

# The Audit Office of New South Wales: Auditing the implementation of

## freedom of information

To comply with the law on Freedom Of Information, agencies need to impose sound standards of information management. But as Stephen Horne explains, there are wider issues to consider, not least of which is whether decisions on information disclosure are taken objectively.



**THE AUDIT OFFICE  
OF NEW SOUTH WALES**

### What is FOI?

Most democratic societies recognise that Freedom of Information (FOI) is a fundamental element of government accountability. Opening government processes to scrutiny allows the public to question and better evaluate the activities the Government carries out on their behalf.

FOI legislation, introduced in New South Wales (NSW) in 1989<sup>1</sup>, gave members of the public the legal right to access most information in most government agencies. They may:

- obtain access to information held as records by State Government Agencies, a Government Minister, local government and other public bodies;
- request amendments to records of a personal nature that are inaccurate; and

The audit aimed to answer some basic questions...

1. Do agencies comply with the spirit of the Act?
2. Do agencies help applicants with their requests?
3. Are fees and charges kept to a minimum?
4. How thoroughly do agencies search for documents?
5. Do agencies provide supporting reasons for their decisions?
6. Do agencies meet the time requirements?
7. Do agencies conduct reviews of decisions?

<sup>1</sup> More details... <http://www.premiers.nsw.gov.au/NSWCommunity/FreedomOfInformation/>

- appeal against a decision not to grant access to information or to amend personal records.

It follows that in order to comply with the Act, departments and agencies need to manage their information in a manner that enables them to trace, recover, and reproduce the information requested within the Act's stipulated period (generally 21 days). Sound information management is therefore essential.

## Background

Dealing with FOI requests can be difficult for agencies. They may believe that information they provide could be taken 'out of context' and give an unfair view of their operations. Releasing information about sensitive decisions they have made may be embarrassing. Senior staff may also be well aware that certain information they release could be used in a political context and create difficulties for their Minister.

The FOI Act recognises that agencies might be tempted to avoid these potential difficulties, by using the discretions set out in the Act to limit the information released. This would frustrate the spirit of the Act, so it specifically requires agencies to apply FOI laws in a way that favours disclosure of information. While this audit covered only three agencies, we believe that the issues and recommendations relate to all bodies that handle FOI requests including Ministers, most NSW government agencies, and local government.

## Audit scope

Against this background, we reviewed the FOI arrangements within three government agencies<sup>2</sup>; we also examined 84 FOI requests for non-personal information.

A full copy of the Freedom of Information report, on which this article is based, is available on the Auditor General's web site...

<http://www.audit.nsw.gov.au/repperf.htm>

In order to test key provisions of the Act, we focused on requests in which access to non-personal information was refused, granted in part, or subject to an internal review. We selected FOI requests for non-personal information because they were more likely to involve policy-related information and offer an insight to government decision-making (most of the requests we examined were made by media personnel or Members of Parliament). We did not review the basis of these decisions, but whether the agencies had acted in accordance with the spirit of FOI legislation; in particular, with Section 5(3) the Act, which requires agencies to behave in a manner that furthers its objectives to *...facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information* [Section 5(3)(b) of the Act].

We also focused on the agencies' processes for handling requests; for example, for providing assistance to applicants, assessing costs, locating documents, response times and making decisions on access to information.

## Audit Findings

During the audit we identified a number of concerns that we subsequently raised with the appropriate departments; these are described in our full report, which is available to download from the Auditor General's web site. I would like to focus on two of them; independence in decision making, which goes to the heart of an equitable FOI process, and the important administrative role of FOI Coordinators.

### Independent decision-making

We found that standard practice in the MoT, and in about 25 per cent of the cases we reviewed in the Premier's Department, was to refer proposed determinations to the chief executive (CEO) before they were finalised and sent to the applicant. In DET, the records suggest that two draft determinations were discussed with the then Minister's Office before being finalised.

We have three concerns about the involvement of CEOs or Ministerial staff prior to a determination being made:

- it opens the possibility for perceptions of interference, even though this may not have been intended;
- it may affect an agency's capacity to conduct an unbiased internal review, as it must be undertaken by someone *who did not* "deal with" the original application and *who is not* subordinate to the original decision-maker;
- it presents efficiency issues, as agencies have tight timeframes to meet FOI requirements.

It may be necessary to contact the office of the CEO or the Minister to ascertain the documents that exist and their exemption status. This is not where our concern lies. We also recognise that it is appropriate for CEOs and Ministers to be informed of decisions. However, we believe this is best done when the applicant is advised of the determination. This process issue is an important one in our view, is easily solved, and would resolve all of our concerns on this matter.

<sup>2</sup> Ministry of Transport (MOT), Premier's Department, Department of Education and Training (DET)

At least half of the officers we interviewed in DET and MoT reported that, at some stage, Ministerial staff or senior departmental officers sought to be involved in the review of determinations or participate in the decision-making process. Sometimes they attributed this to particular individuals who misunderstood or were unaware of the provisions of the Act. Others reported that the situation had improved following a change in managements' attitude or a more centralised FOI process.

