



	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	4
DATE AUTH'D FOR PUBLICATION	28/6/10

**ACT Government Submission
to the**

**Standing Committee on
Justice and Community Safety**

Inquiry into the
Freedom of Information Act 1989

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May 2010

Foreword

The ACT Government believes that access to information – including government information – is an essential right of every person, which will help to fully realise the right to freedom of expression, as guaranteed in the *Human Rights Act 2004*.

The ACT Government is committed to best practice in governance and firmly believes that the ACT's Freedom of Information scheme operates to enhance the accountability and transparency of government and participation in the Territory's democratic system.

The ACT Government is thus committed to ensuring that all ACT citizens enjoy a high level of access to government information.

The ACT Government has already shown its commitment to improving the Freedom of Information scheme operating in the Territory – and indeed to the promotion of government transparency and accountability – through the presentation of a Bill in 2008 to remove the power to issue conclusive certificates from the ACT's Freedom of Information Act, and through its support of the passage of the Private Member's Bill that achieved the same goal. The ability to issue conclusive certificates has now been removed from the *Freedom of Information Act 1989*, except in relation to national security considerations.

The ACT Government has followed with interest the recent debates in Queensland, New South Wales and Tasmania regarding the reform of those states' Freedom of Information schemes. The ACT Government has considered in detail the Queensland Government's response to the Solomon Report, and possible options for the ACT to reform its Freedom of Information scheme as the Queensland Government has done.

The ACT's *Freedom of Information Act 1989* is modelled on the Commonwealth's *Freedom of Information Act 1982*. This submission outlines the broad policy principle of maintaining the consistency between the ACT's Freedom of Information Act and that of the Commonwealth. It is therefore with interest that the ACT Government watches the progress of the Australian Government's review and reform of the Commonwealth Freedom of Information Act.

On 16 September 2008, the Auditor-General presented a performance audit report to the Legislative Assembly on the administration of the *Freedom of Information Act 1989*. Part 9 of this submission responds to that report.

I welcome both the Auditor-General's report on the administration of the FOI Act and the Standing Committee on Justice and Community Safety's Inquiry into the FOI Act, and thank the Committee for the opportunity to present the ACT Government's submission to its inquiry.

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1 Abbreviations Used

ACTGS	ACT Government Solicitor
AGS	Australian Government Solicitor
ALRC	Australian Law Reform Commission
CMD	Chief Minister's Department
DET	Department of Education and Training
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1989 (ACT)</i>
FOI Fees Determination	<i>Freedom of Information (Fees and Charges) Determination 1995 (ACT)</i>
JACS	Department of Justice and Community Safety
MLA	Member of the Legislative Assembly
MP	Member of Parliament
OIC	Office of the Information Commissioner
RTI Act	<i>Right to Information Act 2009 (Qld)</i>
TAMS	Department of Territory and Municipal Services

2 Policy Position

- 2.1. The ACT Government acknowledges that the right to access government information is an essential right of every citizen. Section 16(2) of the *Human Rights Act 2004* (ACT) guarantees the right to freedom of expression – the ACT Government acknowledges that the right to seek, receive and impart information held by the ACT Government is essential in order to fully realise this right to freedom of expression.
- 2.2. The *Freedom of Information Act 1989* (ACT) is modelled on the *Freedom of Information Act 1982* (Cwlth). Any amendments to the ACT's Freedom of Information Act or the Freedom of Information scheme operating in the ACT should be mindful of and, where possible, reflective of amendments to the Commonwealth's Freedom of Information scheme.
- 2.3. In order to achieve its policy position on Freedom of Information, and to ensure better administration of the Freedom of Information scheme operating within the ACT, the ACT Government has adopted the following policy principles:
 - a) The ACT Government seeks to maintain consistency with the Commonwealth's Freedom of Information Act, where appropriate and practical in the context of ACT governance. Any reforms to the Commonwealth's Freedom of Information scheme will thus be closely monitored by the ACT Government, which will consider whether complementary amendments are required to the Territory's Freedom of Information scheme.
 - b) The ACT Government will consider introducing amendments to the ACT's Freedom of Information Act, similar to those recommended in the Solomon Report on Queensland's *Freedom of Information Act 1992*, bearing in mind the policy position that the ACT Government seeks to maintain consistency with the Commonwealth FOI Act. Any amendments to the FOI Act will not be considered until after the completion of the Australian Government's review of the Commonwealth Freedom of Information Act, and the reformed Commonwealth Freedom of Information scheme is in place.
 - c) Any amendments to the ACT's Freedom of Information Act must be made within the context of the other pieces of legislation governing the release of documents in the ACT, in particular the *Territory Records Act 2002* (ACT).
 - d) The ACT Government will watch the establishment of the proposed Commonwealth Office of the Information Commissioner with interest, and will consider whether the creation of the position of Information Commissioner is appropriate for the ACT.
 - e) The ACT Government encourages its agencies to charge all applicable processing fees and charges for FOI applications, unless a decision maker has remitted a charge under section 29 of the FOI Act.
 - f) The ACT Government will progress both a redrafted FOI Fees Determination and a whole-of-government FOI fees and charges policy and guidelines, subject to other government priorities and the availability of resources.

3 The Legislation – *Freedom of Information Act 1989* (ACT)

- 3.1 Freedom of Information (FOI) legislation is concerned with public access to documents held by governments. The world's first FOI legislation was Sweden's *Freedom of the Press Act* of 1766. Many jurisdictions around the world have since enacted FOI laws (alternatively known as 'open records' or 'sunshine' laws).
- 3.2 Australia's first FOI scheme was created with the passage of the *Freedom of Information Act 1982* (Cwlth). Since 1982, all Australian jurisdictions, with the one exception of Norfolk Island, have enacted laws to establish FOI schemes.¹
- 3.3 The ACT's FOI legislation was enacted by the Commonwealth on the ACT's behalf, with the *Freedom of Information Ordinance 1989* (ACT) coming into force the day before self-government for the ACT. As with other Commonwealth ordinances for the ACT, the *Freedom of Information Ordinance 1989* was converted into an ACT enactment on the day of self-government, 11 May 1989.²
- 3.4 In providing access to government documents, the *Freedom of Information Act 1989* (ACT) (FOI Act) does not operate in isolation. Other pieces of legislation governing access to documents held by the Territory are the *Territory Records Act 2002* (ACT),³ the *Health Records (Privacy and Access) Act 1997* (ACT), the *Executive Documents Release Act 2001* (ACT) and the *Privacy Act 1988* (Cwlth). Any future amendments to the FOI Act may also require amendments to the above pieces of legislation.
- 3.5 Because the ACT's FOI Act was written by Commonwealth drafters who were familiar with the operations of the *Freedom of Information Act 1982* (Cwlth), it necessarily reflected the Commonwealth Act, and employed almost the same language. Since enactment of the FOI Act, successive ACT Governments have sought to maintain the consistency between the ACT's and Commonwealth's FOI legislation.
- 3.6 In the 20 years of its existence, requests for access to Government documents have been made under the FOI Act by news organisations, members of the general public and Members of the Legislative Assembly (MLAs). ACT Government agencies and Ministers now receive around 488 requests a year for access to documents under the FOI Act.⁴

¹ In May 2009, the then Commonwealth Minister for Home Affairs announced a proposal to provide residents of Norfolk Island with access to Norfolk Island Government records under Commonwealth Freedom of Information laws: see The Hon Bob Debus MP, 'Important Reforms for Norfolk Island' (Media Release, 28 May 2009).

² *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) s 34(4).

³ The operation of the *Territory Records Act 2002* (ACT) is currently being reviewed, as required by section 58 of that Act.

⁴ ACT Government (Department of Justice and Community Safety), *Annual Report 2008-09* (2009) 83.

