

CHAPTER 2

OVERVIEW OF THE FREEDOM OF INFORMATION ACT

Context of the FOI Act

2.1 The Freedom of Information Act 1982 was the last of four enactments collectively described as constituting the 'new administrative law'. Dr John Griffiths described these enactments as being

designed to regulate the relationship between government and individuals and to reconcile the potential conflict of interests between providing efficient and effective public administration and safeguarding rights of individual justice.¹

2.2 At the time of writing, only one of the four enactments, the Ombudsman Act 1976, is not the subject of formal reassessment. The Administrative Decisions (Judicial Review) Act 1977 is under review by the Administrative Review Council; and the operation of the Tribunal created by the Administrative Appeals Tribunal Act 1975 is under review by the Attorney-General's Department.

2.3 The last of these reviews, like the 1986 amendments to the FOI Act, is part of what the Attorney-General's Department described as 'an important package of [1986] budget related

1. Griffiths, J., 'Australian Administrative Law: Institutions, Reforms and Impact', (1985) 63 Public Administration 445, p. 446.

initiatives'.² According to the Department, these initiatives were designed, inter alia, to rationalise the availability and use of the various avenues of review and access to information.³

2.4 The Committee recognises that the FOI Act forms a (fourth) part of a wider administrative law scheme. In writing this report, the Committee has borne in mind this context and, where appropriate, referred to the relationship between the FOI Act and other elements of the administrative law scheme.

Attitude towards the FOI Act

2.5 The inquiry revealed that there is widespread support for the FOI Act, and little criticism of its object to make available information about the operation of, and in the possession of, the Commonwealth Government, and to increase Government accountability and public participation in the process of government. However, there is some lack of agreement over the degree to which this object has been achieved. This controversy is exacerbated by the lack of agreement as to the extent to which information in the possession of the Government about its operations should, in principle, be made available to the community at large.

2.6 Only one submission, from the Queensland Government, recommended the repeal of the Act.⁴ The remaining submissions and witnesses expressed varying degrees of support for the Act, although many had reservations about the wording of particular sections, and/or their application in particular circumstances.

2.7 Nothing which emerged during the Committee's inquiry caused it to doubt the overall value of the FOI Act. However,

2. Submission (dated 13 August 1987) to the Committee from the Attorney-General's Department on the Committee's inquiry into the Administrative Decisions (Judicial Review) Amendment Bill 1986, p. 2.

3. Ibid., p. 1.

4. Submission from the Queensland Government, p. 1.

there are particular problems affecting the operation and administration of the Act. There is scope for improvement. The discussion of both the problems and possible improvements forms the major part of this report.

2.8 In writing this report, the Committee is conscious of the absence of any simple, empirical means to assess the degree to which the FOI Act's object has been achieved, and of the dangers inherent in relying upon anecdotal reports about the operation of the legislation. The Committee wishes to emphasise that it is firmly of the view that the operation of the FOI Act has proven to be a net benefit to the Australian community. In the Committee's view, much information has been released as a result of the FOI Act which would otherwise never have reached the public.

2.9 The success or otherwise of the FOI Act should not be viewed as exclusively dependent upon the contents of documents released under the Act. The mere existence of the legislation may have influenced agency attitudes towards 'governmental secrecy'. In addition, Mr Jack Waterford, a Canberra journalist with extensive experience in using the FOI Act, made the following point:

Often, when I have obtained documents under FOI, I have found little in the documents themselves to justify a story, but have learnt a lot about the way a department works either from what the document contains, or from the process of trying to extract it.⁵

2.10 To some extent at least, the operation of the FOI Act depends upon agency attitudes towards disclosure of 'government' information. These have varied greatly. Mr Peter Timmins, Managing Director of the Political Reference Service Ltd, had this to say:

5. Waterford, J., 'Reporting the Public Service', (1986) 13 Canberra Bulletin of Public Administration 102, p. 105.

Attitude is what it is all about. But I would suggest that a positive attitude towards more open government has been very difficult to detect at the political level and at the senior public service level over the last couple of years.⁶

2.11 Ms Kate Harrison, representing the Public Interest Advocacy Centre at the Committee's hearings, also referred to the importance of agency attitudes, and said there was still 'an unhealthy level of disclosure phobia among bureaucrats'.⁷ She suggested that 70% of the problems arising out of the operation of the FOI Act were attitudinal, rather than products of legislative defects.⁸

2.12 The Committee noted a wide range of attitudes towards freedom of information in the submissions and witnesses from the agencies. Some agencies, such as the Department of Veterans' Affairs, have embraced freedom of information enthusiastically. Mr Derek Volker, Secretary of the Department of Veterans' Affairs at the time of the Committee's third public hearing, described the FOI Act as being 'a bonus for the Department'. According to Mr Volker, the increased openness implied by the FOI Act had ameliorated many of the difficulties which the Department faced in its day to day operations.⁹

6. Evidence, p. 998.

7. Evidence, p. 913.

8. Evidence, p. 945. For other examples of criticism of agency attitudes see Evidence, pp. 260-62, 296 ('The Age'), pp. 314-15 (Mr R. Howells), pp. 367-69 (Law Institute of Victoria), p. 446 (Confederation of Australian Industry); submission from the Privacy Committee (NSW), pp. 5-6.

