COMMONWEALTH & DEFENCE FORCE
OMBUDSMAN

[illegible]

20 January 1994

C/94/195.C/94/225:JW

Mr J R Holmes
Corporate Secretary
Telstra Corporation Ltd.
38th Floor, 242 Exhibition Street
MELBOURNE VIC 3000

Dear Mr Holmes

I received complaints from three of the 'COT Cases', Mr Graham Schorer, Mr Alan Smith and Ms Ann Garms, concerning TELECOM's handling of their applications under the Freedom of Information Act (FOI Act) of 24 November 1993 and 21 December 1993 respectively.

I have summarised Mr Smith's complaint as alleging that TELECOM unreasonably has decided to apply charges to his FOI request and that the charges will be considerable.

Mr Schorer's complaint is that TELECOM unreasonably refused to remit the application fee and is proposing to impose processing charges.

Ms Garms also has complained that TELECOM unreasonably is imposing charges.

All three assert that they require the information to support their submissions to the imminent review in accordance with the Fast Track Settlement Proposal (FTSP) agreed between TELECOM and AUSTEL, and endorsed by the then relevant Minister.

I understand that the FTSP provides a basis for a Proposed Arbitration Procedure that may be applied as a dispute resolution process additional to the Telecommunications Industry Ombudsman scheme. I also understand that TELECOM acknowledges that the COT Cases proposal has assisted TELECOM to clarify its views about dispute resolution processes suitable for small business in the future.

Clearly it is important that the FTSP be given every opportunity to achieve its objectives. As clause 2(e) stipulates that the review will be primarily based on documents and written submissions and that each party will have access to the other party's submissions and have the opportunity to respond, TELECOM should facilitate access by the parties to relevant information. Furthermore, it is important that TELECOM be seen to be co-operating as far as is reasonable.

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In the circumstances, the giving of access to information required by the applicants to present their cases to the assessor appointed under the FTSP is in the general public interest, in the context of s 29(5) and s30A(1)(b)(iii) of the FOI Act. Accordingly, it is my view that TELECOM should waive payment of the application fees in respect of the FOI applications. Also, TELECOM should waive that part of the charges which relates to the information requested which is required to enable the applicants to present their cases under the FTSP.

I should also draw your attention to section 14 of the FOI Act which states:

> Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.

In view of the importance of the FTSP, I think that TELECOM should release to the applicants all of the information required by them in connection with presentation of their cases to the assessor, outside the provisions of the FOI Act. TELECOM could invite the applicants to make an application under the FOI Act if they require further information which TELECOM is not prepared to release without considering an application under the FOI Act. Should you decide to withhold some documents, it would be helpful to the applicants if you would describe them so that they may make an informed judgement as to whether to pursue access through the FOI Act.

I should be grateful for your early comments on my views.

Should your officers wish to discuss any of the foregoing they could contact John Wynack on 06 2760153.

Yours sincerely

PS

Philippa Smith
Commonwealth Ombudsman.

Paul Rumble - 4844
cc: Iain Campbell - 43876
Jim Holmes - 23215
Steve Black - 23241
Dave Krajnc stein - 42858
CEO Sydney Office.

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28 March 1994

C/94/195.C/94/225

CEO
Melb. Office
28/3/94 cp

Mr F Blount
Chief Executive Officer
Telstra Corporation Ltd.
38th Floor, 242 Exhibition Street
MELBOURNE VIC 3000

Dear Mr Blount

On 20 January 1994 I notified Mr Holmes that I had received complaints from three of the 'COT Cases', Mr Graham Schorer, Mr Alan Smith and Ms Ann Garms, concerning TELECOM's handling of their applications under the Freedom of Information Act (FOI Act) of 24 November 1993 and 21 December 1993 respectively.

I informed Mr Holmes that it is my opinion that Telecom should release to the participants of the Fast Track Settlement Proposal (FTSP), free of charge, the information required by them in connection with presentation of their cases to the assessor and that such release should be outside the provisions of the FOI Act. I also suggested that Telecom should waive the application fees payable by those participants who had applied for information under the FOI Act and also waive that part of the charges which relates to the information requested which is required to enable the applicants to present their cases under the FTSP. Mr Black replied on 9 February 1994 agreeing to provide certain information to the participants, without conditions. I have enclosed copies of the correspondence for your convenience.

