

CHAPTER 5

REQUESTS FOR ACCESS TO DOCUMENTS

5.1 In 1979, the Committee recommended that the FOI Act should be amended so as progressively to close the gap between documents subject to operations of the FOI Act and those subject to the Archives Act.¹ The Committee notes that, as a matter of policy, few agencies now refuse access to documents falling within the gap.² The Committee remains of the view that the Government should work towards the elimination of this gap.³

5.2 One submission asked the Committee to consider adopting the Victorian Public Service Board's recommendation in respect of the Victorian FOI Act,⁴ that access to prior documents should be granted when the documents are at hand or readily retrievable, but not otherwise.⁵

5.3 To the extent that amending the FOI Act to enable agencies to release documents under the protection of sections 91 and 92 of the Act may overcome agency apprehensions about granting access to documents, such an amendment is desirable. (The Committee recognises that amendment in this way will not provide right of access to documents falling into the gap between the FOI Act and the Archives Act. It will merely reduce agencies'

1. 1979 Report, para. 14.19(b).

2. FOI Annual Report 1986-87, p. 30.

3. 1979 Report, para. 14.18. Submission from 'The Age', pp. 39-40 (Evidence, pp. 224-25). See also submissions from the New South Wales Law Society p. 2; the Law Institute of Victoria, p. 3 (Evidence, p. 376).

4. Victoria, Public Service Board, Report to the Attorney-General on the Administration of the Freedom of Information Act for the Year Ending 30 June, 1984, October 1985, p. 25-31.

5. Submission from the Political Reference Service Ltd, pp. 19-20 (Evidence, pp. 969-70). The Committee notes that some agencies may have difficulty in locating older records: submissions from the Australian Federal Police, p. 3 (Evidence, p. 460); and the Department of Foreign Affairs, p. 14 (Evidence, p. 1069).

concerns about the consequences of releasing documents outside of the FOI Act.)

5.4 The Committee recommends that an additional paragraph be inserted into the FOI Act providing that sections 91 and 92 of the FOI Act apply where agencies provide access to documents created more than 5 years before the commencement of the operation of the Act.

'Personal affairs'

5.5 Paragraph 12(2)(a) reflects the Committee's recommendation in the 1979 Report that the then Bill 'specifically provide individuals with a right of access to prior documents affecting themselves'.⁶

5.6 In News Corporation Limited v National Companies and Securities Commission, the Federal Court interpreted the phrase 'personal affairs' in paragraph 12(2)(a) to apply only to the affairs of natural persons, not to the affairs of corporations.⁷ In that case, the Chief Judge, Sir Nigel Bowen and Justice Fisher commented that it was uncertain whether paragraph 12(2)(a) was intended to indicate that a corporation may have personal as distinct from business affairs. They decided that it was not.⁸

5.7 In part, the reasoning in News Corporation rested upon an analysis of the meaning of the phrase 'personal affairs' as it appears in sections 41 and 48 as contrasted with the phrase 'business, commercial or financial affairs' of an organisation or undertaking as contained in section 43.

6. 1979 Report, para. 14.12.

7. News Corporation Limited v National Companies and Securities Commission (1984) 52 ALR 277.

8. *Ibid.*, pp. 283-6 per Bowen C.J. and Fisher J. See also St John J., pp. 292-93.

5.8 As is discussed below, section 41 and 48 are generally perceived as privacy protective. In particular, Part V of the FOI Act confers special rights upon natural persons in respect of the amendment or annotation of documents containing information about them. This right will be extended to documents to which access has been obtained otherwise than under the FOI Act if, or when, either the privacy legislation enters into force or the Committee's recommendation in paragraph 15.62 below is implemented.

5.9 It is consistent with this scheme that natural persons should have rights of access to documents which they would be denied if they were merely legal persons. However, in the Committee's view, it is not necessary that this be so. The case for access to prior documents equally rests upon questions of fairness.

