

# Freedom of Information

# Review

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**Editor:** Rick Snell  
tel 03 62 26 2062 fax 03 62 26 7623  
email: R.Snell@utas.edu.au  
Web site:  
<http://www.foi.law.utas.edu.au/>

### Reporters

Peter Wilmshurst (NSW), Dannielle Evans (Vic.), Emma Sundborn (Cth)

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## Comment

In a recent conference paper in New Zealand, Grant Liddell attempted a quick overview of developments in freedom of information, personal access and data protection law. His paper highlighted the dramatic increase in the number of countries enacting data protection, privacy and Fol laws. In particular, using the work of David Banisar from Privacy International, Liddell points out that now 57 countries (as of March 2002) have Fol laws enacted or proposed and that 10 countries have enacted Fol laws since 2000.

This outbreak of adoption of open government statutes is a surprising phenomenon. In the early 1990s there were only a handful of Fol laws on the statute books. In most countries there was a feeling as Liddell describes it, that these laws were 'for past times'. Fol laws were considered dated, under strain from government restructuring, and policy failures in achieving anything other than a slow way of accessing personal information.

Yet we are now witnessing a frenetic round of activity that sees proposals for Fol being floated from countries at all corners of the globe. Liddell argues that it is the new democracies of Eastern Europe and elsewhere that 'appear to be taking the greatest strides towards open government', whereas countries like the UK, Australia, Canada and the USA (especially since September 11) seem to be resiling from their already lukewarm flirtation with access laws.

On 22 April 2002, President Megawati of Indonesia opened an International Conference on Fol at the Presidential Palace. Her opening speech disappointed many Indonesians, especially those from NGOs, due to its refrain of yes we need Fol but we need to proceed cautiously and protect other values. Yet what is remarkable is that the President opened the conference and that there are two proposals for Fol being considered by the Parliament (one government bill and another presented by a number of parliamentary parties).

Yet this flurry of legislative activity and conferences, like that in Indonesia, reveals a major deficiency in the construction of democratic and civic infrastructure, namely a dearth of comparative studies. At the conference the Indonesians, whether NGOs, government officials, activists or the media were keen to explore the experiences of other countries like Thailand, Japan, South Korea, Sweden and Australia. Yet, in the main, the discussion was limited by the fact that most of the material was presented in singular country case studies. In part this deficit in comparative studies is a consequence of the rapid spread of Fol (Thai and Japanese academics have barely had time to realise that Fol legislation is now operational), a general absence of comparative study in the area of administrative law and the general optimism of reformers that open government just needs the right switch (legislation) to be flicked and that Fol is a readily transplantable law.

There is an urgent need for academics, postgraduates, government officials and NGOs to develop comparative studies in this area which include, but extend beyond, singular case studies or collections of case studies. These studies will not only inform the policy development processes of countries yet to adopt Fol legislation but will also feed back into reforms of veteran jurisdictions like Sweden, Canada, Australia, the United States and New Zealand.

[R.S.]

# Freedom of information legislation and open and accountable government

## A comparison between Victoria and Western Australia

One of the first items on the legislative agenda of the Victorian Labor government following the state election in Victoria in October 1999 was the amendment of Victoria's *Freedom of Information Act 1982*. According to the Attorney General, Mr Rob Hulls, this 'reaffirmed the Bracks Government's commitment to open and accountable government'. This article examines the amendments to the Victorian Act, and compares (in terms of its contribution to open and accountable government) the structure of the new regime with the *Freedom of Information Act 1992* in Western Australia, perhaps one of the better, but by no means perfect, Fol regimes.

The conflict between the needs of citizens and the needs of governments with respect to information release creates a tension that is resolved through the Freedom of Information (Fol) structure put in place in any particular jurisdiction. The nature of the resolution will be determined by the balance of power between the citizens and the government, and the prevailing legal and political institutions in the jurisdiction.

The political context within which government operates, however, creates a general presumption by ministers and agencies that secrecy serves government interests rather than openness. In that environment there will always be a culture within government that is inimical to the notion of freedom of information.

This article examines the significant differences in the legislative structures that set the framework for the delivery of Fol in Victoria and in Western Australia. In Victoria the relevant legislation is the *Freedom of Information Act 1982* (Vic) (the Victorian Act), and in Western Australia it is the *Freedom of Information Act 1992* (WA) (the Western Australian Act). A particular focus is on the amendments designed ostensibly to offset changes made by the former Kennett government in Victoria. These amendments were believed to have shifted the balance of the Fol system in Victoria towards one favourable to that government's perspective on access. The Bracks government has claimed that their amendments shift the balance back to one favourable to applicants.

The conclusion from this review is that both jurisdictions would benefit by the adoption of key elements of each other's Fol structure. The culture of secrecy within government is so strong and so strongly defended that at a minimum the following structures would have the effect of furthering the objectives of Fol:

- an agency such as the of the Information Commissioner in Western Australia to actively promote the principles of Fol;
- the same agency should also deal with appeals from the decisions of government agencies over Fol requests;
- the range of exempt documents should be narrowed;
- appeals to formal tribunals involving costly legal representation should be limited only to points of law (the cost to the applicant should be kept to a minimum, therefore any necessity for legal representation should be avoided);
- a broad public interest test on whether otherwise exempt documents should be made accessible;

- secrecy provisions that override Fol should only be contained in the Fol legislation and not in other enactments;
- the public should be actively informed about the information that is available in government agencies

### The overall framework in each jurisdiction

In both Western Australia and Victoria an application for access is made to the appropriate agency. The agency makes the initial decision about release and the form of release is based on whether the application requests matter that is deemed to be exempt under the legislation. In both jurisdictions if the applicant is not satisfied with the outcome there is scope for a review of the initial decision by a senior official within the agency (*Fol Act 1992* (WA), Part 2 Division 5 and Part 3 Division 2; *Fol Act 1982* (Vic), s.51). Only after the internal review do significant differences in process emerge between the states.

In Western Australia an applicant may make a complaint to the Information Commissioner (*Fol Act 1992* (WA), Part 4 Division 3). The Commissioner reviews the application and makes a decision. A number of categories of exempt matters in Western Australia have limitations on the exemptions. The limitations operate either through the use of definitions of what is not exempt even though it may fall within a general category of exempt matter, or because its release on balance is in the public interest (*Fol Act 1992* (WA), Sched. 1). This public interest test, where it is applicable, enables the Information Commissioner to exercise discretion to release otherwise exempt matter. The only appeals from the Commissioners decision are to the Supreme Court of Western Australia and then only on matters of law (*Fol Act 1992* (WA), Part 4 Division 5).

