

DIAC IN CONFIDENCE

REPORT TO THE CHIEF LAWYER, DEPARTMENT OF
IMMIGRATION AND CITIZENSHIP

INDEPENDENT COMPARATIVE REVIEW OF THE
DEPARTMENT OF IMMIGRATION AND CITIZENSHIP'S
FREEDOM OF INFORMATION PROCEDURES *

ROBERT CORNALL AO

AUGUST 2012

*Individual case details removed

30 August 2012

Ms Jenny Hardy
Chief Lawyer
Department of Immigration and Citizenship
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BELCONNEN ACT 2616

Dear Ms Hardy

Review of the Department's Freedom of Information Procedures – Comparative Best Practices

On 22 May 2012, you engaged me to conduct a review of the Department of Immigration and Citizenship's processes and procedures under the *Freedom of Information Act 1982* concerning comparative best FOI practices.

For the purposes of this review, I compared the Department's FOI processes and procedures with the processes and procedures in the Departments of Human Services and Veterans' Affairs and the Australian Taxation Office. These agencies were selected as they have the largest volume of FOI requests after your Department.

In addition, I considered the processes and procedures in place in the Department of Defence because of the scope and complexity of the requests it receives.

I am pleased to advise I have now completed the review and I enclose my Report.

Yours sincerely

Robert Cornall AO

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TERMS OF REFERENCE

**REVIEW OF FOI PROCEDURES IN THE
DEPARTMENT OF IMMIGRATION AND CITIZENSHIP**

COMPARATIVE BEST PRACTICES

The Department of Immigration and Citizenship has requested an urgent review of DIAC's processes and procedures under the Freedom of Information Act 1982 concerning comparative best FOI practices.

The Review is to be undertaken by an independent person who is familiar with the requirements of the FOI Act and document handling processes in the Australian Public Service.

The Review is to:

- consider the existing processes and procedures which the DIAC FOI team in National Office, Canberra, has in place to process complex, high-profile and sensitive FOI cases;
- identify the processes and procedures which other APS agencies in Canberra, Melbourne and Sydney have in place to ensure complex, high-profile and sensitive FOI cases are processed in a timely manner;
- identify comparative best FOI practices which could be adopted by the DIAC FOI team in the National Office, Canberra; and
- consider the appropriate levels of officers in DIAC who are allocated and are the decision makers for complex, high-profile and sensitive cases.

**REVIEW OF FREEDOM OF INFORMATION PROCEDURES IN THE
DEPARTMENT OF IMMIGRATION AND CITIZENSHIP**

COMPARATIVE BEST PRACTICES

EXECUTIVE SUMMARY

This Review was commissioned by the Department's Chief Lawyer after concern about the Department's failure to meet its obligations under the Freedom of Information Act 1982. This has been evidenced most recently by the Australian Information Commissioner's Own Motion Investigation into Aspects of DIAC FOI Compliance which commenced in March 2012.

The Department has a large FOI workload. It receives the largest number of freedom of information requests of any Australian Government agency.

So the Review selected four agencies for comparative analysis on the basis of the volume or complexity of their FOI requests. Those agencies were the Departments of Veterans' Affairs, Human Services and Defence and the Australian Taxation Office.

The Review found the FOI processes and procedures in the Department and the four agencies selected for comparison are generally similar. Differences in approach and emphasis reflect each agency's particular circumstances, workload and historical development.

Accordingly, the Review concluded that the Freedom of Information and Privacy Policy Section's established processes and procedures are not the principal or even a significant cause of the Department's poor FOI performance.

The major contributing factor is the lack of a whole of department approach to effective FOI management. Key business area responsibilities which are not being met at present include:

- Identifying, locating and retrieving all relevant documents within the scope of an FOI request in a timely way, and
- Identifying and communicating any sensitivities relating to the documents to the Freedom of Information and Privacy Policy Section.

Other whole of department issues arise in relation to establishing better and more cooperative working relationships between the Freedom of Information and Privacy Policy Section and the Department's business areas and the need for improvement in records management.

These issues all contribute to the Department's lack of timeliness in processing FOI requests which is the principal focus of the Australian Information Commissioner's Own Motion Investigation.

The Review concludes that the Department's current level of performance in regard to freedom of information is unacceptable. It is not an option to maintain the status quo, particularly given the Government's recent FOI reforms and its expectation that all agencies will adopt a more pro-disclosure approach.

The Review therefore makes a number of recommendations which are directed to improving the Department's total approach to freedom of information and allocating FOI obligations and responsibilities squarely where they belong.

Those recommendations are set out in the next part of this Report. They will, if accepted and properly implemented, go some considerable way in improving the Department's FOI compliance.

RECOMMENDATIONS

Recommendation 1: That the Department acknowledge that successful management of its FOI function requires DIAC's business areas to accept their share of the responsibility for meeting the Department's obligations under the Freedom of Information Act.

Recommendation 2: That the Secretary issue a Secretary's Instruction directing that compliance with the requirements of the Freedom of Information Act is a whole of department responsibility and every area is required to play its part in responding to FOI requests in a timely and cooperative manner.

Recommendation 3: That the Secretary include freedom of information compliance as a key performance indicator in senior officers' performance agreements.

Recommendation 4: That DIAC develop a chart comparable to the Department of Defence's Freedom of Information Standard 30-Day Timeline chart and display it on all of the Department's notice boards.

Recommendation 5: That the Freedom of Information and Privacy Policy Section establish a constructive and mutually supportive working relationship with the Department's business areas and nominate one of its staff as Business Area Liaison Officer.

Recommendation 6: That each business area nominate one of its officers as an FOI Liaison Officer as a point of first contact for the Business Area Liaison Officer and the Freedom of Information and Privacy Policy Section.

Recommendation 7: That the escalation of an FOI request to higher levels of authority should be initiated quite quickly if there is a delay in a business area's response to the request and that delay is not promptly rectified.

Recommendation 8: That the Freedom of Information and Privacy Policy Section, in conjunction with the Department's Human Resources section, prepare and implement an annual training plan for all FOI officers and the business area FOI Liaison Officers.

Recommendation 9: That the Department develop a mandatory FOI e-learning package specifically for business area officers whose files could be subject to an FOI request.

