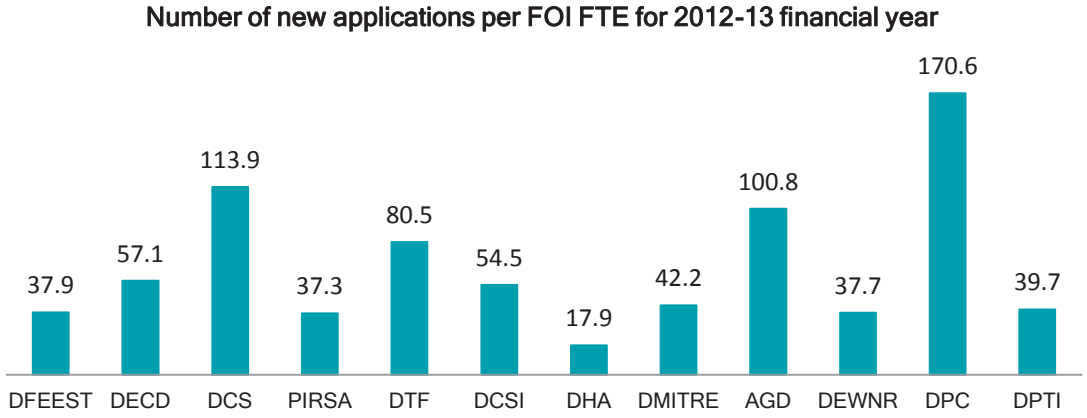
FOI application numbers

77. To understand the workload of FOI staff, the audit collected application numbers across the agencies. The graph below shows the number of new FOI applications received by each of the agencies in the 2012-13 financial year.

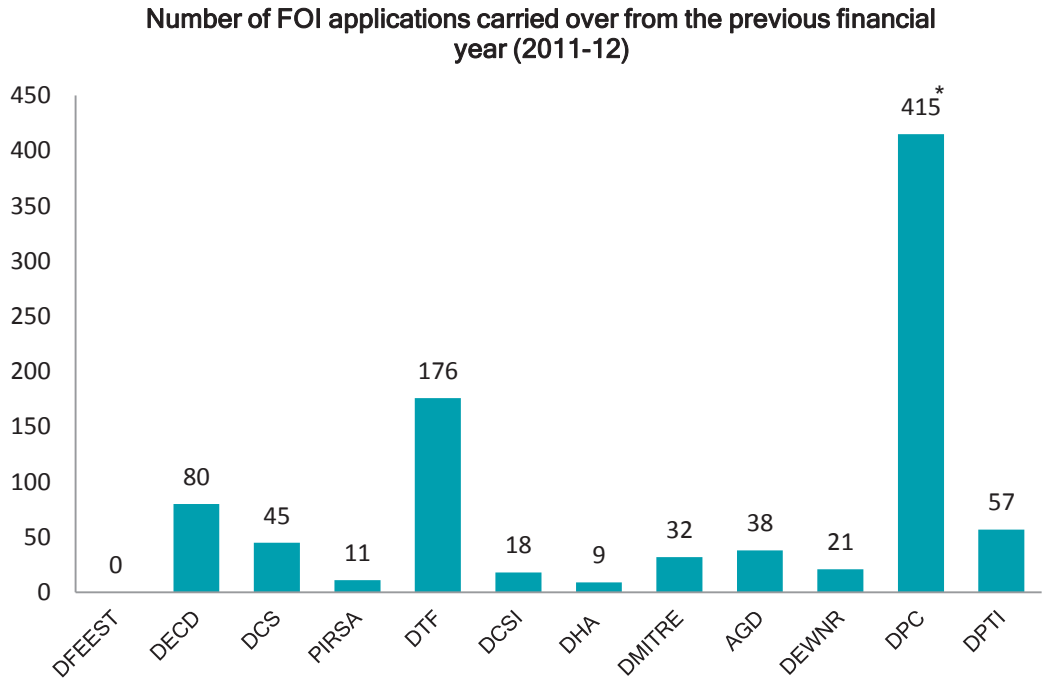


* This figure (72) includes five applications that were made to TAFE SA.

78. The following graph compares the number of new applications received in the 2012-13 financial year per FOI FTE in each agency.



79. The graph below shows the number of FOI applications carried over from the previous financial year (2011-12).



* This figure (415) includes applications that were made to the Office of the Premier, as DPC submitted that the data could not be separated.

Response times to FOI applications

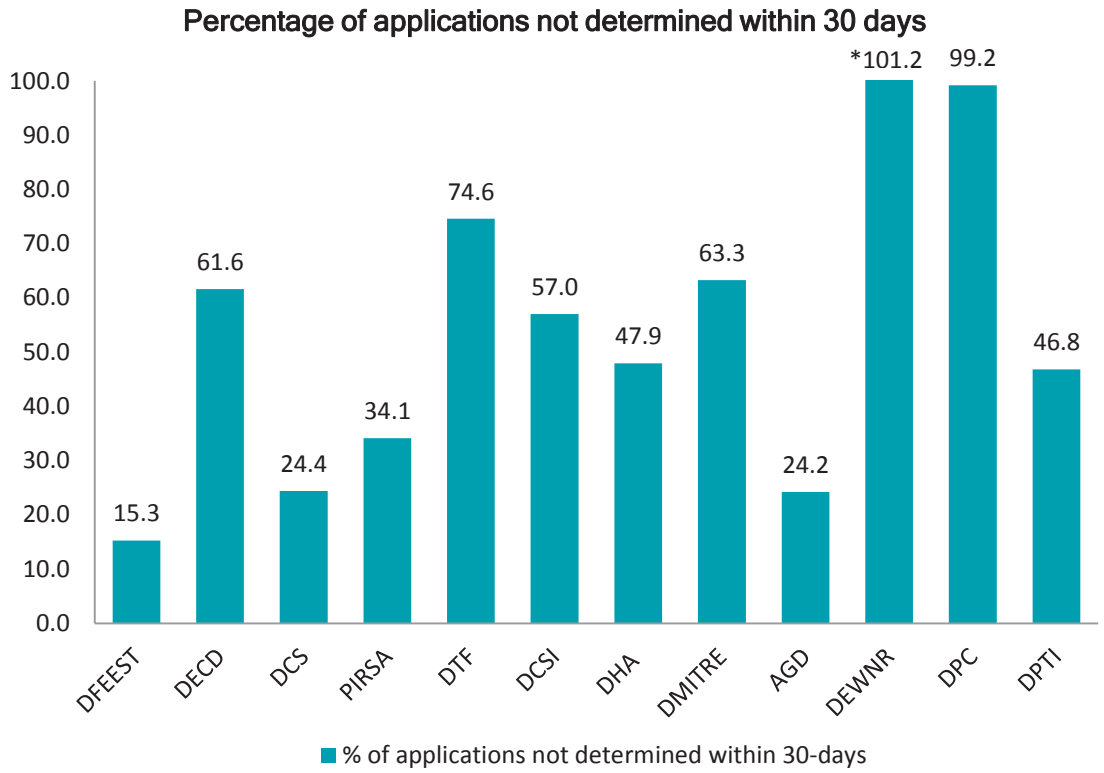
80. Section 3A(2) of the Act requires that agencies are to give effect to the Act in a way that 'assists members of the public and Members of the Parliament to exercise rights given by the Act' and that 'ensures that applications under this Act are dealt with promptly and efficiently'.

81. Section 14(2) provides that an access application must be dealt with (and determined) as soon as practicable (and, in any case, within 30 days) after it is received.

82. Section 14A allows the principal officer to extend this period for a reasonable time in certain circumstances (e.g. large applications or applications which necessitate large searches, or applications which require significant consultation). This extension is considered to be a determination under the Act.

83. Where an agency fails to make a determination within 30 days of receiving an access application or within the extended section 14A duration, the agency is deemed to have refused access to the documents (section 19(2)(b)). A 'deemed refusal' is considered to be a determination that is subject to review and appeal.

84. The following graph shows the percentage of applications received by the agencies in the 2012-13 financial year that were not determined within the 30 day timeframe.



* In response to the audit questionnaire, DEWNR advised it was unable to calculate the number of applications not determined within the 30-day statutory timeframe, and that the number of new FOI applications received in the 2012-13 financial year was 81. This figure also appeared in the Freedom of Information Annual Report 2012-13. In response to the provisional report, DEWNR advised that the number of applications received during 2012-13 financial year, which were not determined within 30 days was 82.

85. This graph shows that five of the agencies failed to determine over 50 percent of their applications received in the 2012-13 financial year, within the 30 day statutory timeframe.

Agencies' reasons for failing to determine applications in time

86. In order from most to least common, below are the reasons identified by the agencies to the audit for failing to determine their applications within time:
- lack of resources (budgetary/staff)
- waiting to receive advice or documents from different sections of the department
- other
- negotiating with the applicant
- seeking legal advice
- seeking ministerial advice.[35]

87. The 'other' reasons submitted by the agencies included:
- receiving multiple applications at the same time
- complexity, size and breadth of the application
- consulting with third parties
- slow or delayed responses from third parties consulted.

88. The audit collected similar data in relation to failure to determine internal review applications within the 14 day statutory timeframe.

[35] Agencies' responses to audit question 31.

Impacts on agencies' determination response times

Resourcing

89. The data above shows that agencies' main reason for determination delay is resourcing. According to one witness:

> So, theoretically every single FOI I do now is a deemed refusal because it's by sheer weight of numbers, it's physically impossible to meet them.[36]

90. According to another witness:

> What we have see [sic] there is that a dramatic increase in extension of time, certainly within the agencies I have worked in, because the only option is then to go considerably over time because you can't satisfy the request offered in 18 to 20 working days. Other States have 45 working days in their Act, so we are still sitting with 30 calendar days, so that is kind of an archaic process and that has been a huge impediment since 2007 until now, and that's across agencies.
> …
> … If there could be one change, apart from the technology verification, we certainly would look at the date, even just to change that wording to 30 working days because, as I said, you lose up to 10 days because there are weekends and public holidays, your staff don't generally don't work those days to be able to process requests. That is certainly a frustration but it is because of the increase in applications.[37]

91. The 30 day access application processing period was introduced as a result of amendments to the Act in 2001 (substituting a 45 day period). In response to my provisional report, DPC raised issue with the impact of consultation with third parties on meeting the legislated 30 day processing period.[38] DEWNR also had concerns about the brevity of this time limit.[39] However, in my view, it is appropriate. Agencies need to consider properly resourcing FOI. Agencies are also able to resort to section 14A of the Act, which allows them to extend the time in which to respond to an application.

92. There are also other factors which prohibit timely determinations, some of which I outline below.

Consultation within the agency and the agency's media unit

93. The audit received evidence from several witnesses who noted that FOI processing and document release does not happen as easily as it used to.

94. One said that a 'relatively quick process' used to occur on receipt of an application. But now FOI officers are hampered from performing their role by 'a lot more meetings occurring where you need go [sic] through and discuss the documents'. Sometimes, the media unit in the agency also has to be consulted.[40]

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36 Transcript of evidence, p12.
37 Transcript of evidence, p7.
38 Response from DPC to Ombudsman dated 16 April 2014.
39 Response from DEWNR to Ombudsman dated 14 February 2014.
40 Transcript of evidence, p10.

Ministerial 'noting' and 'getting the green light'

95. Further, there are time constraints in the practice of ministerial 'noting'. This is a practice which has developed over time, in which state government agencies provide their Minister with copies of applications and/or draft or completed determinations together with the documents which are the subject of the application, for 'noting' and, to quote one witness, for 'giving the green light'.[41]

96. It appears that this may have evolved from a Cabinet directive in March 2003 requiring state government agencies to advise their Minister of an application and its determination two days prior to the determination being sent to the applicant. State Records advised in response to my provisional report that the intention of this directive was simply to provide ministers with a 'heads up' of what was intended to be released and nothing more.[42]

97. I note that section 29(6) of the Act in effect allows a Minister to 'direct' that a determination be made by agencies for which they are responsible:

> A determination is not subject to review under this section if it is made by or at the direction of the principal officer of the agency or at the direction of a person or body to which the principal officer is responsible.

98. My view in this regard appears to differ from that of State Records in its guideline 'Processing FOI Applications'. This guideline says:

> When an application is received it is important to decide whether the Principal Officer of your agency and your Minister should be notified. When advising the Minister of these applications no direction can be given to an Accredited FOI Officer (or accepted by the Accredited FOI Officer) in relation to the conduct of the application.[43]

99. By way of explanation of my view, 'principal officer' is defined in section 4 to mean, in the case of each of the agencies, the Chief Executive Officer of the agency. The Chief Executives of the agencies are each responsible to their agency's Minister. In my view, it follows that under section 29(6), a Minister may direct that a particular determination be made, on an application received by an agency for which they are responsible. I discuss this later in the report, as well as the views of State Records.

100. However, one of the resultant problems is the time apparently taken for this ministerial 'noting' to occur. State Records says in the guideline:

> If your Minister has advised that they wish to be informed of the outcome of a particular application … a copy of the finalised determination should be forwarded to them two working days prior to the determination being forwarded to the applicant. This enables the Minister to be made aware of the outcome of the application should he or she need to respond to any queries as a result of access being provided to the information.[44]

101. One witness gave evidence that it took one month for the Minister's office to advise that the agency's draft determination could be finalised and sent to the applicant. The witness commented:

> … as FOI officers, we do our absolute best to get the documents prepared and ready to go out a week in advance of the 30 day time frame to provide the two day noting process required under the government's policy,

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41 Transcript of evidence, p11.
42 Response from State Records of South Australia to Ombudsman dated 12 February 2014.
43 State Records of South Australia, 'Processing FOI Applications' guideline, January 2013 version 12, p16.
44 State Records of South Australia, 'Processing FOI Applications' guideline, January 2013 version 12, p25.

> and it could still be a month overdue by the time it's gone through the hands of people that need to review it and media and the minister and CEO's office etc to actually get the document to the applicant.[45]

102. In one external review conducted by my office, the former Department of Planning and Local Government waited three months for the Minister to 'note' the agency's determination. The agency advised my office that it had made its determination in mid-January 2011, which was 'noted' six days later by the Minister. However, the agency then chose to further delay the matter by awaiting the outcome of a ministerial reshuffle and by providing the new Minister the determination for his approval some 14 weeks later. When asked why this had occurred, the agency advised that it was thought:

> … prudent to await the announcement of the new Minister for Urban Development and Planning and provide that Minister with a copy of the draft determination.[46]

103. I deal with the issue of ministerial 'noting' in detail later in Part 8 of the report.

Internal searching for documents

104. A significant factor identified by agencies in the audit which contributed to delay in meeting the time limits, was waiting for the requested documents to be provided to the FOI officers by their agency colleagues. On receipt of an FOI application, the agency's FOI officers commonly send out an email across their agency for staff to undertake searches for the requested documents and to give them to the FOI officers for their consideration. I comment on this further in Part 6 of the report.

Delay in getting 'sign off'

105. One witness informed the audit that delays can be attributable to the Chief Executive being unable to sign off on internal reviews and extensions of time in a timely fashion.[47]

> Getting timely access to the CE can be very difficult. There are times when that individual will be interstate on business, but because there is no-one acting in the role, it is not possible to get internal review determinations or time extensions signed during that period. Almost every other delegation held by the CE can be sub delegated as necessary. It is unclear why FOI is a special case.[48]

106. As principal officer,[49] a Chief Executive is required to sign extensions of time for determining an application at first instance under section 14A of the Act. However, a literal reading of the Act suggests that while internal review applications must be addressed to the principal officer,[50] it is arguable that this person does not need to sign off on the internal review determinations. There has been some confusion expressed to my office over the years about this issue, and also whether or not the principal officer is able to delegate their power.

107. It would be helpful if the status of the officer to conduct an internal review and the principal officer's ability to delegate power were clarified in the legislation.

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45 Transcript of evidence, p10-11.
46 Letter from Department of Planning and Local Government to Ombudsman dated 8 September 2011. Agency reference: F2010/001511; Ombudsman reference: 2011/5853.
47 *Freedom of Information Act 1991*, section14A.
48 Email from witness to Deputy Ombudsman dated 6 November 2013.
49 See *Freedom of Information Act 1991*, section 4.
50 *Freedom of Information Act 1991*, section 29(2).

RECOMMENDATION 7

The status of the officer required to conduct an internal review should be clarified in the Act, as well as the principal officer's ability to delegate their power.

Responding to broad or unclear FOI requests of regular applicants

108. The Act is in place to enhance openness and accountability of government, and to enable members of the public, including Members of Parliament to access government-held information to which they are lawfully entitled. Agencies are obliged to assist applicants in their access requests; to give effect to the Act in a way that assists the public and MPs to exercise their rights; and to ensure that applications are dealt with 'promptly and efficiently' (section 3A(2)).

109. Significantly, and appropriately in my view, MPs enjoy dispensation from the usual fees and charges under the Act up to a regulated threshold amount. The current threshold is $1000.[51] Quite properly, many MPs use the Act to assist them to discharge their representative responsibilities. The community and their constituency would expect no less, and this is part of a healthy democratic process.

110. Over the past five years, there has been a significant increase in the number of FOI applications across government departments by these MPs. My office has also experienced increasing numbers of external reviews being sought by MPs (I have reported on this in my annual reports).

111. I have observed, however, that there are an increasing number of MP applications which are couched either in terms of broad questions or requirements of agencies. Trying to deal with such applications means the agency expending further FOI resources. In one application provided to the audit, for example, an MP stipulated what the FOI officer needed to address in the schedule of documents in response to their application:

> I request all documents in file number REV created on 12/07/2012, titled Request for Information : ETSA Retailers 2012/2013.
>
> The schedule will include the file/docket name and number and date created. The schedule will also list any and all briefs/advices/files that were sent by the department to the Minister's office during the same period. The Ministerial material will identify its name and file number, date sent to the office, and a description of its content.[52]

112. Another application requested:

> The total number of calls, and cost of calls, made from Departmental telephones (including mobile telephones) (hereafter 'telephones') to
> 1. the 1194 Telstra 'speaking clock' service
> 2. the 1196 Telstra weather service
> 3. the 1234 Telstra information service which includes White Pages, Yellow Pages, Weather, Movie Times, Sport Scores etc (and prior to November 30, 2012, a Wake up and Reminder service)
> 4. all numbers with the prefixes:
>   a. 1900 9xx xxx
>   b. 1902 9xx xxx
>   c. 1902 2xx xxx

[51] *Freedom of Information (Fees and Charges) Regulations 2003*, regulation 6.
[52] Applicant reference: FOI718/CE ; Agency reference: T&F12/3781.

5. Where possible for item d. above, the three numbers that were called most often from telephones for the subject financial year.
6. Details of any requirements from the Department directed to staff to repay those costs for ant services listed above and/or any disciplinary action taken in relation to the same.

TIME FRAME: 2010/11, 2011/12, 2012/13 financial years.

[NOTE 1 - I accept no Fee in relation to this request being charged without prior agreement in writing via my contact details.]