9. Evidence, p. 596; see generally pp. 594-98. See also the submission from the Returned Services League of Australia, p. 1.

2.13 To some extent, this positive response may be attributable to two factors: a pre-FOI Act discretionary access policy;¹⁰ and the absence of reliance upon non-Commonwealth sources for information.

2.14 According to several agencies, some State bodies are refusing to co-operate, or have threatened to withdraw their co-operation, if information which is provided by the State body to the Commonwealth is released under the FOI Act.¹¹ One agency provided the Committee with information suggesting that bodies in at least three States have threatened to withdraw their co-operation as a result of the disclosure of documents under the FOI Act.¹² At least one Ministerial Council does not keep a transcript of its proceedings, due to concern that the transcript will be released under the FOI Act.¹³

2.15 In the Committee's view, there being freedom of information legislation throughout the Commonwealth would be advantageous.

2.16 The Department of Foreign Affairs reported that it had not noticed any reluctance amongst foreign governments to deal with Australia as a result of the FOI Act.¹⁴ Overseas law enforcement agencies have expressed concern about the effect of the FOI Act upon information supplied by them, but it does not

10. Submission from the Department of Veterans' Affairs, para. 8 (Evidence, p. 563).

11. Eg. Evidence, p. 739 (Department of Immigration and Ethnic Affairs), pp. 1275ff. (Department of Health); submissions from the Department of Health, p. 12 (Evidence, p. 1232); the Department of Local Government and Administrative Services, p. 10; the Great Barrier Reef Marine Park Authority, p. 1; the Department of Arts, Heritage and Environment, p. 3. See also the evidence referred to in Re State of Queensland and Australian National Parks and Wildlife Service (1986) 5 AAR 328, p. 335.

12. Confidential letter to the Committee.

13. Submission from the Queensland Government, p. 5, referring to a resolution of the Ministerial Council on Drug Strategy, Canberra, 18 October 1985. See also Evidence, p. 1272 (Department of Health).

14. Submission from the Department of Foreign Affairs, p. 17 (Evidence, p. 1072).

appear that this has led to any reduction in the supply of information to the Australian Federal Police.¹⁵

2.17 However, the Department of Immigration and Ethnic Affairs told the Committee that, as a result of the FOI Act, at least one overseas agency has declined to supply information; and some overseas agencies will supply information only indirectly (e.g. via an exempt agency such as ASIO), whilst others have advised the Department that they will cease to supply information if any documents supplied are released under the FOI Act.¹⁶

2.18 The attitude of the business sector towards the FOI Act is mixed. The Act provides a means to obtain commercially useful information; but businesses also fear that commercially sensitive information relating to them may be released under the FOI Act.¹⁷ Businesses appear to have felt the need to evaluate the information that they provide to Government in the light of the FOI Act.¹⁸ However, on the evidence available to the Committee, it is not clear whether the FOI Act has reduced the flow of information to the Government from the business sector. If there has been any reduction, it does not appear to have been of major significance.¹⁹

2.19 Individuals have reacted adversely to the introduction of the FOI Act in some circumstances. For example, the Public Service Board informed the Committee:

It is the perception of the Board that many referee reports are significantly less candid

15. Evidence, pp. 488-89.

16. Evidence, pp. 736-40.

17. E.g. Evidence, p. 453 (Confederation of Australian Industry), pp. 794-95 (Business Council of Australia); submission from the Australian Patent, Trade Marks and Design Offices, p. 19.

18. E.g. Evidence, p. 826 (CRA Ltd); submission from the Department of Trade, pp. 2-3.

19. E.g. Evidence, pp. 137-38 (Attorney-General's Department); p. 635 (Treasury); pp. 825-26 (CRA Ltd); pp. 1032-33 (Australian Broadcasting Tribunal).

than previously. There is also a reluctance to provide reports in some instances.²⁰

2.20 Similarly, the Department of Health stated that the FOI Act had led to a discernible reluctance on the part of medical practitioners to provide medical reports, or, where they do provide such reports, a tendency to provide reports with little detail.²¹

Benefits and costs of FOI - an overview

2.21 Much of the public debate about and criticism of the operation of the freedom of information legislation has focused upon the costs ascribed to it. However, many of the costs which are attached to the operation of the FOI Act would have been incurred even in the absence of the legislation.

Disclosure of 'Government' information

2.22 The introduction of the FOI Act formed part of a trend towards increasing openness in government. In turn, the Act has had an impact upon that trend. Some of the material released under the FOI Act would have been released even in the absence of the legislation. The Committee has no method of determining what proportion of FOI access requests are for such material. But the proportion, at least in the area of applicants seeking access to personal or personnel files, would appear to be high.