5.10 In the Committee's view, it is desirable that the legal persons also should be entitled to seek access to prior documents containing information relating to themselves.

5.11 Accordingly, the Committee recommends that paragraph 12(2)(a) of the Act be amended to substitute for the phrase 'to the personal affairs of that person' the phrase 'directly to that applicant's personal, business, commercial or financial affairs'.

Requests for access to documents - sections 15, 18 and 19

5.12 The FOI Act creates two access options: people seeking access to documents may elect to have their requests dealt with 'formally' under the FOI Act within the time limits specified in section 19, or 'informally' under the Act. In the latter case, processing their requests is not subject to specific time limits other than the general requirement which derives from the ordinary principles of statutory interpretation that responses should be provided within a reasonable time.

5.13 According to submissions from agencies, this two-tiered system is unwieldy, and largely disregarded in practice.⁹ All requests are treated as 'formal' requests, subject to specific time limits. This being so, it is questionable whether there is any point in retaining the two-tiered system. The Committee notes that three agencies expressly urged the abandonment of this system.¹⁰

5.14 The Committee recommends that the two-tier access request structure be abandoned. The Committee recommends that all requests for access to documents under the Act attract the time limits specified in the Act.

Prescribed address

5.15 Sub-section 19(2) of the Act provides that 'the appropriate address' for receipt of a formal request for access of documents under section 19 shall be:

- (a) specified in a notice (being a notice that is in force at the time of the request) published in the Gazette ... as an address to which requests made in pursuance of this Act may be sent or delivered in accordance with this section; or
- (b) if, in respect of the agency or Minister, there is no notice in force specifying such an address-
 - (i) in the case of an agency - the address of the office or principal office of the agency that was last specified in the Commonwealth Government Directory; and

 9. E.g. submission from the Inter-Agency Consultative Committee on FOI, p. 3.

10. Submissions from the Department of Arts, Heritage & Environment, pp. 8-9; the Department of Territories, pp. 11-12; the Australian Customs Service, p. 15.

(ii) in the case of a Minister - the address of the office or principal office of the Department of State administered by the Minister that was last specified in the Commonwealth Government Directory.

5.16 The objects of specifying addresses in this manner were to ensure the accurate identification of addresses of agencies and Ministers because addresses listed in telephone directories were not always up to date, and to ensure that all requests were channelled through central reference points so as to facilitate effective administration of the Act.¹¹

5.17 In practice, agencies do not refuse to process requests on the ground that they were not lodged at a prescribed address.¹² Further, as one user pointed out, the Victorian FOI Act does not impose a requirement that the requests be directed to an 'appropriate address'.¹³

5.18 One agency recommended that the system of prescribing addresses should be retained because it is 'desirable for evidentiary purposes'.¹⁴ However, if there is a dispute whether a application has been received by an agency there is a simple solution: the applicant may lodge the application again. It is not essential that the fact of the original application having been made be proven, since only time turns upon the date of receipt - not the right of access.

11. Senate, Hansard, 7 October 1983, p. 1338 (Senator Gareth Evans).

12. Submissions from the Australian Taxation Office, p. 21 (Evidence, p. 671); the Inter-Agency Consultative Committee on FOI, p. 4; the Department of Local Government and Administrative Services, p. 15; and the Department of Territories, p. 12. Contrast the experience referred to in the submission from the Australian Pensioners' Federation, p. 2.

13. Submission from 'The Age', p. 14 (Evidence, p. 199).

14. Submission from the Department of Local Government and Administrative Services, p. 15.

5.19 Further, as one agency noted, it is difficult and costly for agencies which have a large network of offices to keep the list of prescribed addresses up to date.¹⁵

5.20 The Committee recommends the abolition of the system of prescribed addresses.

5.21 One group of users urged the Committee to recommend that it should be possible to send requests to regional offices, not just main, capital city, offices.¹⁶ This appears to be a reasonable suggestion.