- 3.7 The FOI Act establishes a general right for members of the Australian community, and in particular ACT citizens, to access official documents of the Territory.⁵ The FOI Act also provides for the publication of certain documents and the inclusion of specific information in ACT Government agencies' annual reports.
- 3.8 Section 2 of the FOI Act outlines its objects:
- (1) The object of this Act is to extend as far as possible the right of the Australian community and, in particular, the citizens of the Territory, to access to information in the possession of the Territory by—
 - (a) making available to the public information about the operations of agencies and, in particular, ensuring that rules and practices affecting members of the public in their dealings with agencies are readily available to persons affected by those rules and practices; and
 - (b) creating a general right of access to information in documentary form in the possession of Ministers and agencies, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private business affairs of persons in respect of whom information is collected and held by agencies.
 - (2) The provisions of this Act shall be interpreted so as to further the objects set out in subsection (1) and to ensure that discretions conferred by this Act are exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.
- 3.9 In practice, the ACT's FOI scheme operates through an applicant submitting a request to a government agency or minister for access to specified documents. The FOI Act then gives that agency or minister 30 days in which to respond to the request and to make a decision on the release of the requested documents to the applicant. The applicant has rights of both internal and external review in respect of any decisions made in relation to the request.
- 3.10 In reality, the 30 day statutory timeframe is often unrealistic and unattainable, for example the Department of Disability, Housing and Community Services often receives FOI requests from its clients seeking access to their personal information, which can run to over 10,000 pages. In such cases, rejecting an application as being too onerous due to the volume of documents is not appropriate. The Australian Government has recognised the same issue with regards to the Commonwealth FOI Act, and has introduced amendments that are intended to ensure that the *Privacy Act 1988* (Cwlth) is the key Commonwealth law for the disclosure of personal information, and that the focus of the Commonwealth FOI Act is intended to be on access to documents held by government other than an individual's own personal information.⁶
- 3.11 The scheme for access to documents created by the FOI Act is not universal. The FOI Act contains clauses whereby decision makers may exempt or

⁵ *Freedom of Information Act 1989* (ACT) s 2(1).

⁶ Australian Government, *Enhancing National Privacy Protection: Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009) 64.

exclude the release of certain documents. Additionally, certain government agencies are expressly excluded from the operation of the Act.

- 3.12 A basic principle underpinning the FOI scheme is that requested documents should be released to an applicant unless there is a valid reason not to do so, as expressed in the FOI Act. The applicant does not have to give an explanation for his or her request, but if the agency or minister chooses not to release documents to the applicant, a valid reason must be given.

Exemptions, exceptions, and the public interest test

- 3.13 The necessity of restricting universal access to government documents is acknowledged in the objects clause in section 2 of the FOI Act, which limits access to documents

only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.⁷

- 3.14 John Carroll and Gretchen Bennett have explained the tension operating within the FOI scheme, which they call a ‘complicated set of public policy considerations’.⁸ This tension exists between the open disclosure of government documents on the one hand and protecting essential public interests on the other. As Carroll and Bennett have summarised,

[t]he difficulty of providing access to government documents and information stems from the need to balance various competing interests, including:

- open and accountable government;
- effective government;
- the provision of relevant information to parliament and the courts;
- protection of personal and sensitive business information; and
- access to a person’s own information.

These competing interests are well recognised and are evident in both the governing legislation and the case law in this area.⁹

- 3.15 The competing interests that decision makers must weigh up when deciding on the exemptions in the FOI scheme were recognised by the Federal Court of Australia in the early years of the Commonwealth’s FOI Act.¹⁰ The Federal Court held that, in interpreting a specific exemption, the objects clause of the FOI Act did not ‘lean’ towards the disclosure of documents:

In recognition of the delicate balance between the public’s interest in knowing and in expressing its opinion and the need in some cases to protect confidentiality and privacy, the Act provides a wide range of exemptions.

⁷ *Freedom of Information Act 1989* (ACT) s 2(1)(b).

⁸ John Carroll and Gretchen Bennett, ‘Freedom of Information: Penetrating the Maze’ in Robin Creyke and John McMillan (eds), *Administrative Law: The Essentials* (2002) 188, 189.

⁹ *Ibid.*

¹⁰ *Re News Corporation Ltd v National Companies and Securities Commission* [1984] FCA 36.

[...]

In construing [the] Act we do not favour the adoption of a leaning position. The rights of access and the exemptions are designed to give a correct balance of the competing public interests involved. Each is to be interpreted according to the words used, bearing in mind the stated object of the Act.¹¹

- 3.16 The FOI Act and the *Freedom of Information Regulation 1991* (ACT) therefore acknowledge that it is not always appropriate for the ACT Government to release every document that it holds. The release of government documents containing the details of an individual's private affairs to a third party would most often be inappropriate and have the potential to cause distress to that individual. The release of a private business's commercial information could cause detriment to that business's operations. Likewise, the release of sensitive information concerning the enforcement of the law or national security could have significant adverse consequences for public safety, and the release of Executive documents could adversely affect the operations of government.
- 3.17 In order to protect these essential public interests and the private and business affairs of individuals, the FOI Act exempts or excepts from release certain classes of documents, namely:
- lists of housing assistance properties (s 6A);
 - documents older than 20 years, subject to conditions (s 6B);¹²
 - documents that are already open to public access (s 11(1));
 - the Cabinet notebook (s 11(2));
 - documents of the Commonwealth that existed before 1977 (s 11(3));
 - documents that are exempt under the *Freedom of Information Act 1982* (Cwlth) (s 33);
 - executive documents (s 35);
 - documents affecting enforcement of the law and protection of public safety (s 37);
 - documents affecting national security, defence or international relations (s 37A);
 - documents to which secrecy provisions apply (s 38);
 - documents affecting personal privacy (s 41);
 - documents subject to legal professional privilege (s 42);
 - documents relating to business affairs (s 43);
 - documents containing material that was obtained in confidence (s 45);
 - documents the disclosure of which would be contempt of the ACT Legislative Assembly or another Australian Parliament, or a court, tribunal or royal commission (s 46);
 - certain documents arising out of companies and securities legislation (s 47); and
 - electoral rolls (s 47A).

¹¹ *Re News Corporation Ltd v National Companies and Securities Commission* [1984] FCA 36.

¹² The FOI Act and the *Territory Records Act 2002* (ACT) work in conjunction to regulate the release of documents older than 20 years. In general terms, the release of documents older than 20 years is governed by the *Territory Records Act 2002*.

- 3.18 The FOI Act further exempts five classes of documents, except where it is in the public interest to release the documents:
- documents affecting relations with either the Commonwealth or another State or Territory of Australia (s 34);
 - internal working documents (s 36);
 - documents affecting the financial or property interests of the Territory (s 39);
 - documents concerning certain operations of government agencies¹³ (s 40); and
 - documents affecting the economy of the Territory (s 44).
- 3.19 The public interest test used to determine the release of the above five classes of documents is a weighting exercise. The decision maker must assess the public interest in its proper context and look at any competing interests of the community and government in the release of documents. The FOI Act does not currently provide a definition of public interest, in order to allow for change over time and to give decision makers the flexibility of determining the contemporary public interest. It is noted, however, that the Solomon Review of Queensland's *Freedom of Information Act 1992* recommended that a list of relevant factors be included in Queensland's then FOI Act in order to reduce the discordant application of the public interest test between decision makers.¹⁴
- 3.20 Finally, section 6 of the FOI Act and the *Freedom of Information Regulation 1991* (ACT) exclude certain public organisations (or 'prescribed authorities') from the operation of the Act. These excluded organisations are:
- territory-owned corporations (and their subsidiaries), in relation to their competitive commercial activities,¹⁵ which specifically includes ACTTAB Limited;¹⁶
 - all agencies with respect to documents that are health records;¹⁷
 - the Human Rights Commission, in relation to complaints made under the *Health Records (Privacy and Access) Act 1997* (ACT);¹⁸
 - the ACT Civil and Administrative Tribunal, including its presidential and non-presidential members and registry;¹⁹
 - the ACT Government Solicitor (ACTGS), in relation to documents held in its role as a legal practitioner;²⁰ and
 - the Department of Justice and Community Safety (JACS), in relation to documents of ACTGS acting as legal practitioner.²¹

¹³ For example, documents that could prejudice the effectiveness of the conduct of examinations or audits, or the management of personnel.

¹⁴ The State of Queensland (Department of Justice and Attorney-General), *The Right to Information: Reviewing Queensland's Freedom of Information Act* (2008) 155.

¹⁵ *Freedom of Information Act 1989* (ACT) s 6(1).

¹⁶ *Freedom of Information Regulation 1991* (ACT) schs 1, 2.

