



# Office of the Information Commissioner

*Freedom of information for Western Australia*



## **ANNUAL REPORT 2019/2020**



# Significant Issues

## Recommended legislative and administrative changes

The FOI Act requires the Commissioner to include in the annual report to Parliament any recommendations as to legislative or administrative changes that could be made to help the objects of the FOI Act be achieved. None of the amendments recommended by the Commissioner in the last annual report were made to the FOI Act in the reporting period. While the Commissioner maintains the need for those amendments, she considers that the following recommendation is a priority.

### *Appointment of staff by the Information Commissioner*

Under section 61(1) of the FOI Act, all OIC staff – other than those seconded from other State government agencies – are appointed by the Governor in Executive Council on the recommendation of the Commissioner. This can result in significant delays in making an offer of employment to a preferred candidate after the selection process has concluded. It also adds unnecessarily to the workload of Cabinet and Executive Council.

The Commissioner recommends an amendment to section 61(1) to allow the Commissioner to appoint staff directly.

### *Other recommendations*

Recommendations for amendments relating to the following issues have been made in past annual reports:

- Outdated reference to ‘intellectually handicapped persons’.
- Public health facilities operated by non-government operators.
- Consultation with officers of government agencies.
- Refusal to deal with amendment applications.
- Refusal to deal with repeat applications.
- Not confirming the existence of documents that are exempt under clause 14(5) of Schedule 1.
- Reference to ‘closest relative’.

See pages 26-28 of last year’s [annual report](#) for further details.

While the FOI Act has stood up well over almost 30 years of operation, it now operates in a significantly changed environment from that which existed at the time it became operative in November 1993. The OIC will consider making a recommendation that a review of the FOI Act take place before its 30 year anniversary, which could then report back to the Parliament how this important accountability device can continue to best support transparency and trust in government.

## Supreme Court appeals

An appeal can be made to the Supreme Court on any question of law arising out of a decision made on an external review by the Commissioner. An appeal on a question of law is not a further full merits review and there is no appeal to the Supreme Court in relation to decisions on a deferral of access, imposition of charges, or the payment of a deposit. The Commissioner is usually not a party to the appeal.

As noted in last year's annual report, at the end of the previous reporting period there were two outstanding appeals before the Supreme Court arising out of a decision of the Commissioner. The outcome of those appeals was reported in last year's annual report (see pages 28 and 29).

This year, three decisions of the Commissioner were the subject of an appeal to the Supreme Court (all filed by the same complainant), as follows:

- One appeal arose from the Commissioner's decision in *Re Lee and Department of Health* [2019] [WAICmr 4](#). The Supreme Court delivered its judgement on 31 March 2020, dismissing the appeal: see *Lee v Department of Health* [2020] [WASC 103](#).

The complainant filed an appeal in the Court of Appeal against the Supreme Court's decision but then discontinued the appeal during the reporting period.

- One appeal arose from a decision of the Commissioner to stop dealing with the complainant's external review (against a decision of the Department of Justice) on the

ground that it was lacking in substance pursuant to section 67(1)(b) of the FOI Act. The Supreme Court delivered its judgement on 31 March 2020, dismissing the appeal: see *Lee v Department of Justice* [2020] [WASC 105](#).

- One appeal arose from a decision of the Commissioner to stop dealing with the complainant's external review (against a decision of the Department of Justice) on the ground that it was lacking in substance pursuant to section 67(1)(b) of the FOI Act. As at the end of the reporting period, the Supreme Court had not heard the appeal.

Outside of the reporting period, the same complainant filed another appeal arising from a decision of the Commissioner to stop dealing with the complainant's external review (against a decision of the Department of Health) on the ground that it was lacking in substance pursuant to section 67(1)(b) of the FOI Act. This appeal has since been discontinued.

Summaries of the above Supreme Court decisions are available in our [April 2020 newsletter](#). Links to all Supreme Court decisions relating to decisions of the Commissioner are available on our [website](#).

