



Executive Summary

 A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
SUBMISSION NUMBER	5
DATE AUTH'D FOR PUBLICATION	1.9.2010

This submission accepts and endorses the policy position of the ACT Government that it seek to maintain consistency with the Australian Government's FOI Act.

However, this submission goes a step further and advocates the immediate introduction of complementary amendments to exactly align the ACT FOI Act with the Australian Government's FOI Act given the commencement of the latter's reformed information scheme. This should be done in tandem with providing open access to ACT Government information for business and the community through an online agency publication scheme supported by general information disclosure protocols.

This submission also accepts and endorses the proposals of the Australian Press Council in its submission, particularly for the creation of a pro disclosure culture.

This submission also accepts and endorses the comments of the ACT Auditor-General and of the Flynn Primary School Parents and Citizens Association Inc in their respective submissions and provides further examples in support of their observations and conclusions.

In accepting and endorsing the policy position of the ACT Government, this submission rejects the Solomon Report on the Queensland FOI Act as being applicable to the Territory in favour of the exact alignment between the ACT and Australian Government FOI Acts. That is, a hybrid model should not be adopted for the reasons set out herein.

Finally, this submission looks at organisational culture and agency accountability and how a pro disclosure culture can be embedded in higher-quality accountability systems to achieve better FOI outcomes.

This submission concludes that any statutory change will achieve little unless accompanied by other adjustments, including changes that promote a pro disclosure culture at the agency level, and identifies some formal and informal mechanisms by which this can be implemented.

Reformed Australian Government Arrangements

The Australian Government announced as part of its 2007 election policies that it would reform its *Freedom of Information Act 1982* with the principal objects of promoting a pro disclosure culture across Government and building a stronger foundation for more openness. To that end it committed significant resources to identifying and implementing new framework arrangements comprising the *Australian Information Commissioner Act 2010* and the *Freedom of Information Amendment (Reform) Act 2010* which passed through the Parliament on 13 May 2010 and which were assented to on 31 May 2010.

The new Office of the Information Commissioner will commence on 1 November 2010. On 26 February 2010 the Government announced the appointment of Professor John McMillan AO as the Information Commissioner Designate.

The establishment of the Office of the Information Commissioner implements a key element of the Australian Government's FOI reforms. It is part of Government's agenda to restore integrity and openness to government in a number of key areas, including FOI, as is the Information Publication Scheme (new Part II FOI Act) which will commence on 1 May 2011, along with the requirement for agencies to publish information where access has been given under Part III of the FOI Act (new section 11C FOI Act).

In addition, changes to the 'open access period' in the *Archives Act 1983* for most records from 30 years to 20 years will begin on 1 January 2011. Changes to the 'open access period' in the Archives Act for Cabinet notebooks from 50 years to 30 years will begin on 1 January 2011.

Proposed reforms to FOI fees and charges¹ were announced on 24 March 2009 as follows:

- not applying application fees to access requests or internal review requests;
- not applying charges to applicants accessing their own personal information under the FOI Act;
- for all other applications—the first hour of decision-making time will be free (except for journalists and not-for-profit community groups where the first five hours of decision making time will be free); and
- for applications not decided within the statutory time frame—no processing charge will apply.

The Information Commissioner Designate will be requested to undertake a comprehensive review of charges within 12 months of his appointment.

In 2009 the Australian Government removed the power to issue conclusive certificates in the FOI Act and the *Archives Act 1983*.²

¹ Some changes will require amendment of the *Freedom of Information (Fees and Charges) Regulations 1982*.

² *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) which commenced on 7 October 2009. The ability of ACT Ministers to issue conclusive certificates (except in relation to national security matters) was removed from the ACT FOI Act from 19 February 2009.

Importantly, the Australian Government recognised the need to support these reforms through new information policies to address information management issues³ to ensure effective open access to government information for re-use by business and the community, along with a proposed agency publication scheme and other measures including promulgating general information disclosure protocols, auditing information disclosure, and overseeing e-governance protocols.