¹⁷ *Freedom of Information Act 1989* (ACT) s 6(2). Note that the release of health records is governed by separate legislation, the *Health Records (Privacy and Access) Act 1997* (ACT).

¹⁸ *Freedom of Information Act 1989* (ACT) s 6(3).

¹⁹ *Freedom of Information Regulation 1991* (ACT) sch 1A.

²⁰ *Freedom of Information Regulation 1991* (ACT) sch 2.

²¹ *Freedom of Information Regulation 1991* (ACT) sch 2.

The Cabinet exemption

- 3.21 As noted above, the FOI Act contains two provisions through which documents related to the deliberations of Cabinet are exempt from disclosure; namely, section 11(2), excluding the release of the Cabinet notebook, and section 35, exempting the release of executive documents.
- 3.22 The FOI Act defines an 'Executive document' as:
- (a) a document that has been submitted to the Executive for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Executive; or
 - (b) an official record of the Executive; or
 - (c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
 - (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Executive, other than a document by which a decision of the Executive was officially published.²²
- 3.23 While the executive documents exemption has in been existence since the FOI Act's original drafting, the exclusion relating to the Cabinet notebook was inserted into the FOI Act in February 2009.²³
- 3.24 The ACT Government believes that it is vital for the functioning of the Westminster system of government within the ACT that the exemption from release of Cabinet documents be retained within the FOI Act.
- 3.25 It is an accepted convention of Westminster government that the deliberations of, and discussion within, Cabinet are absolutely confidential: Bradley Selway refers to this confidentiality as a 'constitutional necessity'.²⁴ In order to maintain this confidentiality, executive documents necessarily cannot be released under the FOI Act. This confidentiality encourages open discussion in the Cabinet room and aids Cabinet ministers in coming to consensus on a point of discussion. Of this, the ACT's *Cabinet Handbook* notes:
- The convention of collective responsibility [of Cabinet ministers] is underpinned by strict confidentiality surrounding Cabinet papers and discussions in the Cabinet Room. Absolute confidentiality allows ministers to discuss proposals frankly while they are developing a collective position.²⁵
- 3.26 The importance of maintaining the Cabinet exemption within the FOI scheme, and thereby ensuring the Westminster convention of Cabinet confidentiality, was affirmed by the High Court of Australia in the case of *Commonwealth v Northern Land Council*,²⁶ in which the Court held that

²² *Freedom of Information Act 1989* (ACT) s 35(1).

²³ *Freedom of Information Amendment Act 2009* (ACT) s 4.

²⁴ Bradley Selway, *The Constitution of South Australia* (1997) 229.

²⁵ ACT Government, *Cabinet Handbook* (2008) 4.

²⁶ [1993] HCA 24.

... it has never been doubted that it is in the public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although Cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on Cabinet meetings, the view has generally been taken that collective responsibility could not survive in practical terms if Cabinet deliberations were not kept confidential. Despite the pressures which modern society places upon the principle of collective responsibility, it remains an important element in our system of government. Moreover, the disclosure of the deliberations of the body responsible for the creation of state policy at the highest level, whether under the Westminster system or otherwise, is liable to subject the members of that body to criticism of a premature, ill-informed or misdirected nature and to divert the process from its proper course. The mere threat of disclosure is likely to be sufficient to impede those deliberations by muting a free and vigorous exchange of views or by encouraging lengthy discourse engaged in with an eye to subsequent public scrutiny. Whilst there is increasing public insistence upon the concept of open government, we do not think that it has yet been suggested that members of Cabinet would not be severely hampered in the performance of the function expected of them if they had constantly to look over their shoulders at those who would seek to criticize and publicize their participation in discussions in the Cabinet room. It is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited.²⁷

- 3.27 As the High Court, there may be times when, notwithstanding the convention of Cabinet confidentiality, Cabinet deliberations are disclosed; for example in political memoirs or where Cabinet itself has authorised the release of information contained within an Executive document. Additionally, the *Executive Documents Release Act 2001* (ACT) requires the release of most Cabinet documents 10 years after their submission to the ACT Executive.²⁸
- 3.28 In recent years, several Westminster jurisdictions have introduced a 'push model' for the release of documents, whereby the members of Cabinet decide after each meeting which of the documents from that meeting will be immediately released. Such a system has already been in place for several years in Wales and New Zealand, for example, and has been recently introduced in Queensland.²⁹ The Australian Government has similarly proposed reforms to its FOI scheme, to facilitate the proactive release of information from the Commonwealth Cabinet.³⁰
- 3.29 The ACT Government will similarly consider amendments to the Territory's FOI scheme to promote the proactive release of government information, including the greater release of Cabinet information, if the amendments proposed to the Commonwealth's FOI scheme pass Parliament and are implemented by the Australian Government.

²⁷ [1993] HCA 24, [6] (footnotes omitted).

²⁸ *Executive Documents Release Act 2001* (ACT) s 6(1).

²⁹ For a discussion on the recent reforms to the Queensland FOI scheme, including the proactive release of Cabinet information, see part 6 of this submission.

³⁰ For a discussion on the proposed reforms to the Commonwealth FOI scheme, see part 7 of this submission.

Removal of conclusive certificates

- 3.30 On 10 December 2008, Mrs Vicki Dunne MLA presented a Private Member's Bill to the Legislative Assembly to amend the FOI Act, namely the Freedom of Information Amendment Bill 2008. This was followed the next day by the Attorney General, Mr Simon Corbell MLA, who presented the Freedom of Information Amendment Bill 2008 (No 2).
- 3.30 Both Bills sought to achieve essentially the same major objective: to amend the FOI Act to remove the ability of ACT Government ministers to issue conclusive certificates to prevent the release of documents under the FOI Act.
- 3.31 The two Bills were debated concurrently and received unanimous support in the Legislative Assembly. The Private Member's Bill was subsequently passed with government amendments, and was notified on 18 February 2009, commencing the next day.
- 3.32 Consequently, from 19 February 2009, the ability for ACT Government ministers to issue conclusive certificates has been removed from the FOI Act, except in relation to national security considerations. The ACT Government notes that the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cwlth) received Royal Assent on 6 October 2009, and has similarly removed the power for Australian Government agencies and ministers to issue conclusive certificates to prevent the disclosure of documents under the Commonwealth's FOI Act.

4 Recent Reform of Freedom of Information in Australia

- 4.1 In recent years there has been a move among Australian jurisdictions to review and reform their FOI schemes to provide the community with better access to documents held by their governments. Further, last year, there was a call by the then Australian Public Service Commissioner for nationally uniform FOI and release laws across all jurisdictions in Australia.³¹
- 4.2 Queensland, New South Wales and Tasmania have recently reviewed and substantially reformed their FOI schemes, with all three jurisdictions enacting new laws to govern their reformed schemes. The *Right to Information Act 2009* (Qld)³² was enacted following the Solomon Review of Queensland's *Freedom of Information Act 1992*; the *Government Information (Public Access) Act 2009* (NSW) and *Government Information (Information Commissioner) Act 2009* (NSW)³³ were enacted in response to the New South Wales Ombudsman's report *Opening Up Government: Review of the Freedom of Information Act 1989*; and the *Right to Information Act 2009* (Tas) is due to commence operation on 1 July 2010.
- 4.3 The Australian Government is similarly reviewing its FOI scheme, with amendments to the *Freedom of Information Act 1982* (Cwlth) having been introduced into the Senate on 26 November 2009, following the release of two exposure drafts in March 2009 and a period of public consultation.³⁴
- 4.4 With the Australian Government looking to reform its FOI scheme, it is timely for the ACT Government to begin to consider reviewing the FOI scheme operating within the Territory. As outlined in part 2 of this submission, the current ACT Government has continued the policy of successive ACT Governments in seeking to maintain consistency between the ACT's and Commonwealth's FOI Acts. Any reforms to the Australian Government's FOI scheme will thus be closely monitored by the ACT Government, which will consider whether complementary changes are required for the Territory.

³¹ Bill Rowlings, *FOI Problems Are Media's Fault, PS Chief Says* (2009) Civil Liberties Australia <<http://www.cla.asn.au/0805/index.php/articles/2009/title-5>> at 24 August 2009.

