Review of the Freedom of Information Act

Discussion Paper

May 2005
REVIEW OF THE FREEDOM OF INFORMATION ACT

DISCUSSION PAPER
MAY 2005
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Agencies or individuals wishing to submit comments for consideration should do so in writing by 5:00pm on 20 June 2005. A summary of issues to structure responses appears in Appendix 2.

**Responses should be addressed to:**

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Ombudsman  

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Attention: FOI Review Manager

**Or emailed to:**

ombudvic@ombudsman.vic.gov.au
1. **FOREWORD**

1.1 **Freedom of Information**

After I commenced as Ombudsman in March 2004 I became aware of a number of complaints about delays and other problems in the handling of requests under the *Freedom of Information Act 1982* (‘**FOI Act**’). I soon became concerned that the handling of FOI requests did not always live up to either the purposes or the requirements of the FOI Act. I also noted various difficulties in the administration of the FOI Act.

The FOI Act was passed by the Victorian Parliament in 1982, coming into operation on 5 July 1983. It followed the commencement 6 months earlier of the Commonwealth *Freedom of Information Act 1982* and was the first FOI Act of any of the Australian States and Territories. Although it was introduced and passed by the Cain Government, it followed the introduction of Freedom of Information Bills by the earlier Thompson Government.

FOI is regarded as one of the pillars of modern democratic government. A lack of trust in the willingness to administer the FOI Act in accordance with the legislation and its objects could harm confidence in the institutions of democratic government.

On 2 February 2000 Attorney-General Robert Hulls referred to changes made to the FOI Act to ‘foster a new culture of open and accountable government’ and issued guidelines to assist the administration of the FOI Act and to require departments and agencies ‘to make decisions under the FOI Act consistent with three key principles vital to a healthy democracy:

- Well informed people are more likely to become involved in both policy making and government;
- A government open to scrutiny is more accountable; and
- People have a general right to know what information government holds about them.’

In preparing this paper my officers have consulted widely, including with FOI officers in each of the 10 Departments and Victoria Police,
and with a range of users of FOI. The consultations indicate that there are problems in the operation and administration of FOI.

Various issues and suggestions emerged from consultations with various people involved with freedom of information and are set out in this paper. Although much information has been received from the consultations that have taken place, the FOI Act has broad implications for many Victorians and I am eager to take into account the experience and views of a wide range of stakeholders in this investigation.

I am therefore inviting comments or submissions for consideration in my investigation.

1.2 Scope of Investigation

I commenced an investigation in August 2004 of my own motion into the performance and compliance of departments and agencies with the FOI Act, having regard to:

- The timeliness and adequacy of responses to FOI requests;
- The policies and practices adopted by departments and agencies for handling FOI requests;
- The adequacy and effect of protocols and arrangements between the departments and contractors on the keeping and availability of documents where public functions are performed by bodies other than departments or agencies;
- Obligations under other legislation including the Public Records Act 1973, the Health Records Act 2001 and the Information Privacy Act 2000; and
- The legislative requirements imposed for departments and agencies.

Currently there are 10 government departments which are the subject of my investigation. They are:

- Department of Education and Training (DET)
- Department of Human Services (DHS)
- Department of Infrastructure (DOI)
• Department of Innovation, Industry and Regional Development (DIIRD)
• Department of Justice (DOJ)
• Department of Premier and Cabinet (DPC)
• Department of Primary Industry (DPI)
• Department of Sustainability and Environment (DSE)
• Department of Treasury and Finance (DTF)
• Department for Victorian Communities (DVC).

I commenced an investigation at the same time in my then capacity as Police Ombudsman into the policies, practices and procedures of Victoria Police in relation to the FOI Act, having regard to:

• The timeliness and adequacy of responses to FOI requests;
• The provision of services by contractors and the adequacy and effect of protocols and arrangements between the police force and contractors on the keeping and availability of documents;
• The legislative requirements imposed for the police force; and
• Obligations under other legislation including the Public Records Act and the Information Privacy Act.

My investigation in relation to departments is conducted under section 14 of the Ombudsman Act 1973. I commenced the investigation in relation to Victoria Police as Police Ombudsman under the Police Regulation Act 1958 (‘PRA’). In November 2004 amendments to the PRA created the Office of Police Integrity (‘OPI’) and, as Ombudsman, I am also now the Director, Police Integrity (‘DPI’). As DPI, I am able to continue the investigation in relation to Victoria Police under a transitional provision in the amended Act1. The Discussion Paper distinguishes between my roles as Ombudsman and as DPI only where necessary for clarity.

1 PRA s.133(2).
I am conscious that although the handling of FOI requests by government departments and Victoria Police is important, they receive in total only 22% of all FOI applications made in Victoria each year (see Appendix 1). I will be inviting submissions from many of the other agencies which receive FOI requests, some in very large numbers, to ensure any recommendations made are consistent with the proper administration of FOI in all areas of government.

I will also have regard to experience and practices in other comparable jurisdictions. By way of example, from 1 January 2005 the United Kingdom has seen full implementation of its Freedom of Information Act 2000. This has involved the establishment of a new electronic Information Asset Register and expansion of electronic document management systems. Comparison with existing and proposed document or information management systems in Victoria may also be relevant.

In his Annual Report to Parliament on FOI for 2003-2004, the Attorney-General referred to the proposed Discussion Paper and said he would be encouraging Ministers, departments, agencies and other stakeholders to make submissions. The participation of those who are most closely involved in FOI is important in seeking to strengthen the administration of the FOI Act.

The body of this paper sets out issues which have emerged from the consultations that have taken place with FOI officers and FOI users. It also sets out information about the way in which the FOI Act is currently given effect, existing powers of review, and matters which are the source of frequent complaint by users and administrators of the Act. A summary of the issues appears at Appendix 2.

On completion of my investigation I intend to report to Parliament.

G E BROUWER
OMBUDSMAN
and
DIRECTOR, POLICE INTEGRITY
2. FREEDOM OF INFORMATION

2.1 Objects of the FOI Act

The FOI Act was intended to give effect to several fundamental principles:

- That individuals should have access to information about themselves held in government records;
- That by public scrutiny, government should be held more accountable to its electors; and
- To enable people to be informed about government policies to participate in policy making and in government itself.

The stated object of the FOI Act is to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria.

To achieve its object the FOI Act:

- Requires agencies to publish certain information on an annual basis;
- Creates a legally enforceable right to obtain access to documents of agencies and official documents of Ministers, other than exempt documents; and
- Sets out certain exceptions and exemptions from the right of access to documents, to protect interests such as personal privacy, Cabinet discussions, trade and business secrets and law enforcement.

The FOI Act also provides a right to request the amendment of documents which contain personal information that is inaccurate, incomplete, out of date or misleading. It recognises two categories of information, which may be characterised as ‘personal’ and ‘policy’, held by government and to which a right of access is created.

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2 John Cain, Second Reading speech, Parliamentary Debates (Legislative Assembly), Vol. 367, p.1061.
3 FOI Act s.3 sets out in full the object of the FOI Act.
The ‘agencies’ subject to the FOI Act include departments, councils and most bodies set up under Victorian legislation.

The importance of the FOI objective has been stated on many occasions. The President of the Victorian Civil and Administrative Tribunal (‘VCAT’), Justice Morris, has observed:

> Freedom of information legislation is essentially legislation about governance and governance practices. It now forms an important part of our democratic framework, by promoting knowledge about the affairs of government and about governance practices[^4].

The FOI Act gives applicants a right to seek internal review of certain decisions and a right to appeal certain decisions to VCAT. It also allows the Ombudsman to receive complaints, to issue delay certificates and to intervene before VCAT.

Although the FOI Act contains exemptions and exclusions which limit the right to access information, it contains also a direction that ‘Ministers and agencies shall administer this Act with a view to making the maximum amount of government information promptly and inexpensively available to the public’[^5].

The FOI Act depends upon both the willingness of agencies to administer its provisions in accordance with the spirit of the legislation and the efficacy of external review mechanisms, including review of decisions by VCAT and of the administration of the Act by the Ombudsman.

Anecdotal information suggests that requests for personal information are handled differently from requests for policy information. There may be a greater willingness in departments to assist people seeking personal information, or information to assist them in ordinary transactions with government, than to assist people requesting information which has a political purpose or application. Examples referred to in this paper of what appear to be excessive delays and unnecessary pedantry in the handling of some requests suggest that the FOI Act is at times administered in a compliance mode rather than

[^4]: Minogue v Department of Justice [2004] VCAT 1194 at [47].
[^5]: FOI Act s.16(1).
with an ethos of open government. The New Zealand Ombudsmen have observed that:

A ‘compliance culture’ within agencies tends to encourage delayed responses, mechanical rather than intelligent application of the [freedom of information legislation] and release of the minimum amount of information covered by a request. Such outcomes increase the likelihood of misunderstanding and mistrust which inevitably erode public confidence in government processes. That is the very antithesis of the purposes of the [freedom of information legislation].

In addition to the ethos of open government, I consider that the proper administration of the FOI Act requires the allocation of sufficient resources, both in people and in the intelligent application of available technology. These issues are explored in this paper.

