



# Office of the Information Commissioner

*Freedom of information for Western Australia*



## ANNUAL REPORT 2020/21



# Significant Issues

## Recommended legislative and administrative changes

The Commissioner is required 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 (see section 111(4)).

In last year's [annual report](#), at page 35, the Commissioner highlighted a priority reform that could improve the OIC's operational effectiveness, namely, removing the need for Executive Council approval for all staff appointments.

The Commissioner also noted that 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- Outdated reference to 'intellectually handicapped persons'.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'.

None of these amendments were made to the FOI Act during the reporting period. The Commissioner maintains the need for all of these amendments.

Last year's report also noted that the OIC would consider making a recommendation that a review of the FOI Act take place before its 30 year anniversary in November 2023. It was noted that an appropriately scoped and independent review of the FOI Act could examine and report back to the Parliament about how best this important accountability tool can continue to support transparency and trust in government.

In November 2020 the Legislative Council's Standing Committee on Public Administration produced Report No 34, [Consultation with Statutory Office Holders](#): see [page 44](#) of this report for further details.

The Committee recommended that the Attorney General undertake a review of the FOI Act, with public consultation, with a report to be tabled in the Parliament before the end of 2023 and that the review should specifically consider the OIC's previous recommendations regarding private contractors who provide public patient services (see paragraphs 3.39-3.45 of the Committee's report and recommendations 4 and 5).

The OIC is preparing a submission to be provided to the Attorney General later this year regarding a review of the FOI Act.

## 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 was one outstanding appeal before the Supreme Court arising out of a decision of the Commissioner to stop dealing with an external review on the ground that it was lacking in substance pursuant to section 67(1)(b) of the FOI Act. That matter was heard on 25 September 2020 and the judgment delivered on 22 April 2021, dismissing the appeal and ordering the complainant to pay the agency's costs: see *Lee v Department of Justice* [2021] [WASC 119](#).

A summary of the above Supreme Court decision is available in our [May 2021 newsletter](#).

This year, three decisions of the Commissioner were the subject of an appeal to the Supreme Court:

- Two appeals arose from decisions of the Commissioner to stop dealing with external reviews from two separate complainants on the ground that they were lacking in substance pursuant to section 67(1)(b) of the FOI Act. In both matters, the appeals were discontinued during the reporting period.

- One appeal arose from the Commissioner's decision in *Re Mineralogy Pty Ltd and Department of Mines, Industry Regulation and Safety* [2020] [WAICmr 14](#). As at the end of the reporting period, the Supreme Court had not heard the appeal.

As noted in last year's report, on 31 March 2020, the Supreme Court dismissed an appeal against a decision of the Commissioner to stop dealing with an external review on the ground that it was lacking in substance pursuant to section 67(1)(b): see *Lee v Department of Justice* [2020] [WASC 105](#). The complainant subsequently lodged an appeal in the Court of Appeal against the Supreme Court's decision. That appeal was heard on 16 June 2021. The Court of Appeal delivered its judgment on 31 August 2021 (which is outside the reporting period), dismissing the appeal: see *Lee v Department of Justice* [2021] [WASCA 152](#). This is only the second time since the passage of the FOI Act that the Court of Appeal has heard an appeal arising out of a decision of the Information Commissioner.

Links to all Supreme Court decisions relating to decisions of the Commissioner are available on our [website](#).

## Information access policies and procedures beyond formal access applications

In August 2020, the Standing Committee on Public Administration presented Report 31 – *Coming home safely: WorkSafe and the workplace culture in Western Australia* (**the**

**Inquiry Report**). That report and the Government's response is available on the Parliament's [website](#).

The Inquiry Report included a number of recommendations regarding FOI practices, information disclosure, culture and transparency: see recommendations 16, 17, 18, 30, 31 and 32. Among other things, the report and its recommendations serve as a reminder to agencies of the importance of having policies and processes in place that enable access to information, including outside the formal FOI access process, unless there is a good reason not to do so.

Although the FOI Act creates a general right of access to State and local government documents, the use of that right should supplement, rather than replace, other procedures for making information available; the FOI process should essentially be a last resort for people seeking government information. Even when an FOI application is lodged, agencies are encouraged to engage in open and meaningful dialogue with an applicant with a view to finding an outcome which meets the person's needs.

Well planned and coordinated information disclosure policies and procedures that reflect a default position of public disclosure wherever practicable, can reduce the time and resources that would otherwise be required to process formal information access requests under the FOI Act. The existence of those policies leaves the formal FOI access procedures to deal with the more complex, sensitive or non-routine requests for information, particularly where the public interest in disclosure needs to be weighed against genuine public interests in non-disclosure.

