



# Department of Immigration and Citizenship

TIMELINESS OF DECISION MAKING UNDER  
THE *FREEDOM OF INFORMATION ACT 1982*

June 2008

Report by the Commonwealth and Immigration Ombudsman,  
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **06|2008**

## **Reports by the Ombudsman**

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## EXECUTIVE SUMMARY

This 'own motion' investigation into the handling of requests under the *Freedom of Information Act 1982* (FOI Act) by the Department of Immigration and Citizenship (DIAC) had its origins in monitoring by the Ombudsman, which commenced in 2005.

In the early part of 2005 the Ombudsman received a number of complaints about significant delays by DIAC in processing Freedom of Information (FOI) requests. As part of the investigation into these complaints, DIAC provided the Ombudsman's office with information about its FOI processing. It became clear that there were processing delays leading to breaches of statutory deadlines and a significant backlog of unprocessed applications.

The Ombudsman decided to monitor the situation closely. DIAC cooperated with the Ombudsman's monitoring approach and provided data and briefings on a regular basis over a two-year period.

In November 2007 the Ombudsman decided that, despite significant efforts and the implementation of various strategies by DIAC, the timeliness issue had worsened and a significant FOI backlog had developed. This was also a frequent subject of complaint to the Ombudsman.

An investigation was commenced with the aim of highlighting difficulties faced by DIAC in administering the FOI Act, the strategies it had developed to address these, areas for further reform, and issues of broader relevance to government.

### Scope and methodology

The investigation focused on delay in DIAC's FOI decision making and the factors that had contributed to the large backlog of unprocessed FOI requests. The focus was on delay in initial FOI decisions and not delays in internal review decisions or acknowledgement of FOI applications. The investigation did not look at other aspects of FOI processing, such as the quality of decision making or decision letters.

The methodology of this investigation included:

- analysing the data provided by DIAC during the monitoring activities undertaken by this office since May 2005
- examining complaints made to this office about FOI delay
- obtaining briefings and further information from DIAC on the strategies being implemented to address the FOI backlog
- assessing the FOI situation in other high volume agencies
- reviewing DIAC's FOI handbook and other instructions to staff
- using DIAC's situation to consider the broader issues for government.

### Summary

This report discusses the main factors that have contributed to the delay in DIAC's processing of FOI requests, and also the strategies DIAC has implemented to address the problem. These issues are divided into two groups—issues about the high number of FOI requests, and issues about the way FOI is managed in DIAC.

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DIAC's FOI challenge also highlights lessons that are of broader relevance to Australian Government agencies. The final part of the report discusses that broader challenge.

The theme of this report is the significant difficulties that have confronted DIAC in processing FOI requests within the statutory timeframe. This has resulted in a large backlog of undecided requests, many of which are several months overdue. The report discusses strategies implemented by DIAC which are aimed at both reducing the number of requests and at improving processing and administrative practices where requests are made.

The key message stemming from this report for DIAC and other agencies is that providing access to information, including through FOI, should be regarded as core business and as an important aspect of effective client service delivery. Our investigation found scope for DIAC to improve in this area. This is particularly so in relation to enhancing DIAC's overall approach to providing information to the public. This includes ensuring that all DIAC officers are responsible for providing information, clients are provided with comprehensive and complete information about access to records, and mechanisms are in place to allow for early systemic problems to be escalated and addressed within DIAC.

## PART 1—INTRODUCTION

### Legal and policy background

#### ***The Freedom of Information Act 1982***

1.1 Access to government information is integral to modern parliamentary democracy, and to an open and transparent system of government. The FOI Act commenced operation on 1 December 1982. The FOI Act was one aspect of the administrative law reforms that also included the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976*, and the *Administrative Decisions (Judicial Review) Act 1977*. Other legislation that supplemented this new body of administrative law and its underlying aim of ‘open government’ included the *Privacy Act 1988* and the *Archives Act 1983*, which codified records management.

1.2 The purpose of the FOI Act, as described in s 3(1), is to ‘extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth’. This right of public access to information is constrained by a limited number of exemptions, designed to protect essential public interests and for the protection of the private or business affairs of persons.

1.3 Statutory deadlines are an important part of the FOI Act. These deadlines apply to an agency’s acknowledgment of an FOI application, its original decision, an internal review decision and any decision about the remission of fees and charges. Copies of released documents need not necessarily be provided to an applicant at the same time as the notice of an original decision, but can be provided a reasonable time afterwards.

1.4 The statutory deadline for making an FOI decision is as soon as practicable, but not later than 30 calendar days from the date of receipt of the FOI application. This deadline can be extended to 60 days, but only when the agency has determined in writing that consultation with a person, a State Government or a business organisation is appropriate before a decision on access can be made. The applicant must be informed of this decision.

1.5 The timeframe for decision making does not always commence running when an FOI request is first received. This may be because of an invalid application, for example where the FOI fee has not been paid or waived, or because issues relating to charges need to be resolved.

1.6 If the deadline for making a decision is not met, an applicant can treat the breach as a deemed refusal of access and appeal against this deemed refusal to the Administrative Appeals Tribunal (AAT). As this indicates, Parliament regarded the right to receive a decision in a timely manner as an important aspect of the rights conferred by the FOI Act.

#### ***The processing of FOI requests within DIAC***

1.7 DIAC is currently the largest recipient of FOI requests of all Australian Government departments and agencies. In 2006–07, DIAC received 14,917 applications, which is around 38% of the total number of FOI requests.<sup>1</sup> As with many

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<sup>1</sup> Attorney-General’s Department, *Freedom of Information Act 1982 Annual Report 2006–2007*, page 3.

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agencies, most of the FOI applications made to DIAC (83%) are about the personal information of the applicant.