On 15 February 1994, I received a complaint from Ms Maureen Gillan alleging that Telecom had not responded to an FOI application she had lodged with Telecom on 7 December 1994. Your officers informed us that Telecom has no record of Ms Gillan's FOI request, but that Telecom extends to Ms Gillan the same offer made to Mrs Garms, Mr Schorer and Mr Smith as detailed in Telecom's letter to me on 9 February 1994. I understand that a copy of Ms Gillan's FOI request was sent to Telecom on 16 March 1994.

My officers received a number of assurances that documents were being sent to the four applicants from mid February 1994, but I understand that there still are many documents which are being withheld by Telecom. Mr Alan Smith has advised that he still awaits many documents, Mrs Garms advised that she has received only about 7000 of the 15500 documents identified by Telecom as falling within her FOI request and Ms Gillan and Mr Schorer advised that they have not received any documents since the offer of 9 February 1994.

Telecom has formally decided not to release the remaining documents it had promised to provide to Mr Smith free of charge.

In the expectation that the documents would be released within a couple of days after Mr Wynack's visit to your office on 10 March 1994, I took no further action on the complaints. It now appears that Telecom does not intend releasing the documents until the participants agree not to release any information in the documents.

I made some inquiries as to whether it is Telecom, or the other participants, who have been delaying the finalisation of the Agreement. Mr Warwick Smith and Mr Bartlett informed me that the delay is with Telecom. I understand that Mr Bartlett sent a draft Agreement to Telecom on 2 March 1994 and that Telecom sent final information to Mr Bartlett late on 17 March 1994.

As little progress has been made by Telecom in processing the FOI applications, I have decided to give a higher priority to investigating the complaints. As a first step, I should like to apprise you of my preliminary views on that part of the complaints which relate to delays in providing documents.

Decisions under the FOI Act

Insofar as Telecom's actions relate to decisions on the valid FOI applications - Mr Smith's and Mrs Garms' - it is my view that delaying release of the documents to Mr Smith and Mrs Garms is unreasonable in terms of section 15 of the Ombudsman Act 1976.

The statutory time limits within which FOI applications must be processed have not been met and no explanations for the delays have been provided to Mrs Garms or Mr Smith. I should mention that there is no provision in the FOI Act which enables Telecom to delay granting access to information while Telecom vets the information in anticipation of the use to which the applicants might put the information. Indeed, section 11 (2) of the FOI Act states:

> "Subject to this Act, a person's right of access is not affected by:
> (a) any reasons the person gives for seeking access; or
> (b) the agency's or Minister's belief as to what are his or her reasons for seeking access."

Nor is the delay in granting access to the information within the spirit of Telecom's undertaking, given in response to my letter of 20 January 1994, to release certain information outside the provisions of the FOI Act.

I should be grateful if you would inform me, within seven days, of the reasons why the authorised Telecom officer has not made decisions on the FOI applications made by Mrs Garms and Mr Smith.

I should be grateful also if you would inform me whether there is any impediment to Telecom immediately releasing those documents for which exemptions have not been claimed. In this context, I understand that all documents have been gathered and decisions on access have been made.

In view of the lack of progress by Telecom in providing the documents and complaints by Mr Smith that Telecom was improperly claiming exemptions for information without giving adequate explanation, one of my officers, Mr Wynack, visited your officers in Melbourne to obtain an update of the progress in providing information and to examine some of the FOI decisions.

Your officers informed Mr Wynack that the status of the exercise of providing information to the four applicants was :

- Mr Schorer - There was no valid FOI application until he either paid the application fee or agrees to participate in the arbitration process
- Mr Smith - He has a valid application and he has been granted access to most of the documents offered free. He has not paid the deposit for the other documents included in his FOI request. Your officers informed Mr Wynack, on 10 March 1994, that Telecom will not release the remaining free documents until Mr Smith signs an agreement related to the FTSP (the Agreement), which was then being developed.
- Ms Gillan - Telecom did not then have an FOI application from Ms Gillan. Your officers informed Mr Wynack that Telecom is ready to release certain documents to Ms Gillan, free of charge, on the same basis as the offer to the other three participants.
- Mrs Garms - She has a valid FOI application. Your officers informed Mr Wynack that a substantial number of documents have been released and there are a number of other documents being considered for release.