Existing Territory Arrangements

In accepting and endorsing the policy position of the ACT Government, there are cogent reasons for rejecting the Solomon Report on the Queensland FOI Act as being applicable to the ACT in favour of an exact alignment between the ACT and Australian Government FOI Acts. That is, a hybrid model incorporating elements of the Solomon Report should not be adopted for the following reasons.

First, the Territory could utilise the jurisprudence from cases which involved the Australian Government without the need to develop its own. Currently, there is little jurisprudence in support of the ACT FOI Act specifically,⁴ which can be a problem.

Given that the ACT Government's submission to the Standing Committee is qualified throughout by the availability of resources and any other competing priorities, and given that the ACT Government has never developed its own jurisprudence for precisely these reasons, this is a cogent and compelling reason for supporting a mirror scheme to provide better support to FOI practice in the ACT.

Secondly, the Territory could utilise the intellectual capital and outcomes resulting from the Australian Government's reformed information scheme in tandem with its own precedential *Human Rights Act 2004* to adopt and embed a pro disclosure culture within the ACT public sector through the accountability and risk measures identified in this submission. It could also utilise Australian Government FOI and human rights resources to educate ACT personnel in pro disclosure policies and practices. Given that the ACT Government's acceptance of the Auditor-General's recommendations in this regard is also similarly qualified,⁵ this too is a cogent and compelling reason for supporting a mirror scheme.

In particular, if the ACT could leverage off federal resources to train ACT public sector agency personnel in disclosing information more efficiently and effectively, it would enable agencies to develop and implement better FOI policies and practices.

To date, agencies (and the Department of Justice and Community Safety in particular) have not always shown leadership and initiative in this area, with the result that FOI policies and practices within ACT public sector agencies can be inconsistent or poorly administered. Some examples of these circumstances are:

- Failure of governance and poor reporting practices.

³ See *Information Policy and E-Governance in the Australian Government: Report* at <http://www.dpmc.gov.au/>.

⁴ There are some good ACT AAT decisions in this regard which are used by the Australian Government.

⁵ I.e. accepted 'in principle' only. See Recommendations 1, 6, 10, 12 at pp. 31-34, ACT Government Submission to the Standing Committee on Justice and Community Safety—Inquiry into the *Freedom of Information Act 1989*.

- Egregious decision making by an agency as to cause an administrative review applicant unnecessary delay and unnecessary costs.⁶
- The tendency of agencies to use legal professional privilege (a class exemption under s.42 of the ACT FOI Act) beyond what is necessary and justifiable to fulfil its purposes,⁷ with consequential scope for disparity in judicial and tribunal treatments and determinations.⁸
- Failure by the agency to conduct a decision-making process based on what is fair in all the circumstances.⁹

There are also circumstances where agencies do not take FOI seriously and do not provide sufficient FOI resources. This is exemplified by:

- A culture of minimal compliance with FOI requirements.¹⁰
- The deliberate avoidance of FOI obligations.¹¹
- Procedural errors such as failing to identify documents within the terms of the FOI request,¹² failing to conduct an adequate search, failing to provide reasons for decisions, and failing to adequately schedule documents.

The ACT FOI Act is also arguably defective or requires greater oversight by the Attorney-General in the following respects:

- Failing to require agencies to consult with third party individuals before disclosing information under FOI,¹³ resulting in disadvantage to a person or class of persons by depriving them of the opportunity to object to disclosure in circumstances where they may wish to object or to seek review of an agency's decision.¹⁴

⁶ In this case costs were awarded against the Territory notwithstanding it was a no-cost jurisdiction: *Falk and ACT Health* [2005] ACTAAT 22 (21 September 2005). See also *Re Paterson and Department of Arts, Heritage & Environment* (No. 2) (1985) 8 ALD 227.

⁷ Per Kirby J regarding the Victorian FOI Act in *Osland v Secretary to the Department of Justice* [2008] HCA 37 (7 August 2008) at 89. See also Chapter 9 at 9.1 ff of Australian Law Reform Commission Report 107.