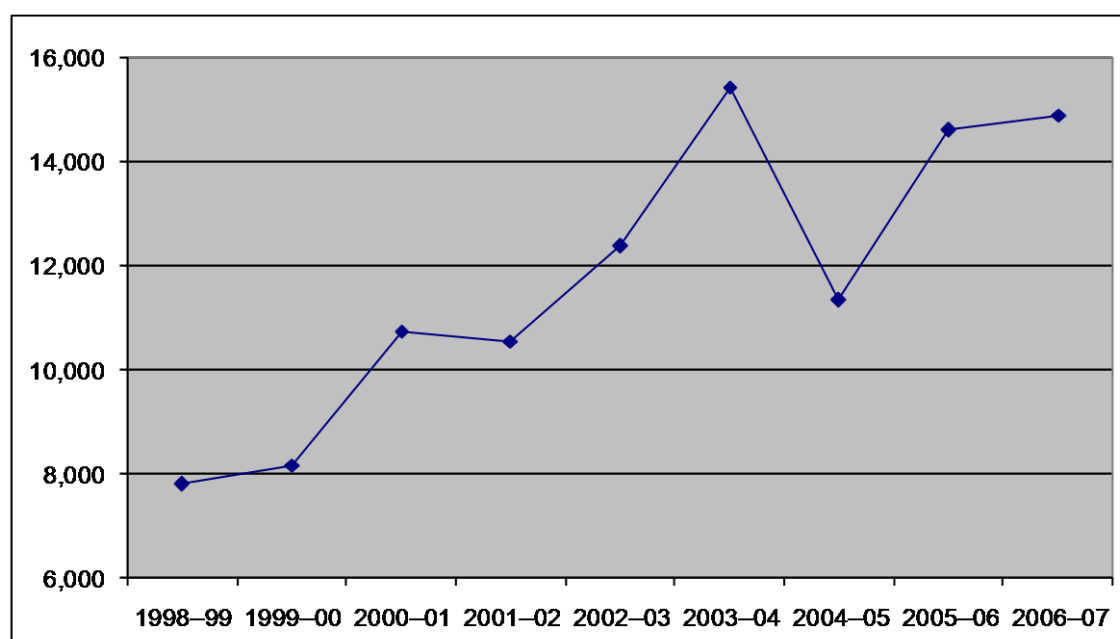
1.8 Over time, DIAC's administration of FOI moved from being based in each State, to being based in three locations, and then in Canberra and Melbourne. Currently, Melbourne processes FOI requests from Victoria while Canberra processes FOI requests from the rest of Australia. Melbourne also undertakes additional FOI requests from time to time, depending on respective workloads.

### Development of the FOI timeliness problem in DIAC

1.9 DIAC has experienced difficulty in meeting the statutory timeframes for FOI requests for some time. The increasing number of applications, combined with resourcing issues and the complexity of requests has led to the creation of a significant backlog of FOI requests that remain unprocessed by DIAC. The periods of delay are often significant and the oldest request is nearly two years old.

1.10 The number of FOI requests to DIAC has been increasing for some time. As can be seen in Figure 1 below,<sup>2</sup> the number has nearly doubled over nine years.

**Figure 1—Number of FOI applications received by DIAC**



1.11 Until 2004-05, the FOI Annual Reports published by the Attorney-General's Department provided data on the number of applications that took longer than 30 days to process, but did not identify those cases in which this was a lawful extension due to external consultation. Only the last three years of FOI Annual Report data allow a calculation of the percentage of finalised applications involving a presumed breach of the statutory deadline. The data for these three years in relation to DIAC is presented in Table 1.

**Table 1—Percentage of DIAC's finalised FOI applications involving a presumed breach of the 30-day statutory deadline**

<sup>2</sup> Data is from the Attorney General's Department, *Freedom of Information Act 1982 Annual Reports*.

Year	Percentage
2004–05	44.16%
2005–06	45.64%
2006–07	38.14%

1.12 Data available over a greater number of years allows a calculation of the percentage of finalised applications by DIAC that took more than 60 days to determine. This percentage peaked at 38% in 2005–06 but appeared to improve the following year, reducing to 29%.

### ***Consequences for an individual***

1.13 A systemic delay problem in FOI administration can disadvantage applicants. A request for personal information is unlikely to be made purely out of interest or curiosity.

1.14 In the immigration context, a person may request information from DIAC for a range of reasons. A person may require information to provide evidence to another government department of their immigration status; or the person may be in detention and need information to support a visa application; or the information may be needed in connection with a review proceeding in a court or tribunal. The *Certifying immigration status* case study highlights how timely access to information can be critical to other factors in a person's life.

#### ***CASE STUDY: Certifying immigration status***

Mr A was acting on behalf of Mr B who was 15 years old. Mr B wanted to transfer to another school due to the long travel time to get to his current school. Enrolment in the new school ended on 21 December 2007, and he needed certified copies of his immigration status for the purposes of enrolment. The FOI application was made in plenty of time—in July 2007.

Mr A complained to the Ombudsman on 30 November 2007. As a result of this complaint, DIAC prioritised the case and Mr A was provided with the information in time for enrolment.

1.15 Sometimes FOI requests are made because the applicant is already dissatisfied with their treatment by the agency. A lengthy and unlawful delay in obtaining FOI documents is likely to worsen that dissatisfaction, with further detriment to the relationship between the agency and client. Poor relations with a client may impair communication with the client or the clarification of complaint issues.

1.16 DIAC clients are sometimes further disadvantaged by not being provided with information from DIAC about the FOI process, the length of the delay, how they can escalate their case and alternative options for obtaining the information they require.

## **Overview of DIAC's strategies**

### ***Reducing the number of FOI requests received***

1.17 Many of the FOI requests to DIAC relate to information that could appropriately be provided to a client outside the FOI process. Requests of this nature increase the workload for the FOI area in DIAC.



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1.18 DIAC has identified strategies to address this issue, though many are either yet to be implemented or are in the early phase of implementation. These strategies, discussed in Part 2 of this report, include:

- improving correspondence with clients, to reduce the number of FOI applications that are made by persons who are seeking better explanation of decisions affecting them
- establishing mechanisms whereby non-FOI staff in DIAC can provide a person with a copy of their movement records, avoiding the need for an FOI application to facilitate this request
- consulting with migration agents on their work practices to reduce FOI requests from agents wanting to get a complete record of a client's immigration history
- identifying ways in which DIAC can facilitate the release of other information outside the FOI framework
- enhancing DIAC's communication with clients in relation to access to information, FOI procedures and related processes.

### ***Improving administrative processes and practices***

1.19 Other strategies being adopted by DIAC are aimed at improving processing and administrative practices underpinning its handling of FOI requests. Issues such as resourcing, information technology (IT) limitations, location of records, prioritisation, quality assurance and governance arrangements have also contributed to the current backlog. These strategies, discussed in Part 3 of this report, are also at various stages of implementation and include:

- establishing a backlog taskforce within the FOI area to focus on the large number of requests which are well outside the statutory timeframe
- ensuring that the processing of FOI requests allows for effective communication with clients about delay issues
- examining the issue of prioritisation and its impact on the backlog of requests
- addressing resourcing and staffing issues
- identifying ways that records located in all areas of DIAC can be more efficiently provided to the FOI area for processing
- ensuring that effective IT and systems support for the FOI area is in place
- working with the citizenship and other areas in DIAC to establish processes for streamlining FOI amendments to citizenship certificates
- reviewing governance and quality assurance arrangements for the FOI area.