## The impact of COVID-19 on FOI in agencies

In early July 2020, the AFRG met remotely to discuss the impact of COVID-19 on FOI in WA State and local government agencies during the first half of 2020. It was helpful to hear of the challenges faced by FOI officers and units as their wider agency dealt with the COVID-19 response.

Some of the observations from that meeting are outlined below.

- There was no real consistency across the agencies as to whether there were more, less or about the same number of access applications received during the COVID-19 emergency period. Anecdotally, local governments generally saw some increase in the number of access applications received.
- FOI timeframes were a challenge in some cases due to changed operations, or the threat of changed operations, during the COVID-19 response.
- The technicalities of working remotely were challenging in dealing with some kinds of access applications. Some documents are only available in hard copy and can only be accessed at an agency office.
- In-person payment of application fees and inspection of documents was problematic when agency offices were shut down or only allowed limited access.
- Agencies worked hard to be flexible in their processes to enable members of the public to exercise their access rights under the FOI Act.
- Members of the public were often very understanding about delays resulting from the challenges of the COVID-19 response.
- Many officers worked very hard to ensure processes ran as smoothly as possible when working remotely. Some

technical issues were solved more quickly than would have occurred in a non-emergency.

- Many agencies provided information proactively to ensure members of the public were informed of agency decisions. It was felt that the sharing of information via websites, social media and enquiry lines enabled the public to be informed without the need to make a formal access application.

## Producing documents to the OIC – change in procedure

After receiving an application for external review, it is the usual practice of the Commissioner to write to the principal officer of the agency to advise them of the matter and require the production of documents within a specified time period, as required under the FOI Act.

It had been the longstanding practice for agencies to produce the required documents in hard copy format. In recent years, the OIC has been considering modernising its procedures to allow documents to be produced in an electronic format in order to achieve greater efficiencies and benefits for both agencies and the OIC. As the nature of the documents being transferred are often highly confidential, it was important to ensure the file transfer software provided full encryption abilities and did not require any special software or systems to be downloaded by the end user.

This project was moved forward in response to the restrictions imposed as part of the Government's emergency response to



the COVID-19 pandemic. In March 2020, the OIC was able to introduce a new procedure that requires agencies to produce documents electronically, using a secure file sharing platform.

Since implementation, more than a thousand files have been successfully transferred to the OIC from more than 30 agencies, and feedback from agencies about the new procedure so far has been positive.

### FOI in local government

In 2013/14, the then Commissioner considered the proportion of external review applications made to him in respect of decisions of local government agencies compared to other government agencies (other than Ministers) over the preceding three years (see page 22 of the OIC’s [2013/14 annual report](#)). At that time, the reported figures showed that, from 2011/12 to 2013/2014, a decision made under the FOI Act by a local government agency was eight times more likely to be subject to an external review than a decision made by a State government agency.

The Commissioner has considered the same issue over the past three years and, as a group, decisions made by local government remain, as it did in 2013/14, eight times more likely to be subject to external review than a decision made by all other agencies (excluding Ministers).

| LOCAL GOVERNMENT              | 2017/18      | 2018/19      | 2019/20      |
|-------------------------------|--------------|--------------|--------------|
| # of applications received    | 860          | 832          | 790          |
| # of external review requests | 41           | 50           | 39           |
|                               | <b>4.77%</b> | <b>6.00%</b> | <b>4.93%</b> |

| ALL OTHER AGENCIES (EXCEPT MINISTERS) | 2017/18      | 2018/19      | 2019/20      |
|---------------------------------------|--------------|--------------|--------------|
| # of applications received            | 16,302       | 18,370       | 17,552       |
| # of external review requests         | 103          | 115          | 114          |
|                                       | <b>0.63%</b> | <b>0.63%</b> | <b>0.65%</b> |

FOI applications to local government agencies can involve private disputes or grievances relating to land, planning matters, nuisance complaints or other neighbourhood issues. The personal nature of these kinds of disputes may account, in part, for the significantly high proportion of external review applications made to the OIC in respect of decisions of local government agencies compared to other government agencies (other than Ministers).