⁸ E.g. the careful inspection and categorisation of documents subject to a claim of legal professional privilege in *Fogarty and Chief Executive Officer, Cultural Facilities Corporation* [2005] ACTAAT 14 (14 July 2005) compared to *Sernack v ACT Department of Treasury* [2010] ACAT 40 (3 August 2010).

⁹ Per *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 (18 December 1985); 62 ALR 321 CLR at 584-85; ALR at 346-47).

¹⁰ I am aware of only one agency that has voluntarily commissioned an external compliance audit to test the rigour of its FOI policy and practices.

¹¹ I.e. the senior agency officer who routinely kept no files or papers in the officer's office lest they be disclosable under FOI.

¹² E.g. *Mann, Dr Arnold and Department of Health (ACT)* [1994] ACTAAT 73 (17 May 1994).

¹³ I.e. the occasion on which the agency released its lawyer's billing statements to opposing lawyers without consulting the law firm in question, thereby enabling the course of a confidential inquiry to be tracked without the law firm being aware of it, while also depriving the firm of the opportunity to seek a review of the release decision.

¹⁴ In correspondence in 2008 with the ACT Ombudsman and the ACT Attorney-General regarding the inconsistency between s.27 of the ACT FOI Act and the Australian Government's approach to consultation, the Attorney-General agreed this was a matter of concern which he undertook to refer to his department; however, the ACT Government Submission to this Standing Committee makes no reference to it.

- Failing to address the agency practice of routinely claiming legal professional privilege as a class exemption under s.42 of the FOI Act.¹⁵ The Australian Government dealt with this matter by a direction stating when legal professional privilege should and should not be claimed.¹⁶ Specifically, that agencies should not claim the exemption for documents which have no particular sensitivity, and that an agency should not be advised to claim the exemption simply because it is available.

Practitioners must also grapple with the relationship between the FOI Act and the *Public Interest Disclosure Act 1999*,¹⁷ as well as with and between the *Human Rights Act 2004* and the *Privacy Act 1988* (Cth). These relationships are not always clear. In creating the Office of the Information Commissioner, the Australian Government brought together independent oversight of its FOI and Privacy Acts by way of addressing the tension between them.

Notwithstanding, FOI has worked well in affording rights to citizens in the following circumstances:

- The use by private sector law firms of FOI as an alternative to discovery,¹⁸ noting a processing charge is generally not applied or is remitted on the basis of custom and practice.¹⁹
- The use of FOI in workplace disputes.²⁰
- The use of FOI to gather evidence where there is an issue of liability.²¹
- The use of FOI by Members of the Legislative Assembly to source and obtain details of Government policy proposals not otherwise available²² in the absence of agency publication schemes to provide contestability in public policy formulation.²³ An Information Publication Scheme is clearly to be preferred where the information gap results in significant costs to the taxpayer with little quantifiable public benefit.²⁴

¹⁵ *Fry and University of Canberra* [2005] ACTAAT 23 (13 October 2005), *Kowalski and ACT Government Solicitor* [2006] ACTAAT 14 (2 May 2006).

¹⁶ 'Brazil Direction': Claims of Legal Professional Privilege, Appendix 2, *Freedom of Information Act 1982—Fundamental Principles and Procedures* at <http://www.dpmc.gov.au>.

¹⁷ See *Public Interest Disclosures—Governance in the ACT Public Sector* at <http://www.arpi.org.au>.

¹⁸ E.g. *Josette Joan Badcock v Australian Capital Territory* [1998] ACTSC 223 (29 May 1998).

¹⁹ I.e. the occasion on which the agency head remitted the processing fee without examining the documents in question to determine if they were within the scope of the personal affairs remission as claimed by the applicant.

²⁰ E.g. *Fogarty and Chief Executive Officer, Cultural Facilities Corporation* [2005] ACTAAT 14 (14 July 2005).

