



LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY

The Freedom of Information (Amendment) Bill 1998

**Report No. 17 of the
Standing Committee on Justice and Community Safety**

August 2001

Resolution of Appointment

That—

The following general purpose standing committees be established to inquire into and report on matters referred by the Assembly or, matters that are considered by the committee to be of concern to the community...

...a Standing Committee on Justice and Community Safety to examine matters related to administration of justice, legal policy and services, registrar and regulatory services, electoral services, consumer affairs, corrective, emergency and police services and fair trading and any other related matter.¹

Terms of Reference

Inquire into and report on the Freedom of information (Amendment) Bill 1998².

Committee Membership

Paul Osborne MLA (Chair)

John Hargreaves MLA (Deputy Chair)

Harold Hird MLA

Trevor Kaine MLA

Secretary: Fiona Clapin

¹ Legislative Assembly for the ACT, Minutes of Proceedings, No.2, 28 April 1998, p 15 as amended in Minutes of Proceedings, No.70, 25 November 1999, p 622.

² Legislative Assembly for the ACT, Minutes of Proceedings No.10, 28 May 1998, p 73

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RECOMMENDATIONS

Recommendation 1

The committee recommends that the Freedom of Information (Amendment) Bill 1998 not be proceeded with.

Recommendation 2

The committee recommends that either the Government or non-Executive members of the Fifth Legislative Assembly develop draft FOI legislation which simplifies the legislative framework to an outline of general principles rather than attempting to anticipate every eventuality.

Recommendation 3

The committee recommends that future proponents of FOI reform release an exposure draft with a discussion paper and invite public comment from the general community as well as from local FOI experts.

Recommendation 4

The committee recommends that future changes to ACT FOI legislation should take into account:

- (i) amendments made to the Commonwealth FOI legislation since 1988;**
- (ii) analysis and recommendations made by the Auditor-General in his forthcoming report on FOI; and**
- (iii) analysis of the impact of any changes which have occurred since the abolition of charges for FOI requests.**

Recommendation 5

The committee recommends that the Government develop strategies to improve the cultural commitment of public servants to FOI.

Recommendation 6

The committee recommends that the Government review records management in the ACT Public Service to ensure it enables public servants to meet FOI obligations efficiently and effectively.

Recommendation 7

The committee recommends the Government improve the reporting of FOI decisions to include more appropriate measures of client satisfaction with FOI decisions and processes.

Recommendation 8

The committee recommends that the Government promote the availability of FOI to potential users.

Recommendation 9

The committee recommends that the Government adopt the model of having an Information Commissioner to provide an early review, help streamline FOI decision-making and help promote a more pro-disclosure, user-friendly FOI culture within the public service.

EXECUTIVE SUMMARY

The committee concluded that the bill, in its current form should not be proceeded with.

Evidence received in submissions and in public hearings revealed significant problems with the bill. In particular, this bill does not provide for the achievement of the bill's stated objectives, that is to create a more user-friendly and pro-release FOI regime.

Furthermore, the inquiry revealed the need for additional reforms, such as better review mechanisms such as an Information Commissioner and improved promotion and evaluation of FOI.

This does not mean the committee is satisfied with the current FOI legislation. To the contrary, the inquiry revealed serious problems with the provisions in the current FOI legislation and in its implementation.

While the Government was of the view that the small number of appeals to the Administrative Appeals Tribunal and the Ombudsman indicated a high level of satisfaction by applicants with the current FOI system, the committee was not quite so convinced. The experiences of individual applicants such as Mr Stanhope MLA provide stark evidence of these problems.

The committee, while limited to some extent by the unavailability of the Auditor-General's FOI audit, still managed to draw some conclusions about the deficiencies of the current system and to make some suggestions aimed at improving the access to information by ACT citizens.

This report calls for parliamentary representatives to undertake further work to develop draft FOI legislation which would better achieve a freeing up of Government-held information to ACT citizens.

This work should be informed by the Auditor-General's report, due out early next year, by the experiences of other jurisdictions, particularly Western Australia (which has an Information Commissioner), Queensland, the Commonwealth and New Zealand and by consultation with locally-based FOI experts, including academics, journalists and practitioners.

Based on the evidence received in this inquiry, more work is needed to influence the culture of the ACT Public Service. Public servants must understand their responsibility to release Government-held information to the public, rather than withhold it.

The experiences of Jon Stanhope, the Cyclists Rights Action Group and Mr Len Munday point to a lack of understanding by ACT public servants of their responsibilities in relation to FOI.

One of the consistent themes of evidence presented to this inquiry was the tendency for government officials to be tempted to withhold information they believe may embarrass the Government and/or public servants. Any future proposals for legislative reform will need to address this problem.

It is likely that this problem cannot be dealt with purely with a legislative remedy. The Government will need to encourage changes in attitudes through other means and the committee has made some suggestions in this regard to assist the Government promote cultural change. Whatever methods are used, the Executive Government has a critical role in ensuring senior public servants in particular, and all public servants, understand that protecting the Government from political embarrassment is not reasonable grounds for refusing to release information.

The committee hopes that the information contained in this report will assist future parliamentarians who wish to promote FOI reforms.