Recommendation 10: That the Department improve its file and records management to better support its freedom of information function, including in particular in understanding national security and non-national security classifications and the more effective and consistent use of the Client of Interest field in the Department's Integrated Client Service Environment.

Recommendation 11: That the Department's Chief Lawyer, Assistant Secretary responsible for FOI and Director of the Freedom of Information and Privacy Policy Section establish a direct relationship with their counterparts in the freedom of information areas in the Departments of Human Services and Defence to discuss and share ideas about the development and improvement of DIAC's FOI function on a continuing basis.

Recommendation 12: That the Department:

- (a) Closely monitor the implementation of the recommendations made in this Report
- (b) Review its progress in implementing the recommendations in March 2013, and
- (c) As part of that review (if not earlier), consider doing away with DIAC's additional sign off processes involving a Deputy Secretary and the Minister's Office and, instead, moving to the briefing procedure adopted by the Department of Defence.

**REVIEW OF FREEDOM OF INFORMATION PROCEDURES IN THE
DEPARTMENT OF IMMIGRATION AND CITIZENSHIP**

COMPARATIVE BEST PRACTICES

SECTION 1: THE BACKGROUND TO THIS REVIEW

This Review was commissioned by Jenny Hardy, the Department's Chief Lawyer, in May 2012.

Ms Hardy decided to undertake a comparative review of DIAC's freedom of information procedures.

It is important to note that the major issues surrounding the Department's compliance with its freedom of information obligations arise in regard to its management of complex or sensitive requests handled in National Office. These are the requests which usually require whole-of-department cooperation.

The bulk of FOI requests – dealing with the applicant's personal information – do not appear to cause any significant problems.

**SECTION 2: OUTLINE OF THE DEPARTMENT'S FREEDOM OF
INFORMATION PROCESSES**

This Section outlines the Freedom of Information and Privacy Policy Section's processes for handling freedom of information requests.

Categories of request

FOI requests are categorised as either *Personal* or *Other*.

In the great bulk of the FOI requests received by the Department, the applicant is seeking his or her personal information. DIAC received 7,783 *Personal* requests in 2010 – 2011 (96.6% of the total applications received) and only 274 *Other* requests (3.4% of the total).

In addition to FOI requests, the Freedom of Information and Privacy Policy Section handles requests from individuals to amend their personal details (3,667 amendment requests were received in 2010 – 2011).

Requests processed in three DIAC offices

FOI requests are processed in the Department's offices in Canberra, Parramatta and Melbourne. Work is allocated between the offices generally as follows:

- National Office, Canberra: Requests involving the Minister, requests from the media, Members of Parliament or a political party, requests seeking policy documents and requests in high profile cases that have attracted or may potentially attract media attention
- Parramatta: Requests for personal information from applicants residing in the Australian Capital Territory, New South Wales, Queensland, the Northern Territory and Tasmania (except applications where a process to refuse or cancel a visa on character grounds under section 501 of the Migration Act 1958 is on foot), and
- Melbourne: Requests for personal information from applicants residing in Victoria, South Australia and Western Australia (including applications where a process to refuse or cancel a visa on character grounds under section 501 of the Migration Act is on foot).

Personal applications received from persons residing overseas are processed in Parramatta or Melbourne, depending on the office in which the request is received.

Personnel

As at 20 June 2012, the number and APS level of Freedom of Information and Privacy Policy Section personnel in each of the three offices was:

- National Office: One EL2, four EL1, eight APS6, two APS5 and one APS4 officers
- Parramatta: One EL1, four APS6, five APS5, seventeen APS4 and five APS3 officers, and
- Melbourne: One EL1, two APS6, four APS5, fifteen APS4, seven APS3 and two APS1 officers.

Levels of authority

The Secretary of the Department has authorised officers in the Freedom of Information and Privacy Policy Section to make decisions on FOI requests. Within the Section, requests are allocated as follows:

- Single documents or application forms: APS3 and above
- Specific documents (not being application forms): APS4 and above
- Complete files: APS4 and above

- All documents: APS4 and above, and
- Complex client (with an ongoing history with FOI in relation to the same or similar documents): APS5 and above.

Allocation of files

The complex or sensitive cases in the *Other* category are allocated to EL1 and APS6 decision makers in National Office. Those decision makers are supported by APS5 and APS4 officers.

However, most FOI requests are processed in the Parramatta and Melbourne offices.

Those offices are headed up by a Manager at EL1 level supported by Assistant Managers or team leaders at APS6 level.

The team leader considers applications as they are received and, in the absence of any apparent issues requiring further attention, passes them onto an APS5 supervisor for more detailed consideration and allocation to an appropriate APS4 officer for processing.

The handling officer considers the application, reviews the Department's records relating to the applicant and calls for files from the relevant business areas.

On receipt of all of the documents, the officer reviews the documents, considers any advice received from the business areas, escalates any concerns or uncertainties with his or her supervisor and, once satisfied, makes a decision on the application.

At any point during the handling of a request, the FOI procedures require a request that is difficult or complex to be escalated to a higher level officer. A sensitive or significant request that was not initially categorised that way can and should be referred to National Office.

The Guidelines for consultation or escalation are set out in the Freedom of Information and Privacy Policy Section's recently revised Quick Reference Guide for Processing FOI Cases..

It is important to note that, in the absence of an alert from a relevant business area or an entry on an applicant's file in the Department's computer systems, the sensitivity of a particular request may not be apparent to an FOI officer.

Most common FOI issue

The most common issue confronted by APS4 officers is to determine if some of the information sought by the applicant should be redacted or refused under section 47F of the Freedom of Information Act 1982 on the basis that it discloses information relating to third parties.

Section 47F(1) provides:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

Responsibilities of the Department's business areas

Responding to FOI requests in a timely, comprehensive and accurate manner – including refusing access to or redacting material that should not be disclosed and claiming appropriate exemptions – is a responsibility for the whole Department, not just the Freedom of Information and Privacy Policy Section.

While the Freedom of Information and Privacy Policy Section processes and makes decisions on FOI applications, it necessarily relies heavily on advice from the relevant business areas to alert it to problems or sensitivities with the documents the business areas provide to it when called upon to assist with an FOI response.