²¹ E.g. *A v D* [1995] ACTSC 107 (20 September 1995), *Canberra Drag Racers Club Incorporated v Australian Capital Territory and Commonwealth of Australia* [2000] ACTSC 61 (26 July 2000), *Schofield, Ray and ACT Workcover* [2000] ACTAAT 30 (7 September 2000).

²² See p. 52 of the *Land Development Agency Annual Report 2009-10* at <http://www.lda.act.gov.au> where of the 11 requests attributable to MLAs during the reporting period, all are attributed to one MLA.

²³ See *Dunne/Barden and ACT Department of Education & Training* [2007] ACTAAT 26 (17 December 2007).

²⁴ E.g. in the Leader of the Opposition's *Media Release* of 4 May 2009, documents released under FOI were used to attack the Government's Land Rent scheme. The request involved very significant processing costs which were not charged to the applicant.

In these existing arrangements, some problems are the result of omissions or anomalies in the ACT FOI Act itself. Other problems of inconsistency, poor administration and inadequate resourcing originate in a risk averse culture.

A Risk Averse Culture

An agency's culture consists of the way in which it goes about carrying out its activities.²⁵ Once it exists, that culture will define the agency's leadership and agency leaders who fail to recognise and manage their agency's culture will be hostage to it.

The current cultural orientation of ACT agencies comprises beliefs, values, and assumptions based on the learned experiences of personnel. That culture shows a lack of trust and empowerment and an excessive reliance on process and rules over outcomes. These are risk averse elements and, to the extent that the ACT Government has not attracted and retained high-quality external recruits, the culture has not been refreshed and revitalised by the new beliefs, values, and assumptions that new starters bring to the agency employing them.

Culture is important because, along with organisational structures and processes, it creates an agency's accountability system.²⁶ Only clear accountability systems can deliver organisational cohesion. The prevailing risk averse culture in agencies is the result of poor accountability systems which in turn produce poor outcomes.²⁷

If the organisational culture of an agency is to be less risk averse, agency accountability systems must deal with risk. For agencies to have a robust risk management culture, they need to apply different treatments to different risks, they need to recognise that particular risks can change over time, and they need to distinguish between inherent,²⁸ enduring and residual risk. Agency accountability systems also need to recognise the interdependency between systems, which can magnify the impact of failure.²⁹

Risk is solely an agency concern. If an agency has a healthy risk appetite and risk tolerance which is embodied in a pro disclosure culture, its personnel will feel confident about dealing with potentially adverse consequences effectively and efficiently, rather than feeling threatened by them.

Good risk management can facilitate speedy and comprehensive disclosures of government information under FOI. Moreover, few FOI disclosures have resulted in major disasters, although they have on occasion generated robust public debate that included criticism of Government.

On the other hand, the Tanner and McKinnon FOI requests resulted in extensive litigation at considerable cost to the taxpayer. Arguably these matters could have been risk managed to minimise the escalation of costs.

²⁵ See *Organizational Culture & Leadership* by Edgar H Schein.

²⁶ Accountability: being called to account for one's actions. See *Delivering Performance and Accountability*, Australian Public Service Commission 2009 at <http://www.apsc.gov.au>.

²⁷ E.g. non-compliance in reporting, poor or inappropriate planning outcomes, poor outcomes in the delivery of municipal services such as water storage, failure to address cost-shifting, failures in the delivery of hospital services, failures in hospital management, failure to deliver major infrastructure items (such as the gaol) on time and on budget, failure to consult on significant matters of public concern (such as school closures and the O'Connor Ridge).

²⁸ E.g. see *Inherent Risk—A Case Study of Totalcare Industries* at <http://www.arpi.org.au>.

²⁹ For a new paradigm for risk, see the ARPI Risk Policy Model at <http://www.arpi.org.au>.

An agency needs to be clear about the outcomes it has to achieve,³⁰ who is to achieve them, and what is to be done to fix failures when they occur. The quality of an agency's accountability system will determine the quality of agency-wide outcomes. Accountability arrangements that do not support strategic control over day-to-day decision making will produce poor outcomes. To make good decisions efficiently and effectively, agencies need to be able to exercise strategic direction and control.