5.22 The Committee recognises that this may lead to disputes as to what constitutes an 'office' for this purpose. This may be so particularly in respect of agencies which post 'outrider' officers to discharge particular functions without formally establishing agency offices for these officers. (For example, some agencies locate liaison officers in other agencies' offices.) Consequently, it is desirable to nominate some readily accessible means of identifying agency offices.

5.23 'The Age' noted that telephone directory addresses are more accessible than the lists contained in the Government Gazette.¹⁷ The Committee agrees.

5.24 Telephone directories are readily accessible, and updated annually. Although the listed addresses may occasionally be no longer current, it is unlikely that this will cause applicants excessive difficulty. If the request is not re-directed by postal authorities, it is likely to be returned to the applicant. In these circumstances, the applicant may have to

15. Submission from the Australian Taxation Office, p. 21 (Evidence, p. 671).

16. Submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 3 (Evidence, p. 852).

17. Submission from 'The Age', p. 14 (Evidence, p. 199).

resort to some other means to locate the agency, but this is unlikely to be beyond the wit of applicants.

5.25 If the application is neither received nor returned, this is likely to be communicated to applicants if they follow up their requests in an attempt to ascertain the reason for the lack of response or complain to the Ombudsman or Administrative Appeals Tribunal about an agency's (or Minister's) failure to decide upon the request within the statutory time limit upon the basis that this should be treated as a deemed refusal under section 56. (As is discussed below, in these circumstances the Tribunal is empowered to make any decision which 'could have been or could be decided by an agency or Minister' including that the application has not been received.)¹⁸ In these circumstances, an applicant may simply lodge the application at the current address.

5.26 The Committee considers that the category of appropriate addresses should be limited to those appearing in Australian telephone directories.

5.27 The Committee recommends that sub-section 19(2) be amended to provide that the 'appropriate address' be 'the address of any regional or central office listed in any current Australian telephone directory'.

Time limits

5.28 Sub-section 19(3) reflects the Committee's 1979 recommendation for a time limit upon the processing of FOI requests. It provides as follows:

18. FOI Act, s.58(1).

- (3) In sub-section (1), "the relevant period", in relation to a request made to an agency or to a Minister for access to a document, means, subject to sub-section (4)-
- (a) in a case where the request is received before 1 December 1984 - 60 days;
 - (b) in a case where a request is received on or after 1 December 1984 but before 1 December 1986 - 45 days; and
 - (c) in any other case - 30 days.

5.29 The Act provides for the extension of the time period by 15 days where agencies consult third parties under the reverse-FOI procedures.

5.30 Users urged the Committee to support the 30 day time limit. Agencies recommended that the time period should return to the earlier 45 day period. The Committee notes that one of the unsuccessful amendments proposed by the Government in 1986 was intended to retain the 45 days limit after 1 December 1986.¹⁹

5.31 The amendment was rejected in the Senate in October 1986 and the 30 days limit has applied since 1 December 1986. The Government contended that it would be necessary to allocate additional staff in order to meet the 30 day time limits, and it would be difficult to meet the burden of the additional costs. Consequently, the Government argued that the introduction of the 30 day deadline would sharply increase applications for review by the Administrative Appeals Tribunal. It was contended that this would occur because a failure to comply with the statutory time limits gives an automatic right to seek review.²⁰

 19. Freedom of Information Laws Amendment Bill 1986, cl.10.
 20. Senate, Hansard, 15 October 1986 (Senator Gareth Evans), p. 1358.

5.32 This contention does not appear to have been borne out by experience. For example, almost none of the large number of applicants whose requests were not determined within the statutory time-limits during 1985-1987 elected to treat the delay as a deemed refusal and apply for review by the Administrative Appeals Tribunal or Ombudsman.²¹

5.33 The Committee concludes that it is unlikely that the reduction in the time limits will increase the number of applications to the Administrative Appeals Tribunal for review, even if agencies continue to process requests at the 1986 pace and consequently fail to meet the 30 day deadline (as many failed to meet the 45 day deadline).