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3. PART II OF THE FOI ACT: PUBLICATION OF INFORMATION

3.1 Part II Statements

In his Second Reading speech, Premier Cain said:

If freedom of information legislation is to work effectively, two fundamental problems must be overcome. Firstly, persons must be aware of the existence of documents that might be of interest to them. Secondly, persons must be able to identify what they need to inspect by first being able to make a wider search.

Part II of the Act addresses those problems by requiring every agency to:

- Publish an annual statement providing details of the agency’s organization and functions, decision making powers, and any arrangements for consultation with or representation by persons outside government; categories of documents held by the agency and literature available from it, the procedure for making FOI requests and the names of its FOI officers, any advisory boards or committees and any library or reading room⁷;

- Make available for inspection and purchase, and publish an annual list of, any internal guidelines, procedure manuals and other documents provided for the use of the agency or its officers in making decisions or recommendations affecting the rights or obligations of people and in enforcing Acts or schemes administered by the agency which may directly affect members of the public⁸; and

- Publish annually a statement of the reports, advice and recommendations prepared by or for the agency⁹.

Part II also requires the Premier to publish a register containing, at the Premier’s discretion, the terms, details of reference numbers and dates of Cabinet decisions¹⁰.

⁷ FOI Act s.7.
⁸ FOI Act s.8.
⁹ FOI Act s.11.
¹⁰ FOI Act s.10.
In this way it was recognised from the outset that FOI required some information to be available to applicants before they could formulate requests. Sometimes the applicant knows the document which exists, or at least the kind of document that exists. For example, that a particular report has been prepared by or for a department, or that the Police hold information about the applicant. At other times the applicant knows that something does or may exist, but does not know how to describe it; or the applicant may not even know whether any document exists relevant to his or her interest.

None of the Departments or Victoria Police now publish Part II Statements. One Department has advised that it is currently preparing a Part II Statement.

A number of Departments stated that they publish much of the information required by Part II in their Annual Report, on their website and in other publications. Many FOI officers said that Part II is out of date, that Part II Statements would be difficult to compile and be of little use to the public, and that with the publication of information on the Internet and by other means Part II has become redundant.

FOI officers reported that very few requests are made for Part II Statements, and the absence of such statements appears not to have been challenged by a notice to the Secretary of any Department or by application to VCAT\(^\text{11}\).

FOI officers did report that some Departments have received requests for access to documents which should be listed in Part II Statements or which Part II requires to be made available for inspection and purchase.

Users of FOI report that it is often difficult or impossible to find out what documents or categories of documents Departments hold.

\(^{11}\) FOI Act s.12.
### 3.2 Issues

1. Should compliance with Part II be enforced?
2. Should Part II be amended to allow or require Part II information to be published on agency websites?
3. Should there be standards for the content of departmental Annual Reports and websites to ensure compliance with Part II (or with an amended Part II) and to ensure adequate information is published for the public to view and participate in the process of forming policy and in reviewing the performance of government agencies?
4. Should Part II be amended to better reflect the type of information needed by the public? What information is needed?
5. Should departments give access to indexes or data bases listing documents or categories of documents they hold to enable the public to identify documents to which they may wish to request access under FOI?
6. Should Part II be repealed?
4. PROCESSING REQUESTS

4.1 Assessing the Request

An FOI request is a request for access to a document and not a request for information as such. To be valid, the request must provide such information concerning the document as is reasonably necessary to enable the agency to identify the document and the application fee (currently $20.50) must be paid, unless it is waived or reduced.

As a general rule, a department is not required to create a new document in order to satisfy an FOI request, although the Act requires agencies where possible to collate information by computer so as to produce a written document containing information in discrete form or to make a transcript from a sound recording if there is no existing document which contains the requested information.

A request may be refused if the agency is satisfied that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations (the so-called ‘voluminous’ ground).

A valid, non-voluminous request for access to a document must be granted unless one of the exemptions in Part IV of the Act applies. In some cases access can be deferred pending the presentation of the document to Parliament or a council or its release to the press.

The FOI Act requires that an agency must take all reasonable steps to notify its decision on an FOI request as soon as practicable and in any case within 45 days. There is some uncertainty whether this creates an absolute obligation to respond within 45 days, or just to take all reasonable steps to be able to respond within that period. FOI officers indicated that, in practice, they aim to provide a response within the 45-day period, rather than “as soon as possible”. Some reported that they regard a request as voluminous if it cannot be responded to within 45 days. Most FOI officers consulted said they would have difficulty in responding to most requests within less than about 45 days.

12 FOI Act s.17.
13 FOI Act ss.17(2A), 17(2B).
14 FOI Act s.19.
15 FOI Act s.25A.
16 FOI Act s.21.
The 45-day period does not commence until a valid request is received. If an agency serves notice that it intends to refuse the request on the ground it is voluminous, the 45-day period is suspended until the request is re-made in a form that is not voluminous\(^{17}\).

In handling FOI requests, departments and other agencies have obligations:

- To interpret the Act so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information\(^{18}\);
- To administer the Act with a view to making the maximum amount of government information promptly and inexpensively available to the public\(^{19}\);
- To assist people to make valid requests or to direct them to the appropriate agency or Minister\(^{20}\); and
- To give an applicant an opportunity to consult to amend a voluminous request and, as far as practicable, to provide the applicant with any information that would assist in making the request in a form that is not voluminous\(^{21}\).

A number of frequent sources of concern have been highlighted in consultations with FOI users. These include:

- Difficulties in formulating requests which departments will accept as clear and unambiguous requests for access, particularly in the absence of Part II Statements or other information on the documents held by departments;
- A lack of assistance from some agencies, with consultation over the form of requests being slow and at times unsatisfactory;
- Misuse of the ‘voluminous’ objection to requests and, equally, difficulty in processing large requests within the 45 day time limit;

\(^{17}\) FOI Act s.25A(7).
\(^{18}\) FOI Act s.3(2).
\(^{19}\) FOI Act s.16.
\(^{20}\) FOI Act s.17(3).
\(^{21}\) FOI Act s.25A(6).
• Refusal or failure to generate responses from computer data bases when the base data is readily accessible to the department;
• Unreasonable delays in processing requests;
• Misuse of exemptions to deny access to sensitive documents;
• Delaying the release of documents for allegedly political reasons;
• releasing documents on the eve of a hearing by VCAT.

Agencies may have real difficulty in processing requests because of ambiguity in the request; the amount of material to be searched in finding relevant documents; and the time needed for consultation with any third parties. To find documents, departments rely mainly on the knowledge of officers as to where relevant documents may be held with little assistance from information technology systems. A request may be rejected as ‘voluminous’ because of the time required to find the relevant documents or the time to assess and process them, or a combination of these factors. The other workload of the relevant individuals or sections, including both FOI units and program areas, also affects the time needed to process requests.

A number of complaints were made by FOI users that departments misinterpret requests or say they are unclear and request explanations of clear and ordinary language, or that they threaten to treat requests as voluminous, with the effect of delaying the processing of the request.

4.2 Access to Documents

Each FOI agency is responsible for handling FOI requests for access to the documents it holds22, and each agency makes its own administrative arrangements for processing requests. The processes adopted by the 10 Departments and Victoria Police are broadly similar.

A decision on an FOI request may be made by the responsible Minister, the principal officer of the agency, or by an authorised officer of the agency. Each Department has established an FOI

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22 FOI Act s.18 enables a request to be transferred from an agency which does not have possession of a document to one that does, on to an agency whose functions are more closely connected to the subject matter of the document, but appears not to enable a request to be ‘split’ between two agencies.
Unit to coordinate the handling of FOI requests. Each FOI Unit has officers with delegated authority to make decisions and initial decisions are usually made within the FOI Unit. In some departments and particularly in small regional offices the FOI Officer may be a person with other operational roles.

When a department receives a request an FOI officer first checks that the request is valid and that the request has come to the correct department or agency. The FOI officer may contact the applicant to clarify the terms of the request or to negotiate changes to the terms of the request so that it will not be deemed ‘voluminous’.

Some requests are very time consuming to process, with difficulty in locating relevant documents, or in sorting through large volumes of material (sometimes hundreds, and occasionally thousands, of pages), or in assessing documents for release.

FOI officers reported that it is often difficult to tell whether a request is unclear or voluminous until speaking with the business unit and sometimes until at least a part of the document search has been done. As a result, a request may be identified as unclear or voluminous quite late in the process, often after there has been an initial document search. Where a request is first said to be unclear and then voluminous there can be considerable delay in processing requests. However, as the 45-day ‘clock’ is stopped, the delay does not show in the performance statistics of the agency.

The Act provides a range of exemptions from disclosure for a range of documents, including Cabinet documents; documents whose disclosure could affect national security or law enforcement; documents which would unreasonably disclose personal information or commercially sensitive information or which would disclose trade secrets; and other categories of documents containing confidential information or which are subject to other secrecy laws.

