

## Freedom of Information in the Australian Capital Territory

The *Freedom of Information Act* 1989 (the ACT *Fol Act*) has been in force in the Australian Capital Territory since 11 May 1989, the day that the ACT became self-governing under s.22 of the *Self Government Act* 1989.

Prior to that date the ACT was subject to the Commonwealth *Freedom of Information Act* 1982 (the Commonwealth *Fol Act*).

The ACT *Fol Act* was at the date of being passed (subject to references to ACT bodies and legislation) identical in substance to the Commonwealth *Fol Act* that it was replacing. However, later amendments made to the Commonwealth *Fol Act*, some as a result of the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the operation of the Commonwealth *Freedom of Information Act*, have not been made to the ACT *Fol Act*. Only two minor amendments have been made to the ACT *Fol Act* since it was enacted.

### Access

The ACT *Fol Act* allows the public access to documents of an agency, or to documents of a Minister, other than an exempt document. An agency is defined as a department or a prescribed authority. A 'prescribed authority' is defined as a statutory authority or a body declared by the regulations to be a prescribed authority, subject to exemptions of Royal Commissions, Boards of Inquiry or bodies declared by the Regulations to be exempt.

The only body declared by the Regulations to be a prescribed authority is ACT TAB, and it is also the only body declared by the Regulations to be exempt, and even that is only for documents 'in respect of its competitive commercial activities'. This means that no incorporated companies or associations over which the Government can exercise control are currently subject to the Act.

'Document' is undefined, in contrast to the Commonwealth *Fol Act*. However, s.16 of the ACT *Fol Act* does provide for requests for documents which are not in a written document form but are on computer, to be converted into written form.

A request for access is required to be in writing and accompanied by an application fee, or a request for a remission of the application fee. The request must provide sufficient information for the document to be identified by an officer of the agency. Where all these preconditions are met, the agency must give access to the requested document, if it is not exempt.

Notification of receipt of an application is required to be given within 14 days and a decision is to be made within 30 days.

While applications are required to be processed within 30 days, only about one-third are usually processed within that period, with most processed before the expiry of 60 days. The ACT *Fol* Office is patently aware of the long time taken for processing applications, having been questioned heavily about it in Estimates hearings, and is implementing procedures designed to reduce the time lag.

Section 15 of the ACT *Fol Act* makes provision for the transfer of a request where, to the knowledge of the agency, the information is in the possession of another agency.

### Exemptions

A document which if it were a document in the possession of a Commonwealth agency, would be exempt under the Commonwealth *Fol Act*, is also exempt under the ACT *Fol Act*. In such a case the request and the document are to be transferred to the relevant Commonwealth agency.

Documents which affect relations with the Commonwealth or with the States are also exempt, as are executive documents, internal working documents, documents affecting enforcement of the law and protection of public safety, documents affecting financial or property interests of the Territory, documents affecting personal privacy, documents affecting the economy of the Territory, documents subject to legal professional privilege, documents to which secrecy provisions of enactments apply, documents containing material obtained in confidence, documents release of which would be contempt of the Legislative Assembly or a court, or documents which are for the purposes of the Ministerial Council of Companies and Securities.

While most of the exemptions are substantially, if not precisely, the same, as those contained in the Commonwealth *Fol Act*, it should be noted that s.38 which deals with secrecy provisions in enactments has not been modified as the Commonwealth equivalent has. Accordingly, the section may apply to documents which are within secrecy provisions even where the secrecy provision does not apply directly to the applicant.

Also, the section on exemption for breach of confidence has not been modified to clarify that the ground for exemption is that required to be established in an action for breach of confidence at common law.

Provision is made for the operation of reverse *Fol*. But, unlike the Commonwealth *Fol Act*, where a document contains information relating to the business or professional affairs of a person, organisation or undertaking, that person, organisation or undertaking is not guaranteed the opportunity to make a submission against disclosure. It has to appear to the agency that the person, organisation, or undertaking 'might reasonably wish to contend that the document is exempt under s.43' — the exemption for commercial documents — before being given the opportunity to make a submission.

If the opportunity is given and submissions are made, then the decision maker has to have regard to any submissions made when deciding whether access should be refused.

### Personal information

Under s.48 of the ACT *Fol Act*, a person may apply for a correction to be made to a document containing 'information about the personal affairs of that person'. This definition was amended in the Commonwealth *Fol Act* to a document containing 'personal information about the person', to correspond to the *Privacy Act* 1988, but a similar amendment has not been made to the ACT *Fol Act*, leaving the scope of the terms uncertain.

