

**2023**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**TENTH ASSEMBLY**

**STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY – REPORT NO 12  
INQUIRY INTO THE FREEDOM OF INFORMATION AMENDMENT BILLS 2022 –  
GOVERNMENT RESPONSE**

**Presented by  
Chris Steel MLA  
Special Minister of State  
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## Introduction

The ACT Government welcomes the Report of the Standing Committee on Justice and Community Safety on the Inquiry into the Freedom of Information Bills 2022.

The Freedom of Information Amendment Bill 2022 and the Freedom of Information Amendment Bill 2022 (No 2) were presented in the Legislative Assembly on 21 September 2022 and referred to the Standing Committee on Justice and Community Safety (the Committee). The Committee resolved to undertake an inquiry into the Bills on 29 September 2022, and reported on 7 February 2023.

In the ACT, people have a right of access to government information. This is an important feature of our representative democracy. Access to government information enables the public to participate more effectively in government processes, and to be informed about government decisions. Access to government information makes the people and bodies that are responsible for governing the Territory more accountable to the public.

The ACT Government is committed to a robust, sustainable and efficient freedom of information regime that facilitates prompt access to government information at the lowest reasonable cost to the public. The Government's Freedom of Information Amendment Bill is an important reform in this respect, and Government welcomes this inquiry, and its recommendation that the Bill be passed following implementation of the recommendations.

## Recommendation 1

The Committee recommends that the ACT Government amend the Freedom of Information Amendment Bill 2022, so that an application for review can be made before the information is published.

### **Noted**

This recommendation concerns the Bill's amendment to make decisions to publish information on open access under section 24(1) reviewable by anyone whose interests are affected. Currently, only decisions *not* to publish are reviewable.

The ACT Government notes the ACT Ombudsman's and the Committee's concerns that retrospective review of a decision to publish information on Open Access may be difficult to resolve to the satisfaction of the person seeking review.

However, where the information relates to materials disclosed to an FOI applicant, which are generally required to be published on the open access disclosure log, a third party will be aware of the decision and intent to publish as they are required to be consulted about the release of information. In other situations, a third party may only become aware of the issue on publication, however there is still likely to be value for the third party in having the material removed from the open access website following an Ombudsman review, if the Ombudsman determines that it should not have been published.

As the Committee notes, the amendments would require an application for review to be made within 20 working days after the day the information was released. However, this is an upper time limit on when applications for review need to be made, and an applicant does not need to wait until after information is published to exercise their statutory review right, which accrues at the time the decision to publish is made.

As there is no legislative barrier to a third party making an application prior to information being published, the Government believes the Committee's recommendation for a proposed amendment is unnecessary.

Noting that making guidelines for the FOI Act is a statutory function of the Ombudsman, JACS will work with the Ombudsman to provide guidance on this provision to ensure that this new review right works as effectively as possible for third parties who may be affected by the publication of open access material.

## Recommendation 2

The Committee recommends that the ACT Government ensure the ACT Ombudsman is sufficiently resourced to manage any resulting increase in workload prior to commencement of the Freedom of Information Amendment Bill 2022.

### ***Existing government policy***

The ACT Government shares the view of the Committee that if the ACT Government increases legislative responsibilities and workload for statutory office holders, they must be adequately resourced and staffed.

As the Bill was being developed, JACS consulted with FOI processing teams across Government to predict how often the new review right proposed in the Government's Bill would be exercised, in order to gauge how the expansion of review rights was likely to impact the Ombudsman's workload. It was not anticipated that this new review mechanism would be exercised often.

JACS will work with the Ombudsman following passage of the Bill to assist in monitoring any impacts. In the event that there is a substantial increase in volume of work arising from this Bill, the Service Agreement between the Ombudsman and the ACT Government provides a mechanism to mutually agree on interim increases to funding.

## Recommendation 3

The Committee recommends that the ACT Government demonstrate to the Assembly why the extension of time for processing applications is needed.

### ***Noted***

As set out in the Explanatory Statement to the Bill, and the introductory speech, the purpose behind the increase to the statutory timeframes is to better reflect the actual time required to process applications under the Act and to avoid the need to request small extensions that are already granted in most instances.

Since the ACT's new FOI Act came into effect in 2018, the more detailed analysis and reasoning required to be articulated in decisions, and a range of new administrative requirements in the Act have increased the time it takes our agencies to process access applications. Data from the ACT Ombudsman Annual Reports show that average processing time across Government exceeded 20 days in the 2019-20, 2020-21 and 2021-22 reporting periods.