In Victoria where an applicant is not satisfied with the outcome of the processing of an application a complaint may be made to the Ombudsman (*Fol Act 1982* (Vic), s.53(2)). Where a decision on access is not satisfactory to the applicant, a review of the decision by the Victorian Civil and Administrative Tribunal (VCAT) may be requested (*Fol Act 1982* (Vic), s.50). The VCAT can also make use of a public interest test to grant access to a document *Fol Act 1982* (Vic), s.50(4). Appeals to the Supreme Court from decisions of the VCAT can only be made on matters of law (*VCAT Act 1998* (Vic) s.148).

### The amendments made to the Victorian structure by the Kennett and Bracks governments

In 1993 the Kennett government amended the Victorian Act by passing the *Freedom of Information (Amendment) Act 1993* (58/1993). The amendments dealt with the extension of the Victorian Act to local government, and, importantly for this article, amendments that had the effect of restricting access to government information.

The increased restrictions came about first through the insertion of s.25A into the Victorian Act. Section 25A gave agencies and ministers the power to refuse access where the request 'would substantially and unreasonably divert the resources' of the former or 'substantially and unreasonably interfere with the performance of the ... functions' of the latter (*Fol Act 1982* (Vic), s.25A(1)(a) and (b)). The new section

also gave agencies and ministers the power to refuse access to documents without having to identify them physically if the description in the application gave rise to the appearance that the documents were exempt, or could not be edited in a way that would permit access. The powers given by this new section were subject to complaint to the Ombudsman and review by the VCAT.

This amendment, however, only brought the Victorian Act into line with the provisions in s.20 and s.31 of the Western Australian Act. Section 20 enables an agency to refuse to deal with an application if it would 'divert and substantial and unreasonable portion of the agency's resources from its other operations'. Section 31(2) provides that an agency 'may give written notice to the applicant that the agency neither confirms nor denies the existence ... of such a document but that, assuming the existence of such a document, it would be an exempt document ...'

The second and more contentious amendment was the widening of the definition of a Cabinet document. In the original Victorian Act s.28 made a document exempt if it was:

(b) a document that has been prepared by a minister for the purpose of submission for consideration by the Cabinet;

This was replaced by:

(b) a document that has been prepared by a minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet or a document which has been considered by the Cabinet and which is related to issues that are or have been before the Cabinet;

and

(ba) a document prepared for the purpose of briefing a minister in relation to issues to be considered by the Cabinet;

The Secretary of the Department and the Premier always had the power to issue a certificate establishing that a document was an exempt document because it was a Cabinet document. The 1993 amendments added the extra constraint that the issuing of such a certificate was not open to complaint to the Ombudsman. These amendments dealing with cabinet documents were also retrospective in that they applied to all documents created before or after the amendment.

Even though the changes introduced by the Kennett government appeared to add to the restrictions on access, they were possibly less onerous than the restrictions set out in Schedule 1 of the Western Australian Act dealing with Cabinet and Executive Council documents. Schedule 1, clause (1)(d) exempts matter if it:

- (d) was prepared to brief a Minister in relation to matters —
  - (i) prepared for possible submission to an Executive body; or
  - (ii) the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body ...

Wording such as 'possible submission', 'decision of a kind generally made' and 'policy of a kind generally endorsed' is vague and imprecise in comparison to the wording in the Victorian Act. It is likely that more documents would be exempted by the Western Australian Act.

The Bracks Labor government was elected in Victoria in October 1999. Almost immediately amendments to the FoI legislation were introduced into the Victorian Parliament; these were passed and came into operation on 1 January 2000 as the *Freedom of Information (Miscellaneous Amendments) Act 1999* (57/1999). The amendments had the following effect:

- Repeal of Part IIIA – this was a short-lived Part as it had only been incorporated into the *FoI Act* in mid 1999 by the

*Freedom of Information (Amendment) Act 1999* (38/1999). The repealed Part IIIA exempted documents containing personal information about persons other than the applicant. Personal information was defined as information identifying any person or disclosing their address or location or information from which this could reasonably be determined (s.27A). Documents in this context included such items as letters and memos. During the second reading debate on 38/1999 Mr Bracks, then leader of the Opposition, said, 'It establishes an entirely new stage of the FoI process in a case where a document identifies a person. Most documents of interest held by the government mention persons.'<sup>1</sup> Documents in this context include such items as letters and memos. The repealed provisions allowed the applicant to apply to the VCAT for an order that access be granted, but any application to the VCAT involved an application fee and the possibility of legal representation.

- Amended s.28 'Cabinet documents' by limiting the exemption to include only those documents being part of a formal cabinet decision, thus preventing other documents being exempted by simply attaching them to a cabinet submission (s.28(1)(b)). Section 28(ba) remains without amendment.
- Amended s.33 'Document [sic] affecting personal privacy'. This amendment was a response to the repealing of Part IIIA and allowed a discretion for refusal of disclosure containing personal information where it 'would, or would be reasonably likely to, endanger the life or physical safety of any person' (s.33(2A)).
- Amended s.34 'Documents relating to trade secrets etc'. This section, dealing with commercial confidentiality, was amended to limit the amount of exempt information previously covered. The reworded section now separates trade secrets from 'other matters of a business, commercial or financial nature'. Trade secrets remain exempt, but the 'other matters' are now only exempt if disclosure 'would be likely to expose the undertaking unreasonably to disadvantage' (s.34(1) as amended). The previous wording of the section was interpreted to exempt the 'other matters' as well as trade secrets.
- Inserted a new s.53A 'Notification of reviews regarding documents affecting personal privacy'. This relates to the situation where an application for disclosure is refused on the basis that disclosure would involve the unreasonable disclosure of the personal affairs of a person under s.33. If an application is made to the VCAT to review the decision, the agency or Minister must give written notice to the person to whom the information relates.
- Inserted a new s.65AB 'Report to Parliament by Minister'. Where a Minister decides to appeal a decision made by the VCAT, the Minister must make a report to Parliament setting out the reasons for seeking leave to appeal and these reasons must also be published in the Government Gazette.
- Inserted a new s.68 that has the effect of removing the fee charged for reviews of deemed refusals. Deemed refusals arise where an agency fails to respond to an application, or fails to do so within the time limit, and the applicant is then required to apply to the VCAT to obtain access. At the time of the amendment the fee, brought in by the Kennett government, was \$170.

These amendments would appear to improve the ability of the FoI legislation in Victoria to achieve the objectives of open and accountable government.