SECTION 3: OTHER REVIEWS OF THE DEPARTMENT'S FOI PROCESSES

The Department's FOI processes have been closely scrutinised on several occasions recently:

- In June 2008, the Commonwealth Ombudsman issued an investigation report into DIAC's compliance with timelines for decision making under the FOI Act
- Ernst & Young released its report on the *Management Initiated Review of Freedom of Information* on 26 September 2011, and
- The Office of the Australian Information Commissioner published an Issues Paper in March 2012 in relation to the Commissioner's *Own Motion Investigation into Aspects of DIAC FOI Compliance OM/00001*.

Ombudsman's investigation 2008

The Ombudsman's 2008 report was an investigation into DIAC's FOI processes and its compliance with statutory timeframes for all FOI requests. It looked generally at DIAC's FOI processing. The report made numerous recommendations to improve DIAC's processing of FOI requests and DIAC agreed to implement those recommendations.

The Freedom of Information and Privacy Policy Section advised this Review that most of the Ombudsman's recommendations have been implemented and are, from its perspective, operating effectively.

Ernst & Young review 2011

Ernst & Young was engaged by the Department to examine current FOI processes to determine ways to reduce the number of requests, to improve the efficiency of processing FOI requests and to identify what is further required in moving to a culture of disclosure across the Department which is consistent with the latest reforms to the FOI Act.

Appendix A to that report set out a detailed Current State Capability Assessment based on a matrix of Key Corner Stones and Current Challenges. That assessment found there were:

- 18 areas requiring significant improvement
- 39 areas where improvement was required, and
- 6 areas rated as established.

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The status of the implementation of the Ernst & Young recommendations as at 31 May 2012 is as follows:

- Four recommendations had been completed
- Six were to be completed by the end of 2012, and
- Four were scheduled for completion by mid 2013.

The three remaining recommendations (regarding web site design and records management) require broader departmental action.

While the Ernst & Young inquiry was more broadly focussed, a number of its observations and findings are relevant to this Review as well.

The Australian Information Commissioner's Own Motion Investigation 2012

This most recent investigation into the Department's handling of FOI requests is more narrowly focussed than the Ombudsman's 2008 inquiry. It relates specifically to DIAC's handling of ten non-routine FOI requests and will examine four areas of concern:

- Failure to comply with statutory timeframes
- Inadequate communication with FOI requesters about delays
- Inefficient management of requests, and
- Poor engagement with the OAIC in resolving complaints and IC reviews concerning deemed refusal decisions.

The stated aim of the investigation is to consider the extent to which DIAC's practices in the cases concerned are indicative of systemic issues, if so to understand the root causes of these issues and make recommendations to address and resolve these. ¹

The Information Commissioner notes that there are similar concerns in this investigation and the Ombudsman's investigation which looked generally at DIAC's FOI processing. In other words, the Commissioner is of the opinion that some of the issues identified in 2008 are still apparent.

However, this investigation relates specifically to DIAC's handling of non-routine FOI requests and its engagement with the OAIC ².

¹ Issues Paper, page 1

² Issues Paper, page 2

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The ten cases under investigation by the OAIC are all complex or sensitive Other matters being handled in National Office. They do not involve FOI personnel or processes or procedures in the Parramatta or Melbourne offices.

That Own Motion Investigation has not yet been concluded.

SECTION 4: COMPARABLE AGENCIES

The Department receives the largest number of freedom of information requests of any Australian Government agency.

The Australian Information Commissioner's Annual Report shows that the top four agencies for FOI access requests in 2010-11 were:

- The Department of Information and Citizenship – 8,057 (34.1% of all requests made to Australian Government agencies)
- The Department of Veterans' Affairs – 4,937 (20.9%)
- Centrelink (which is now part of the Department of Human Services) – 3,780 (16%), and
- The Australian Taxation Office – 852 (3.6%).

In addition to FOI requests, the Freedom of Information and Privacy Policy Section also processes requests from individuals to amend their personal details (3,667 amendment requests were received in 2010 – 2011). These requests can include, for example, requests to record the applicant's correct date of birth or to anglicise their name.

Figures provided to the Review by the Freedom of Information and Privacy Policy Section indicate that in 2011-12 the total number of FOI requests received by the Department was around 9% more than the number received in 2010 – 2011 (increasing to 8,845 access requests).

In order to determine comparative best practice among Australian Government agencies, the Review interviewed senior FOI officers from the three other big FOI agencies, the Departments of Veterans' Affairs and Human Services and the ATO.

In addition, the Review interviewed the senior officers in the Department of Defence's freedom of information area.

I was accompanied at those interviews by two senior departmental officers, Ms Catherine Seaberg and Ms Linda Rossiter.

The Department of Veterans' Affairs

I interviewed Mr Trent Babbington, Senior Legal Adviser (General Advising and Information Access) and Mr Eden Zanatta, Director in Canberra on 13 June 2012.

In the DVA structure, the Advising and Public Law Section includes the Information Access Team which handles complex FOI and privacy matters.

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The national team is now based in one office in Sydney, following a consolidation of that function five years ago. It deals with:

- Most FOI requests
- Requests for internal review, and
- Minor third party requests for business information.

Service information is provided by the Department of Defence. Health claims are not dealt with under the Freedom of Information Act as they are processed under different Acts.

Sensitive or difficult cases (such as requests by Members of Parliament or journalists) are processed in the Canberra legal area and decisions are made by officers within the Information Access Team.

Staff training is largely on the job under close supervision and some participation in training courses provided by the Office of the Australian Information Commissioner. Mr Babbington also undertook a one day Australian Government Solicitor FOI course.

Department of Human Services

On 1 July 2011, Centrelink and Medicare were integrated with the Department of Human Services. I interviewed Ms Kerrie Terry (who is based in Newcastle) on the telephone on 13 June 2011.

The department's Ombudsman, Privacy and FOI Branch is part of the DHS Legal Services Division. In December 2011, it comprised 100 FTE staff located in 21 offices spread across the Australian Capital Territory and five states.