## PART 2—ISSUES AFFECTING THE RATE OF FOI APPLICATIONS

### Use of FOI to find out the reasons for a DIAC decision

2.1 A client affected by a DIAC decision does not always receive written reasons for the decision, and may not have a legal right to do so. The client may use FOI simply to find out the reasons for the decision applying to them.

2.2 Legislation applying specifically to DIAC limits the information that must be provided about the reasons for DIAC decisions. The *Migration Act 1958* (s 66) specifies that reasons must be provided for decisions to refuse a visa that can be appealed to the Migration or Refugee Review Tribunal. The notification of a decision to cancel a visa must specify the ground for the cancellation (*Migration Act* s 127). The *Australian Citizenship Act 2007* (s 47) requires reasons to be provided in relation to a decision to refuse citizenship.

2.3 An obligation to provide reasons upon request is imposed by some other legislation, generally where some form of review is available by a court or tribunal such as the Federal Court or Administrative Appeals Tribunal. This right to reasons covers a limited number of the decisions made by DIAC.

2.4 There is no obligation to provide reasons if a visa decision is made that is not appealable to a tribunal. Many DIAC decisions fall into this category. A person so affected may use FOI to obtain information about the decision.

2.5 Another circumstance in which FOI becomes important is where a decision is made to refuse a visa on a particular criterion, and there are other relevant criteria that are not assessed by the decision maker. The client may use the FOI process to find out information about those other criteria, which could become relevant if a fresh visa application is made.

2.6 A recent own motion investigation by the Ombudsman into DIAC's notification of decisions<sup>3</sup> identified the quality of decision letters written by DIAC as another factor affecting the rate of FOI requests. If a decision letter is not comprehensive, or is poorly written or confusing, a person may not understand the reasons for a decision and may therefore lodge an FOI application to access further information. DIAC accepted all of the recommendations made in the own motion report and has implemented a number of strategies to improve client correspondence. This may ultimately have an impact on the number of FOI requests.

### Access to movement records

2.7 Prior to May 2007, DIAC considered that s 488 of the Migration Act (which prohibited tampering with movement records) prevented the supply of movement records data other than in response to an FOI request. At the time, requests for movement records constituted approximately 30–40% of FOI requests, and added to DIAC's FOI workload. An amendment to the Migration Act in 2007<sup>4</sup> resolved this

<sup>3</sup> Commonwealth Ombudsman, DIAC: *Notification of Decisions and Review Rights for Unsuccessful Visa Applications*, Report No 15|2007, page 23.

<sup>4</sup> *Migration Legislation Amendment (Information and Other Measures) Act 2007*.

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problem, and movement records are now released outside the FOI Act by non-FOI staff. There was nevertheless a delay in implementing this change, which we were advised would occur incrementally from February 2008.

2.8 This initiative will have a significant effect on the number of FOI requests, but is unlikely to cause a corresponding reduction in the FOI workload as the time spent on each request was not large. It is likely too that some requests for movement records will continue to be processed under the FOI Act where appropriate.

### **Migration agent work practices**

2.9 Practices outside DIAC can also impact on the number of FOI requests it receives. For example, when a client changes migration agents client records are generally not transferred to the new migration agent, as the Migration Agents Code of Conduct in the Migration Agents Regulations 1998 states that a registered migration agent must keep client records for a period of seven years after the date of the last action on the file for the client. The new migration agent may lodge an FOI request simply to understand the client's history with DIAC.

2.10 DIAC is exploring working with migration agents on this issue; however, this has been put on hold while other priorities to deal with the FOI problem are implemented. In the Ombudsman's view, DIAC should continue to liaise and communicate with external stakeholders, including migration agents, to address these issues and to improve its overall provision of information.

### **Use of FOI instead of other methods of accessing information**

2.11 The introduction of the FOI Act was not intended to discourage the release of information outside the framework of the FOI Act.<sup>5</sup> There seems to have been a general practice within DIAC of encouraging the use of the FOI process to release information that could appropriately have been released apart from the Act.

2.12 Examples of the type of information DIAC could provide to a person without requiring an FOI request are set out below.

- Movement records—as discussed above, these documents can now be provided outside FOI and DIAC should take a coordinated approach at implementing appropriate procedures to facilitate this.
- Visa applications—people often make FOI requests to DIAC to access a copy of their visa application form. DIAC has advised that it is introducing a strategy of providing protection visa applicants with a copy of their application when a decision is made to refuse the visa. DIAC is also in the process of amending its visa application forms (for other visa types) to remind clients to keep a photocopy of their application.

Other strategies could also be considered by DIAC. For example, visa processing centres could be encouraged to ask applicants routinely if they remembered to keep a copy of their application, and to provide this information directly to applicants without requiring an FOI request. Visa application forms could include a tick-box reminding applicants to keep a copy of the form, or asking if they would like DIAC to provide a copy of their application and supporting documentation.

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<sup>5</sup> See *Freedom of Information Act 1982* s 14.

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- Original documents provided by applicants as part of their visa application—FOI requests are sometimes made by people seeking the return of original documents, such as passports and certificates of identification. DIAC should ensure that, where appropriate, these documents are returned to clients without requiring an FOI request.
- Detainee medical records—historically, DIAC required detainees to make an FOI application to access their own medical records. DIAC has acknowledged that this is not necessary and is currently working on procedures to facilitate these requests outside of FOI, where appropriate.

2.13 The DIAC FOI Handbook contains useful guidelines on the types of information that can appropriately be released outside of FOI. These instructions include the examples outlined above. However, given that a large number of DIAC's FOI requests still apply to those categories of documents, it is possible that this guidance is not widely understood or accessed by all DIAC officers. DIAC employs over 7,000 staff, many in frontline positions inside and outside Australia. The guidelines in the FOI Handbook on release of information should be made available to officers in a more accessible and applicable format.

2.14 DIAC has recently implemented strategies to encourage the release of information outside FOI, and has issued advice and instructions to facilitate this. This includes procedural guidance to support the release of movement records by non-FOI staff, the creation of pamphlets for staff about what sorts of information can appropriately be released outside FOI, FOI related messages being sent to all staff by the Secretary, and working with detention centres and staff to facilitate the provision of medical records to detainees. These are important initiatives. They should be supplemented by steps to engender a culture of openness and accountability in DIAC that promotes access to information as a person's right. It is important that the FOI area in conjunction with all areas of DIAC continues to explore avenues for communication and a coordinated approach to FOI and the provision of information more generally.