In a small number of the cases we examined, involvement of this nature affected the outcome of the determination. The CEO of the former MoT suggested that proposed determinations for two requests be revised or altered. Subsequently, one matter appeared to

have lapsed and no determination was made. The other remained unchanged. In this case, the CEO sought unsuccessfully to release more information than had been proposed. When we discussed these cases with him, he indicated that it was his policy not to interfere. However, he believed there were special circumstances, and his concerns were documented on file to ensure transparency. In DET, agency records suggest that one draft determination was altered following comments from staff of the then Minister.

### The Role of FOI staff

FOI Coordinators play an important role in ensuring agencies comply with the spirit of the Act. They manage all the stakeholders in the process - the

applicant, search unit, any third party, and the decision-maker - and monitor time limits. They must also be aware of the Act's requirements, including any new judgments made by the courts or the NSW Ombudsman. We found that FOI Coordinators and their staff supported the Act's objectives. A number of the issues raised above were caused by factors outside their immediate control, for example dealing with uncooperative or uninformed units elsewhere in the agency.

It is important that agencies ensure that all staff, not just those directly involved in processing requests, are aware of the Act's aims and key provisions. FOI Coordinators should be at a relatively senior level in the agency with authority to administer FOI arrangements as required.



**freedom of information**

## Conclusion

Overall, we found that FOI Coordinators and their staff supported the legislation, but the agencies examined can do considerably more to achieve the intentions of the Act.

On the positive side, each agency had made a number of changes to improve the effectiveness of their processes for handling FOI requests. In most cases, they did not charge processing fees, but if charged the fees were reasonable.

However, we believe that further improvements should be made to address the following issues:

- processing fees being charged in some cases and not others even though a similar amount of work had been undertaken;
- little documented evidence of the extent of searching which had been undertaken to locate documents, making subsequent reviews more difficult;
- supporting reasons for refusing access to information not always being provided to applicants;
- involvement of CEOs or Ministerial staff prior to some determinations being finalised, which opens the possibility for perceptions of interference and may affect an agency's capacity to conduct an unbiased internal review;
- no routine or formal analysis of reviews of decisions to determine whether changes in practice are required;
- timeframes not being achieved.

DET advised us that prior to the audit it had been reviewing its FOI performance and was implementing a number of reforms (developed in consultation with the NSW Ombudsman) to improve the effectiveness of its FOI process. The Premier's Department and the MoT already have, or plan to change various processes to address the issues we raised.

## All agencies that handle FOI requests should...

### Assist applicants:

- clarify the scope of FOI requests at the earliest opportunity, particularly for large and complex applications;
- provide applicants with information on the FOI process and the status of their request.
- ensure that decisions on access to information are made independent of any undue influence;
- ensure that all staff are aware of the purpose and key provisions of the Act;
- ensure that staff involved in the FOI process have full authority to make decisions as required under the Act.

### Fees and charges:

- ensure that fees and charges are applied consistently.

### Searching for documents:

- conduct thorough and complete searches for documents;
- document the types of searches undertaken to locate information;
- ensure that adequate records management systems are in place to facilitate document searches.

### Making decisions on access:

- document the decision-making process, including all deliberations and viewpoints considered;
- provide supporting reasons for refusing access to information;
- identify all relevant documents to the applicant;
- advise all applicants of their right to appeal.

### Independent decision-making:

- inform CEOs of the outcome of decisions in parallel with, rather than prior to, issuing the determination to applicants;

### Internal reviews:

- ensure internal reviews are conducted by someone other than, and more senior to, the original decision maker, as required by the Act;
- introduce formal systems for reviewing the outcomes of internal and external reviews of FOI determinations.

### FOI laws:

Any review of FOI legislation in NSW should consider:

- the value of *Statements of Affairs* and *Summaries of Affairs*, and whether they serve their intended purpose;
- extending timeframes when consulting the applicant or handling large multi-faceted requests.

### Review mechanism:

The Government should consider introducing a review mechanism that routinely oversees FOI arrangements in NSW government agencies.

About the author

Stephen Horne is a Director in the Performance Audit Branch of the Audit Office of New South Wales. He has twenty-five years' experience in a range of organisations in the NSW public sector, and is a recognised authority in the fields of e-government; corporate governance; fraud control strategies; corruption prevention, and performance reporting. Stephen has also contributed widely to public sector improvement in a variety of capacities, including responsibility for over forty major performance audits.

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helps the New South Wales Parliament hold Government accountable for its use of public resources; is independent of Government and reports directly to the Parliament; operates under the Public Finance and Audit Act 1983.

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supports the Auditor-General in his work reviews more than 400 New South Wales government agencies to:

- give Parliament reasonable certainty that agencies' financial reports are prepared correctly;
- confirm that agencies adhere to specific laws, regulations and Government directions.

investigates allegations of serious and substantial waste of public money

determines whether an agency or government activity is achieving what it set out to do, economically, efficiently and according to the law has 205 employees.

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- Independence – work without fear or favour.
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Empathy – be understanding of others.  
 Customer Focus – be courteous, professional and add value.

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our clients are the Parliament of NSW, the Government and its agencies, and ultimately the public of NSW.

Scissors used to open the Sydney Harbour Brodge in 1932, NSW Parliament House



Sydney Harbour Bridge