Ms Terry told me that, although DHS receives nearly 5,000 FOI requests in a year, only about 50 are classified as non-personal (sensitive). Adopting a triage approach, the following matters will be put in that category:

- Requests from Ministers, MPs, journalists and advocacy groups
- Complex staff matters or requests involving high profile customers, and
- Complex personal requests, assessed on the basis of prior FOI experience.

Personal matters are handled by APS5 officers. Since a recent internal restructure, DHS has adopted second counselling in all matters. This process requires an APS6 officer to cast an eye over the APS5 officer's file. In many instances, this upward consultation would already have occurred if the APS5 case officer had run into some complication or otherwise sought more senior assistance.

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DHS operates on the basis of hubs headed by an APS6 officer managing a number of APS5 officers for routine personal applications.

Non-personal (sensitive) matters are handled by an officer at EL1 level or higher, assisted by an APS6 caseworker.

An FOI legal team has recently been established in the Department's Legal Services Division for complex matters.

An Administration Pod has been set up in DHS' Ombudsman, Privacy and FOI Branch to liaise with the Branch's main internal customers. While this initiative is commendable in any event, it was likely to have been driven at least in part by communication and cooperation complications arising from the integration of three substantial agencies and the merger and restructure of their three legal divisions last year.

Ms Terry emphasised that the relevant business area within the department should be responsible for identifying all documents relevant to a request and:

- Responding to the FOI area in a timely way
- Understanding and conveying the importance of the documents provided, and
- Providing cooperative assistance to the FOI area.

On the issue of staff training, Ms Terry said:

- DHS conducts on the job training with mentoring
- DHS has taken advantage of training from the Office of the Australian Information Commissioner and law firms on its legal panel, both face-to-face and by video conferencing
- Some training is too broad for the day-to-day needs of casework officers
- The recently established FOI legal team could provide inhouse training in future, and
- DHS has found that call centre operators looking for a job change have made good FOI officers.

In response to specific questions, Ms Terry advised:

- DHS does not have a Chief Executive Instruction in relation to the handling of FOI requests

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- Non-personal (sensitive) matters which may require the Minister's attention are monitored in a traffic light format based on the applicable timeframes
- Other non-personal (sensitive) matters are covered in a weekly report to the department's Chief Counsel, and
- SES contracts of employment do not include any reference to assisting with FOI requests in a timely and cooperative way as that is not seen to be necessary at the moment.

Finally, I am aware from other contact with DHS that:

- Chief Counsel, Ms Sue Bird, regards the freedom of information area as a high risk area for the department and compliance with the department's FOI obligations commands a lot of her attention, and
- DHS' management of its FOI processes and any FOI problems which arise are well respected by the Office of the Australian Information Commissioner.

Australian Taxation Office

I met with senior ATO FOI officers on 12 June 2012.

They advised that about half of the ATO's 852 FOI requests are Personal and the remainder fall in to the Other category. Some complex issues arise from relationships between taxpayers.

Requests directed to the Minister are handled by The Treasury.

Responsibility for freedom of information falls under General Counsel. General Counsel's office comprises about 60 people, 20 of whom are based in Canberra.

The ATO FOI staff range from APS4 to EL2 level and the majority of decision makers (usually APS6 or EL1 officers) are lawyers.

The allocation of requests is managed centrally and requests are then distributed to an appropriate decision maker in one of several ATO offices around the country.

The FOI officers work closely with the ATO's media unit on media matters and liaise with the Minister's Office through the Parliamentary Unit.

On the issue of staff training, the ATO officers advised:

- The ATO does not presently have a formal process of induction for new FOI officers but it is rewriting its manual to accord with the OAIC requirements
- New starters are trained under the buddy system unless they are already experienced FOI officers

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- Ongoing FOI training is provided by the ATO's FOI officers and by external trainers, and
- The continuing professional development program for General Counsel legal officers includes FOI.

Finally, I was told:

- The FOI area relies on the ATO's business areas to flag sensitivities in the files and documents they provide in response to a request
- There is a good culture at ATO of wanting to provide information to taxpayers, and
- Business areas can put pressure on the FOI area for action if they feel a request is being processed too slowly.

Department of Defence

I met with Mr Tony Corcoran (an SES Band 1 officer) and his senior FOI officer Mr Neil Phillips on 12 June 2012.

Mr Corcoran advised that in 2010-11 the department:

- Received 362 requests for access to documents under section 15 of the Freedom of Information Act, 55% of which were categorised as personal requests
- Received 780 requests for access to personnel records under section 15A of the Freedom of Information Act, and
- Made 650 administrative decisions.

I was advised that the Habib FOI request *broke the camel's back* in Defence's legal area and led to a reorganisation of the way in which Defence managed FOI and the establishment of the Freedom of Information and Information Management Branch.

The effect of this decision was to:

- Move FOI from the legal area and into the Ministerial and Executive Communication and Coordination Division, and
- Place responsibility for both freedom of information and records management in the one branch.

This Review gained the impression in its interview with Mr Corcoran and Mr Phillips that having both areas in the one branch was regarded in Defence as beneficial, given the importance of records management in meeting FOI obligations.

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From a short, informal discussion I had recently with Dr Ian Watt AO, former Secretary of Defence, I understand this reorganisation greatly improved Defence's management of freedom of information requests.

Under those new arrangements:

- All FOI requests are received centrally in Canberra
- One person (Mr Corcoran) conducts all of the internal reviews
- Any documents subject to Legal-in-Confidence claims go through General Counsel
- Defence has trained and appointed 50 approved decision makers at EL2 or colonel level who are based around Australia
- Approved decision makers are assisted by APS4 to APS6 support staff
- Decisions are subjected to a quality assurance process
- Some decision makers only make a few decisions in a year (say 2 to 5 decisions) while others could make up to 25 decisions
- Traffic light reports and FOI alert emails (to the Minister, the Chief of the Defence Force, the Secretary and so on) are used to monitor the progress of requests and keep relevant areas up to date with significant FOI matters, and
- Draft decisions are no longer sent to the Minister's Office for clearance but the Office is briefed about sensitive cases and five days are allowed for comment before release (which will occur if no comment is received).

Mr Corcoran stressed that his aim was to professionalise the department's FOI workforce and staff it with common sense decision makers. However, for this aim to be achieved, it has to be *empowered from the top*.