2.15 DIAC will also need to continue to monitor the timeliness of responses to requests for information that are processed outside the FOI framework. It would be undesirable if the timeliness problem that currently applies to FOI processing is relocated to other areas. This would be problematic, as the FOI Act imposes time limits and confers a right of appeal to the AAT for a deemed refusal when those time limits are not met.

## **Communication with clients**

2.16 DIAC has introduced some strategies to improve its communication with clients, though more could be done in relation to FOI and access to information.

2.17 There is limited information available to clients about ways to obtain information outside the formal FOI process. For example, the FOI application form contains a paragraph headed 'Do I have to make an FOI request?', the answer merely explains that documents over 30 years old are held by the National Archives of Australia. There is no suggestion that more recent documents can be obtained from DIAC without using FOI. The DIAC website does not contain any information about this issue or access to information more generally. Clearer guidance would assist DIAC clients to better understand how best to access information by the different means available.

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2.18 Many FOI applicants to DIAC currently face a lengthy delay before a decision will be made. DIAC has considered writing to all outstanding FOI applicants to ascertain whether the information requested is still required. For the moment, DIAC is focusing its resources on processing requests, though clients would benefit from general advice on FOI delays, an explanation of the delay, likely processing times and options such as clarifying a request or advising DIAC whether the information is still required. DIAC should use avenues such as its website, client contact areas and migration agents to provide information about the FOI delay, and how a client can obtain an update on their matter, clarify their request with DIAC or, where appropriate, seek to have it escalated for a more urgent response.

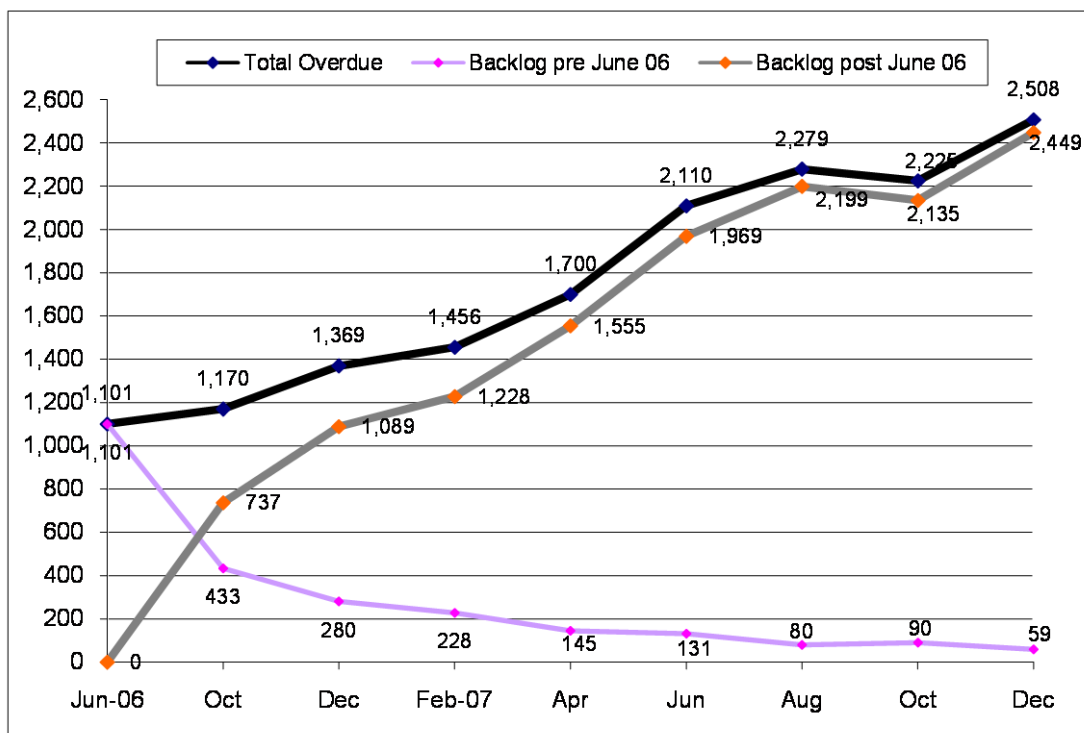
## PART 3—MANAGEMENT OF FOI IN DIAC

### The backlog

3.1 DIAC’s failure to process FOI requests in a timely manner has led to a backlog of overdue requests, making it difficult for new requests to be processed within the statutory timeframe. In the absence of appropriate resourcing and strategies to respond to the volume of FOI requests being received, the number of requests undecided in the required timeframe has increased and a significant backlog has developed.

3.2 Between June 2006 and December 2007 the backlog of overdue requests in Canberra rose from around 1,000 to around 2,500. DIAC’s strategy over this period was to divide this backlog into two groups—requests received prior to June 2006 and requests received after June 2006. Over that period, DIAC primarily concentrated on decreasing the size of the first group as it was the oldest. However, this meant the second group increased significantly. This can be seen in Figure 2 below. Over a similar period (August 2006 to December 2007) the Melbourne office backlog of overdue FOI requests rose from around 100 to around 600.

**Figure 2—Total overdue and backlog FOI requests in Canberra**



3.3 The DIAC FOI area has received an injection of funds to address the more recent backlog of post-June 2006 requests. A backlog taskforce has been created within the FOI area in Canberra, with a mixture of newly recruited and more experienced staff. The aim of this initiative is to clear the backlog of requests received before September 2007 by the end of June 2008.

3.4 DIAC has reported that progress is being made. For example, the backlog taskforce in Canberra finalised 204 requests during February 2008. There is, however, a risk that requests received after September 2007 will become another

new backlog, if care is not taken to ensure that those requests are processed within the statutory timeframes. DIAC needs to be responsive to its FOI caseload, ensure that strategies are identified to adhere to legal timeframes, ensure that appropriate measures are taken to deal with increases in requests, and implement sustainable strategies to deal with backlogs. DIAC has recently indicated that the backlog will not be viewed in isolation and that there will be renewed emphasis on the statutory timeframes for all requests. This is encouraging.

## **Communication with applicants about delay**

3.5 Breaches of FOI deadlines are not uncommon in other Australian Government agencies. However, the current situation in DIAC has meant that the processing of many requests does not commence until some time after the deadline has already passed.

3.6 It is generally considered good administrative practice to keep in contact with the applicant and negotiate a small amount of additional time if a deadline is unlikely to be met. DIAC's FOI Handbook states, 'Where unavoidable delays are experienced, it is preferable to negotiate a satisfactory time frame with the applicant rather than have a situation where the applicant lodges a 'deemed refusal' appeal with the AAT after the 30 days has expired or decides to involve the Ombudsman'.<sup>6</sup> This is appropriate advice, but there is anecdotal evidence that this has not been occurring in DIAC. The *Delay following initial acknowledgement* provides an example.