[NOTE 2 - I would be grateful if I can be directed to where this information is publicly available if that is the case]

[NOTE 3 - unless expressly stated in the request, where the names or personal information of an individual might be disclosed by the request, the Department is permitted (where it is deemed necessary) to mask or otherwise de-identify such personal identifying information]

[NOTE 4 - I do not consent to this request being published without my prior permission]

[NOTE 5 - Parts of this request are severable so as to fall within the free processing limit, such that if that limit is exceeded, elements of this request may be treated as severable starting,

- *firstly, with the oldest year in the time-frame and severing each year until within the free processing limit, except and until only the most recent complete calendar year remains and*
- *then, if the free processing limit is still exceeded, starting with the last numbered item in the list above and proceeding with severance of each item until the scope of the request comes within that free processing limit so that, ultimately, in theory only item 1 for the most recent financial year comprises the scope of the request].*[53]

113. In my view, such applications can be misconceived.

114. In saying this, the audit received evidence that one of the reasons for increased use of FOI by opposition and minority party MPs may be the increase in number of outstanding Questions on Notice. By mid-October 2013, the audit was informed that the number of outstanding Questions on Notice in both houses of the parliament had risen to over 3 500. One witness commented that while it was doubtful that answering the Questions on Notice would stop the flow of FOI requests from opposition and minority party MPs, 'it might mean that the FOIs are more specific' and narrower in their scope.[54]

115. Regardless of the reasons for this increased and regular use of FOI, applicants, MPs and agencies alike, have responsibilities to be mindful of how public resources are used. The NSW Ombudsman noted a similar trend in NSW and reported on this issue in his review of the NSW *Freedom of Information Act 1989* in 2009. I endorse his view:

> Regular users of the system share the responsibility for making this legislation work effectively. There will never be unlimited resources for FOI and we urge regular users to avail themselves of training in the system to make sure they, and their staff, use public resources as efficiently and effectively as possible while exercising their right to access information.'[55]

116. DPC responded to my provisional report supporting the NSW Ombudsman's view, and highlighted that MPs' access applications have become a 'source of frustration', in that:

- they have become increasingly inclined to seek a very broad range of documents with no particular focus

[53] Agency reference DPC13/2527.
[54] Transcript of evidence, p10.
[55] 'Opening up Government' report on review of the *Freedom of Information Act 1989* (NSW), NSW Ombudsman, p89.

- they ask complex questions which cannot be answered without expending significant agency resources
- they often include instructions detailing how an access application should be processed
- they will, on occasion, suggest that FOI officers make judgements as to the comparative worth of documents.[56]

Consequences of agencies' delays in making determinations

Diminished confidence in government

117. Repeated agency delay in responding within FOI statutory time frames can diminish public confidence in government and reflect poorly on agencies' commitment to open and accountable government. In my view, the figures set out earlier in this part show that the current situation is not sustainable.

Applicants may not know their review and appeal rights

118. Agencies must notify applicants of their review and appeal rights in their determination. In the instance where there is no 'active' determination by the agency, applicants are often not in a position to know of these rights. The onus to escalate the process and apply for a review or appeal of a 'deemed refusal' still falls to the applicant, even though there may have been no communication at all from the agency. For this reason, it is important for applicants to be well informed about their review and appeal rights from the outset. In my view, this can occur through an acknowledgement process.

119. On the question of whether the agencies, as a matter of practice, send a letter to acknowledge receipt of FOI applications, all departments advised that they do. Two agencies, DFEEST and DPTI advised that they do not, as a matter of practice, acknowledge receipt of applications for internal review.

120. DFEEST advised:

> Due to the short response timeframe for internal review, acknowledgement letters are not sent to the FOI applicant. This process will be considered as part of continuous improvements to the FOI process.[57]

121. DPTI said:

> The short timeframes applicable to the internal review process are considered to negate the value of an acknowledgement letter. In addition, it is noted that they are not required.[58]

RECOMMENDATION 8

The Act should require agencies to promptly acknowledge receipt of an access application and an application for internal review. Both acknowledgements should inform the applicant of the relevant review and appeal rights and timelines, particularly in the event of the agency failing to make an active determination within the statutory time frames.

In the meantime. the agencies should adopt this practice as a matter of policy.

[56] Response from DPC to Ombudsman dated 16 April 2014.
[57] DFEEST response to audit question 10.
[58] DPTI response to audit question 10.

122. In my view, the Act should also allow applicants and agencies to negotiate extensions of time to deal with applications, at the initial determination and internal review level. Applicants' rights of review and appeal should remain preserved, however. I understand that this already occurs to some degree, even though this takes the process outside the Act.

RECOMMENDATION 9

The Act should allow applicants and agencies to negotiate extensions of time to deal with an access application, both at the initial determination and internal review level. However, applicants' rights of review and appeal must be preserved.

Applicants still bear the burden of fees

123. Unless waiver under the Act is possible,[59] applicants must lodge a fee with the agency upon requesting access and also upon requesting an internal review (the same amount). The fees are currently $31.50.

124. The Act provides that if on internal review, the agency varies or reverses a determination so that access to a document is to be given, then the agency must refund the fee paid in respect of the review (section 29(4)).

125. In my view, agencies should be obliged to refund fees if they have exceeded the statutory time limit to deal with applications (particularly as they have available to them the right to extend the time to initially deal with the application under section 14A).

126. As a matter of good public policy, the public should not have to bear the burden of government agencies' inability to comply with statutory time limits.

127. In saying this, I do not think that the applicants have an unqualified right to require agencies' resources to be used in a particular way. In 2012, the Australian Information Commissioner released his 'Review of charges under the *Freedom of Information Act 1982* (Cth)'.[60] That review recommended the imposition of a discretionary ceiling on FOI processing and charges of 40 hours processing time by agencies (following consultation with the applicant). I support this view.

RECOMMENDATION 10

The Act should provide that:

- agencies must refund the fees to an applicant if they exceed the initial determination or internal review time limitations under the Act
- agencies have a discretion to impose a ceiling of 40 hours for processing access applications following consultation with the applicant.

External review authorities and the District Court also bear the burden

128. Numerous external review applications to my office are a result of agencies being unable to make their determinations in time; and it is often the case that agencies have

[59] *Freedom of Information Act 1991*, section 53 and *Freedom of Information (Fees and Charges) Regulations 2003*.
[60] See http://www.oaic.gov.au/freedom-of-information/foi-resources/freedom-of-information-reports/review-of-charges-under-the-freedom-of-information-act-1982 (as at 19 December 2013).

not been able or are unwilling to avail themselves of section 14A to extend the time to deal with the application at first instance.

129. As a consequence, when the matter comes to external review, the agency has not turned its mind to the application and the documents have not been collected or collated. This can place an unnecessary burden on my office.

130. External review authorities under the Act do not have the power to remit deemed or inadequate determinations back to agencies for their reconsideration. Anecdotal evidence from agencies to my office suggests that for some agencies, it is easier to allow the statutory time to pass and let my office 'do the work'. In such matters, the external review authority has to bear the burden of agencies' inability to manage its staffing resources and processes.

131. I note that the Victorian and NSW Acts provide for remittal by their respective external review authorities in certain circumstances.[61]

RECOMMENDATION 11

The Act should allow an external review authority to remit deemed or inadequate determinations back to the agency for consideration.

[61] *Freedom of Information Act 1982* (Vic) section 49L; *Government Information (Public Access) Act 2009* (NSW), section 93. See also Submission of the Office of the Australian Information Commissioner to the Hawke Review ' Review of freedom of information legislation', December 2012, p29.

PART 6

JUSTIFYING FOI DETERMINATIONS - SEARCHING FOR DOCUMENTS

Searching for documents

What is a document?

132. The FOI Act is couched in terms of 'documents'. The preamble to the Act talks of providing public access to 'official documents and records' and 'correction of public documents and records in appropriate cases'. Section 12 provides that 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'.

133. The Act inclusively defines 'a document' as 'anything in which information is stored or from which information may be reproduced' (section 4).

134. This definition provides little guidance, and does not fully take into account the advances in technology. On this issue, one witness stated:

> … it doesn't provide any great direction. Obviously, we've had legal advice and Ombudsman reviews that have given us direction, but the government's lack or willingness to put the Act on the floor of parliament to make changes has really made it difficult for agencies to know where the boundaries are with technology and obviously the biggest increase now is people using their mobile phones as their main communication. Text message, iPads, all those mediums that have come in, how do you extract that data? How is it then stored in that central record keeping systems? So, really becoming quite complex and the Act certainly hasn't kept up with that.[62]

135. By way of contrast, the *Freedom of Information Act 1982* (Cth) defines a document as:

> **4. Interpretation**
>
> **"document"** includes:
>
> (a) any of, or any part of any of, the following things:
>
> (i) any paper or other material on which there is writing;
> (ii) a map, plan, drawing or photograph;
> (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
> (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
> (v) any article on which information has been stored or recorded, either mechanically or electronically;
> (vi) any other record of information; or
>
> (b) any copy, reproduction or duplicate of such a thing; or
>
> (c) any part of such a copy, reproduction or duplicate;

136. Definitions in other FOI legislation also address access to meta data and back up files, for example, and the reasonable practicability of accessing this information.[63]

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62 Transcript of evidence, p6.
63 *Right to Information Act 2009* (Qld), sections 28 and 29.

Where to search for documents

137. In order to meet their obligations under the Act, agencies must be able to adequately conduct searches for requested documents. The Act and FOI legislation generally, is necessarily reliant on the effectiveness of an agency's records management system and its ease of searchability and retrievability.

138. State Records' 'Freedom of Information and Sufficiency of Search' guideline[64] provides a list of common places that an agency should search to locate documents, including:
- office desks, filing cabinets and compactus storage
- records management systems and business systems
- computer drives and files – including personal drives and files if necessary
- computer discs and other portable storage devices including portable computers
- notepads, diaries and calendars
- audio and video recordings
- offsite storage locations
- State Records archival collection
- email accounts
- home computers where staff may be working from home; and
- government mobile devices, and personal mobile devices used for business purposes.

139. With electronic communications and storage, and most transactions and communications occurring online, the challenges for FOI officers are increasing. One witness told the audit:

> It's a big issue at the moment.[65]
>
> It's what everyone's talking about at the moment at all our meetings; emails, electronic records are causing great difficulties.[66]
>
> It's struggling to keep up with the changing world of the government and particularly, I guess, one frustration that we constantly talk about as FOI officers is the lack of direction within the Act in relation to technologies: what constitutes a database and accessing a database, how far you have to go to satisfy the requirements of sufficiency of search and obviously also then the applicant's expectations of what systems we should have as being a function in government. That's certainly, from talking to my colleagues and my own experience, that is our biggest frustration is that there's just one little line that refers to basically computers or thereabouts.[67]
>
> But it is, the crux of it is simple. If you are not good at records management and you don't have good metadata and whatever, how is it that you know what to search for? We are facing this now.[68]

140. The government's recent policies on Open Data is an acknowledgement of changing technological times. The FOI Act is in need of updating and offering greater guidance on access to information, in recognition of electronic communications, case

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64 http://www.archives.sa.gov.au/files/foi_guidelines_sufficiencyofsearch.pdf , June 2013, Version 1 (as at 4 December 2013).
65 Transcript of evidence, p23.
66 Transcript of evidence, p23.
67 Transcript of evidence, p6.
68 Transcript of evidence, p28-29.

management and electronic record storage. I also note that the Act still provides for applications to be 'in writing' and for 'fee payments' to accompany applications, which must be lodged at the office of the agency. Other state government services allow online applications and fee payments.

141. In response to my provisional report, State Records advised that together with the eGovernment Directorate of DPC, it is currently exploring how online applications and payment can be made. This will require funding, appropriate ongoing resourcing, and support from agencies.[69]

RECOMMENDATION 12

The Act should be updated to recognise technological advancements in electronic communications and storage, and modern records management practices.

'Sufficiency of search'

142. The FOI Act does not deal with what is required when agencies are unable to locate the requested documents. The District Court has suggested that an agency's search for the documents should be 'reasonable and sufficient'.[70]

143. By way of contrast, equivalent legislation in Victoria, Western Australia, Queensland and the Commonwealth all expressly provide that if documents cannot be found or do not exist, then this is construed as a determination to refuse access. I note in particular section 26(1) and (2) of the *Freedom of Information Act 1992* (WA):

> (1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –
>
> (a) all reasonable steps have been taken to find the document; and
>
> (b) the agency is satisfied that the document –
>
> (i) is in the agency's possession but cannot be found; or
>
> (ii) does not exist.
>
> (2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.

144. It would be appropriate to import such a provision into the Act. Agencies appear to struggle with offering adequate explanations to applicants when they cannot locate documents. I outline the agencies' responses to the audit on this issue below.

145. It would also be helpful for the Act to expressly provide that an agency's inability to locate the requested documents is in effect a determination to refuse access, and is a reviewable and appealable determination under the Act.

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[69] Response from State Records to Ombudsman dated 12 February 2014.
[70] *Akritidis v Police Commissioner* [1998] SADC 291 (23 April 1999), [20].

RECOMMENDATION 13

The Act should include a provision similar to section 26 of the *Freedom of Information Act 1992* (WA), that an agency can determine to refuse access on the basis that 'documents cannot be found or do not exist'.

A determination of this nature should be subject to review and appeal.

146. Applicants often raise concerns about the sufficiency of an agency's search for requested documents at the application and review level. In the last financial year, my office conducted 21 external reviews in which the sufficiency of agencies' searches for documents was in issue.[71]

Difficulties conducting internal searches for documents

147. It is common practice for FOI officers to notify the relevant areas in their agency of an access application, and seek a response as to what documents they hold within the scope of the application.

148. On the question of the difficulties experienced in this process, seven of the agencies identified 'departmental delay in responding' as the most frequent.

149. Other difficulties identified included:
- complexity and volume of documents within scope
- departmental lack of understanding of FOI obligations
- difficulties with records management systems
- uncertainty of what business unit might hold the requested documents
- time required for senior management to 'sign off' on a search for documents.[72]

150. DHA commented that:

> None of the options provided above accurately reflect challenges, which are minor by nature, experienced by Departmental staff conducting searches for documents. The Department for Health and Ageing has key FOI contacts in every Division, each of whom have wide ranging experience in the discovery and collation of documents in response to FOI applications.
>
> From time to time, a document discovery officer within a Division will consult the Office of the Chief Executive in the document discovery phase of a FOI application, primarily to ascertain whether a document(s) is within scope of a FOI application. This is a fairly uncommon occurrence, but given the sometimes very complex scope of some FOI applications, it is to be expected.[73]

151. In one external review of a determination by DPTI to extend the time it had to deal with an application under section 14A of the Act, staff delay in responding to the FOI officer's internal search for documents was a key difficulty. In my determination, I commented:

> 14. While I appreciate that the FOI unit began processing the application immediately, it appears that there was delay in the relevant divisions within the agency responding to the FOI unit's search requests. In my view, the applicant should not

[71] Statistics from Ombudsman SA case management system where 'sufficiency of search' was an issue noted during external review (2012/2013 financial year).
[72] Agencies' response to audit question 14.
[73] DHA response to audit question 14.

> have to bear the delay caused by agency's internal management of the application.[74]

152. One witness commented to the audit that if agency staff receive too many emails from the FOI officers seeking documents in response to FOI applications, they 'hit the delete button':

> We know a lot of people just
> hit delete as soon as they get the email that comes out
> saying "do you hold documents".[75]

153. In my view, such conduct offends the South Australian Public Sector Code of Ethics and breaches the State Records Act.

154. The witness suggested that agency staff react in this way, because they:

> … find FOI as something that
> stops them from doing their job. I don't know that it's as
> sinister as not wanting to release. I think people, as a
> department we are… all departments would argue
> …probably under resourced for the expectations.[76]

155. Agencies' staff awareness of the need for accountability and compliance with internal searches should be actively promoted by their Chief Executive and senior management.

156. The audit asked agencies whether they had directives, circulars or memos from senior management regarding responding to FOI internal searches for documents. Two agencies advised that they do, and 10 advised that they do not.

157. AGD provided the audit with a copy of a minute from its Chief Executive dated 23 August 2011 to all 'Business Unit Heads' within the department. The purpose of the minute was to remind the Business Unit Heads of their obligations to ensure that staff undertake thorough and timely searching for documents following a request by an accredited FOI officer:

> As Principal Officer of the [department] (AGD), I am responsible to ensure that FOI applications are determined within the statutory 30 calendar day period.
> …
> Accredited FOI Officers and Agency Key Contacts are experiencing difficulty obtaining documents from a number of business units in order to achieve these timeframes.
> …
> As a Business Unit head, I remind you of your responsibilities to ensure that searches are performed thoroughly and within the requested timeframe.[77]

158. DTF also provided the audit with a copy of an (unsigned) 'Procedure - Freedom of Information' from the Acting General Manager, Corporate Services, dated October 2006, stating:

> The FOI Officer will identify the branch/es likely to hold information relevant to the request and instruct them to provide relevant documents/records. Where no particular business unit can be identified, the FOI Officer may issue a general request to all business units. Any queries regarding a request must be addressed for the FOI Officer as soon as possible after receipt of the request.

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74 Ombudsman reference: 2013/04129.
75 Transcript of evidence, p30.
76 Transcript of evidence, p31
77 Documents submitted by AGD in response to audit question 11.

> Business units must make a proper search of all information (irrespective of format) held by them, identify and provide copies of all relevant information, and meet any timeframes set by the FOI Officer. Even if a business unit considers information relevant to the request to be too sensitive for release, they must still provide that information to the FOI Officer.[78]

159. I support the approach taken by these two agencies; and encourage all Chief Executives and senior management to issue a directive to their staff about the need to respond promptly and thoroughly to FOI internal searches for documents.

RECOMMENDATION 14

Chief Executives of the agencies should issue a written directive to all of their staff about the need for them to respond promptly and thoroughly to FOI internal searches for documents.

The directive should remind staff of their compliance obligations with the South Australian Public Sector Code of Ethics and the *State Records Act 1997*.

'Signing off' agency staff searches for FOI documents

160. Nine agencies answered to the audit that their senior management 'sign off' on the searches undertaken by agency staff in response to an internal request for documents from FOI officers.

161. Of the three agencies that do not require senior management 'sign off' (DCS, DCSI and DPC), two (DCS and DCSI) advised that 'departmental staff delay in responding' is the most frequent difficulty encountered by FOI officers when conducting internal searches for documents.[79]

162. In my view, senior management 'sign off' on agency staff's searches may lend a greater gravity to the FOI process within the agency; remind staff of their accountability obligations; and encourage compliance.

RECOMMENDATION 15

As a matter of policy, senior management in the agencies should be required to sign off on the searches undertaken by agency staff in response to an internal request for documents from FOI officers.

Procedures for conducting FOI internal searches

163. Nine agencies reported to the audit that they have procedures for conducting internal searches for documents; and 10 have a template. Most of the procedures include a document search check list to be completed by the FOI officer when processing an access request.