2.23 It is not possible to determine what access any particular agency would have allowed had the Act not been passed. Nevertheless, the cost of freedom of information would be dramatically reduced if it were to be discounted to allow for the

20. Submission, p. 5. See also the submissions from the Department of Foreign Affairs, p. 14 (Evidence, p. 1069); the Department of Defence, p. 18.

21. Submission, p. 15 (Evidence, p. 1235). But see also Evidence, pp. 1288-89 (Department of Health).

fact that access to a significant proportion of freedom of information material would have been disclosed even in the absence of any freedom of information legislation. There is no way of estimating what should be the discount factor.

2.24 A further complication is introduced by the need to balance the value of access as a right under the FOI Act against whatever degree of access would have been allowed as a matter of discretion otherwise. For these reasons, the Committee cannot recommend that the total cost of FOI should be formally discounted by any particular amount. However, any discussion of FOI costs should be influenced by the fact that some discounting is appropriate.

2.25 In addition, the validity of the figures contained in the FOI Annual Reports for the average cost per request of allowing access is undermined by the possibility that agencies may disclose material outside of the FOI Act. At the extremes, agencies may adopt either of two approaches to granting access.

2.26 One approach may be to attempt to encourage potential FOI applicants to seek informal access outside the Act wherever possible on the basis that informal access is cheaper and more satisfactory for agencies and applicants alike. If agencies are successful in this strategy, only the most difficult cases may result in the lodgement of a formal FOI access request.

2.27 The net result may be that there would be only a small number of formal FOI requests and a low total cost of FOI. However, the average cost per FOI request will be high, both because the requests processed would be the difficult ones, and because the agency overheads of FOI (e.g. publication requirements, staff training) are spread over a relatively small number of requests. The refusal rate and average time taken to provide access would also be relatively high, because only difficult requests would enter the FOI system.

2.28 At the other extreme, agencies may discourage or refuse informal access, and channel all information seekers into making formal FOI requests. The net result would be a large number of FOI requests and a high total cost of FOI. But the average cost per FOI request would be relatively low, because many of the requests would be straightforward to process and because overheads would be spread over a larger number of requests. The refusal rate and average time taken to provide access would be relatively low because most of the requests entering the system would be straightforward.

2.29 Agencies might adopt either of these strategies (or some intermediate strategy) consistently with the overall objects of the FOI Act. For example, the Department of Veterans' Affairs appears to encourage the use of formal FOI requests for access. For agencies like this, which are faced with large numbers of applicants seeking access to their personal files, no doubt it is administratively simpler, and cheaper, to process all requests through the single (FOI) channel.

2.30 On the other hand, the Department of Education informed the Committee that the Department

decided when the Act was introduced that, where possible, it would not force information seekers to use FOI. Thus its student assistance clients and its own staff continued to be given wide access to their files outside the Act. This made access quicker for the requester and cheaper administratively for the Department. By adopting this practice Education may have been disadvantaged. The Department has less staff than needed because its 'statistics' are not high. Yet the majority of requests processed under the Act are qualitatively more difficult than those which relate to a person's file. That is, a request, for example, for 'the reasons why X school received Government funding' is treated

statistically the same as a request for an interview report for a clerical assistant grade 2 position.

Moreover, the likelihood exists that requests for documents of some policy complexity may involve refusal at least in part. Because Education's open access policy does not provide many straight forward requests it cannot leaven the number of refusals by granting access under the Act to students' files etc. Thus the refusal rate is relatively high and gains the Department unwarranted criticism.²²

2.31 The Committee has no evidence to suggest that agencies adopt a particular strategy on access to information with a view to influencing the total cost of FOI. However, strategies adopted on other grounds do have the effect of either increasing or decreasing the FOI component in the overall cost of information provision by the Commonwealth. This is yet another reason for treating with caution the significance of the figure for the total cost of FOI.

2.32 Submissions from a few FOI users criticised particular agencies, or suggested that the Committee should investigate the processing of FOI requests by particular agencies. In some cases, the submissions relied upon high averages for the cost of processing requests or the time to process requests. For the reasons given above,²³ the Committee does not consider that these averages should be used in any simple way to identify agencies as being inefficient or not acting in accordance with the objects of the FOI Act.

22. Submission from the Department of Education, pp. 1-2.

23. See also the first supplementary submission of the Attorney-General's Department, pp. 7-8, for examples of the ways in which misdirected requests and transferred requests can distort the statistical picture of an individual agency's FOI performance.

Benefits

2.33 In the Committee's view, it is neither reasonable nor realistic to examine the costs of the freedom of information legislation without simultaneously considering the benefits which have flowed from the legislation.