### ***CASE STUDY: Delay following initial acknowledgement***

Mr C was a detainee. He made an FOI request which was received by DIAC on 4 May 2007 and acknowledged by DIAC on 14 May 2007. A decision would then be due in early June if no third party consultation was required, and early July if third party consultation was required.

On 11 July 2007 Mr C's solicitor complained to the Ombudsman as nothing had been received. On 10 August 2007 DIAC advised the Ombudsman's office that it had obtained some of the files covered by the request but 'at this stage the files have not yet been reviewed by a FOI decision maker, so it is not known if any third party consultations will be necessary. It is therefore not possible at this time to determine when Mr C's request will be finalised'. The documents were ready to be provided in May 2008.

3.7 Based on complaints to the Ombudsman, there appear to be instances when FOI requests are acknowledged but applicants hear nothing further until some time after the deadline has passed, prompting an applicant to contact DIAC or take other action. In some cases the lack of adherence to the advice in the FOI Handbook may simply be because the request has not yet been allocated to a particular officer for processing. The officer would have the responsibility to keep in contact with the applicant and negotiate an extended timeframe. This problem increases the frustration experienced by applicants and may complicate their attempts to discuss the overdue processing of requests with DIAC. An effective communication channel between DIAC and a client could result in the person clarifying their request and specifically identifying the information required.

<sup>6</sup> Department of Immigration and Citizenship, *Freedom of Information Handbook*, 2007, paragraph 190.

## Safeguarding the reverse FOI procedure

3.8 As discussed in Part 1 of this report, the FOI timeframe for processing can be extended to 60 days if there is a need to consult with a third party. This can occur in respect of documents likely to affect Commonwealth–State relations (FOI Act s 26A), documents relating to the business, professional or financial affairs of a third party (s 27), or a document containing personal information about a person (s 27A). The FOI Act s 15(6) implies that a decision to engage in third party consultation and to extend the processing time to 60 days, should be made within the initial 30 day period. This will not be possible when the FOI request is not allocated to an officer or the files are not provided to the officer within that 30-day period.

3.9 The operation of the reverse FOI procedures in the FOI Act can be compromised by a delay of this kind. Sections 27(1) and 27A(1) applying to business and personal affairs provide that a decision to grant FOI access ‘must not be made’ until the reverse FOI procedure is followed, but only if ‘it is reasonably practicable to do so having regard to all the circumstances’, including the FOI timeframes. In short, it is possible that a third party will not be given the opportunity to contend that a document should not be released when there is a delay in allocation of a file to an FOI officer. This opportunity for third party consultation could likewise be hampered if an FOI applicant treats a failure to make a decision as a deemed refusal and applies to the AAT for review at the expiration of the 30-day processing period.

3.10 It is important to remember that the reverse FOI procedure is created by the FOI Act for the benefit of third parties. The underlying premise is that a member of the public or a business organisation that could be injured by disclosure of information under the FOI Act should have a reasonable opportunity to make a submission arguing against disclosure. If their submission is not accepted, the third party has the correlative right to institute proceedings in the AAT to contend that the document in question is exempt and should not be released under the FOI Act (ss 58F, 59 and 59A).

3.11 This provides an added reason why DIAC should improve its timeliness in FOI processing and ensure that cases are allocated to FOI officers upon receipt. Those officers should then make a timely decision within the 30-day period as to whether third party consultation is required.

## Prioritisation of FOI applications

3.12 Up until early 2008, DIAC was prioritising requests into five categories. High priority requests included those received from detainees, requests for information needed for a tribunal or court hearing, and other cases where individual factors justified prioritisation. Priority for a time was also given to requests received prior to June 2006 as a temporary measure to clear the backlog and avoid further disadvantage to FOI applicants. While prioritisation is understandable, it can contribute to the formation of a backlog of low priority applications that await attention.

3.13 A practical difficulty with DIAC’s prioritisation system is that it placed the onus on applicants to activate the prioritisation process. This has recently been amended and the standard letter acknowledging receipt of an FOI request prompts applicants to indicate any reasons for priority. Even so, applicants may not appreciate the need to seek priority unless they know what the delay is likely to be. In the case study of Mr A, outlined in Part 1 of this report, he applied for documents that he would need many months later. He did not anticipate that timing would become a problem and



did not indicate any reason for priority. The issue was resolved after he complained to the Ombudsman. This example illustrates the importance of DIAC communicating effectively with potential and current FOI applicants.

3.14 The prioritisation system could be misapplied to justify unlawful delays. The case of Mr D involved a non-prioritised case where the delay became lengthy and resulted in a complaint to the Ombudsman. The lack of priority was cited by DIAC as one of the reasons for the delay.

***CASE STUDY: Lengthy delay***

Mr D's FOI request to DIAC was validated on 29 November 2005 after he paid the FOI access fee. His request was complex and involved a large amount of material.

By the end of June 2006, DIAC advised Mr D's solicitors that it was close to finalising the matter. By the end of July 2006 there had been no further correspondence. A complaint was then made to the Ombudsman about the lengthy delay.

DIAC noted a number of reasons for the delay, including complexity and volume. One reason given for the delay was that 'there was no apparent urgency/priority when compared with other cases that involve people in detention or needing documents to pursue a visa outcome. Mr D was granted a Protection Visa in March 2006'.

Mr D's solicitors began to receive the documents in late August 2006, nine months after a valid FOI application was made.

3.15 DIAC has now reviewed the prioritisation system because of concern that lower priority FOI applications were inherently likely to become part of a backlog. As a result of this review, DIAC has advised that all new requests will be treated with equal priority and have action initiated immediately upon receipt of each request. As FOI timeliness in DIAC improves, DIAC may be able to reconsider whether it requires a prioritisation system.

3.16 While it is understandable that a prioritisation system had been adopted for a period of time, the existence of such a system is undesirable in principle. The FOI Act does not outline any procedure or principles for prioritisation of FOI requests, or concern itself with an applicant's reason for seeking access to a document. It is at odds with the FOI scheme for an agency to adopt such a system and to place the onus on applicants to initiate action to ensure that the statutory timeframes are met. There is also a departure from s 11(2)(a) of the FOI Act which provides that 'a person's right of access is not affected by any reasons the person gives for seeking access'.

## **Staffing levels**

3.17 The number of staff devoted to FOI in DIAC has risen and fallen over time. A major cause of the timeliness problem has been that inadequate staff resources were devoted to FOI processing and to deal with the volume of requests being received. Staff turnover has been another problem. This can be a challenging issue for any organisation, and can lead to a loss of corporate memory and subject expertise, a loss of efficiency, and the need to train and develop new staff.