As also noted in the OIC's 2013/14 annual report, the Commissioner understands that the higher percentage is likely due to a number of factors, some of which are outside the control of individual local governments. However, it was also observed:

*[A] more positive and open attitude to information disclosure can significantly reduce the potential strain on an agency's resources by reducing or eliminating the need to deal with individual FOI applications for that information. The Commissioner encourages local government agencies to adopt a more positive and open attitude in this regard. This can manifest itself in the proactive publication of information and by being responsive and open to both formal and informal requests for information from members of the public.*

In addition to the higher percentage of local government decisions coming to the Commissioner on external review, in the last two years there has been a noticeable increase in the number of applications for external review received from local government councillors, who are using the FOI Act to apply to their own local government agency to access documents. Between 2011/12 to 2017/18, there were no applications for external review lodged by councillors, whereas in 2018/19 there were four and in 2019/20 there were seven.

As Commissioners past and present have consistently stated, the FOI process should be used as a last resort for citizens seeking government information. The use of the FOI Act by local government councillors as a vehicle to access documents from their own local government would appear to

be unnecessary and, although the numbers may not appear high, it may become of some concern if the trend continues. Applications of this kind invariably result from unresolved internal disputes and can cause extra pressure and stress on the FOI officers at the local government agency.

The role of an FOI officer in any State or local government agency can be difficult. It involves working to statutory deadlines; liaising with other agency officers, applicants, third parties and the OIC; and examining documents and making decisions that can be complex.

Recognising this, the OIC considers that it is critical that all FOI officers are given adequate resources, are respected and supported by agency officers, particularly by management and senior staff.

As part of its statutory function of assisting agencies on matters relevant to the FOI Act, the OIC endeavours to provide ongoing support to local government agencies by responding to questions and concerns expressed by the Local Government FOI networking group; responding to enquiries by individual local government officers; and providing FOI briefings to local government agencies, including councillors, on request.

At the FOI in WA Conference held by our office in November 2019, one of the presentations ('FOI and Dogs, Disputes and Discontent') focused on issues that local government regularly deal with. In addition, as part of the events in the week of International Access to Information Day in September 2020, the OIC is hosting a webinar aimed at local government to

discuss the importance of information access in local government.

## Association of Information Access Commissioners (AIAC)

The AIAC was established in 2010 and consists of the statutory officers in each Australian and New Zealand jurisdiction responsible for FOI and information access.

The purpose of the AIAC is for members to exchange information and experience about the exercise of their respective oversight responsibilities and promote best practice and consistency in information access policies and laws.

Cooperation between jurisdictions allows the sharing of information, which in turn assists each jurisdiction to more effectively utilise their own resources based on the learning and work of other jurisdictions.

In this reporting period the Commissioner attended two AIAC meetings. The first was held in New Zealand in August 2019. The second held in March 2020 was hosted by the Office of the Victorian Information Commissioner as a remote meeting.

The OIC will be hosting the next AIAC remote meeting in November 2020.



The Commissioner with members of the AIAC in Brisbane August 2019

## Right to Know Week and International Right to Know Day

International Right to Know Day is celebrated on 28 September each year and recognises citizens' rights to access information and reinforces the importance of transparency in building trust in government. In a [media statement](#) celebrating the day in 2019, Information Access Commissioners and Ombudsmen from across Australia and New Zealand urged government agencies to do more to make information available for the benefit of citizens. Agencies were encouraged to make the most of opportunities offered by the digital age to increase the flow of information to the community, while protecting sensitive information as required. The Commissioners and Ombudsmen emphasised that the community's right to know underpins expectations for greater government openness and accountability. Public access to information encourages scrutiny and participation in democratic processes, supports better decision-making and strengthens citizen engagement with the public sector.

The OIC supported the events and promotions during the week following International Right to Know Day by providing links to information and activities provided by other information access jurisdictions.