1. INTRODUCTION

Background

The Freedom of Information (Amendment) Bill 1998 was tabled in the Assembly by Paul Osborne MLA on 28 April 1998.

The Assembly referred the bill to the Standing Committee on Justice and Community Safety for examination and report on 28 May 1998.

The Freedom of Information (Amendment) Bill 1998

The bill provides for substantial changes to the current FOI Act.

According to the explanatory memorandum, the purpose of the bill is to provide for increased access to government held information by members of the public through the following provisions:

- making the application process easier to use by both the public and government agencies;
- reducing the costs of requests;
- shorter time periods for compliance;
- rationalising exemptions so they only apply to information for which there is an overriding public interest in withholding it;
- changing the objects of the Act to promote an attitude of pro-disclosure;
- reducing the power of Ministers to veto disclosure; and
- increasing the awareness on both sides that members of the public have a legal right of access to government-held information.

Conduct of the inquiry

Advertisements were placed in local newspapers in 1999.

The committee also wrote to individuals and organisations thought to have an interest in the subject, including journalists and non-Executive members of the Legislative Assembly.

Ten submissions were received.

It was disappointing that no submissions were received from journalists, despite the direct invitation.

Three public hearings were conducted. See Appendix A for details of submissions and who appeared at the hearings.

The committee is reporting on this inquiry much later than it had originally intended due to the need to focus on other priorities and the delay in receiving the Auditor-General's report on FOI compliance.

Audit of FOI compliance

The committee wrote to the Auditor-General in 1998 requesting him to consider conducting an audit of the compliance of ACT government agencies with the current FOI legislation.

The Auditor-General agreed to conduct the audit. The audit deals with the following matters:

- the accuracy and meaningfulness of the present system of statistical reporting about the operation of the Act;
- the provision of information by departments under sections 7 and 8 of the Act;
- the provision of assistance by officials to applicants making requests;
- the procedures for handling requests, including the quality of reasons provided to applicants where access has been refused;
- the location and identification to applicants of documents relevant to a request;
- the use of exemptions provided for under Part IV of the Act;
- the timeliness of responses to requests; and
- the conduct of internal reviews of decisions.

Unfortunately, his FOI audit was delayed due to other commitments, mostly related to Bruce Stadium.

The Auditor-General has kindly kept the committee informed about the progress of his audit. Recently he advised that the audit is currently at the stage of providing extracts from the draft report to individuals for their comments. Following this stage he will be sending copies of the draft report to

departments for their comments, after which he expects to table his report after the commencement of the new Assembly.³

This means the committee does not have the benefit of his findings for this inquiry. However, it is expected that the Auditor-General's report will provide useful material for those interested in FOI in the next Assembly.

³ Letter from the Auditor-General to committee chair, dated 14 August 2001.

2. SUMMARY OF EVIDENCE

The committee received 10 submissions to the inquiry. It also received oral evidence from individuals in public hearings. The submissions and the oral evidence are summarised below.

SUBMISSIONS

Regula Baker

In her submission, Ms Baker made mention of several areas of concern and deficiencies, as she saw them, in the Bill. Some of the issues raised in the submission are paraphrased below.

- A suggestion that FOI applicants be required to have an Australian address so as preclude excessive expenditure incurred from sending documents overseas.
- Ms Baker saw that oral accounts of records were likely to be viewed with suspicion by many applicants and that it would be necessary, if this were to be implemented, to have a transcript of the oral account produced for posterity.
- Ms Baker noted that provisions to refuse an application on the grounds that it is frivolous, vexatious or trivial is problematic in that they are quite subjective notions, which are likely to be contentious amongst various parties involved in the FOI process. Ms Baker noted that, ‘The issue may be of overwhelming importance to the applicant, although the rest of us might regard it as trivial’.⁴
- Ms Baker noted concerns that it would be inappropriate to give the Ombudsman determinative powers, arguing that, ‘such powers are

⁴ Ms Baker, Submission, p 3.

inconsistent with the role of the Ombudsman as an impartial investigator⁵.

- Ms Baker expressed concerns that while there are timeframes set out in the Bill for FOI information to be provided, there are no penalties should these time limits be exceeded.

Commonwealth Ombudsman

One of the main areas of concern for the Ombudsman was the provision in the Bill that would give the, ‘Ombudsman the function of certifying that a document, to which access was requested and refused for one of the reasons set out..., is an exempt document’⁶.

In this regard, the Ombudsman noted that further clarification was required in respect of the following areas:

- it would appear to require the Ombudsman to engage in a determinative function which is inconsistent with the investigative and recommendatory role of the Office;
-
- rather than the Ombudsman being independent of Government, the Ombudsman may be seen as answerable to Ministers and a party in any disputes;
- it does not specify whether certification is to be the final and conclusive...[determination];
- it is unclear about how the Ombudsman is to be satisfied that a document is exempt...;
- there is a potential conflict between this role and the Ombudsman’s role of investigating complaints, either about the handling of a request for the document or about some administrative action to which the document relates;

⁵ ibid

⁶ Ombudsman, Submission p 2.

