

Fol in NSW in 1995–96: Two perspectives from the Ombudsman

This article undertakes a comparison between the 1995–96 Annual Report of the New South Wales Ombudsman and the NSW Ombudsman's special report *Implementing the Fol Act, A Snap-Shot* made to the NSW Parliament in July 1997.

The Ombudsman's Annual Report focuses on the work performed within the office in the 12 months leading up to the report, providing future directions that are to be taken as a result of the findings. The Annual Report focuses more generally on statistics and complaints received by agencies, whereas *Snap-Shot on Fol* focuses on the level of compliance with the *Fol Act* by a sample of agencies and provides recommendations as to how the problems faced could be overcome.

In the Annual Report it was stated that to comply with the recommendation of the Australian Law Reform Commission and Administrative Review Council,¹ the Office would provide detailed annual reports. However, as was the major focus in *Snap-Shot on Fol*, the majority of agencies in NSW still fail to comply with annual reporting requirements, making the reporting by the Ombudsman a difficult if not ineffective task. If Fol is to reach its full potential in the quest for open government, a much higher level of compliance with Fol legislation is necessary.

On the positive side, common to both the reports was an increased level of successful applications for information. However, this may be partly due to the relatively small number of requests received in NSW at present.

In both reports it was suggested that agencies should classify their documents in order to provide a faster and more efficient response to requests. Documents which can be removed or destroyed should not be kept on file and commonly requested documents should be made available informally so as to avoid unnecessary costs. Many of the recommendations or future proposals for Fol in the reports were similar, the most basic of these being the further promotion of Fol in NSW which, judging by the small number of requests and poor compliance of agencies, seems to be a need at present.

In order to overcome some of the problems discussed in the reports the NSW Government would need to provide more funding. It has been suggested that the most effective way to make agencies more accountable is through the creation of an Fol unit within the Premier's Department or, alternatively, to authorise and fund the Ombudsman to cover the tasks that would otherwise be carried out by this unit. The suggested role of the unit is discussed below under *Snap-Shot on Fol*.

THE 1995–1996 ANNUAL REPORT OF THE NSW OMBUDSMAN AND ITS COVERAGE OF FREEDOM OF INFORMATION

This review looks at the Freedom of Information section of the 1995–1996 Annual Report of the New South Wales Ombudsman. The Annual Report covers generally the work performed within the office, including activities under the Freedom of Information Act for the previous twelve months and plans for 1996–97.

The year at a glance

There was a 21% drop in the number of complaints received by the NSW Ombudsman. It is suggested that this was due to the wide circulation of *FOI Policies and*

Guidelines which lead to better analysis of complaints and compliance creating more informed decision making.

There was an 11% increase in the number of finalised matters, with a significant fall in the number of complaints made outside the jurisdiction. This may have been because of an increased awareness in the community about internal review options and a greater number of agencies meeting the requirements of the Act.

The majority of complaints were resolved. In part this was due to improved record keeping by agencies and their dealing immediately with delayed determinations or paying refunds. Priority was given to older complaints. Speeding up the external review process resulted in 22% more complaints being completed than received. This figure stems from a backlog of cases which the NSW Ombudsman is rapidly reducing. The backlog is being rapidly cleared because fewer complaints were received and there was continued emphasis on the resolution of complaints, streamlining of procedures, and a growth in expertise.

Future directions

Promotion of the *Fol Act* is seen by the NSW Ombudsman as a priority. However, the office is constrained by limited resources. This limitation has been somewhat improved by the introduction of the Ombudsman's Fol Guidelines, which have assisted agencies in dealing with complaints and assessing determinations, and also have provided an avenue for the views of the office to be made public.

The Ombudsman's focus centred on complaints relating to agencies refusing to access documents, charging excessive fees for processing, and refusing to amend documents that are believed to be wrong or out of date. The Office suggested that agencies should classify their documents to identify those which may be disclosed immediately. This suggestion is in line with the recommendations of the Moynihan Commission Report (US) concerning approaches to classification of government information.²

In order to make agencies more accountable for their decisions it is the intention of the Office to carry out random audits, provide annual reports, and provide summaries and statements of affairs. This intention fits in with the recommendations of ALRC/ADR Review into the operations of Freedom of Information at the federal level.

Key issues mentioned in the Annual Report

Redeterminations

Section 52A was added to the NSW *Fol Act* to allow agencies to review and redetermine applications following the Ombudsman's involvement. Previously there had been a problem with agencies releasing documents following intervention, thereby removing the protection offered in ss.64-66.