Where practicable, access may be given to an exempt document by deleting the exempt material from it\(^\text{23}\). This cannot be done in all cases. For example, a document which is exempt because it was prepared for submission to Cabinet cannot be made non-exempt by deletions. By far the most frequent deletions are of personal information relating to people other than the applicant.

\(^{23}\) FOI Act s.25.
Even if only a part of a document relates to the request, the agency is required to provide access to the entire document (subject to deletion of any exempt material).

If no exemption applies, access to the document should be granted, subject to payment of any access charge that applies\(^{24}\). However, there is some doubt whether an applicant is entitled to access to the whole of a document where only part of the document is relevant to the request.

A decision on an FOI request may be:

- To grant access to the document;
- To defer access to a document which has been prepared for presentation to the Parliament, to a local council or for release to the press, until it has been presented or released\(^ {25}\);
- To release a copy of a document that would be exempt from release with deletions so the copy is not exempt\(^ {26}\);
- That the requested document does not exist or cannot be located\(^ {27}\).

Where a decision is made refusing or deferring access, or that a document does not exist or cannot be located, the agency must give written notice of the decision including findings of any material questions of fact and the reasons for the decision\(^ {28}\).

Access may be provided in a number of ways, including providing an opportunity to inspect the document and provision of a copy of the document\(^ {29}\). In my experience, most applicants want copies of the relevant documents.

Most other Australian jurisdictions allow less than 45 days in which to make FOI decisions, but most also allow an extension of the decision-making period for consultation or for large requests. The following table sets out the time within which decisions are to be made under each of the Australian FOI Acts:

\(^{24}\) FOI Act s.20.
\(^{25}\) FOI Act s.24.
\(^{26}\) FOI Act s.25.
\(^{27}\) FOI Act s.27(1).
\(^{28}\) FOI Act s.27(1).
\(^{29}\) FOI Act s.23.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Time to Respond to Request</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth of Australia</td>
<td>Freedom of Information Act 1982 30 days, subject to extension for a further 30 days for 3rd party consultation (Section 15)</td>
</tr>
<tr>
<td>Victoria</td>
<td>Freedom of Information Act 1989 45 days (Section 21)</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Freedom of Information Act 1991 30 days (Section 16)</td>
</tr>
<tr>
<td>South Australia</td>
<td>Freedom of Information Act 1991 30 days, subject to extension for a reasonable period for large requests or for consultation (Sections 14, 14A)</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Freedom of Information Act 1992 45 days, subject to extension where the Information Commissioner is satisfied it is impracticable to comply within 45 days (Section 13)</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Information Act 2002 30 days, subject to extension where additional time is required for large or voluminous requests or for 3rd party consultation (Sections 19, 26)</td>
</tr>
<tr>
<td>Queensland</td>
<td>Freedom of Information Act 1992 45 days, or 60 days for documents more than 5 years old not concerning the applicant’s personal affairs, and subject to agreeing a period for what would otherwise be a voluminous request (Sections 27, 28A)</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Freedom of Information Act 1989 21 days (Section 18)</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>Freedom of Information Act 1989 30 days, subject to 15 days extension for consultation with other governments or with business (section 19)</td>
</tr>
</tbody>
</table>

### 4.3 Issues

7. Should applicants be encouraged to make requests for documents containing specific information rather than ‘fishing’ requests for all documents relating to a subject?

8. Should section 25 be amended to clarify whether an agency should disclose documents in their entirety or only those parts which are relevant to a request?
4.4 The Search and Decision Process

The search for documents is usually not done by the FOI Unit. The FOI Unit notifies the appropriate business units of the request and asks them to search for relevant documents and to advise of any particular sensitivities and/or any issues relevant to the various exemptions under the FOI Act. The Minister’s office may also be asked to provide documents and may be consulted on issues relevant to assessment and possible exemptions.

The difficulty of the search varies with the nature of the request. Typically, personal information is easily located. By contrast, material relating to policies or programs may be held in a variety of places and files, and some documents or files may not be indexed against the terms used in the FOI request. The ability to find relevant documents therefore depends in large part on officers in the relevant program areas knowing what documents exist and relating them to the request. Difficulty in finding documents sometimes results from a change in personnel or an employee being on leave. The effectiveness of the search also depends on the search officers properly understanding the request.

As each business unit completes its search it sends the documents and any comments on possible exemptions to the FOI Unit which checks to ensure all relevant documents appear to have been received and then assesses the documents for any relevant exemptions.

In some cases there is considerable interaction between the business units and the FOI Unit to clarify the terms of the request, ensure there is a common understanding of what is meant by the request, identify relevant documents and ensure all relevant documents have been located. Comments and advice from the business units may result in further contact with the applicant to ensure the request is clear and not voluminous. It is rare for the program area to liaise directly with the applicant. There may also be a requirement to consult with third parties where the release of documents would disclose information about the personal affairs of a person or trade secrets or other commercially sensitive information of a business, commercial or financial undertaking30.

30 See discussion at 7.27.1.
FOI officers emphasise that they rely on advice from the relevant program areas both to know what documents exist and to understand the content of those documents, particularly with reference to any obligation to consult with third parties on matters such as commercial information and exemptions under the FOI Act. Liaison with program areas is also important at times in assessing matters such as the application of the privacy provisions of other legislation, or the effect release of documents may have on programs of the agency or on third parties, or other matters of relevance to the public interest.

4.5 Consultation with Ministers’ Offices

As part of their portfolio administration, Ministers are advised about potentially sensitive FOI requests. There are sound reasons for this which are expressed in the Attorney-General’s Improved Accountability Guidelines for FOI. Ministers and their staff may hold, or be aware of, documents relevant to a request. They may also be aware of matters relevant to the application of exemptions. The Improved Accountability Guidelines state that, in making a decision, ‘the FOI officer should take into account the views of Ministers, Ministerial advisers (who are in effect representing the Minister), the Principal Officer in an agency and any other relevant person’.

The Improved Accountability Guidelines also require that ‘where documents relate to a Minister’s portfolio (except personal requests) and/or where the Minister could be asked by the media or in Parliament to comment or explain, the agency will provide a brief to the Minister’. The brief is to be provided five days prior to the proposed release and include issues apparent from the documents proposed for release and background to the FOI application including the date of receipt and the terms of the request. The Guidelines state that it is not the responsibility of the FOI officer to follow up if no input is received by the proposed release date.

Where the request relates to a Minister’s portfolio or matters involving possible issues of liability (sometimes referred to as ‘sensitive’ requests), the Minister’s office will be advised of the request when it is received. After the request has been fully processed, a brief is sent to the relevant Minister’s office containing a copy of the request, the
decision, the documents to be released, and an outline of the issues apparent from any documents to be released and background to the FOI request. Generally the Minister’s office is given five days notice of the decision before it is sent to the applicant. Where the request is only for personal information and is not otherwise sensitive, it is sent directly to the applicant without any briefing to the Minister. The matters on which Ministerial briefings are provided vary between departments, as does the extent of the briefings.

FOI officers consulted in preparing this paper advised that the Minister’s briefing includes a copy of the proposed decision letter. Some departments have a practice of asking the program area responsible for the document search to provide to the FOI Unit, along with the search results, a draft briefing and in some cases any draft Proposed Parliamentary Questions for inclusion in the Minister’s briefing.

FOI officers reported differing practices between departments, with some waiting for advice that a briefing to the Minister’s office has been noted before sending out the decision unless the 45-day decision period has already expired, and others sending the decision on the fifth day after the briefing is provided whether or not the briefing has been noted.

All FOI officers consulted reported that the briefing on the proposed decision is sent to the Minister’s office by way of advice. While some said there may have been occasions when the Minister’s office was then able to advise of further documents which should have been included in the response, decisions on release were not altered as a result of the briefings.
4.6 Issues

9 Should applicants have a right to consult direct with the manager who has responsibility for the program area relevant to the request over issues such as clarification of requests and the scope of potentially voluminous requests?

10 Should agencies provide lists or indexes of documents or classes of documents which they hold to assist applicants to make informed requests for access to documents?

11 Should agencies provide a list of documents or classes of documents relevant to a request as part of the provision of assistance under both section 17(3) and section 25A(6)?

12 Should the FOI Act be amended to enable agencies to nominate a reasonable time in which to respond to a request in cases where to respond within 45 days would unreasonably divert resources from other activities? If so, should there be a right to complain to the Ombudsman, or to apply to VCAT, where the time specified is unreasonable?

13 Should agencies release documents that are identified as relevant to a request within a reasonable time, even if not all relevant documents have been located, with the remainder to be provided as they become available and are assessed for release?

14 Should responsibility for assessment and determination of FOI requests be devolved to managers within the program areas rather than being handled by specialised FOI officers?

15 To justify rejection of a request as voluminous, should the agency be required to conduct a sample search?

4.7 Electronic Records

Each department has one or more electronic records management systems. Although some testing of ‘e-file’ use has commenced, for the most part departments use paper files and only limited information is available from their records management systems. The systems are not designed to assist the FOI process and are seldom used to conduct an FOI search for documents, although they are sometimes used to see who may be responsible for documents which are the subject of a request or to help ensure that a search is complete.
New electronic data management systems are being introduced across the Victorian government. These systems have greater capacity for data and metadata searches, and to generate indexes of files or data categories.