Agency culture around information access is paramount to achieving the objects of the FOI Act, namely enabling the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public. As the Commissioner stated in the [OIC's 2010 report](#) tabled in Parliament titled [The Administration of Freedom of Information in Western Australia](#):

*The culture of an agency in regard to attitudes about concepts of openness, accountability and transparency is considered inextricably linked to how well FOI applications are administered by the agency and whether the intent of the FOI Act is met. For FOI to be administered effectively, efficiently and fairly within agencies, it is important for Ministers, CEOs and FOI Coordinators to have a strong commitment to the principles and promotion of openness, accountability and transparency.*

## 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 to 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.

The Commissioner hosted a remote meeting of the AIAC in November 2020. The Honourable Chief Justice Peter Quinlan opened the meeting with a pre-recorded message acknowledging the importance of FOI for governmental accountability and transparency. Topics discussed included the then upcoming 12<sup>th</sup> conference of the International Conference of Information Commissioners (**the ICIC**); the National Metrics on the public use of freedom of information access rights; the Monash University study into FOI access culture in Australia; and plans for International Access to Information Day 2021 (**IAID**).

The AIAC met remotely again in June 2021, hosted by the Office of the ACT Ombudsman. Topics discussed included the ICIC, the Open Government Partnership, preparations for IAID and promotion of proactive disclosure of information principles.

## FOI culture research project

In partnership with Monash University, the Office of the Victorian Information Commissioner and the South Australian Ombudsman, the OIC is participating in a research project led by Monash University on *Information Access Culture in Australia – The Promise and Practice of Freedom of Information in the Digital Age*.

The project will run for three years from 2021 and aims to:

- capture and analyse how FOI officers and decision-makers view information access, and the factors that shape their attitudes towards implementing FOI;
- determine the factors that play a key role in determining FOI cultures within agencies;
- identify and develop practical measures that can be implemented by regulators to improve these cultures; and
- identify any additional measures that may be required to improve the interface between records management and FOI practice.

It is intended that the research findings will provide an increased understanding of the culture of administering FOI and inform the OIC's training and awareness programs to increase the functionality of FOI in Western Australia. Well-functioning access to information systems is crucial both for good governance and Australia's participation in the digital economy.

The OIC agreed to contribute \$38,000 to the research project. In April 2021, the project was granted funding by the Australian Research Council.

The next meeting of the participants to the project is scheduled for November 2021, after which further information will be provided to agencies on how they can participate.

## Accountability Agencies Collaborative Forum

The Commissioner is a member of the Accountability Agencies Collaborative Forum (**the AACF**), which consists of a number of small independent accountability agencies. The AACF meet as required to discuss opportunities to collaborate, share ideas and provide mutual support. This benefits members by providing a collegial environment to communicate on matters unique to small agencies and with accountability functions.

The Commissioner was appointed as the new Chair of the AACF in December 2020.

## International Conference of Information Commissioners

In September 2019 the Commissioner became a member of the [International Conference of Information Commissioners \(the ICIC\)](#). The ICIC is comprised of 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.

In June 2021 the Commissioner attended remote sessions of the 12<sup>th</sup> International Conference of Information Commissioners, hosted by the Brazilian Office of the General Comptroller. The theme of the conference was *Access to*

*information for a changing world: using technology to promote inclusion.*

The conference unanimously passed the following [resolution](#):

*As the global pandemic continues, the importance of transparency and the right to access information remains. Recognising the role that access to information has in building trust in our global community during times of crisis and beyond, Information Commissioners around the world highlight the importance of the proactive disclosure of information held by governments or public institutions.*

The resolution was proposed by the Office of the Australian Information Commissioner and co-sponsored by Information Commissioners from WA, NSW, Victoria, Queensland, New Zealand, Canada and the UK.

The ICIC recognised that public sector agencies make significant decisions that affect public health, civil liberties and economic participation; and that the public's right of access to information relating to the COVID-19 pandemic is of critical importance to the effectiveness of the public health response.

The conference continues with [ICIC Wednesdays](#), a series of open sessions held each month from May to December 2021, on the following topics:

- Transparency and trust in pandemic times;
- Blurred boundaries in access to information: home office and public records management;

- Access to information and Freedom of Press;
- Challenges of Transparency in the Digital Governments: Transparency of public administration in the use of Artificial Intelligence;
- State Secrecy;
- Interplay between data protection and access to information; and
- Environmental Information and P10.

All sessions are available on the ICIC [YouTube channel](#).

## National Dashboard of Utilisation of Information Access Rights 2014/15 – 2019/20 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 2019/20 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 2019/20 statistical returns indicated that 87% of access applications made in the State were finalised within the permitted period. This is three 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.