164. One agency (DCS) reported that it has neither a documented procedure or template for conducting internal searches, commenting:

[78] Documents submitted by DTF in response to audit question 11.
[79] Agencies' response to audit question 14.

> While nothing is formally documented, FOI staff note down all actions, including searching for FOI documents on a timesheet.[80]

165. State Records has produced a 'Freedom of Information and Sufficiency of Search' guideline[81] and a template of a basic form for staff to use to note their searches.[82] I encourage agencies without their own procedures, guidelines or templates to utilise this helpful resource.

Conducting a 'reasonable' search for documents

166. As noted above, the District Court has stated that a search for documents must be 'reasonable and sufficient'.[83] In my view, it can be helpful for agencies to show an applicant that reasonable searches have been conducted in response to their FOI application, even when documents are located.

167. Many of the agencies responded to the audit that their determinations indicate in broad terms the searches that have been conducted to locate relevant documents.

168. Two agencies (DMITRE and DPTI) responded that details of searches are not provided to applicants:

> No details of searches are provided to applicants, unless no documents are located. The applicant is then only advised that extensive searches are undertaken, but these are not provided. It is noted that there is no requirement to provide this information to the applicant.[84]

> The applicant is not provided with details of document searches undertaken by the agency. There is no requirement under the FOI Act for the agency to do this.[85]

169. Two other agencies (PIRSA and AGD) indicated that they provide details of the searches conducted where no documents are located. According to PIRSA:

> If no documents were located, the determination states the actions undertaken to attempt to locate the documents, ie:
> - Searches undertaken, eg electronic searches (Objective, email), hard copy files, listing the search criteria
> - Enquiries made, by stating with whom or to which Division enquiries were made.[86]

170. In the event of being unable to locate requested documents, agencies should be able to demonstrate to the applicant that reasonable and sufficient searches have been conducted. Such determinations should address as a minimum:
- how, when and where the searches were conducted
- the record management systems and databases searched, along with a relevant description of the contents of these databases, and any search terms used.

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80 DCS response to audit question 12.
81 'Freedom of Information and Sufficiency of Search' guideline, Version 1, June 2013, available at http://www.archives.sa.gov.au/files/foi_guidelines_sufficiencyofsearch.pdf (as at 12 December 2013).
82 http://www.archives.sa.gov.au/foi/foiadmin/foisampleletters.html (as at 12 December 2013).
83 *Akritidis v Police Commissioner* [1998] SADC 291 (23 April 1999), [20].
84 DMITRE response to audit question 16.
85 DPTI response to audit question 16.
86 PIRSA response to audit question 16.

RECOMMENDATION **16**

In the event of being unable to locate requested documents under the Act, agencies need to be able to demonstrate to applicants in their determination that they have conducted reasonable and sufficient searches, showing:

- how, when and where the searches were conducted
- the records management systems and databases searched, along with a relevant description of the contents of these databases, and any search terms used.

As a matter of policy, the agencies should have regard to the State Records of South Australia's 'sufficiency of search' guideline.

Consideration of agencies' determinations showing searches

171. The audit asked the agencies to provide a copy of their last FOI determination before the audit date, in which they had conducted searches but were not able to locate the requested documents.

172. All but one of the agencies responded. The table below quotes the relevant portions of the agencies' determinations.[87]

Agency	Determination
DFEEST	*Records held by the Office of the Chief Executive and Workforce relations have been searched for confirmation that an email was sent. No such record has been discovered.*
DECD	*Searches have been conducted for information in relation to your request. No documents have been identified which relate to your application.*
DCS	no determination provided
PIRSA	*In accordance with Section 23(1)(b) of the Act, I advise that no documents have been located within the scope of your request.* *Below I have outlined the nature of the searches and enquiries made in order to locate the documents you seek access to:* • *A search of PIRSA's electronic documents and records management system was conducted* • *Enquiries were made with relevant officers of PIRSA*
DTF	*A search of the department's databases and information stores has not identified any documents within the scope of your application.*
DCSI	*In scoping your application, no documents falling within the parameters of your request were located. I must therefore refuse access to the requested documents on the grounds that no such documents exist.*
DHA	*A comprehensive search of departmental records has been undertaken and no documents were found that fit within the parameters of your request.*

[87] Documents submitted by the agencies in response to audit question 17.

DMITRE	*In accordance with Section 23(1)(b) of the Act, I have determined that, following a search conducted throughout the Department, no relevant documents have been located.*
AGD	*No documents were located as a result of your request.* *On behalf of the Agency, I determine on 7 June 2013 that, pursuant to S23(1)(b) of the Freedom of Information Act 1991 (the Act), the Attorney-General's Department does not hold the documents you have requested.*
DEWNR	*Section 23(1)(b) of the Act states that an agency must notify an applicant in writing if the application relates to documents that are not held by the agency.* *I hereby advise that documents relating to your request do not exist.*
DPC	*An extensive search of DPS's records has been conducted and no documents relevant to this application were discovered.*
DPTI	*I have determined that there are no documents within the scope of your application.*

173. The majority of these determinations are not adequate. Applicants could not feel assured that the agency had conducted a reasonable and sufficient search in response to their application.

174. State Records has produced a 'FOI Sample Letter - Determination - No Documents Found', which includes the following text template:

> Pursuant to section 23(1)(b) of the FOI Act I advise that, following extensive searches conducted throughout the agency, I have not been able to locate the documents you have requested.
>
> Below I have outlined in detail the nature and extent of the searches and enquiries made in order to locate the documents you seek access to. Based on the searches and enquiries made, I have come to the conclusion that the documents *are either lost and/or never existed*.
>
> *insert details of:*
> *where you searched – including locations*
> *the reasons searches were made in those locations*
> *an explanation of any enquiries that were made to locate documents*
> *a conclusion based on the above*
> …
> If you have any information that might assist this agency to locate the documents you have requested access to, please include this information in your application for internal review.[88]

175. From the above, it appears that the agencies do not use this template.

176. I have included the following case study to highlight the importance of agencies having effective records management systems; adequately interpreting the scope of an application; and conducting reasonable searches for documents when responding to an access application under the Act.

[88] http://www.archives.sa.gov.au/foi/foiadmin/foisampleletters.html (as at 26 November 2013).

Case study

Department for Communities and Social Inclusion (2013/06843)

On 18 March 2013, the applicant made four FOI applications to DCSI for access to:

1. All briefings, speeches and written translations prepared by a staff member for a Minister's overseas travel (DCSI/13/03322) (**application 1**)
2. All documents relating to a staff member's overseas travel with a Minister (DCS/13/03323) (**application 2**)
3. All documents relating to the creation of the position currently occupied by a particular staff member (DCSI/13/03324) (**application 3**)
4. The department's Overseas Travel Procurement documents and policies and a particular staff member's application for overseas travel (DCSI/13/03325) (**application 4**)

The agency made the following determinations:[1]

Application	Original determination	Internal review determination
1	2 documents in scope - both released in full (28 May 2013)	Determination **confirmed** - no additional documents located (9 July 2013)
2	19 documents in scope - 10 released in full, 8 released in part, and 1 refused in full (22 May 2013)	Determination **varied** - additional documents located, 3 documents released in full, and 1 document (an email with 8 attachments) released in part (5 July 2013)
3	6 documents in scope - 2 released in full, 4 released in part (21 May 2013)	Determination **confirmed** - no additional documents located (5 July 2013)
4	6 document in scope - 5 released in full, 1 released in part (21 May 2013)	Determination **varied** - 1 additional document located, released in full (5 July 2013)

This matter came to my office as a complaint under the *Ombudsman Act 1972*. On 2 August 2013, I wrote to the Chief Executive of the agency and requested all relevant documentation and submissions.

In response to my request, the agency located additional documents. Of these:

- 20 documents were identified that had not been previously located, and the agency considered that they were in scope of the FOI application/s
- 6 documents were identified that were previously located and within the application's scope, however, they were not provided to the applicant
- 22 documents were identified that had not been previously located, and the agency considered that they were outside the scope of the FOI application/s.

I have considered the 22 additional documents that the agency claimed were outside the scope of the FOI applications, and for the most part, disagree. I base this view on the broad nature of the applications.

In my view, the agency failed to conduct a reasonable search for documents.

In her submissions, the Chief Executive advised that the agency is a 'large and complex portfolio' with no centralised records-management system in place. The error which occurred was that the correct business areas were not identified at the beginning of the process, in particular Financial Services.

Comments

This case study demonstrates the importance of:

- effective records management and systems
- understanding and clarifying the scope of an application at first instance with applicants
- a centralised FOI Unit with the requisite knowledge of the internal workings of an agency, in order to be able to conduct sufficient searches for documents.

PART 7A

JUSTIFYING FOI DETERMINATIONS - CLAIMING EXEMPTIONS

Determinations to refuse access - exemptions in the Act

177. The Act provides that a person 'has a legally enforceable right to be given access to an agency's documents in accordance with the Act'.[89] This right is governed by restrictions that are consistent with notions of public interest and the preservation of personal privacy.[90]

178. When agencies receive an application for access to documents, one of the grounds on which they may make a determination to refuse access is if the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.'[91] Schedule 1 to the Act lists exemption clauses in relation to different types of documents concerning, for example:
    - Cabinet
    - law enforcement and public safety
    - intergovernmental relations
    - personal affairs
    - commercial and business affairs
    - internal working documents
    - legal professional privilege
    - judicial functions
    - the economy of the state
    - operations of agencies
    - parliamentary privilege.

179. The existence of exemptions recognises that there are some documents which, due to public or private interest, should be withheld from disclosure.

Types of exemptions in Schedule 1

180. Schedule 1 lists 19 types of exemption clauses; however, there are over 50 sub-clauses and categories of documents embedded within most of these clauses. Clause 7(1), for example, has four categories capturing information which, if disclosed, would either:
    - disclose trade secrets
    - diminish the commercial value of the requested information, and on balance be contrary to the public interest
    - have an adverse effect on business, professional, commercial or financial affairs and on balance, be contrary to the public interest, or
    - prejudice the future supply of like information to the government, and on balance be contrary to the public interest.[92]

181. Some documents are exempt because they fit within a particular class of document - such as Cabinet documents.[93] Others are exempt because of predicted harmful consequences of their disclosure. These exemptions often contain a public interest balancing test, where disclosure 'would, on balance be contrary to the public interest'.[94] Others are exempt because their disclosure would offend legislation;[95] while others might be exempt because they are protected under common law privileges such as legal professional privilege or parliamentary privilege.[96]

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89 *Freedom of Information Act 1991*, section 12.
90 *Minister for Education and Child Development v Chapman* [2013] SADC130 (27 September 2013) [16].
91 See *Freedom of Information Act 1991,* sections 4 and 20(1)(a).
92 *Freedom of Information Act 1991*, clause 7(1)(a)(b) and (c) of Schedule 1.
93 *Freedom of Information Act* 1991, clause 1 of Schedule 1.
94 See *Freedom of Information Act 1991*, clauses 4, 5, 7(1), 9(1),13(1)(b),16 of Schedule 1.
95 See *Freedom of Information Act 1991*, clause 12(1) of Schedule 1.
96 *Freedom of Information Act* 1991, clauses 10(1) and 17 of Schedule 1.

182. As I illustrate below, applying the exemptions for FOI officers can be a technical and sometimes challenging exercise.

Agencies don't have to refuse access to 'exempt' documents

183. Section 3(3) of the Act reminds agencies that information can be released 'if it is proper and reasonable to do so, and permitted or required by any law'. This is a provision which is often not considered by agencies.

184. Further, the wording in section 20(1) of the Act provides agencies with a discretion to refuse access to documents that are 'exempt'. That is, agencies are not obliged to refuse access to documents which they decide are 'exempt':[97]

> **20—Refusal of access**
>
> (1) An agency **may** refuse access to a document—
>
> a) if it is an exempt document; (my emphasis)

185. The Act also provides that the parliament's intent is for the Act to be interpreted and applied 'so as to further the objects of this Act', and that the discretions conferred by the Act are to be interpreted 'as far as possible, in a way that favours disclosure' (without infringing privacy).[98]

186. I often observe through the external review process and providing advice to agencies, that agencies fail to appreciate the discretionary wording in this provision.

Has the department ever made a determination to give access to a document, despite being exempt under Schedule 1?

187. The audit posed the question above to the 12 agencies, to understand their approach to the FOI Act's exemptions and the discretion afforded to them under section 20(1)(a) of the Act.[99]

188. The audit found that:
- 10 agencies answered in the negative
- one agency answered in the positive (DPC)
- one agency did not know (DPTI).

189. Further, no agencies had any policies on the matter.[100]

190. In my view, these results reflect a failure to fully appreciate the extent of the objects and intent of the Act, and its policy underpinnings.

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97 There appear to be exceptions. For example, I do not think the Act could have intended that an agency has a discretion in relation to a document whose release would constitute an offence under an Act (see clause 12(1) of Schedule 1).

98 *Freedom of Information Act* 1991, section 3(1).

99 Audit question 40.

100 Agencies' response to audit question 43.

RECOMMENDATION 17

The agencies should develop an information disclosure policy highlighting, in the context of the objects and intent of the FOI Act:

- their discretion to give access even if a requested document is exempt
- the fact that merely because a document might satisfy an exemption does not mean that access to the document must be refused.

RECOMMENDATION 18

The Act should expressly provide that nothing prevents an agency making a determination to give access to an exempt document.

Determinations to refuse access - giving reasons is sound administrative practice

191. The Act says that on receipt of an access application, if agencies make a determination to refuse access to the requested documents, they must give reasons in their notice of determination. As the Crown Solicitor has advised agencies in his Legal Bulletin for government:

> On reading Schedule 1, you may have the impression that there are so many reasons for refusing access to a document that agencies find it easy to withhold documents. The FOIA itself contains a number of mechanisms that prove that impression to be mistaken. For example, the administrative discretions in the FOIA, of which there are many, are to be exercised so as to promote the objects of the Act. Also, an agency is required to justify any claims of exemption and applicants have a right to have determinations reviewed. These factors mean that an agency cannot merely assert a document is exempt, lapse into silence and close the file.[101]

192. It is commonplace for government decision makers to be required by statute to provide reasons for their decisions. For example, under the Ombudsman Act, the Ombudsman is required to give a complainant reasons when deciding not to investigate a complaint or to discontinue investigating a complaint.[102] Likewise, the Ombudsman is required to provide reasons when, at the conclusion of an investigation, the agency is found to have fallen into administrative error.[103] An external review authority also has an obligation under the FOI Act to provide reasons for its determination.[104]

193. There is no requirement at common law for administrative decision makers to give reasons for their decisions.[105] However, giving reasons for decisions is sound administrative practice and maintains public confidence in government decision making processes. It:

- makes the decision making process open and accountable
- can ensure decision makers exercise more care in their making their decision
- affords the affected party the opportunity to have the decision explained, to scrutinise the decision and to see the extent to which their case has been heard and understood by the decision maker

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101 Legal Bulletin No11, updated and reissued on 13 January 2011, p1. http://intra.sa.gov.au/communicating/crownsolicitors/legalbulletins/Bulletin11.pdf (as at 4 December 2013).
102 *Ombudsman Act 1972,* section 17(3).
103 *Ombudsman Act 1972* , section 25(2).
104 *Freedom of Information Act 1991*, section 39(13).
105 *Public Service Board v Osmond* (1986) 159 CLR 656, 666-7.

- allows the affected party to make an informed decision about whether to exercise any rights or review or appeal and, if so, the basis on which they might argue their case.[106]

194. Giving reasons also allows the review or appeal body to conduct a proper review of the decision. The comments of Owen J in the Supreme Court of Western Australia in *Manly v Ministry of Premier and Cabinet*[107] are apposite. In considering the equivalent of exemption clause 7 of Schedule 1 to the Act in the *Freedom of Information Act 1992* (WA), he said of my WA counterpart's[108] task:

> How can the [Information] Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker.[109]

Claiming exemptions under Schedule 1 - giving reasons - section 23(2)(f)

195. The Act provides in section 23(2)(f) that in a notice of determination refusing access to documents, agencies must:
- give reasons
- show the findings on any material questions of fact underlying the reasons
- show the sources of information on which those findings are based:[110]

> (f) if the determination is to the effect that access to a document is refused–
>
> (i) the reasons for the refusal, including–
>
> (A) the grounds for the refusal under section 20(1); and
>
> (B) if a ground for the refusal is that the document is an exempt document–the particular provision of Schedule 1 by virtue of which the document is an exempt document and, if under the provision disclosure of the document must, on balance, be contrary to the public interest in order for the document to be exempt, the reasons why disclosure of the document would be contrary to the public interest; and
>
> (ii) the findings on any material questions of fact underlying the reasons for the refusal, together with a reference to the sources of information on which those findings are based; …

Reasons for refusal

196. In accordance with section 23(2)(f)(i), when claiming that requested documents are exempt, agencies' reasons in their notice of determination must record first, that the documents are exempt; and second, the particular exemption clause in Schedule 1 that they are relying on.

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106 Administrative Review Council Decision Making: REASONS, Best Practice Guide 4, 2007, p1. http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/ARCBestPracticeGuide4Reasons.aspx (as at 25 September 2013).
107 *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550.
108 Western Australian Information Commissioner.
109 *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550, 573.
110 *Freedom of Information Act 1991*, section 23(2)(f).

197. Some clauses contain sub-clauses, paragraphs or sub-paragraphs which must be considered in a claim of exemption. Clause 16(1) ('operations of agencies'), for example, contains five within paragraph (a). It is not enough for agencies to simply claim clause 16(1) and not particularise which of the five paragraphs it is claiming in a determination. This is not an uncommon problem experienced by my office in the review process, and one which I have noted in the audit returns. This reflects poorly on the legitimacy of an agency's determination, and suggests that the agency has not turned its mind to their claim of exemption. In addition, it deprives applicants of the opportunity to make an informed decision about whether or not to exercise their review and appeal rights.

The findings on material questions of fact and the sources of the findings

198. In accordance with section 23(2)(f)(ii), agencies also need to show the findings of the material facts underpinning their reasons. Further, they are required to identify the sources of their findings. Otherwise the applicant (or the review body) cannot know what was taken into account in the process of the agencies reaching their exemption claim. Material facts are the facts which are relevant to supporting the determination.

199. Agencies need to identify the evidence which was considered relevant, credible and significant in relation to each material finding of fact. As the Crown Solicitor has advised agencies:

> 3. *The content of determinations*
>
> When an agency makes a determination that a document is exempt (either in whole or in part) the agency must explain why ie. it must justify its claim. The requirement to explain is contained in section 23 of the FOIA and section 48 of the FOIA specifically provides that in proceedings under the FOIA, the agency carries the onus of justifying its claim.
>
> An agency is not required to give so much detail in a determination that it reveals the exempt matter and thereby makes the determination itself exempt. On the other hand an agency will not comply with section 23 by merely repeating the words of the ground of exemption. Some explanation is needed, or to use the words of the FOIA, the agency must explain "*any findings on any material questions of fact underlying the reasons for the refusal.*"[111]

Analysis of the agencies' determinations - claiming exemptions

200. To assess the 12 agencies' understanding and compliance with section 23(2)(f), the audit sought copies of their last five determinations (initial and internal review, where appropriate) prior to the audit date, which had claimed requested documents to be exempt.