Those officers who applied to become approved decision makers were put through a two day course conducted by the Australian Government Solicitor with an exam at the end.

Their ongoing training includes receiving advice about recent FOI decisions, advice about legislative changes and Defence's analysis of the application of FOI exemptions to particular Defence situations or issues.

Mr Corcoran made the obvious but sensible point that not all FOI officers need to know about everything. Training is delivered at different levels depending on the complexity of the matters particular officers are likely to handle.

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Mr Corcoran also made some comments about the records management challenges confronting the Department of Defence generally and the FOI section in particular. He said:

- Defence's physical files occupy 150 kilometres of shelf space
- 2.5 million electronic documents are created per month in Objective
- The department has 30 shelf space kilometres of unsentenced files growing at the rate of six kilometres a year
- Defence has 60,000 IT users, and
- Next year the department proposes to cease creating paper files.

Mr Corcoran provided me with a copy of the Department of Defence's chart headed *Freedom of Information Standard 30-Day Timeline* under three parallel columns: the *FOI Directorate*, the *Decision Support Staff (Group Coord/Action Area)* and the *Accredited Decision Maker*.

The chart highlights the complementary responsibilities of the FOI section, the relevant business area and the FOI decision maker at each stage of the FOI process.

It demonstrates very clearly that the FOI section cannot satisfactorily respond to an FOI request without the timely cooperation and assistance of the business areas of the department.

Despite the approach in the Department of Defence, I do not recommend amalgamating DIAC's FOI and records management functions because:

- That very significant decision requires far broader consideration than this Review, and
- In any event, the Department needs to get its FOI house in order first and as a matter of high priority without any additional complications.

SECTION 5: COMPARING THE DEPARTMENT AND THE FOUR COMPARABLE AGENCIES

I note at the outset that personal access requests – being the great bulk of FOI requests received by the Department – are generally routine, straight forward and do not cause DIAC any major problems. The difficulties arise mainly in relation to the sensitive or non-personal requests.

This Review’s comparative analysis has found that:

- The Department’s prescribed procedures for handling FOI requests are largely similar to the procedures in place in the four comparable agencies, and
- In each of those four agencies (as in DIAC), the large volume of personal or routine requests do not appear to cause much or even any difficulty. The problems arise in relation to the much smaller number of sensitive or non-personal requests.

In my view, the Department will gain the most benefit from the information obtained from the Departments of Defence and Human Services. Those two departments are managing either a large or a complex FOI workload and appear to be doing so effectively.

My short discussion with Dr Watt indicated he was very satisfied with the improvements made in the FOI area under Mr Corcoran in the last few years and I have already noted the positive views the OAIC has expressed about the DHS’ FOI area and its Branch head, Ms Gabrielle Davidson.

The interviews with the Department of Veterans’ Affairs and the Australian Taxation Office tended to reflect processes and approaches which are already in place in DIAC but with a greater emphasis on the engagement of lawyers in the process.

Differences

Some of the differences between DIAC’s FOI processes and procedures and those in the comparable agencies are due to each agency’s individual circumstances, workload and historical development.

For example:

- The nationwide dispersal of DHS’ FOI officers is a reflection of Centrelink’s past policy of job portability and not any positive decision to locate the department’s FOI staff in 21 offices in six jurisdictions, and

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- The restructure of Defence's FOI operation resulted (at least partly) from the difficulties it incurred in responding to Mr Habib's FOI request.

Some more notable differences include:

- Many of the Department's decisions are taken by officers at APS4 level while the decision makers in the other agencies are at a higher level (especially in Defence)
- The three large FOI agencies (the Departments of Veterans' Affairs and Human Services and the Australian Taxation Office) have placed their FOI section squarely within and under the supervision of the Legal Services branch or area
- In those agencies, lawyers are more closely involved in handling FOI requests and may be the decision maker, and
- As far as I am aware, the Department is the only agency which has a practice requiring a Deputy Secretary to thoroughly review the files in sensitive cases before documents are released.

My view is that those differences are not of great significance for DIAC because:

- Having regard to DIAC's personal request workload and the low level of complexity generally involved, well trained officers at APS4 level are capable of handling these matters competently and efficiently and complex or sensitive Other FOI requests are handled in National Office and allocated to more senior APS6 or EL1 officers
- The FOI function is already ultimately under the supervision of the Department's Chief Lawyer in the Governance and Legal Division (although it sits in the Governance Branch rather than the Legal Branch). It is an option to place FOI more squarely within the DIAC legal stream which Ernst & Young suggested could increase the *effective engagement with their legal staff (which) is critical to success*³. However, my view is that the placement of the Freedom of Information and Privacy Policy Section within the Governance and Legal Division is not a key issue as long as the FOI and legal areas work closely together
- It is not necessary to have lawyers as decision makers although lawyers could be appropriate decision makers in some complex or sensitive cases, and

³Ernst & Young Report, page 19

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- If the FOI function was operating effectively and had the trust of the Department's Executive and the Minister, there would be no need for a Deputy Secretary to vet draft release decisions and the Department could adopt the Defence approach of briefing the Minister's Office about upcoming FOI decisions with a specified time for consultation before release.

Notwithstanding the similarities in prescribed procedures, the Department's FOI process is not working well:

- The Management Initiated Review of Freedom of Information identified many areas requiring improvement
- The OAIC Own Motion Investigation reflects serious regulatory concern about the Department's FOI performance (and appears to encompass some concerns the Ombudsman raised in 2008 but are still unresolved). The chart on page 6 of the Commissioner's Issues Paper shows why he is concerned. Some of the 10 requests to be investigated are listed as Request not finalised 379 days after receipt.
- The Office of the Australian Information Commissioner speaks publicly about the Department's poor FOI performance, and
- While DIAC is currently struggling to meet the Australian Government's FOI expectations, the situation is likely to get worse if it cannot adapt to the recent reforms requiring agencies to adopt a pro-disclosure approach.

So the question is: What is the Department doing wrong?

In my opinion, the answer can be found in the way the Department implements its prescribed FOI procedures rather than in the procedures themselves.

The next Section of this Report:

- Identifies the lessons to be learnt from this Review's comparative analysis involving the other four agencies, and
- Makes recommendations to improve the Department's freedom of information compliance.