³² The *Right to Information Act 2009* (Qld) commenced on 1 July 2009. For a discussion on Queensland's reforms to its FOI scheme, see part 5 of this submission.

³³ The *Government Information (Public Access) Act 2009* (NSW) and *Government Information (Information Commissioner) Act 2009* (NSW) both received Royal Assent on 26 June 2009, and are expected to become operational in 2010.

³⁴ For a discussion on the proposed reforms to the Commonwealth FOI scheme, see part 6 of this submission.

5 Reform of the *Freedom of Information Act 1992* (Qld)

- 5.1 On 17 September 2007 in a joint statement, the Queensland Premier, the Hon Anna Bligh MP, and the then Attorney-General, the Hon Kerry Shine MP, announced that an independent review panel would look at the FOI scheme then operating in Queensland.³⁵ The report of the review panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, was delivered to the Queensland Government on 10 June 2008; this report is usually referred to as the 'Solomon Report', after the panel's chair, Dr David Solomon AM. The Solomon review of Queensland's FOI Act was the first of several major reviews of Australian FOI legislation to occur in recent years.
- 5.2 The Solomon Report recognised that the FOI scheme then operating in Queensland hindered rather than promoted the disclosure of information, and that there existed considerable scope for improving public access to documents held by the Queensland Government and reducing the Queensland Government's associated time, cost and effort involved with providing them.
- 5.3 The Solomon Report looked at reforming three main areas within Queensland's FOI scheme:
- the public interest test;
 - exemptions from the release of documents; and
 - the proactive release of information by government.
- 5.4 The Queensland FOI scheme had been operating under a two-part public interest test, similar to the public interest test under which the ACT's FOI legislation currently operates. The Solomon Report recommended the introduction of a single public interest test, based on whether the disclosure of documents would, on balance, be contrary to the public interest. The Solomon Report argued that this reframed public interest test would reduce confusion and would facilitate consistent application of the test by government agencies. Further, the Solomon Report recommended that the onus of proving the public interest be placed on the agency processing the particular FOI request.
- 5.5 The Solomon Report also recommended limiting the exemptions in the Queensland FOI Act to cases where it has been determined by the Queensland Parliament that the public interest outweighs any other consideration. The report recommended that an executive documents exemption be retained for those Cabinet documents which, if released, would prejudice Cabinet confidentiality.
- 5.6 Finally, the Solomon Report recommended the proactive release of information by both Queensland government agencies and the Queensland Cabinet – what is referred to as a 'push model'. The three main elements that would work to create this push model are:
- publication schemes for government agencies;

³⁵ The Hon Anna Bligh MP and the Hon Kerry Shine MP, 'Premier Bligh Announces Overhaul of FOI Laws' (Media Release, 17 September 2007).

- disclosure logs to provide on-line access to documents already released as part of an FOI request, within 24 hours of the documents' release to the original applicant;³⁶ and
 - greater release of Cabinet documents.
- 5.7 Regarding the release of Cabinet documents, the Solomon Report recommended that the Queensland Premier, in consultation with Cabinet, decide weekly after the Cabinet meeting what Cabinet material should be released proactively, and that an edited version of the Cabinet agenda and a summary of decisions should be released.³⁷
- 5.8 Additionally, the Solomon Report recommended a new charging regime for FOI applications (discussed in part 8 of this submission).
- 5.9 In its response to the Solomon Report,³⁸ the Queensland Government supported in full 116 of the report's recommendations, and partly or in principle supported another 23 recommendations. Only two of the report's recommendations were not supported by the Queensland Government.
- 5.10 Following the Queensland Government's response to the Solomon Report, the Queensland Premier introduced into Parliament the Right to Information Bill 2009 (Qld), which was duly passed by the Queensland Parliament and became operational on 1 July 2009.
- 5.11 The *Right to Information Act 2009* (Qld) (RTI Act) repealed the *Freedom of Information Act 1992* (Qld), and introduced the majority of the reforms recommended by the Solomon Report, including a reformulated public interest test and exemptions, and a broader push model of greater proactive and routine release of information held by the Queensland Government.
- 5.12 Most Queensland Government agencies have since created disclosure logs on their websites, which disclose non-personal information already released in response to an RTI request. An example of a Queensland Government disclosure log can be found on the website of the Queensland Department of the Premier and Cabinet at <http://www.premiers.qld.gov.au/right-to-info/disclosure-log/index.aspx>.
- 5.13 The ACT Government has keenly followed the debate in Queensland surrounding the Solomon Report and the introduction of the RTI Act. The ACT Government looks to continuously improve both the operations of the ACT Public Service and its engagement with the community, including the release of government information. The work completed in Queensland in the

³⁶ Disclosure log schemes have already been established in several Westminster jurisdictions. For example, the disclosure logs of the Welsh Assembly Government can be viewed at <<http://wales.gov.uk/publications/accessinfo/disclosurelogs>>.

³⁷ Like disclosure logs, several Westminster jurisdictions have already adopted this recommendation. For example, the agenda, documents and decisions of the Welsh Cabinet can be viewed at <<http://wales.gov.uk/about/cabinet/cabinetmeetings>>.

³⁸ Queensland Government, *The Right to Information: A Response to the Review of Queensland's Freedom of Information Act* (2009).

lead up to the introduction of the RTI Act will inform the ACT Government's policy on FOI, bearing in mind the policy position that the ACT Government seeks to maintain consistency with the Commonwealth FOI Act. The ACT Government will not, therefore, consider any amendments to the FOI Act until the completion of the Australian Government's ongoing review of the Commonwealth FOI Act (discussed in part 6 of this submission).

6 Reform of the *Freedom of Information Act 1982* (Cwlth)

- 6.1 On 22 July 2008, the then Cabinet Secretary, Senator the Hon John Faulkner, announced that the Australian Government would reform the Commonwealth's FOI scheme in two stages.³⁹ This reform formed part of the Australian Labor Party's election commitments made in its policy statement *Government Information: Restoring Trust and Integrity*.⁴⁰
- 6.2 To facilitate this reform, administration of the FOI Act had already been transferred from the Attorney-General's Department to the Department of the Prime Minister and Cabinet, and the associated ministerial responsibility was transferred from the Attorney-General to the Cabinet Secretary.⁴¹
- 6.3 To deliver the first stage of these reforms, on 26 November 2008, Senator Faulkner introduced into the Senate the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cwlth) – a Bill to remove the power to issue conclusive certificates from the *Freedom of Information Act 1982* (Cwlth) and the *Archives Act 1983* (Cwlth), and to revoke existing conclusive certificates if and when a new request for access to a document already covered by a certificate is received.
- 6.4 In the second reading speech for this Bill, Senator Faulkner stated that
- the repeal of this power to issue conclusive certificates is an important step in achieving greater accountability in government decision making on access requests under the FOI Act and Archives Act.⁴²
- 6.5 The *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cwlth) received Royal Assent on 6 October 2009, and consequently the ability to issue conclusive certificates has been removed from both the Commonwealth FOI Act and the Archives Act.
- 6.6 It is noted that since the passage of the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cwlth), the Australian Government has begun the process of releasing documents that were previously covered by conclusive certificates issued under the obsolete provisions of the Commonwealth FOI Act.⁴³
- 6.7 The ACT Government agrees with Senator Faulkner's assessment of the repeal of the power to issue conclusive certificates; the ACT Attorney General presented the Freedom of Information Amendment Bill 2008 (No 2) to the Legislative Assembly, and supported the passage of the Private Member's Bill

³⁹ Senator the Hon John Faulkner, 'Freedom of Information Reform, (Media Release, 22 July 2008).

⁴⁰ Explanatory Memorandum, Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cwlth) 1.

⁴¹ *Administrative Arrangements Order 2008* (Cwlth) pt 16.

⁴² Commonwealth, *Parliamentary Debates*, Senate, 26 November 2008, 7293 (John Faulkner, Cabinet Secretary).

⁴³ Senator the Hon Joe Ludwig, 'Government Releases Documents under New FOI Rules' (Media Release, 18 December 2009).

to remove the power for ACT Ministers to issue conclusive certificates.⁴⁴ Both the presentation of the ACT amendment Bill and support of the Private Member's Bill accords with the ACT Government's policy position that the ACT's FOI Act should be as consistent as possible with the Commonwealth's FOI Act, where practical.