201. While all agencies complied with naming the documents as exempt and the particular clause in Schedule 1, in the majority of determinations or parts of determinations:
- most failed to show the findings on material questions of fact underlying the reasons for the refusal
- most failed to refer to the sources of information on which those findings were based
- most failed to provide adequate reasons.

[111] Legal Bulletin No11, updated and reissued on 13 January 2011, p1. http://intra.sa.gov.au/communicating/crownsolicitors/legalbulletins/Bulletin11.pdf (as at 4 December 2013).

202. Overall, most determinations failed to show how the actual information in each of the documents was caught by all of the criteria in the exemption clauses which they claimed as a basis for refusing access to the documents.

203. In the following, I provide one example of a determination or part of a determination from each agency to illustrate how agencies struggle with making adequate determinations. I do not include consideration of the 'public interest' component of some of the exemptions, as I deal with this in Part 7B of the report.

DFEEST

204. In response to a request for access to documents provided to the CEO about procurement practices, especially relating to the purchase of printer cartridges,[112] the agency claimed *inter alia* exemption clauses 4(2)(a), 6(1) and 6(2) of Schedule 1 as a basis for refusing access to many of the documents.

205. In claiming these clauses, the agency effectively copied these clauses and the Act's definition of personal affairs:

> **4—Documents affecting law enforcement and public safety**
>
> …
>
> (2) A document is an exempt document if it contains matter the disclosure of which—
>
> (a) could reasonably be expected—
>
> (i) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case; or
>
> (ii) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained; or
>
> (iii) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law); or
>
> (iv) to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety; or
>
> (v) to endanger the security of any building, structure or vehicle; or
>
> (vi) to prejudice any system or procedure for the protection of persons or property; and
>
> (b) would, on balance, be contrary to the public interest.
>
> **6—Documents affecting personal affairs**
>
> (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
>
> (2) A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.
>
> ***personal affairs*** of a person includes that person's—
>
> (a) financial affairs;
>
> (b) criminal records;

[112] Agency reference: BRIEFC/13/48.

(c) marital or other personal relationships;

(d) employment records;

(e) personal qualities or attributes,

but does not include the personal affairs of a body corporate

206. The agency failed to comply with section 23(2)(f), in that it:
- failed to state which of the six (6) sub-paragraphs of clause 4(2)(a) were relevant. Although it was likely that the agency was claiming clause 4(2)(a)(i), the agency failed to show:
  - which law would be contravened and how
  - the nature of the prejudice that would be occasioned through disclosure
  - how the expectation of the prejudice was reasonable
- failed to show how the information in the document was captured by the definition of 'personal affairs', and which paragraph of the definition (if any) was applicable
- failed to show how disclosure of the information would be an 'unreasonable disclosure' of information concerning a person's 'personal affairs'
- failed to address why disclosure of the 'allegations or suggestions of criminal or other improper conduct on the part of a person' would be unreasonable.

207. The determination was also misconceived in that it wrongly found that information which had been identified as being outside the scope of the FOI request was exempt under clause 6(1).

DECD

208. In response to a request seeking documents about meetings concerning the applicant between high school staff and other departmental employees, the agency's determination refused access to some of the documents on the basis of the personal affairs exemptions in clauses 6(1) and 6(3)(a):[113]

6–Documents affecting personal affairs

(1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

…

(3a) A document is an exempt document if it contains matter–

(a) consisting of information concerning a person who is presently under the age of 18 years or suffering from mental illness, impairment or infirmity or concerning such a person's family or circumstances, or information of any kind furnished by a person who was under that age or suffering from mental illness, impairment or infirmity when the information was furnished; and

(b) the disclosure of which would be unreasonable having regard to the need to protect that person's welfare.

209. The agency failed to comply with section 23(2)(f), as it:
- simply recited and relied on the wording of the clause in its determination
- failed to show how the information which was being denied was caught by the definition of 'personal affairs' in the Act[114]
- failed to address why disclosure of the information was 'unreasonable'

[113] Agency reference: DECD 12/2243 (I have not included consideration of the determinations of Families SA).
[114] *Freedom of Information Act 1991*, section 4.

- failed to address why disclosure of the information concerning a person under the age of 18 years would be unreasonable.

DCS

210. In response to a prisoner's application for access to his case notes during a certain period of time, the agency determined in part to refuse access to some of the documents on the basis of exemption clauses 6(1) and 13(1)(a).[115] Clause 6(1) is set out above. Clause 13(1)(a) provides:

> **13—Documents containing confidential material**
>
> (1) A document is an exempt document—
>
> (a) if it contains matter the disclosure of which would found an action for breach of confidence…

211. In its determination, the agency failed to comply with section 23(2)(f) in so far as it:
- merely quoted clause 6(1)
- failed to indicate what kind of 'personal affairs' were in issue in the documents, and how these affairs were caught by the definition in the Act
- failed to show why disclosure would be unreasonable within the meaning of clause 6(1). Instead, the agency purported to determine that:

> [c]lause 6(1) applies to the personal information of persons who may be referred to in department documents, and who are unaware that their private affairs stand subject to exposure by a claim for access under the Act.

- simply quoted clause 13(1)(a) and determined on internal review that the clause 'refers to confidential information held by the department. Release of this information under a claim of access under the FOI Act would be a breach of confidence'
- failed to appreciate that the words 'matter which would found an action for breach of confidence' have a legal meaning; and that in order to show that this exemption applies, an agency must demonstrate that:
  - the information in the documents must be able to be identified with specificity, and not merely in global terms
  - the information has the necessary quality of confidence (and is not for example, common or public knowledge)
  - the information was received in such circumstances as to import and obligation of confidence, and
  - there is actual or threatened misuse of the information.[116]

  The agency failed to show that it had considered these factors in applying the exemption.

PIRSA

212. One application sought access to copies of correspondence between the Auditor-General and the Chief Executive of the agency over a period of time.[117] The agency's determination in part refused access to some of the documents on the basis of exemption clauses 9(1) and 16(1)(a)(i) and (b). Clauses 9(1) and clause 16(1)(a)(i) and (b) provide:

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[115] Agency reference: CEN/13/0074.
[116] See the SA District Court decision in *Ekaton Corporation Pty Ltd v Chapman & Department of Health* (2010) 273 LSJS 453, citing Gummow J, as a member of the Federal Court, in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428, 437.
[117] Agency reference: CORP F2013/000006.

9—Internal working documents

(1) A document is an exempt document if it contains matter—

(a) that relates to—

(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and

(b) the disclosure of which would, on balance, be contrary to the public interest.

16—Documents concerning operations of agencies

(1) A document is an exempt document if it contains matter the disclosure of which—

(a) could reasonably be expected—

(i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or

…; and

(b) would, on balance, be contrary to the public interest.

213. In its determination, the agency set out the clauses; however, the agency:
- failed to show how the documents related to the decision making process of 'the Government, a Minister or an agency' under clause 9(1)(a)
- although required by clause 16(1)(a)(i), failed to address:
  - the method or procedure for the conduct of tests, examination or audits which was caught by sub-paragraph (i)
  - which agency's 'tests, examination or audits' were in question. It appears that the determination was concerned about the Auditor-General's 'tests, examinations and audits'. However, the Auditor-General is not 'an agency' under the FOI Act, as required by sub-paragraph (i)[118]
  - the nature of the prejudice that would be occasioned through disclosure
  - the reasonable expectation of the prejudice.

DTF

214. Upon receipt of a request for documents indicating an estimate of increased costs associated with the introduction of two part day public holidays on Christmas Eve and New Year's Eve, the agency determined *inter alia* that clause 14 and clause 9(1) applied.[119] Clause 9(1) is set out above; and clause 14 provides:

14—Documents affecting the economy of the State

A document is an exempt document if it contains matter the disclosure of which—

(a) could reasonably be expected—

(i) to have a substantial adverse effect on the ability of the Government or an agency to manage the economy, or any aspect of the economy, of the State; or

[118] The Auditor-General is an exempt agency' under Schedule 2 to the Act. The definition of agency in section 4 of the Act is expressed not to include an exempt agency.
[119] Agency reference: T&F12/0429; TFA168769.

(ii) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State; and

(b) would, on balance, be contrary to the public interest.

215. In relation to clause 14, although the agency endeavoured to address sub-clause (b), the agency failed to address sub-clause (a):
- to show whether paragraphs (i) or (ii) or both, were relevant
- if (i), how release of the documents could be expected to have a substantial adverse effect (not just an adverse effect) and which aspect of the economy was relevant
- the reasonable basis for expecting a substantial adverse effect
- if (ii), the person or class of persons in question
- what kind of advantage or disadvantage would incur as a result of disclosure
- how disclosure of the documents would be premature
- what proposed action or inaction of the parliament, the government or an agency was in question.

216. In its claim of clause 9(1), again the agency endeavoured to address paragraph (b); but failed to show how the documents were captured by paragraph (a).

DCSI

217. A request for access to all board minutes and agenda of the SA Affordable Housing Trust Board over the past two years was refused in part by the agency under clause 7(1)(c).[120] The agency set out the clause:

7—Documents affecting business affairs

(1) A document is an exempt document—

(a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or

(b) if it contains matter—

(i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and

(ii) the disclosure of which—

(A) could reasonably be expected to destroy or diminish the commercial value of the information; and

(B) would, on balance, be contrary to the public interest; or

(c) if it contains matter—

(i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and

(ii) the disclosure of which—

(A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and

[120] Agency reference: HSA 95149.

(B) would, on balance, be contrary to the public interest.

218. While the agency's determination attempted to address the public interest aspect of the exemption, it did not address how Housing SA's business and financial affairs would be adversely affected if the information was disclosed. The agency instead purported to determine that:

> It is proposed to exempt this type of information from release in the interests of ensuring there is no negative impact on a Housing SA's operations including where the information relates to specific projects involving third parties or budgetary and funding considerations.

219. This determination was misconceived, and failed to understand what is required in claiming the exemption.

DHA

220. An application requested copies of documents from the CEO or CEOs relating to payment of entertainment expenses and credit card transactions over a period of time.[121] The agency determined to refuse access in part to the documents on the basis of the personal affairs and business affairs exemptions under clause 6(1) and clause 7(1)(c) (as set out above).

221. While the agency's determination set out these clauses, it failed to satisfy section 23(2)(f) in that it:
- simply paraphrased clause 6(1)
- paraphrased clause 7(1)(c)(i), simply claiming 'business or professional affairs of the agency or other persons'
- paraphrased the first limb of clause 7(1)(c)(ii)(A)
- incorrectly paraphrased the second limb of clause 7(1)(c)(ii)(A) claiming that 'full disclosure ...could reasonably be expected ... to prejudice the future supply [sic]'
- failed to address clause 7(1)(c)(ii)(B).

DMITRE

222. An application requesting access to correspondence for a certain duration between the Minister and the department regarding the National Medical Devices Partnering Program was refused in part on the basis of clause 17(c):[122]

> **17—Documents subject to contempt etc**
>
> A document is an exempt document if it contains matter the public disclosure of which would, but for any immunity of the Crown—
>
> …
>
> (c) infringe the privilege of Parliament.

223. In its determination, the agency set out the clause, but did no more. It failed to show how the documents were subject to parliamentary privilege. Furthermore, the documents were simply called 'briefings' in the schedule attached to the determination, with no other identifying features to connect the documents to any proceedings of the parliament.

[121] Agency reference: FOI2012-00159.
[122] Agency reference: 2012/00501.

AGD

224. The agency determined to refuse in part, an application seeking copies of records concerning a fire in the South East and any consequent disciplinary action that was taken.[123] The determination claimed clause 6(2) (as set out above), but merely set out the clause in the determination notice. No further information or reasons for claiming the clause were provided, and therefore it failed to satisfy section 23(2)(f).

DEWNR

225. The agency refused a request seeking access to a copy of a report into the Adelaide Gaol Preservation Society.[124] The agency's determination claimed clauses 6(1), 16(1)(a)(iii) and (b), clause 7(1)(c) and clause 10(1) (legal professional privilege) over the entire document. Clause 6(1) and 7(1)(c) are set out above. Clause 16(1)(a)(iii) and (b), and clause 10(1) provide:

> **16—Documents concerning operations of agencies**
>
> (1) A document is an exempt document if it contains matter the disclosure of which—
>
> (a) could reasonably be expected—
>
> …
>
> (iii) to have a substantial adverse effect on the management or assessment by an agency of the agency's personnel; or
>
> …; and
>
> (b) would, on balance, be contrary to the public interest.
>
> **10—Documents subject to legal professional privilege**
>
> (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
>
> (2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.

226. The agency set out the clauses in its notice of determination; however:
- in relation to clause 6(1), failed to show how the document involved the 'personal affairs of individuals' and did not address the definition of the term in section 4 of the Act
- in respect of clause 16(1)(a)(iii) and (b), failed to address how release of the document could be expected to have a substantial adverse effect (not just an adverse effect) and the reasonable basis for this expectation.
- failed to adequately address the public interest test in (b) and show how, on balance, release would harm the public interest
- in relation to clause 7(1)(c), it simply paraphrased the clause and claimed that it had 'tak[en] into consideration the nature of the information and current services provided to the public'
- in claiming clause 10(1), failed to apply the test of legal professional privilege, and simply determined that the provision 'operates to exempt communications between an agency and legal advisers where that communication would be subject to legal professional privilege'.

[123] Agency reference: 13/0184.
[124] Agency reference: 57/0662.

DPC

227. In response to an application under DPC Circular PC031 (Freedom of Information release of Cabinet documents) seeking access to a Cabinet document titled 'Constitutional Convention' dated 5 May 2002, the agency determined in part to refuse access under clause 7(1)(c) (as set out above).[125]

228. The agency set out the clause in its determination; however, it failed to satisfy section 23(2)(f). The agency:
- simply stated that the document contained 'commercial information' which, if released could place the organisation at a disadvantage'
- failed to address why it considered the information was 'commercial'
- failed to show how, if the information was released, the organisation would be adversely affected
- failed to show why this expectation was reasonable
- failed to address the public interest test.

DPTI

229. The application requested access to a copy of submissions to the Draft Road Management Plan for Brighton Road.[126] While the agency released much of the information, it deleted the remaining information on the basis of clause 6(1) (as set out above). While the agency recited the clause in the determination, it:
- failed to show how the deleted information related to 'personal affairs' as defined in the Act
- wrongly advised that the information was exempt because it was 'personal information' (this is broader in meaning than information about a person's 'personal affairs')
- failed to show how disclosure of the information would be unreasonable.

In summary ...

230. The NSW Ombudsman in his review of the *Freedom of Information Act 1989* (NSW) commented that the list of clauses in that Act were 'unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.'[127]

231. Based on my brief analysis of the agencies' use of exemptions above and my experience as an external review authority under the Act, I agree with the NSW Ombudsman's view (noting also that the Act is based on the NSW Act and is similarly drafted).

232. In my view, the sheer list of 19 clauses and 50 sub-clauses and paragraphs of exemptions in the Act is liable to encourage all but the most seasoned FOI officer to adopt a 'pick the exemption' approach.

233. On receipt of an access application, agencies can often turn first to consider what exemptions might 'fit'. Evidence given to the audit confirms this.[128]

234. I note the NSW Ombudsman found similarly in his review of the NSW *Freedom of Information Act 1989,* where he said:

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[125] Agency reference: DPC13/0163.
[126] Agency reference: 2013/02645.
[127] Report on the Review of the *Freedom of Information Act 1989*, NSW Ombudsman, February 2009, p3.
[128] Transcript of evidence, p20.

> Many agencies automatically claim an exemption clause 'because they can'.[129]

235. In saying the above, I do not mean to cast aspersions on the good faith of agencies' FOI officers in exercising their responsibilities under the Act. There is no evidence before the audit to suggest that any FOI officer has conducted themselves in their role without propriety.

Ombudsman observations - Annual Reports - 1992-2013

236. Looking back through the Ombudsman's annual reports from 1992-93 to 2011-12, there are two key themes that my predecessors have observed and that I continue to observe as an external review authority in the FOI process.

237. The first is that agencies commonly fail to provide reasons for denying access to documents. They fail to link the exemptions claimed to the actual contents of the documents, and can often make 'blanket' claims over the documents.

238. This was noted in 13 of the 20 Ombudsman Annual Reports on FOI. In the first 1992-93 report, the Ombudsman noted that 'it is not sufficient for an agency to merely list the exemption clauses being claimed by an agency'. The Ombudsman repeated this message in his 1993-94 and 1994-95 reports. In 1995-96, the Ombudsman noted that '[o]ne of the constant features…is agencies' abrogation of their responsibilities under the Act to provide proper reasons for their determination'.

239. In my 2011-12 report, I commented that '[a]gencies commonly submit "blanket claims" over documents, rather than assessing the actual information within the documents'; and that 'most agencies regularly fail to provide detailed submissions to justify their FOI determination'.

240. The second consistent theme is that the starting point for agencies should be that documents should be released, unless release would cause real harm. This is in contrast to the apparent practice of first turning to exemptions and trying to force documents to fit into a category of exemption. This theme has been present in five reports. This position was most strongly put in 2002-03, with reference to the objects of the Act: 'agencies should always turn their mind to the objects of the Act "to extend as far as possible, the rights of the public to obtain access to information held by the government"'.

RECOMMENDATION **19**

The Act should be amended to:
- lessen the number of exemption provisions
- provide that information must be disclosed unless, on balance, disclosure would be counter to the public interest
- expressly direct agencies to consider the objects and discretions in the Act before applying exemption provisions.

The agencies should in the meantime, adopt a policy that, in the context of the objects and intent of the Act:
- discretions under the Act must be exercised in a way that favours disclosure of requested documents
- documents requested under the Act should be released, unless release would cause real harm.

[129] NSW Ombudsman Report 'Opening up government: Review of the *Freedom of Information Act 1989* (NSW), February 2009.

Composing a schedule of the requested documents

241. To assist agencies responding to requests in their determinations, there is a practice of agencies providing a discrete schedule to the applicant, which can show:
- the number attributed by the agency to the document (this number is marked on the document)
- a description of the document
- the author (and recipient of the document if relevant)
- the document's exempt status or otherwise.

242. This is a useful approach for applicants and agencies alike, and is supported by State Records.[130]

243. However, the audit has revealed that this practice varies considerably in calibre amongst the agencies; and there is a danger in agencies using the schedule, in effect, as the determination.