SECTION 6: COMPARATIVE ANALYSIS

After a careful consideration of the lessons learnt from the comparative agency analysis, this Review puts forward 12 recommendations under the following headings which could contribute to some significant improvement in the Department's FOI processes and compliance:

- FOI is a whole of department responsibility
- Driven from the top
- Clearly spelling out FOI responsibilities
- Facilitating cooperative behaviour
- Escalation processes
- More effective training
- File and records management
- Interaction with FOI counterparts
- Monitoring and reviewing progress in implementing these recommendations, and
- Implementation of outstanding and forthcoming review recommendations.

6.1 FOI is a whole of department responsibility

My assessment is that the business areas of the Department operate as if compliance with the Department's obligations under the Freedom of Information Act has little or nothing to do with them.

I understand that many of the delays in the matters being investigated by the Australian Information Commissioner arise from the failure of the relevant business area to search for, identify and deliver the relevant files and documents to the Freedom of Information and Privacy Policy Section.

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Put simply, it is impossible for the Freedom of Information and Privacy Policy Section to do its job properly without the active engagement and timely cooperation of all of the relevant business areas as outlined on the Defence chart.

In other words, compliance with DIAC's responsibilities under the Freedom of Information Act is a whole of department responsibility. Acceptance of and compliance with that responsibility is made even more pointed and urgent by:

- The number of Improvement Required and Significant Improvement Required recommendations made by Ernst & Young in its Management Initiated Review of Freedom of Information
- The requirement to move to a pro-disclosure approach under recent freedom of information reforms when the Department presently appears to have more of an attitude of resistance to disclosure, and
- The Office of the Australian Information Commissioner's clear dissatisfaction with Department's FOI performance as evidenced by the Commissioner's Own Motion Investigation into Aspects of DIAC's FOI Compliance and Dr James Popple's recent address to senior departmental officers.

The correct approach is reflected in the Department of Defence's *Freedom of Information Standard 30-Day Timeline* chart which clearly spells out these responsibilities of the business or action areas:

- Identifying, locating and retrieving all relevant documents within the scope of the request, wherever they are held
- Identifying and communicating any sensitivities relating to the documents
- Determining if any other action (business) areas are involved
- Identifying potential third party consultation
- Scheduling and preparing the documents in the form proposed for release, and
- Providing talking points addressing issues raised in the documents.

In my view, the Department's FOI performance will continue to be sub-standard until all of DIAC's business areas accept their responsibility to actively participate in meeting the Department's obligations under the Freedom of Information Act.

Recommendation 1: That the Department acknowledge that successful management of its FOI function requires DIAC's business areas to accept their share of the responsibility for meeting the Department's obligations under the Freedom of Information Act.

6.2 *Driven from the top*

Successful management of a significant change in corporate culture has to be driven from the top of the organisation.

Given the extent of the corporate culture change required in relation to the Department's approach to its FOI obligations, that leadership will need to be firm and direct to have an impact.

The Department does not have a Secretary's Instruction on FOI procedure and compliance.

In my view, it would be appropriate for the Secretary to issue a Secretary's Instruction on freedom of information compliance. The Instruction would direct that compliance with the requirements of the Freedom of Information Act is a whole of department responsibility and every business area is required to play its part in responding to FOI requests in a timely and cooperative manner. The Instruction would set out specific obligations along the lines of the Defence chart.

Recommendation 2: That the Secretary issue a Secretary's Instruction directing that compliance with the requirements of the Freedom of Information Act is a whole of department responsibility and every area is required to play its part in responding to FOI requests in a timely and cooperative manner.

I would also recommend that the Secretary reinforce the significance of that Secretary's Instruction by including freedom of information compliance as a key performance indicator in senior officers' performance agreements.

Recommendation 3: That the Secretary include freedom of information compliance as a key performance indicator in senior officers' performance agreements.

6.3 *Clearly spelling out FOI responsibilities*

To improve department-wide FOI compliance, the roles and responsibilities of the Freedom of Information and Privacy Policy Section, the relevant business areas and the FOI decision makers need to be clearly spelt out and widely publicised within the Department.

As I understand it, DIAC does not have a chart comparable to the Department of Defence's *Freedom of Information Standard 30-Day Timeline* chart. In my view, it would be very helpful to develop a DIAC version of that chart and display it on all of the Department's notice boards.

Recommendation 4: That DIAC develop a chart comparable to the Department of Defence's Freedom of Information Standard 30-Day Timeline chart and display it on all of the Department's notice boards.

6.4 *Facilitating cooperative behaviour*

Publishing a chart will not be enough to change corporate behaviour at the operational level, even with the support of a Secretary's Instruction and a new KPI.

The Freedom of Information and Privacy Policy Section needs to establish a constructive and mutually supportive day-to-day working relationship with all Department's business areas and should nominate one of its officers for that specific purpose.

In this regard, I note the Department of Human Services has set up an Administration Pod in DHS' Ombudsman, Privacy and FOI Branch to liaise with the Branch's main internal customers.

The business area liaison role would include:

- Establishing direct and effective working relationships with appropriate officers in relevant business areas
- Developing a broader understanding in the business areas of their role and responsibility in regard to FOI requests in general
- Keeping business areas advised about important FOI issues and developments, and
- Dealing with specific matters that arise in regard to individual requests.

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This initiative sits comfortably with the fourth and fifth recommendations made by Ernst & Young in its Management Initiated Review of Freedom of Information in September last year:

4. *DIAC should integrate its FOI stakeholder engagement strategies with those of individual business areas to provide a more holistic and targeted approach to the publishing of information,*
5. *DIAC should appoint a program manager to coordinate and oversee the broad range of FOI improvement initiatives identified within this report. Additionally, they should regularly report progress to the Executive Committee.*

Recommendation 5: That the Freedom of Information and Privacy Policy Section establish a constructive and mutually supportive working relationship with the Department's business areas and nominate one of its staff as Business Area Liaison Officer.

Each business area should also nominate one of its officers as an FOI Liaison Officer as the first point of contact for the Business Area Liaison Officer and, more generally, the Freedom of Information and Privacy Policy Section.