4.8 Issue

16 Should records management systems be designed and implemented by departments to assist in FOI search processes?

4.9 Delays

Sometimes very considerable delays occur between the lodging of a request and a decision that the request is unclear or voluminous. Those delays can be frustrating to applicants. FOI officers also complain that some experienced applicants repeatedly make unduly wide or poorly focused requests which exacerbate the difficulties and time taken in handling the request and cause consequential delay to other requests.

Delay may result from problems with the form of the request, resource issues in the agency and from the way the request is handled. If a department considers a request is not clear, it does not treat the 45-day period for responding to the request as having commenced until the request has been clarified. Once the request is clear, if the department gives notice that the request is voluminous, calculation of the 45-day period is stopped until the request is re-scoped so as not to be voluminous.

This is an example of the delays in one request seen by my office:

- Day 1: FOI request lodged with department
- Day 3: Search process commenced in program area
- Day 30: Documents received by the FOI Unit from the program area
- Day 51: Clarification sought from applicant after some internal discussions
• Day 57: Applicant’s response re-scoping the request received (57 days after the request was first made)

• Day 92: After further internal discussions, department notified the applicant the request was now considered to be voluminous

• Day 102: Applicant again re-scoped the request

• Day 145: Program area provided a further search response to FOI Unit, which began assessing the search results.

In this case, the 45-day decision period was regarded as not having started until the first re-scoping of the request, 57 days after the initial request was lodged. The 13-day period from notification that the request was considered voluminous until the second re-scoping was also regarded as being outside the 45-day decision period, so the processing time was regarded as suspended for a total of 70 days from the date the request was received. 181 days after the request was lodged the Department still had not given the applicant a decision on access.

Most discussions about clarification or re-scoping of requests are held between the FOI Unit and the applicant and do not directly involve the program area. This may lead to several attempts being undertaken before a clear and non-voluminous request is made. The fragmentation in the process between the coordination and assessment by the FOI Units and the search and briefing by the program areas may lengthen the time taken before a request is clarified or before it is found to be potentially voluminous. This requires a deal of communication and consultation between the program area and the FOI Unit. The reverse-FOI process (discussed at 7.2) may also delay the grant of access to documents.

Some applicants have alleged undue pedantry or intentional delay as the cause for some requests for clarification of requests. On other occasions, applicants have acknowledged that the consultation process has been necessary or valuable. A number of FOI officers reported that they feel at times that they face a dilemma: if they seek clarification of a request, they will be accused of delay, while if they do not they may be accused of misinterpreting the request.
Although departments treat the 45-day period as not having begun if at any time they seek clarification of the request, VCAT has confirmed that determining whether a request is clear (and consequently whether the 45-day period has commenced) is to be done objectively. If the request is in fact clear, time will have commenced, and in some cases the 45-day period may have expired, despite an agency’s request for clarification.31

The obligation of an agency under section 21 of the FOI Act is to take all reasonable steps to enable the applicant to be notified of a decision as soon as possible but in any case not later than 45 days. An applicant may complain to the Ombudsman at any time about unnecessary delay in processing a request, whether before or after the expiry of the 45-day period. If the Ombudsman certifies there has been unreasonable delay, the applicant may apply to VCAT on the basis of a deemed refusal of the request, even if the 45-day period has not elapsed. The time in which an application may be made to VCAT is suspended from the date of complaint to the Ombudsman until the Ombudsman informs the applicant of the outcome of the complaint.32

### 4.10 Issues

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<tr>
<td>17</td>
<td>Should there be direct communication between program areas and applicants where it is necessary to clarify requests?</td>
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<tr>
<td>18</td>
<td>Should there be active monitoring by the Ombudsman of time taken to process requests and intervention when necessary to ensure requests are handled expeditiously and without unnecessary delay?</td>
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</table>

31 Re Kelly and Department of Treasury and Finance [2002] VCAT 1019.
32 FOI Act ss.53(2) – (5).
5. REASONS FOR DECISION

5.1 Statement of Reasons

The FOI Act requires agencies to give the applicant notice in writing of a decision that the applicant is not entitled to access to a document, that access will be deferred or that no document exists. The notice must state the material questions of fact, referring to the material on which the findings were based, and the reasons for the decision33.

A number of FOI users reported dissatisfaction with the quality of reasons given for refusal of access to documents. Reasons provided for refusal of access are often little more than a bland assertion that a particular exemption applies and do not indicate the nature of the documents to which access has been denied or do not state the facts on which the decision is based.

If a matter proceeds on appeal to VCAT, the agency must file and serve a statement including findings on material facts, evidence or other material on which the findings are based, reasons for decision including any public interest grounds relied on, and a schedule of the documents to which the claims of exemption relate34. The statement and schedule provided at VCAT typically contain considerably more information than is generally provided at first instance or upon internal review, and are often the first time the exempt documents are clearly identified.

FOI officers reported that it would be onerous to provide the level of information required by VCAT on every first instance refusal of access to documents and expressed doubt whether that information would be of assistance to most applicants.

At times there is a decision provided that a document does not exist or cannot be located. In a number of instances where complaints have been made to my office, my officers have been able to locate at least some relevant documents within the relevant agency after examining the files.

Some of the exemptions under the FOI Act apply if it is in the public interest that access should not be given to a document. Section

33 FOI Act s.27(1).
34 VCAT Act ss.46 and 49; VCAT Practice Note of April 2004.
30(5) requires the public interest considerations to be stated for a
decision that a document is exempt under this section as an internal
working document\textsuperscript{35}, but there is no equivalent stipulation to state
the public interest grounds for decisions on documents involving
communications with other States or the Commonwealth\textsuperscript{36},
confidential communications\textsuperscript{37} or where disclosure is considered
contrary to the public interest\textsuperscript{38}. It appears that, in practice, the
reasons for a public interest finding are often not stated.

5.2 Issues

19 Should the reasons given for refusal of access be detailed? If so, what
level of information should be given? Should a statement similar to
the VCAT statement and schedule of exempt documents be provided?

20 Should reasons for decisions that a document cannot be found or
that no document exists state what enquiries have been made; what
searches conducted; and any other facts relevant to the conclusion
that the document cannot be found or does not exist?

21 Should agencies indicate what related documents may exist in order
to assist the applicant when a decision is made to refuse access to
documents or that the requested document cannot be found or does
not exist?

22 Should agencies be required to provide a statement of reasons under
section 27 where they determine that a request is not valid, for
example because of a lack of clarity?

23 Should a section 27 statement of reasons state the public interest
considerations on which a decision that a document is exempt from
disclosure is made under section 29 (matters communicated by
other States or the Commonwealth), section 35(1)(b) (confidential
communications) or section 36 (disclosure contrary to the public
interest)?

\textsuperscript{35} FOI Act s.30(5).
\textsuperscript{36} FOI Act s.29.
\textsuperscript{37} FOI Act s.35(1)(b).
\textsuperscript{38} FOI Act s.36.
6. CONSTRUCTIVE POSSESSION

6.1 Documents of an Agency

The FOI Act provides a right of access to documents of agencies other than exempt documents. This includes documents in the actual possession of agencies and documents which agencies have a right and power to deal with (‘constructive possession’).

Questions of constructive possession become important where work is carried out for a government agency by a third party. The third party may create or receive documents as a result of the work it does. The agency’s right, if any, to possession of those documents will depend in part on the terms of any contractual relationship between the agency and the third party, and in part on the reason the documents were created or received. Whether there is a right of access to documents in relation to services performed for government may depend therefore on how the services were provided.

From consultation with FOI officers it appeared that some departments had no clear guidelines on when a search for documents should extend to include documents held by third-party service providers. Other departments had a clear understanding of the occasions when it was necessary to obtain documents held by some third-party service providers.

6.2 Issues

24 Should departments and other agencies have protocols to ensure a proper search for documents which may be held by contractors in response to FOI requests, where the department does have constructive possession?

25 Should there be guidelines to ensure departments and other agencies have a right to possession of documents created by contractors engaged to perform public functions? Should this be written into contracts?
7. **THIRD PARTY CONSULTATION**

7.1 **Third Party Consultation**

FOI officers consistently reported that consultation with third parties causes much work and delay in processing FOI applications. The need for third-party consultation arises mainly under sections 33 and 34. Third-party consultation often extends the time to process requests beyond the 45-day period, particularly where a number of third parties are involved.

Section 33 exempts documents if their disclosure would involve the unreasonable disclosure of personal information relating to the personal affairs of any person (including a deceased person) other than the applicant. If an agency decides to grant access to a document containing third-party personal information it must, if practicable, notify the person who is the subject of the information (or if the person is deceased, their next-of-kin) and advise them of their right to appeal to VCAT against the decision (‘reverse-FOI’)\(^{39}\). The FOI Act does not define “next-of-kin”, and FOI officers reported difficulties at times in knowing who they were required to notify.