> **RECOMMENDATION** **20**
>
> The Act should provide that a schedule of documents must be developed to accompany a notice of determination.
>
> The schedule should indicate, as a minimum:
> - a number attributed to the document
> - the date of the document
> - the author of the document and recipient of the document (where relevant)
> - a substantial description of the document
> - the exempt status or otherwise of the document.
>
> The Act should expressly state that the schedule is not a substitute for a determination; and that where access to documents is refused, section 23(2)(f) must be followed.
>
> In the meantime, the agencies should adopt this as a matter of policy.

244. In response to my provisional report, State Records expressed agreement with this recommendation. However, DPTI and DHA objected to the requirement for a schedule to include a 'substantial description' of the document.

Further comment

Personal affairs information - harmonising with the Information Privacy Principles

245. FOI legislation invariably intersects with privacy concerns. The objects of the Act expressly refer to the need to preserve an individual's privacy. In the recent reforms in Queensland and the Commonwealth, the two jurisdictions combined FOI and privacy, and these areas are the responsibility of the one Information Commissioner.

246. In South Australia, there is no privacy legislation. Agencies subject to the FOI Act have different privacy obligations. Most state agencies, for example, are bound at a policy level by the state government's Information Privacy Principles (**IPPs**).[131] However, local government councils and universities are not.

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[130] http://www.archives.sa.gov.au/foi/foiadmin/foisampleletters.html (as at 20 November 2013).
[131] Information Privacy Principles Instruction, 16 September 2013, PC 012.

247. There is also a notable incongruence between the FOI Act and the IPPs and the meaning of private information. Under the FOI Act, private information which is exempt or which may be amended is described as information concerning a person's 'personal affairs'. Although the definition of 'personal affairs' in the Act is inclusive, in my view, it has a narrower meaning than 'personal information'.[132]

248. The IPPs are concerned to protect 'personal information'; and they define this as 'information or an opinion, whether true or not, relating to a natural person or the affairs of a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.[133] In effect, this means any information about an identifiable individual, unlike the meaning of 'personal affairs' information in the Act.

249. This is confusing; and in my view, there should be an integrated approach and a common legislative understanding of what kind of private information is protected from disclosure in this state.

Disclosing the name of an applicant

250. My office has noted that agencies do not tend to convey the name of the applicant when they consult with third parties about release of documents.

251. In its guidelines, State Records advises that agencies must take into consideration the IPPs before they disclose an applicant's identity during consultation.[134]

252. The FOI Act is silent on the issue. In his Annual Report of 2002-03, my predecessor noted that there was 'no obvious legal impediment' to an agency releasing the name of an applicant during the consultation process. He commented that 'where applicants seeking information concerning the personal or business affairs of a third party, it might reasonably be concluded that they have impliedly consented to release of their identity to the third party'.[135] I agree with this view, but nonetheless suggest that the Act should clarify the question.

253. I note that in Queensland, agencies are required to include the name of the access applicant in their disclosure logs (which are publicly available on their website), where the applicant is given access to the document, the document does not contain personal information and disclosure is not prohibited under the legislation.[136]

254. In my opinion, the starting point should always be that there is a public interest in disclosing the identity of parties who seek to use public resources (in this case, to access information).

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[132] See section 4 *Freedom of Information Act 1991*. See *Priebe v SA Police* [2007] SADC 119 (20 November 2007). For discussion in the Queensland context, see *Stewart and Department of Transport* (1993) 1 QAR 227.
[133] Information Privacy Principles Instruction, 16 September 2013, Part 1, Item 3.
[134] 'Consultation and the FOI Act' guideline, 6 September 2011, Version 2, p5. http://www.archives.sa.gov.au/files/foi_guidelines_foiconsultation.pdf (as at 11 November 2013).
[135] Annual Report 2002-2003, SA Ombudsman, p52.
[136] See http://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/disclosure-logs (as at 18 December 2013).

RECOMMENDATION 21

There should be an integrated approach to privacy concerns and access to government-held information in this state.

Local government and universities should be bound by the same privacy rules as state government.

There needs to be congruency between the meaning of private information in the FOI Act and the Information Privacy Principles.

The Act should expressly provide for the publication of FOI applicants' names and the nature of their applications, in terms similar to the practice of publishing applicants' names in disclosure logs under the *Right to Information Act 2009* (Qld).

255. In response to my provisional report, DHA, DEWNR and DPTI objected to this recommendation on privacy grounds. However, they considered that an MP should be required to disclose their identity as an applicant. DEWNR observed that releasing an applicant's name in the context of consultation under the Act, can create tension between the parties.

256. I do not share these agencies' objections for the reasons above. I note also that parties will invariably be identified in the event of a determination being appealed to the District Court.

PART 7B

JUSTIFYING FOI DETERMINATIONS - EXEMPTIONS & THE PUBLIC INTEREST

Public interest

> [N]otions of the public interest constitute the basic rationale for the enactment of, as well as the unifying thread running through the provisions of, the FOI Act.[137]

Exemptions with a public interest test

257. Nine of the 19 exemption clauses in Schedule 1 to the Act have an added 'public interest test'. That is, they contain an added requirement (**the public interest test**) to assess whether release of the requested documents:

> would, on balance, be contrary to the public interest.

258. These clauses concern:
- law enforcement and public safety (clause 4)
- inter-governmental relations (clause 5)
- business affairs (clause 7)
- conduct of research (clause 8)
- internal working documents (clause 9)
- confidential material (clause 13)
- the economy of the State (clause 14)
- financial or property interests of the state or an agency (clause 15)
- operations of agencies (clause 16).

259. Before these exemptions can apply:
- first, initial criteria in the clause must be met
- second, the public interest test must be met.

260. In all of these clauses except clause 9(1), the initial criteria contain a harm test or threshold.[138]

Application of the public interest test

261. Section 23(2)(f)(i) of the Act provides that agencies must address the public interest test in exemption clauses in their determinations:

> (f) if the determination is to the effect that access to a document is refused–
>
> (i) the reasons for the refusal, including–
>
> (A) the grounds for the refusal under section 20(1); and
>
> (B) **if a ground for the refusal is that the document is an exempt document–the particular provision of Schedule 1 by virtue of which the document is an exempt document and, if under the provision disclosure of the document must, on balance, be contrary to the public interest in order for the document to be exempt, the reasons why disclosure of the document would be contrary to the public interest; and** (my emphasis)
>
> (ii) the findings on any material questions of fact underlying the reasons for the refusal, together with a reference to the sources of information on which those findings are based; …

[137] *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, [39].
[138] *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54.

262. The District Court in *Everingham v Director-General of Education* said that in assessing the applicability of the public interest test:

> In each case the documents must be viewed in the light of all relevant circumstances, their contents and purposes assessed, and that done, the question of balance decided.[139]

263. Agencies must engage in a 'public interest balancing process' in applying the public interest test. The Court has said:

> This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.[140]

264. The test should be interpreted in accordance with the objects and intent of the FOI Act. In *Everingham,* the Court commented:

> Clearly the achievement of the objectives of the [FOI] Act is conducive to the public interest. It is a factor - and, I think, a fairly weighty factor - to be taken into account when determining where the balance lies.[141]

Analysis of agencies' determinations - application of the public interest test

265. Many of the agencies' determinations provided to the audit did not comply with the requirement in section 23(2)(f) to show the reasons for their claim that disclosure of the requested documents would, on balance be contrary to the public interest. Further, some of the agencies showed internal inconsistency, with the public interest test being applied in one determination but not another.[142]

266. The agencies' determinations varied in quality, and either:
- identify that the documents in issue meet the initial criteria of the exemption clause, but then ignore the public interest test
- note the harm test in the initial criteria of the exemption clause as the only public interest factor against disclosure
- confuse the public interest test with disclosure of documents having to be *in* the public interest
- fail to address and balance the public interest factors for and against disclosure
- simply reflect a lack of understanding of the public interest, and the objects of the Act.

267. I note that a State Records guideline provides that:

> Satisfying the elements of one or more exemption clause that contains a public interest test may be an indication that disclosure would not be in the public interest, especially where the elements are easily satisfied.[143]

268. In my view, this guideline is not as clear as it could be. For the unsuspecting, it may suggest that to justify an exemption clause that has a public interest test, it is sufficient to focus only on establishing the initial criteria or the harm test. State Records disagreed with my view in its response to the provisional report.

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139 *Everingham v Director -General of Education* , D2959 (Unreported, District Court of South Australia, Judge Bowering, 13 November 1992). The court was considering clause 9(1)(b) of Schedule 1 to the Act.
140 *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.
141 *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.
142 For example DEWNR reference 57/0662; AGD reference 13/0341 cf 13/0060; DECD reference 13/3099 cf F2178.
143 State Records of South Australia, 'FOI and the Public Interest' guideline, July 2011 version 1.2, p6.

269. A similar concept was critiqued in a Queensland review of its FOI legislation, where it was stated in relation to the Queensland Information Commissioner's guidelines:

> The application of these guidelines would seem to turn the public interest from a "balancing" exercise to one where there is a presumption that once the basic elements of the exemption are satisfied , the public interest will ordinarily favour non-disclosure.[144]

RECOMMENDATION 22

Agencies should note the legal position that merely satisfying the initial criteria in an exemption clause with a public interest test under the Act, is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest.

270. Below, I provide one example of a determination or part of a determination from each agency provided to the audit, to illustrate the agencies' different struggles with addressing the public interest test. The relevant exemption clauses are set out in the previous part of the report.

DFEEST

271. A determination claimed clause 4(2)(a)[145] which exempts matter that could reasonably be expected to prejudice an investigation of a contravention of the law, and in clause 4(2)(b) its disclosure would, on balance be contrary to the public interest.[146] The agency referred to the initial harm criteria under the clause as the only factor relevant to determining the public interest:

> The agency is of the view that to release the documents into the public domain could prejudice the investigations and it would be contrary to the public interest if matters were not properly investigated.

DECD

272. The agency claimed 16(1)(a)(i) in a determination and merely stated the harm envisaged by the clause as the only public interest factor:

> Access is refused as it would be contrary to the public interest to release the document as doing so would disclose information relating to the structure and scoring information of assessment tools, thus impeding an agency's ability to apply the tool effectively and would impact upon the validity of the results attained from its application.[147]

DCS

273. In a determination exempting a document under clause16(1)(a)(i) and (1)(b), the agency claimed only the harm factor provided for in the clause itself as the public interest reason for protecting the document from disclosure:

> Clause 16 is applied in circumstances when the release of information would render the method or procedure for the conduct of an examination by an agency ineffective. If disclosed, the information contained within this document would prejudice the effectiveness of procedures used by Correctional Services staff when undertaking their

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144 *The Right to Information: Reviewing Queensland's Freedom of Information Act: Report by the FOI Independent Review Panel*, June 2008, p141.
145 The exact subclause is not mentioned; however, it appears to be clause 4(2)(a)(i).
146 Agency reference: BRIEFC/13/48.
147 Agency reference: DECD 13/3099.

required functions. Therefore, it would, on balance, be contrary to the public interest for this document to be released.[148]

PIRSA

274. In one determination, the agency provided a more adequate example of considering the public interest factors for and against disclosure in relation to clause 9(1):

> In favour of the public interest
>
> - Meeting the objects of the act favouring access to documents.
> - The importance of transparency and openness and the interest that the public has in the effective operation of agencies.
>
> Contrary to the public interest
>
> - The advice contained within the report has been prepared by the consultant on the basis of it being confidential to PIRSA, for the purposes of current decision-making by PIRSA.
> - Disclosure of such information would jeopardise the decision-making processes of Government if an option of this nature for future consideration was to be made public.
> - To release the contents of the report of the matter under consideration would provide an advantage to interested third parties.
>
> After weighing up the above factors, I have determined that disclosure of the document would, on balance, be contrary to the public interest.[149]

DTF

275. In finding information exempt under clause 14 (without any discussion on whether the information satisfies the initial harm test), the agency claimed in one determination:

> I considered the following factors in favour of release of these documents:
>
> - The public's interest in government expenditure and the importance of transparency.
>
> I considered the following factors against release of these documents
>
> - The documents contain details of future wage provisioning of the Government which, if released, could jeopardise future wage negotiations.
>
> On balance, it is my view that disclosure would be contrary to the public interest.[150]

DCSI

276. In exempting information under clause 7(1)(c) in a determination, the agency made a clear distinction between the reason that the clause had been applied and the application of the public interest test:

> The exemptions under this clause have been applied because the exempted material relates to Housing SA's business and financial affairs. It is proposed to exempt this type of information from release in the interests of ensuring there is no negative impact on Housing SA's operations including where the information relates to specific projects involving third parties or budgetary and funding considerations.
>
> It is acknowledged that there is a genuine public interest in releasing information held by Government. This leads to greater transparency and public confidence in government

[148] Agency reference: CEN/12/1655.
[149] Agency reference: CORP F2013/000107.
[150] Agency reference: T&F12/4029.

> decision making processes. However, it is not in the public interest to disclose certain information if, in doing so, it would undermine sensitive business and financial negotiations. In this case the competing interests can be accommodated by releasing the information with third party and dollar amounts removed.[151]

DHA

277. In exempting information pursuant to clause 7(1)(c) in one determination, the agency failed to make any mention of the public interest test.[152]

DMITRE

278. In a determination, the agency engaged in a balancing exercise in exempting information pursuant to clause 9(1):

> In weighing the public interest, I weigh the interest of the public in knowing the views of those within the Government, with the interests of the Minister in being able to make decisions in relation to policy and consultative documents without this advice being publicly available.
>
> It is my view that in balancing these two interests that the detriment which is likely to fall upon the decision making processes within government upon release of this information would not be in the public interest.

Later in the determination, also in relation to clause 9(1):

> In weighing up the public interest, I weigh the public's [sic] interest in the opinion amongst Government consultative forums, with the need for the Minister to receive advice for decision making purposes.
>
> It is my view that in balancing these two interests that the detriment which is likely to fall upon the decision making processes within government upon the release of this information would not be in the public interest.[153]

AGD

279. In exempting a document under clause 7(1)(c) in a determination, the agency provided the following assessment of the public interest:

> The public interest factors favouring release of this material include providing information that is it is [sic] of particular interest to the applicant and meeting the objects of the Act. However, releasing the exempt material may negatively impact on an organisation. I consider it is not in the public interest to release material which may negatively impact on an organisation.[154]

DEWNR

280. In determining that documents were exempt pursuant to clause 16(1)(a)(iii), the agency mentioned only the harm envisaged by the clause in balancing the public interest:

> The document contains information that relates to the operations of a State Government agency. Disclosure of this document could reasonably be expected to have a substantial adverse effect of the management, or assessment by an agency, of the agency's personnel. Disclosure could reasonably be expected to create a reluctance of personnel

[151] Agency reference: HSA 95149.
[152] Agency reference: FOI2012-00159.
[153] Agency reference: 2012/00057.
[154] Agency reference: 13/0171.

> to provide information to the agency in the future, impact on personnel morale, create a loss of trust in the agency, and would on balance be contrary to the public interest.[155]

DPC

281. In one determination, the agency claimed the business affairs exemption in clause 7(1)(c), but failed to make any mention of the public interest test.[156]

DPTI

282. In a determination in exempting matter under clause 9(1), the agency stated the release of the information would be premature, but then simply claimed under the public interest test that 'this may affect intergovernmental relations':

> In considering the ground of exemption for clause 9, I am required to consider the public interest in disclosure or non-disclosure.
> …
> If this agency were to release this information, it is the view of the Department that this may affect the inter-governmental relations between the Federal Department of Infrastructure and Transport and the South Australian Department of Planning, Transport and infrastructure.[157]

The Howard factors

283. During external review, I have noted that agencies sometimes rely on a decision of the Commonwealth Administrative Appeals Tribunal in *Re Howard and the Treasurer of the Commonwealth of Australia* when they apply the public interest.[158] This usually occurs without the agencies having considered the contents of the requested documents.

284. *Re Howard* was decided in 1985, early in the operation of the Commonwealth *Freedom of Information Act 1982*. In his decision, Davies J considered elements of the public interest relevant to considering whether the disclosure of deliberative documents would be contrary to the public interest, as follows:

> (1) the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed;
> (2) disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
> (3) disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;
> (4) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest;
> (5) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision-maker and may prejudice the integrity of the decision making process.[159]

285. These have become known in FOI circles as 'the *Howard* factors'; and over the years, they have been wrongly regarded at times as if they are 'statutory factors' in determining where the public interest lies.[160]

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155 Agency reference: 57/0662.
156 Agency reference: DPC13/0163.
157 Agency reference: 2013/06018/01.
158 *Re Howard and the Treasurer if the Commonwealth of Australia* (1985) 7 ALD 626, 634-5.
159 *Re Howard and the Treasurer if the Commonwealth of Australia* (1985) 7 ALD 626, 634-5.
160 Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982', ALRC 77 (1995), [9.16].

286. Davies J himself commented in the decision at the time that:

> As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest. **Weight must be given to the object of the FOI Act**.[161] (my emphasis)

Rejection of the Howard factors

287. In order to counter the continuing reliance on the Howard factors in determining where the public interest lies, a number of jurisdictions have expressly legislated.

288. The *Freedom of Information Act 1982* (Cth) was amended in 2010. It expressly prohibits the consideration of a number of the Howard factors in determining the public interest. The following factors must not be taken into account:
- access to the document could result in embarrassment to the government, or cause a loss of confidence in the government
- access to the document could result in any person misinterpreting or misunderstanding the document
- the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made
- access to the document could result in confusion or unnecessary debate.[162]

289. The *Right to Information Act 2009* (Qld) sets out specific factors which must not be taken into account in determining the public interest, namely:
- disclosure of the information could reasonably be expected to cause embarrassment to the government or to cause a loss of confidence in the government.
- disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document
- the person who created the document containing the information was or is of high seniority.[163]

290. The *Government Information (Public Access) Act 2009* (NSW) specifically precludes from consideration the fact that disclosure of information might:
- cause embarrassment to, or loss of confidence in the government
- be misinterpreted or misunderstood by any person.[164]

291. The *Right to Information Act 2009* (Tas) includes the following as irrelevant factors:
- 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 or that there is a possibility that the public might not readily understand any tentative quality of the information
- that disclosure would cause a loss of confidence in the government
- that disclosure might cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

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161 *Re Howard and the Treasurer if the Commonwealth of Australia* (1985) 7 ALD 626, 635.
162 *Freedom of Information Act 1982* (Cth), section11B(4).
163 *Right to Information Act 2009* (Qld), schedule 4, part 1.
164 *Government Information (Public Access) Act 2009* (NSW), section 15.

RECOMMENDATION 23

The agencies should develop a policy that in assessing the public interest test in their FOI determinations, they should reject the *Howard* factors and focus on the actual content of the requested documents.

The Act should be amended to provide that the following matters are irrelevant when assessing if disclosure of particular information would, on balance, be contrary to the public interest:

- the author of the document was or is of high seniority
- that disclosure would confuse the public or that there is a possibility that the public might misinterpret the information
- disclosure of the information could reasonably be expected to cause embarrassment to the government or to cause loss of confidence in the government.