This is despite Government investing considerable resources in our FOI system to respond to the increased processing demand. Since the new FOI Act came into effect in 2018, the Government has committed an additional \$6.523 million to our FOI system, on top of recurrent funding, including 12 new full-time positions to work in FOI processing teams across Government.

A modest increase to the statutory processing time is therefore warranted.

The increase to the processing time proposed in the Government's Bill will avoid the need for Government agencies to seek small extensions in time from the applicant or the Ombudsman. As the ACT Ombudsman Annual Reports show, most of these extension requests are already being agreed to by the applicant, or are granted by the Ombudsman. An increase to the processing time therefore saves respondents, applicants and the Ombudsman from the administrative burden associated with seeking, agreeing to, or granting them.

The key outcome of this change made as part of the Bill is more time spent processing an applicant's requests and less time on administrative processes for time extensions, ensuring FOI teams across Government spend more time getting information ready for review and release.

#### Recommendation 4

The Committee recommends that the ACT Government work to produce guidance material on the public interest test in the Freedom of Information Amendment Bill 2022 for decision-makers, and that the explanatory statement references that guidelines will be developed to assist decision-makers.

##### ***Agreed***

The Bill proposes to amend the public interest test so that identity, circumstances, or reasons for seeking access to information is not to be taken into account, except in circumstances where an applicant is seeking access to personal information that is not their own. The current framing of the public interest test precludes decision-makers from taking into account the fact that a person is seeking access to personal information that does not relate to them, and there may be circumstances in which this is relevant to the decision to release information, particularly when certain factors favouring non-disclosure are engaged, such as prejudice to an individual's right to privacy or other human right.

Noting that making guidelines for the FOI Act is a statutory function of the Ombudsman, JACS will work with the Ombudsman to develop specific guidance on this issue which could be included in the Ombudsman Guidelines.

#### Recommendation 5

The Committee recommends that the ACT Government amend the proposed amendments to section 39 of the Freedom of Information Act so the responsible Minister is to provide quarterly reports to the Assembly.

##### ***Not agreed***

The Government's Bill proposes to remove the need for Ministers to report to the Assembly on deemed refusals of access applications where the information sought is only personal information.

The Government notes the Committee's and the Ombudsman's view that Assembly oversight of deemed refusals is valuable, but maintains the view that giving notice to the Assembly of deemed refusals of access to personal information is not a useful accountability exercise because the privacy implications constrain Ministers' ability to give meaningful context to the Assembly.

The purpose of the original amendment, and the Government's Bill, is to reduce the resource burden on processing teams by removing processing requirements that do not deliver public interest outcomes or assist applicants. Removing the need for Ministers to report to the Assembly on deemed refusals of access to personal information is a valuable efficiency measure that allows processing teams to spend more time on processing applications and getting people access to the documents they are seeking. Transparency over deemed refusals of access to personal information is maintained by annual reporting of these matters.

The Committee's proposal that these reports be made quarterly, instead of within 3 sitting days, would still be a significant reporting burden on processing teams, with little commensurate benefit and require entirely new systems to be developed across government to collate and present this data to the Assembly. The Government considers that the current reporting mechanisms through the annual report system is sufficient in providing the necessary oversight to the Assembly without causing a significant impact on government resources.

### Recommendation 6

The Committee recommends that the ACT Government work with the applicant where a disability or vulnerability exists to ensure the information requested is given in an appropriate form that meets their needs.

#### ***Agreed***

The proposed amendment to give agencies slightly more flexibility in the form that information must be given has an in-built safeguard that agencies may only provide information in an alternative form to that which is requested by the applicant, if the agency is 'reasonably satisfied' that the applicant can receive information in the alternative form.

Discussions such as that recommended by the Committee will feature in the conversations that agencies have with applicants, as decision-makers reach this 'reasonably satisfied' threshold.

### Recommendation 7

The Committee recommends that after implementing the recommendations in this report, the Assembly pass the Freedom of Information Amendment Bill 2022.

#### ***Noted***

### Recommendation 8

The Committee recommends the Assembly does not pass the Freedom of Information Amendment Bill 2022 (No 2).

#### ***Noted***

### Conclusion

The ACT Government thanks the Committee for its exploration of these important issues.