



# Office of the Information Commissioner

*Freedom of information for Western Australia*



## **ANNUAL REPORT 2019/2020**



# Operational Performance

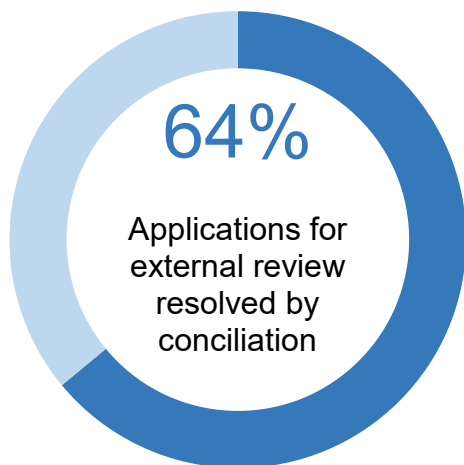
## Snapshot of financial and operational performance indicators

	Target \$000	Actual \$000	Variation \$000
Total cost of services	2,417	2,211	(206)
Net cost of services	2,413	2,175	(238)
Total equity	736	800	(64)
Net increase/(decrease) in cash held	(8)	182	174
Approved salary expense level	1,388	1,370	(18)

See the [Key Performance Indicators](#) and [Financial Statements](#) sections of this report for the OIC's full audited performance and financial reports.

### **Outcome: Access to documents and observance of processes in accordance with the FOI Act**

	Estimate	Actual	Variation
<b>Resolution of Complaints</b>			
<i>Key effectiveness indicators:</i>			
Participants satisfied with complaint resolution and external review processes	85%	78%	(7%)
Applications for external review resolved by conciliation	70%	64%	(6%)
<i>Key efficiency indicator</i>			
Average cost per external review finalised	\$7,206	\$7,709	\$503
<b>Advice and Awareness</b>			
<i>Key effectiveness indicator</i>			
Agencies satisfied with advice and guidance provided	98%	98%	-
<i>Key efficiency indicator</i>			
Average cost of service per application lodged	\$364	\$283	(\$81)



## External Review

**STRATEGIC GOAL:** *Provide a fair, independent and timely external review service*

The main function of the Commissioner is to review decisions made by agencies under the FOI Act.

The performance of this service is measured in two ways: by the satisfaction of participants of an external review with the way in which the external review was conducted; and by the number of external review applications resolved by conciliation.

Detailed performance data on the number of external review applications received and completed, and the number currently on hand and their age, is updated monthly and published on our [website](#).

### Conciliation

The Commissioner has powers to deal with an external review application in a number of ways including by conciliation, negotiation and compulsory conferences. These are in addition to the power to resolve an external review by issuing a binding determination. It has always been the focus of the OIC to ensure that the conduct of external review proceedings is not unduly legalistic or formal. The OIC prefers to negotiate a conciliated outcome between the parties rather than issuing a formal determination.

When a new external review is assessed and assigned to an officer (who acts on behalf of the Commissioner under certain delegated powers), consideration is given to any procedural

options available to resolve the matter. Consideration may be given as to whether proceeding to a compulsory conciliation conference is preferred over other conciliation methods, given the particular circumstances of the case at that time.

Conciliation is an important element of the external review process and can result either in resolution of the matter or clarification or narrowing of the issues in dispute. This has the effect of making the external review process more efficient for those matters that require further review.

This year's conciliation rate was 64%, below our target of 70%.

It is likely that some of the procedural changes implemented in the external review process may have contributed to this decrease. For example, in an effort to deal with as many external reviews in as timely a manner as is considered practicable, a decision was made to limit the number of options that may have otherwise resulted in the conciliated outcome of a matter, outside of the office's Early Intervention Program referred to below.

As noted elsewhere in this report, our conciliation rate target was increased from 60% to 70% following a review of the OIC's Performance Indicators conducted in February 2018.

### ***Early Intervention Program***

As reported in last year's report (on page 15), an early intervention pilot program was scheduled for trial this year. The pilot program commenced on 1 September 2019 and has continued as the Early Intervention Program (**EIP**).

The purpose of the EIP is to establish a long term strategy for dealing with matters quickly, reducing the issues in dispute and achieving resolution of matters informally, within the framework of the FOI Act.

The EIP uses a variety of approaches including attempting informal resolution over the telephone or by email, conducting conciliation conferences or meeting with the parties either separately or together.

During the reporting year, a total of 62 external review applications were dealt with in the EIP. Of those, 32 were finalised as a result of the EIP.

### ***Conciliation Case Studies***

#### **Agreement reached at conciliation conference**

The complainant applied to the Commissioner for external review of the agency's decision to refuse to deal with their access application under section 20 of the FOI Act on the ground that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

The Commissioner required the parties to attend a conciliation conference. At the conference, the agency agreed to deal with the complainant's access application in the revised terms agreed by the complainant and to give the complainant its notice of decision regarding access to the requested documents by a specific date.

As a result, the complainant withdrew their application for external review and the matter was resolved by conciliation.

#### Resolution of matter following meeting with parties

The complainant applied to the agency for access to documents relating to decisions made by the agency about the development of particular land holdings. The agency gave the complainant access to some documents. The complainant sought external review on the ground that additional documents should exist, and he did not accept the editing of the documents released.

It was unclear from the material before the Commissioner what documents might exist, and whether the agency held any additional documents. As a result, the OIC held a meeting with the parties to enable the complainant to identify particular documents that he believed should exist, and for the agency to provide explanations where documents did not exist, or to consider if there were documents that would provide the complainant with the information he required.

After the meeting the agency provided the complainant with access to edited copies of documents identified by the complainant during the meeting. After further discussion between this office and the parties, the agency withdrew some of its claims for exemption and released additional information to the complainant.