5.34 Many agencies informed the Committee that they would be able to deal with routine requests for access to documents within 30 days. Presumably, there will always be a number of requests

21. Time limits apply where requests comply with section 19. Of the 29,440 section 19 requests determined in 1985-86, 7752 took longer than 45 days to determine (FOI Annual Report 1985-86, Appendix F5). Only 287 applications for review were lodged with the AAT during the year. A subset of the 287 is listed in Appendix H2 'AAT Review - Applications based on delay' which shows a total of 160 applications for review by the AAT. Of these, 5 were due to delay at the primary decision-making level. A further 6 were due to delay at the internal review stage. The Committee understands that the 160 applications categorised in the Appendix H2 were roughly representative of the total 287. Presumably, therefore, approximately 20 of the total 287 applications were based upon delay. A further 91 complaints were made to the Ombudsman. No statistics are available on the grounds of these complaints, but delay is one of the six common grounds identified. But even if all 91 complaints concerned delay and are added to the 20 AAT applications, the resulting total is small in comparison to the number of requests not determined within time-limits. A similar situation is shown by the 1986-87 statistics (FOI Annual Report 1986-87, Appendix H and p. 42).

which cannot be processed within 45 days, or even within the 60 days which were allowed before 1 December 1984.²²

5.35 Some agencies attributed their slowness in processing requests to the lack of resources available for or allocated to FOI. Alternatively, some agencies commented upon the complex vetting required in order to determine whether to release some documents, and the necessity for consultation with third parties, such as foreign governments, businesses etc.²³

5.36 In 1985-86, 26.3% of all requests subject to section 19 time-limits were not resolved within 45 days. Among major agencies the percentage ranged from a low of 1.8% of total requests received by the Department of Social Security, to a high of 46% by the Attorney-General's Department.²⁴

5.37 In 1986-87, average response time by agencies to all requests subject to time limits was approximately 32.5 days, with 37.2% of requests remaining unresolved after 30 days and 14.7% remaining unresolved after 60 days. Among major agencies the percentage unresolved within 30 days ranged from a low of 13.2% by the Department of Social Security to a high of 86.3% by the Department of Defence.²⁵

22. For statements on the difficulty of meeting the 45 day limit, see submissions from the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Veterans' Affairs, para. 65 (Evidence, p. 574); the Department of Housing & Construction, p. 3; Telecom Australia, p. 4 (Evidence, p. 752); the Department of Defence, pp. 11-12; the Department of Trade, p. 10; the Department of Territories, pp. 8-9; the Department of Local Government and Administrative Services, pp. 5-6; the Department of Transport, pp. 4-5; and the Department of Immigration and Ethnic Affairs, pp. 8-11 (Evidence, p. 698-701).

23. E.g. see submission from the Department of Foreign Affairs, pp. 8-10 (Evidence, pp. 1063-65).

24. See FOI Annual Report, 1985-86, p. 20.

25. FOI Annual Report 1986-87, pp. 18-19. Note that the 30 day time limit applied to only 7 months of the year to which the figures in this paragraph relate.

5.38 Users were very critical of the time taken by agencies in responding to requests. One frequent FOI user suggested that some agencies, as a matter of policy, delay responding to politically sensitive requests until the last possible moment.²⁶ Other users suggested that delay is a deliberate bureaucratic tactic used to frustrate either particular requests or freedom of information in general.²⁷

5.39 The Committee is conscious that the processing of FOI requests may be time-consuming, and expensive in terms of staff resources. Consequently, the Committee has considered carefully the case for the restoration of the 45 day period. The Committee has also considered the suggestions contained, or implied, in agency submissions for the extension of the normal time-limits in some circumstances, perhaps subject to supervision by the Ombudsman.

5.40 Agencies were particularly concerned about the processing of certain categories of requests, generally defined by the volume or nature of the material sought, for example, classified documents, documents containing policy rather than personal information and documents held overseas, and the necessity for consultation with applicants, or with third parties including other agencies.