## The treatment of the public interest in the Victorian and Western Australian approaches to FoI

In the Victorian legislation the exemptions are incorporated into the body of the Act as Part IV – Exempt Documents. In Western Australia documents are exempt if they fall into the category of ‘Exempt Matter’ (Schedule 1), or are the documents of an ‘Exempt Agency’ (Schedule 2), or are defined as not the documents of an agency in the Glossary (Schedule 2). One of the most significant differences is immediately apparent, and that is the blanket exemption given to a number of agencies in Western Australia by virtue of Schedule 2. In the Victorian Act the one blanket exemption, for documents created by the Bureau of Criminal Intelligence, is buried in s.31 ‘Law Enforcement documents’. Blanket exemptions run counter to the purposes of FoI as all agencies should be accountable, and information held by them made available to the public unless subject to a specific content exemption. The Information Commissioner in Western Australia has recommended with respect to Schedule 2 of the Western Australia Act that Parliament should review the status of exempt agencies so as to articulate clear public policy reasons for the inclusion of any agency.

The types of documents, or matters, that are exempt are broadly the same in the two jurisdictions. The two schemes differ, however, in the application of the public interest test as a curb on exemptions. In the Western Australian Act most of the clauses specifying ‘exempt matter’ are subject to a ‘Limits on exemptions’. With the exception of Clause 1 ‘Cabinet and Executive Council, Clause 6 ‘Deliberative Process’, and Clause 7 ‘Legal Professional Privilege’ the limits on exemptions include a provision stating that the relevant matter is not exempt if its disclosure would, on balance, be in the public interest.

It is more likely that the onus will fall on the applicant to show that disclosure is in the public interest, a difficult task made more difficult because there are no guidelines for ascertaining the meaning of ‘in the public interest’. The issue of public interest has been raised by the Commission on Government and by the Information Commissioner in Western Australia.<sup>2</sup> Both recommended that, with the exception of Cabinet documents (Clause 1), the Western Australian Act should be amended to make provision for the application of a public interest test to all of the categories of exempt matter.

In the Victorian Act there is no consistent application of the public interest in Part IV. Two sections say a document is exempt if disclosure under the Act would be contrary to the public interest (*FoI Act 1982* (Vic), ss.29 and 30). Compared with Western Australia, this reversal of the onus means the starting point in Victoria is that the information is to be disclosed and the agency has the onus of showing that the public interest favours non-disclosure. Three other sections in the Victorian Act use the words ‘reasonably’ or ‘unreasonably’, but there is no general definition of ‘reasonable’ or ‘unreasonable’. One of these sections, s.33 ‘Document [sic] affecting personal privacy’, has a new subsection (2A), incorporated as part of the Bracks government amendments, which outlines what ‘must’ be taken into account when the agency or Minister determines whether disclosure is unreasonable. Another of these sections, s.34 ‘Documents relating to trade secrets etc.’, gives indicators to be taken into account when determining ‘whether disclosure would expose an undertaking unreasonably to disadvantage’ for the purposes of that particular section (s.34(2)).

The VCAT has interpreted ‘unreasonableness’ to require a balancing of the respective interests, that is the interests for and against disclosure.<sup>3</sup> Section 36 of the Victorian Act is

headed ‘Disclosure contrary to the public interest’, but this is limited by the section to specific areas such as the economy of Victoria and of local councils. Overarching most of these provisions, however, is s50(4), known as the ‘public interest override’. This section gives the VCAT the discretion to grant access to exempt documents where the VCAT concludes that disclosure is in the public interest. The documents excepted from the operation of s50(4) are Cabinet documents, documents created by the Bureau of Criminal Intelligence and documents affecting personal privacy. While this ‘public interest override’ works in favour of FoI, the fact is that it requires an application to the VCAT, with all the potential for further delay and the involvement of legal counsel representing the Minister.<sup>4</sup>

## The promotion of access to and supply of information

As noted earlier, the role of the Information Commissioner in Western Australia is to determine complaints against decisions over access. In addition the Information Commissioner deals with applications for amendment of personal information. She has other powers and responsibilities that effectively make her an advocate for freedom of information.

The Governor appoints the Information Commissioner, and the position is not an office in the Public Service. That makes it free of ministerial direction and subject directly to the Parliament. The Speaker of the Legislative Assembly in the Parliament administers the oath of Office. The other powers of the Commissioner (set out in s.63) deal with:

- decisions made with respect to s.32 and s.33 dealing with waiving the need for consultation with third parties over personal information or commercial or business information (s.35),
  - decisions dealing with destruction of documents (s.48),
  - ensuring government agencies are aware of their responsibilities under the legislation,
  - ensuring that the public is aware of its rights under the legislation,
  - providing assistance to both the public and agencies on matters relevant to the legislation,
  - The responsibility to bring evidence of misconduct or breach of duty to the notice of the appropriate authorities.
- There is also a general power granted under s.64:

The Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of the Commissioner’s functions.

In dealing with the main function of resolving complaints, the Commissioner has considerable discretion over the manner in which complaints are considered. Section 70(6) gives the right to those persons required or permitted to appear before the Commissioner to have representation, including legal representation. The powers of the Commissioner are also substantial with respect to demanding appearance or the supply of documents to the Commissioner. Section 83 provides for penalties in cases of non compliance.

Unlike the Ombudsman in Victoria, the Information Commissioner has the power to examine those applications refused on the basis that an exemption certificate under Division 4 has been issued by the Premier. Division 4 exemption certificates establish that a document would be exempt because it deals with Cabinet deliberations. If the Commissioner comes to the decision that there were not reasonable grounds for issuing the certificate it ceases to have effect unless the Premier confirms the certificate. The Premier is

obliged to give reasons for the confirmation to the Parliament (s.77(4)-(6)).

The advocacy role of the Information Commissioner, and the removal of decision making over access from a formal, costly and time consuming legal process such as the VCAT, gives rise to a structure that is probably far more conducive to the objectives of open and accountable government.

### **Provision of information to the public about the existence of documents, including Cabinet registers of decisions**

The Western Australian Act does not give assistance in identifying documents to a claimant. There is the assumption that the claimant knows with some precision the document being sought, or at least enough to enable the requested documents to be identified (s.12). There is an obligation on an agency to help an applicant make an application (s.11). If dealing with an application requires 'substantial and unreasonable' resources from the agency, the application may be returned to the applicant for refinement. If it subsequently still requires 'substantial and unreasonable' resources, the agency may refuse to deal with the application (s.20).

Part 5 of the Western Australian Act requires agencies to prepare a publicly available 'information statement'. This statement contains information about the functions of the agency, and information held by the agency that is available to the public without the use of the Fol legislation. It also contains an outline of the procedures to be followed for access under Fol legislation.

Part II (ss.7-12) of the Victorian Act is far more comprehensive in requiring agencies to list documents in their possession, including consultants' reports, reports of interdepartmental committees, and environmental impact statements prepared within the agency (s.11). Section 10 requires a register of the details of Cabinet decisions, though discretion is given to the Premier as to the content. Part II the Victorian Act thus gives far more guidance to the public than the Western Australian Act.