‘Information relating to the personal affairs of any person’ is defined to include information that identifies any person or discloses their address or location, or from which that information can reasonably be determined\(^{40}\). It includes the names of public servants and police officers who have signed standard letters or whose names are on other documents relating to their normal duties, although FOI officers from a number of departments advised that senior executives are commonly regarded as having given consent to the release of their names.

Departments often ask applicants to agree to the deletion of names, particularly if they are not relevant to the request. At times however documents, particularly those relating to personal matters, would be meaningless or useless if all names were deleted. In many cases, the applicant already knows the identity of many of the people involved, although some names may be confidential. Some documents (such as welfare files of DHS, or police records) contain many, sometimes hundreds, of names.

\(^{39}\) FOI Act s.33(3).

\(^{40}\) FOI Act s.33(9).
Section 34 exempts documents which disclose information acquired from a business, commercial or financial undertaking and relating to trade secrets or other matters of a business, commercial or financial nature if their disclosure would be likely to expose the undertaking unreasonably to disadvantage. Agencies are required to seek the views of the undertaking before deciding whether to give access to such documents. If the agency decides to release the documents it must notify the undertaking of its reverse-FOI rights.

In consulting with third parties, the identity of the applicant is itself regarded as private information and FOI officers reported that many people become very concerned at the prospect that documents containing their personal or business information may be made available to an unknown applicant. At times the third party cannot be shown the documents in question because they contain information about other people or businesses.

Section 35 exempts documents which contain information communicated in confidence, other than information relating to a business, commercial or financial undertaking, if they would be exempt if generated by an agency or a Minister or if disclosing them would be contrary to the public interest because it would be reasonably likely to impair the ability to obtain similar information in the future. There are no consultation obligations or reverse-FOI rights where a decision is made to disclose the information or to discover if the third party regards the information as confidential.

My office is aware of a number of occasions when departments have refused access to documents claiming they contained information communicated in confidence by third parties. In some cases, subsequent communication with those third parties has revealed that they had no objection to the release of the information.

It appears that on occasions departments request information saying that it will be received “in confidence”. The parties providing the information may however be willing to provide it publicly or, in some cases, may themselves be publicly funded bodies which might reasonably be required to provide the information publicly. There are however many instances where information is clearly confidential and where it would be unreasonably intrusive to seek consent for its release.
FOI officers were unanimous that the statutory 45-day period is often insufficient when third-party consultation is required. This can also be a resource-intensive process, with flow-on effects for the handling of other FOI requests.

FOI officers also stated that sections 33 and 34 in particular cause confusion and uncertainty from the way they are drafted, and suggested that section 33 should allow for the exercise of more discretion.

### 7.2 Reverse-FOI

If an agency does decide to release documents containing third-party personal or business information, the third party may apply to VCAT within 60 days to review the decision. There is no express provision requiring the agency to wait 60 days before granting access to the documents.

Consultation is expressly required before making a decision on the release of third-party business information, but not in relation to third-party personal information. However, FOI officers reported that departments do generally consult before deciding to release personal information. The Act does not allow a reverse-FOI application on a decision to release business information where the third party has consented\(^{41}\), but there is no provision for third party consent to release personal information. FOI officers consulted reporting differing practices, with some always waiting until the expiry of the 60-day reverse-FOI period before releasing documents and others releasing documents immediately if the third party had given consent.

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\(^{41}\) FOI Act s.50(2)(e).
### 7.3 Issues

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<th>Question</th>
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<td>Should the 60-day reverse-FOI application period be shortened?</td>
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<td>27</td>
<td>Should agencies be able to require applicants to provide proof of identity where the decision is to give access to information personal to the applicant?</td>
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<tr>
<td>28</td>
<td>Should agencies, in consulting with third parties on the release of personal information under section 33, or business information under section 34, be able to disclose the identity of the applicant, or to ask applicants whether they consent to their identity being made known to any third party who may need to be consulted?</td>
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<tr>
<td>29</td>
<td>Should agencies have regard to the identity of the applicant and the intended use of the information in determining if the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of a third party?</td>
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<tr>
<td>30</td>
<td>Should a definition of ‘next of kin’ be provided for in section 33(3)?</td>
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<td>31</td>
<td>Should the FOI Act be amended to extend the 45-day period where third-party consultation is required? If so, should it extend the 45 days by a fixed period, for example of 30 days, or should it enable agencies to nominate a reasonable time in which to respond to the request to allow for consultation?</td>
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<tr>
<td>32</td>
<td>Should there be a right to complain to the Ombudsman, or to apply to VCAT, where the time specified is believed to be unreasonable?</td>
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<tr>
<td>33</td>
<td>Should agencies be allowed some discretion to give access to documents containing third-party personal information without consultation in cases where that information is already known to the applicant?</td>
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<tr>
<td>34</td>
<td>Should section 33 be amended to provide that reverse-FOI will not apply where the third party consents to the release of information?</td>
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<tr>
<td>35</td>
<td>Should section 35 be amended to provide for consultation before deciding that the release of information would be contrary to the public interest?</td>
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8. ACCESS CHARGES

8.1 Charges

The FOI Act, in addition to the application fee, provides for charges to be imposed before access to documents is given\(^{42}\). Access charges may include charges for time spent in a routine search for the document (but not additional time searching for a lost or misplaced document) and time spent supervising inspection of documents by the applicant, costs of supplying copies of documents, and the reasonable costs of collating computer information or creating a transcript.

The charges are to be waived in some cases, including for a ‘routine request for access to a document’\(^{43}\); if the intended use of the document is a use of general public interest or benefit\(^{44}\); if the applicant is a Member of Parliament\(^{45}\); or if the request is for a document containing information relating to the personal affairs of the applicant\(^{46}\). Charges for copying documents or making arrangements for them to be viewed are also waived if the applicant is impecunious and the request is for access to a document containing personal information relating to the applicant\(^{47}\).

FOI officers reported that in practice most departments rarely impose access charges below an arbitrary limit in the range of $5 - $10. Many departments reduce or waive the charge if the response is delayed beyond 45 days. FOI officers often negotiate lower charges, sometimes in agreeing on a varied scope of request or for additional time to process the request. Instances have also emerged where charges have been imposed to prevent or discourage “nuisance” or difficult requests.

\(^{42}\) FOI Act s.22.
\(^{43}\) FOI Act s.22(1)(g).
\(^{44}\) FOI Act s.22(1)(h)(i).
\(^{45}\) FOI Act s.22(1)(h)(ii).
\(^{46}\) FOI Act s.22(1)(h)(iii).
\(^{47}\) FOI Act s.22(1)(i).
1.2 Issues

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<td>36</td>
<td>Should there be standard policies, within departments or across the whole of government, for when access charges should be waived? Is it appropriate for access charges to be used as a bargaining tool in dealing with FOI requests?</td>
</tr>
<tr>
<td>37</td>
<td>Should section 22(1)(g) be amended to define a ‘routine request for access to a document’ for which access charges are to be waived?</td>
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9. REVIEW OF DECISIONS

9.1 Right of Review

The FOI Act provides for two levels of review of most decisions in relation to access to a document. Unless the decision has been made by the Minister or the principal officer of the agency, the applicant may request an internal review of the decision. Internal review may be conducted by a more senior officer in the FOI Unit or from elsewhere in the agency.

Although internal review is by an officer senior to the original decision maker, in many cases the original decisions will have been seen by the manager of the FOI unit before it was confirmed and sent out. Where the request is potentially sensitive, both the Minister’s office and members of the department’s executive are likely to have been informed of it and to have seen the proposed decision before it was despatched. Even so, many decisions are varied on internal review to allow at least some greater release of documents.

Subject to having exercised any right of internal review, the applicant may then apply to VCAT for review of the decision. The FOI Act also provides that if a decision has not been made within the statutory time\(^{48}\), or the Ombudsman has certified his opinion that there has been unreasonable delay\(^{49}\), the Applicant may apply to VCAT on the basis of a deemed decision by the Minister or principal officer to refuse to grant access\(^{50}\).

Application to VCAT to review a decision as to the charges to be paid for access to a document is allowed only if the applicant has obtained a certificate from the Ombudsman that the matter is of sufficient importance for VCAT to consider\(^{51}\).

There is some doubt whether VCAT has any power to review a decision that a document does not exist or that it cannot, after a thorough and diligent search, be located, particularly if the

\(^{48}\) 45 days for an initial decision (FOI Act s.21), and 14 days upon internal review (s.51(2)).
\(^{49}\) FOI Act s.53(2), (3).
\(^{50}\) FOI Act s.53(1).
\(^{51}\) FOI Act s.50(2)(c).
Ombudsman is satisfied that there was a thorough and diligent search\(^52\).

In reviewing a decision to refuse access, VCAT is limited to determining whether the document is subject to an exemption unless the so-called ‘public interest override’ applies. The public interest override gives VCAT the power to grant access to some types of exempt documents, if it considers the public interest requires that access should be granted\(^53\). It is not sufficient to find there is no public interest in access to the document being denied, or even that there is some general public interest in disclosure\(^54\). The public interest override does not apply to Cabinet documents, documents affecting security, defence or international relations, documents created by the Bureau of Criminal Intelligence, or documents containing third-party personal information\(^55\).