During discussions on 10 March 1994, your officers informed Mr Wynack that there is a delay in sending the remaining documents because of their concern that information might be released by the applicants which might result in comment in the media which is adverse to Telecom. Your officers also advised that the Agreement, which was almost finalised, contained clauses which required that all FTSP participants keep all information confidential. Your officers informed Mr Wynack that they expected that the Agreement would be presented to the participants on 15 or 16 March 1994.

Your officers assured Mr Wynack, however, that Telecom was not delaying the release to Mrs Garms of the documents she requested under the FOI Act. They said that they were concerned at the publicity and significant diversion of Telecom resources caused by the recent release of certain information by Mr Smith and that the delay in release of documents was due to the need for Telecom to check all documents prior to release so that Telecom is alert to the possible use/misuse of sensitive information. Your officers also informed Mr Wynack that they expected the vetting of the documents would take only a couple of days.

On 31 January 1994 Mr Black released a number of documents to Mr Smith and stated in a letter of that date that some other documents were being collated, copied and reviewed and would be provided to him shortly. Mr Smith informed my officers recently that Mr Black told him recently that no further documents will be released. This decision by Mr Black was made soon after a media report based on information released by Mr Smith and Mr Black's decision appears to have been a reaction to inconvenience caused to Telecom by that media report. Please advise whether

Mr Alan Smith also informed my officers that Mr Black informed him that Telecom has lost, or destroyed, a number of files relating to his contacts prior to June 1991 and also some personal files given to Telecom in 1992. Please inform me of the steps Telecom has taken to locate the files or to confirm that they were destroyed.

Imposition of conditions on release of documents.

Telecom's undertaking in response to my letter of 20 January 1994 is unconditional and it was given in the knowledge that the Cot Case people had signed agreements to participate in the FTSP. It was unreasonable for Telecom to require the participants to make further assurances while Telecom was considering the Agreement and thereby denying the participants the opportunity to consider the rules that Telecom wished to have included in the Agreement.

There is no provision in the FOI Act which would permit Telecom to impose such conditions on applicants prior to granting access to documents - access under the FOI Act is public access. Notwithstanding that Telecom's undertaking to me may have been to provide access outside the FOI Act, it was made in the context of complaints to me about Telecom's processing of applications under the FOI Act. Accordingly, it is my view that it was unreasonable for Telecom to impose the condition.

I do not accept that the action by Mr Alan Smith in disclosing to the media, and to the AFP, some information released by Telecom pursuant to its undertaking to grant free access, provides justification for the imposition of a condition that the participants must sign the Agreement before access to documents will be effected.

Please inform me whether Telecom intends releasing information to Mr Smith, Mrs Garms, Mr Schorer and Ms Gillan in accordance with the undertaking in Mr Black's letter to Mr Schorer dated 27 January 1994 (copy attached) and subsequently confirmed in communications to my officers by Mr Black and Mr Rumble.

I will write to you separately to inform you of my findings on other aspects of the complaints, when I have concluded my investigation. The other matters include the basis for some exemptions claimed, the adequacy and method of providing reasons given for exempting documents, the estimates of charges for access under the FOI Act.

Yours sincerely

Philippa Smith
Commonwealth Ombudsman.

CEO
Melt. Office
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6 May 1994

C/94/195:JW

Mr F Blount
Chief Executive Officer
Telstra Corporation Ltd.
38th Floor, 242 Exhibition Street
MELBOURNE VIC 3000

cc: Steve Black.
Sue Krasnostein
Ian Campbell
Sec. Ceo's Office
(2 pages)

Dear Mr Blount

I refer to previous correspondence concerning complaints I received from Messrs Schorer and Smith and Ms Garms and Ms Gillan about Telecom's handling of their requests under the Freedom of Information Act (FOI Act).

In my most recent letter, dated 25 March 1994, I apprised you of my preliminary views on that part of the complaints that related to delays in providing documents, and invited your comments on several matters.

Mr Black replied on your behalf on 31 March 1994, but his letter addressed only some of the matters I raised. Mr Black stated that Mr Rumble '..would give Mr Wynack a full update on the current status of all applications next Tuesday. A further written response will be provided at this time based on a total status review.' I have not yet received the promised written response.