- 6.8 In the second stage of its reform of the Commonwealth FOI scheme, the Australian Government introduced into Parliament two further bills on 26 November 2009 – the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009. These Bills had previously been released for public consultation as exposure drafts in March 2009.
- 6.9 The reforms proposed by the Australian Government amount to the first substantial overhaul of the FOI Act since the Act's inception in 1982. The reforms in the two Commonwealth Bills include:⁴⁵
- ensuring that the right of access to documents under the FOI Act is as comprehensive as it can be, limited only where a stronger public interest lies in withholding access to documents;
 - giving greater weight to the role that the FOI Act serves in the proactive publication of government information;
 - the introduction of structural reforms designed to deliver a platform for system-wide information policy development across government; and
 - the establishment of a statutory Office of the Information Commissioner in 2010. This office will be headed by an independent Information Commissioner who will be supported by the existing Privacy Commissioner and a new Freedom of Information Commissioner.⁴⁶
- 6.10 At the heart of the Australian Government's reforms is the desire to ensure that greater access to government documents will create greater government openness and transparency. To this end, the Australian Government will seek to promote greater proactive publication of government information.⁴⁷
- 6.11 The Australian Government has proposed that this proactive publication of government information will be realised through:
- new obligations on Australian Government agencies to publish various classes of information on their websites, such as details of statutory appointments;
 - the publication of information that has been disclosed in response to an FOI request, within 10 working days of its initial disclosure (through 'disclosure logs'); and
 - a new emphasis on the fact that the FOI Act does not prevent publication of information outside the Act.

⁴⁴ For a discussion on the 2009 amendments to the ACT FOI Act, see part 3 of this submission.

⁴⁵ Australian Government, *Freedom of Information (FOI) Reform Companion Guide* (2009).

⁴⁶ For a discussion on the proposed OIC, see part 8 of this submission.

⁴⁷ Australian Government, above n 45, 9.

- 6.12 A further part of the Commonwealth's reforms would require Cabinet records to be fully disclosed after 20 years, and Cabinet notebooks to be disclosed after 30 years.
- 6.13 It is noted that, despite the fact that the major part of the reforms to the Commonwealth FOI Act have not yet been passed by the Commonwealth Parliament, in the spirit of the FOI Act, some Australian Government agencies are already applying the Australian Government's FOI reform measures.⁴⁸
- 6.14 Similar to the RTI scheme newly operating in Queensland, the Australian Government proposes a push model for the release of documents, imposing new obligations on Australian Government agencies to proactively publish various classes of information, including:
- details of statutory appointments;
 - information to which an agency routinely gives access;
 - information that is routinely provided to the Commonwealth Parliament; and
 - operational information about an agency's functions or powers in making decisions affecting members of the public.
- 6.15 Australian Government agencies and ministers would also be required to publish information disclosed in response to access requests in disclosure logs; similar to what is now occurring in Queensland.
- 6.16 Previously in 2008, the ALRC carried out a review of Australian privacy law at the request of the Attorney-General of Australia.⁴⁹ Currently, both the Commonwealth's FOI Act and the *Privacy Act 1988* (Cwlth) provide ways for individuals to access and correct their personal information held by public sector agencies. The Australian Government has responded to this by introducing amendments to the Privacy Act to enact an enforceable right of access to, and correction of, an individual's own personal information, rather than maintain this right through the FOI Act. The Privacy Act will thus become the key Commonwealth law for the disclosure of personal information, and the focus of the FOI Act will be on access to documents held by government other than an individual's own personal information.⁵⁰
- 6.17 FOI practitioners within the ACT Government have similarly expressed their concerns with the difficulty of administering requests for personal information from ACT citizens, via the FOI Act. The ACT Government will consider amendments to its FOI and privacy schemes to facilitate the disclosure of personal information to individuals, following the Australian Government's proposed amendments to its FOI and Privacy Acts. Any such amendments to personal information access provisions would be limited by the secrecy provisions in other legislation, for example the *Children and Young People Act 2008* (ACT).

⁴⁸ Bernard Keane, *No Exclusivity in Faulkner's New World of Gotcha-Free FOI* (2009) Crikey <<http://www.crikey.com.au>> at 17 July 2009.

⁴⁹ Commonwealth of Australia (Australian Law Reform Commission), *For Your Information: Australian Privacy Law and Practice* (2008).

⁵⁰ Australian Government, above n 6, 64.

- 6.18 As previously outlined in this submission, the ACT Government's policy position is that the ACT's FOI scheme should be consistent with the Commonwealth's. Among other benefits, this would allow the ACT to follow the jurisprudence of the Commonwealth's FOI Act.
- 6.19 The ACT Government will therefore consider amending the ACT's FOI ACT to enact similar changes to both those recommended in the Solomon Review of Queensland's FOI Act and those proposed by the Australian Government, when the Commonwealth reforms have been enacted, and the modified Commonwealth FOI scheme is in place.

7 An Information Commissioner for the ACT

- 7.1 As part of the parliamentary agreement with the ACT Greens, ACT Labor committed to include consideration of the appointment of an independent Information Commissioner for the ACT as part of FOI reform.⁵¹
- 7.2 Consideration of the introduction of an independent statutory office of Information Commissioner has become a popular theme among Australian jurisdictions, seeking to ensure better administration of FOI, information privacy and data and information management.
- 7.3 The ACT Government notes that a statutory office of Information Commissioner has already been established in four Australian jurisdictions – Queensland in 1992,⁵² Western Australia in 1993,⁵³ the Northern Territory in 2003,⁵⁴ and New South Wales in 2009.⁵⁵ With the passage of its *Right to Information Act 2009*, Tasmania has assigned the task of Information Commissioner to the Tasmanian Ombudsman.⁵⁶
- 7.4 Queensland has now gone one step further than other jurisdictions, having recently created the position of a Right to Information Commissioner, in addition to its Information Commissioner.⁵⁷ The Queensland Right to Information Commissioner will operate within the existing Queensland Office of the Information Commissioner later this year. Once appointed, the Right to Information Commissioner will act as a deputy to the Queensland Information Commissioner, with specific responsibility for performing the Information Commissioner's functions under the RTI Act, to the extent delegated.
- 7.5 As part of its current reform of its FOI scheme, the Australian Government proposes the establishment of a statutory Commonwealth Office of the Information Commissioner (OIC).⁵⁸ If passed by the Commonwealth Parliament, the OIC would be overseen by a new statutory office holder, the Information Commissioner, who will be supported by the existing Privacy Commissioner and a new Freedom of Information Commissioner. The Australian Government is aiming to have the OIC established and operational as soon as practicable after enabling legislation has been passed through the Commonwealth Parliament,⁵⁹ and will provide \$20.5 million over four years to establish and run the OIC.⁶⁰ On 26 February 2010, the Australian Government appointed Professor John McMillan AO as Information

⁵¹ Parliamentary Agreement for the 7th Legislative Assembly for the ACT, 31 October 2008, [5.3].

⁵² *Freedom of Information Act 1992* (Qld) s 61, repealed by *Right to Information Act 2009* (Qld).

⁵³ *Freedom of Information Act 1992* (WA) s 55.

⁵⁴ *Information Act 2002* (NT) s 85.

⁵⁵ *Government Information (Information Commissioner) Act 2009* (NSW) s 4. The administrative arrangements to create the new office of New South Wales Information Commissioner are still continuing, including the recruitment of a permanent Information Commissioner.

⁵⁶ *Right to Information Act 2009* (Tas) s 47.

⁵⁷ *Right to Information Act 2009* (Qld) s 147.

⁵⁸ Information Commissioner Bill 2009 (Cwlth) s 5.

⁵⁹ Senator the Hon Joe Ludwig, 'Introduction of Freedom of Information Reforms' (Media Release, 24 November 2009).

⁶⁰ Senator the Hon John Faulkner, 'Freedom of Information Reforms' (Media Release, 12 May 2009).