### **The treatment of secrecy provisions in agency specific legislation relative to the Fol legislation**

One of the problems arising from Fol legislation is the issue of secrecy provisions in other enactments. These secrecy provisions may thwart the aims of Fol by exempting material outside the framework of Fol legislation. Section 38 of the Victorian Act simply confirms that any secrecy provisions in other enactments will effectively exempt the relevant documents. To find out what documents are exempt in addition to those listed by the Act itself would mean trawling through the statute books.

In Western Australia the Commission on Government (COG) recommended that 'existing statutory secrecy provisions should be repealed and the freedom of information regime should be the governing legislation for determining when information held by the government should not be disclosed'.<sup>5</sup> At the time there were more than 100 Acts and regulations containing secrecy provisions restricting the disclosure of information held by government agencies. Section 8 of the Western Australian Act provides for it to override the secrecy provisions in other legislation unless the operation of the Act is expressly ousted by the other legislation. This applies to Acts passed before or after the commencement of the Fol Act. Further limited sanction is given to secrecy provisions in other legislation by Clause 14 of Schedule 1 of the Western Australian Act, which is entitled 'Information protected by certain statutory provisions'. This

clause allows for the exemptions of matter mentioned in certain sections of other specified legislation, for example a number of sections in the *Equal Opportunity Act 1984 (WA)* are included. State Cabinet has instituted a procedure so that any secrecy provisions contained in other Acts will also be included in the Western Australian Act.

### **The time frame for the process of acquiring information**

Where the request is for access to information, the Western Australian Act requires the agency to provide written notice of a decision within 45 days after the application is received. If it is not possible for the agency to comply with the 45 days, s.13 permits an extension of time by agreement between the agency and the applicant or, if allowed, by the Information Commissioner. In certain defined circumstances an applicant may request an agency to review a decision (s.39 and s.40) and the agency may confirm, vary or reverse the decision under review (s.43). The agency must respond within 15 days, or in a longer timeframe if the applicant agrees, or it will be taken to have confirmed the original decision (s.43). Where the application is for amendment of personal information, the response must be made within 30 days (s.49). Time delays are a way in which agencies may attempt to frustrate the objectives of the Fol legislation. The COG recommended that s.13 of the Western Australian Act be amended to reduce the 45-day time frame to 14 days.<sup>6</sup> In the mandatory review of the Western Australian Act carried out in 1997 the reviewer suggested an appropriate response time might be 30 days.<sup>7</sup>

With respect to access applications, the Victorian Act provides that the applicant should be notified of a decision 'as soon as practicable' but no later than 45 days after the request has been received (s.21). The deadline for notifying a decision on the amendment of personal records is 'as soon as practicable' but no later than thirty days after the application (s.43). Where no response is made within the time allowed, the agency is deemed to have made a decision refusing to grant access (s.53(1)). In the circumstances where internal review by the agency is permitted by the Act, the response must be within fourteen days or the applicant may apply to the VCAT for a review of the decision (s.51).

### **The scope for appeals to the courts or other final decision makers**

Before seeking external review of a decision, an applicant in both jurisdictions must first seek internal review where this is required by the relevant Fol legislation.<sup>8</sup> In her report of 1996-1997 the Information Commissioner recommended that the Act be amended so that internal review was not a prerequisite to external review.<sup>9</sup> In Western Australia the external review is carried out by the Information Commissioner; in Victoria it is the VCAT. As noted above, in Victoria the VCAT has the ability to grant access to exempt documents by virtue of the public interest override. In addition in Victoria an applicant may make a complaint to the Ombudsman. Under s.57 the Ombudsman may also intervene on behalf of the applicant before the VCAT, except for applications brought under s.34 'Documents relating to trade secrets etc'.

Following the decision of the Information Commissioner in Western Australia, there is the right of appeal by any party involved to the Supreme Court on any question of law, and in certain other defined circumstances (s.85). In Victoria the decisions of the VCAT may be appealed, on a question of law, to the Trial Division of the Victorian Supreme Court if the Trial Division gives leave to appeal.<sup>10</sup> Where an appeal to the

Supreme Court is to be made the Minister or responsible Minister must inform the Parliament and the public of the reasons through their publication in the Government Gazette, and being tabled in Parliament.<sup>11</sup> No such requirement exists in the Western Australian structure.

## Conclusion

Evolution in the structures and processes associated with providing citizens with access to government information appears to have stalled. The changes brought about by the Bracks government in Victoria are not in any way a new or radical approach to FoI, and represent a limited response to restrictive measures introduced by the previous government. Recommendations for further changes to the Victorian system have been made by the Audit Review of Government Contracts (2000), and the Public Accounts and Estimates Committee (2000). These have yet to be accepted.

In Western Australia there has been a statutory review of the legislation and a review by the Commission on Government. In addition the Information Commissioner has been active in campaigning for changes to improve access to information. The recommendations of both reviews and the Commissioner have been largely neglected.

The culture of secrecy appears to be holding its ground. In part the privatisation process that has taken some agencies and departmental functions out of the public sector may explain this. The use of FoI by opposition political parties to find material embarrassing to the government may have reinforced the view that the information being made available under FoI is for narrow political interests rather than any public good. The use of FoI by newspapers also to embarrass and sensationalise may have the same effect. Change will probably only come when FoI moves beyond being used mainly as an instrument of hostility to government by interest groups opposed to government policy or actions, or by individuals reacting to perceived wrongs done to them by government. For this to happen, however, governments would have to make the first, perhaps heroic, move and radically embrace the idea that government information is a public resource, not a private one to serve the narrow interests of government.

### PAULINE SADLER AND FRANK HARMAN

*Dr Pauline Sadler is a Senior Lecturer in Business Law at Curtin University.*

*Dr Frank Harman is a Senior Lecturer in Economics at Murdoch University and he served as a Commissioner on the Commission on Government.*

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## Using the Official Information Act (NZ) to investigate its use A survey at the agency level

One of the purposes of New Zealand's *Official Information Act 1982* (OIA) is to enable greater public participation in the making of our laws and policies. While media coverage and complaint figures published by the Ombudsmen suggest that use of the Act since its inception has been high, published research on the nature of that use is limited. Furthermore, the few research-based attempts to delve into the workings of the Act have employed interviews and questionnaires to gain either descriptions of those workings within selected central and local government agencies or opinions about the workings from the agencies' officials.<sup>1</sup> This focused approach has produced some rich descriptive detail and description, but has done little to provide data of the kind

that allows us to compare how readily people use the Act to access information across the various departments and agencies of the public sector. Similarly, it has offered little in the way of data that lets us compare the number and nature of complaints received by government agencies against the number and nature of those received by the Ombudsmen and published in their annual reports. (The Ombudsmen reports are useful in this regard because they identify complaints made against particular agencies.) The lack of public sector OIA data has attracted comment both from overseas<sup>2</sup> and domestically.<sup>3</sup>

These considerations, along with the premise that the greater the amount of retrievable information proven to be

held by government agencies, the less need there is to rely on anecdote and opinion or on the 'impression that a great deal more official information has been released during the year',<sup>4</sup> provided the rationale for this present study. The study has attempted to fill in some of the information gaps regarding the types of requests made of government agencies under the provisions of the OIA, how these agencies respond to the requests, and the sort of request-related information, if any, that the agencies hold in database or other storage format. More specifically, it has sought answers to these questions:

- Which agencies receive OIA requests?
- How many OIA requests do agencies receive per annum?
- What sorts of people or groups of people make OIA requests?
- What sorts of requests are received?
- What is the outcome of these requests?
- What facilities do agencies have for creating and holding metadata about requests?
- Do agencies have formal rules or manuals describing OIA request practices and procedures?