✳ I should be grateful if you would now respond to the outstanding matters raised in my letter of 25 March 1994 ie

1. Comment on my views that:
   - it was unreasonable for Telecom to impose a condition for release of certain documents that the participants make further assurances that they will participate in the FTSP; and
   - it was unreasonable for Telecom to require the participants to make the assurances while Telecom was considering the agreement related to the FTSP (the Agreement) and thereby denying the participants the

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opportunity to consider the rules that Telecom wished to have included in the Agreement.

2. Provide information about the steps Telecom has taken to locate files containing information relating to Mr Smith's contacts prior to June 1991 and the personal files which allegedly were destroyed.

I have decided to prepare separate formal reports pursuant to section 15 of the Ombudsman Act 1976 on each of the complaints I received from Ms Garms, Ms Gillan and Messrs Schorer and Smith. As I have commenced preparing the reports, I should be grateful if you would provide a substantive response to my letter of 25 March 1994 by 13 May 1994.

My reports will contain opinions critical of certain Telecom actions and, in accordance with section 8(5) of the Ombudsman Act 1976, I will give you an opportunity to make submissions in relation to those actions.

I should also inform you that, in compliance with section 8(7A)(b) of the Ombudsman Act 1976, I have informed the Minister that I am investigating the complaints.

Yours sincerely

Philippa Smith
Commonwealth Ombudsman

① Outing of paranoia. ...
② Ignited
③ ... to prepare report. / Not
④ Appreciation of reason...
⑤ Not big stick
⑥ Reference to new unit in response
Acknowledged

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COMMONWEALTH & DEFENCE FORCE
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10 November 1994

C/94/225

Mr Frank Blount
Chief Executive Officer
Telstra Corporation Ltd
38th floor, 242 Exhibition Street
MELBOURNE VIC 3000

Attention Ms Joy Geary

Dear Mr Blount

At the request of Ms Geary, I am notifying you of the details of the complaints made to the Ombudsman by Mr Alan Smith.

20.1.94 Telecom unreasonably has decided to apply charges to his FOI request and has stated that the charges will be considerable.
2.3.94 Telecom has delayed providing access to documents.
2.3.94 Deletions from documents provided and exemptions were not explained.
24.3.94 Telecom claimed that documents given to Telecom by Mr Smith in 1992 had been destroyed or lost.

Telecom unreasonably refused to give any further documents to Mr Smith.

Telecom has lost or destroyed a number of files relating to his contacts with Telecom prior to 1991.
14.4.94 Telecom unreasonably refused to provide documents allegedly referring to discussions Mr Smith had with three Telecom officers concerning a discussion Mr Smith had with Mr Malcolm Fraser.

Telecom unreasonably deleted information from documents released.

Telecom unreasonably denied Mr Smith access to 460 documents.(letters of 14.4.94 and 15.4.94 from Mr Smith to Mr Black refer)
5.5.94 Telecom unreasonably delaying providing access to many documents.

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Telecom denied access to ELMI tapes for 21, 22, and 23 October 1992.

Telecom imposed unreasonable charges for access to documents sought under the FOI Act.

25.5.94 Telecom failed to provide fault reports for the period after 22/6/93, particularly from 9/8/93 to November 1993.

14.9.94 Telecom refused access to documents relating to voice monitoring for fault finding during 1993.

18.9.94 Telecom acting unreasonably in refusing to provide access to 'Bell Canada Raw Data'.

2.10.94 Telecom delayed providing access to documents under the FOI Act while Telecom's solicitors examined the documents.

23.10.94 Telecom unreasonably refused access to 'ELMI Smart 10 tapes' for the period May to July 1993. (Mr smith's letter to Mr Benjamin ctr 23.10.94 refers).

27.10.94 Telecom unreasonably refused access to CCS7 Call Statistics documents dated 4/11/93, 5/11/93, 6/11/93 and 9/11/93. (Mr Smith's letter to Mr Benjamin dated 27.10.94 refers).

26.10.94 Telecom incorrectly informed Mr Smith that Telecom did not have in their possession '..any of the raw data and working papers to do with the Bell Canada testing and report.'

7.11.94 Telecom unreasonably refused to provide the 'Portland/Cape Bridgewater Log Book associated with the RCM at Cape Bridgewater' for the period 2 June 1993 to 6 March 1994.

I think the above is comprehensive; but I have sent a copy of this letter to Mr Smith and invited him to apprise me of any complaints he has made which I may have omitted inadvertently.

Yours sincerely

John Wynack
Director of Investigations