292. In response to my provisional report, DPTI objected to this recommendation. It considered the recommendation to be 'contrary to a full and rigorous consideration of the public interest.' In my view, this objection is misconceived, as assessing the public interest can only ever be on the basis of the contents of the documents.

293. State Records' response to my provisional report commented that in assessing the public interest test, the FOI guideline 'FOI and the Public Interest' was prepared following a request from Senior Management Council (**SMC**) and endorsed by SMC. Agencies should therefore be complying with it. The guideline includes a section on 'Factors excluded from consideration of the public interest', which rejects the *Howard* factors.

294. State Records supported the recommendation, particularly to include 'potential loss of confidence in the government' as an irrelevant factor.

Frankness and candour

295. In my experience, it is not uncommon for agencies to argue that it is contrary to the public interest for information to be disclosed on the grounds that release may inhibit frankness and candour in government communications and advice by public servants. I reject this as a general proposition.

296. I note that State Records guideline 'FOI and the Public Interest' includes:

> **Maintaining free and frank advice to government**
>
> While the FOI Act provides a legally enforceable right to access information held by government it also balances this with the adverse impact release of some documents could have on the conduct of public affairs. That is, it recognises that access to documents may need to be refused where it can be demonstrated that 'free and frank expression of opinions' will be restricted, particularly by those who provide advice to government. This advice can originate from both within and external to government.
>
> Consideration of this factor would usually relate to decision making and policy development at highest levels of government where candour and freedom to explore a number of options are paramount to the proper workings of government. Release of information should not discourage public servants from providing unfettered advice to Ministers.

> Claiming that disclosure of certain information would not be in the public interest because it would prevent free and frank advice to government must be considered on a case by case basis and supported by factual evidence of the harm and damage it could cause to government.[165]

297. There has been considerable criticism over the years of the 'frankness and candour' argument. One academic, for example, points out that acceptance of the argument encourages:

> … a culture which legitimates fear of public criticism, rather than one in which public servants are expected to have the necessary fortitude to give frank advice irrespective of any potential criticisms. To the extent that they are accepted, they encourage Ministers and public servants to hide behind then as a means of preventing access to any information which might potentially expose them to criticism.[166]

298. Deputy President Forgie of the Commonwealth AAT in the case of *McKinnon and Secretary Department of Prime Minister and Cabinet* found that there is a distinct tension between claiming that disclosure of a document may inhibit frankness of public service advice, and the obligations of public servants to comply with the law, including the relevant public sector legislation.[167]

299. In my view, a South Australian public servant's failure to provide frank and candid advice to government would be contrary to the Code of Ethics for the South Australian Public Sector.

300. The Queensland Information Commissioner has also pointed out:

> Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely means that unnecessarily brusque, colourful or even defamatory remarks are removed from the expression of the deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could materially alter for the worse, by the threat of disclosure under the FOI Act.[168]

The public interest test is 'amorphous'

301. It has often been said that the public interest is an amorphous concept. It is not defined in the FOI Act or any other statute. The determination of where the public interest lies is essentially non-justiciable, and depends on the application of a subjective rather than an ascertainable criterion.[169]

> The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of

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165 State Records of South Australia, 'FOI and the Public Interest' guideline, July 2011, version 1.2, p6.
166 Associate Professor Moira Paterson submission, p5, Report of the Independent Audit into the State of Free Speech in Australia, October 2007.
167 *McKinnon and Secretary Department of Prime Minister and Cabinet* [2007] AATA 1969, [161].
168 *Re Eccleston and Department of Family Services and Islanders* (1993) 1 QAR 60, [137].
169 Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982', ALRC 77 (1995), [8.13].

> these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that "the public interest" can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable.[170]

302. Australian case law generally accepts that '[t]he public interest is not to be circumscribed'.[171]

303. The difficulties that FOI officers have with applying the public interest is evident from the determinations submitted to the audit. One witness told the audit that applying the public interest test is:

> ... always a difficult area for staff, particularly when we are talking about do you choose not to use clauses when you generally could. That's certainly one factor around that is, we could use this clause and it's legitimate and would definitely hold up, but how do we actually structure and word and put in place the requirements of that public interest process of the clause? Certainly that's not just an issue I face and my staff face, it's an issue that a lot of staff across government have a problem with because it's so grey.[172]

Should the public interest be defined?

304. The difficulties for agencies in ascertaining the public interest is widely acknowledged.[173] However, it is generally accepted that legislators should not attempt to define the public interest in freedom of information legislation. The Australian Law Reform Commission (**ALRC**) and Administrative Review Council (**ARC**) have rightly commented that:

> 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.[174]

305. In recent times a number of jurisdictions have dealt with the uncertainty of the public interest test through greater legislative guidance.

306. The *Right to Information Act 2009* (Qld) establishes a uniform and express procedure for implementing the public interest test in determining whether a document was exempt from disclosure. The Act prescribes specific factors which must be considered in determining where the public interest lies. The Act sets out 19 factors, which are not exclusive, favouring disclosure in the public interest;[175] and 32 factors favouring non-disclosure.[176] Their inclusion was necessitated by the removal of exemption provisions; and they cover matters normally dealt with by way of exemption provisions in other freedom of information legislation.

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170 *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142, [12] (Tamberlin J).
171 *Re Murtagh and Commissioner of Taxation* (1984) 6 ALD 112, 121.
172 Transcript of evidence, p28.
173 See Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982', ALRC 77 (1995) [8.13].
174 See Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982', ALRC 77 (1995), [8.13].
175 *Right to Information Act 2009* (Qld), Schedule 4, Part 2.
176 *Right to Information Act 2009* (Qld), Schedule 4, Part 4.

307. The FOI decision maker is then required to balance the factors favouring disclosure against the factors favouring non-disclosure and decide whether, on balance, disclosure of the information would be contrary to the public interest.

308. The *Government Information (Public Access) Act 2009* (NSW) expressly states that there is a general public interest in favour of the disclosure of government information.[177] An FOI applicant under that Act has a legally enforceable right to be provided with access to the information, unless there is an overriding public interest consideration against disclosure.

309. The Act sets out non-exclusive considerations in favour of the disclosure of information held by government that may be taken into account for the purposes of determining whether there is an overriding public interest against disclosure:

> The following are examples of public interest considerations in favour of disclosure of information:
>
> (a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
>
> (b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.
>
> (c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
>
> (d) The information is personal information of the person to whom it is to be disclosed.
>
> (e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct. [178]

310. The *Right to Information Act 2009* (Tas) adopts a different approach by listing 25 (non-exclusive) factors that must be considered when assessing if disclosure would be contrary to the public interest. The factors are generally listed as 'neutral' with the decision maker needing to assess whether each factor favours disclosure or not. For example:
- whether the disclosure would contribute to or hinder debate on a matter of public interest
- whether the disclosure would promote or hinder equity and fair treatment of persons or corporations in their dealings with government
- whether the disclosure would promote or harm public health or safety or both public health and safety.[179]

311. The *Freedom of Information Act 1982* (Cth) was amended in 2010. The amendments created 'conditional exemptions' whereby access must be given to a document unless access would, on balance, be contrary to the public interest.[180]

312. If a determination is made that a conditionally exempt document should not be disclosed, the decision maker must include the public interest factors they took into account in their statement of reasons under section 26(1)(aa) of the Act.

313. The Commonwealth Act does not list any factors weighing against disclosure and sets out four factors favouring disclosure that must be considered if relevant:

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177 *Government Information (Public Access) Act 2009* (NSW), section 12(1).
178 *Government Information (Public Access) Act 2009* (NSW), section 12(2).
179 *Right to Information Act 2009* (Tas), Schedule 1.
180 *Freedom of Information Act 1982* (Cth), section 11A(5).

- promote the objects of the Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her personal information.[181]

314. Given the difficulties experienced by FOI officers in considering and applying the public interest test in their exemption claims, it would be helpful if the Act if, like Commonwealth and interstate FOI legislation, gave express guidance on what factors should and should not be taken into account in assessing the public interest.

RECOMMENDATION 24

Following Commonwealth and interstate FOI legislation, the Act should give express guidance on what factors should and should not be taken into account in determining whether disclosure of documents would, on balance, be contrary to the public interest.

[181] *Freedom of Information Act 1982* (Cth), section 11B(3).

PART 8

MINISTERIAL ‘NOTING’

Agencies' obligations to inform their Ministers of important issues

315. In his Report of the Independent Education Inquiry, Bruce Debelle AO QC recently wrote of the role of a government agency to keep a responsible minister informed of relevant issues:

> One most important obligation of the chief executive and the department is to keep their Minister fully informed of all matters that concern the department and are of political interest in the broadest sense of the word 'political'. The chief executive and the officers of the department should be guided by the principle of 'no surprises'. They should inform the Minister promptly of matters of significance within the responsibility of the Minister's portfolio, particularly where those matters may be controversial or may become the subject of political debate.[182]

316. There is no requirement in the FOI Act that agencies advise their Ministers in relation to FOI applications or determinations. However, evidence gathered through the audit demonstrates a wide spread practice of agencies:
- notifying their Ministers when an FOI application is received, and/or
- providing a copy of the documents and a draft determination for approval, prior to finalisation, or
- providing a copy of the documents and a finalised determination.

317. Whilst it is appropriate for agencies to keep their Minister informed of sensitive matters, the practice of 'ministerial "noting"' can result in political interference, or the perception of political interference, in the FOI process. The Act provides a mechanism for transparency and accountability of government; and any perception of political interference in the decision making may affect public confidence in the process.

Advising Ministers of FOI applications and determinations

318. Of the audited agencies, 10 advised that they notify their Minister of FOI applications:
- seven agencies have a documented policy about notifying their Minister of applications (DFEEST, DECD, DTF, DHA, AGD, DEWNR, DPC)
- three agencies do not have a documented policy, but nonetheless have a departmental practice of notifying their Minister of applications (PIRSA, DCSI, DPTI)
- two agencies do not inform their Ministers of FOI applications when they are received (DCS, DMITRE).

319. All of the audited agencies notify their Minister of FOI determinations prior to the determinations being sent out to applicants:[183]
- nine agencies have a documented policy or procedure (DFEEST, DECD, DTF, DCSI, DHA, AGD, DEWNR, DPC, DPTI)
- three agencies do not have a documented policy but do have such a practice (DCS, PIRSA, DMITRE).

320. Of the audited agencies:
- five allow 1-3 days (DFEEST, DECD, DCS, DCSI, AGD) for ministerial 'noting'
- three allow 4 -7 days (DTF, DHA, DPC)
- four allow no set number of days, and they wait to hear back from their Minister or ministerial staff prior to sending out the notice of the determination to the applicant (PIRSA, DMITRE, DEWNR, DPTI).

[182] Report of the Independent Education Inquiry by Bruce M Debelle AO QC, p125 [375].
[183] DCSI indicated that no notification is provided to the Minister in the case of client related FOI determinations.

A Minister's power to direct their agency's determination

321. I have previously referred to my interpretation of section 29(6) of the Act in Part 5 of the report, and my view that a Minister has the power to direct that a determination be made in response to their agency's receipt of an access application. I have also noted that my view appears to differ from State Records' 'Processing FOI Applications' guideline, which says that 'no direction can be given to an Accredited FOI Officer (or accepted by the Accredited FOI Officer) in relation to the conduct of the application'.[184] I note that State Records' publication of 'What is an Accredited FOI Officer' also says that 'the FOI Act requires accredited FOI Officers to make FOI determinations independently and free from any influence.'[185]

322. In response to the provisional report, the Acting Director of State Records commented that the intent behind the statement in the *'Processing FOI Applications'* guideline that no direction can be given by Ministers or accepted by accredited FOI officers is to protect against improper interference or 'dictation' by Ministers rather than the type of direction referred to in section 29(6). Further, he commented:

> The CSO has advised that the 'direction' referred to in section 29(6) specifically refers to the situation where the principal officer makes the determination and directs a person to draft the notice of determination and sign it, in effect, as the principal officer's agent. It should not be interpreted as 'dictation', interference or fettering of discretionary powers.
>
> I will give consideration to how our guidelines can be reworded to make it clear that the 'direction' referred to in section 29(6) is lawful and should not be interpreted as authorising 'dictation' by the principal officer or minister.
>
> Generally speaking, I still consider it important that State Records' guidelines support decision making by accredited FOI officers, on behalf of agencies, that is free from improper influence and pressure from inside or outside the agency. State Records will continue to advise accredited FOI officers, that are not principal officers, that if they are being pressured to make a determination they do not agree with, they should ask the principal officer to make the determination, thereby invoking section 29(6). This is important because although all determinations are taken to have been made by the agency pursuant to section 49, the protections from legal liability in the FOI Act are dependent upon the individual person making the determination honestly believing that the Act permits or requires the determination to be made. This is consistent with Recommendation 26.[186]

323. I note that this publication also says that '[t]he designation of an accredited FOI Officer should be viewed as a formal delegation of authority'.[187] In my opinion this is doubtful. The Act provides that an accredited FOI officer is one who, having completed training, has been designated by the principal officer of the agency as an accredited FOI officer (section 4). A designation is not a delegation. The Act provides that an application for access will be dealt with on behalf of an agency by an accredited FOI officer.[188] The power that an accredited officer is exercising in dealing with an access application is an original power granted directly under the Act.

324. The Acting Director of State Records advised in response to the provisional report that the intent of this sentence is to ensure that when an agency experiences administrative change, the agency review designations as they would delegations. Consideration will be given to clarifying this in the information sheet 'What is an Accredited FOI Officer'.[189]

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184 State Records of South Australia, 'Processing FOI Applications' guideline, January 2013, version 12, p16.
185 State Records of South Australia,' What is an Accredited FOI Officer', 14 June 2011, version 4, p3.
186 Response from State Records to Ombudsman dated 12 February 2014.
187 State Records of South Australia,' What is an Accredited FOI Officer', 14 June 2011, version 4, p4.
188 *Freedom of Information Act 1991,* section 14.
189 Response from State Records of South Australia to Ombudsman dated 12 February 2014.

325. I note that only Commonwealth and Victorian FOI legislation have a similar provision to section 29(6) of the Act.[190] Other interstate FOI legislation in Queensland, NSW and Tasmania is concerned to ensure the independence of agency decision makers, and that they be free from inappropriate influence.

Evidence of ministerial influence

326. Evidence given to the audit suggests that some influence is brought to bear on FOI decision makers by agencies' Minister's office. One witness informed the audit that ministerial staff invariably contact more junior FOI staff when there are concerns about a determination, in the ministerial 'noting' phase:

> They don't ring me. They'll ring the weakest …
> They tend to pick on the weakest link, which means … and I have always said to my guys that if anybody is ringing them they need to talk to me because it's my signature on the bottom ….
> …
> … They used to ring [me]. Then they decided they would ring other people. … [FOI officers]
> have actually got to (a) understand politics and (b) be comfortable with somebody ringing them up in a daring degree of an abusive way. …
> … I've had some very
> interesting phone calls from people, very abusive phone calls from people.[191]

327. In response to being questioned about political interference, this witness added:

> I have experienced that on many occasions where people want to change my determination. I don't change very often. I have on occasions.[192]

328. The audit also received evidence of FOI officers being treated less favourably, due to determinations that they had made. However, the audit did not receive evidence that this is common practice. One witness said:

> I'm aware of a situation where an FOI officer released information, in many respects against the trends of similar sorts of information that were requested across government, and there were conversations about what should happen to that individual, to the point of are they, do they have a connection to the opposition.[193]

329. Another witness indicated that they had received phone calls from a Minister's office asking that certain documents not be released - not because an exemption applied, but because the documents were considered to be embarrassing to the government.[194]

330. A witness said in relation to ministerial involvement:

> There have been occasions where on the day something was then due to be released, I'll get a phone call saying "Hang on, we don't want you to release that" and then that is then about why don't you want us to release that, and then

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190 *Freedom of Information Act 1982* (Cth) section 23(1); *Freedom of Information Act* 1982 (Vic) section 26(1).
191 Transcript of evidence, p21.
192 Transcript of evidence, p19.
193 Transcript of evidence, p16-17.
194 Transcript of evidence, p21.

> we'll have a conversation. Normally it's a document or it's not the determination, but it will be a document in a determination. Then we will pull -- so, we won't release it, and then we'll have the conversation about why a document that we said was either could be released in full or could be released in part is something that they believe shouldn't be released at all…[195]

331. A significant finding of the audit is a change in practice of agencies from a process of providing their Minister with notice of the determination a set number of days prior to release, to a practice of providing a draft determination and then waiting for ministerial approval prior to release. One witness commented that previously:

> all you would do is give the copy and then two days after it has gone up you would release the documents. There would be no haggling or green light required. You noted the time, two days, it goes out that day.
> It's unfortunately evolved into a process where we now can't release the documents until we have received the green light, or "Yes, …, this has been noted". And while we then work to try and go okay it was two days, could we, let's make it a maximum of a week to push this through, it could evolve to four weeks or beyond before we get that note and that is …with us hassling and chasing quite often to go "where is this?".[196]

Ministers and their staff effectively decide the timing of determinations

332. One witness in the audit indicated that the time taken in the ministerial 'noting' process 'varies quite considerably. We can get an answer sometimes within days and sometimes it can drag for more than six months':[197]

> …certainly as FOI officers, we do our absolute best to get the documents prepared and ready to go out a week in advance of the 30-day time frame to provide the two day noting process required under the government's policy, and it could still be a month overdue by the time it's gone through the hands of people that need to review it and media and the minister and CEO's office etc to actually get the document to the applicant.
>
> We then have to, of course, field those calls from the applicant "You have extended it by a month saying it would be ready, now you are over time. Where is it at?" Of course, we have to be the ones to provide that interface where we actually know we have done it in time, we have done all the work we can do on that point and we are waiting on someone else to give us the green light to be able to release it.[198]

333. Two witnesses said that delays occur in the ministerial noting process, even when the determination is that there are no documents which fall within the scope of the application.[199]

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195 Transcript of evidence, p20.
196 Transcript of evidence, p11.
197 Transcript of evidence, p14.
198 Transcript of evidence, p10 -11.
199 Transcript of evidence, p11 and p14.

334. This practice places the decision of the timing of the release of a determination in the hands of the Minister's office. As I have previously said in Part 5 of the report, evidence collected in the audit suggests that this process negatively impacts on the timeliness of release of determinations.

335. Further, FOI officers can feel compromised when the Minister's office delays in 'noting' their determination, and when they convey news of the delay to applicants. One witness said that they don't specifically tell applicants that the (draft) determination is with the Minister's office, but they are 'compromised regularly':

> …usually I would say it's in its final stages or it's being reviewed as we speak; something along those lines …[200]

336. Leaving the decision to the Minister's office on when to release information can create possibilities for political views to influence the timing. I have come across an instance in an external review in which an agency released information the subject of an access application to a media outlet, prior to releasing the information to the applicant, an Opposition Member of Parliament.[201] Evidence given to the audit suggests that this is not uncommon.[202]

Summary finding

337. In summary, the evidence provided to the audit strongly suggests that ministerial or political influence is brought to bear on agencies' FOI officers, and that FOI officers have been pressured to change their determinations in particular instances. I have no reason to disbelieve this evidence.