2.34 As part of the Attorney-General's Department data collection for the 1985-86 FOI Annual Report, agencies were asked to indicate whether they had experienced particular benefits arising from FOI during the year. The range of acknowledged benefits was indicated by the following replies:²⁴

<u>Particular Benefit</u>	<u>Number of Agencies</u>
. Greater awareness of the need for objectivity and accountability in dealing with the public	46
. Improved quality of decision-making	38
. Improved communications and understanding between the agency and clients	33
. Improved efficiency of records management	27
. Greater public awareness of the role of the agency	25
. Other (greater awareness of rights of access among staff)	1

2.35 Agency submissions to the Committee presented a similar picture.

2.36 In general, public awareness of how agencies operate has been to their benefit and, in some cases, has improved their public images. Many agencies have become more open about their

 24. FOI Annual Report 1985-86, p. 293. The Report also included a table of 'detriments' - see p. 293-94. These detriments are considered below in the discussion of costs.

operations and procedures as a result of the FOI Act, even where much of the additional information is provided outside the Act.²⁵ For example, the Australian Taxation Office informed the Committee:

Perhaps the greatest benefit flowing from the impact of the FOI legislation on the operations of the Australian Taxation Office has been the introduction of the taxation ruling system. The benefits of this system have accrued to taxpayers and their advisers, to commercial publishing houses and to Taxation Office personnel ... [It] has led to greater efficiencies in the Taxation Office and has provided the office with a better public image.²⁶

2.37 The benefit to the taxpayer of an agency avoiding even a single poor decision may be large in relation to the overall costs of FOI. This is illustrated by the events which led the Department of Defence to abandon its proposal to acquire land in the Bathurst-Orange region for army training purposes in April 1986.

2.38 The proposal was strongly opposed by local residents and was the subject of an inquiry by the Senate Standing Committee on Foreign Affairs and Defence. The report of that Committee noted:

Throughout the inquiry, material obtained from the Department under the Freedom of Information (FOI) Act by interest groups

25. Some agencies, however, moved to a more open approach independently of FOI: e.g. submission from the Department of Resources and Energy, p. 3.

26. Submission from the Australian Taxation Office, pp. 1-2. (Evidence, pp. 651-52) For other examples, see the submissions from the Department of Housing & Construction, pp. 4-5; the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre (Sydney), p. 18 (Evidence, p. 867); the Australian Broadcasting Tribunal, pp. 2-3 (Evidence, p. 1011-12); the Department of Education, p. 1; the Department of Health, p. 7 (Evidence, p. 1227); the Department of Community Services, p. 4.

opposing the proposals repeatedly contradicted or undermined evidence presented to the Committee by Departmental witnesses.²⁷

2.39 The material obtained under the FOI Act showed that the proposed acquisition would not have met the Army's requirements. Further, the material showed that the Department of Defence should have abandoned the proposed acquisition at a much earlier stage. Its failure to do so reflected poorly upon its management of the proposal.²⁸ It is a reasonable inference that the proposal might have gone ahead if groups opposing it had not gained access, through FOI, to documents with which to convincingly demonstrate the proposal's inadequacy. It is impossible to calculate reliably the loss to the Commonwealth had the proposal not been abandoned. With this campaign in mind, one submission commented:

It is not unlikely ... that FOI pays for itself many times over, in that it prevents wrong decisions being made by agencies ...²⁹

2.40 In its submission, 'The Age' identified some of the news stories which it had published based upon material obtained under the FOI Act. 'The Age' noted that

the mere existence of FOI can lead to Government disclosing information to journalists and members of the public without the need for formal requests.

FOI provides considerable benefits to journalists and their readers by supplying new information of sometimes higher quality or greater detail than previously available. But it is impossible to quantify these benefits.³⁰

27. Land Acquisition in New South Wales by the Australian Army - First Report, (Parliamentary Paper No. 180/1986) p. xviii.

28. *Ibid.*, p. xxiii.

29. Submission from Dr A. Ardagh, p. 3.

30. Submission from 'The Age', Appendix 1, p. 1 (Evidence, p. 235).

2.41 To the end of June 1987 over 125,000 requests had been made under the FOI Act.³¹ Measured by volume of requests, the FOI Act has been primarily used by individuals to obtain access to information about themselves. The Committee knows of no way to assess the benefits accruing to these individuals from the operation of the FOI Act.³²

2.42 The reasons for lodging freedom of information requests indicate some of the benefits which applicants see as flowing from the FOI Act. A Department of Veterans' Affairs survey of its clients conducted in 1984 showed that

while curiosity was undoubtedly a factor in prompting 21% of applicants to seek access to records concerning them, the significant reason for use of the Act for 69% of applicants was to seek information which would assist with a claim or appeal under the Repatriation Act. A further 12% made their FOI requests in order to obtain more information about their dealings with the Department and these could well also be leading to claims or applications for review of pension decisions.³³

2.43 A number of agencies informed the Committee that it is not uncommon for FOI access requests to be dropped after applicants have been informed that (usually modest) charges are payable.³⁴ The Committee recognises that some applicants may

31. Because the number of section 15 requests made in 1986-87 was not recorded, an exact total cannot be given: FOI Annual Report 1986-87, p. 7.