On 15 October 2019, the 74th United Nations General Assembly adopted a resolution to proclaim 28 September as the International Day for Universal Access to Information.

## OIC joins as a member of the International Conference of Information Commissioners

In September 2019 the OIC became a member of the [International Conference of Information Commissioners](#) (the ICIC). The ICIC is constituted by Information Commissioners and Ombudsmen from across the globe, who meet to discuss issues related to the protection and promotion of the right to public information for the benefit of citizens. The Information Commissioners of Australia, Queensland, New South Wales and Victoria are also members of the ICIC.

## National Dashboard of Utilisation of Information Access Rights 2014/15 – 2018/19 released

The National Dashboard of Utilisation of Information Access Rights compares statistics regarding the utilisation of information access rights across jurisdictions within Australia, and the 2018/19 data has recently been added.

The metrics reflect the priorities agreed in Australia's first [Open Government National Action Plan 2016-18](#), to develop uniform metrics on public use of FOI access rights (Commitment 3.2) that promote the importance of better measurement and improve our understanding of the public's use of rights under FOI laws.

Since 2017/18, the OIC has provided additional data about the proportion of access applications dealt with within the statutory timeframe under the FOI Act. Under the FOI Act, this refers to the percentage of applications dealt with in the 'permitted period'. Section 13(3) of the FOI Act, provides:

*For the purposes of this section the permitted period is 45 days after the access application is received or such other period as is agreed between the agency and the applicant or allowed by the Commissioner under subsection (4) or (5).*

The data provided by WA agencies in the 2018/19 statistical returns indicated that 90% of access applications made in the State were finalised within the permitted period. This is one percent less than the previous reporting period. Only NSW and the Northern Territory reported a greater percentage of decisions being made within the statutory timeframe – each with 92%.

The data from the 2018/19 dashboard also indicates, amongst other things, that Western Australia has:

- the highest number of applications received by agencies per capita (7.3);



- the third highest percentage of access provided in full or in part (94%) [note: only Victoria and the Northern Territory had a higher percentage at 96%]; and
- the lowest percentage of external reviews received (0.9%), as a percentage of the total number of access applications received by agencies.

The full dashboard of FOI metrics can be found on the NSW Information and Privacy Commissioner's [website](#).

## Information Access Study 2019

In last year's annual report, the OIC reported on a community attitudes survey undertaken with Information Access Commissioners from NSW, Victoria, Queensland, the Commonwealth of Australia and the ACT Ombudsman, to seek to understand community attitudes to access to government information. The survey results were published for each jurisdiction under the title, Information Access Study 2019. In September 2019 the Information Access Commissioners and Ombudsman released the findings for this first cross-jurisdictional study of community attitudes towards access to government information.

The Information Access Commissioners and Ombudsman released a media statement about this summary, published on our [website](#).

It is pleasing to note that Western Australia was the jurisdiction with the highest rate of success when people sought access to information. In WA, of the people who had tried to access information from WA government agencies in

the last three years, 91% were successful in part or in full. The jurisdiction with the next highest rate of success was NSW with 80%.

The results of the WA portion of the study are available on our [website](#). The summary of findings across all the jurisdictions is available on the NSW Information and Privacy Commissioner's [website](#).

Some of the jurisdictions have also published more detailed reports showing the results of the surveys conducted for their jurisdiction:

- [Office of the Australian Information Commissioner](#)
- [Queensland Office of the Information Commissioner](#)
- [Office of the Victorian Information Commissioner](#)

## Submissions and consultations

During the reporting period, the Commissioner was formally consulted or requested to make a submission on a number of matters. The following submissions were made in respect of legislative proposals or administrative practices affecting the FOI Act, the OIC or information disclosure more generally.

### *Submission in response to the Privacy and Responsible Information Sharing for the Western Australian Public Sector Discussion Paper*

As reported last year, on 5 August 2019 the Department of the Premier and Cabinet (**DPC**) released the *Privacy and Responsible Information Sharing for the Western Australian*

*Public Sector Discussion Paper (the Discussion Paper)* and invited public comment by 1 November 2019.