The Business Area's FOI liaison role would include:

- Establishing direct and effective working relationships with the Freedom of Information and Privacy Policy Section's Business Area Liaison Officer
- Acquiring a general understanding of the Freedom of Information Act
- Developing a broader understanding in the relevant business area of its role and responsibility in regard to FOI requests in general
- Monitoring the business area's timely compliance with FOI requests
- Dealing with specific matters that arise in regard to individual requests, and
- Keeping abreast of important FOI issues and developments.

Recommendation 6: That each business area nominate one of its officers as an FOI Liaison Officer as a point of first contact for the Business Area Liaison Officer and the Freedom of Information and Privacy Policy Section.

6.5 *Escalation processes*

The Department's FOI processes provide for escalation of a request to higher levels of authority in the Freedom of Information and Privacy Policy Section, the relevant business area and their Executive level heads if there is a delay in responding to a request.

If the business areas appoint an FOI Liaison Officer, that person will in future be the first point of contact to expedite a response.

While there should be understanding about reasonable causes of delay in a business area's response or assistance, there should be limited tolerance as DIAC's poor compliance with its FOI obligations reflects badly on the whole Department and damages its reputation.

In this regard, I note the Australian Information Commissioner expressed concern in his Own Motion Issues Paper that DIAC's priorities were seen as an acceptable contributing factor to long FOI delays.⁴

Accordingly, I recommend that, as part of the required corporate culture change, escalation procedures should be initiated quite quickly if a delay occurs and it is not promptly rectified.

Given that senior officers could have FOI compliance as part of their performance agreement, it is likely that they will be keen to know about problems sooner rather than later.

Recommendation 7: That the escalation of an FOI request to higher levels of authority should be initiated quite quickly if there is a delay in a business area's response to the request and that delay is not promptly rectified.

6.6 *More effective training*

Each of the comparative agencies has a similar approach to training but meeting training needs in a timely way for each employee can be difficult.

The Department of Defence stood out in requiring FOI decision makers to undertake a two day AGS course and sit an exam to qualify them for appointment as an *approved decision maker*.

However, I agree with Mr Corcoran's comment that not all FOI officers need to know everything.

⁴ Page 7

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Their training has to be timely (for example, promptly upon commencement) and appropriate for the FOI tasks they will be expected to undertake combined with:

- A general awareness of FOI policy and its main principles
- Regular updates about new legislation, relevant court or tribunal decisions and current developments, and
- Immediate and practical (not high level, academic or vague) training when a specific issue arises.

These objectives will be best achieved if the Freedom of Information and Privacy Policy Section, in conjunction with the Department's Human Resources section, prepares and implements an annual training plan for all FOI officers and the business area FOI Liaison Officers. That annual plan would include an effective and timely induction program for new FOI officers.

Recommendation 8: That the Freedom of Information and Privacy Policy Section, in conjunction with the Department's Human Resources section, prepare and implement an annual training plan for all FOI officers and the business area FOI Liaison Officers.

However, it will not be enough to train only the freedom of information officers.

Some more limited FOI training will be required for business area officers whose files could be subject to an access request.

Business area officers should have a sufficient understanding of the Freedom of Information Act to enable them to identify the sensitive issues on their files which will need careful consideration by the more highly trained FOI decision makers before any documents are released.

The Department already has an e-learning package for FOI officers.

The proposed training for business area officers could also be delivered effectively on line but in a separate e-learning package directed specifically at the FOI principles and issues they need to know and their responsibilities in meeting them.

In order to have an immediate impact, completing this e-learning program would have to be a mandatory requirement for relevant business area officers.

Recommendation 9: That the Department develop a mandatory FOI e-learning package specifically for business area officers whose files could be subject to an FOI request.

6.7 *File and records management*

An effective freedom of information process depends on prompt and comprehensive access to the relevant files and documents.

That requirement leads on to the issue of file and records management. It is quite likely that one of the reasons business areas are slow to respond to FOI requests is that it can be time consuming and difficult to find the relevant files and documents.

The Department's file and records management policy and practice is outside the scope of this review. Nonetheless, it is appropriate to note its importance to timely FOI compliance and to be alert to the file and records management challenges that will most likely need to be confronted in the near future (and are about to be tackled by the Department of Defence).

Recommendation 10: That the Department improve its file and records management to better support its freedom of information function, including in particular in understanding national security and non-national security classifications and the more effective and consistent use of the Client of Interest field in the Department's Integrated Client Service Environment.

6.8 *Interaction with FOI counterparts*

I appreciate there are existing meetings of FOI managers from Australian Government agencies. However, I understand those meetings are conducted as seminars or group discussions.

I am of the opinion it would be helpful if Ms Hardy, DIAC's Chief Lawyer, Mr Chris Hodges, the Assistant Secretary responsible for FOI and Ms Rossiter, the Director of the Freedom of Information and Privacy Policy Section could establish a more direct relationship with their counterparts in freedom of information areas in the Departments of Human Services and Defence to discuss and share ideas about the development and improvement of DIAC's FOI function.

Those two departments appear to me to be handling their FOI obligations well and could be a useful sounding board for DIAC officers, particularly during the coming period as they implement the recommendations made in this Report which are accepted by the Department.

Recommendation 11: That the Department's Chief Lawyer, Assistant Secretary responsible for FOI and Director of the Freedom of Information and Privacy Policy Section establish a direct relationship with their counterparts in the freedom of information areas in the Departments of Human Services and Defence to discuss and share ideas about the development and improvement of DIAC's FOI function on a continuing basis.

6.9 Monitoring and reviewing progress in implementing these recommendations

In view of the Department's current shortcomings in FOI compliance, it will be important to ensure that those recommendations made in this Report which are accepted are promptly and effectively implemented.

I therefore recommend that progress in implementing the accepted recommendations should be closely monitored and then reviewed in March 2013.

I also note that the comparable agencies do not have the same level of checking, oversight and sign off for sensitive FOI requests as the Department. As far as I am aware, none of those agencies have draft FOI decisions vetted by a Deputy Secretary or their Minister's Office.

Naturally, the comparable agencies brief their Minister's Office about upcoming releases of sensitive documents. For example, the Department of Defence factors into its FOI procedures a period of five days for questions or comments from the Minister's Office before proceeding with a proposed release.