3.18 In addition to the recent injection of funds and the creation of a backlog taskforce within the FOI area, DIAC has implemented other strategies to assist staff. For example, administrative support has been enhanced so that FOI decision makers

can concentrate on FOI decision making. DIAC has also limited the number of applications allocated to each decision maker at any given time and have provided additional training and development opportunities for FOI decision makers. Legal support has been enhanced with a view to resolving some longstanding complex cases.

3.19 DIAC should continue to explore strategies to retain and develop experienced FOI decision makers and ensure that the FOI area is appropriately resourced to deal with the requests received. DIAC should continue to explore the benefits and costs of centralised and decentralised approaches to processing FOI requests.

### **Assistance from other areas within DIAC and other organisations**

3.20 If FOI administration is centralised in an agency, it is necessary that other areas of that agency actively assist the FOI area to make timely decisions. This involves providing requested files and records in a timely fashion, together with other forms of liaison to support the FOI decision maker. DIAC has recently introduced reforms to ensure this happens. They include escalation protocols to support timeliness of file retrieval, information requests and input from internal business areas, such as overseas posts, State and Territory offices and national office divisions.

3.21 Files located at overseas posts present a particular challenge for DIAC's FOI timeliness, as the processing time allowed under the FOI Act may have expired by the time a file arrives back in Australia. Some use of scanning has commenced, but it is unclear how widespread this practice is. This issue may require ongoing attention within DIAC.

3.22 DIAC has advised that it has been working with the Migration Review Tribunal and the Refugee Review Tribunal to improve document transfer processes. When a tribunal is reviewing a DIAC decision, the tribunal usually has the DIAC file, which may be needed by DIAC if it receives an FOI request. A process was set up whereby the tribunal sent a scanned copy of the file to DIAC so that it could process the FOI request. DIAC has advised that it is also implementing a procedure to allow the tribunal to supply the information directly to an applicant.

### **IT and systems issues**

3.23 DIAC has advised the Ombudsman's office that IT and systems issues have adversely impacted on its processing of FOI requests. The following examples highlight the importance of IT and systems support in assisting FOI staff to process requests in a timely manner.

- DIAC's case management system that was used for FOI appeared not to have been effective as a tool to manage FOI or to provide data about FOI. DIAC is now moving to a new case management system for FOI, which should allow for better recording, case management and tracking of requests.
- At one point the DIAC Canberra FOI area had its access to scanners reduced, which increased FOI processing time. The number of scanners has now been increased to three.
- A department-wide systems rollout caused DIAC FOI staff to lose functionality for some time to on-screen redaction, a process that reduces processing time by allowing deletions to be done electronically. This function has now been restored.

## Amendment of citizenship certificates

3.24 A person wanting to amend or annotate a record can make a request to do so under the FOI Act. DIAC processes many requests for amendment of citizenship certificates, often associated with a change of name. To discharge this function, it can be time consuming to investigate a claim and verify a person's identity.

3.25 DIAC is working to streamline and formalise the processes for amending identity details on citizenship certificates. It could be that some of the tasks that have to be performed—such as investigation of identity issues and guarding against identify fraud—could more appropriately be placed outside the FOI area in DIAC. For example, issues of possible identity fraud could be given to an investigation unit, that would report its findings to the FOI processing area for a final decision on amendment.

## Governance and quality assurance

3.26 It appears that until recently, FOI delay issues in DIAC had not been routinely escalated to senior management. Another agency with high volume FOI work advised the Ombudsman's office that it has a reporting system that enables identification of systemic FOI timeliness problems and escalation to senior management when this occurs. This approach alerts senior management to any emerging problems in the agency's service delivery and provides an opportunity for strategies to be discussed at a higher level.

3.27 One of DIAC's recent strategies has been to bring the FOI delay issue before DIAC's high level Departmental Performance Governance Committee. This approach allows early problem signs to be reported to senior management, achieving a more timely response to issues and bringing visibility to FOI as a mainstream, client service delivery function of DIAC.

3.28 Senior officers in the DIAC FOI areas have been conducting quality assurance checking for all FOI decisions. This has contributed to the systemic timeliness problems, though it is aimed at ensuring quality FOI decisions. DIAC is currently considering introducing a risk based quality assurance model as an alternative to checking all decisions. This may be a positive development if the quality of decision making is not compromised as a result.

## Recommendations

3.29 In light of the current delay in FOI processing in DIAC and the large volume of requests not processed within the statutory timeframe, DIAC should conduct a wide-ranging review of its FOI and information disclosure processes. The review should focus on ensuring that:

- the provision of information to clients is a core business function for all areas within DIAC
- FOI areas are adequately resourced to process applications lawfully within the statutory timeframe, and that staffing recruitment, development and retention are kept under constant review
- strategies are implemented to reduce the number of unnecessary FOI requests and to ensure that information is provided to DIAC clients in the most efficient and effective way

## Commonwealth Ombudsman—DIAC: Timeliness of decision making under FOI Act

- useful and appropriate information is provided to clients about how they can access information and when an FOI request is appropriate
- DIAC consults and communicates with external parties such as migration agents and tribunals to explore and implement strategies aimed at streamlining access to information for clients
- DIAC sets up appropriate governance and reporting mechanisms to ensure efficient and open access to information, through FOI and other means, including early identification and escalation of problem areas
- there is improved communication within all areas of DIAC about the importance of FOI timeframes and the need to be responsive to requests for information
- DIAC's communication with FOI applicants is improved to ensure that they are kept advised of progress, in particular where delay is being experienced; applicants should also be made aware of their right to lodge a complaint or appeal to the AAT once the statutory timeframe has been breached
- the FOI manual, training and other instructions for decision makers are reviewed to ensure they are accessible and assist decision makers to finalise requests as efficiently as possible.

## PART 4—BROADER ISSUES FOR GOVERNMENT

4.1 The issues discussed in this report have a broader relevance to all Australian Government agencies. The *Freedom of Information Act 1982* applies to all agencies, and they jointly shoulder the responsibility of carrying forward the policy of open government that is enshrined in the Act. FOI problems occurring in one agency of government can as easily occur in others. Equally, lessons learnt by one agency in tackling FOI problems can be as relevant and instructive to other agencies.

4.2 This report illustrates that FOI delay can spring from various causes. The steady increase in the volume of FOI requests received by DIAC has been a prominent factor, but not the only one. The growing volume and complexity of statutory and policy rules administered by the Department is sometimes matched by complexity in FOI requests and the time taken to deal with them. The growth in the volume of records, the decentralisation of decision making nationally and internationally, and the diffusion of data across numerous electronic and hard copy files, can add to the time taken to handle a request. Technology can assist in that process, but it can also add another layer of difficulty in identifying and assembling the records that fall within the scope of a single request.