The complainant confirmed that he was satisfied with the access provided and withdrew his application for external review.

#### Further discussions between parties

The complainant's representative applied to the agency for access to documents relating to a particular investigation it had undertaken. The agency refused the complainant access to documents on the ground they were held by another agency.

After discussions between this office and the agency, the agency agreed to meet with the complainant's representative to discuss particular documents that would assist the complainant. The matter was suspended for a period of time, after which the parties reported back to the OIC.

The complainant's representative considered that there should be additional documents within the scope of the access application. After further searches were carried out by the agency and further explanations provided, the complainant's representative accepted that, even though it was likely that certain documents should have been created, they had not been. As a result, the complainant's representative withdrew the application for external review.



### Provision of better reasons and further documents during external review

The complainant applied to the agency for copies of certain documents relating to a specific project undertaken by the agency. The agency refused the complainant access to the requested documents on the basis that they were exempt under clause 4 of Schedule 1 to the FOI Act, without identifying the particular exemption clause or clauses it relied on (clause 4(1), 4(2) or 4(3)) or explaining why the elements of the exemption clause(s) were made out.

One of the Commissioner's officers advised the agency that its notice of decision did not contain sufficient information as required by the FOI Act and asked the agency to provide the complainant with further information in support of its exemption claims. The agency gave the complainant further information and, at the same time, reconsidered its decision. As a result, the agency decided to give the complainant access to a substantial number of the documents with third party information deleted.

The agency also claimed that some of the remaining documents were exempt under clause 7(1) of Schedule 1 to the FOI Act on the ground of legal professional privilege. The complainant subsequently advised the Commissioner's office that they now only sought external review of this aspect of the agency's decision.

After reviewing the documents that the agency claimed were exempt under clause 7(1), the Commissioner's officer advised the complainant that, in her view, those documents were exempt either in full or in part under clause 7(1). The complainant accepted that view and decided not to continue with the external review, resolving the matter by conciliation.

### Complainant accepts that agency did not hold the requested documents

The complainant applied to a local government agency for copies of documents directly related to minutes from a particular meeting. The agency refused access to the requested documents on the basis that they could not be found or did not exist.

The Commissioner was satisfied that it was reasonable to conclude that the requested documents existed or should exist. As a result, this office made further inquiries with the agency about the searches it conducted to locate the documents.

The agency provided a comprehensive breakdown of its searches and conducted further, more specific searches. The Commissioner was satisfied that all reasonable steps had then been taken to find the documents and that, while the documents may have once existed, they could no longer be found.

The complainant accepted the agency's explanations and the matter was resolved.

### Agency reconsiders exemption claim

The complainant applied to the agency for access to documents relating to a deceased relative. The agency gave access to edited copies of documents, claiming that the information deleted related to third parties and was exempt under clause 3(1) of Schedule 1 to the FOI Act.

The complainant sought external review on the basis that he was not satisfied that the information provided was the information he sought. He sought access to the details contained within one document in particular, which were the details of another deceased relative.

After discussions with the OIC, the agency reconsidered its position. The agency was satisfied that, in the particular circumstances of the case, no harm would arise from disclosure of the requested details and that it had complied with its third party consultation obligations under section 32 of the FOI Act. As a result, the agency disclosed an unedited copy of the document, resolving the matter by conciliation.

### Agency agrees to deal with access application

The complainant applied to the Commissioner for external review of the agency's decision to refuse to deal with their access application under section 20 of the FOI Act on the ground that the work involved in dealing with the access application would divert a substantial and

unreasonable portion of the agency's resources away from its other operations.

One of the Commissioner's officers advised the agency that it was her initial assessment, based on the material then before the Commissioner, that the agency's decision did not appear to be justified.

The agency subsequently withdrew its reliance on section 20 and advised that it would deal with the complainant's access application in accordance with the FOI Act. Therefore, the matter was resolved by conciliation.

### Complainant accepts agency's decision following initial assessment

The complainant applied to the agency for documents regarding certain public submissions and specifically requested personal details of third parties. The agency identified a large number of documents within the scope of the application. The agency refused to deal with the complainant's application under section 20 of the FOI Act on the basis that to do so would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

The complainant sought external review on the basis that it was in the public interest for the requested documents to be disclosed. On the material before the Commissioner it was clear that the agency had attempted to assist the complainant in reducing the scope of the application. It was also clear that the amount of work

which would be required to deal with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations. Therefore, the complainant was informed that it was likely that the Commissioner would consider that the agency's decision under section 20 was justified.

The complainant was also informed that, even if the amount of work required to deal with the application was reduced substantially, documents of the kind requested containing personal information about third parties, were on their face exempt under clause 3(1) of Schedule 1 to the FOI Act. Therefore, the complainant would need to persuade the Commissioner that, in the circumstances, the public interest in the disclosure of those documents would outweigh the public interest in protecting the personal privacy of the third parties.

The complainant accepted that the further explanation provided supported the agency's decision in refusing to deal with the application under section 20 and that, even if the application had been reduced, the type of information requested would be exempt under clause 3(1). As a result, the matter was resolved.

#### Agency accepts Commissioner's preliminary view

The complainant applied to the agency for a copy of certain reports. The agency refused access to the three documents identified within the scope of the complainant's access application on the ground they

were exempt under clause 6(1) of Schedule 1 to the FOI Act.

The Commissioner required the parties to attend a conciliation conference. The matter was not resolved at the conference. After the conference, the agency withdrew its exemption claims for one of the documents and gave the complainant a copy of that document. The agency also withdrew its clause 6 exemption claim for the remaining two documents and, in substitution, claimed that one document was exempt under clause 1(1)(b) and that the other document was exempt under clauses 1(1)(a) and 1(1)(b) of Schedule 1 to the FOI Act.