### 9.2 Ombudsman Review

The Ombudsman has power to enquire into or investigate administrative actions taken in any Government department or public statutory body\(^56\). Complaints are frequently made to the Ombudsman about a wide range of matters relating to the administration of the FOI Act. The Ombudsman does not generally conduct an investigation where the complainant has a right to apply to VCAT for review of a decision on an FOI request, unless the Ombudsman considers that in the particular circumstances it would not be reasonable to expect the complainant to resort to that right, or that the matter merits investigation in order to avoid injustice\(^57\). The Ombudsman therefore does not act as an alternative avenue of appeal to VCAT in respect of decisions under the FOI Act refusing applicant’s access to documents.

The FOI Act makes a number of specific references to the Ombudsman, leading to some ambiguity whether complaints to the

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\(^{52}\) See *Re Tovarlaza and Ministry of Housing and Construction Victoria* (unreported, Vic AAT, Judge Smith P, 9 October 1990); and commentary in Kyrou & Pizer, *Victorian Administrative Law*, at [2276] and [2490].

\(^{53}\) FOI Act s.50(4).

\(^{54}\) Secretary to Department of Premier and Cabinet v Hulls [1999] 3 VR 331.

\(^{55}\) FOI Act s.50(4). Note: the Bureau of Criminal Intelligence no longer exists.

\(^{56}\) Ombudsman Act, s.13.

\(^{57}\) Subsection 13(4)(a) *Ombudsman Act 1973*. 

36
Ombudsman about FOI matters are made and handled under the Ombudsman Act or the FOI Act.

The FOI Act makes reference to the Ombudsman in relation to:

- **Voluminous requests**

  Complaint may be made to the Ombudsman about a decision to refuse access to a document on the ground that the request is voluminous or that it is apparent from the request that the request relates only to exempt documents and that an edited copy could not be provided. If the complainant applies to VCAT for review of the decision, the Ombudsman must provide a written report to VCAT\(^{58}\).

- **Lost documents**

  Where the decision is that a document does not exist or cannot, after a thorough and diligent search, be located, the applicant must be informed of his or her right to complain to the Ombudsman\(^{59}\).

- **Charges certificate**

  An applicant who wishes to apply to VCAT for review of a decision as to the amount of a charge on access to a document must first obtain a certificate from the Ombudsman that the matter is of sufficient importance for the Tribunal to consider\(^{60}\).

- **Delay**

  An applicant may complain to the Ombudsman before or after expiry of the 45-day period, concerning failure to make a decision on an FOI request\(^{61}\). A certificate from the Ombudsman that there has been unreasonable delay operates as a deemed decision by the principal officer of the agency to refuse access, entitling the complainant immediately to apply to VCAT for review\(^{62}\).

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\(^{58}\) FOI Act s.25A(8)

\(^{59}\) FOI Act s.27(1)(e) FOI Act.

\(^{60}\) FOI Act s.50(2)(c).

\(^{61}\) FOI Act s.53(2).

\(^{62}\) FOI Act s.53(2) and 53(3).
• **Intervention**

The Ombudsman may intervene in an application before VCAT\(^63\).

The question of the source of power may at times be important. The bodies to which the FOI Act applies\(^64\) are defined differently from those in relation to which the Ombudsman is given power to enquire or investigate\(^65\). Whether the Ombudsman has power to enquire or investigate the handling of FOI requests by some agencies may therefore depend upon which Act is seen as the primary source of power. In particular, it is unclear whether complaints in relation to the handling of FOI requests by Victoria Police should be dealt with by the Ombudsman or the DPI\(^66\).

Complaints about the administration of FOI are frequently made to the Ombudsman in relation to lost documents, delay, and decisions to refuse access to documents. A large proportion of those complaints are found to be sustained or result in clarification or rectification.

As previously stated, the Ombudsman does not directly review decisions refusing to grant access to documents, so that the only form of external review of such decisions currently available is by VCAT.

### 9.3 Conciliation

In most cases, the FOI Act does not provide for conciliation of disputes about access to or amendment of documents. An exception is that an applicant may apply to the Health Services Commissioner for conciliation in place of internal review of a decision concerning a document containing health information relating to the applicant\(^67\). If the matter is not resolved by conciliation, the applicant may then apply to VCAT.

The review model adopted in many areas for government decisions provides for a conciliation mechanism, with some right to appeal decisions to an administrative tribunal. In some Australian jurisdictions,

\(^{63}\) FOI Act s.57.

\(^{64}\) See FOI Act s.5(1), definition of ‘agency’, and s.5(2).

\(^{65}\) Ombudsman Act s.13.

\(^{66}\) See Ombudsman Act s.13(3A) and PRA ss.86N, 86NA.

\(^{67}\) S.51(2), 51A, providing for conciliation under the *Health Records Act* 2001.
an Information Commissioner is appointed, with powers to receive and investigate complaints about FOI and to conciliate disputes. In New Zealand, the Ombudsmen have power to investigate and review FOI decisions and, if of the opinion that the request for information should not have been refused or that the decision is unreasonable or wrong, report their opinion and reasons to the appropriate department or Minister and to make such recommendations as they think fit. The Ombudsman’s recommendation is binding unless the Governor-General, by order in Council, otherwise directs within 21 days. There is a limited right to judicial review of decisions.

Anecdotal evidence suggests that conciliation is often an effective means of resolving many disputes at lower cost and with less delay than either formal investigation or administrative review.

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69 The Ombudsmen Act 1975 (NZ) provides for the appointment of more than one ombudsman; at present there are three.

70 Official Information Act 1982 (NZ) s.30(1).

71 Official Information Act 1982 (NZ) s.32(1).
9.4 Issues

38 Should the Ombudsman take a more interventionist approach to the review of FOI actions including:
   • Monitoring the response of agencies to FOI requests;
   • Monitoring the compliance of agencies with their obligations under the FOI Act; and
   • Reviewing the way in which decisions on FOI requests are made and the adequacy of reasons provided for FOI decisions?

39 Are the existing forms of review appropriate and adequate? If not:
   • Should internal review be retained or replaced by some form of external review?
   • Should the Act be amended to allow for mediation of disputes over decisions on FOI requests? If so, which agency should conduct such mediations?

40 Should the Act be amended to lower the public interest override test to allow VCAT to grant access to exempt documents where access:
   • “would not be contrary to the public interest”; or
   • “is in the public interest”,
   in place of the existing provision that access to an exempt document may be granted only where “the public interest requires that access to the document should be granted”?

41 Should the FOI Act be amended to clarify the source of the power of the Ombudsman and the Director, Police Integrity, to investigate complaints about FOI?
10. PRIVACY AND HEALTH RECORDS

10.1 Personal Information

A large proportion of FOI requests are for access to personal or health information relating to the applicant or, in some cases, a person the applicant is closely related to such as a child.

There are four statutory regimes governing access to personal information held by government and non-government bodies in Victoria. The FOI Act governs access to records held by government agencies, including personal information such as health records held by public hospitals. Access to personal health records held by non-government organisations is regulated by the Health Records Act 2001 (‘HRA’). Access to non-health personal information held by federal government and many private organisations is governed by the Privacy Act 1988 (Commonwealth). The Information Privacy Act 2000 (‘IPA’) governs access to non-health personal information held by any Victorian government body that is not subject to the FOI Act. However, the great majority of bodies that might otherwise be subject to the IPA are FOI agencies.

The IPA and the HRA give effect to a range of Information Privacy Principles (‘IPPs’) and Health Privacy Principles (‘HPPs’), expressed in broad terms and requiring the exercise of discretion. This contrasts with the generally prescriptive regime of the FOI Act. The IPA and HRA provide for investigation and conciliation of disputes, including about access to information and objections by third parties to the release of information relating to them, with a right of application to VCAT where conciliation fails to resolve the dispute.

It appears from initial consultations that these separate statutory regimes cause some confusion, with applications for access to records of personal information being made under the wrong Act from time to time. Those errors appear to be corrected quickly without causing significant problems. It was not clear whether the lack of a conciliation option under the FOI Act leads to less favourable outcomes than conciliation under the HRA.
**10.2 Issues**

42 Should there be a single statute regime governing access to information held by government in place of the three current Acts (FOI, Privacy and Health Records)?

43 Should requests by individuals for access to personal information about them held by government agencies be determined by reference to the Information Privacy Principles and Health Privacy Principles rather than under the FOI Act?

**10.3 Amendment of Personal Records**

The FOI Act provides that where a document containing information relating to the personal affairs of a person is released to an applicant who is the subject of the information or the next-of-kin of a deceased person, the applicant may request correction or amendment of any part of the information which is inaccurate, incomplete, out of date or where it would give a misleading impression.

The request must be in writing, give particulars of the errors and specify the amendment the applicant wants made. The agency is required to take all reasonable steps to notify the claimant of the decision as soon as possible but in any case not later than 30 days\(^2\).