## Method

A questionnaire was sent to 50 government agencies, identified through the online *Directory of Official Information*,<sup>5</sup> and selected to cover the range of agency types found in the public sector. The agencies thus included 'core' government (ministries and departments) agencies, state-owned enterprises (SOEs), and 'other' Crown entities. Of the 50 agencies sampled, the majority were 'core' agencies (30 of 39) and SOEs (10 of 18). The 'other' 10 agencies were selected to cover a diversity of organisations from the health, education and research sectors.

The questionnaire was presented explicitly as a request for official information. The covering letter explained the survey rationale and offered to make results available in electronic form to the agencies. Some questions required a 'yes/no' answer or a short answer while others requested statistical information. The questions focused on information reasonably expected to be held and retrievable by agencies. Opinions were not actively sought, although for some questions space was made available for additional detail or comment.

The requests for information/questionnaires were posted via surface mail on 13 November 2000. Each request was marked 'Official Information Act Request'. A total response time of 30 working days was allowed to accommodate the likelihood of surface post delivery both ways. In late December/early January (2001), follow-up emails were sent out to agencies that had not returned questionnaires. The returned questionnaire data were entered and analysed in terms of the study questions during January and February 2001.

The findings reported here cite the responses of 49 government agencies to requests made under the Act. (The response from the Office of the Ombudsmen was not included because the office is not bound by the provisions of the OIA.) While the sample does not provide a comprehensive coverage of the over 260 government agencies listed in the *Directory of Official Information*, it does include most of the core agencies and SOEs.

## Results

The following data represent agency information received as at 15 January 2001.

## Responses by agency type

The majority of the agencies responded to the requests for information within the 20 working days required under the terms of the Act. Core government departments were slightly less responsive in this regard than were the SOEs and other government agencies (see *Table 1*). The agencies that did not meet this requirement were Agriquality New Zealand, the Crown Law Office, Work and Income New Zealand, the New Zealand Police, the Department of Internal Affairs and the Inland Revenue Department.

**Table 1**  
Responses to requests for information  
by agency type

	Number requests sent	Number responses received in 20 working days	Number questionnaires returned
<i>Core</i>	30	25	25
<i>SOE</i>	10	09	09
<i>Other</i>	09*	09	07
<b>Total</b>	<b>49</b>	<b>43</b>	<b>41</b>

\*Note: 50 questionnaires were posted out, but the response of the Office of the Ombudsmen was excluded from the results, as the office is not 'bound' by the OIA.

Two health sector agencies provided noteworthy responses. Northland Health offered 'to research and answer your request at a charge of \$30 per hour'. They estimated this work would take three to four hours' work. Capital Coast Health replied that they would try to send a reply 'no later than December 19th', and advised that delays could be 'caused for a number of reasons'. However, no reply had been received as of 15 January and no reasons for the delay were given.

A response rate of 83.6% would be the envy of many researchers, but this result must be measured against the requirements of legislation, which provides a generous statutory response time of 20 working days. Two of the responses received within the specified limit were the less than helpful health sector replies just mentioned, and a third agency failed to return the questionnaire, referring me instead to other agencies who might hold such records on their behalf. When these ineffective responses were excluded, the number of usable questionnaires received within the allowed time was 40 (81.6 per cent of the total). There is obviously the possibility that some agencies did not receive the questionnaires, but all had clear return address labels and the postal addresses were later checked for accuracy.

## Receipt of requests and holding of information about requests

The specific questions asked in this regard were: Does your organisation receive requests for information under the Official Information Act? Does your organisation hold any information about requests received by it under the Official Information Act?

Forty of the 41 agencies that actually returned questionnaires said that they received OIA requests. The exception was Taranaki Polytechnic, whose response was 'Don't know'. However, not all of these agencies held 'information about requests' (see *Table 2*). This finding raises the question of how agencies holding 'no information' about their OIA

requests manage those requests in terms of correspondence, filing and archiving. One such agency, Statistics New Zealand, commented that because its customised statistics 'do not qualify as "official information"', it was not able to provide summary statistics of the few OIA requests that it had received. Other agencies, particularly the SOEs, seem to have interpreted the question about holding of information quite narrowly, assuming that 'holding information' excluded documents or information held on correspondence and case files.

**Table 2**  
Number agencies receiving and holding information on OIA requests

	OIA requests	Holding request information
<i>Core</i>	25	23
<i>SOE</i>	09	06
<i>Other</i>	06	04
<b>Total</b>	<b>40</b>	<b>33</b>

### Recording of number of requests

The agencies were asked if they recorded the total number of requests they received each year and to state the total number of requests they had received for each year ending 30 June from 1990 onwards.

Twenty-three of the agencies that returned questionnaires reported that they recorded request totals. The low incidence of recording this information makes it impossible to answer the key study question of 'How much use is made of the OIA?' While most core agencies could provide request totals, Meridian Energy was the only SOE to supply an annual total. The highest recorded request number was from the Ministry of Health (513 for the 1999/2000 year). At the other end of the scale, Terralink advised that they had received a total of only two requests in the previous year. The average number of requests for all agencies reporting totals for 1999/2000 was 101. For core agencies, it was 114. Request totals from 1990 onwards were available from just four core agencies, and one of these had no records from 1992 to 1996. A more complete historical record might have helped measure the impact of the *Privacy Act* on use of the OIA, given that many requests were previously requests for personal information.<sup>6</sup>

### Recording of details about requests

Two of the questionnaire items asked agencies if they recorded details of official information requests and the outcomes of those requests. The first question endeavoured to establish whether requesters were being identified in groups (categories) similar to the complainant categories published by the Ombudsmen. A positive response might have meant that claims of decreasing use of the freedom of information (Fol) laws by the media,<sup>7</sup> or of high use by political parties could be verified or disproved, and comparisons with overseas research made. Only nine agencies stated that they recorded information in this way.