The OIC provided an extensive written submission to DPC. This and other submissions received by DPC in response to the Discussion Paper are available on the WA.gov.au [website](#).

Following our submission, DPC further consulted with the OIC about DPC's responsible information sharing project and we provided some further assistance within the constraints of our role and legislative remit.

The OIC understands that DPC is currently consulting with a wide range of government agencies to finalise the proposed legislative model but that this process has been delayed by the impacts of COVID-19: see <https://www.wa.gov.au/government/privacy-and-responsible-information-sharing>.

### ***Submission to the Joint Standing Committee on the Corruption and Crime Commission***

In August 2019 the Joint Standing Committee on the Corruption and Crime Commission (**the Committee**) invited feedback from the OIC on the function of the *Corruption, Crime and Misconduct Act 2003 (the CCM Act)* and how the CCM Act might be improved through legislative reform (see page 9 of the Committee's 2018/19 [annual report](#) for information about this legislative review).

The Commissioner provided a response to the Committee in October 2019.

### ***Parliamentary inquiry into local government***

On 26 June 2019 the Legislative Council established the Select Committee into Local Government (**the Select Committee**) to inquire into how well the system of local government is functioning in Western Australia (**the Inquiry**). At the invitation of the Select Committee, the Commissioner provided a submission.

The key points arising from that submission were as follows.

- The 2019 amendments to the 'Access to Information' provisions of the *Local Government Act 1995 (the LG Act)*, together with provisions in the FOI Act, provide substantial pillars to support transparency and disclosure in local government. Whether they go far enough is a relevant matter for the Inquiry.
- The Inquiry should consider whether the provisions of the LG Act currently provide sufficient transparency around, and disclosure of, local government information or could instead include a broader range of information currently held by local government.
- When drafting its recommendations as they relate to accountability and transparency in local government, the Inquiry may wish to consider:
  - greater recognition for the pro-disclosure objects and operation of the FOI Act and the role of the OIC in encouraging local government agencies to give access to as much documentation outside the FOI Act as

possible, and to use the FOI process as a last resort for those seeking access to government documents; and

- how local government engagement with Australia's involvement in the Open Government Partnership and Second National Action Plan 2018 – 2020 could further drive transparency and access to information at the local government level.

The [full submission](#) is available on Parliament's website.

### ***Submission in response to Office of the Australian Information Commissioner discussion paper – Disclosure of public servants' names and contact details***

In July 2019 the Office of the Australian Information Commissioner (**OAIC**) invited the OIC's comment on a [discussion paper](#) relating to the disclosure of public servants' names and contact details when processing or responding to FOI requests.

The OIC provided a submission that was intended to provide some guidance for the OAIC to consider how issues around the disclosure of the names and contact details of officers of WA government agencies have been dealt with in WA, noting that this State's FOI legislation is different to the Commonwealth FOI legislation. The OIC's submission and other submissions received by the OAIC in response to the discussion paper are available on their [website](#).

## **Use of the term 'complaint' in the FOI Act**

The FOI Act describes the main function of the Commissioner as dealing with 'complaints' made under Part 4 of the FOI Act about decisions made by agencies in respect of access applications and applications for amendment of personal information (section 63(1)).

Under section 65 of the FOI Act, a complaint can be made to the Commissioner by an access applicant or a third party against an agency's decision of the kinds described in section 65(1)(a)-(g) and section 65(3)(a)-(b). Those complaints are, in effect, applications for external review of an agency's decision. Although Part 4 of the FOI Act is titled 'Part 4 – External review of decisions; appeals', the term 'external review' is not otherwise used in the FOI Act and the term 'complaint' is used throughout.

Section 63(2) provides that the Commissioner's functions also include ensuring agencies are aware of their responsibilities and that members of the public are aware of their rights under the FOI Act. However, the Commissioner does not have any specific powers of oversight, monitoring/auditing, investigation or enforcement in relation to matters that may broadly come within the functions described in sections 63(2)(d)-(f).