After considering all of the material before her, the Commissioner advised the parties that it was her preliminary view that the documents were not exempt as the agency claimed. The agency accepted the Commissioner's preliminary view and gave the complainant access to the disputed documents. Therefore, the matter was resolved by conciliation.

#### Complainant discontinues external review following preliminary view

The complainant applied to the agency for access to documents relating to a workplace investigation and human resource files. The agency granted access to several documents in full; access to an edited copy of others; and refused access to the remaining documents.



The complainant limited the scope of the external review to two documents which the agency edited, claiming that the deleted information was exempt under clause 3(1) of Schedule 1 to the FOI Act.

After considering all of the material before her, including submissions made by the parties, the Commissioner advised the parties that it was her preliminary view that the deleted information was exempt under clause 3(1) as the agency claimed. The complainant did not proceed with the external review and the matter was resolved.

#### **Both parties accept Commissioner's preliminary view**

The complainant applied to the agency for all documents relating to all communications in respect of proposed action relating to a contract. The agency identified eight documents within the scope of the access application and refused access to all eight documents on the basis that they were exempt under clauses 7(1) and 10(1) of Schedule 1 to the FOI Act. The agency also claimed that one of those documents was exempt under clause 12(c).

After considering all of the material before her, including submissions made by the parties, the Commissioner advised the parties that it was her preliminary view that seven of the eight documents were exempt under clause 7(1). Therefore, it was not necessary for the Commissioner to further consider if those documents were also exempt under another exemption clause. The Commissioner further advised the agency that it was her preliminary view that the eighth document was not

exempt under clauses 7, 10 or 12 and she invited the agency to reconsider its decision in respect of that one document.

Both the complainant and the agency accepted the Commissioner's preliminary view and the eighth document was disclosed to the complainant, resolving the matter by conciliation.

#### ***Decisions made by the Commissioner***

Where applications for external review remain unresolved after the initial efforts to conciliate the matter, the Commissioner may need to finalise an external review by issuing a binding final determination. Before doing so, the Commissioner may issue a written preliminary view to the parties involved in the external review.

The purpose of the preliminary view is to give the parties an opportunity to review the Commissioner's understanding of the matters in dispute; identify any factual errors; and provide new and relevant information or submissions for her final consideration. While there is no legislative requirement to provide a preliminary view, the FOI Act does provide that the parties to an external review are to be given a reasonable opportunity to make submissions.

The preliminary view is addressed in full to the party to whom the Commissioner's preliminary view is largely adverse, with a copy provided to the other parties (abridged if necessary to avoid disclosure of potentially exempt matter). Based on the preliminary view of the Commissioner, each party is provided the opportunity to reconsider their position, as applicable, and

may withdraw or provide additional material in support of their position.

If any matters remain in dispute after the preliminary view has been issued, the Commissioner will, after considering any further information and submissions following the preliminary view, formally determine the issues in dispute between the parties.

The parties are informed in writing of the final decision and the reasons for it. The Commissioner is required to publish decisions in full or in an abbreviated, summary or note form which are published on the OIC's website, unless the decision is to stop dealing with a matter under section 67(1). It is the usual practice to identify all of the parties to the external review in the published decision, except in certain circumstances.

During the reporting period eight applications for external review were finalised by formal published decision of the Commissioner, and a summary of those follow. The decisions are published on our [website](#).

[Table 5](#) provides detail on external review outcomes.

### Decisions under section 67(1)

Under section 67(1) of the FOI Act, the Commissioner may decide to either not deal with, or stop dealing with, an external review application in certain circumstances:

- section 67(1)(a): when an external review application does not relate to a matter that the Commissioner has power to deal with; and

- section 67(1)(b): when the Commissioner considers the matter is frivolous, vexatious, misconceived or lacking in substance.

Where the Commissioner informs the parties in her preliminary view that an agency's decision is justified, and if the complainant does not provide any meaningful response by the specified date, the Commissioner may finalise the matter by deciding that, under section 67(1)(b), the matter is lacking in substance.

Decisions made under this section are usually not published.

### Documents relating to the northern section alignment of the Bunbury Outer Ring Road

#### *Re Rawet and Main Roads Western Australia* [2020] [WAICmr 1](#)

The complainant applied to the agency for access to certain documents relating to the revised northern section alignment of the Bunbury Outer Ring Road including variations and alternatives investigated or considered by the agency.

The agency released some documents but the complainant claimed that the agency had not identified all documents within the scope of his application. Following a conciliation conference conducted by the OIC, the agency undertook additional searches and released further documents to the complainant.

The complainant maintained that it was reasonable to believe that documents which explain or relate to the options considered for the revised alignment of the highway exist or should exist (**the further documents**). That was, in effect, a claim that the agency had refused the complainant access to the further documents under section 26 of the FOI Act.

On the material before her, the Commissioner was satisfied that, apart from the documents already released, documents of the kind described by the complainant were not created by the agency and therefore did not exist. On that basis, and having regard to the searches conducted by the agency, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate the further documents. As a result, the Commissioner did not require the agency to conduct additional searches.

Accordingly, the Commissioner confirmed the decision of the agency to refuse the complainant access to documents under section 26 of the FOI Act on the ground that the further documents either could not be found or did not exist.

### Documents relating to the costs of a legal case

*Re Toodyay Progress Association Inc. and Shire of Toodyay* [2020] [WAICmr 2](#)

The complainant applied for access to information that would enable a determination of the full cost of a particular named legal case (**the legal case**).

The agency decided that there was no single document that enabled a determination to be made of the full costs of the legal case, but gave the complainant access to edited copies of relevant documents, including invoices relating to the legal costs of the legal case. On internal review, the agency accepted that the scope of the application was wider than the legal costs of the case and gave access to an additional document. The complainant claimed that additional documents should exist and sought external review of the agency's decision to, in effect, refuse him access to further documents under section 26 of the FOI Act.

