

## Report under s 67 of the Freedom of Information Act 2016

November 2018

Section 67 of the *Freedom of Information Act 2016* (FOI Act) requires the ACT Ombudsman to prepare a report on the operation of the Act each financial year, for the Speaker to present to the Legislative Assembly.

This is my first report on the operation of the FOI Act, following its commencement on 1 January 2018. This report covers the first six months of its operation over January to June 2018, and provides some early observations about its implementation.

### **Introduction**

ACT Government agencies are required under s 96 of the FOI Act to prepare an annual report on the operation of the FOI Act, including statistics, for their agency. The Ombudsman's report under s 67 complements these individual reports, through reporting of statistics and trend analysis across all government agencies, and of the Ombudsman's own oversight role.

For the first six months of operation, operational statistics relating to the activities of agencies and Ministers under the FOI Act were collected and published by the Justice and Community Services (JACS) Directorate in its 2017–18 Annual Report.<sup>1</sup> This is consistent with how statistics were recorded and reported on under the *Freedom of Information Act 1989* (the 1989 Act), and indeed JACS' report also included statistics from the final six months of operation of the 1989 Act.

We have also already reported on the Ombudsman's oversight role of the FOI Act in our 2017–18 Annual Report.<sup>2</sup>

Observations in this report should be read in conjunction with the information on the FOI Act included in these two annual reports.

It is anticipated that for future reporting periods, which will cover a full year of reporting and enable meaningful comparison with previous years, this report under s 67 will collate data from all agencies, accompanied by the Ombudsman's analysis and commentary on trends and issues identified.

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<sup>1</sup> See JACS Annual Report 2017–18, pp. 401-10, at <http://www.justice.act.gov.au/page/view/4053/title/annual-report-2017-2018>

<sup>2</sup> See ACT Ombudsman Annual Report 2017–18 <http://www.ombudsman.act.gov.au/publications-and-media/reports/annual-reports/act-ombudsman-annual-report-2017-18>

### ***Implementation activities***

The first six months of the operation of the FOI Act has involved adjustments in processes to meet the new requirements, with the new legislative framework designed to promote a culture of openness and transparency throughout ACT government.

We acknowledge the additional work of agencies and Ministers throughout this transition period to prepare for implementation of the new scheme.

As reported by our Office<sup>3</sup> and JACS<sup>4</sup> in our Annual Reports, much has been done across the ACT Government to implement the FOI Act, both in the lead up to, and since January 2018.

Some of the achievements during the last year include:

- A coordinated and consultative whole-of-government implementation process, led by JACS and in close consultation with my Office, including establishment of new processes, forms and templates to enable dealing with access applications from commencement.
- Launch of an Open Access Information website by the ACT Government,<sup>5</sup> providing the public with a central searchable interface to enable the community to access Open Access Information for government agencies and Ministers.
- Publication of Ombudsman FOI resources for ACT Government agencies and the public, including fact sheets and guidance material, on our website.<sup>6</sup>
- Establishment of the ACT Ombudsman's oversight role, including a new merits review function.

### ***ACT Government activities***

Statistics on the operations of agencies and Ministers under the FOI Act were collected and published by JACS in its 2017–18 Annual Report. This includes data regarding:

- decisions to publish or withhold open access information
- access applications received and decisions giving (full or partial) access or refusing access
- time taken to decide access applications
- number of requests to amend personal records
- number of applications for Ombudsman review, and
- number of applications made to the ACT Civil and Administration Tribunal.

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<sup>3</sup> See pages 6 and 25-28 of the ACT Ombudsman Annual Report (2017–18) at: <http://www.ombudsman.act.gov.au/publications-and-media/reports/annual-reports/act-ombudsman-annual-report-2017-18>

<sup>4</sup> See pages 390-410 of the JACS Annual Report 2017–18 at: <http://www.justice.act.gov.au/page/view/4053/title/annual-report-2017-2018>

<sup>5</sup> The ACT Government Open Access Information website can be found at [www.act.gov.au/open-access](http://www.act.gov.au/open-access).

<sup>6</sup> Information on the FOI Act, including resources and published decisions, can be found on the ACT Ombudsman website at [www.ombudsman.act.gov.au/Freedom-of-Information](http://www.ombudsman.act.gov.au/Freedom-of-Information).

Having analysed the data from the limited reporting period of six months, we note the following:

- there has been an increase in access applications in comparison to the last six months of the operation of the 1989 Act (20 per cent based on JACS Annual Report data)
- there has been a small decrease in decisions to refuse access to information, which would be consistent with the pro-disclosure objectives of the FOI Act (23 per cent of applications finalised were denied access from January to June 2018 compared to 28 per cent in the previous six months)
- 60 per cent of decisions under the FOI Act provided partial access to information, which may be due to more documents being disclosed containing minor redactions, such as for personal information, but this will require further consideration
- in only one matter were fees imposed under the new framework, and
- processing times under the new framework, with JACS data indicating that:
  - 74 per cent of decisions were decided within time frames and a further 25 per cent within an agreed extension period, but
  - a significant number of access applications received in 2017–18 have not yet been finalised and it is unclear whether, and if so by how long, these matters have exceeded required processing times.

We will monitor these issues during 2018–19 to determine whether these are short-term variations or indicative of a broader trend.

Under the FOI Act, agencies and Ministers are required to proactively publish government information as Open Access Information and be more transparent about the information they do not publish. There is also an emphasis on facilitating access to government information via informal requests without the need for more formal processes.