- the power would need to be made capable of being delegated... 7

Other areas of concern taken up in the submission from the Office of the Ombudsman include:

- concern that the provision for the Ombudsman to determine whether documents be certified as exempt would shift the locus of Executive responsibility from the Minister to the Ombudsman;
- concern that the proposed definition of “personal information” in Section 4 is ambiguous and a suggestion that the Commonwealth FOI ACT might provide a better definition;
- concern that the trivial/vexatious test would be unable to be applied consistently;
- concerns about the provision for oral disclosure of information, noting that, ‘As access to oral or summary form amounts to disclosure, there is no requirement to give reasons for any details which may be omitted in such an account’⁸;
- a suggestion that it may be prudent to outline what is meant by confidentiality in 33(e), noting that, ‘Because the law relating to confidentiality is not well understood by members of the public, and by many public officials, it might be timely to include in the provision a comprehensive guide to what it means, not requiring reference to external sources’;⁹
- a suggestion that the test for legal professional privilege be spelt out in greater detail in the Bill;
- concerns about replication of elements of the Commonwealth Act;
- the importance of resolving, ‘questions about whether individuals should have a right of access, directly or through Territory agencies, to information

⁷ ibid

⁸ Ombudsman, Submission, pp 4-5.

⁹ ibid, p5.

held by contractors performing functions for the Territory’¹⁰; and

- a suggestion that the Bill could be amended to explicitly permit, ‘refusal or deferral of access where the grant of access would have the potential to interfere with an administrative investigation or inquiry of the kind conducted by the Ombudsman’.¹¹

The Law Society

The Law Society urged that the Bill in its proposed form should not be accepted without, ‘proper inquiry and wide community consultation’.¹² The Law Society argued that the Bill does not achieve the aim of a more user friendly and pro-release FOI process.

Other points raised by the Law Society included:

- concerns about an inadequate definition of “personal information”;
- denying access on the basis of frivolous or vexatious grounds is not appropriate and not in keeping with the objects of Freedom of Information legislation;
- inconsistency in terminology in the proposed amendments to fees and charges¹³; and
- ‘... there will still be no reverse FOI rights for individuals whose personal privacy may be unreasonably invaded whereas businesses have had these rights since the Act was passed’¹⁴.

¹⁰ ibid, p 6.

¹¹ Ombudsman, Submission, p 6.

¹² Law Society of the ACT, Submission, p 1.

¹³ ibid, p 3.

¹⁴ ibid

In summary, the Law Society concluded that, ‘The Bill in its present form has the potential for widespread and undesirable ramifications. It is considered crucial that it should be subject to a proper Inquiry and wide community consultation before it progresses any further’¹⁵.

Cyclists’ Rights Action Group

The thrust of the Cyclists’ Rights Action Group submission related to the manner in which public interest is interpreted by Government agencies in the context of FOI applications. The Group submitted evidence in relation to a particular FOI request made to the Department of Urban Services concerning the decision to mandate that cyclists wear helmets.

The Group was displeased that the Department had not decided to remit the application fees for its request on the grounds of public interest. The Group contended that the Department took an exceedingly narrow interpretation of the notion of public interest.

The Group made the point that a Commonwealth department had deemed an application in relation to the same issue to be in the public interest and had remitted fees. The Group noted that, ‘It would appear that DUS’s interpretation of the public interest excludes scrutiny of the past workings of government. In our 1994 FOI request, we sought a wide range of statements about helmet wearing. We requested remission of fees and charges on the grounds of public interest. DUS refused this, but gave no substantive explanation for their decision. By contrast, the Federal Department of Transport remitted, on grounds of public interest, charges for documents which we had requested for the same purposes and which contain similar information’.¹⁶

The Group expressed concern that the Department of Urban Services had not provided comprehensive responses to FOI requests and had relied on an argument that the documents withheld were ‘secondary’, despite the fact that the Act makes no such provision.

The Group also had problems with imprecise information provided by Urban Services. The Group requested that the committee support their request for

¹⁵ ibid

¹⁶ Cyclists’ Rights Action Group, Submission , p 3.

full remission of the fees that they had paid in relation to the matters described above.

The Group submitted evidence of unfair treatment due to the present law giving open licence to government agencies to submit new material at the appeal stage to the Administrative Appeals Tribunal.

ACTCOSS

The ACTCOSS submission to the inquiry suggested a number of reforms were needed to address community concerns. They were:

- improved provision of information about the activities and consultative arrangements of Departments and Agencies;
- legislative provisions requiring information to be available in a range of formats, including hard-copy, electronic, braille, orally and in sign language;
- reviewing the operation of the Act on a bi-annual basis, with particular reference to those cases where access has been refused;
- further clarity in relation to definitions of “safety”, “confidence”, “public interest” and “business affairs”; and
- a more detailed consideration of the possible application of the Bill and the Act to contracted service providers.¹⁷

¹⁷ ACTCOSS, Submission p 8.