32. Cf. submissions from the Department of Treasury, p. 7 (Evidence, p. 621); the Department of Finance, p. 4 (Evidence, p. 1181).

33. Submission from the Department of Veterans' Affairs, para. 26 (Evidence, p. 566). Respondents were allowed to specify more than one reason, so the figures do not total 100%.

34. E.g. submissions from the Australian Wool Corporation, p. 6; the Department of the Treasury, p. 9 (Evidence, p. 623); Telecom Australia, p. 5 (Evidence, p. 753); the Department of Trade, p. 6; the Department of Finance, p. 2 (Evidence, p. 1179).

attach only a negligible value to the documents which they seek where no charges are payable. However, the Committee has no reason to believe that this is true in the majority of cases.³⁵

2.44 In addition, the Committee notes that, while much of the information now provided under the FOI Act was made available prior to the introduction of the FOI Act, pre-FOI Act disclosure policies were frequently imprecise and inconsistent.³⁶ The statutory access regime created by the FOI Act has established 'the rules for all parties involved', and introduced a degree of certainty.³⁷

Costs

2.45 The major sources of data about the costs of FOI are the annual reports on the operation of the Act compiled by the Attorney-General's Department from data supplied by agencies. Additional sources include agency annual reports, agency submissions to the Committee, and the Report of the Inter-Departmental Committee.³⁸

2.46 According to the FOI Annual Reports, the total costs to the Commonwealth of FOI was \$15m in 1983-84, \$16.5m in 1984-85, \$15.7m in 1985-86 and \$13.3m in 1986-87.³⁹

2.47 The data contained in the FOI Annual Reports has to be used with caution, as the Reports themselves acknowledge. The 1986-87 Report states:

35. For statements of the benefits to requesters which flow from FOI, see e.g. the submissions from the Returned Services League of Australia, p. 1; Mr P. Frankel, p. 1; Mr B.F. Grice, p. 1; and the Australian Pensioners' Federation, p. 3.

36. Submission from the Department of Veterans' Affairs, para. 8 (Evidence, p. 563).

37. Submission from the Department of Veterans' Affairs, para. 10 (Evidence, p. 563).

38. See para. 1.18 above on this Committee.

39. FOI Annual Report 1986-87, p. 1.

As in previous years, the costs ... [agencies] reported varied widely in nature and extent, and in the bases used to determine them. There were considerable disparities between agencies in terms of the resources available for and utilised in monitoring costs attributable to FOI. For example, agencies differed in their approach to reporting staff costs where resources were used to prepare manuals which are required to be made available under the Act. Some agencies report these costs as attributable to FOI while others take the view that this work would be done irrespective of the FOI Act and thus is not strictly attributable to FOI.⁴⁰

2.48 There is also some double-counting of costs. A percentage of direct salary cost is added to that cost to cover overheads (often called 'on-costs'). Yet some items covered by this percentage have also been added to costs as discrete items. The FOI Annual Report 1985-86, stated:

Recent research associated with the Inter-Departmental Committee on FOI Costs showed that there had been double-counting in a number of areas. Items which could clearly be identified as having been the subject of double-counting amounted to 11% of the 88% allowed for on-costs in previous FOI Annual Reports. Other areas also appeared likely to have been subject to double-counting but it was not possible to quantify the magnitude of the discrepancy.⁴¹

2.49 The data in the FOI Annual Reports about non-labour expenditure is also unsatisfactory.⁴²

2.50 Increased sophistication in cost-reporting had the effect of increasing some multipliers used in compiling costs for

40. FOI Annual Report 1986-87, p. 54. See also Evidence, pp. 110, 131-32 (Attorney-General's Department) and pp. 1197-1200 (Department of Finance).

41. FOI Annual Report 1985-86, p. 75.

42. FOI Annual Report 1986-87, pp. 57-58.

the FOI Annual Report 1985-86.⁴³ A comparison of the figure for total staff costs in a random sample of individual agency annual reports to Parliament for 1984-85 with the relevant agency figure in the FOI Annual Report 1984-85 revealed discrepancies.⁴⁴ Numerous discrepancies were found in the reported amounts of charges collected in 1984-85 as between Departmental annual reports and the FOI Annual Report.⁴⁵ A similar pattern of discrepancies emerged with respect to the number of FOI requests received.⁴⁶ Similar discrepancies were noted between the 1986-87 Departmental annual reports and the FOI Annual Report 1986-87.⁴⁷

 43. Eg. in the data collection for the first, second and third Reports, the smallest unit recorded in respect of staff-costs was one-twelfth of a staff-year. For later Reports, this was altered to one-hundredth of a staff-year. In all Reports, staff input of less than the minimum figure was not included unless special circumstances existed. A second example concerns the mean average salaries used by the Attorney-General's Department to translate agency-supplied figures on staff hours into staff costs. In 1984-85, the highest of the three categories used, 'principal officers and their advisers', was assigned an average salary of \$35,400: 1984-85 Report, p. 126. In 1985-86, this category was sub-divided into 'clerical administrative' with an average salary of \$35,489 and 'SES' with an average salary of \$52,426: 1985-86 Report, p. 76.