If the agency refuses to amend the record, the agency must give reasons and the applicant may seek internal review or apply to VCAT for review of the decision in the same way as for a decision refusing an FOI request.

If VCAT upholds the agency’s decision, the applicant may require the agency to add a notation to the record specifying the aspect in which the applicant says the information is incomplete, incorrect, out of date or misleading\(^3\). There is no right to require a notation to be added unless there has been an application to VCAT, a process which may be relatively expensive and time-consuming for both the applicant and the agency. FOI officers consulted on this said there are relatively few requests for amendment of records. Most requests are refused and the making of a notation on the records is the most common outcome.

\(^2\) FOI Act s.43.

\(^3\) FOI Act s.46.
### 10.4 Issues

<table>
<thead>
<tr>
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11. OPEN GOVERNMENT

11.1 The Open Government Ethos

The FOI Act seeks to maximise the provision of information to the public, in part by creating a legal right to access and in part by encouraging agencies to make information available where they can properly do so (‘administrative release’). In consultation a number of FOI users said requests for policy-related information are generally refused if an exemption can be applied to the documents. Some FOI officers reported that such requests are assessed strictly, so that access will be denied if an exemption is available.

An overview of complaints suggests that excessive delays and unnecessary pedantry in clarifying requests may lead to an interference that at times the Act is administered in a compliance mode rather than with an open government ethos.

One example is a matter which was the subject of complaint to the Ombudsman. A request had been made for documents relating to the cost of a directory published by a department. The Department advised that no discrete documents existed in relation to the request. On investigation it was found the Department had published 2 directories, and documents existed relating to the cost of both directories. The Department had not attempted to explain the way in which information was held or the documents it did hold. On the Ombudsman’s intervention the Department agreed to reconsider the request as redefined to include both directories, and released the information sought.

Departments do make available a considerable amount of material explaining the various programs and services they administer, in free printed material, on the Internet and in material for sale. Departments also regularly provide access to some other documents by way of administrative release. For example, FOI officers reported that current Victorian Government employees can access their personnel records outside FOI. There does not appear to be any policy or guidelines within departments as to the basis on which categories of documents might be made available for administrative release and it

74 FOI Act ss.3, 13 and 16.
appears only limited categories of documents are made available on this basis.

The Department of Justice plays a coordinating role, particularly in gathering statistical information and reporting on trends in FOI. FOI officers in other departments report varying degrees of reliance on, or assistance from, DOJ. Each department has developed its own documents, internal guidelines and processes for handling FOI requests, in addition to the two Guidelines issued by the Attorney-General, and is responsible for the training needs of its staff.

Sections 62 and 63 of the FOI Act provide protection against actions for defamation or breach of confidence, and against any criminal offence, for providing access to a document where the Act requires or permits access or in the belief the Act required access to be given. The FOI officers consulted did not express any serious concern about their potential liability for administrative release of documents outside FOI, or where an exemption might apply.

At times agencies express reluctance to provide access to, or copies of, documents on legal grounds, such as that copyright in the document may be held by a third party. A recent decision of VCAT suggests that the Copyright Act allows agencies to provide document copies to applicants for the purposes of the FOI Act75.

My office is aware of instances where a department has justified refusal of access to documents in part on public interest grounds, on the basis that the information might mislead or confuse the public or that an informed public might damage certain programs. On other occasions, departments have justified non-disclosure of information on grounds of concern as to the effect disclosure might have on the future provision of information. On one occasion, after VCAT required a department to consult with the original providers of information, they advised they were happy, subject to deletion of one matter, for the information to be made public.

75 Minogue v Department of Justice [2004] VCAT 1194 (25 June 2004), per Morris J.
11.2 Issues

46 Should agencies give effect to section 16 by maximising the information provided in response to FOI requests?

47 Should agencies assist applicants by providing contextual material where the documents provided might otherwise be misleading or inadequate?

48 Should a wider range of material be available by administrative release or be published on websites or in printed form?

49 Should departments and other agencies formulate policies to guide decisions on what categories of documents will be made available by administrative release?

50 Should departments apply a public interest test in deciding whether to grant access to exempt documents? If so, should the test be to grant access:
   a. in any case where there is no clear public interest against disclosure; or
   b. in those cases where there is a public interest in disclosure; or
   c. only in those cases where the public interest in disclosure outweighs the basis for the exemption that otherwise applies?

51 Should the Department of Justice give greater direction and leadership both in the technical aspects of the FOI Act and in the approach taken toward handling FOI requests?

52 Do the limits of the protections under the Act discourage departments from giving access to documents? If so, should those protections be extended without improperly limiting the protection of personal and business information?
12. **LEGISLATIVE ISSUES**

12.1 **General**

It is reasonable to ask, 22 years after the FOI Act came into effect, if:

- The FOI Act is achieving its object and meeting the purposes for which it was introduced;

- Departments and other agencies interpret and apply the FOI Act in accordance with its spirit or in a manner which suits their own objectives; and

- More recently developed public law concepts relating to information and implementation of new legislation are adequately reflected in and given effect by the FOI Act and related Acts dealing with access to personal information.

I am concerned to identify those areas in which the object of the FOI Act is not achieved and the reasons why and to make recommendations for change including, where necessary, for legislative amendment. The broader question is whether the FOI Act has reached the point where it needs reconsideration, perhaps to be replaced by a general Act dealing comprehensively with all issues relating to access to information, or alternatively by separate Acts whose application depends on whether the information sought is “private” or “public” in character.

At present, the FOI Act generally governs rights of access to both “public” and “private” information held by government bodies, while the Health Records Act governs access to health information held by bodies that are not subject to FOI, which in the main are non-government bodies. The Information Privacy Act governs access to information of a “private” character held by those government bodies that are not subject to FOI.

An alternative may be to provide a uniform rights of access to information which is “private” in character, such as health records and other personal information, regardless of the nature of the body holding the information and with the FOI Act (or a replacement Act) providing for rights of access to government-held information which is “public” in character. These are ultimately questions for government.
The question of what action can be taken to encourage departments and other agencies to give full effect to the FOI Act and to adopt an open-government ethos to the release of information may lead to recommendations both within the existing legislative framework and for legislative change. Much may be accomplished through consideration of the existing review mechanisms. I also recognise that agencies face many practical difficulties in giving effect to the FOI Act, and that these may be reduced by changed practices by some regular users of FOI or by amendments to the legislation.

Most FOI officers expressed the view that the FOI Act is out of date in some respects, such as the requirements under Part II, and that it needs extensive review. While there were varying opinions as to whether, and how, the Act might be varied, there was unanimous opinion that there are numerous problems arising from the drafting of the Act and the numerous amendments made to it over the 22 years it has been in operation. Some areas, such as the operation of section 33 and third-party consultation requirements, were generally agreed to cause operational difficulty or confusion. There are also various typographical errors and minor problems of consistency in the Act which could be corrected in any review of the legislation, but which do not cause operational difficulty.

Some concerns have been raised as to whether some of the exemptions in the Act are too wide or too narrow. I do not intend to pursue those concerns, save to the extent they relate to a lack of clarity in the Act.

Many of the difficulties with the Act and suggestions for amendment can be found in various commentaries on the Act (for example Victorian Administrative Law by Kyrou & Pizer).

12.2 Issue

53 Should there be a comprehensive review of the FOI Act to remove anomalies and drafting errors and to ensure its continuing functionality?
APPENDIX 1: STATISTICS

Use of FOI

The Attorney-General publishes an annual report on the operation of the FOI Act\textsuperscript{76}. The report for 2003-4\textsuperscript{77} records information from 378 agencies which are subject to receiving FOI requests. The 10 Departments (including Victoria Police) received less than 22\% of the total number of requests. Victoria Police receive more FOI requests than any other agency (2,198 in 2003-4), but only 4 Departments (DHS, DOI, DOJ and DET) are listed in the ‘Top 30’ agencies.

Review of Decisions

The 2004 FOI Report indicates that of FOI applications made in 2003-4, the 10 Departments together with Victoria Police received almost 22\% of FOI requests, 59\% of requests for Internal Review and 64\% of applications to VCAT in 2003-4. These figures show a disproportionate number of applications for review of decisions by the Departments and Victoria Police when compared with other agencies.

The 2004 FOI Report records 400 decisions on requests for internal reviews, of which 116 (29\%) varied the initial decision so as to provide some or all of the documents in dispute. A higher proportion (39\%) of decisions were varied on internal review by the 10 Departments.

Information obtained from VCAT indicates that in 2003-4, approximately 133 applications\textsuperscript{78} were made to VCAT for review of decisions refusing access to documents, of which 16 applications were by Members of Parliament. Those applications however took on average more than twice as long to resolve as the average for all applications (225 days, compared with an average of 101 days for all applications). Of the 16 applications by Members of Parliament, 5 (31\%) were determined at hearing with orders for full or partial release of the documents in 4 of the 5 cases, and in another 7 matters some or all documents were released before the final scheduled hearing. Two matters were settled on undisclosed terms, and another 2 were pending when the information was made available in February 2005.