26. Submission from Cramb Corporate Services, p. 7.

27. Submissions from Mr John Doohan, p. 1; Mr D.R. Simpson, p. 2; Mr B.F. Grice, p. 2; the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, pp. 12-15 (Evidence, pp. 861-64); the Political Reference Service Ltd, pp. 11-12 (Evidence, pp. 961-62); and Mr Robin F. Howells, pp. 1-3 (Evidence, pp. 303-5); Cramb Corporate Services, p. 5. See also the submission from the Commonwealth Ombudsman, pp. 6 and 19 (Evidence, pp. 1313 and 1326): delay is often the central element in complaints made to his office concerning FOI.

5.41 The Committee does not accept that there should be different time limits applicable to different classes of documents. In the Committee's view this would be unwieldy in practice, and likely to generate dispute over the designation of requests.

5.42 Similarly, the Committee rejects the suggestion offered by 'The Age' that access should be expedited where requests are made by journalists or public interest groups.²⁸ In practice, the establishment of a 'fast track' for access would invite an examination of applicants' motives for requesting access to information whilst simultaneously delaying the processing of requests from persons not entitled to expedited access.²⁹

5.43 Several agencies informed the Committee that the additional 15 days allowed by sub-section 19(4) where agencies engage in reverse-FOI consultation is insufficient.³⁰ The Department of Local Government and Administrative Services suggested that sub-section 19(4) should be amended so as to permit agencies which consult with States under section 26A to defer any decisions upon the requests until the States' views have been received and considered.³¹

5.44 The Committee considers that the time for reverse-FOI consultation should not be open-ended. However, the Committee

28. Submission from 'The Age', pp. 14-16 (Evidence, pp. 199-201).

29. See Evidence, pp. 278 and 281-83. As was noted earlier the Committee is opposed to any suggestion that applicants' motives should determine their access to documents. (As is discussed below, this proposition is subject to some qualification in respect of these documents where the question of whether the document should be disclosed turns upon a balancing of the applicant's interest in obtaining access as against the privacy or business, commercial, or financial interests of a third party).

30. Submissions from the Inter-Agency Consultative Committee on FOI, p. 3; the Department of Resources & Energy, p. 4; the Department of Health, p. 23 (Evidence, p. 1243); the Department of Trade, p. 10. See also the submission from the Queensland Government, p. 7.

31. Submission from the Department of Local Government and Administrative Services, p. 10.

does accept the 15 day consultation period may be inadequate in practice. The Committee considers that the time allowed for reverse-FOI consultation should be increased to 30 days.

5.45 Accordingly, the Committee recommends that sub-section 19(4) be amended by the substitution of the period of 30 days for the period of 15 days.

5.46 According to the Inter-Departmental Committee, in 1984/85 the average time taken to process freedom of information requests (ie. search, retrieval and decision-making) was as follows:³²

<u>Request category</u>	<u>Average time</u> (hours)
Personal	9
Personnel	13
Business	34
Policy	58
All Requests	15

5.47 In view of these averages, the Committee considers that it should be possible for agencies to comply with the 30 days limit.³³

5.48 The Committee considers that the 30 day deadline should be retained.³⁴ Having regard to the average time for processing

32. IDC Report, p. A4.

33. The proportion of requests dealt with within 30 days increased from 52.2% in 1985-86 to 62.8% in 1986-87: FOI Annual Report 1986-87, p. 17. Note that the requirement to respond within 30 days applied only from 1 December 1986.

34. The Committee recognises that the introduction of the 30 day deadline may raise applicants' expectations unrealistically. If agencies continue to process requests at the same pace as they did in 1985-86, notwithstanding the reduction in time allowed, the result may be an increase in user dissatisfaction with the operation of the freedom of information legislation.

requests identified by the IDC, the Committee sees no reason why agencies should not be able to meet this deadline.

5.49 Senator Stone dissents from this conclusion in respect of policy documents.