Identification of documents covered by Fol applications

The Annual Report suggests that some decision makers take advantage of the terms of an application to escape responsibility for making a decision on a sensitive document, while other decision makers save themselves work by constructing as narrow an interpretation as possible

of the Act. The Ombudsman considers that honesty is central to the concept of FoI so that when an agency holds information which, on a reasonable interpretation of the terms of the FoI application is covered by those terms, then the documents should be considered to be covered by the application and assessed appropriately. This would avoid the feeling of some applicants that a technical interpretation by the agency has denied them information they were seeking.

Removal and destruction of documents from official records

Whether a document can be removed or destroyed is considered to be an important question of principle. Unimportant documents which can be destroyed should not be kept on file. The test for determining whether a document can be destroyed is whether any valuable information would be lost as a result. Destruction of documents, in the Ombudsman's view, makes release and determination impossible.

Access to information compiled and created by consultants

FoI applications are often unsuccessful in relation to information compiled and created by consultants. It is suggested that agencies should ensure that copies of all source material documents are provided with the final reports, or ensure that they have right to immediate access to those documents under the contract. This area is increasingly important given the increasing proportion of work being contracted out to consultants.³ Similar concerns in relation to government tendering processes and outsourcing have been noted in the Western Australia Commission on Government Report (1995). It is vital to the public interest that the documentation on which consultants base their conclusions be accessible. The only exception available is where the documents would reveal a trade secret. This exemption is contingent on the consultant being able to show that the information was not central to the facts and conclusions in the final report.

In a recent discussion paper, 'The Contracting out of Government Services', the Administrative Review Council identified three ways in which to approach the question of preserving information access rights with regard to contractor services. These included:

- making the private sector body subject to the *FoI Act*; deeming documents in the possession of the contractor to be in the possession of the government agency; and
- incorporating information access rights into individual contracts.

The Review remarked on these approaches but stated that it felt that by extending the scope of the *FoI Act* by either of the first two approaches, 'would leave open the possibility that some documents held by contractors, including documents which concern the contractor's business affairs, could become available because of public interest factors'.⁴

Objections to building and development applications

Councils ought not to consider objections to Building and Development Applications which are not disclosed, as they would be making administrative decisions on the basis of information which was not publicly available. Consequently, objections should not contain personally motivated or subjective comment which is irrelevant to

the merits of the case. Councils should publicise the fact that protection will not be given to documents of such a nature, in order to lessen the occurrence of objections containing malicious or personally based material. Councils should make it clear to potential objectors that they are seeking submissions based upon planning, environmental, privacy, public safety or other relevant grounds and not objections containing personal animosities, gossip, etc.

Identification of complainants and witnesses

The Ombudsman feels there is a strong argument for non-disclosure of the identity of a complainant if the complaint was made in good faith, disclosing a possible contravention of the law, and was sent to the Council to enable it to enforce the law. It is suggested that fewer problems arise for Councils when they develop a clear policy which is widely advertised. In some instances it may be appropriate to partially release the information. It is important that the information should be considered in regard to whether it is malicious or genuine.

Key investigations in 1995/1996

Botany Council's use of public funds

There were problems with the Botany Council refusing to amend information described as incorrect, misleading and incomplete. It was recommended in a special investigation that Parliament should amend the *FoI Act* to put beyond doubt that the public can seek amendment of an agency's records regardless of how access to the information was obtained. A second recommendation provided that a record should be amended by the addition of a notation or other document, located close to the information determined to be incomplete, incorrect, out of date or misleading.

The Casino Control Authority and the FoI Act

The argument put forward in this case proposed that individual documents released over time could form a mosaic that, when viewed in total, could reasonably be expected to cause serious adverse commercial effects. Thus it is the combination of the documents that was viewed as important. However, it could be argued that the rule is too easily applied to any individual document, if it can be shown to belong to a particular class of documents. It requires a test to be applied to the generalised class of documents to which the particular documents belong.

'IMPLEMENTING THE FOI ACT, A SNAP-SHOT'

The priority of this report was to determine the level of compliance of agencies within NSW with the *FoI Act* in order to promote and ensure the aim of open government. The *FoI Act* requires that public sector agencies in NSW regularly publish certain information about:

- the affairs of the agency which includes a description of the agency's structure, functions, kinds of documents held by the agency and a list of all policy documents; and
- the administration of FoI by the agency including FoI statistics, an assessment of the impact of the FoI on the agency's activities and so on.

In order to improve the work of the Ombudsman's Office as an external review agency and under the *FoI Act* and to foster the spirit of open government in NSW, the Ombudsman's Office maintains an active role in the promotion of FoI, as borne out by this report.