44. Eg. the departmental annual report figures, with the FOI Annual Report figures in brackets, are as follows: Arts, Heritage and Environment \$75,500 (\$189,658); Defence \$1,592,888 (\$1,535,859); DEIR \$390,000 (\$355,572), DIEA \$1,098,000 (\$1,038,140); Resources and Energy \$82,555 (\$86,510).

45. Examples from Department annual reports, rounded to the nearest dollar with the FOI Annual Report 1985-86 figure in brackets are: Communications \$428 (\$330); Defence \$1,010 (\$1,185); DEIR \$208 (\$169); Prime Minister and Cabinet \$66 (\$28); Territories \$628 (\$412); and Trade \$366 (nil).

46. Eg. the Public Service Board's Annual Report 1984-85, p. 93, stated: 'During 1984-85 the Board received 318 FOI requests compared with 177 FOI requests in 1983-84'. Yet in the FOI Annual Reports for these periods, the figures for requests received by the Board were 239 and 158 respectively. The Australian Telcommunications Commission Annual Report for the year ended 30 June 1985 stated that in the year 'Telecom received 301 requests' under the FOI Act. The FOI Annual Report 1984-85 listed the total requests received as 245.

47. Examples from agency annual reports, with the FOI Annual Report 1986-87 figure in brackets are: Aboriginal Affairs 26 requests (33), \$464 charges collected (\$355), \$46,205 cost of implementing FOI (\$91,465); Australian Federal Police 200 requests (188); Australian Postal Commission \$1356 charges collected (\$1894); Department of Defence 1843 requests (1841); Health Insurance Commission 43 requests (28), 35 requests finalised (24); Primary Industry 39 requests (37), \$3642 charges collected (\$2107), \$70,385 total costs (\$81,836).

The Committee raised the issue of discrepancies with two agencies in an attempt to discover the reason for the differences. The results of these inquiries are set out in detail in Appendix IV.

2.51 In the first three FOI Annual Reports, the fixed percentage added to direct salary costs to cover overheads ('on costs') was 88%. The Inter-Departmental Committee's research led it to conclude that 88% was unjustifiably high. The IDC considered that a true figure for on-costs could only be determined as a result of detailed assessment of operating, costing and accounting procedures of agencies subject to the FOI Act.⁴⁸ The advice of the Department of Finance to the IDC was that these on-costs would probably lie between 50% and 75%. The IDC decided that the appropriate course would be for it to base its analyses on the figure of 60% on-costs. Subsequent FOI Annual Reports also adopted the figure of 60% for overheads.⁴⁹

2.52 The Committee accepts that a figure of 60% is more realistic than 88%. The Committee notes that even 60% is apparently no more than an educated guess. The actual figure for overheads for the Department of Finance for 1984-85 was stated by the Department to be 113.5%.⁵⁰ However, the Committee accepts that the high cost of the investigation necessary to establish a precise average for use by all agencies cannot be justified. Equally, the extra cost of establishing a separate, precise, figure for each agency is unjustified.

2.53 Submissions from some users argued that the total reported cost of FOI is unnecessarily increased by some agencies' practices. These include improperly refusing access at the initial decision-making stage, thus provoking otherwise unnecessary internal reviews and Administrative Appeals Tribunal appeals; using of staff of greater seniority than the task

48. IDC Report, p. 10.

49. FOI Annual Reports 1985-86, p. 73; 1986-87, p. 55.

50. Letter to the Committee, 9 September 1986.

requires; briefing counsel or seeking legal advice unnecessarily; and failing to maintain record systems adequate for efficient retrieval of requested documents.⁵¹

2.54 The Committee received no evidence that agencies, as a general rule, incur costs unnecessarily or maintain inefficient record-keeping systems from a perverse desire to frustrate FOI applicants. It follows that the Committee does not consider that the costs of FOI have been artificially inflated to any significant extent.

2.55 The Committee acknowledges that the total reported cost of FOI should be reduced to reflect (a) the fact that some of the material required to be published under the FOI Act is of benefit to the publishing agency and would, to some extent at least, have been produced even if not required by the Act; and (b) discrepancies in accounting. Further, as was noted above in paragraph 2.22, a considerable proportion of the material released in response to FOI requests would have been released even in the absence of FOI.⁵²

2.56 The Committee does not consider that the cost of providing FOI access to agency personnel documents at the request of staff should be debited to FOI. This cost, which in 1984-85 was estimated to be about \$1.5m,⁵³ should be debited to the staff management costs of the agencies concerned.

51. Eg. see joint submission from the Australian Consumers' Association, the Public Interest Advocacy Centre, the Inter Agency Migration Group, and the Welfare Rights Centre, p. 23 (Evidence, p. 872); submission from the Law Institute of Victoria, p. 2 (Evidence, p. 375).