During the external review, the agency advised that it did not have separate costings for certain matters associated with the costs of the case, such as employee costs, and that it had provided all the information it had that was within the scope of the application, other than a deed of settlement (**the Deed**) that it had identified, which the agency claimed was exempt under clause 8(1). The agency provided information to the Commissioner that persuaded her

that disclosure of the Deed would be a breach of confidence for which a legal remedy could be obtained. Therefore, the Commissioner found that the Deed was exempt under clause 8(1).

The Commissioner was satisfied that the agency would not necessarily keep a separate record of its internal costs in relation to the legal case. Accordingly, on the information before her, the Commissioner was not persuaded that there were reasonable grounds to believe additional documents exist and therefore did not require the agency to undertake further searches. The Commissioner found that the agency's decision to refuse access to documents under section 26, on the ground that further documents either cannot be found or do not exist, was justified.

The Commissioner varied the decision of the agency.

### Audio records of interview relating to a workplace investigation

*Re 'V' and Curtin University* [2020] [WAICmr 3](#)

The complainant applied to the agency for access to documents relating to particular complaints lodged with the agency about him when he was employed by the agency. The requested documents included documents that related to an investigation report prepared by an external investigator and nine audio

records of interviews referred to in the investigation report (**the audio records of interview**).

The agency refused access to the audio records of interview on the ground they were exempt under clauses 3(1) and 8(2) of Schedule 1 to the FOI Act.

During the course of the external review, the complainant limited the scope of the review to only the audio records of interview.

The audio records of interview contained personal information about a number of individuals including the complainant, the investigator and the interviewees. The Commissioner considered that the audio records of interview were, on their face, exempt under clause 3(1), subject to the application of the limits on the exemption set out in clauses 3(2)-3(6). After considering all of the information before her, the Commissioner found that none of the limits on the exemption applied.

In weighing the competing public interest factors for and against disclosure, the Commissioner did not consider that those favouring disclosure outweighed the public interests against disclosure. Weighing against disclosure, the Commissioner was satisfied that the interviewees participated in the interviews on a voluntary basis and on the understanding that the interviews were being recorded, and that the information provided during the interview was given in confidence. The Commissioner considered that in workplace grievance matters – where information is

given to investigators voluntarily and steps are taken to ensure that such information is given in confidence – there is a real risk that disclosure of that information would dissuade some staff members from volunteering information in similar situations in the future. Similarly, staff may be less likely in the future to consent to their interview being recorded if the audio records of such interviews are disclosed under the FOI Act.

The Commissioner varied the agency's decision and found that the audio records of interview were exempt under clause 3(1) of Schedule 1 to the FOI Act.

#### Document relating to a complaint against a local government councillor

*Re 'W' and Department of Local Government, Sport and Cultural Industries [2020] [WAICmr 4](#)*

The complainant applied to the agency for access to documents relating to a complaint he made to the agency against a named local government councillor alleging that the councillor breached the *Local Government (Rules of Conduct) Regulations 2007*.

The agency identified one document – a letter from a third party to the Local Government Standards Panel relating to his complaint – and refused the complainant access to it on the ground that it is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Personal information is exempt under clause 3(1) subject to the application of the limits on the exemption set out in clauses 3(2)-3(6).

The Commissioner considered the limitations on the exemption in clauses 3(2), 3(3), 3(5) and 3(6) and was satisfied that they did not apply. The Commissioner found that the disputed document was exempt under clause 3(1).

The Commissioner confirmed the agency's decision.

#### Document relating to a review by a barrister

*Re National Tertiary Education Industry Union and Murdoch University [2020] [WAICmr 5](#)*

The complainant applied to the agency for access to a particular document relating to a review conducted by a barrister on behalf of the agency. The agency refused access to the document on the ground that it was exempt under clause 7(1) of Schedule 1 to the FOI Act.

Based on the material before her, the Commissioner was satisfied that the dominant purpose of the creation of the disputed document was to give or obtain legal advice. Accordingly, the Commissioner found that the disputed document would be privileged from production in legal proceedings and that it was therefore exempt under clause 7(1).



The Commissioner also noted that, following the decision of the Supreme Court in *Department of Housing and Works v Bowden* [2005] WASC 123, the question of waiver of legal professional privilege does not arise under the FOI Act.

The Commissioner confirmed the agency's decision.

### Notes made at OIC conciliation conference

*Re Dickens and Water Corporation* [2020] [WAICmr 6](#)

The complainant applied for access to the notes taken by an agency officer at a conciliation conference conducted by the OIC. The agency refused access to the documents under clause 8(2) of Schedule 1 to the FOI Act.

Information is exempt under clause 8(2) if its disclosure would reveal information of a confidential nature that was obtained in confidence and its disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

The Commissioner was satisfied that any information recorded during the conciliation conference would comprise information of a confidential nature obtained in confidence. The Commissioner considered that, if parties believed that any information shared during the conciliation conference could be disclosed to the world at large, then those parties would not volunteer information to try to resolve the matters between

them. Accordingly, she considered that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind.

Under clause 8(4), information is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest. In this case, the Commissioner considered that the public interest in maintaining the integrity of the conciliation process outweighed any public interest in disclosing confidential notes outside the conciliation conference.

The Commissioner found that the disputed documents were exempt under clause 8(2) and confirmed the agency's decision.

### Records of access to an integrated court management system

*Re Lee and Department of Justice* [2020] [WAICmr 7](#)

The complainant made two applications for access to documents that recorded access to the integrated court management system by officers, specifically in relation to two named businesses. The complainant disputed the agency's decision to give access to edited copies of two documents. The agency deleted the names of agency officers under clause 5(1)(e) on the ground that the disclosure of the information could reasonably be expected to endanger the life or

physical safety of a person. The agency deleted the logon identities of the officers under clause 3(1).