ACT Government

The Government submission to the inquiry noted that, ‘The Government is of the view that the overall effect of many of the proposed amendments would be to skew the balance too much in favour of access at all costs, and that the current Act provides an appropriate balance’.¹⁸

In its submission the Government provided a table of the number of FOI applications made in years gone by. This is included below:

	1996/97	1997/98
Number of FOI applications to agencies	224	217
Complaints made to Ombudsman	9 (4%)	8 (3.7%)
Review sought by AAT	7 (3.1%)	5 (2.3%)

The Government put across the view that the current legislation does not have the effect of preventing people of access to Government information. The Government noted that, ‘There appears to be little evidence that the current Act (and associated review and appeal mechanisms such as the Ombudsman and the Administrative Appeals Tribunal is operating to deprive persons of legitimate access to government information’.¹⁹

The Government argued that while the motive behind the amendments is one which is supported by the Government, that support is tempered by concern that the practical effect of the amendments would be to:

¹⁸ ACT Government, Submission, p 1.

¹⁹ ACT Government, Submission 6, p 1.

- impose unreasonable burdens on government agencies;
- compromise the ability of agencies to properly and frankly advise the Government;
- disadvantage the territory legally; and
- make the Act internally inconsistent and thus more difficult to interpret and apply.²⁰

In its submission, the Government opposed many of the amendments, supported some and suggested improvements to others.

Tom Campbell

Mr Campbell, in his submission to the inquiry, advised that the Bill be rejected noting that, ‘My strong recommendation is that the proposed reduction in the period which Government documents are held private in archives should be rejected out of hand’.²¹

Australian Society of Archivists, ACT Branch

The Australian Society of Archivists summarised its submission as follows:

- while encouraging any measure that improves access to government records, the ASA would argue that the ACT Government to consider the releases of executive documents within the framework of a whole-of-government archives regime underpinned by appropriate legislation;
- the proposed ACT Government Archivist should have decision-making responsibility for release of all ACT Government records, including executive documents, in consultation with record creators, such as the Legislative Assembly, as appropriate;

²⁰ ibid

²¹ The Australian Society of Archivists, Submission, p 2

- any regime for providing access to government records must be adequately resourced to deal with the task;
 - the ASA supports a sunset clause on exemption provisions for the release of records;
 - no record should be permanently exempted from public access. Decisions to permanently exempt records from the operation of this Bill should only be allowed where other archival legislation is in place to allow later release of the records;
 - an independent ACT Government Archivist should be empowered to produce guidelines on all aspects of decision-making about and release of records in order to ensure consistent and equitable decision-making; and
 - there should be provision for appeal against decisions made under the act.
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²² The Australian Society of Archivists, Submission, p 2

Mr Peter Bayne

Mr Bayne described the key issues which should be considered in this inquiry as follows:

- the need to choose between two models-either a law containing many provisions designed to anticipate all issues of substance and procedure or a law providing the basic framework and basic principles such as extent of right of access, the regime for external review and matters of procedure and charges;
- the exemptions;
- should there be a public interest override?;
- should there be a ‘fail-safe’ government veto?;
- should there be a separate regime for access for personal information?;
- should the FOI law recognise that some persons have an interest in obtaining access that is greater than that of members of the public?;
- costs and charges; and
- who should review agency decisions under an FOI Act?
- who should review agency decisions under an FOI Act and should there be changes to review agencies flowing from FOI Act changes?

Mr Bayne questioned what is to be done about non-government bodies which discharge government functions.

Mr Bayne’s submission was very detailed and is included in full in Appendix B.

Mr Ron Fraser

Mr Fraser submitted that:

- while FOI legislation in Australia has been very successful promoting access to personal government-held information, it has been much less successful in achieving its democratic objects to increase government

accountability to the people and to allow a far greater public participation in the working of government;

- there has been less usage of FOI for access to information on government policy than for accessing one's own files;
- the reasons for this include: the lack of a strong FOI community in Australia like that in the US; and cultural attitudes promoting secrecy in government agencies, partly due to the structure of FOI legislation;
- legislative and administrative changes are needed to change the culture of secrecy in a significant, lasting and consistent way.

Mr Fraser suggested that for FOI to be used for truly democratic ends the following design principles should be implemented:

- an objects clause that clearly sets out the democratic and other objectives so that decision-makers are required to give effect to those objects wherever possible and any discretion is decided in favour of ambiguity;
- the grounds for refusal of documents (exemptions) should be based on an assessment of the specific consequences of disclosure, not on a description of the kinds of documents in question;
- the expected harm must be of substantial character (examples provided in Appendix);
- where possible agencies should be required to take into account all aspects of the public interest (both favouring disclosure and against it);
- a further 'public interest' override power should be available to an external review body to help ensure the public interest in accountability is taken into account on appeal;
- essential that there be an external review authority that can obtain the relevant documents early on, is not expensive to use and is easily accessible and can help agencies administer the legislation well by publishing the reason for its decision-the Information Commissioners for WA and Queensland provide the best models for review;
- there is a strong need for a body to monitor and assist agencies in the administration of legislation-this is no longer done by units in central departments in most jurisdictions;
- the legislation should be amended to encourage more routine disclosure of information, more information on the Internet and the discretionary release

of information even where it may be technically exempt but would be in the public interest to do so;

- details of decision-making processes could be left to administrative guidelines and some changes should be made to the existing processes; and
- charges inhibit use of FOI for democratic processes and should be reduced as much as possible.

Mr Fraser made some general comments on the actual bill. He questions whether it will satisfactorily achieve the drafters' objectives, questions the nature of some of the changes and draws attention to some unintended consequences of proposed changes:

Mr Fraser's full submission is included in Appendix C.