52. Eg. from its submission it appears that access would have been given in the absence of FOI to almost all the material to which FOI access is given by the Department of Veterans' Affairs: para. 7 (Evidence, p. 563). In 1985-86, this Department received 31.9% of the total access requests reported by agencies and its total FOI costs were \$1.3m: FOI Annual Report 1985-86, pp. 12 and 114.

53. IDC Report, p. A3.

2.57 On the other hand, the Committee recognises that the reported cost of FOI should be increased to reflect, inter alia; (a) FOI-related costs that are not formally ascribed to FOI but which are incurred by agencies;⁵⁴ (b) the cost of delayed decision-making on other matters because relevant files have been required to process an FOI request;⁵⁵ (c) the cost of providing the Tribunal/court system to resolve FOI disputes;⁵⁶ (d) the cost of FOI to agencies not subject to the FOI Act,⁵⁷ whose costs are therefore not included in the FOI Annual Reports; and (e) the cost to the Commonwealth of actual or threatened reduction of information flow to it.⁵⁸

2.58 Costs associated with the FOI Act also fall upon those who provide information to the Commonwealth. Information-providers have to consider the possibility that the information which they provide will be released under the FOI Act. The resulting costs may include learning about FOI,⁵⁹ adopting less efficient modes of operation to prevent information from entering the Commonwealth's possession, and becoming involved in the reverse-FOI process.

2.59 The Committee is not in a position to estimate with any precision the cost of FOI to information-providers. The Committee is prepared to make a very rough estimate that the FOI-related costs to business as information-providers are at least equal to the costs to agencies of handling FOI requests for business-related documents. In 1984-85 this cost was estimated as \$2.4m.⁶⁰

54. E.g. submission from the Department of Trade, pp. 5-6.

55. E.g. submission from Department of Territories, p. 19.

56. IDC Report, p. A21.

57. E.g. IDC Report, p. D11 (FOI consultation costs of exempt agencies); Australian Audit Office, Annual Report 1985-86, p. 57 (consultations regarding FOI access to documents originating with the Audit Office).

58. IDC Report, p. C6.

59. E.g. the cost of preparing and distributing the booklet published in 1985 by the Confederation of Australian Industry, 'Disclosure of Confidential Business Information'.

60. IDC Report, p. C6.

2.60 State, Territory and foreign governments also incur costs related to the FOI Act.⁶¹ The Committee lacks data upon which to base even a rough estimate of what these costs might be, although it recognises that they may be substantial. The Queensland Government informed the Committee:

During 1984/85 some 65 individual matters were referred to Queensland Government Departments, with the exception of the Registrar-General's Department which received some 20 requests.

The Queensland Government has been involved in two appeals before the Administrative Appeals Tribunal and a third appeal is pending which involves both a Federal Court and an AAT hearing. The cost to the State of legal representation has been substantial. In addition, air fares and other travel and accommodation costs have been incurred as both appeals have been heard in Sydney. Legal fees were also involved in another AAT case which did not proceed to finalisation as the applicant failed to appear before the AAT at a preliminary hearing.⁶²

Detriments

2.61 The 1985-86 FOI Annual Report contained a chart listing agencies' indications of particular detriments arising from the operation of the FOI Act. Where appropriate, these have been noted in the body of this report.

2.62 The most common detriment, reported by 55 agencies, was that there had been a '[d]isproportionate allocation of resources in response to requests from particular individuals'.⁶³ This was followed by complaints that the Act was used as a 'research tool'

61. E.g. by involvement in reverse-FOI consultation and appeals, and refraining from keeping transcripts of Commonwealth/State Ministerial Council meetings: submission from the Queensland Government, pp. 2 and 5.

62. Submission from the Queensland Government, p. 2.

63. Annual Report 1985-86, p. 293.

by journalists and others (47 agencies), or used by 'litigants in the course of other legal proceedings' (42 agencies).⁶⁴

2.63 These detriments rest upon agencies' perceptions of requesters' identities or motives. As is discussed in chapter 3 below, the Committee considers that agencies should not have regard to applicants' motives. It follows that the Committee does not consider it proper to take into account the applicants' motives for the purpose of assessing the operation of the Act.

2.64 Nonetheless, the Committee notes that the vast majority of requests for access to documents are requests for access to personal (72.8% in 1984-1985) or personnel (a further 14.9% in 1984-85) records.⁶⁵ Only 7.6% of requests are for access to policy documents.⁶⁶

Effect of the FOI Act upon candour

2.65 In 1979, there was concern that the introduction of freedom of information legislation would decrease the candour with which public servants expressed their views in writing.⁶⁷ Some submissions suggested that there has been some reduction in what is committed to paper as a result of the FOI Act.⁶⁸

2.66 The Department of the Treasury included the following observation upon the effects of the operation of the freedom of information legislation in its 1984-85 Annual Report:

In oral evidence [to the Administrative Appeals Tribunal], a senior Treasury officer

64. Annual Report, 1985-86, pp. 293-94.

65. IDC Report, p. A3.

66. Ibid. Other categories of request are for business (4.4%) and miscellaneous (0.3%) documents.

67. 1979 Report, paras. 4.50-4.53.