In my view, if DIAC's FOI processes and procedures were working correctly:

- It would not be necessary for a Deputy Secretary or the Minister's Office to sign off draft FOI release decisions, and
- Briefing senior management and the Minister's Office could be placed on a similar basis to Defence, that is, they could have an agreed time for questions or comments. In the absence of such a specified but limited period, the Department will not be able to meet the strict timetable for compliance laid down in the Freedom of Information Act.

As part of the review of the implementation of these recommendations (if not earlier), I recommend that the Department consider doing away with those additional sign off processes by a Deputy Secretary and the Minister's Office and move to the briefing procedure adopted by the Department of Defence.

Recommendation 12: That the Department:

- (a) Closely monitor the implementation of the recommendations made in this Report
- (b) Review its progress in implementing the recommendations in March 2013, and
- (c) As part of that review(if not earlier), consider doing away with DIAC's additional sign off processes involving a Deputy Secretary and the Minister's Office and, instead, moving to the briefing procedure adopted by the Department of Defence.

6.10 Implementation of outstanding and forthcoming review recommendations

Finally I note for the sake of completeness that:

- The Department will complete the implementation of the accepted recommendations made by Ernst & Young in their Management Initiated Review of Freedom of Information over the next 12 months, and
- The Australian Information Commissioner will no doubt make further recommendations for the improvement of the Department's FOI function when he completes his Own Motion Investigation into Aspects of DIAC's FOI Compliance.

7. TERMS OF REFERENCE

This Review's response to the Terms of Reference is covered in the earlier Sections of this Report. A summary of my findings is set out below.

1. Consider the existing processes and procedures which the DIAC FOI team in National Office, Canberra, has in place to process complex, high-profile and sensitive FOI Cases

DIAC's processes and procedures do not seem to me to be significantly different to those in the comparable agencies.

The problems in DIAC largely derive from the lack of a whole of department approach to FOI and the failure of the relevant business areas to discharge their freedom of information obligations in a timely manner. This failure is most likely due to a failure to understand the importance of their role and responsibilities in responding to FOI requests.

My expectation is that, if the every area of the Department performs its share of FOI compliance promptly and efficiently, the FOI processes and procedures presently in place should work satisfactorily.

2. Identify the processes and procedures which other APS agencies in Canberra, Melbourne and Sydney have in place to ensure complex, high-profile and sensitive FOI cases are processed in a timely manner

These issues are covered in Sections 4, 5 and 6 of this Report.

I have made a number of recommendations for improvement in the Department's FOI performance based on the information obtained from my interviews with the comparable agencies.

3. Identify comparative best practice which could be adopted by the DIAC FOI team in the National Office, Canberra

My response to this Term of Reference is set out in Sections 4, 5 and 6 of this Report.

However, I reiterate that the Department's current issues with its FOI performance are not so much due to the internal processes and procedures of the Freedom of Information and Privacy Policy Section but other factors including the lack of a whole of department approach to its FOI responsibilities.

This finding is supported by the fact that the Australian Information Commissioner's Own Motion Investigation into Aspects of DIAC FOI compliance appears to be substantially driven by the huge delays in finalising the ten FOI requests which are the subject of his inquiry.

The Commissioner states⁵:

In DIAC's submissions to the OAIC, these delays have been attributed to:

- *The size and complexity of the applications*
- *The large number of FOI requests DIAC receives*
- *Un-cooperative business areas or lengthy internal consultations*
- *Problems with locating and retrieving documents across multiple databases*
- *Staff shortages mean there are not enough decision makers, and*
- *DIAC's priorities.*

I note that Ernst & Young also identified the following weaknesses in the current state assessment set out in its report on the Management Initiated Review of Freedom of Information conducted last year⁶:

- *There is an imbalance of responsibility for disclosure between FOI functions and the service delivery network*
- *Current technology limitations are operating as a barrier to achieving FOI driven efficiencies, and*
- *Poor network wide records management practices are impacting on FOI resources and costs, and ultimately on the Department's reputation.*

Ernst & Young concluded⁷:

While it is clear that additional resources are required to process and manage FOI requests, it is also clear that successfully overcoming these challenges will require a whole of department approach, and should not just be the responsibility of FOI staff to facilitate the significant business transformation required to address the requirements of more open government.

⁵ Issues Paper, page 7

⁶ Page 10

⁷ Page 10

4. Consider the appropriate levels of officers in DIAC who are allocated and are the decision makers for complex, high-profile and sensitive cases

The comparative analysis undertaken for this Review disclosed that different agencies have different levels of decision makers. The Defence approved decision makers are at EL2 or colonel level and, in other agencies, a lot of decisions are made by qualified lawyers (which is not in itself surprising as the FOI function is based in their Legal Services area).

I know this issue has received considerable attention from Chief Counsel at the Department of Human Services. Ms Bird's solution is to create an FOI section in her legal team and ensure that the FOI operational section and the FOI legal team have adjacent offices in DHS' new building to facilitate consultation and the receipt of legal advice.

However, I have seen no evidence that the current level of DIAC decision makers in complex, high-profile and sensitive cases (when properly categorised) is inappropriate.

8. CONCLUSION

The Department's current level of performance in regard to freedom of information is unacceptable. DIAC is not complying with its legal obligations. It is in bad standing with the FOI regulator. Its FOI shortcomings damage the Department's relationship with the Minister and his Office and reflect adversely on the Department's reputation within the Australian Government.

It is not an option to maintain the status quo, particularly given the Government's recent freedom of information reforms and its expectation that all agencies will adopt a more pro-disclosure approach.

I am of the opinion that the recommendations made in this Report will, if accepted and properly implemented, go some considerable way in improving the Department's FOI compliance.

9. ACKNOWLEDGEMENTS

I express my appreciation for the cooperation extended to me by the Freedom of Information officers from the Departments of Human Services, Veterans' Affairs and Defence and the Australian Taxation Office who I consulted during the course of this Review.

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I also record my thanks for the assistance I have received from Catherine Seaberg, Linda Rossiter and their colleagues in the Freedom of Information and Privacy Policy Section.

Robert Cornall AO

30 August 2012