Commissioner designate, in order to ensure that the OIC is fully operational as soon as practical after the passage of the legislation creating the OIC.⁶¹

- 7.6 The proposed Commonwealth Information Commissioner would be vested with all powers and functions under the Commonwealth FOI Act and the *Privacy Act 1988* (Cwlth), and would have the function of reporting to the relevant minister on matters relating to information management. The proposed Commonwealth Freedom of Information Commissioner would be largely responsible for administering the FOI functions of the Australian Government, as delegated by the Information Commissioner.
- 7.7 The creation of the OIC represents not only an overhaul of the Commonwealth's FOI scheme, but also its information privacy arrangements, flowing from the ALRC's report on privacy law within Australia.⁶²
- 7.8 The Australian Government proposes that the Information Commissioner, supported by the Freedom of Information Commissioner,
- will act as an independent monitor for FOI and will be entrusted with a broad range of functions designed to make the Office of the Information Commissioner both a clearing house for FOI matters and a hub for the promotion of the objects of the Act.⁶³
- 7.9 The ACT Government watches with interest the Australian Government's effort to establish the OIC, and will pay close attention to the operations of the OIC when it has been created. When the Commonwealth OIC is operational, the ACT Government will consider whether the creation of the position of an independent statutory Information Commissioner is appropriate and necessary for the ACT.
- 7.10 The ACT Government will continue to investigate the possibility of establishing a statutory office of Information Commissioner for the ACT, noting that the issue requires detailed consideration in the context of the requirements of the ACT and its capacity to fund a new statutory framework.

⁶¹ Senator the Hon Joe Ludwig, 'Appointment of the Information Commissioner Designate' (Media Release, 26 February 2010).

⁶² Commonwealth of Australia (Australian Law Reform Commission), above n 49.

⁶³ Australian Government, above n 45, 8.

8 Fees and Charges

- 8.1 Section 80 of the FOI Act authorises the Minister administering the Act⁶⁴ to determine, in writing, fees and charges for the Act. Specifically, charges have been determined for requests for access to documents under section 14(1) of the FOI Act.
- 8.2 The *Freedom of Information (Fees and Charges) Determination 1995* (FOI Fees Determination) – is often considered confusing, both by ACT Government FOI practitioners and by FOI applicants. The ACT Auditor-General has described the FOI Fees Determination as ‘outdated’.⁶⁵
- 8.3 The confusion surrounding the FOI Fees Determination is highlighted by comments from the Auditor-General in her report on the administration of the FOI Act, where she refers to a misconception among FOI officers that the ACT Government has a policy of not charging processing fees for FOI requests. As the Auditor-General has indicated, this belief is erroneous.⁶⁶
- 8.4 Notwithstanding the fact that within some ACT Government agencies FOI officers are not charging processing fees for FOI requests received, the ACT Government has a clear policy of charging all applicable processing fees and charges for FOI applications, unless a decision maker has remitted a charge under section 29 of the FOI Act.
- 8.5 In fact, in 2005, the then Attorney General, Mr Jon Stanhope MLA, wrote to the then acting Chief Executive of JACS, Ms Elizabeth Kelly, about the issue of FOI fees and charges.⁶⁷ In his letter, Mr Stanhope asked Ms Kelly to remind other ACT Government agencies that the Government has not issued a directive that a blanket policy of not applying charges for FOI should apply, and that FOI processing fees, as allowed by the FOI Fees Determination, should apply unless the applicant falls within the criteria permitting waiver, as specified within the FOI Act.
- 8.6 The ACT Government’s position is that the charging of fees for the processing of FOI requests is justified. As the Chief Minister expressed in 2005,
- Freedom of Information [does] not mean the same as ‘free information’ ... The ACT’s FOI charging regime is comparable to those of the States and compares favourably with the Commonwealth scheme.⁶⁸
- 8.7 The processing of FOI requests costs the ACT taxpayer a considerable amount in public funds each year. The Auditor-General’s Office has estimated that it cost the ACT Government \$4.5 to \$5.0 million to provide services under the

⁶⁴ The *Freedom of Information Act 1989* (ACT) is currently administered by the Attorney General; see *Administrative Arrangements 2009 (No 2)* (ACT) sch 2 pt 2.4.

⁶⁵ ACT Auditor-General’s Office, *Administration of the Freedom of Information Act 1989*, Performance Audit No 5/2008, [4.1].

⁶⁶ *Ibid* [3.9].

⁶⁷ Letter from Jon Stanhope MLA to Elizabeth Kelly, 12 April 2005.

⁶⁸ Jon Stanhope MLA, ‘Charge for FOI Request Appropriate’ (Media Release, 20 April 2005).

FOI Act in 2006-07.⁶⁹ This figure was based on an average cost to government of \$10,900 to \$12,000 per FOI application.⁷⁰

8.8 In 2008-09, only one ACT Government agency, JACS, recouped any money to government through the charging of processing fees for FOI requests. These fees amounted to \$280.⁷¹

8.9 The Auditor-General's Office noted advice from ACTGS that private law firms are making increased use of the FOI process to obtain government documents for use in legal proceedings, and stated:

Where documentation obtained through FOI is put to commercial use, Audit considers that there is justification for recovering the cost of providing documents under FOI.⁷²

8.10 The ACT Government agrees with the Auditor-General's assessment that, in general, there is justification for recovering the cost to the ACT taxpayer for providing documents under the ACT's FOI scheme. The ACT Government's policy rationale for charging FOI processing fees is to ensure that users of the FOI Act make a contribution to the quite considerable costs that the ACT taxpayer bears in agencies' processing of FOI requests and providing access to documents within the ACT Government's possession. The ACT Government believes that the ACT taxpayer should not generally have to subsidise the costs of an individual's, news outlet's or private law firm's desire to seek documents under the FOI ACT, especially where any documents released would lead to a commercial gain for the applicant.

8.11 Having said that, the ACT Government recognises that it is very often appropriate for an FOI decision maker to remit any applicable charges for an FOI request, particularly so in cases where the FOI Act has specified that FOI charges should be remitted – in those cases where the applicant is seeking access to personal information, the payment of a charge would cause the applicant personal financial hardship, or the release of documents is in the public interest.⁷³

8.12 Summarised from the FOI Fees Determination, the current fees that may be charged by an agency for the processing of an FOI request are:

Application fee	nil
Search/retrieval of documents	\$15.00 per hour
Examination/consultation/decision making	\$20.00 per hour
Inspection of documents	\$6.25 per half hour
Photocopying of documents	\$0.20 per page, after 200 pages

⁶⁹ ACT Auditor-General's Office, above n 65, [4.8].

⁷⁰ Ibid [4.7].

⁷¹ ACT Government (Department of Justice and Community Safety), above n 4, 84.

⁷² ACT Auditor-General's Office, above n 56, [4.43].

⁷³ *Freedom of Information Act 1989* (ACT) s 29(3).

- 8.13 Clause 2(3) of the FOI Fees Determination states that no processing charges are payable for the first 10 hours of an agency's work on processing an FOI application. This is complicated by the fact that clause 2(3) of the FOI Fees Determination requires that in calculating the time spent processing an FOI request, time in respect of examination, consultation and decision making on the release of a document shall be counted first and time spent in searching and retrieving a document shall be counted second. Further, if an agency charges processing fees for an FOI request, it may not also charge search fees for the same request.⁷⁴
- 8.14 Perhaps the basis for the erroneous belief that the ACT Government does not charge processing fees for FOI requests lies in the fact that the Government removed *application* fees for making an FOI request in 2001.⁷⁵ Before this variation, application fees for both FOI requests and internal reviews of FOI decisions were \$15.00; these fees had themselves been reduced in 1995 from the previous fees of \$30.00 for an FOI request and \$40.00 for a request for an internal review.⁷⁶ An application fee waiver has always existed where an application related to the personal affairs of the applicant or the person on whose behalf the application was being made.
- 8.15 In the explanatory statement accompanying the disallowable instrument removing FOI application fees, the then Attorney-General, Mr Bill Stefaniak MLA, stated that
- [t]he removal of the application fees ensures easier access for citizens to documents and relevant information under the Act. As such fees are often routinely waived anyway, the revenue/cost implications are not likely to be significant.⁷⁷
- 8.16 The FOI Fees Determination has not been amended since the removal of application fees in 2001.
- 8.17 Currently, there exist three specified matters within section 29(3) of the FOI Act that an agency must take into account when deciding whether to remit a charge for an FOI request:
- whether the payment of the charge would cause financial hardship to the applicant;⁷⁸
 - whether the document sought relates to the applicant's personal information;⁷⁹ and
 - whether the giving of access is in the general public interest, or in the interest of a substantial section of the public.⁸⁰

⁷⁴ *Freedom of Information (Fees and Charges) Determination 1994* (ACT) sch 1 item 1.