68. Submissions from the Department of Foreign Affairs, p. 14 (Evidence, p. 1069); the Political Reference Service Ltd, p. 17 (Evidence, p. 967); the Queensland Government, p. 9; the Public Service Board, p. 5 (Evidence, p. 1097); the Department of Defence, pp. 14-15.

suggested that because of a reluctance to put certain advice in writing, the Treasurer was not receiving advice he otherwise would.⁶⁹

However, in evidence to the Committee, Mr Ted Evans, a Deputy Secretary in the Department of the Treasury, suggested that the comment in the annual report had been somewhat exaggerated.⁷⁰

2.67 Evidence received by the Committee indicates that any reduction in the volume of information committed to paper has been outweighed by the improvement in quality.⁷¹

2.68 In this context, the Committee noted that Inspector Saunders of the Australian Federal Police identified as one of the benefits of the freedom of information legislation that the standard of reports had improved.⁷² A similar point was made by Dr Wilenski, then Chairman of the Public Service Board, who listed as one of the benefits of the FOI Act 'a better recording of decisions'.⁷³ Overall, Dr Wilenski regarded FOI 'as having had a highly beneficial effect on the overall administration of the Government's policy and programs'.⁷⁴

2.69 Dr Wilenski also commented upon the suggestion that, as a result of concern about possible release under the FOI Act, material which should be put on paper, particularly policy advice, either is not being offered or is being provided orally only. Dr Wilenski commented that

it would be naive to say that either the Board or officials of other departments have not always preferred to discuss some matters which are particularly sensitive orally. That has always been the case in Government - well

69. P. 21, see Evidence, p. 638.

70. Evidence, p. 638.

71. Evidence, p. 483 (Australian Federal Police); cf. 1979 Report, para. 4.56.

72. Evidence, p. 483.

73. Evidence, p. 1153.

74. Evidence, p. 1153.

before the FOI Act. Speaking as far as the Board is concerned it has not in any way reduced the candour of our written communications and I cannot think of an instance where we have said 'Because of the FOI Act we will not write this down; we want to talk to you about it orally'.⁷⁵

2.70 Dr Wilenski added his opinion, that as a result of the Administrative Appeals Tribunal decisions, public servants can give frank policy advice in writing, and be '99.9 per cent confident that their communications will be confidential'.⁷⁶

2.71 It appears to the Committee that, as a result of the way courts and the Tribunal have interpreted the FOI Act, public servants have become increasingly confident that the Act provides sufficient protection to sensitive documents. It seems that only very rarely has the FOI Act adversely affected the quality and quantity of information which public servants commit to paper.

2.72 The Committee does not regard this reticence as an inevitable consequence of the FOI Act. As is discussed below in chapter 11, the Committee considers that the Act provides an appropriate level of protection to written policy advice and other types of internal working documents. This is so not withstanding the potential for the embarrassment to former ministers,⁷⁷ individual public servants, agencies or the Government resulting from the disclosure of such documents.

Conclusion

2.73 The Committee finds that the operation and administration of FOI has brought benefits to individuals,

75. Evidence, p. 1155.

76. Evidence, p. 1157.

77. The Committee notes that the FOI Act operates to undermine what is often regarded as a convention that incoming Ministers are restricted in their access to their predecessors' documents. See Re Bartlett and Department of Prime Minister and Cabinet (31 July 1987) para. 20.

agencies and the Australian community. These benefits are significant even though they are of a kind which cannot be measured precisely.

2.74 The published information on the costs of FOI must be treated with some caution for the reasons noted earlier in this chapter. However, the effect of the noted defects in the published information is not preponderantly in one direction. The Committee is prepared to assume that, in a rough and ready way, the errors, omissions, deficiencies, etc., cancel each other out.

2.75 The Committee, therefore, accepts the overall totals of annual costs of FOI (calculated using a 60% addition for overheads)⁷⁸ are approximately correct. These reported costs include items which should not be attributed to FOI. But some items attributable to FOI are not included. The net effect of these two sets of items, again in a very approximate way, is probably to cancel each other out.

2.76 The Committee is faced with the difficult task of weighing the admittedly unquantifiable benefits of FOI against its costs, which can be measured in at least an approximate way. The Committee regards the benefits of FOI as considerable. However, the Committee leans towards the view that more attention should be paid to the costs of FOI, particularly in the current economic and budgetary circumstances.

2.77 The Committee believes that if such increased attention is paid to the costs of the operation and administration of the freedom of information legislation, the benefit/cost comparison will continue to disclose that FOI confers a net benefit.

78. See FOI Annual Report 1985-86, p. 73, where the figures from previous years are re-calculated using 60% for overheads rather than the 88% originally used.