ORAL EVIDENCE

Mr Len Munday

Mr Munday, provided evidence on his experiences in using ACT freedom of Information laws. Mr Munday highlighted the following problems:

- excessive number of rejections of applications;
- the practice of the ACT Government providing additional documents on the day of appeal hearings before the Administrative Appeals Tribunal (AAT);
- unnecessary and costly-to-the-taxpayer appeals by the ACT Government of AAT decisions (for example one appeal to the Supreme Court cost \$17,000)
- the fact that when the ACT Government appeals decisions by the AAT to the Supreme Court and the Federal Court, he, the applicant has to defend it but he did not make the decision;
them but he did not make the decision;
- the ACT Government had to seek the assistance of the FBI and Bill Gates to break into its own electronic data system to retrieve information related

to an FOI request at an estimated cost to the taxpayer of \$60,765.29 (so the work was not done);

- the danger of electronic information stored on ACT Government computers not being fully accessible;
- the previous practice (about 4 years ago) of being able to access an FOI Coordinator to sort out problems at an early stage no longer exists and he had found that very useful; and
- different government agencies make conflicting decisions about the same documents;

Mr Munday also told the committee he objected to the provision in the draft bill of a reference to 'frivolous and vexatious' clients.

Mr Jon Stanhope MLA

Mr Stanhope MLA, the Leader of the Opposition, provided a graphic illustration of the deficiencies of the current FOI legislation and of the decision-making process of ACT public servants.

Mr Stanhope told the committee:

I have used the Freedom of Information Act over the last 2 and a half years on a reasonably regular basis. I have probably made half a dozen or more separate requests under the act over that period. My experience is mixed. Some of the requests I have made I think have been responded to certainly within the timeframes and framework of the act and I believe the responses have been appropriate and professional. I have serious reservations about some other of my requests and I am concerned that it is not a coincidence that the requests that I am not happy with....were in relation to politically very contentious issues.²³

Mr Stanhope told the committee that he was particularly unhappy with the responses he received to FOI applications relating to Bruce Stadium. One related to the tender selection process for the management of Bruce Stadium, the other to the Bruce Stadium rock concert which was cancelled.

Mr Stanhope argued that the FOI response to the rock concert request was 'not within the spirit of the Freedom of Information Act' and the response to

²³ Transcript, 5 October 2000, p34.

the tender request was ‘not in accordance with the act.’²⁴ The first response he had for this application was a list of expense for the rock concert with all the items blocked out. One of these items which Mr Stanhope said “one of things which the government thought I should not know , or that none of us should know is that for the budget for the rock concert...contained an amount of money for cleaning and electricity”.²⁵ Other items blocked out included \$9000 for credit card charges \$5000 for ushers and \$5000 for posters.

Mr Stanhope complained that the response to his tender application stated that the exemptions were the reasons for non-disclosure but in the statement of reasons there was no attempt by the decision-maker to explain the basis on which he came to the decision that the document was exempt.²⁶ Also after making this application, he later became aware of other documents (mentioned in the Auditor-General’s report on Bruce Stadium) and noted these had not been given in the Statement of reasons, a requirement under the Act.²⁷

He noted that in relation to the public interest test that should apply to the use of exemptions there is never an attempt to explain the use of any of the exemptions. In his case he did not receive an explanation of whether the overriding public interest in release of documents supersedes the strict interpretation or the existence of the exemption.

Mr Stanhope also noted that the Administrative Appeals Tribunal is very adversarial, very legalistic and very expensive.²⁸

Mr Stanhope does not disagree with the need for exemptions but believes the Government needs to be more accountable for its decision-making in relation to exemptions.

²⁴ Transcript, 5 October 2000, p34.

²⁵ Transcript, 5 October 2000, p37.

²⁶ Transcript, 5 October 2000, p35.

²⁷ Transcript, 5 October 2000, p42.

²⁸ Transcript, 5 October 2000, p44.

Mr Stanhope was of the view that the legislation itself was reasonable but there is a problem with the administration of the Act and the ‘culture of secrecy or a culture of restraint...which prevents access to information’.²⁹

Mr Simon Corbell MLA

Mr Corbell stated he had used the freedom of Information Act on six occasions in the past two and half years. He said that on the whole he had received fairly good access to documentation held by the various departments.³⁰

He told the committee that he had concerns about the operation of the Act, mainly in relation to internal review. In one request he was advised that he was refused a folio called ‘various documents’. His problem was, he had no way of knowing whether the documents should have been denied to him. He believes the internal review, should, at the very least, identify the documents.

Mr Corbell objects to the internal review process being internal. He does not have confidence in an internal review process. He suggests it should be replaced by an external review process.

Mr Corbell also noted that if someone in his position found it difficult to accessing documents, then ordinary citizens would find it more difficult.

²⁹ Transcript, 5 October 2000, p34.

³⁰ Transcript, 5 October 2000, p53.