As the matters were similar, the Commissioner dealt with them together. The Commissioner found that the logon identities of the officers was exempt personal information under clause 3(1). The Commissioner was persuaded that disclosure of the full name of the officers could reasonably be expected to endanger the life or physical safety of a person. However, the Commissioner considered it was practicable for the agency to edit the information, pursuant to section 24, and give access to just the first names of the officers. Accordingly, the Commissioner found that the last names of the officers were exempt under clause 5(1)(e) but that their first names were not.

The Commissioner varied the agency's decision.

### Documents relating to legal representation of a child

*Re 'X' and Legal Aid Western Australia* [2020]  
[WAICmr 8](#)

The complainant sought access to a copy of the Independent Children's Lawyer's (**the ICL**) correspondence in relation to an identified legal file. The file comprised documents arising from the ICL's representation of a child. The agency refused the complainant access to the requested documents pursuant to section 23(4) of the FOI Act, on the basis

that it was not in the best interests of the child to disclose the documents. The agency additionally claimed that it was not required to identify the documents as it was apparent from the nature of the documents as described in the access application that all of the documents are exempt documents, pursuant to section 23(2) of the FOI Act.

In considering section 23(2), the Commissioner accepted that it was apparent from the nature of the documents as described in the access application that they were exempt under clause 3(1). Additionally, the Commissioner considered that it would not be practicable for the agency to give access to an edited copy of the requested documents because the severe editing that would be required to avoid disclosure of the exempt matter would render the requested documents unintelligible.

In considering section 23(4), the Commissioner accepted that: the personal information related to a child who had not turned 16; the decision-maker, at the relevant time, held the view that giving access would not be in the best interests of the child; that the decision-maker, at the relevant time, held the view that the child did not have the capacity to appreciate the circumstances and make a mature judgement as to what might be in his or her best interests; and that the view of the decision-maker was held on reasonable grounds.

The Commissioner confirmed the decision of the agency.

### *External review benefits*

When an external review is finalised by the OIC the outcome is currently recorded as one of four types of legislative outcome (see [Table 5](#)). The FOI Act outlines the basis on which an external review can be finalised as follows:

- By formal published decision under section 76(2) where the Commissioner formally determines any issues remaining in dispute and makes a decision that either confirms, varies or sets aside the agency's decision and makes a decision in substitution.
- By decision under section 67(1)(a) where the Commissioner decides to stop dealing with the matter because it does not relate to a matter the Commissioner has power to deal with.
- By decision under section 67(1)(b) where the Commissioner decides to stop dealing with the matter because it is frivolous, vexatious, misconceived or lacking in substance.
- By conciliation where the external review is finalised on the basis that there are no issues remaining in dispute that the Commissioner is required to determine.

Summary details of the external review process, which may include some outcomes achieved for the parties during the external review process, are described in published formal decisions and case studies of conciliated matters reported in

this report. However, those summaries do not necessarily describe the full extent of the benefits to a party, particularly the complainant, which are achieved in the external review process.

For example, a formal published decision may state that an agency's decision is confirmed in relation to any issues that remained in dispute at the end of the external review process. However, it is often the case that a significant amount of what was in dispute at the *commencement* of the external review is resolved during the external review process, meaning the Commissioner was not then required to formally determine those issues.

In order to better reflect and record all outcomes achieved, from 1 July 2019 the OIC has recorded benefits to a party that may not otherwise have been reflected when only using one of the four legislative outcomes of an external review, as outlined above. Some matters may have more than one benefit to a party.

For each external review finalised since 1 July 2019, the OIC case officer was required to identify whether:

- access to additional documents or parts of documents was given to the complainant;
- additional action was taken by the agency while the matter was on external review which resulted in more information being provided to the applicant;
- the scope of the external review was reduced by a party; or

- no additional benefit was attributed to a party to an external review.

In the first year recording such information the following data applies to the 148 external review applications finalised:

	#	%
Additional documents or parts of documents released to the complainant	45	30%
Additional action taken by the agency	53	36%
Reduction in scope	8	5%
No additional benefit	55	37%

### ***External review indicators over the last 10 years***

In the last 10 years the OIC has received a total of 1,385 external reviews (average of 138.5 per year) and finalised a total of 1,353 (average of 135.3 per year).

By assessing each five year period a clearer picture indicates what has contributed to the current position of the OIC in respect of the number of external reviews on hand and the time that it takes to finalise them.

PERIOD	RECEIVED	AVG PER YEAR	FINALISED	AVG PER YEAR
2010/11 - 2014/15	621	124	638	128
2015/16 – 2019/20	764	153	715	143
	+143	+29	+77	+15
	↑23%		↑12%	

In summary, although the OIC has increased the number of external reviews finalised by 12% over the last five years, there has been a corresponding increase of 23% in the number of external reviews received.



## Advice and Awareness

### STRATEGIC GOALS:

- *Enhance public awareness of rights to government information*
- *Foster improvement in agency practice*

The OIC seeks to ensure that agencies and their staff value FOI as part of an agency's operations and that FOI Coordinators, decision-makers and principal officers are aware of their responsibilities under the FOI Act. An understanding of agency obligations under the FOI Act should form part of any public sector employee's competency. The OIC also provides information for members of the public and those who may advocate for or assist members of the public to understand the rights and processes outlined in the FOI Act. Training and briefings are provided to State and local governments and to non-government groups as part of those activities.

This year the OIC provided training, briefings and workshops at the OIC premises and at various sites on invitation from the relevant agency or organisation. A list of these activities is available at [Table 9](#).