⁷⁵ *Freedom of Information (Fees and Charges) Variation 2001* (ACT).

⁷⁶ See *Freedom of Information (Fees and Charges) Determination 1994* (ACT) cl 4, repealed by *Freedom of Information (Fees and Charges) Determination 1995* (ACT).

⁷⁷ Explanatory Statement, *Freedom of Information (Fees and Charges) Variation 2001* (ACT) 1.

⁷⁸ *Freedom of Information Act 1989* (ACT) s 29(3)(a).

⁷⁹ *Freedom of Information Act 1989* (ACT) s 29(3)(b).

⁸⁰ *Freedom of Information Act 1989* (ACT) s 29(3)(c).

- 8.18 The list of matters within section 29(3) of the FOI Act is not exhaustive, and agencies may take into account any other matters that they consider relevant when deciding whether to remit an FOI charge.
- 8.19 In the recent review of Queensland's FOI scheme, the Solomon Report recommended that a new charging regime be developed for FOI applications, based on the number of full pages provided to the applicant, rather than an estimate of the time taken to conduct searches and process the application. The report recommended that there should be no charges for searching for, or retrieval of, documents, or for decision-making by FOI officers.⁸¹
- 8.20 In its response to the Solomon Report, the Queensland Government supported the intention of the above recommendation to implement a more structured approach to charges for access to documents.⁸² However, the Queensland Government expressed its concern that the model proposed in the Solomon Report could lead to unintended increased costs for FOI applicants if adopted. Consequently, the Queensland Government did not accept this recommendation, and instead reviewed its existing charging regime to ensure that costs for FOI applicants were not significantly increased.⁸³
- 8.21 It has been claimed by several MLAs that there exists a longstanding convention that fees and charges for the processing of FOI requests from MLAs are automatically waived by the ACT Government. This is claimed to reflect a convention in the Commonwealth and other Australian states that Members of Parliament (MPs) receive automatic remission of FOI processing charges.
- 8.22 The ACT Government can see no basis for either claim.
- 8.23 It is acknowledged that in some ACT Government agencies, it is common practice to waive all FOI processing fees where the applicant is an MLA; however this is by no means accepted practice in most ACT Government agencies. In fact, section 80(2) of the FOI Act specifies that '[a] fee for a service must not vary according to the identity of an applicant or agency'. Arguably, this means that an MLA must be subject to the exact same fee structure as any other FOI applicant in the community.
- 8.24 Similarly, the ACT Government can find no evidence to suggest that the apparent convention that MPs are exempt from paying FOI processing charges is widely established in other Australian jurisdictions. It is noted that the Tasmanian FOI Act requires FOI charges to be remitted where an application is received from an MP acting in connection with his or her official duty,⁸⁴ while in South Australia, MPs are subject to a \$1,000 threshold before being charged processing fees for their FOI requests.⁸⁵ However, this is in contrast

⁸¹ The State of Queensland (Department of Justice and Attorney-General), above n 14, 198.

⁸² Queensland Government, above n 38, 7, 26.

⁸³ See *Right to Information Regulation 2009* (Qld) pt 3.

⁸⁴ *Freedom of Information Act 1991* (Tas) s 17(1)(h), reproduced as *Right to Information Act 2009* (Tas) s 16(2)(b) (not yet in force).

⁸⁵ *Freedom of Information (Fees and Charges) Regulations 2003* (SA) reg 6.

with other jurisdictions, where MPs are expected to pay full processing charges for FOI requests; for example, under Queensland's new RTI Act, four reasons for remission of processing fees exist, none of which is that the applicant is an MP.⁸⁶

8.25 The ACT Government therefore disputes the existence of a general convention that processing fees are automatically remitted for FOI requests submitted by MLAs.

8.26 As the Auditor-General noted in her report on the administration of the FOI Act, JACS has developed a new draft FOI Fees Determination, however this determination has not yet been made.⁸⁷ In her report, the Auditor-General recommended that:

JACS should:

- develop a whole-of-government charge policy and guidelines to be applied to FOI requests, noting that fee exemptions can be provided for public interest and other relevant grounds; and
- update the section 80 fees and charges determination.⁸⁸

8.27 To ensure easier access for the ACT's citizens to government documents, the ACT Government will seek to develop an FOI fee structure that will simplify access for citizens to documents under the FOI Act, while also acknowledging that the ACT taxpayer should not be burdened with the entire cost of processing an FOI applicant's request, particularly in cases where that applicant would make a commercial gain from the release of a document. The ACT Government agrees with the Auditor-General's recommendation above, and JACS will progress both its draft FOI Fees Determination and a whole-of-government FOI fees and charges policy and guidelines, subject to other government priorities and the availability of resources.

⁸⁶ *Right to Information Act 2009* (Qld) ss 59, 64-7; in practice, the most apparent reason used to remit FOI charges in Queensland is that of financial hardship of the applicant, found in ss 66-7.

⁸⁷ ACT Auditor-General's Office, above n 65, [3.12].

⁸⁸ *Ibid* 36.

9 Administration of the *Freedom of Information Act 1989*

- 9.1 For over six years, from self-government in 1989 to 1995, administration of the FOI Act was centralised in the then ACT Attorney-General's Department, which responded to all FOI requests made to the ACT Government. In December 1995, responding to a substantial increase in FOI requests received by the Attorney-General's Department, responsibility for administration of the FOI Act was devolved to individual line agencies within the ACT Government.⁸⁹ This devolution reflects the fact that the FOI Act clearly identifies individual agency heads and ministers as responsible for decision making in relation to FOI requests.
- 9.2 Although each ACT Government agency is responsible for administering the FOI Act in regard to its own operations and documents within its possession, JACS is responsible for whole-of-service policy advice and annual reporting.
- 9.3 In 2008, the Auditor-General's Office conducted a performance audit of ACT Government agencies' administration of the FOI Act. Auditor-General's Report No 5/2008: *Administration of the Freedom of Information Act 1989* was presented to the Speaker of the Legislative Assembly on 16 September 2008.
- 9.4 To conduct its performance audit, the Auditor-General's Office investigated FOI administration within three ACT Government agencies: CMD, the Department of Education and Training (DET) and the Department of Territory and Municipal Services (TAMS).
- 9.5 In her report, the Auditor-General found that
- [a]udited agencies had a good understanding of the requirements of the FOI legislation and had put in place a number of policies and procedures to support administration of the Act. In practice, agencies did not always fully discharge their responsibilities under the Act ... There was a lack of whole-of-government guidance and advice to ensure consistency in application of the FOI law across ACT agencies and in the provision of information to the public.⁹⁰
- 9.6 The Auditor-General made 14 recommendations for ACT Government agencies to better administer the FOI Act. As required by the *Auditor-General Act 1996* (ACT), the Auditor-General's Office supplied a copy of the final report to the Chief Executives of CMD, JACS, DET and TAMS,⁹¹ all of whom provided a response to the Auditor-General's draft.
- 9.7 The ACT Government welcomes the Auditor-General's report into the administration of the FOI Act and its recommendations, and the associated

⁸⁹ Ibid [2.7].

⁹⁰ Ibid [1.15].

⁹¹ The *Auditor-General Act 1996* (ACT) s 18(1) states: 'Before finalising a report for the Legislative Assembly, the auditor-general must— (a) give a copy of the proposed report to the responsible chief executive; and (b) by written notice, invite the chief executive to provide written comments about the proposed report to the auditor-general within a period specified in the notice.'

contribution to the ACT community's understanding of the FOI scheme operating within the Territory. The ACT Government will continue to strive to achieve best practice in the administration of the FOI Act. The ACT Government will progress reforms to the FOI Act and its administration, subject to government priorities and the availability of resources.

- 9.8 The Auditor-General's 14 recommendations and the ACT Government's response to these recommendations are found below. The ACT Government agrees with 7 recommendations, agrees in principle with 6 recommendations, and does not agree with 1 recommendation in the Auditor-General's report.