3. IS THERE A NEED FOR FOI REFORM?

ACT FOI Data

Table 1: Outcomes of FOI requests 1998-2000³¹

	1998/99	1999/00
Number of FOI applications to agencies	249	268
Full release	108	101 (40.1%)
Partial release	106	111 (40.0%)
Technical refusal (No documentation existed)	11 (4.6%)	24 (9.5%)
Access refused	4 (1.7%)	8 (3.2%)

³¹ Source; Department of Justice and Community Safety annual reports 1996-2000

Table 2: Section 18-Determination of requests 1996-2000

	1996/97	1997/98	1998/99	1999/00
Met the 30 day deadline ³²	67.5%	81%	83.6%	82.3%
Took between 31 and 45 days to complete	20.3%	15.9%	11.4%	11.2%
Took more than 45 days to complete	11.2%	3.1%	5.1%	3.2%

Table 3: Review applications relating to FOI requests 1996-2000³³

	1996/97	1997/98	1998/99	1999/00
Number of FOI applications to agencies	224	217	249	268
Internal review requested	*34	*35	2	30
Complaints made to Ombudsman ³⁶	9 (4%)	8 (3.7%)	4	14
Review sought by AAT	7 (3.1%)	5 (2.3%)	0	0

³² Section 18 requires that an applicant be notified of a decision on their request within 30 days except where Commonwealth/State relations may be affected or business affairs are involved.

³³ Source; Department of Justice and Community Safety and Ombudsman annual reports 1996-2000

³⁴ not included in annual report

³⁵ ibid

³⁶ Complaints received under section 53(3) of the Act requires the Ombudsman to report on complaints arising from FOI requests made to agencies, claiming there had been defective administration.

FOI and democracy

The existence of FOI legislation is a key requirement for a participatory, representative, accountable government.

Citizens must have access to government-held information if a government's activities are to be open to scrutiny, discussion and review.

In societies which have little access to governmental information, the balance of power is heavily weighted in favour of the government.

The United States has demonstrated a greater commitment to freedom of information than Australian jurisdictions, including the ACT. There is much room for improvement in the processes for making ACT Government information available to the public.

This can be achieved through legislative reform and through administrative and cultural changes. The committee has identified the need for action on both fronts.

Problems with the bill

While there was strong support for the objectives of the bill, there was a strong view that the provisions of the bill would not allow for the achievement of these objectives. In particular, the view of many submitters was that the bill would not achieve the aim of a more user-friendly and pro-release FOI process.

The deficiencies of the bill identified by submitters are:

- oral accounts of records problematic;
- the provision to refuse an application on the grounds it is frivolous, vexatious or trivial is problematic because they are subjective notions and it is inconsistent with freedom of information principles;
- it would be inappropriate to give the Ombudsman determinative powers because this is inconsistent with the investigative and recommendatory role of that office and rather than the Ombudsman being independent of government, he or she may be seen as answerable to Ministers and a party to disputes;
- there are no penalties set out if time frames are exceeded;

- it is unclear how the Ombudsman is to be satisfied that a document is exempt;
- the Ombudsman's power would need to be made capable of being delegated;
- further clarity required in relation to definitions of "safety", "confidence", "public interest" and "business affairs" and 'personal information';
- need to clarify if applicants would have access to information held by contractors;
- inconsistency in terminology relating to the proposed fees and charges;
- the bill contains no reverse FOI rights for individuals whose personal privacy may be unreasonably invaded whereas businesses have these rights;
- the bill should require information to be available in a range of formats, including hard-copy, electronic, braille, orally and in sign language;

- the operation of the Act should be reviewed on a bi-annual basis, with particular reference to those cases where access has been refused;
- it would make the Act internally inconsistent and thus more difficult to interpret and apply.

The committee concluded that the Freedom of Information (Amendment) Bill 1998 has too many deficiencies and should not be proceeded with.

The key objectives of the bill, as outlined in the explanatory memorandum – to make the application process easier, to reduce the costs of requests, to rationalise the exemptions, to reduce the power of Ministers to veto disclosure and to increase public awareness of their right of access to government-held information – are very worthy objectives. Unfortunately the provisions in the bill are not the best way of achieving these objectives.

The committee must therefore recommend that the bill not be proceeded with.

Recommendation 1

The committee recommends that the Freedom of Information (Amendment) Bill 1998 not be proceeded with.

However, the committee's rejection of this bill should not be interpreted as a rejection of the need for further reform of FOI so that it promotes disclosure.

This inquiry has revealed that there are serious problems with the current FOI legislation and its implementation.

Suggestions for reform

In this section the committee canvasses some of the key issues relating to FOI reform. Before that, it should be acknowledged that the Government has recently abolished FOI charges.

Recent Government reforms

In March 2001, the ACT Government announced the abolition of FOI application fees for accessing documents and for seeking internal reviews of FOI decisions.³⁷

The Attorney-General when announcing the removal of fees, stated this initiative was part of the Government's 'Moving Forward' initiatives.

The committee welcomes this initiative as it should promote greater access to government-held information. However it does not negate the need for further FOI reforms.

Applicants are still required to pay for Administrative Appeals Tribunal appeals and these can be very costly.

Principles for reform

The committee has identified the need for improvements to the ACT's legislative regime for FOI.

The committee believes these changes would be best achieved with entirely new FOI legislation which sets out broad principles rather than the current form of legislation which attempts to anticipate every possibility.