### *FOI Coordinator's and Decision Writing Workshops*

The FOI Coordinator's Workshop is a one day training session and the primary training opportunity provided by the OIC for agency staff, with several workshops held each year. Participants in this workshop include officers who have



responsibility for information access processes and decisions within their agencies. Many participants are new to FOI and attend the workshop as part of the education for their role, and some use the workshop as a refresher to ensure that their agency's processes and policies continue to accord with best practice.

The Decision Writing Workshop is run several times per year and is intended to assist decision-makers understand their obligations under the FOI Act, particularly in relation to writing compliant notices of decision. A good notice of decision demonstrates that the decision process has been properly carried out in accordance with the FOI Act. The workshop builds on the material covered in the FOI Coordinators Workshop but may be completed by officers who have not attended the FOI Coordinators Workshop if they complete pre-reading from the [FOI Coordinator's Manual](#).

Participants have a variety of experience and needs when attending these two workshops. The OIC seeks to address this by providing a clear idea of what will be provided in the training and by having supplementary materials available outside of training, including an online basic introduction to the FOI Act.

Due to the COVID-19 response, the OIC cancelled its face-to-face workshops for April through to July 2020. Efforts were directed to arranging workshops to be held remotely for the remainder of 2020.

**“Overall the training was very informative and beneficial, and will assist me in my role in the FOI process. It will also enable me to support staff in my team who are involved in FOIs.”**

*Workshop participant survey response*

### ***Briefings for community groups***

The OIC will consider invitations from non-government groups to provide briefings about rights under the FOI Act. Priority is given to groups that support individuals to understand or exercise their rights under the FOI Act. For example, during the year a presentation was made to the Health Consumer Council to assist their officers understand how to effectively use the FOI Act to access documents for, or on behalf of, their clients.

A key message for community groups seeking to assist people to access documents is to contact the relevant agency before making a formal access application. This early contact can be useful in reducing the work required for both the applicant and agency. Community groups are referred to our publication [Is FOI my best option?](#) and are informed of effective strategies for exercising rights under the FOI Act.

## ***FOI Newsletter***

The newsletter provides an opportunity to address current or recurring FOI issues. While the information contained in the newsletter is primarily targeted to agency staff, it includes information that may be of interest to members of the public. Subscribers to the newsletter also receive alerts when new decisions of the Commissioner are published on our website.

Three newsletters were published this reporting period in [August](#), [November](#) and [April](#).

As at 30 June 2020 over 300 individuals were subscribed. Subscriptions to the newsletter are registered from our [website](#).

## ***Commissioner's speaking engagements***

- *FOI and Open Government* for the Piddington Society in October 2019.
- Lecture to students participating in the UWA Government Accountability – Law and Practice Unit in February 2020.
- In her capacity as State Records Commissioner under the *State Records Act 2000*, the Commissioner spoke at the Leaders' Summit of the Council of Australasian Archives and Records Authorities (CAARA) in October 2019 about the legislative requirements for good record keeping and the role of the WA State Records Commission.

## ***Briefing for a delegation from the Thai Ombudsman's Office***

In September 2019, the Ombudsman WA hosted the Thai Chief Ombudsman and his staff. At the invitation of the Ombudsman WA, the OIC provided a briefing about FOI in WA to the delegation.

## ***Online resources***

Wherever possible the OIC's written resources are published on our website, including guides for members of the public and agencies; the Commissioner's decisions; annual reports; the FOI Coordinator's Manual; the OIC's newsletter; the customer service charter; the Disability Access and Inclusion Plan; the gift register; and corporate credit card statements.

The OIC maintains a suite of online guides for agencies to assist them in meeting their obligations under the FOI Act, and for members of the public to provide guidance about making FOI applications and understanding the FOI process.

Short guides on common issues or questions regarding FOI are available from our home page with drop-down menus for members of the public and for agencies. More detailed publications are available from our publications page, which is accessible from our home page under 'Other Resources'. The [OIC guidance](#) page provides detailed information about FOI processes, some FOI Act exemptions and external review procedures.

The [FOI Coordinator's Manual](#), which is a key resource for the FOI Coordinator's workshop, is available online. It is a comprehensive reference tool for FOI Coordinators and is intended to be an evolving resource.

This year, three new publications were added to our website:

- [Documents that cannot be found or do not exist – guide for access applicants](#) – a guide to what the Commissioner considers when dealing with applications for external review where the access applicant claims that additional documents exist.
- [Applying for documents during the COVID-19 pandemic](#) – a guide for members of the public.
- [COVID-19 Managing FOI timeframes and potential office closures](#) – a guide for agencies and members of the public.

The OIC [External review guide](#) was updated during the year to reflect the OIC's new practice of accepting electronic delivery of documents from agencies.

### **Online decision search tool**

Decisions of the Commissioner made under section 76 of the FOI Act are published on the OIC's website as soon as practicable after being handed down and provided to the parties. A comprehensive search facility is available for full decisions whereby users can search for specific exemption clauses, sections of the FOI Act or words and phrases found in the decisions. For these criteria, the facility will search the

catchwords found at the beginning of each full decision as per the following example:

FREEDOM OF INFORMATION – refusal of access – lease of premises commonly known as 'Indiana Tea House' – section 30(f) – the requirements of a notice of decision if the decision is to refuse access – section 102 – burden of proof – section 33 – safeguards for affected third parties – clause 4(3) – adverse effect on business affairs – clause 4(7) – public interest – clause 8(1) – breach of confidence – clause 8(2) – information of a confidential nature obtained in confidence.

The Commissioner may issue a decision note, which is not as comprehensive as a full decision but is still captured by the search facility when searching by agency or complainant name, selecting decisions between dates, or a particular outcome.