Recommendation 1

JACS should develop general and consistent information on FOI for the public, and make this accessible through an FOI website, linked to ACT Government and agency web portals. This should also include advice to the public on contacting the agency prior to lodging a formal FOI request, and on information to include in the request to aid in the identification of documents.

Agreed in principle

The ACT Government acknowledges that a central entry point to access information on FOI in the Territory may have benefits for both ACT FOI practitioners, and the general public, improving the public's access to government information and decision making. Indeed, such a centralised website has already been created in several Australian jurisdictions; for example, the Government of South Australia's FOI website at <http://www.archives.sa.gov.au/foi> and the Queensland Government's new Right to Information website at <http://www.rti.qld.gov.au>. The ACT Government will investigate the possibility of developing a central ACT FOI website, taking into account its other priorities and the availability of resources.

Recommendation 2

Audit recommends that all agencies review their training needs to ensure:

- *relevant staff have a general awareness of the FOI Act, and their obligations and responsibilities under the Act; and*
- *officers with direct responsibility for responding to, and deciding on, FOI requests have received comprehensive initial training and regular refresher sessions.*

Agreed

The ACT Government encourages all staff, particularly those officers with direct responsibility for processing and deciding on FOI requests, to undertake training. ACT Public Service staff can currently access training in the ACT's FOI Act through either ACTGS or the Australian Government Solicitor (AGS). JACS, as the ACT Government's lead agency for the administration of the FOI Act, intends to examine the delivery of FOI training and consider options for improving opportunities for ACT Government officers to undertake training or to refresh their skills, subject to other government priorities.

Recommendation 3

JACS should:

- *develop a whole-of-government charge policy and guidelines to be applied to FOI requests, noting that fee exemptions can be provided for public interest and other relevant grounds; and*
- *update the section 80 fees and charges determination.*

Agreed

The issue of fees and charges for FOI requests in the ACT is discussed in part 8 of this submission. The ACT Government will ask that JACS update the *Freedom of Information (Fees and Charges) Determination 1995* (ACT), and draft a whole-of-government fees and charges policy and guidelines, subject to other government priorities and the availability of resources.

Recommendation 4

Agencies should consistently adopt any new charging policy in the development of their own internal policy and supporting guidance on the application of charges.

Agreed

The ACT Government would expect all government agencies to consider any whole-of-government policy that is adopted when developing their own internal policies and guidelines on the application of FOI fees and charges.

Recommendation 5

Agencies should regularly evaluate the processes used to reach FOI decisions to ensure future decisions are well based; properly documented, and conveyed to applicants clearly and comprehensively.

Agreed in principle

The ACT Government expects all agencies to regularly evaluate their processes to ensure all administrative decision-making is well-based, and properly documented and conveyed, which includes FOI decisions. The ACT Government agrees that it would be beneficial to ensure that FOI decision makers are supported with training and material to provide guidance on the responsibilities and obligations of administrative decision makers; as noted previously, such general training is provided by both ACTGS and AGS. Specific training, if requested by an agency, will be considered, subject to the availability of resources.

Recommendation 6

Agencies should issue better practice guidelines and search checklists to help with searching for documents relevant to FOI requests.

JACS should assist agencies to develop and maintain such guidelines through assembling better practice for distribution to agencies.

Agreed in principle

Due to the decentralised processing of FOI requests in the ACT, the ACT Government expects individual agencies to develop their own procedures for their staff to properly administer the FOI Act, including the search for any relevant documents; this would include the development of better practice guidelines and search checklists. JACS will assist agencies to develop and maintain their FOI guidelines, subject to the priorities that the ACT Government has set for it, and the availability of resources.

Recommendation 7

Agencies should specify in correspondence to applicants when the statutory periods commence and finish, having regard to section 151 of the Legislation Act 2001.

Agreed

Section 151 of the *Legislation Act 2001* (ACT) outlines the statutory requirements for working out periods of one day or longer, as specified in an Act of the ACT Legislative Assembly. The ACT Government agrees that it would be helpful for applicants to be told exactly when the statutory periods for their FOI requests commence and finish, and will advise individual agencies to update any pro-forma acknowledgment letters accordingly.

Recommendation 8

Agencies should record decisions and reasons for decisions, including a comprehensive list of the documents or parts of documents disclosed, on the FOI request file.

Agreed

The ACT Government expects all agencies to comply with records management principles, as required by the *Territory Records Act 2002* (ACT); this includes placing decisions, and the reasons for those decisions, on an official file, for not only FOI requests, but all administrative matters.

Recommendation 9

JACS advise Government of the merit of a provision in the ACT FOI Act equivalent to section 24A in the Australian Government's Freedom of Information Act 1982; that allows agencies to 'refuse a request' where documents cannot be found or do not exist.

Agreed

Section 24A of the *Freedom of Information Act 1982* (Cwlth) allows an agency or minister to refuse an FOI request where the agency or minister is satisfied that the document is in its possession but cannot be found, or where the document does not exist; the Commonwealth Parliament inserted this provision into its FOI Act in 1991.⁹² As outlined in this submission, it is the ACT Government's policy that, where reasonable and practicable, the ACT FOI Act should be consistent with the Commonwealth's FOI Act; thus the ACT Government will consider drafting legislation to enact an ACT equivalent of section 24A. In practice, ACT Government agencies make a technical refusal of FOI requests where documents cannot be found or do not exist; the ACT Government acknowledges that FOI applicants must be advised of their rights to internal or Ombudsman's review in such cases.

Recommendation 10

Agencies should include an analysis of information on FOI services in annual reports. Such analysis could include information on compliance, times taken to respond, types of requests, any issues with FOI administration, or with the legislation itself.

Agreed in principle

The ACT Government requires all agencies to comply with the statutory requirements of the FOI Act, the *Annual Reports (Government Agencies) Act 2004* (ACT) and the Chief Minister's Annual Report Directions when preparing material for publication in their annual reports. Although, at this time, agency reporting is confined to statutory requirements, the ACT Government acknowledges that further analysis of FOI data in annual reports might prove useful; however, such analysis must be balanced between the resource and time implications of collecting and analysing FOI data and the likely benefits to readers of agency annual reports.

Recommendation 11

Agencies should include a link to their FOI Act sections 7 and 8 statements (regarding publication of information, and making documents available for inspection and purchase), in their agency websites.

Agreed

The ACT Government will ask all its agencies to provide links to their FOI Act sections 7 and 8 statements in their websites.

Recommendation 12

To support the consistent and effective administration of the FOI Act, JACS should provide adequate policy and administrative support, including training; legal advice; guidance and reference information; and routine monitoring of FOI administration.

Agreed in principle

⁹² *Freedom of Information Amendment Act 1991* (Cwlth) s 15.

The ACT Government acknowledges that fulfilling this recommendation would contribute to improved administration of the FOI Act, while noting that internal administration of the FOI Act has been devolved to individual line agencies since 1995. JACS already seeks to provide a high level of policy support in FOI matters to individual agencies; any increase in JACS' administration and policy support of FOI matters, as recommended, needs to be considered in the context of the Government's other priorities and the availability of resources.

Recommendation 13

JACS should develop annually a full list of all agencies and Ministers subject to the FOI Act to ensure that they are included in the compilation of data, and review the accuracy of data received.

Not agreed

As noted above, the internal administration of the FOI Act has been devolved to individual line agencies since 1995. It is thus the responsibility of individual agencies to provide accurate reporting to JACS for its annual report. The ACT Government expects all agencies to provide confirmation of the details of other agencies within their portfolio and ministers to which they report, to ensure that these agencies and ministers are included in the annual compilation of FOI data.

Recommendation 14

JACS should review its section 79 report to determine if it is meeting the information needs of potential users. In particular, JACS should analyse the data provided by agencies and report on the efficiency and effectiveness of FOI services.

Agreed in principle

Section 79 of the FOI Act requires that the Attorney General prepare a report on the operation of the FOI Act each financial year. JACS currently undertakes this duty. The ACT Government notes that, in this regard, JACS is currently complying with the requirements of the FOI Act and the Chief Minister's Annual Report Directions. The Attorney General will request that JACS review his section 79 report, to determine whether it is meeting the information needs of potential readers. Such a review must, however, be considered in the context of other government priorities and the availability of resources.