### Means by which information is recorded

The agencies' answers to a question on the means by which they recorded information, including paper-based and electronic record keeping, confirmed the observation that electronic records are now a feature of the record-keeping landscape,<sup>8</sup> at least for the core agencies (*Table 3*). However,

of the four SOEs that answered this question, none recorded request information electronically. With two exceptions (Ministry of Education and the Treasury), all agencies using software or databases reported use of fairly standard programs such as Microsoft Access, Excel, Word, and Lotus Notes.

**Table 3**  
Means by which agencies store recorded request information, by number of agencies

	File-based	Paper-based register	Database or software	No response
<i>Core</i>	01	06	18	02
<i>SOE</i>	01	03	00	05
<i>Other</i>	00	01	02	04
<b>Total</b>	<b>02</b>	<b>10</b>	<b>20</b>	<b>11</b>

### Provision of printed copy of request information

Those agencies that did hold records about requests were asked to provide printed copy (excluding names of requesters) for the three most recent requests received. This request was inserted as a check on earlier questions about request details recorded, and on the ability of agencies to produce print output from information held in electronic form. For those agencies recording details and holding information electronically ( $N = 20$ ), the production of a title, description, or some form of request metadata should have been fairly simple. However, only 13 of these agencies (65%) produced a printout as requested.

### Guidelines for dealing with OIA requests

With the OIA now two decades old and the Office of the Ombudsmen's *Practice Guidelines* more readily available <<http://www.ombudsmen.govt.nz>>, one of the questionnaire items was designed to check what additional documented procedures agencies had in place for dealing with requests. The Ombudsmen's annual report for 2000 identifies proper 'information-handling strategies' as important in enabling agencies to operate effectively in the official information environment.<sup>9</sup> The Ombudsmen, in the same report, also refer to the need to train staff on OIA-related procedures as an outstanding issue. Almost all of the core agencies confirmed that they had some sort of manual, handbook or standard operating procedures for dealing with requests, with the Ministry of Fisheries providing the only negative response. However, only 10 of the 16 SOEs and other agencies that returned questionnaires said that they held this documentation. In the absence of any procedures, the ability of agencies to apply the broad principles or specific detail of the Act in an efficient or effective way has to be questioned.

### Discussion

The questions asked of the agencies fall into two distinct categories — those relating to how frequently requests for information are made under the OIA and by whom and those relating to how the various agencies of which requests are made manage request records.

In terms of information on use of the Act within the agencies surveyed, the findings of this study reveal an absence of comprehensive OIA usage statistics across both core government departments and the SOEs. Although totals could be provided by most core agencies, this record went back, in most cases, only a few years. Efforts to compare request-

related data obtained from the present study with similar data listed in recent annual Ombudsmen reports, especially those data pertaining to the 'complaint' agencies (Work and Income Support, Inland Revenue, Police and the Fire Service Commission), were frustrated by responses being received late or not at all. Of these agencies, only the Fire Service Commission's response was received in time to include in the study. It showed that the majority of requests received by the Commission in the 1999/2000 year had been the subject of complaints to the Ombudsmen.

Information about how much the Act is being used may be patchy but responses about who is requesting information are even scarcer. Agencies generally were unable to confirm trends in the literature<sup>10</sup> estimating high use by particular groups or categories of requesters. This is because the information is not held by most agencies (79% of those responding), or is available only on individual subject or correspondence files and not readily accessible. This situation leaves unanswerable most questions about the proportion of various groups of requesters (or requesters as a whole) that end up seeking the assistance of the Ombudsmen. Until this level of information is recorded and made available, it will be difficult to evaluate the effectiveness of the OIA. Without data available to identify how requesters are faring in their interactions with agencies, it is perhaps impossible to produce informed commentary or discussion about the general health of the Act. As Roberts<sup>11</sup> points out, such scrutiny may be most important at times of government restructuring or reforms, and during periods of significant political change.

The recording of request outcomes across government agencies could help measure average response times, frequency of refusals and deletions from released information, as well as other basic indicators. In its 1997 annual report, the New Zealand Law Commission recommended that the statutory time limit for agency response be reviewed 'with a view to reducing it to 15 working days'.<sup>12</sup> However, the lack of accessible and centralised information about responses within a given time means that it is difficult to estimate whether this 15-day standard is being met and, if so, how often.

In regard to recording of other request details, there is certainly the potential for most core agencies to compile and disseminate reports or descriptions about *what* information is being requested from them. Production of this richer request detail could be aided if agencies used appropriate software to record their request information. Making this information available could be one means of enhancing participation — or 'engagement' — by citizens in the processes of government as envisioned by the e-government program <<http://www.e-government.govt.nz/>>.

Several survey questions sought details about how agencies manage both request-related records and the requests themselves. As the Information Commissioner of Canada recently observed, official information that is not captured and maintained in effective record-keeping systems can 'threaten the viability of rights to access it'.<sup>13</sup> Despite the National Archives of New Zealand Statutory Regulatory Group<sup>14</sup> and the Office of the Ombudsmen<sup>15</sup> both noting the increase in, or prevalence of, electronic record keeping across government agencies in recent years, this study suggests that e-government, with electronic record keeping at its foundation, is still very much a work in progress. Only 20 of the agencies that responded to the questionnaire were recording request information in electronic format, and not all of these were able to produce printed copy of this information when requested.

A number of initiatives have been made in recent years to encourage good information management in the public sector. The National Archives of New Zealand's *Electronic Records Policy* (published in 1997) was designed, in part, 'to ensure that future generations retain the ability to access and scrutinise the decisions of government and its agencies'.<sup>16</sup> Evolving data management standards and policies are also being promoted by the E-government Unit, but responsibility for effective enforcement or auditing of these remains unresolved.

The lack of documented request procedures or manuals held outside of core government agencies presents an impediment to effective implementation of the Act by SOEs and some other agencies. Moreover, even though the core agencies might hold documentation on such procedures, they are not necessarily adequate. For example, the Ombudsmen recently commented publicly on the inadequacy of the OIA operating manual of one large government department.<sup>17</sup>

The study methodology placed me in the position of being both requester and surveyor. While my experiences as requester were not one of my primary research objectives, they are nonetheless noteworthy, given that they add descriptive detail to the range of statistics presented and can be related to OIA user experiences from the literature.