A Google search is also available that will search the full text of all published decisions.

The decision search facility is a very helpful tool for FOI practitioners to search for precedents relevant to matters with which they are dealing. The Commissioner's decisions are also available and searchable on the Australasian Legal Information Institute (**AustLII**) [website](#) under Western Australia case law. AustLII provides a free online database of Australasian legal materials.

People can subscribe to receive notifications of newly published decisions of the Commissioner at our [website](#).

### **Responding to enquiries**

The OIC provides general assistance to members of the public and agency staff regarding FOI issues. The information provided is intended to ensure that members of the public are aware of their rights to access documents under the FOI Act

and of the options available to seek access to documents outside of formal FOI processes where appropriate. Agency officers are assisted to understand their obligations under the FOI Act.

This year the OIC dealt with 1,750 written, phone and in-person requests for guidance or advice, including misdirected requests for documents. This is a 36% increase from the 1,286 requests for advice received last year.

The OIC does not provide legal advice and does not provide specific rulings on particular issues or sets of facts when the matter is not before the Commissioner on external review. The resources outlined in this report are readily available to support agencies and the community, and to promote the objects of the FOI Act.

### *Agency FOI Reference Group*

The Agency FOI Reference Group (**AFRG**) is made up of key staff of the OIC and FOI practitioners from ten agencies that are representative of the different agency types in the sector.

The purpose of the AFRG is to promote and advocate for good FOI practice in agencies. Meetings of the group continue to provide an opportunity for the OIC to hear directly about current issues facing agencies relating to FOI. These discussions are an important contributing factor to the advice and awareness activities of the OIC.

The AFRG met three times during the reporting period. Members of the AFRG are encouraged to share information from meetings with their staff and similar agencies, and to feed information back from those sources to the group.

### *FOI in WA Conference – Building Trust*

The second FOI in WA Conference for FOI practitioners was held on 21 November 2019 at Fiona Stanley Hospital's Education Building.

A total of 322 State and local government officers registered for the event, close to our capacity of 350 attendees (24% from local government and 76% from State Government).

The OIC acknowledges the generous support of Fiona Stanley Hospital for again allowing us to use its Education Building facilities for the conference at no cost. This allowed us to keep the registration fee to a minimum. This year, we also offered a half day ticket for people to attend the opening keynote speech and the conference panel discussion that followed.

Our Conference keynote speaker this year was Emeritus Professor Geoff Gallop AC. Professor Gallop spoke about the concept of Open Government and people's right to know and to be involved, and discussed the role of FOI legislation in that context. He acknowledged the difficulties that decision-makers may face in the FOI process, which he described as requiring an exercise of character and judgement.

"The keynote speech from Dr Gallop that underpinned the philosophy of the process over the mechanism"

*Participant feedback on their Conference highlight*





Joanne Kummrow, Office of the Victorian Information Commissioner; Ian Cowie, City of Gosnells; Catherine Fletcher, Information Commissioner, Professor Geoff Gallop; and Caroline Spencer, Auditor General.

Following his address, Professor Gallop participated in a panel session moderated by the Commissioner about the role and challenges of FOI and open government in the current environment. Also on the panel were Caroline Spencer, WA Auditor General; Joanne Kummrow, Public Access Deputy Commissioner of the Office of the Victorian Information Commissioner; and Ian Cowie, CEO of the City of Gosnells.

The keynote address and panel discussion were recorded and are available [here](#).

The rest of the program included presentations from the Commissioner, OIC staff, the State Solicitor's Office, experienced FOI practitioners and others.

The presentations were available on our website for attendees to view until May 2020. A copy of the conference program is outlined at [Table 13](#).

The FOI in WA Conference would not have been possible without the significant work of the Conference steering group, which consisted of the Commissioner, OIC officers and agency representatives from Fiona Stanley Hospital, Main Roads WA, Department of the Premier and Cabinet, Department of Transport and the City of Armadale.

Following the Conference the OIC received positive feedback via a survey sent to participants, which included:

- 93% of participants said the Conference either met or exceeded their expectations;
- 90% of participants said the range of topics was useful; and
- the highlight of the Conference for many participants was hearing from Professor Gallop.



**“I have been looking forward to attending this conference since the last one I attended in 2017. It was great to be able to leave a conference with a deeper understanding of FOI and know that we are not alone..”**

*Participant feedback*

A key highlight of this Conference from the perspective of the OIC was the gathering of a community of agency officers seeking to enhance their skills in dealing with information access issues and giving effect to the objects and processes of the FOI Act. It was an opportunity to celebrate the role of FOI practitioners, further equip them to perform their role effectively and increase their understanding of the importance of information access in the public sector. FOI practitioners can sometimes feel very isolated. The Conference enabled attendees to network with other FOI practitioners from across the sector to understand and discuss the importance of what they do for good government as a whole.

### ***Online FOI access application form***

In early 2020, the OIC began working with the Office of Digital Government, and a number of State government agencies that had migrated their agency website to the WA.gov.au site, to develop an online generic FOI access [application form](#).

Members of the public can use the form to submit an online application to those agencies hosted on the WA.gov.au site.

The online form is preceded by information to assist applicants understand their rights under the FOI Act. Applicants are encouraged to contact the relevant agency before lodging their access application because in many cases, a formal application is not necessary. The relevant FOI contact for each agency is provided.

While a form is not required to make a valid access application under the FOI Act, it can be preferred by applicants because it provides a structure to their access application. An online form also provides an easy way to lodge the FOI access application with the appropriate agency.

The online form is structured to allow applicants to provide the information needed to make a valid access application under the FOI Act, while also allowing and encouraging the applicant to provide additional information to assist agencies to clearly identify the documents requested, and the information that the applicant does not want, so that the application can be dealt with effectively and efficiently.