The need for accountability - Ministerial involvement in agencies' determinations

338. Given my opinion that section 29(6) of the Act permits an agency's determination to be directed by its Minister, in my view, if this occurs, it should be clearly stated in the determination. No determinations provided to the audit showed such a statement; and in my term as Ombudsman, my office has never known of such an instance.

339. Furthermore, in my view, if a Minister has had significant involvement in their agency's determination or if the agency has to 'wait for the green light' from the Minister, in the interests of transparency, I consider that this should also be clearly stated in the determination. I suggest this because, in my view, there may be little difference between a direction from a Minister to make a determination and having to wait for the Minister's approval and the 'green light' about a determination. In certain instances, the latter process may well amount to a 'constructive direction'. Again, my office has not seen a determination couched in such terms.

[200] Transcript of evidence, p34.
[201] Ombudsman reference: 2013/00279.
[202] Transcript of evidence, p40.

RECOMMENDATION 25

If ministerial 'noting' is to occur, the process should be established by a formal written policy, common to all state government agencies.

The policy should:

- expressly recognise section 29(6) of the Act
- provide that if the Minister has directed that the agency's determination be made in certain terms, the agency should ensure that this is clearly stated in the determination
- provide that if the Minister or their staff has had any involvement in the 'noting' of a determination, then this fact and the extent of the noting should be stated in the determination
- provide that the ministerial 'noting' process must be managed in a way that does not impact on statutory time frames.

340. State Records responded to this recommendation, advising that there was a 'two day notification policy directive of Cabinet' in 2003. However, this was only meant to be a 'heads up' for ministers so that they were aware of what information will be released. State Records commented that:

> If it has evolved into a two day 'noting' policy then State Records supports recommendation 25 that a formal written policy should be established.[203]

Should section 29(6) remain?

341. The likes of section 29(6) in FOI legislation have attracted much criticism amongst FOI commentators.[204] While the provision may be questionable from the perspective of administrative law principles or politically unpalatable, my principal concern is that if there is ministerial direction or influence in making an agency's determination, then the determination must reflect as much.

342. The effectiveness of the FOI Act is dependent to a large extent on those charged with responsibility for implementing the Act. The Act does not contain any prohibition about improper direction of, or influence on, an accredited FOI officer or other FOI staff.

343. The importance of protecting FOI decision makers from improper influence has been recognised in Queensland and in NSW legislation. Both of these Acts make it an offence to direct a person engaged in the administration of the FOI legislation to make a decision which the person believes is not the decision that should be made under the Act.[205]

344. Transparency and accountability in ministerial involvement has also been promoted by the Queensland Information Commissioner, through issuing 'Model Protocols for Queensland Government Departments on Reporting to Ministers and Senior Executive on Right to Information and Information Privacy Applications'.[206]

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[203] Response from State Records to Ombudsman dated 12 February 2014.

[204] See Peter Timmins, Timmins Consulting Australia, Open and Shut blog-www.foi-privacy.blogspot.com ,'Ministers and engagement in the FOI process'. Posted on 5 March 2013 10:01pm (as at 7 March 2013).

[205] *Right to Information Act 2009* (Qld) section 175; *Government Information (Public Access) Act, 2009* (NSW), sections 117 and 118.

[206] See http://www.oic.qld.gov.au/about/news/oic-releases-model-protocols-on-reporting-to-ministers-and-senior-executive-on-access-applications (as at 17 December 2013).

345. The NSW Act creates two offences:

> 117 **Offence of directing unlawful action**
>
> A person (the **"offender"**) must not:
>
> (a) direct an officer of an agency who is required to make a decision in relation to an access application to make a reviewable decision that the offender knows is not a decision permitted or required to be made by this Act, or
>
> (b) direct a person who is an officer of an agency involved in an access application to act in a manner that the offender knows is otherwise contrary to the requirements of this Act.
>
> Maximum penalty: 100 penalty units.
>
> 118 **Offence of improperly influencing decision on access application**
>
> A person (the **"offender"**) who influences the making of a decision by an officer of an agency for the purpose of causing the officer to make a reviewable decision that the offender knows is not the decision permitted or required to be made by this Act is guilty of an offence.
>
> Maximum penalty: 100 penalty units.

RECOMMENDATION 26

The Act should create offences of improperly directing or influencing a decision or determination made under the Act.

A uniform protocol should be created for use across all agencies which codifies the requirements for accountable and transparent communication between ministerial offices and agency FOI officers in relation to access applications under the Act.

PART 9

PROMOTING FOI

Information statements

346. Section 9 of the Act requires agencies to publish an up-to-date information statement at least every 12 months. The regulations require that the information statement be published in either the agency's annual report or on its website or both.[207]

347. The audit responses indicate that:
- three agencies publish the information statement in both their annual report and the website (PIRSA, DEWNR, DPTI)
- three publish the information statement only on their website (DECD, AGD, DPC) and
- six agencies published only in their annual report (DFEEST, DCS, DTF, DCSI, DHA and DMITRE).

348. It is now commonplace for the public to access government information through the internet; and in my view, agencies should publish their information statement on their website.

> **RECOMMENDATION** **27**
>
> Agencies should publish their FOI information statement on their website.

349. Section 9(2) of the Act lists the mandatory requirements for an information statement. The audit requested agencies to provide a copy of their current statement; and across the agencies, I found:
- none of the agencies complied fully with the requirements of section 9(2)
- some parts of section 9(2) were not complied with by any agency or very few agencies
- inconsistencies between agencies in the interpretation of the requirements of section 9.

350. The following table sets out the number of agencies complying with each of the requirements in section 9(2):

Section 9(2) requirements for Information Statements	Number of complaint agencies at the audit date
Description of structure and functions of the agency.	10
Description of the functions of boards and committees whose meetings or minutes are open to the public.	1
Description of the ways the functions of the agency affect members of the public.	9
Description of arrangements that exist to enable members of the public to participate in the formulation of the agency's policy.	9
Description of the kinds of documents usually held.	11

[207] *Freedom of Information (General) Regulations 2002*, regulation 5.

Description of the kinds of documents available for inspection.	0
Description of the kinds of documents available for purchase.	1
Description of the kinds of documents that are available free of charge.	2
Description of arrangements for obtaining access to documents and to seek amendment of records concerning his or her personal affairs.	12
Description of the procedures of the agency in relation to the giving of access and to the amendment of the agency's records concerning the personal affairs of a member of the public.	9
Designation of the officer to whom inquiries should be made.	10
The address at which applications should be lodged.	12
Identification of each of the agency's policy documents.	1
Designation of the officer to whom inquiries concerning inspecting and purchasing policy documents should be made.	1
Address and times during which policy documents may be inspected and purchased.	3

351. In March 2013, State Records conducted an assessment of the agencies' information statements. Some agencies informed the audit that they are currently reviewing the publication and content of their statements.[208]

Are there directives by the Chief Executive, senior management or the Minister to staff about the operation or implementation of the Act?

352. Only three agencies responded in the affirmative to the audit's question above:[209]
- PIRSA provided an undated document titled 'Freedom of Information Responsibilities' including a series of frequently asked questions for agency staff about the internal FOI process
- DTF provided a volume of documents consisting of guidelines, training manuals, PowerPoint presentations and a memo about the operation of the FOI Act. Further, DTF advised that it also had 'unwritten' directives:

> Unwritten directives to FOI team, relating to expectations. Monthly administrative staff support meetings, at which FOI is a standing agenda item, but minutes are not produced. FOI Team Leader attends these meetings.[210]

[208] DFEEST, DPTI.
[209] Audit question 8.
[210] DTF response to audit question 8.

353. AGD provided 14 examples of minutes from the Chief Executive and other senior managers about the operation of FOI within the department. Some of the minutes relate to the creation of a centralised FOI processing unit in 2009, while others reminded staff of their obligations to respond to internal FOI search requests. The minutes primarily date from 2009 - 2011.

354. The fact that nine of the agencies answered in the negative, suggests a culture that does not promote awareness and compliance with FOI.

355. In my view, Chief Executives should promote and be seen to be promoting the operation of the Act, and issue a directive to agency staff about the need for compliance with the objects and operation of the Act.

RECOMMENDATION 28

The Chief Executive of the agencies should promote information disclosure and issue a written directive to all staff about the need for compliance with the objects and operation of the FOI Act.

Facilitating access to the FOI process

356. The extent to which the objects of the FOI Act can be facilitated by the government depends largely on the awareness of members of the public of the Act, and the quality of the information provided by agencies on how to apply for access to documents.

357. All agencies in the audit, except DCS make the following information available on their websites:
- the postal address to which FOI applications can be sent
- the telephone number of the FOI contact person

358. Further:
- three agencies also provide an email address to which access applications may be sent (DECD, PIRSA, DTF)
- eight agencies provide a link for a downloadable FOI application form (DFEEST, DECD, PIRSA, DTF, DCSI, AGD, DEWNR, DPC)
- four agencies provide a link to the Act (DECD, DHA, AGD, DEWNR)
- four agencies provide a link to State Records (DECD, PIRSA, DTF, DEWNR)
- one agency provides a link to Ombudsman SA (DHA)
- five agencies provide information about fees for FOI applications (DECD, DTF, DCSI, DMITRE, DPC)
- no agencies provided information on their website about the appeal rights of a person aggrieved by a determination under the Act.

RECOMMENDATION 29

All of the agencies should, as a matter of policy, provide on their website:
- the postal and electronic addresses to which access applications may be sent
- the telephone number of an FOI officer
- a link to an access and internal review application form
- links to the FOI Act and State Records of South Australia
- details of external review and appeal rights, and a link to Ombudsman SA/or the Police Ombudsman (whichever is the relevant review authority) and the District Court.

Proactive disclosure

359. Proactive disclosure involves agencies making information available to the public without waiting for it to be requested, either through FOI or other means. It promotes the administrative release of information, as a matter of course. Proactive information release by agencies demonstrates a commitment to openness, accountability and transparency.

360. I have mentioned at the beginning of the report, recent significant proactive disclosure initiatives by the state government. These initiatives include:
- the Accountable Government Project
- the government's ICT strategy, SA Connected[211]
- Open Data declaration and the Open Data Action Plan.

361. While this is timely and commendable, these initiatives should be enshrined in legislation to first, harness legislative force and second, to ensure compliance by local government councils, universities and other agencies which are subject to the FOI Act.

362. In Queensland, NSW, Tasmania and the Commonwealth, FOI legislation has been reformed to embrace a 'push' rather than a 'pull' model of information disclosure, with an emphasis on:
- comprehensive publication schemes covering
  - administrative release of government-held information
  - release of FOI requested information on disclosure logs on agencies' websites
- disclosure of all information, unless it would be contrary to the public interest
- release of information in response to an informal request for information[212]
- a formal FOI application being the last resort means of seeking access.[213]

RECOMMENDATION 30

Information disclosure initiatives should be enshrined in legislation, to harness the strength of legislative force and to capture local government councils, universities and other agencies which are subject to the FOI Act.

However, this should not interfere with proper access being provided outside of the FOI Act and other legislation. Prescribing information that should be released in legislation can create a culture of risk aversion when providing access to information through administrative schemes.

363. State Records supports this recommendation.

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211 See http://www.sa.gov.au/saconnected (as at 15 December 2013).

212 *Freedom of Information Act 1992* (Qld) repealed, replaced by *Right to Information Act 2009* (Qld), commenced 1 July 2009. *Freedom of Information Act 1989* (NSW) repealed, replaced by *Government Information (Public Access) Act, 2009* commenced 1 July 2010. *Freedom of Information Act 1991* (Tas) repealed, replaced by *Right to Information Act, 2009* commenced 1 July 2010. *Freedom of Information Act 1982* (Cth), as amended by *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) commenced on 7 October 2009, *Australian Information Commissioner Act 2010* (Cth) and the *Freedom of Information Amendment (Reform) Act 2010* (Cth).

213 See 2010 'National Administrative Law, Information-foundation for administrative justice', Peter Timmins, Timmins Consulting Australia, and the Open and Shut blog-www.foi-privacy.blogspot.com.

PART 10

A WAY FORWARD

FOI culture within the agencies

364. The ALRC in its report 'Secrecy and Open Government' in 2009[214] made these observations about FOI agency culture within the public sector:

> 15.54 … agency culture can prevent information from being disclosed in situations where disclosure would be lawful and appropriate. … in the context of FOI, there are compelling drivers for agencies to sacrifice the goals of openness and accountability because of a real or perceived need for non-disclosure. Such a 'culture of secrecy' was criticised by the ALRC and the ARC in ALRC 77.[215] In 2008, the Independent Review Panel examining the *Freedom of Information Act 1992* (Qld) discussed the tensions in information management:
>
> > 'Inherent at an organisational level, the urgency of the everyday imperatives in modern government can pull the public sector's information culture towards information protection in the interests of issues management, at the expense of the important but less urgent information goals for transparency in government. …
> >
> > Culture brings a more complex setting. Access to government information reaches to the core of political and bureaucratic interests and operates beyond purely legal considerations and dispassionate calculations on the public interest.'[216]

365. The audit received evidence from several government witnesses involved in FOI, who noted a change in FOI culture across government departments in the past years. They noted that FOI processing and document release does not happen as easily as it used to. One witness said that in the past:

> … I think we gave people information or had information available in any number of forms for years. People, media would ring us up and say "I'd like information on X", and we'd provide it to them. Now, what has happened is we don't move unless people have lodged an FOI. I think the whole concept of giving people information seems to have channelled [sic] down an FOI focus and I think it needs to go back the other way.[217]

366. Another witness informed the audit that 'the independence of the FOI officer has lessened'.[218]

367. The same witness said that a 'relatively quick process' used to occur on receipt of an access application. But now FOI officers are hampered from performing their role by 'a lot more meetings occurring where you need go [sic] through and discuss the documents'. Sometimes, the media unit in the agency also has to be consulted.[219]

368. The witness remarked that there is also a 'paranoid culture' around possible adverse media as a result of document disclosure; and media releases have to be drawn up to accompany any FOI disclosure:

> It's kind of more of a defensive approach, let's get all of our paperwork in order, let's get the media release ready just in case it does hit the media.[220]

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214 Australian Law Reform Commission , 'Secrecy Laws in Open Government in Australia, ALRC 112 (2009), [15.54].
215 Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982', ALRC 77 (1995) Chapter 4.
216 Freedom of Information Review Panel 'Enhancing Open and Accountable Government' Discussion Paper (2008), p 90-91.
217 Transcript of evidence, p9.
218 Transcript of evidence, p8.
219 Transcript of evidence, p10.
220 Transcript of evidence, p10.

369. One witness went further to say that real understanding and appreciation of FOI within agencies is so lacking that:

> … at the
> moment FOI is a three letter acronym that nobody likes.[221]

FOI leadership

370. The audit received evidence of opinions that Chief Executives are largely distant from FOI; that they 'struggle with it'; and that it is 'an annoyance'.[222] One witness said:

> I feel there's a bit of a [sic] attitude from chief executives which is something is going to go wrong, the more information we put out there about what we are doing the more chance there is of something being shown to be wrong and therefore we will have to do something to fix it up. I feel as if they see it as annoying. At the same time what I detect is it's difficult or -- I don't know if it's just difficult or if it's a lack of enthusiasm for trying to do something about it.[223]

371. Most witnesses considered that there is a lack of support for FOI from the top in some agencies; and that senior management do not see FOI as 'core business'. One witness said:

> I think chief executives see it as not their core business and they see it as something that gets in their way.
> …
> They see it as a drag on resources. And, they just see it as just something that they have to do, rather than something that they should be doing.[224]

372. Were it otherwise, it was suggested by this witness that their department would be resourced better to respond to FOI applications or would find better ways of releasing information.[225]

373. How to inculcate an FOI and pro-disclosure culture at the Chief Executive level and within senior management is a challenge which demands to be met by the government. I have long held the view that performance appraisal for senior management should include adherence to accountability and the principles on which FOI is based. Apart from reminding management of an important tenet of public sector administration, this approach may well be one way of offering a tangible incentive for management to take a more active interest in FOI and adopt sound FOI practices. I note this was a recommendation of the ALRC/ARC in their report in 1995 of a review of the Commonwealth *Freedom of Information Act 1982*. I endorse this approach.[226]

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221 Transcript of evidence, p33.
222 Transcript of evidence, p8.
223 Transcript of evidence, p8.
224 Transcript of evidence, p16
225 Transcript of evidence, p9.
226 Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal *Freedom of Information Act 1982*', ALRC 77 (1995), Recommendation 8.

RECOMMENDATION 31

Performance agreements of Chief Executives and senior management in the agencies should contain a provision requiring a responsibility to ensure appropriate practices and performance in respect of access to government-held information, including FOI.

Fear of disclosure

374. The audit received evidence from several witnesses, suggesting that there is a fear within agencies of releasing information outside the FOI Act - due to real or imagined lack of legal protection; possible embarrassment to the government; or simply an anxiety about 'doing the wrong thing'. I have already referred to evidence received above.

375. I note the introduction into the parliament of the *Civil Liability (Disclosure of Information) Amendment Bill 2013* to amend the *Civil Liability Act 1936* (SA).

376. The Bill amends the Civil Liability Act to provide the Crown with immunity from civil liability in respect of the release by government agencies of information of a prescribed kind, or of the publication of information in circumstances prescribed by regulation.

377. In his second reading speech on the Bill, the Attorney-General noted:

> Although the FOI process is often described as the option of 'last resort' and the objects of the Act clearly state Parliament's intention that disclosure should be favoured over non-disclosure, some applicants report difficulties in obtaining information they have requested, including time delays and prohibitive costs. Government agencies administering the FOI Act report a culture of risk aversion and a reluctance to release information outside of the FOI Act.
>
> One of the barriers to agencies proactively disclosing information outside of the FOI Act is the lack of protection from legal liability, meaning the proactive publication of information could give rise to a cause of action against the Crown.
>
> … the Crown has no general immunity from civil liability in respect of the release of information outside of the FOI framework.
>
> Understandably, this lack of protection weighs heavily on the minds of public servants when considering whether to release information proactively.[227]

378. The Attorney-General continued:

> This amendment will not require a government agency to release information or documents. Rather, it will provide the Crown with a degree of legal protection where information or documents is or are released proactively. In so doing, this reform is aimed at encouraging greater proactive release of information by government agencies, thereby reducing the number of freedom of information requests received by government agencies and protecting the Government, and, by extension, the taxpayer, from civil liability arising from the proactive release of information by government agencies.[228]

[227] South Australia, *Parliamentary Debates*, House of Assembly, 11 September 2013, 6803 (Hon JR Rau MP).
[228] South Australia, *Parliamentary Debates*, House of Assembly, 11 September 2013, 6803-4 (Hon JR Rau MP).

