ACT AUDITOR-GENERAL'S OFFICE

M09/28

Ms Vicki Dunne MLA
Chair
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
London Circuit, Canberra ACT 2601

Dear Ms Dunne

Re: Inquiry into the *Freedom of Information Act 1989*

Thank you for the opportunity to make a submission to the Committee's inquiry into the *Freedom of Information Act 1989* (the FOI Act).

The Office supports the Inquiry to review the ACT FOI legislation. FOI legislation has been reviewed independently in Queensland, and a review is underway in the Australian Government. The Queensland review has resulted in substantial reform, and the Australian Government review is expected to do likewise.

This Submission brings to the attention of the Committee the issues identified by our recent Audit report, and discusses possible amendments to the Act to protect the integrity of the independent audit functions of the Office.

ACT Auditor-General's Office Report

In 2008, I tabled a performance audit report on the administration of the FOI Act (Audit report No. 5/2008, tabled 16 September 2008), in recognition of the importance of the legislation to the community, and perception of difficulties with its administration.

This Audit examines the administration of the FOI Act by three government departments (Chief Minister's Department, Department of Education and Training, and the Department of the Territory and Municipal Services), as well as considering the responsibilities of the Department of Justice and Community Safety in relation to policy and reporting requirements. The Audit concluded that:

> Audited 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.
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> In practice, however, agencies did not always fully discharge their responsibilities under the Act, particularly:
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> - the quality of FOI decision-making varied within agencies, and across agencies and there were inadequate mechanisms to monitor and report on the performance of agencies in delivering FOI services;

- the reasons to exempt certain documents were not always fully explained as required in decision notices;
- search procedures did not provide assurance that all relevant documents were identified and located; and
- consultation with third parties regarding release of information was inadequate.

Further, the Audit concluded that 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.

My report included fourteen recommendations, all agreed or agreed in principle by the responding agencies, with the exception of one recommendation directed to JACS. That recommendation (Number 13, page 79-80 of the report) related to compilation of data by JACS for the Annual FOI Report, and was aimed at providing assurance about the completeness and accuracy of publicly reported data.

As part of my audit follow-up procedures, I have written recently to agencies involved in the audit seeking advice regarding implementation of the audit's recommendations. I would be pleased to pass on to the Committee the results of my enquiries once they have been received and considered.

Although I consider my audit report in general is of interest to the Committee, there are a number of issues raised in the report that relate specifically to the Committee's Terms of Reference:

Developments in other jurisdictions

The audit report noted that administration of the FOI Act in the Territory appears to be falling behind that in other jurisdictions, particularly in light of recent and current reviews. For example, we observed that the FOI annual reports produced by lead agencies of the Australian Government, and a number of state jurisdictions, provide more comprehensive information on the operation of the respective FOI legislation than that available in the ACT through Annual Reports or the Annual FOI Report.

We also observed that whole-of-government FOI websites were common in other jurisdictions, and were used to support agencies in complying with the legislation, as well as to make available information such as FOI training material; guidelines; decision summaries and links to FOI annual reports. In addition, these websites are a key focal point for the provision of general information for the public. The ACT does not provide a similar resource.

We noted that support given to administering agencies was comprehensive and centralised in some jurisdictions, but in the ACT, JACS had not been pro-active in issuing general FOI guidance material. Nor did JACS routinely monitor FOI administration across agencies, including administrative and judicial trends and developments. ACT Government agencies tended to rely on information available from the Australian Government's Department of Prime Minister and Cabinet (in some sense, this is not unreasonable, given the similarity – at the time of audit – in the Territory and Commonwealth legislation).

Costs

The audit report estimated the total cost of providing FOI services in 2006-07 would be in the range of $4.5 million to $5.0 million, based on the average costs per application of all applications received by the ACT Government that year. However, the report also noted that agencies did not measure the cost of administering FOI requests nor specifically track staff and other costs associated with handling FOI requests. Cost information assists the development of policy for fees for FOI services, and the management of resources of agencies.

Although the ACT Government is incurring significant costs in providing FOI services in accordance with the legislation, the audited agencies did not collect any revenue to recover costs for cases where remission of charges were not justified. Indeed, the audit identified that it had not been the usual practice for agencies to charge for responding to FOI requests, although evidence indicated that it is Government policy to do so since April 2005.

The audit also observed that many FOI requests are made when the applicants are not able to get access to the relevant information publicly, or when there was concern about the lack of transparency in government decisions or dealings with the community. In our view, it is possible that costs to Government could be reduced if more information on Government activities was available publicly, or on request, especially information on topics of current public interest. The Queensland review of the FOI legislation advocated public disclosure as an alternative to FOI in meeting the public's right to know.