JACS has reported that agencies made only two formal decisions to withhold information from publication on the ACT Government's Open Access Information. While this is positive, we are interested to understand the processes ACT agencies have in place to identify Open Access Information and ensure that consideration is given to publication on this website as part of standard business processes within their organisation.

Statistics about the use of informal release of government information is not captured within JACS Annual Report. While such data would be of interest, the act of capturing it could itself turn an 'informal' process into a 'formal' process (so that it can be recorded and reported on), which could have the unintended consequence of discouraging informal release of information. Accordingly, while we will not seek comprehensive statistics on the use of informal release, we will seek to learn more about how this is used and share best practices through our ongoing engagement with ACT Government agencies.

### ***Ombudsman review activities***

In the first six months of the scheme, the Ombudsman:

- received 17 applications for Ombudsman review
  - the majority were made by members of the public (12), followed by members of the Legislative Assembly (3), media (1) and organisations (1).

- finalised eight of these applications, including seven within 30 working days as required under the FOI Act<sup>7</sup>, and
- received four complaints relating to access applications under the FOI Act, two of which were finalised by 30 June 2018.

As at 30 June 2018, the Office had not published any Ombudsman review decisions. A number have since, however, been made available on our website.<sup>8</sup>

### ***The Ombudsman's observations on the first six months of the scheme***

The Ombudsman has responsibility for independently reviewing FOI decisions made by ACT agencies and Ministers, and more broadly monitoring the operation of the FOI Act. In performing these functions, we seek to promote the pro-disclosure objects of the Act. We work with stakeholders constructively and, wherever possible, informally with a strong emphasis on engagement and education.

Some of our observations after undertaking these monitoring responsibilities for the first six months of the FOI Act's operation are outlined below.

#### **Decision making**

From our Office's reviews and complaints work, it is apparent that decision makers are still adjusting to the shift away from the 'exemptions' used in the 1989 Act to the public interest test. In some cases, decision makers are applying the concepts and language from the former legislation, resulting in defective decisions on access applications.

Decision makers are also adjusting to the application of the new public interest test. The emphasis behind the FOI Act on the proactive disclosure of government held information has resulted in a shift in decision making and a framework where the primary consideration is the public interest.

A common issue identified by our Office in our review cases is a failure to provide sufficient, or sometimes any, reasons as to why the decision maker considered particular public interest considerations (both for and against disclosure) applied to the information being sought by the applicant. While in some cases the application may be readily apparent (for example, that particular information is personal information), this is not often the case with other public interest factors.

As an example, disclosure of information has been stated as being reasonably expected to 'prejudice trade secrets, business affairs or research of an agency or person' but the reasons why this may be the case and/or the potential negative impacts on a business involved have not been explained.

My Office will continue to work with agencies to improve the application of the public interest test in their decision notices and strengthen the reasoning which underpins their FOI decision making. As discussed further below, this will be a focus of the Office's Guidelines for the FOI Act which will be developed in 2019.

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<sup>7</sup> The methods of finalisation were withdrawal, closure with no reasonable prospect of success (s 82(3)(b)), invalid application and insufficient information (s 82(3)(a)).

<sup>8</sup> See: <http://www.ombudsman.act.gov.au/Freedom-of-Information>.

### **Obligation to assist the applicant and assessing the scope of the request**

Where an application is made that does not comply with the information identification requirements of the FOI Act, agencies and Ministers should take reasonable steps to assist the applicant and give them reasonable time to make the application comply (see s 31 of the FOI Act).

We have been working with agencies to improve their FOI practices through our complaints and review work. In particular, we have been focused on ways in which agencies can more effectively assist applicants through the FOI process.

The Office is encouraging agencies to provide early and accurate information to applicants about the new FOI Act, its timeframes and the decision making process. We also suggest agencies take further steps to discuss the scope of the applicant's application with them where there is confusion about what is being sought – with feedback to the Office raising some concerns about consistency of approaches by different FOI officers in this space.

Concerns have been raised that some decision makers may be adopting a narrow approach to interpreting the scope of access applications, despite the pro-disclosure bias and objectives of the Act and the requirements of section 31 outlined above. Acting on these concerns and feedback we have received from agency information officers, we intend to provide additional guidance on these matters as part of the Ombudsman's Guidelines for the FOI Act.

### ***The Ombudsman's focus for the year ahead***

The first six months of the FOI Act has brought significant procedural and organisational change to the way FOI is administered in the ACT. Going forward, we will continue to work with agencies and Ministers to encourage more proactive release of information in the spirit of the FOI Act's objects and its express pro-disclosure bias.

In the year ahead, in addition to continuing to conduct reviews and consider complaints independently, efficiently and, wherever possible informally, the Ombudsman will focus on:

- developing Guidelines to assist agencies to implement the FOI Act
- maintaining an FOI practitioner's forum for agency FOI officers throughout the ACT (with the first one held recently on 9 November 2018)
- raising awareness of the public's right to access government information and the nature of the Ombudsman's oversight functions, through more information on our website and more active community engagement
- agency compliance with any annual statement issued by the Chief Minister under s 95 of the FOI Act, noting that no statement has yet been issued, and
- proactively monitoring compliance with the Open Access Information scheme and engaging with agencies and Ministers to support a pro-disclosure culture that promotes the proactive release of government information.