The report focuses on the level of compliance with the *Fol Act* by a sample of agencies. The agencies were selected on the following criteria:

- all agencies received a significant number of Fol applications;
- the agencies were subject to Fol related complaints;
- most were major public sector organisations constituting:
 - 28 councils
 - 20 ministerial offices
 - 9 area health services
 - 4 universities
- various accountability/watch dog bodies.

Relevant annual reports were examined and an assessment was made as to whether the information complied with Fol reporting requirements, statistics gained being tabulated and assessed. These statistics were then compared with the NSW 1989/90 Annual Report as well as other jurisdictions within Australia.

The Report revealed that the majority of agencies were failing to comply with Fol annual reporting requirements either completely or to a significant degree. In total, 52% of agencies did not meet the expected standards: 13% of these completely failing to comply, and 39% inadequately complying. Only 19% fully complied.

It was also revealed that access to information by the public in NSW was under utilised with most agencies receiving less than eight Fol applications in 1995/96. A comparison with other Australian States revealed that NSW received proportionally fewer Fol applications per head of population than other jurisdictions. Of the applications that were received, 92.3% of applicants received all or some of the documents requested with only 6.7% of applications being rejected.

The Ombudsman suggests that where possible, agencies should informally and routinely disclose information. They should identify any documents which they are required by law to make available for inspection and purchase, classify them and identify those that can be released. By identifying commonly requested categories of documents it may be possible to determine whether it

is unnecessary to deal with such requests formally under the Act. In relation to formal disclosure, the Ombudsman suggests that the spirit of the legislation encourages disclosure of as much information as possible and that agencies should therefore exempt only the minimal amount of documentation necessary for the effective functioning of government.

As a result of the findings the following recommendations were made:

- (1) That the Premier re-establish the Fol unit within the Premiers Department;
- (2) that the functioning of the Unit include:
 - (a) promoting Fol in NSW
 - (b) providing advice and education on Fol
 - (c) regularly reviewing and updating the Fol Procedure Manual
 - (d) monitoring the implementation of Fol by NSW public sector organisations
 - (e) collecting and analysing statistics and reporting them to parliament
 - (f) reviewing the format and content of the Fol sections of agency annual reports; and
 - (g) reviewing the operation of the *Fol Act* and Regulations
- (3) that, as an alternative, the Office of the Ombudsman be authorised and funded to perform the functions listed in (2).

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References

1. ALRC/ARC, 'Open Government: A Review of the Federal Freedom of Information Act 1982', 1996.
2. Sheridan, Helen and Snell, Rick, 'Secrecy: Report of the US Commission on Protecting and Reducing Government Secrecy', (1997) 69 *Fol Review* 36-40.
3. Townley, Helen and Snell, Rick, 'Public Records — Current Issues In Control And Access Prior To Privatisation', (1996) 65 *Fol Review* 58-61.
4. Administrative Review Council, 'The Contracting Out of Government Services', Issues Paper, February 1997.

Freedom of information reporting requirements: The Tasmanian 'devil' approach — forget and file away

Freedom of Information legislation in several Australian jurisdictions (including Tasmania) requires that public sector agencies adhere to certain Fol reporting requirements in their departmental annual reports, and also in a general Fol annual report. Indeed, the Australian Law Reform Commission has noted that 'reporting is an important part of monitoring'¹ and have suggested that an Fol Commissioner, at the Commonwealth level, should prepare an annual report to Parliament on the operation and administration of the *Fol Act*, including such details as poor Fol administration and any regular or persistent failure by agencies to comply with the Act. The ALRC further suggests that the Commissioner's monitoring powers should not be limited to the annual report as a means of drawing attention to poor practices, but that he or she should be able to take appropriate steps to exert pressure on an agency to improve its practices, such as by briefing the relevant Minister.²

The evidence is mounting that several jurisdictions struggle to achieve bare minimum reporting standards. Indeed, New South Wales has been painted, by several articles in the *Fol Review*, as a jurisdiction in which Fol annual reporting requirements are particularly inadequate. As Bruce Smith has observed over a number of years through his examination of agency annual reports, typically such reports fail to comply with even the most basic of Fol statistical reporting requirements.³

In light of the ALRC recommendations and the evidence of reporting inadequacies, the NSW Ombudsman in a special report to Parliament titled *Implementing the Fol Act: A Snap-Shot* (July 1997), outlined the procedure and methodology undertaken, and results gained in the commencement of a program to audit compliance by government agencies with the requirements of the *Fol Act*, including compliance with Fol reporting requirements. The perceived need for the audit program arose out of long-standing concerns held by the NSW Ombuds-