The data from the 2019/20 dashboard also indicates, amongst other things, that Western Australia has:

- the highest number of applications received by agencies per capita (6.9);
- the third highest percentage of access provided in full or in part (91%) [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](#).

## Standing Committee on Public Administration's report 'Consultation with Statutory Office Holders'

Under its [terms of reference](#), the Legislative Council's Standing Committee on Public Administration (**the Committee**) is required to consult regularly with the Commissioner, the Parliamentary Commissioner for Administrative Investigations (the Ombudsman), the Public Sector Commissioner, the Inspector of Custodial Services, and any similar officer. These consultations, in the form of hearings, provide an opportunity for the Commissioner and the Committee to discuss any issue of concern and to further explore issues raised by the Commissioner in her annual reports to Parliament.

In October 2020, the Commissioner and some of her staff gave evidence at a public hearing held by the Committee. The Committee subsequently produced Report No 34, '[Consultation with Statutory Office Holders](#),' which is available on the Parliament's [website](#).

The Committee's report included two recommendations relating to the OIC's external review process. As noted elsewhere in this report, after considering those recommendations, the OIC has produced a new publication regarding procedural fairness and amended our existing external review guide provided to the parties to external review matters. The Committee's report also included a recommendation that the Attorney General undertake a review of the FOI Act, with public consultation, with a report to be tabled in the WA Parliament before the end of 2023.

The Commissioner's response to the Committee's recommendations is published on the Parliament's [website](#).

## Western Australian Information Classification Policy

In August 2020, the government launched the WA Information Classification Policy (**the WAICP**). The WAICP provides a common language for agencies to identify risks and apply appropriate sensitivity labels that will assist agencies to protect, store and share their information assets.

During the year, the OIC joined over 26 other agencies, forming the Information Classification Working Group, to develop a toolkit of guides and templates that will be made available to agencies to assist in their implementation of the policy.

## Privacy and responsible information sharing

In 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.

The OIC's submission and other submissions 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.

In April 2021, DPC gave the OIC an update on the status of this project, advising that it is progressing, but has been delayed.

The [\*Digital Strategy for the Western Australian Government 2021-2025\*](#), published on 23 June 2021, states that the WA Government is progressing Privacy and Responsible Information Sharing legislation to bring stronger protections to the personal information held on behalf of the community.

## 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.

### *Feedback relating to the Australian Government's proposed digital identity legislation*

At the invitation of the Digital Transformation Agency, the OIC provided feedback in July 2020 on a scoping paper in relation to the Australian Government's proposed digital identity legislation.

The Commissioner provided limited feedback within her statutory constraints, noting that WA does not have currently have privacy legislation or mechanisms for complaints, redress, enforcement or oversight in relation to privacy; that privacy

protections relating to digital identities should be included in primary legislation; and that, to build and maintain public trust, digital identities should be optional rather than mandatory.

### *Feedback relating to education and prevention functions of Victorian oversight agencies*

At the invitation of the Integrity and Oversight Committee (**the Committee**) of the Parliament of Victoria, in August 2020, the Commissioner provided a submission regarding the Committee's *Inquiry into Education and the Victorian Freedom of Information Commissioner, Victorian Ombudsman and Victorian Inspectorate*.

The Commissioner's submission outlined the awareness and training activities of the OIC, as the Western Australian equivalent of the Office of the Victorian Information Commissioner; the benefit of those activities to the work of the OIC, government agencies and the wider community; and the value of inter-jurisdictional cooperation through the Association of Information Access Commissioners in sharing information and resources.

### *Consultation regarding the PSC Agency Capability Review Program*

The Commissioner and one of her officers were invited to participate in the Public Sector Commission (**PSC**) consultation process for the development of an agency capability framework. The framework establishes a sector-wide approach to improvement by identifying the capabilities needed to be a high-performing agency.

The OIC was particularly consulted in relation to the *Governance and accountability* aspect of the proposed framework, with a particular emphasis on *Information and data*. The OIC provided some assistance to the PSC, addressing issues regarding data and information management responsibilities, including FOI.

## Audit outcomes

### *Internal audit*

In June 2021, the OIC engaged Assurance Advisory Group 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 low risk observations were made with the following recommendations:

- arrange third party review of transaction corrections;
- review the treatment of salary accruals during the year;
- review the recording and treatment of some leave entitlements; and
- ensure that accurate and robust reports are provided from payroll systems.

### *External audit*

The audit opinion from the Auditor General identified no reportable issues in the financial statements, key performance indicators or controls for 2020/21.

In July 2020, the OIC's finance manual was finalised, which combined the financial policies and procedures into a single comprehensive user-friendly document.