RECOMMENDATION **32**

After the passing of the amendment to the *Civil Liability Act 1936* (SA), Chief Executives in the agencies should issue a memorandum to all staff explaining the consequences of the amendment and the protections described by the Attorney-General in his second reading speech.

The memorandum should also emphasise that the FOI process is a last resort option only.

379. In its response to this recommendation, State Records advised that the Bill had lapsed in the parliament as a result of the state election. It commented that it did not, however, support this approach and believes that 'protections for proactively disclosing information is better provided through the FOI Act as is the case in other jurisdictions. In addition there is concern that agencies will only release information as prescribed in the regulations to the *Civil Liabilities Act*.'.

FOI developments interstate

380. FOI in South Australia has no dedicated independent 'champion', as the other states and the Commonwealth do.[229] In my view, this is a significant shortcoming in this state.

381. The Commonwealth and interstate Information Commissioners and the Tasmanian Ombudsman all have legislated roles in:
- issuing FOI guidelines
- ensuring public awareness of the FOI legislation
- conducting FOI training
- addressing complaints about the FOI process
- conducting external reviews
- monitoring and auditing agencies' FOI performance
- recommending administrative and legislative reform in FOI.

382. The state government would do well to adopt such a model. The FOI framework in South Australia is fractured and lacks a necessary legislative backbone. State Records' role to report on agencies' FOI performance and to issue guidelines should be the remit of a single independent oversight body with investigation, audit and recommendatory powers which should be combined with an external determinative review role of agencies' determinations.

383. I also consider that this independent body should be responsible for oversight of the state's privacy policies and legislation.

[229] The Commonwealth, Western Australia, Northern Territory, Victoria, New South Wales and Queensland have dedicated independent FOI Commissioners. Their counterpart in Tasmania is the Tasmanian Ombudsman.

RECOMMENDATION 33

There should be an independent oversight body with investigation, audit and recommendatory powers to:

- issue FOI guidelines
- ensure public awareness of FOI legislation
- give FOI advice and conduct FOI training for agencies
- address complaints about the FOI process
- monitor and audit agencies' FOI performance
- conduct merits reviews (with determinative powers)
- recommend administrative and legislative reform
- report to the parliament on the operation of the legislation.

This body should also be responsible for the oversight of state privacy policies and legislation.

384. Views were expressed to the audit by FOI practitioners that the Act in South Australia, compared with other states and the Commonwealth is outdated. This view is shared by national FOI commentators, one of whom recently remarked that South Australia has yet to embrace '21st century FOI thinking'.[230] This commentator has further remarked:

> SA stood to one side, along with the west, from the FOI reform movement of 2007-2010 that saw significant change at the national level and in Queensland, NSW and Tasmania. The SA FOI Act of 1991 remains as it has always been since commencement 21 years ago and way short of a modern information access law that reflected 21st century expectations and norms.
> …
> … it's the same old same old in SA … lack of leadership, closed government culture, delay, high cost, limited resources, etc, etc,[231]

385. The recent policy initiatives by the state government in SA Connected, the 'Open Data Declaration' and 'Proactive disclosure of regularly requested information' are timely; and it is evident that the government is committed to facilitating information release into the community.

386. However, the results of the audit indicate that there is a 'disconnect' between these policy initiatives and how the FOI is being implemented by government agencies. In my view, more needs to be done to change agencies' culture around information disclosure under the Act.

387. Further, ad hoc policy development and Cabinet directives are insufficient to achieve meaningful cultural and operational change, as they lack legislative force and do not bind all state authorities, local government and universities.

[230] Peter Timmins, Timmins Consulting Australia, Open and Shut blog-www.foi-privacy.blogspot.com. Posted on 11 August 2013 (as at 23 October 2013).
[231] Peter Timmins, Timmins Consulting Australia, Open and Shut blog-www.foi-privacy.blogspot.com. Posted on 26 February 2013 (as at 27 February 2013).

Appendix 1 - Abbreviations

AAT	Commonwealth Administrative Appeals Tribunal
AGD	Attorney-General's Department
ALRC	Australian Law Reform Commission
ARC	Australian Review Council
DCS	Department for Correctional Services
DCSI	Department for Communities and Social Inclusion
DECD	Department for Education and Child Development
DENWR	Department of Environment, Water and Natural Resources
DFEEST	Department of Further Education, Employment, Science and Technology
DHA	Department for Health and Ageing
DMITRE	Department for Manufacturing, Innovation, Trade, Resources and Energy
DPC	Department of the Premier and Cabinet
DPTI	Department of Planning, Transport and Infrastructure
DTF	Department of Treasury and Finance
FOI Act	*Freedom of Information Act 1991* (SA)
FTE	Full time equivalent
IPPs	Information Privacy Principles Instruction (PC 012) 5 August 2013
MP	Member of the South Australian parliament
PIRSA	Department of Primary Industries and Regions SA
State Records	State Records of South Australia, a business unit within the Department of the Premier and Cabinet which is responsible for assisting the Attorney - General in the administration the FOI Act
the Act	*Freedom of Information Act 1991* (SA)

Appendix 2 - Audit questionnaire

FREEDOM OF INFORMATION in SA GOVERNMENT DEPARTMENTS

AUDIT QUESTIONNAIRE

Section 12 of the *Freedom of Information Act 1991* (SA) (**the FOI Act**) provides members of the public with a legally enforceable right to access an agency's documents in accordance with the Act.[232]

As part of its administrative improvement role, Ombudsman SA is undertaking an audit of 12 state government departments and their fulfilment of their responsibilities under the FOI Act.

The aim of the audit is to improve FOI understanding and the FOI responses of these departments, and agencies generally across South Australia. The audit will focus on:

- FOI staffing
- FOI policies, procedures and templates
- FOI searching for documents
- ministerial noting of FOI applications and determinations
- understanding FOI Act obligations, and FOI training
- number of FOI applications and response times
- use of FOI exemptions in determinations
- proactive disclosure of information outside FOI.

The audit group comprises:

- Attorney-General's Department
- Department for Communities and Social Inclusion
- Department for Correctional Services
- Department for Education and Child Development
- Department for Health and Ageing
- Department of Environment, Water and Natural Resources
- Department of Further Education, Employment, Science and Technology
- Department for Manufacturing, Innovation, Trade, Resources and Energy
- Department of Planning, Transport and Infrastructure
- Department of Primary Industries and Regions SA
- Department of the Premier and Cabinet
- Department of Treasury and Finance

This document commences the audit process.

Name of department:

.....

The department's contact person details for the FOI audit:

.....

[232] The term 'agency' is defined in section 4 of the *Freedom of Information Act 1991*.

PART A: STAFFING

1. As at **30 June 2013**, please provide details of the number of staff employed by the department.

2. As at **30 June 2013**, please provide details of the number of FOI FTE staff in the department.

..... accredited FOI officers[233] (including the FOI Principal Officer) ..... other dedicated FOI staff (not including accredited FOI officers)

3. List the classification levels of each FOI staff member (including accredited FOI officers and the FOI Principal Officer).

Position title	Classification level

4. What percentage of each FOI staff member's time is spent on FOI?

Position title	Percentage of time

5. Please provide copies of all documents showing the designation by the Principal Officer of each accredited FOI officer.[234]

[233] As defined in section 4 of the *Freedom of Information Act 1991*.

PART B: FOI POLICIES and PROCEDURES

6. Does the department have its **own current documented policies** regarding FOI?

☐ yes
☐ no

If yes, please provide a copy of all of these policies.

6.1 If not, why not?

7. Does the department have its **own current documented procedures** regarding FOI?

☐ yes
☐ no

If yes, please provide a copy of all of these procedures.

7.1 If not, why not?

8. Are there **current written or unwritten directives, circulars or memos issued by the Chief Executive, senior management or the Minister** to departmental staff about the operation or implementation of the FOI Act?

☐ yes
☐ no

If there are **written** directives, circulars or memos, please provide a copy of all documents.

If there are **unwritten** directives, please provide details.

9. Does the department use any **templates** (whether for external or internal use) during the FOI process? Eg. letters of acknowledgement; responding to applications; transferring applications; consultation with interested parties; determinations; internal requests for documents; assessing time spent in dealing with applications; communications with the Chief Executive or the Minister?

☐ yes
☐ no

---

[234] See *Freedom of Information Act 1991*, section 4(1)(b)(ii).

If yes, please provide a copy of all of these templates.

9.1 If not, why not?

10. As **a matter of practice**, does the department send a **letter to acknowledge**:

10.1 receipt of FOI applications?

☐ yes
☐ no

10.2 receipt of applications for internal review?

☐ yes
☐ no

If yes, please provide a copy of such a letter in relation to Questions 10.1 **and** 10.2 above.

10.3 If not, why not?

10.1 10.2

PART C: FOI SEARCHING for DOCUMENTS

11. Are there **current written or unwritten directives, circulars or memos issued by the Chief Executive and/or senior management** to **all departmental staff** about responding to FOI internal searches for documents?

- ☐ yes
- ☐ no

If there are **written** directives, circulars or memos, please provide copies of all of them. (These should also be provided under **Question 8** above.)

If there are **unwritten** directives, please provide details.

12. Are the department's procedures for conducting FOI internal searches for documents documented?

- ☐ yes
- ☐ no

If yes, please provide copies of all of them. (These should also be provided under **Question 7** above.)

12.1 If not, why not?

13. Is there a departmental template for conducting FOI internal searches for documents?

- ☐ yes
- ☐ no

If yes, please provide copies of all of them. (These should also be provided under **Question 9** above.)

14. What difficulties commonly present themselves when FOI staff conduct internal searches for documents in response to a FOI application?

Please number in order of frequency (number 1 being the most frequent).

- ☐ difficulties with record management systems
- ☐ departmental staff lack of understanding of FOI obligations
- ☐ departmental staff delay in responding
- ☐ other (please specify)

15. Is senior management required to sign off on the searches undertaken by departmental staff in response to an internal search request for documents from FOI staff?

☐ yes
☐ no

Please provide details.

16. How does the department show an applicant that reasonable searches have been conducted in response to their FOI application? Please describe in detail.

17. Please provide a copy of the department's last FOI determination (initial **and** internal review) **before the date of this audit (13 June 2013)**, where the department has **conducted searches but has not been able to locate the document(s)** requested in the FOI application.

PART D: MINISTERIAL NOTING

18. Is there a **documented** departmental policy, procedure, directive, circular, memo or template about notifying the Minister of FOI **applications**?

☐ yes
☐ no

If yes, please provide copies of all of them. (These should also be provided under **Questions 6, 7, 8 and 9** above.

19. If no to Question 18 above, is there nonetheless a departmental practice of notifying the Minister about FOI **applications**?

☐ yes
☐ no

19.1 If yes, please describe in detail the practice and the circumstances in which the Minister is notified of FOI **applications**?

20. Is there a **documented** departmental policy, procedure, directive, circular, memo or template about notifying the Minister of FOI **determinations**?

☐ yes
☐ no

If yes, please provide copies of all of them. (These should also be provided under **Questions 6, 7, 8 and 9** above.)

21. If no to Question 20 above, is there nonetheless a departmental practice of notifying the Minister about FOI **determinations**?

☐ yes
☐ no

21.1 If yes, please describe in detail the practice and the circumstances in which the Minister is notified of FOI **determinations**?

How many days does the department set aside for the Minister's office to be notified prior to a notice of determination being sent to the applicant?

- ☐ 1-3
- ☐ 4-7
- ☐ 8-14
- ☐ 15-30
- ☐ no set number of days. Wait to receive the views of the Minister or ministerial staff prior to sending the notice of determination.

22. Has the Minister or ministerial staff ever recommended changing the determination?

- ☐ yes
- ☐ no

If yes, please provide copies of all documents (including the FOI application, determination (initial and internal review), advice, internal communications and communications with the Minister's office relevant to the **two (2) last** examples of this, **before the date of this audit (13 June 2013)**.

PART E: UNDERSTANDING the FOI ACT

23. How does the department promote the objects of the FOI Act amongst staff generally? Eg. strategies, policies, CE memos, newsletters, internal seminars.

1. 2. 3.

Please provide copies of all documentation to support the answers above.

24. Apart from formal training, how do FOI staff usually inform themselves about implementing the provisions of the FOI Act in response to applications?

1. 2. 3.

25. Please detail the FOI training that each of the department's FOI staff has most recently completed (including the FOI Principal Officer).

Position title	Details of training	Most recent date completed

26. Does the department require its senior managers to complete FOI training?

☐ yes
☐ no

27.1 If so, please describe this training below.

Position title	Details of training	Most recent date completed

27.2 If not, why not?

PART F: FOI APPLICATIONS and RESPONSE TIMES

Please answer the following questions in relation to the period of the financial year 1 July 2012 to 30 June 2013.

27. How many new FOI applications did the department receive?

28. How many FOI applications were carried over from the previous financial year(s)?

29. How many applications were not determined within the 30 day statutory timeframe?[235] (Exclude matters where a determination was made under section 14A of the FOI Act to extend time.)

30. Following question 30 above, what were the reasons for the department failing to determine the applications within the 30 day statutory timeframe?

    Please number in order of frequency (number 1 being the most frequent).

    - ☐ lack of resources (budgetary/staff)
    - ☐ negotiating with the applicant
    - ☐ waiting to receive advice or documents from different sections of the department
    - ☐ seeking legal advice
    - ☐ seeking ministerial advice
    - ☐ other (please specify)

31. How many internal review applications were not determined within the 14 day statutory timeframe?[236]

Following Question 32 above, what were the reasons for the department failing to conduct the review within the 14 day statutory timeframe?

[235] See *Freedom of Information Act 1991* section 14(2).
[236] See *Freedom of Information Act 1991* section 29(5).

Please number in order of frequency (number 1 being the most frequent).

- ☐ lack of resources (budgetary/staff)
- ☐ negotiating with the applicant
- ☐ waiting to receive advice or documents from different sections of the department
- ☐ seeking legal advice
- ☐ seeking ministerial advice
- ☐ other (please specify)

PART G: USE OF FOI EXEMPTIONS

32. Please provide copies of the department's last **five (5)** FOI determinations (initial **and** internal review) **before the date of this audit (13 June 2013)**, which have claimed documents to be exempt under Schedule 1 to the FOI Act.

33. If none of these five (5) determinations claim an exemption which has a public interest test, in addition, please provide a copy of the last **two (2)** determinations (initial **and** internal review) **before the date of this audit (13 June 2013)**, that do.

PART H: PROACTIVE DISCLOSURE OF INFORMATION

34. Describe all of the ways in which the department made its most **recent FOI Information Statement** available to the public. Eg. on the department's website (provide the URL), social media (specify), Annual Report.

1. 2. 3.

Please provide a copy of this FOI Information Statement.

35. Describe all of the ways in which the department makes its FOI policies and/or procedures available to the public. Eg. on the department's website (provide the URL), social media (please specify).

1. 2. 3.

36. Describe the ways in which the department makes its other (non FOI) policies available to the public. Eg. on the department's website (provide the URL), social media (please specify).

1. 2. 3.

37. Does the department have policies and/or procedures about releasing departmental information outside the FOI Act?

☐ yes
☐ no

If yes, please provide copies of all of them. (These should also be provided under **Questions 6 and 7** above.)

39.1 If not, why not?

38. Has the department ever exercised its discretion under the FOI Act and made a determination to give access to a document, despite its exempt status under Schedule 1?

☐ yes
☐ no

39. If yes to Question 40 above, under what circumstances has the department exercised its discretion?

1.

2.

3.

40. Please provide a copy of the department's **last** determination (initial and internal review) **before the date of this audit (13 June 2013)**, showing the department's exercise of its discretion referred to in Question 40 above.

41. In relation to Question 40 above, does the department have policies and/or procedures about this?

☐ Yes
☐ No

If yes, please provide copies of all of them. (These should also be provided under **Questions 6 and 7** above.)

42. Does the department have information about the FOI process (including timeframes and review rights) available on its website?

☐ Yes
☐ No

If yes, please provide the URL.

43. Are the contact details of the department's FOI officer(s) available on the department's website?

☐ Yes

☐ No

If yes, please provide the URL.

44. Does the department wish to make any additional comments about FOI?

DOCUMENT CHECKLIST

Please indicate below which documents you have enclosed in your response.

Also, please mark each document in the top right corner with the Question Number it relates to.

- ☐ documents showing the designation by the Principal Officer of each accredited FOI officer[237] (**Question 5**)
- ☐ department's FOI policies (**Question 6**)
- ☐ department's FOI procedures (**Question 7**)
- ☐ **written** directives, circulars or memos from the Chief Executive, senior management and/or the Minister to departmental staff regarding the operation of the FOI Act (**Question 8**)
- ☐ department's FOI templates (**Question 9**)
- ☐ copy of letter of acknowledgement upon receipt of FOI application (**Question 10.1**)
- ☐ copy of letter of acknowledgement upon receipt of application for internal review (**Question 10.2**)
- ☐ directives, circulars or memos issued by the Chief Executive and/or senior management to all departmental staff about responding to FOI internal searches for documents (**Question 11**)
- ☐ department's procedures for conducting FOI internal searches for documents (**Question 12**)
- ☐ department's template/s for conducting FOI internal searches for documents (**Question 13**)
- ☐ a copy of the department's **last** FOI determination (original **and** internal review) **before the date of this audit (13 June 2013)**, where the department **conducted searches but was not able to locate the document(s)** requested in the FOI application (**Question 17**)
- ☐ department's policy, procedure, directive, circular, memo or template relating to ministerial noting of **FOI applications** (**Question 18**)
- ☐ department's policy, procedure, directive, circular, memo or template relating to ministerial noting of **FOI determinations** (**Question 20**)
- ☐ all documents (including the FOI application, determination (initial and internal review), advice, internal communications and communications with the Minister's office) relevant to the **two (2) last** examples of the Minister or Minister's office recommending changes to a FOI determination, **before the date of this audit (13 June 2013)** (**Question 23**)

[237] See *Freedom of Information Act 1991* section 4(1)(b)(ii).

- ☐ all documents to demonstrate how the department promotes the objects of the FOI Act amongst staff generally (**Question 24**)

- ☐ copies of the department's **last five (5)** FOI determinations (initial **and** internal review), **before the date of this audit (13 June 2013)**, which have claimed documents to be exempt under Schedule 1 to the FOI Act (**Question 34**)

- ☐ copies of the department's **last two (2) determinations** (initial **and** internal review) **before the date of this audit (13 June 2013)**, where an exemption provision claimed by the department has a public interest test (**Question 35**)

- ☐ copy of the department's most recent FOI Information Statement (**Question 36**)

- ☐ department's policies and/or procedures about releasing departmental information outside the FOI Act (**Question 39**)

- ☐ a copy of the department's **last** determination, **before the date of this audit (13 June 2013)**, showing the department's exercise of its discretion to release a document despite its exempt status under Schedule 1 (**Question 42**)

- ☐ any other documents you believe are useful to understanding how FOI applications are dealt with in your department (please attach and list)

Chief Executive

Name .....

Signature.....

Date.....

OmbudsmanSA