The most lasting impression is of a huge range of response times and levels of assistance offered by agencies. One complete and detailed response was received within four days of posting, while other respondents replied outside the 20-day limit without any attempt at explanation. The majority of sample responses were received comfortably within 20 working days, and over half of the returned questionnaires met the Law Commission's recommended reduced timeframe of 15 working days. Other agencies posting responses toward the end of 20 days failed to complete the requests, or, if they did, answered a minimal number of questions, appearing to confirm that, for some, 20 days has become more of a benchmark than an outer limit. These delays and omissions certainly support some media commentators' frustrations with the operation of the Act.<sup>18</sup>

The overall response from core agencies that returned questionnaires appeared reasonable, with most either answering the majority of questions or making an attempt to do so. Core agencies were the only ones to seek clarification of request questions, and several also provided written acknowledgement of receipt of the request. Noteworthy for the fullness of responses or level of assistance offered were the responses received from the Christchurch Polytechnic Institute of Technology, Department of the Prime Minister and Cabinet, the Education Review Office, Ministry for the Environment, Ministry of Agriculture and Forestry, Ministry of Defence, Ministry of Education, Ministry of Foreign Affairs and Trade, Ministry of Health, Ministry of Justice, Ministry of Women's Affairs, Ministry of Youth Affairs, National Library, Te Puni Kokiri and Treasury.

Non-core agencies were less likely to return questionnaires, acknowledge receipt or answer questions in full, with SOEs and health sector agencies providing some of the briefest and least informative responses. Most SOE and 'other' responses came from legal staff or CEOs, but this was the case with only three core agencies. The Ombudsmen's 2001 annual report nonetheless notes that government agencies are making greater use of law firms to review OIA requests.<sup>19</sup> The aforementioned request from Northland Health that I pay the \$30 per hour for the 'substantial amount of work involved' to complete the questionnaire was the only such request.

Several areas of future survey work and research relating to the OIA readily follow on from the results of this study. More detailed information about the ability of agencies to generate accessible descriptive detail from existing request records would be a useful start. This could help determine how dissemination of request information might be achieved, either by agencies themselves or by requesters seeking to make such information progressively more available. The reported results from questions relating to record keeping raise concerns about the record-keeping standards of both the core agencies and the SOEs. More detailed and up to date information from across the government sector, and similar to that collected by National Archives in the past, might suggest whether the results of this survey are representative of government record-keeping practices. The survey could usefully be expanded to cover all agencies covered by the Act and, perhaps most importantly, could include Ministers' offices (a source of considerable complaint as documented in the Ombudsmen's reports).

**Conclusions**

Our Ombudsmen continue to advocate for measures that will develop 'an official information culture',<sup>20</sup> while the Law Commission's 1997 review<sup>21</sup> identified as an outstanding issue the need for OIA education, training and co-ordination throughout the public sector.

Results from this study support the need for such initiative. No matter which agency is to be responsible for co-ordination of OIA policy across government agencies, there is a need for mandated data gathering and reporting at the agency level. Effective laws require effective monitoring and evaluation beyond that offered by our main OIA watchdog, the Office of the Ombudsmen. Robert's arguments<sup>22</sup> in support of Fol audit systems that are more than simply complainant or incident based are equally relevant in the New Zealand context. There also is a need to raise debate and commentary about the Act above individual experiences and frustrations and instead to discuss its place in assisting the development of a progressive national information policy. The agency best placed to lead this discussion and development is surely the State Services Commission (SSC). The SSC is able to organise the broader co-ordination and policy development areas, and is also empowered to ensure that the OIA continues to be relevant in an age of government electronic record keeping.

These recommendations have even more cogency in the light of Roberts' claim that 'Citizens have come to expect that public institutions will maintain effective Fol systems, and are unlikely to concede the legitimacy of institutions that fail to do so'.<sup>23</sup> The results of this study show that the majority of the agencies sampled maintain at best the most basic of record-keeping systems on how they deal with OIA request information. With the OIA in its twentieth year, it is timely to reflect on the Act's overall health in its present form, and to plan and implement policies that continue to realise its original progressive intent.

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**DAVE CLEMENS**

*Dave Clemens is Information Services Librarian, Christchurch College of Education, New Zealand.*

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# VICTORIAN FOI DECISIONS

## Victorian Civil & Administrative Tribunal (VCAT)

### KELLY AND DEPARTMENT OF TREASURY AND FINANCE (No. 2000/48629)

**Decided:** 14 March 2001

*Section 25A (voluminous requests).*

#### Factual background

On 25 September 1998 an explosion occurred at the then recently privatised Longford gas plant in Victoria. The Longford plant was owned and operated by Esso Australia Pty Ltd, Esso Australia Resources Pty Ltd and BHP Petroleum (Bass Strait) Pty Ltd (Esso). The explosion caused major interruptions to the supply of natural gas throughout Victoria.

Since the Longford gas explosion multiple legal proceedings have been initiated in the Federal Court of Australia against Esso for negligence and misleading and deceptive conduct. Esso has joined the State of Victoria as a third party to the proceedings on the basis that it was negligent and had engaged in misleading and deceptive conduct. In addition third party proceedings were launched against a number of instrumentalities and authorities of the State which were involved in the distribution and sale of gas to consumers.

The State of Victoria sought an order from the Federal Court in November 1999 to limit the extent of discovery it was required to undertake in connection with the Esso proceedings. It argued that in the light of the magnitude of litigation it would be oppressive for the State to provide discovery in the ordinary way. On 3 December 1999 the Court agreed and granted an order which limited the category of documents available for discovery and reduced its normal obligation to make inquiries for discovery purposes in the way set out in the order.

#### Procedural history

Edward Kelly (the applicant), is a solicitor for Middletons, Moore and Bevans who act as Esso's legal representatives in the Federal Court proceedings. Over a period of two weeks commencing 10 December 1999 Mr Kelly made 321 separate requests on behalf of Esso under the *Freedom of Information Act 1982* (Vic) (the Act) to several

Victorian government departments. The individual requests encompassed some nine categories including:

- the Longford incident,
- the Victorian gas system,
- gas system security measures,
- the distribution system split,
- gas market development issues,
- liquefied natural gas storage,
- underground gas storage,
- security of supply, and
- recipients of assistance from the Gas Emergency Trust Account.

In January 2000, the Department of Natural Resources and Environment, the Department of State and Regional Development, the Department of Premier and Cabinet and the Department of Infrastructure decided to transfer the requests to the Department of Treasury and Finance (the respondent). Following s.18(2)(b)(ii) of the Act, the Departments (other than the respondent) considered that the subject matter of the requests was more connected with the functions of the respondent.

Throughout February, March and April 2000 the applicant and the respondent consulted in an effort to clarify the request. However on 31 May 2000 the respondent applied s.25A of the Act and refused to process the request on the basis that to do so would substantially and unreasonably divert the resources of the Department from its other operations. The respondent estimated that processing the requests would involve retrieving and searching up to 12,000 files.

On 2 June 2000 the applicant sought an internal review of the respondent's decision to refuse to process the requests. By letter dated 16 June 2000 the respondent affirmed the decision to refuse to process the request based upon s.25A of the Act. The applicant applied to the Victorian Civil and Administrative Tribunal (the VCAT) on 20 June 2000 to review the respondent's decision refusing to process the request based on s.25A(1) of the Act. Some time after, the State of Victoria commenced an application in the Federal Court to restrain the prosecution of the freedom of information requests arguing that they substantially or entirely overlap with orders for

discovery of documents in the Federal Court action.