4.3 The measures that are required to tackle FOI delay can be equally diverse. Necessary changes and reforms identified in this report include the allocation of more staff and resources to FOI processing; improved training and instruction for FOI staff; introduction of better IT support for FOI handling; education of other department officers to assist in meeting FOI timeframes; escalation of difficult FOI cases to qualified senior staff; liaison with tribunals to streamline document exchange and retrieval; consultation with migration agents to enlist their support in reducing unnecessary FOI requests; better communication with clients to clarify their needs and expectations; and enhancement of non-FOI channels for disclosure of information.

4.4 Two messages lie behind that list of problems and reforms. The first is that FOI can impose complex demands upon an agency and require a concerted and high level response from the agency. Shortly stated, FOI is a core business activity of government agencies that will only be undertaken adequately if appropriate managerial attention and resourcing is directed to the task.

4.5 The second message is that this commitment to high quality FOI administration requires cultural as well as managerial devotion. Access to government information is both a statutory right and an essential requirement for administrative transparency and open government. As examples given in this report illustrate, members of the public often need timely information in order to enjoy other rights or make other claims against government.

4.6 The issues raised in this report tie into a broader debate now occurring in and outside government about the reform of FOI laws and processes in Australia. A prominent issue in that debate is the proposal to create an FOI or Information Commissioner to oversight FOI administration across government and to focus attention on the whole-of-government responsibility to comply with minimum

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legislated standards for openness.<sup>7</sup> The findings of this investigation lend support to that proposal, whether the oversight function is created as a separate office or a designated function of the Ombudsman. Briefly stated, the Freedom of Information Act is a special law that can present difficult challenges for government. There is a need for a better understanding across government of the commitment and steps that can be taken to ensure that timely access to government information becomes a respected right and not a hollow ideal.

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<sup>7</sup> For example, Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*, Report No 2|2006 at page 33; and J McMillan, 'Designing and Effective FOI Oversight Body—Ombudsman or Independent Commissioner?', paper to 5<sup>th</sup> International Conference of Information Commissioners, 2007 ([www.ombudsman.gov.au](http://www.ombudsman.gov.au)).

## ATTACHMENT A—SECRETARY OF DIAC'S RESPONSE TO REPORT

### **DIAC should conduct a wide-ranging review of its Freedom of Information and information disclosure processes.**

Agreed—being implemented.

DIAC has undertaken considerable work on improving both its compliance with the statutory timeframe and implementing improvements to business processes and information access arrangements in accordance with the *Freedom of Information Act 1982* (the FOI Act). These improvements have been identified to the Ombudsman and an update of our progress on these has been included in the responses below.

One important change to processing will see a new processing centre for FOI established in Sydney by early 2009, to undertake processing for FOI requests from clients in NSW, Qld and ACT. Our Victorian FOI unit will expand its share of FOI processing to include, in addition to requests from Victorian clients, requests from clients in SA, WA, NT and Tasmania. By locating FOI processing in these key locations where 80% of requests arise, we will ensure our clients have more accessible information services available, with improved access outside of FOI.

### **The provision of information to clients is a core business function for all areas within DIAC.**

Agreed—being implemented.

The Department has reviewed the way it conducts its business in relation to providing information to clients. The Department has undertaken a number of changes to ensure that all areas of the Department take ownership of DIAC's core function of being an open and accountable organisation.

Processing of international movement record (IMR) requests is now undertaken in each State and Territory Office (STO) outside of FOI as a result of changes to section 488 of the *Migration Act 1958* (the Migration Act). Since 1 April 2008, clients may request their IMR directly from their nearest STO or overseas post. This is likely to reduce the number of FOI requests by approximately 7000 per annum.

The Department is educating both staff and clients and their representatives on accessing original documents and personal information. These two classes of documents do not need to be accessed under the FOI Act.

Staff in the service delivery network are now able to respond to requests for original documents and personal information. Staff have been instructed not to store documents such as birth certificates, but to copy these documents and return them directly to clients. The Department's client service standards will be used to ensure that requests such as these are responded to promptly and that performance is monitored by the Departmental Performance Management Committee (DPMC).

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Training is currently being provided to staff in the service delivery network on providing information to clients outside of FOI where they are requesting their own personal information. This training will also be extended to the overseas posts. All staff messages from the Secretary have reinforced the need for all DIAC staff to be involved in the provision of information to clients.

**FOI areas are adequately resourced to process applications lawfully within the statutory timeframe, and that staffing recruitment, development and retention are kept under constant review.**

Agreed—being implemented.

The Department has undertaken a review of its current FOI service delivery model. An external consultant was engaged to assist the FOI leadership group in National Office and Victoria to review and develop options for a more appropriate service delivery model to support DIAC. The report delivered by the external consultant has identified appropriate staffing levels to ensure that DIAC is compliant with the statutory timeframe. The options proposed in the report and staffing levels are being considered in the context of the 2008–09 budget allocation process.

The Department is committed to compliance with the 30 day statutory timeframe and is currently implementing a processing model and using internal governance and communications strategies to support this compliance. On 30 November 2007, DIAC had 3,030 FOI requests on hand, of these, 2,686 requests were greater than 30 days old.

Since the FOI Taskforce commenced on 1 January 2008, we have been able to reduce the number of FOI requests to 1,233 requests on hand as at 30 May 2008, of these, 750 requests were greater than 30 days old. It is expected that the number of overdue FOI requests will further reduce by the end of June, as 70% of new requests are now being processed within 30 days.

A new 24 hour/30 day case management model was implemented in April 2008. Since implementing this model, 70% of new requests are being finalised within 30 days. This is expected to rise to 90% by September 2008.

An Information Contact Officer (ICO) network has now been established in National Office and STOs to assist with information requests and escalation processes to ensure that all staff respond quickly to requests for information from clients and from FOI areas for files and documents.

A decision has been made to relocate all routine FOI processing to two processing centres in Victoria and NSW (which represent about 80% of all FOI requests). This will ensure that the majority of FOI clients have easy access to their information. Performance of the processing centres will be monitored by DPMC.

**Strategies are implemented to reduce the number of unnecessary FOI requests and to ensure that information is provided to DIAC clients in the most efficient and effective way.**

Agreed—being implemented.

DIAC has identified and is currently implementing a series of strategies to reduce the number of unnecessary FOI requests. The first of these strategies was allowing



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clients to request and receive international movement records from STOs in accordance with changes to section 488 of the Migration Act.