The creation of an office of Information Commissioner would provide a resource to both the ACT Government and its agencies for day-to-day contact regarding FOI functions by assisting agencies to be more accountable for their activities. This applies particularly where information commissioner functions include providing strategic advice to Government on a wide range of issues associated with government information. For example, advice on how the Government could utilise emerging technologies to improve public access to government information, and how to achieve a more coordinated approach on government information policy and practice across all aspects of information management and at all stages of the information life-cycle. The office of an Information Commissioner would also assist agency accountability by providing easy and informal access to advice and review on a no-cost basis.

Embedding a Pro Disclosure Culture

FOI policies and practices under an amended ACT FOI Act mirroring that of the Australian Government should be mandated through a whole of government information policy that is identified, sponsored, recommended and promulgated by each agency leader on an agency-wide basis. The policy should be supplemented by an online agency publication scheme supported by general information disclosure protocols to provide contestability for significant issues of public interest and concern.

However, more is required.

The Attorney-General as the minister responsible for the legislation must act more clearly and decisively, including by issuing clear pro disclosure directions and by introducing a robust auditing regime and stronger FOI reporting obligations. FOI could also be encouraged by recognition and reward schemes, with awards for agencies with the highest achievements.

The ACT FOI regime will only operate effectively if agency personnel are able to work knowing they will be supported by an organisational culture that makes resolving a failure more important than blaming the individual concerned. The following measures would assist:

- Modelling new FOI behaviours by agency leaders owning and promulgating a culture of full disclosure and transparency in decision making.
- Making FOI an ongoing accountability in all executive appointments, a contractual condition in all executive contracts of engagement, and a key performance measure in all executive performance agreements.
- Making FOI an ongoing accountability and a key performance measure in individual performance agreements through a meaningful performance management process in which the individual is held fully to account.

³⁰ I.e. SMART outcomes (specific, measurable, achievable, relevant and time-bound).

- Identifying clear lines of individual accountability within an agency based on its strategic corporate plan and aligning strong FOI performance management measures with agency-wide outcomes.
- Improving agency accountability systems to enable problems to be openly and speedily identified and resolved so systemic solutions can be developed to prevent other failures and the rest of the agency can learn from the experience and avoid a repetition.
- Using both formal and informal incentives to encourage individual behaviours that support finding a solution when failures occur rather than blaming the individual concerned.
- Introducing a whole of government FOI career training model to train agency personnel and equip them with disclosure skills, together with agency career pathways that value disclosure knowledge and skills.

Conclusion

This submission advocates the immediate introduction of complementary amendments to exactly align the ACT FOI Act with the Australian Government's FOI Act. If this proposal is not accepted, s.27 of the ACT FOI Act should be amended to require consultation with third party individuals consistent with the Australian Government's FOI Act.

The Attorney-General should in any event issue a direction along the lines of the 'Brazil Direction' to address the current practice of agencies routinely claiming legal professional privilege under s.42 of the ACT FOI Act. The direction would make it clear that agencies should not claim the exemption for documents which have no particular sensitivity, and that an agency should not be advised to claim the exemption simply because it is available.

Even if these adjustments are made, they will achieve little unless they are accompanied by other changes, including to promote a pro disclosure culture at the agency level for both FOI and human rights purposes. I have identified some formal and informal mechanisms by which this can be implemented, the majority of which involve minimal cost. However, they all require a meaningful commitment to openness in government through open access to government information.

This would involve a single portal entry point for government information. The portal should be able to receive online FOI requests without an applicant having to specify an agency. It would also involve an Information Publication Scheme for publishing comprehensive agency-specific information on each agency website. There should be an office of Information Commissioner with the same functions as those of the federal Information Commissioner, in particular, to assist agencies to publish information in accordance with the Information Publication Scheme.

All of these arrangements would be based on the presumption that all government information should be available and accessible online unless there is a compelling public interest reason (such as national security considerations) to the contrary.

Canberra
August 2010