Unlike some other jurisdictions in Australia (for example, Victoria and the Commonwealth), the Commissioner does not have jurisdiction to deal with or investigate complaints about the actions taken by an agency under the FOI Act or how an

agency handles or deals with an FOI request or access application.

Under section 63(3) the Commissioner may notify specified persons when the Commissioner forms the opinion that there is evidence that an officer of an agency is guilty of a breach of duty, or of misconduct, in the administration of the FOI Act. However, this only applies when the Commissioner is dealing with an external review application (a 'complaint', as described in section 65).

In recent years, this office has observed that the use of the term 'complaint' in the FOI Act, and by this office, can create confusion and misconceived expectations by members of the public about the role and powers of this office and the possible outcomes of making a 'complaint' to this office.

As a result, this office continues to review our materials and the appropriateness of the use of the term 'external review' rather than 'complaint' to better reflect the nature of the external review mechanism.

The OIC does occasionally receive expressions of dissatisfaction about certain actions taken by an agency and officers of an agency that are not of the kind that the Commissioner is required to deal with on external review. Such matters may include allegations that:

- an agency has taken too long to deal with a matter before it;
- an officer of an agency has a conflict of interest;

- an agency did not provide reasonable assistance to an access applicant;
- an officer of an agency has acted in an unprofessional manner; and
- an agency is acting in a biased way toward a person.

The FOI Act gives the Commissioner a limited role in dealing with any such expressions of dissatisfaction regarding agency FOI administrative practices. Nevertheless, wherever it is practicable and if the Commissioner considers that the allegation may have substance, the Commissioner will usually make inquiries to establish the full circumstances and suggest possible options to that person, should they wish to pursue the matter. Such options may include reporting their concerns to the principal officer of the agency, or referring the matter to the WA Ombudsman.

If the Commissioner is of the view that an agency is acting contrary to its obligations under the FOI Act, the Commissioner will usually advise the agency of the appropriate way to comply with those obligations. That action may include specific advice on a particular issue or providing additional training to agency officers.



## Audit outcomes

### *Internal audit*

In June 2020, the OIC engaged Braxford Consultancy to conduct the annual internal audit of the OIC's finance and human resource processes and controls.

The internal audit report indicated a satisfactory result. A number of observations were made which the OIC has endeavoured to address, none of which concerned high risk issues, as follows:

- some processes were considered to impair the proper segregation of duties;
- transaction corrections were not always reviewed;
- the recording and treatment of some leave entitlements needs improvement;
- ensuring that accurate and robust reports are provided from payroll systems; and
- ensuring all policies are up-to-date.

### *External audit*

The audit opinion from the Auditor General identified no reportable issues in the financial statements, key performance indicators or controls for 2019/20.

This year a review was undertaken of the processes involved during the COVID-19 response. The audit opinion identified a moderate risk to financial security in staff using their personal

devices to access the OIC's network. The OAG recommended a review of this process, as it could pose a security risk.

The OIC's Risk Management Steering Committee has identified the security of remote access as a priority issue, and the further development of secure remote access is part of our office's strategic plan for 2020-2023.

### *Internal Audit Committee*

The introduction of Treasurer's Instruction 1201 during the reporting period required the Commissioner to ensure the formation of an Internal Audit Committee, which must include a suitably qualified Chairperson who is external to the OIC.

In June 2020, the OIC's Internal Audit Committee was formed, consisting of two OIC staff and the Chief Finance Officer from the Office of the Inspector of Custodial Services as Chairperson.

### *Risk management*

The OIC has an established Risk Management Steering Committee (RMSC). In early 2020, changes were made to its membership and meetings were held regularly to discuss and manage the risks posed by the COVID-19 pandemic. As outlined earlier in this report, the RMSC oversaw the revision and implementation of the OIC's Business Continuity Management Plans, action plans and other relevant processes to ensure the safety of staff, the community and the OIC's infrastructure.