The Department has also commenced an outreach program to train staff in STOs and overseas posts about FOI and Privacy. The training identifies information and documents that can be released to clients under the *Privacy Act 1988* (the Privacy Act) rather than clients having to make unnecessary FOI requests. FOI and Privacy eLearning training is also being developed for DIAC staff and is expected to be available from 1 July 2008.

Another strategy currently being implemented involves the FOI Section working together with DIAC staff from the Citizenship, National Security and Identity areas and with DFAT representatives to reduce the number of unnecessary FOI requests for amendments made by Australian citizens.

### **Useful and appropriate information is provided to clients about how they can access information and when an FOI request is appropriate.**

Agreed—being implemented.

The Department is currently updating the information it provides to clients about how they access personal information. Information on the Department's website is being updated to provide clients with clear directions on what avenues are most appropriate for their particular requests for information.

The Department's FOI form (424A) has been updated to assist clients in making requests for information. The updated form will be available for public use in the October form cycle. All DIAC forms are being updated to include a recommendation that clients keep a copy of their applications and supporting documents.

A FOI pamphlet has been developed and is currently in its final clearance process. The pamphlet provides information to clients on the most appropriate ways to access certain classes of information from the Department. Client enquiry scripts are being developed to assist contact centre staff to provide appropriate advice to clients on accessing information.

### **DIAC consults and communicates with external parties such as migration agents and tribunals to explore and implement strategies aimed at streamlining access to information for clients.**

Agreed—being implemented.

The Department has undertaken communications with external parties including attendance at the Migration Agents Registration Authority (MARA)—Migration Institute of Australia (MIA)—DIAC meeting on 5 May 2008.

DIAC is assisting MIA with a Continuing Professional Development course on FOI requirements. The 24 hour/30 day case management model which has been implemented is also ensuring that Migration Agents are contacted early to discuss the scope of their request and any timing issues resulting from the need to consult or retrieve files.

The FOI Section has discussed information access with the MRT and RRT. Avenues of releasing information outside the FOI process are being undertaken including

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ensuring that files have disclosure certificates on them prior to being transferred to the MRT/RRT to allow information to be released directly to clients.

**DIAC sets up appropriate governance and reporting mechanisms to ensure efficient and open access to information, through FOI and other means, including early identification and escalation of problem areas.**

Agreed—being implemented.

The Department is currently training staff in National Office and STOs on providing efficient and open access to information through both the FOI and Privacy Acts. An access database has been developed to enable early identification of problem areas and protocols have been implemented to ensure that problems are escalated appropriately. The Department is committed to the implementation of the RESOLVE database and a dedicated officer is now overseeing this project.

Weekly reports are provided to the Executive on DIAC's compliance with statutory timeframes and to identify any problem areas in FOI processing such as file retrieval. Quarterly reporting of compliance with the 30 day statutory timeframe is also provided to DPMC to ensure any critical trends are escalated to the Executive and any appropriate action to improve processing times is acted upon by DPMC members.

**There is improved communication within all areas of DIAC about the importance of FOI timeframes and the need to be responsive to requests for information.**

Agreed—being implemented.

The Department has taken steps to ensure that all staff within DIAC are aware of the importance of FOI timeframes and the need to be responsive to FOI requests. The Secretary has sent a number of all staff emails highlighting issues such as timely responses to requests for files from the FOI Section and the importance of good record keeping.

The Secretary has sent further messages to all Senior Executive staff reinforcing these messages and requesting their leadership on this important issue. The FOI Section has provided further training and information to STOs on the importance of responding to client requests for information in a timely and appropriate way.

The FOI pamphlet and eLearning package will provide all staff within DIAC with appropriate information to allow them to understand the importance of FOI timeframes and will enable the Department to be responsive to requests for information.

**DIAC's communication with FOI applicants is improved to ensure that they are kept advised of progress, in particular where delay is being experienced; applicants should also be made aware of their right to lodge a complaint or appeal to the AAT once the statutory timeframe has been breached.**

Agreed—being implemented.

The FOI Section has implemented a new processing model where all requests are acknowledged and files are ordered within the first 24 hours of receipt. This has

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enabled the FOI Section to develop escalation protocols for use when documents are not received within set timeframes (that is, 7, 14 and 21 days). As part of these protocols, if on day 21 the documents have not been received, the case officer will contact the client and advise of the delay and negotiate a new timeframe.

The FOI Section is currently updating its letter templates to include client's rights to lodge a complaint or appeal to the AAT if the statutory timeframe is breached.

Under the case management model, FOI staff may contact clients or their representative within 24 hours to clarify and/or re-scope their request, particularly where there is a very large volume of files and documents involved. If a client or their representative is unable or unwilling to narrow the scope of their request, consideration is then given as to whether charges are applicable under the Act. This is to ensure that DIAC can reasonably respond to the request within the statutory timeframe and with available resources.

**The FOI manual, training and other instructions for decision makers are reviewed to ensure they are accessible and assist decision makers to finalise requests as efficiently as possible.**

Agreed—being implemented.

The Department's FOI manual is currently being updated to provide decision makers clear instructions on processing FOI requests. FOI staff have recently attended training with the Australian Government Solicitor on FOI decision making. The Department has also engaged an FOI consultant to provide ongoing training and support to staff in the FOI Section.

The FOI Section, in conjunction with the Client Correspondence Process Section, is currently reviewing its letter templates to achieve better efficiency in the FOI process. New letters are being implemented progressively as they are updated.

Electronic redaction software has been purchased and is currently being used by decision makers. This software allows exempt material to be removed from documents electronically, therefore reducing the time it takes a decision maker to finalise FOI requests. Staff have been provided with training and instruction documents on the use of this software.

Instructions for decision makers on escalating outstanding requests for files have been developed and distributed to decision makers. The FOI Section is now seeing an increased responsiveness to requests for files.

Instructions on applying charges have been distributed and decision makers are now applying processing charges where applicable. Applying charges can be helpful, as clients focus on specific documents or information they need to help them progress a new application or seek review or intervention, rather than just seeking 'all my files'.

## GLOSSARY

AAT	Administrative Appeals Tribunal
DIAC	Department of Immigration and Citizenship
DPMC	Departmental Performance Management Committee
FOI	Freedom of Information
FOI Act	<i>Freedom of Information Act 1982</i>
ICO	Information Contact Officer
IMR	international movement record
IT	information technology
MARA	Migration Agents Registration Authority
MIA	Migration Institute of Australia
Migration Act	<i>Migration Act 1958</i>
MRT	Migrant Review Tribunal
RRT	Refugee Review Tribunal
STO	State and Territory Offices