Recommendation 2

The committee recommends that either the Government or non-Executive members of the Fifth Legislative Assembly develop draft FOI legislation which simplifies the legislative framework to an outline of general principles rather than attempting to anticipate every eventuality.

Future process for improving ACT FOI legislation

This committee has been able to identify the need for FOI reform and to identify problems with the reform framework proposed in the bill under consideration.

³⁷ Bill Stefaniak, Media Release, *ACT Government Wipes FOI Application Fees*, 9 March 2001.

There is clearly still a need for future work in developing another legislative proposal which would better achieve the objectives underlying the Freedom of Information Bill 1998.

The committee considers it important that the ACT community have an opportunity to contribute to the development of future FOI reform proposals. This would best be achieved by the release of a discussion paper setting out the detail of the reforms proposed together with an exposure draft of a new bill inviting community comment.

This committee is especially grateful for the contributions made to this inquiry by three local FOI experts (one academic- Mr Peter Bayne and two experienced practitioners- Ms Regula Baker and Mr Ron Fraser). The committee therefore encourages proponents of FOI reform to engage the assistance of local experts such as these when developing detailed proposals.

Recommendation 3

The committee recommends that future proponents of FOI reform release an exposure draft with a discussion paper and invite public comment from the general community as well as from local FOI experts.

Developing future reforms

Because the ACT FOI Act is almost identical to the Commonwealth Freedom of Information Act 1982 as it stood at the granting of self-government in 1988 and proposed reforms to the ACT legislation should take into account the amendments to the Commonwealth FOI legislation made since 1988.

Mr Ron Fraser submitted that such an analysis should take particular note of the amendments made in 1991 and it should consider whether the policy reasons for the changes justify similar changes for the ACT³⁸

³⁸ Mr Ron Fraser, Submission, p7. Mr Fraser noted that the policy rationale for the changes to Commonwealth legislation could be obtained from the Explanatory Memorandum to the 1991 bill and from the recommendations of the 1987 Report of the Senate Standing Committee on Legal and Constitutional Affairs. He also suggests that the 1986 Report of the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) which contains 106 recommendations for legislative or administrative changes to the Commonwealth's FOI regime

The development of future proposals for FOI reform should also take account of the analysis and recommendations made by the Auditor-General in his FOI Performance Audit report which is expected to be released early into the new Assembly.

The current Government announced the abolition of charges for FOI requests in February 2001 and it would be appropriate for the impact of this change to be taken into account in the development of any future reform proposals.

Recommendation 4

The committee recommends that future changes to ACT FOI legislation should take into account:

- (i) amendments made to the Commonwealth FOI legislation since 1988;**
- (ii) analysis and recommendations made by the Auditor-General in his forthcoming report on FOI; and**
- (iii) analysis of the impact of any changes which have occurred since the abolition of charges for FOI requests.**

Administrative and cultural changes

The committee concluded that case studies³⁹ provided strong evidence that the current FOI regime was in need of improvement. The critical question, though, is the problem due to legislative deficiencies or is it a problem of culture within government agencies?

The committee came to the view that current problems with FOI in the ACT cannot all be solved with a legislative remedy. Some of the problems will require non-legislative solutions.

The committee identified a problem with the culture in the ACT Public Service. Some public servants appear not to accept the spirit of FOI legislation and

needs to be taken into account when considering the changes that should be made to the ACT's FOI regime.

³⁹ In particular the experiences of Mr Stanhope, Mr Corbell, the Cyclists Rights' Action Group and Mr Munday.

instead appear to believe it is appropriate to stymie the release of government-held information, particularly information likely to cause embarrassment to the Government and/or to public servants.

This cultural problem became evident in the Auditor-General's report on Bruce Stadium and from some of the case studies considered by this committee, particularly the Jon Stanhope case.

The committee suggests that the next Government will need to develop strategies to address this cultural problem and the following strategies are offered for consideration:

- senior executives need to be made more accountable for FOI decisions, perhaps through new provisions in their executive contracts and it be a factor in their performance assessment;
- Cabinet Ministers and the Government need to promote a consistent, strong message to all public servants and the community in general that it supports full release of all government-held information (with only rare exceptions);
- Public servants need to be tested on their commitment to FOI perhaps through inclusion of 'commitment to FOI' words in all selection criteria so public servants can be expected to face questioning on FOI in job interviews.

Recommendation 5

The committee recommends that the Government develop strategies to improve the cultural commitment of public servants to FOI.

Improving records management

Clearly a well-functioning records management system is a prerequisite for meeting FOI obligations. The ACT Government's record in this regard has not been good although it appears that following the Bruce Stadium report by the Auditor-General, the Government has tried to implement some reforms.

Recommendation 6

The committee recommends that the Government review records management in the ACT Public Service to ensure it enables public servants to meet FOI obligations efficiently and effectively.

Need for improved evaluation

The conversation between committee members and public officials in one of the public hearings highlights the need for an improved reporting system on FOI decisions.

Public officials attempted to convince the committee that data on FOI reported in the Department of Justice and Community Safety annual report indicates that there is a high satisfaction with the current FOI decisions and processes.

Government officials attempted to argue that the low number of appeals to the Administrative Appeals Tribunal was evidence of the satisfaction by ACT citizens with the current implementation of FOI legislation.