The form was made available on the WA.gov.au website in August 2020. In the future, the online form will also allow access applicants, in some instances, to pay any required fee online with their application, using BPoint.

The OIC intends to develop a generic form that can be downloaded and submitted to all agencies, regardless of whether they have migrated their agency website to the WA.gov.au site.

## Our workplace

### STRATEGIC GOALS:

- *Build the capacity of our people*

### Strategic plan review

Throughout the year, all staff have participated in reviewing and updating the OIC's strategic goals and initiatives for the next three years.

The strategic plan for 2020/23 was approved by the Commissioner on 30 June 2020, with the following goals:



### Response to COVID-19

The COVID-19 pandemic significantly impacted most aspects of the OIC's service delivery. Our focus was to ensure the safety of staff; the continued management of external review applications; the delivery of agency support; and the provision of advice and guidance to the community.

Last year we reported on our ongoing efforts to provide flexible working arrangements for staff, as part of normal operations, which adequately addressed security and confidentiality issues. As noted below, management of these issues was fast tracked when it became clear in early 2020 that the response to COVID-19 meant working remotely might become mandatory, either in full or in part.

The OIC is grateful to the Department of the Premier and Cabinet's FOI Unit for their assistance in testing secure electronic document transfer software; and the Department of Finance for sharing their resources and coordinating the availability of equipment from suppliers.

### What we did

- In early 2020, the OIC's Business Continuity Management Plan (**the BCMP**) was reviewed by the OIC's Risk Management Steering Committee (**RMSC**) to ensure that the OIC would be able to continue operations if we were required to close our physical office. An 'interim' BCMP was created that focussed primarily on the risks posed by the COVID-19 pandemic to the continuity of the services we provide, including the potential shutdown of the OIC premises. The three OIC areas of service delivery

(external review, advice and awareness and corporate services) prepared action plans that would facilitate the continuity of services, in the event the OIC was required to perform its operations remotely.

- During March and April 2020, staff were rostered to work remotely to facilitate social distancing in the workplace and to limit the need for staff to travel using public transport. Subsidised parking was also provided for staff who were working in the office, which further reduced the need for staff to use public transport. Existing projects that were aimed at enabling the OIC's functions to be undertaken securely and effectively from home or remotely were accelerated. This included providing staff with secure remote access to the OIC networks and establishing a secure system for the electronic production of documents from agencies. In addition, procedures for administrative processes, such as incoming mail and accounts payable, were overhauled to be managed electronically.
- At times when the OIC had limited staff in the office, regular meetings were held with all staff using remote technology to keep staff informed, to enable staff to raise issues of concern and to assist with the continuing function of the office. A 'buddy' system was initiated to ensure everyone had individual support from another staff member. During this uncertain and potentially isolating period, the mental health of staff was given high priority.
- Two new guides were prepared and published on our website to assist agencies and members of the public in

relation to COVID-19 and FOI: [COVID-19 Managing FOI timeframes and potential office closures](#) and [Applying for documents during the COVID-19 pandemic](#).

- Joint statements were issued by the Commissioner and other Information Access Commissioners, in support of advice from the International Conference of Information Commissioners regarding the importance of keeping records and providing access during COVID-19: [COVID-19: The duty to document does not cease in a crisis, it becomes more essential](#) and [Transparency and access to information in the context of a global pandemic](#)

### Challenges

- In preparation for the potential closure of the OIC's physical office, all staff contributed to the development of new or adapted work practices to enable remote working. This had the benefit of those changes being implemented with minimum disruption. The development and management of processes, protocols, resources and technologies for remote working required some staff to dedicate more time to these issues, which resulted in those staff having less time available for other OIC service areas.
- When working remotely, it was important that staff had access to the resources needed for secure and confidential communications between officers and with external parties, including the ability to securely receive confidential documents from agencies and access networks. This required a prompt review and implementation of existing and new technologies and

required all staff to quickly understand and adapt to these technologies so that we could continue to provide our services.

### Learnings

Staff participated in, and continue to participate in, many remote meetings and remote training during the COVID-19 pandemic. The learnings from those experiences are assisting us to develop processes for remote training and communication with our stakeholders. Since the completion of the reporting period, the OIC has conducted several online workshops. Experience with, and the technology to provide, remote training continues to develop, having been given a greater impetus during COVID-19.

Overall, staff responded very positively to the challenges of working remotely. The OIC recognises the benefits of remote working and we intend to further develop our information technology systems so that all staff can work efficiently, effectively and securely from home, whilst maintaining seamless and timely delivery of our services.

As part of our strategic plan for 2020-2023, we intend to update our systems to enable us to respond to future crises and to improve our efficiencies. Our experience in responding to COVID-19 will help us in that process.

### *Social club*

One of the benefits of a small office is the close-knit environment. The OIC maximises the benefits of this through the long standing establishment of a staff funded social club that organises events during the year.

Contributing to the community is important to staff and during the year staff participated in several fundraising events:

- the Push-Up Challenge, with donations going to the National Youth Mental Health Foundation (*headspace*);
- the Law Week Virtual Walk for Justice; and
- the Vinnies CEO Sleepout for the St Vincent de Paul Society.

### *Cultural Competency Hub*

In July 2019, the Commissioner and heads of tenancies within Albert Facey House (**AFH**) agreed to form the Cultural Competency Hub (**CCH**). The purpose of the CCH is to:

- take both symbolic and practical action to promote systemic appreciation of, and learning from, Aboriginal culture;
- provide opportunities for Aboriginal members of the WA community to work with us and gain experience in public administration;
- listen to and, wherever possible, act upon the guidance offered by the AFH Aboriginal Representatives Committee and consult with Aboriginal members of the community; and
- encourage staff to support cultural initiatives and events.