Timeliness and advice to the applicant

The audit noted that all agencies generally complied with statutory timeframes for acknowledging FOI requests and advising applicants on their access decisions. However, for most FOI requests reviewed, agencies did not provide applicants with adequate decision notices, particularly the reasons for refusing access to requested documents. There was also insufficient evidence on FOI request files of the reasons for the decision.

On a related matter, the report notes that procedures used by agencies for identifying and locating requested documents did not provide assurance that a thorough search for all relevant documents had been conducted. Our testing of selected FOI request files confirmed this deficiency in document search; search processes were potentially deficient or inadequately documented, and inadequate guidance was available to staff to assist them in responding accurately and completely to a FOI request.

Further, it is evident that the quality of a response to a FOI request is dependent on the quality of the recordkeeping practices in the agency and the work units. Although this audit did not examine recordkeeping in detail, all agencies audited were aware of deficiencies in their recordkeeping systems.

Exemption provisions for the Auditor-General's Office

The Committee may wish to consider whether the Territory's FOI legislation should specifically exempt the Auditor-General's Office from the provisions of the FOI Act, in relation to the Office's audit functions.

I note that in all Australian jurisdictions, other than the ACT, the Auditor-General is either fully or partially exempt from the provisions of the FOI Act. I understand that the Auditor-General in Tasmania is not currently exempt, but a recent review of the FOI legislation has agreed that an exemption is appropriate.

I draw the Committee's attention to a submission from the Australian Auditor-General, Mr Ian McPhee, to an inquiry by the Joint Committee of Public Accounts and Audit on the federal *Auditor-General Act 1997*. Mr McPhee's submission (No. 3.2, dated 11 August 2009), is available from the JCPAA's Website.[1]

The independence of the Auditor-General is central to the effective discharge of the Auditor-General's role and responsibilities. The Auditor-General is established as an important component of the accountability framework within government, and meets many of her or his responsibilities through the public reporting of audits that assess the performance of public sector entities.

Through the course of any audit, the Auditor-General gains full access to information and documents, including confidential and Cabinet documents from audited agencies, and generates documents based on an analysis of this information. The audit working papers use the information obtained as 'audit evidence' to support the audit opinions in the public audit reports. As pointed out by the ANAO submission, the public can get access to agencies' documents by directly applying for them; the Auditor-General and her/his staff should not be required to make an FOI decision in relation to documents that are the property of government agencies. In relation to the working papers and other related internal documents, the views and opinions expressed in them are work in progress and do not necessarily reflect the final considered views of the Auditor-General, which are contained in the final, public, report.

To protect the integrity of the independent audit process, the Auditor-General should be able to have full access to information to undertake her or his work unimpeded, and to have the confidence that the information obtained as part of the audit process is fully protected against disclosure outside the public audit reports tabled in the Assembly.

At present, I state in my Annual Report that:

> the *Auditor-General Act 1996* contains specific provisions aimed at protecting the integrity of an audit or investigation by the Auditor-General (Sections 33-36). Under these provisions, it is an offence for a person exercising, or who has exercised, a function of the Auditor-General to disclose protected information to someone else. Any documents obtained in reviewing matters relevant to an audit or investigation are, for the purposes of the Auditor-General Act, protected information.
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> Section 38 of the FoI Act provides for an exemption from access to documents to which secrecy provisions of enactments apply, and in the case of this Office, protected information under the Auditor-General Act would be generally exempt from production under the FoI Act.

This is based on legal advice provided to me by the Government Solicitor's Office.

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[1] http://www.aph.gov.au/house/committee/jpaa/agact/subs.htm

Although I am reasonably satisfied the Auditor-General Act offers protection of audit information and hence the integrity of the Audit process, I consider that a more specific statement of exemption within the FOI legislation, as is the case in other jurisdictions, would put the matter beyond legal challenge.

Concluding comments

My recent audit of administration of the FOI Act showed that although there is a reasonable understanding of the legislation, and adequate policies and procedures, application of the Act is still problematic. Agencies can do more to improve its administration.

The audit also showed that the ACT has not kept pace with reforms in other jurisdictions.

I also consider there is merit in providing, in any reformed legislation, for the specific exemption of the Auditor-General from the provisions of the FOI Act, insofar as they relate to the audit functions of the Office.

If you would like further information on our submission, I can be contacted on 6207 0833.

I would also be available to give evidence at a public hearing, if required.

Yours sincerely

T. Pham

Tu Pham
Auditor-General

16 December 2009