### Review

Review by the Ombudsman of action taken by an agency under the ACT *Fol Act* is available under s.51. Although the ACT has its own *Ombudsman Act*, the ACT office is currently held by the Commonwealth Ombudsman in addition to the Commonwealth office.

Internal review is also provided for, as is review by the ACT Administrative Appeals Tribunal (the AAT). Appeals are then available on a question of law from the AAT to the ACT Supreme Court.

There have not, as yet, been any major decisions handed down by either the AAT or the Federal Court in relation to the ACT *FoI Act*. Only a few cases have actually gone to the AAT, with others being withdrawn or transferred to the Commonwealth. Similarly, there were only four complaints made to the Ombudsman in the past year.

### Practical operation of the ACT *FoI Act*

The ACT Government has established a central 'clearing house' for all *FoI* applications within the ACT Attorney-General's Department. All applications are required to be addressed to the relevant Department or body which holds the documents, or is thought to hold the documents, but all applications are sent to the *FoI* Office.

Each agency has been encouraged to appoint an *FoI* Contact Officer to handle all applications and to liaise with the *FoI* Office.

Notwithstanding the differences between the ACT *FoI Act* and the Commonwealth *FoI Act*, Commonwealth policy directives are apparently still followed by the ACT agencies.

### Fees

The current fees, set by the Minister under s.80 of the *FoI Act* are:

- (a) application fee is \$30;
- (b) \$15 per hour fee for location and retrieval of documents;
- (c) \$20 per hour fee for decision making, including perusing documents;
- (d) \$6.25 per hour (or part thereof) for supervising the inspection of documents; and
- (e) 10 cents per page for photocopying.

There is a discretion for a fee to be remitted under the ACT *FoI Act*. Matters to be considered when determining whether a fee is to be remitted are, without limitation, whether payment would cause financial hardship, whether the request relates to documents relating to the personal affairs of the applicant or where the giving of access is in the public interest.

### Usage of the Act

In 1992-93 the ACT Government received 206 requests for access under the *FoI Act*. The majority of applications were from members of the public. In the previous year, only 156 requests were received.

The type of request most commonly received is for access to personal records. It is interesting to note, however, that in the past year only three requests for amendment to personal records were received.

### The future of *FoI* in the ACT

The ACT Government has placed emphasis on there being more scope for internal review of agency decisions, which has had an effect on the need to use the ACT *FoI Act*. The introduction of internal review in the Housing Trust area has, for example, apparently greatly reduced the number of *FoI* requests. This is a move which is regarded favourably by the *FoI* Office.

The ACT *FoI Act* has been in operation for almost four years, and in that time has only had two minor amendments. It is arguably due for an overhaul or an evaluation of its operation by the ACT Government. Either way, a right of access to information held by the Government in the ACT is here to stay, whatever its future scope may be.

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## Obviously four unbelievers

### Adequacy of searches under *FoI*, an act of faith?

#### 'I don't believe you, you're a liar'<sup>1</sup>

It might come as a major disappointment to many *FoI* officers to know that most applicants would share the above sentiment when reading the following:

despite its best efforts the Department has been unable to find any information relating to your request.

The integrity of *FoI* is compromised if applicants harbour reservations as to whether agencies have conducted adequate searches for information. The purpose of this article is not to ask agencies to achieve the unachievable or, in the words of one US decision, 'the *FOIA* does not require that the government go fishing in the ocean for fresh water fish'.<sup>2</sup> Information will often be unlocatable because of many factors including, but not exhaustively:

- poor record keeping,
- misfiling,
- inadvertent destruction,
- complete and forgotten transferral to another office or agency,
- poor and ambiguous request definition,

- non-existence.

My intention in this article is to persuade *FoI* officers that applicants need to be assured that a search for information was reasonably adequate, that many applicants have a justifiable basis to their disbelief and to offer a few suggestions that may help restore good faith to the process. My final conclusion is that statements of reasons and some ideas borrowed from the US can play key roles in this process of ensuring integrity and faith in the day-to-day operations of *FoI* in Australia.

#### Unbeliever one

The following extract comes from a letter written by the Tasmanian Ombudsman to the author in relation to the Molesworth Environment Centre:<sup>3</sup>

Following discussions between this office and the Secretary of Education and the Arts, the above file was provided. The Department advises the file was inadvertently overlooked in its search for records on the matter.

As a result of further inquiries the Department located 13 folios of various reports . . . Some of the information contained therein comes within the scope of the initial request.