#### Decision

The VCAT set aside the respondent's decision to refuse to process the applicant's request. The matter was remitted to the respondent to comply with the provisions of s.25A(6)(a)(b) and (c) of the Act and for recommendation of whether any one or more requests are exempt by reason of the provisions of s.25A(1) of the Act.

#### Reason for decision

##### *Section 25A(6)(c)*

The applicant submitted that the respondent's freedom of information officer, Ms Karen Macdonald, failed to fulfil her obligations under s.25A(6)(c) the Act. This section requires that as far as is reasonably practicable, an agency or Minister must provide an applicant with any information that would assist the making of the request prior to refusing access to documents.

In her witness statement Ms Macdonald said that she advised the applicant to make his requests more specific. The Tribunal commented that the substance of her evidence revealed that she assumed the onus was on the applicant to narrow his requests rather than for her to provide information to assist. Ms Macdonald created an index of some 2600 files which were deemed to relate to gas to assist her assessment of whether the 321 requests constituted a voluminous request. The index was not forwarded to the applicant to assist in narrowing his request.

The VCAT noted that s.25A(6)(c) of the Act imposes a positive obligation on an agency to provide access to government documents by assisting an applicant to provide information. It found that it was reasonably practicable for the respondent to supply the applicant with the index and that doing so would have enabled the applicant to refine their request. It was held that the respondent failed to comply with its obligations under the Act and should have given the applicant the index before refusing to process the request. Consequently the Tribunal ordered that the respondent release the index to the applicant.

### Section 25A(1)(a)

The Tribunal then moved on to consider the question of whether the respondent had the right to group the 321 requests for the purpose of determining whether they constitute a voluminous request. Section 25A(1)(a) of the Act enables an agency or a Minister to refuse to process a request if it is satisfied that to do so would 'substantially and unreasonably divert the resources of the agency from its other operations'.

The Tribunal examined s.37(c) of the *Interpretation of Legislation Act 1984* (Vic) which states that in an Act or subordinate instrument, unless the contrary intention appears, words in the singular should be interpreted to include the plural. It was regarded that the Act expressed a contrary intention to treating the words 'request' and 'requests' interchangeably as it contemplated the processing of requests individually. The VCAT considered that many provisions of the Act would be unworkable if 'request' could be interpreted as also encompassing 'requests'. By way of example the Tribunal noted that it was improbable that Parliament intended that an applicant could avoid paying a \$20 processing fee required by s.17(2) of the Act or that an agency could avoid providing access to information by characterising many requests as one. It was decided that equating the meaning of 'request' with 'requests' would also be contrary to the purpose of the Act and thus inconsistent with s.35(a) of the *Interpretation of Legislation Act 1984* (Vic).

Accordingly the VCAT held that s.25A(1) of the Act is concerned with individual requests not groups of requests and the respondent was not justified in treating the 321 requests as a global request. When assessing the respondent's conduct in processing the request the Tribunal observed that Ms Macdonald approached the applicant's 321 requests as one broad request before she concluded that it was voluminous rather than treating them individually. It was maintained that by grouping the requests, the respondent caused them to be characterised as voluminous. The VCAT felt that it was possible that one or more of the requests may have individually constituted a voluminous request under s.25A(1) of the Act. Nonetheless it held that it would be inappropriate to allow the respondents to avoid processing a number of non-voluminous requests from the same applicant by simply grouping the requests so as to invoke s.25A(1)(a) of the Act.

When determining the size of the request Ms Macdonald sought the assistance of Christopher Smith who was previously employed to manage the records system of the Energy Projects Division of the respondent to locate relevant files. Mr Smith estimated that there were between 12,500 to 13,000 relevant files and approximately 2600 pertained to gas that were relevant to the request. An index of the 2600 files was produced to assist with the request. In calculating how long it would take to process the requests Ms Macdonald selected samples from the 2600 files Mr Smith identified as relevant. Ms Macdonald then selected a sample group of 21 files containing material she deemed fell within the ambit of the requests. After reviewing 10 files from the sample group she estimated that for one officer to process all of the 2600 documents, it would take 'in the vicinity of 670.41 standard public service weeks' representing approximately 14.57 years.

However the VCAT was not convinced that the sampling exercise embarked upon by Ms Macdonald was a sufficient gauge of the time it might take to process the 2,600 files. While it was conceded that Ms Macdonald's evidence that processing the requests could involve communication with some 1500 parties, ultimately it was found that there was no evidence to support her decision that any one request was voluminous.

The Tribunal held that even if it was wrong in decision that the respondent could not properly aggregate the 321 requests under s.25A(1)(a) of the Act, the respondent's evidence had failed to demonstrate that processing any one of the 321 requests would substantially and unreasonably divert the resources of the respondent. The respondent was ordered to determine whether any one of the 321 requests would constitute a voluminous request within s.25A(1) of the Act.

### Comment

With respect to the Tribunal many features of this decision are problematic. This decision overlooks one of the main purposes of s.25A of the Act outlined in the Attorney-General's Second Reading Speech on the *Freedom of Information (Amendment) Act 1993*

inserting s.25A of the Act. In that speech s.25A of the Act, which is modelled upon s.24 of the *Freedom of Information Act 1982* (Cth), was seen as providing measures for curbing abuse of the Act by applicants with unreasonably broad requests. It is conceivable that Fol was being used by the applicants in such a way as to avoid enlivening s.25A of the Act and to supplement the strict confines of the Federal Court's order limiting discovery.

In addition it also conflicts with the approach taken in relation to the equivalent section of the Commonwealth Act in the Administrative Appeals Tribunal decision *Re Shrewcroft v Australian Broadcasting Corporation* (1985) 2 AAR 496. In that case it was deemed appropriate for a respondent to group some eight requests from the same applicant as one request for the purpose of the equivalent Commonwealth section. Sir William Prentice (Senior Member) found that it would be contrary to the spirit of the section to allow an applicant to avoid its operation simply by breaking up its requests to avoid the individual categorisation as voluminous.

This decision has recently been substantially amended by *Secretary, Dept of Treasury and Finance v Kelly* [2001] VSCA 246. (A summary of this decision of the Supreme Court will be included in the next edition of *FoI Review*.) In that case the Court of Appeal appears to resolve some of the problems with the VCAT's interpretation of s.25A(1) of the Act in relation to grouping of requests.

[D.E.]

**Editorial Co-ordinator:** Elizabeth Boulton

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**Correspondence to Legal Service Bulletin Co-op.,**  
C/- Faculty of Law, Monash University, Clayton 3800

Tel. (03) 9544 0974 email: L.boulton@law.monash.edu.au