\textsuperscript{76} FOI Act s.64(1).
\textsuperscript{77} Annual Report by the Attorney-General of Victoria on Freedom of Information for 2004.
\textsuperscript{78} The figure of 133 excludes a number of apparently invalid and otherwise anomalous applications.
Delays

The following table shows the time taken by departments to make decisions on access in 2003-4, based on information provided by DOJ. The figures exclude time taken in negotiating over requests regarded as unclear or potentially voluminous which, as discussed in this paper, can be significant.

<table>
<thead>
<tr>
<th>DEPARTMENT</th>
<th>NO. OF DECISIONS</th>
<th>&lt; 46 DAYS</th>
<th>46 – 90 DAYS</th>
<th>&gt; 90 DAYS</th>
</tr>
</thead>
<tbody>
<tr>
<td>DTF</td>
<td>82</td>
<td>100.0%</td>
<td>0.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>DIIRD</td>
<td>80</td>
<td>70.0%</td>
<td>28.8%</td>
<td>1.3%</td>
</tr>
<tr>
<td>DSE</td>
<td>88</td>
<td>65.9%</td>
<td>33.0%</td>
<td>1.1%</td>
</tr>
<tr>
<td>DPI</td>
<td>41</td>
<td>97.6%</td>
<td>2.4%</td>
<td>0.0%</td>
</tr>
<tr>
<td>DHS</td>
<td>1252</td>
<td>42.7%</td>
<td>19.7%</td>
<td>37.5%</td>
</tr>
<tr>
<td>DOJ</td>
<td>244</td>
<td>51.6%</td>
<td>40.2%</td>
<td>8.2%</td>
</tr>
<tr>
<td>DOI</td>
<td>273</td>
<td>67.0%</td>
<td>28.9%</td>
<td>4.0%</td>
</tr>
<tr>
<td>DPC</td>
<td>81</td>
<td>95.1%</td>
<td>3.7%</td>
<td>1.2%</td>
</tr>
<tr>
<td>DVC</td>
<td>38</td>
<td>63.2%</td>
<td>36.8%</td>
<td>0.0%</td>
</tr>
<tr>
<td>DET</td>
<td>225</td>
<td>71.6%</td>
<td>28.4%</td>
<td>0.0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>2404</td>
<td><strong>55.82%</strong></td>
<td><strong>23.21%</strong></td>
<td><strong>20.97%</strong></td>
</tr>
</tbody>
</table>

Victoria Police does not keep records of the time taken to process claims but instead maintains a record of the age of all requests in process. In the period from July 2001 to September 2003, the number of current FOI requests over 45 days held at any time by Victoria Police (that is, requests received but not decided within 45 days) fluctuated between about 15 to 100. Since October 2003, the number of requests has risen considerably, reaching a peak of over 450 in November 2004. Since then the number of current requests not determined in 45 days has fallen to under 150.
APPENDIX 2: SUMMARY OF ISSUES

Part II Statements

1. Should compliance with Part II be enforced?
2. Should Part II be amended to allow or require Part II information to be published on agency websites?
3. Should there be standards for the content of departmental Annual Reports and websites to ensure compliance with Part II (or with an amended Part II) and to ensure adequate information is published for the public to view and participate in the process of forming policy and in reviewing the performance of government agencies?
4. Should Part II be amended to better reflect the type of information needed by the public? What information is needed?
5. Should departments give access to indexes or data bases listing documents or categories of documents they hold to enable the public to identify documents to which they may wish to request access under FOI?
6. Should Part II be repealed?

Processing Requests

7. Should applicants be encouraged to make requests for documents containing specific information rather than ‘fishing’ requests for all documents relating to a subject?
8. Should section 25 be amended to clarify whether an agency should disclose documents in their entirety or only those parts which are relevant to a request?
9. Should applicants have a right to consult direct with the manager who has responsibility for the program area relevant to the request over issues such as clarification of requests and the scope of potentially voluminous requests?
10. Should agencies provide lists or indexes of documents or classes of documents which they hold to assist applicants to make informed requests for access to documents?

11. Should agencies provide a list of documents or classes of documents relevant to a request as part of the provision of assistance under both section 17(3) and section 25A(6)?

12. Should the FOI Act be amended to enable agencies to nominate a reasonable time in which to respond to a request in cases where to respond within 45 days would unreasonably divert resources from other activities? If so, should there be a right to complain to the Ombudsman, or to apply to VCAT, where the time specified is unreasonable?

13. Should agencies release documents that are identified as relevant to a request within a reasonable time, even if not all relevant documents have been located, with the remainder to be provided as they become available and are assessed for release?

14. Should responsibility for assessment and determination of FOI requests be devolved to managers within the program areas rather than being handled by specialised FOI officers?

15. To justify rejection of a request as voluminous, should the agency conduct a sample search?

16. Should records management systems be designed and implemented by departments to assist in FOI search processes?

17. Should there be direct communication between program areas and applicants where it is necessary to clarify requests?

18. Should there be active monitoring by the Ombudsman of time taken to process requests and intervention when necessary to ensure requests are handled expeditiously and without unnecessary delay?

Reasons for Decision

19. Should the reasons given for refusal of access be detailed? If so, what level of information should be given? Should a
statement similar to the VCAT statement and schedule of exempt documents be provided?

20. Should reasons for decisions that a document cannot be found or that no document exists state what enquiries have been made; what searches conducted; and any other facts relevant to the conclusion that the document cannot be found or does not exist?

21. Should agencies indicate what related documents may exist in order to assist the applicant when a decision is made to refuse access to documents or that the requested document cannot be found or does not exist?

22. Should agencies be required to provide a statement of reasons under section 27 where they determine that a request is not valid, for example because of a lack of clarity?

23. Should a section 27 statement of reasons state the public interest considerations on which a decision that a document is exempt from disclosure is made under section 29 (matters communicated by other States or the Commonwealth), section 35(1)(b) (confidential communications) or section 36 (disclosure contrary to the public interest)?

**Constructive Possession**

24. Should departments and other agencies have protocols to ensure a proper search for documents which may be held by contractors in response to FOI requests, where the department does have constructive possession?

25. Should there be guidelines to ensure departments and other agencies have a right to possession of documents created by contractors engaged to perform public functions? Should this be written into contracts?

**Third Party Consultation**

26. Should the 60-day reverse-FOI application period be shortened?
27. Should agencies be able to require applicants to provide proof of identity where the decision is to give access to information personal to the applicant?

28. Should agencies, in consulting with third parties on the release of personal information under section 33, or business information under section 34, be able to disclose the identity of the applicant, or to ask applicants whether they consent to their identity being made known to any third party who may need to be consulted?

29. Should agencies have regard to the identity of the applicant and the intended use of the information in determining if the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of a third party?

30. Should a definition of ‘next of kin’ be provided for in section 33(3)?

31. Should the FOI Act be amended to extend the 45-day period where third-party consultation is required? If so, should it extend the 45 days by a fixed period, for example of 30 days, or should it enable agencies to nominate a reasonable time in which to respond to the request to allow for consultation?

32. Should there be a right to complain to the Ombudsman, or to apply to VCAT, where the time specified is believed to be unreasonable?

33. Should agencies be allowed some discretion to give access to documents containing third-party personal information without consultation in cases where that information is already known to the applicant?

34. Should section 33 be amended to provide that reverse-FOI will not apply where the third party consents to the release of information?

35. Should section 35 be amended to provide for consultation before deciding that the release of information would be contrary to the public interest?
Access Charges

36. Should there be standard policies, within departments or across the whole of government, for when access charges should be waived? Is it appropriate for access charges to be used as a bargaining tool in dealing with FOI requests?

37. Should section 22(1)(g) be amended to define a ‘routine request for access to a document’ for which access charges are to be waived?

Review of Decisions

38. Should the Ombudsman take a more interventionist approach to the review of FOI actions including:

• Monitoring the response of agencies to FOI requests;
• Monitoring the compliance of agencies with their obligations under the FOI Act; and
• Reviewing the way in which decisions on FOI requests are made and the adequacy of reasons provided for FOI decisions?

39. Are the existing forms of review appropriate and adequate? If not:

• Should internal review be retained or replaced by some form of external review?
• Should the Act be amended to allow for mediation of disputes over decisions on FOI requests? If so, which agency should conduct such mediations?

40. Should the Act be amended to lower the public interest override test to allow VCAT to grant access to exempt documents where access:

• “would not be contrary to the public interest”; or
• “is in the public interest”,

in place of the existing provision that access to an exempt document may be granted only where “the public interest requires that access to the documents should be granted”? 
41. Should the FOI Act be amended to clarify the source of the power of the Ombudsman and the Director, Police Integrity, to investigate complaints about FOI?

**Privacy And Health Records**

42. Should there be a single statute regime governing access to information held by government in place of the three current Acts (FOI, Privacy and Health Records)?

43. Should requests by individuals for access to personal information about them held by government agencies be determined by reference to the Information Privacy Principles and Health Privacy Principles rather than under the FOI Act?

44. Should a person be able to request correction of personal records without first obtaining access to them under an FOI request?

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Review of the Freedom of Information Act
Discussion Paper

May 2005