At a public hearing on FOI in October 2000, the then Attorney-General, Mr Gary Humphries told the committee:

We get very few complaints about it (FOI). In fact I cannot recall any from any member of the public in at least two years. The appeal processes seem to work fairly effectively and efficiently and the internal review process within agencies also appears to work fairly well, based on the lack of feedback of a negative nature.⁴⁰

An official from the Department of Justice and Community Safety further stated:

The only objective measure that we have really got is the statistics on appeal, and if you look at those it is a very, very low level of appeal. You have to keep in mind that we have got two avenues that people can explore, one of which is completely free- that is the Ombudsman- and the Administrative Appeals Tribunal as well.⁴¹

⁴⁰ Transcript, 5 October 2000, p5.

⁴¹ Transcript, 5 October 2000, Ms Anna Lennon

The official went on to recite the appeal statistics included in the Government submission, such as nine complaints to the Ombudsman and seven to the Administrative Appeals Tribunal out of a total of 224 FOI applications made in 1996-97.⁴² The then Attorney-General went on to claim that this is 'very strong evidence that the system is working'.

The committee questions the Government's interpretation of this data. There is a need for caution when analysing these figures.

The committee had hoped to have access to the Auditor-General's deeper analysis of FOI applications, but unfortunately this will not be available until next year.

It is suggested that further work is needed before it is clear how satisfied FOI applicants are with the process and outcomes and whether the current process deters many potential applicants from applying in the first place. The real picture will only become clear with an analysis of the Auditor-General's work, an analysis of Administrative Appeals Tribunal and Ombudsman decisions and perhaps some focus group work with potential applicants such as journalists and community representatives.

The FOI applicants who gave evidence to this inquiry indicated that they were not satisfied that the search had been adequate, they felt that exemptions had been used unreasonably and felt the decision took too long.

It will be interesting to see if the Auditor-General's report supports this.

The Government should be monitoring client satisfaction with FOI and clearly this will require deeper analysis than the current crude extrapolations from FOI data.

If the Government was truly committed to FOI, it would be more pro-active in trying to evaluate client and potential-client satisfaction with the processes and decisions. For example, it is noteworthy that ACT journalists make very little use of FOI for ACT government matters. Neither do community organisations. The Government needs to reach out to these people and ask them what are the barriers to them using FOI. A change in usage could be expected following the abolition of FOI charges. If such a change has not occurred then it is possible that FOI needs to be better promoted.

⁴² ibid, p9.

Recommendation 7

The committee recommends the Government improve the reporting of FOI decisions to include more appropriate measures of client satisfaction with FOI decisions and processes.

Recommendation 8

The committee recommends that the Government promote the availability of FOI to potential users.

Need for improved review process

The committee received evidence that the current review process is not satisfactory. For example both Mr Stanhope and Mr Corbell were dissatisfied with the internal review and the Administrative Appeals Tribunal process, the first for being possibly biased and the second for being expensive, time-consuming and over-legalistic. The Cyclists' Rights Action Group was dissatisfied about unfair treatment at the review stage due to lack of restriction on government agencies to introduce new material to them.

The committee likes the idea of having an Information Commissioner in the ACT who could not only be responsible for reviews of decisions but could also be involved at the early stages of FOI decision-making to help clarify requests to reduce delays.

Such a body would need to be given a wide power to intervene and to give directions to both requestors and agencies.

Both Queensland and Western Australia have such a function and the committee recommends this model be further investigated.

Recommendation 9

The committee recommends that the Government adopt the model of having an Information Commissioner to provide an early review, help streamline FOI decision-making and help promote a more pro-disclosure, user-friendly FOI culture within the public service.

Paul Osborne

Chair

27 August 2001

APPENDIX A – LIST OF SUBMISSIONS AND HEARING DATES

Submissions

1. Ms Regula Baker
2. ACT Ombudsman
3. The Law Society of the ACT
4. Cyclists' Rights Action Group
5. ACT Council of Social Service Inc
6. ACT Government
7. Mr Tom Campbell
8. Australian Society of Archivists Inc
9. Mr Peter Bayne Law School ANU
10. Mr Ron Fraser

Public Hearings

4 September 2000

Mr Peter Bayne

Ms Regula Baker

Mr James Grieve (Cyclists Rights Action Group)

Mr Daniel Stubbs and Mr Chris Johnston (ACTCOSS)

Ms Danielle Wickman and Ms Ann Marie Schirtlich (ACT Branch of the Australian Society of Archivists)

5 October 2000

Mr Gary Humphries (Attorney-General) and Ms Anna Lennon (Department of Justice and Community Safety)

Mr Bill Curnow (Cyclists Rights Action Group)

Mr Jon Stanhope MLA (Leader of the Opposition)

Mr Simon Corbell MLA, Member for Molonglo

15 November 2000

Mr Ron Fraser

Mr Len Munday

Mr Phillip Moss and Mr Paul Bluck (Ombudsman's Office)

APPENDIX B – MR PETER BAYNE’S SUBMISSION

Please note the electronic copy of this report does not contain appendix b or appendix c. for copies of these contact the committee office.

APPENDIX C – MR RON FRASER’S SUBMISSION

