Government of **Western Australia**
Office of the Information Commissioner

The Administration of Freedom of Information in Western Australia

Comprehensive Report

Review by the Information Commissioner
31 August 2010

Contents

Part A – Summary Report

COMMISSIONER'S FOREWORD

Access to government information is a key safeguard of democracy in Western Australia and reminds us that Government is a servant of the people. Parliament must have been very conscious of these sentiments when it passed the *Freedom of Information Act 1992* (the FOI Act), which expressly aims to enable the public to participate more effectively in government, and to make government more accountable to the public. These aims are enshrined in section 3 of the FOI Act, and have recently been referred to by the Supreme Court as *the essential bedrock of open, democratic government [whose] policy importance therefore cannot be overstated* [1].

Overall, the review found high levels of support from Ministers, Chief Executive Officers and FOI Coordinators for the principles of openness and transparency reflected in the FOI Act. The review also found that agencies generally administer the FOI process competently, especially in light of the increasing number and complexity of FOI applications made. However, the review also found room for improvement in a number of areas if there is to be an overall culture within government which is consistent with the aims of the FOI Act.

Part I of the FOI Act indicates that the FOI process supplements, rather than replaces, other procedures for making information available. The Information Commissioner has consistently stated that the FOI process should be used as a last resort for those seeking government information. Agencies should consider making government information available outside the FOI process as much as possible, both proactively and in response to a formal or informal request, unless there is a good reason not to do so. There is considerable variation in how well this is done across agencies.

The review highlights the critical importance of how agencies manage information. It also shows that the first interaction between a government agency and a person seeking information is crucial, whether this interaction is in person, by telephone, by written correspondence or through the Internet. It is at this stage that people may effectively be deprived of the ability to exercise their rights if they receive incorrect advice or if the interaction discourages them from pursuing access to information. This results in a door closing and an injustice being done. It is therefore important that these interactions are designed in a way which encourages openness and transparency, and that staff who are involved in them are suitably trained.

Another area where practice can be improved is in how agencies deal with FOI applications. This has two key elements. The first is that in many cases, agencies should be encouraged to engage early and meaningfully with a person who has applied for access to information. This is usually preferable to shifting into 'process mode'. Early engagement may clarify the scope of an access request and reduce the time and resources required to deal with it, resulting in a better outcome for the applicant and the agency. The second element is how agencies apply the exemptions to disclosure in the FOI Act. The review revealed that some officers in agencies take into account inappropriate or irrelevant factors in deciding whether material is exempt from disclosure under the FOI Act. It is important that those officers who administer the FOI process in their agencies bear in mind that they are making important administrative decisions under legislation and that the legislation specifies what they need to take into

[1] *Water Corporation -v- McKay* [2010] WASC 210 per Martin J at paragraph 38

account in making those decisions. If made correctly, their decisions will contribute to justice being done. If made incorrectly, they will do the opposite.

One of the biggest developments in the administration of the FOI Act is the significant increase in FOI applications made to Ministers by Members of Parliament since the 2008 election. This has been the subject of media attention and much debate in the Parliament. The review found that dealing with these applications has placed a significant strain on the resources of Ministers' offices, particularly when several large applications were received by Ministers in a short space of time. One of the recommendations made by the review is that Ministers should consider exploring the option of a shared capability to assist them in dealing with FOI applications. This could be of particular assistance in relation to searches for electronic documents and advice on the correct application of the FOI Act. However, it is important that Ministers remain personally accountable for their decisions under the FOI Act.

The increase in FOI applications noted in the previous paragraph is directly responsible for the current backlog of complaints before me. Under the FOI Act, I am required to make a decision on a complaint within 30 days unless this is considered impracticable. The average age of complaints is now over 200 days and increasing. It is not surprising that the review found these delays a major source of frustration among parties to the FOI process. One submission to the review made the important point that *justice delayed is justice denied*.

In light of the above, I strongly urge Members of Parliament and Ministers to explore more informal and expedient methods of seeking and disclosing information, rather than relying purely on the FOI process. Members of Parliament who are seeking information from Ministers may be better served by approaching the Minister in the first instance with an informal request for a briefing or a document, instead of submitting a FOI request. Similarly, Ministers may be able to reduce their FOI workload by being more forthcoming with information in response to such requests. Such an approach would be consistent with the legislative intent that FOI should supplement, rather than replace, other methods of disclosing government information. While it may appear naïve to expect this to occur in light of political realities, I believe it could lead to much better outcomes for all parties and would serve the public interest much more efficiently and effectively than the current approach.

The final and perhaps most important point this review makes is that most of the areas for improvement identified in the review can be addressed by my office providing more training and support for government agencies. This is one of my statutory functions, but current resources do not allow my office to meet the significant agency demand in this regard. However, the review sheds much light on exactly where this demand lies and how it can best be met.

I would like to acknowledge those members of the public, Members of Parliament, Ministers, Chiefs of Staff, agency Chief Executive Officers and agency staff who have contributed to the review either through making submissions, completing surveys or making themselves available for interview.

Finally, I would like to thank Mr Grant Washer who managed the overall review process, and all members of my staff who assisted in undertaking the review.

Sven Bluemmel
Information Commissioner

31 August 2010

ABOUT THE REVIEW

This review arose from a commitment of the Government to review the manner in which government departments are administering the FOI process to ensure that Government is accountable and open in accordance with the spirit of the FOI Act. The review was undertaken by Western Australia's independent Information Commissioner.

The review examined the manner in which agencies administer the FOI Act as currently in force. It focussed on assessing the effectiveness of the processes used by agencies to administer FOI, rather than the content of the current legislation.

The Information Commissioner took a broad approach in conducting the review. This included calling for public submissions, sending over 700 surveys to all Ministers and agency Chief Executive Officers, seeking submissions from Members of Parliament and conducting interviews with staff from 33 agencies based in the metropolitan region, the Kimberley and the South West.

SUMMARY OF FINDINGS

The following findings are based on results from two surveys, public submissions, interviews with agency staff, assessments of agency documents and processes, and the Information Commissioner's experience in reviewing agency FOI decisions. They are described in more detail in Part B of the report.

Perceptions about the intent of FOI and agency culture

Overall, there is a very high level of support from Ministers, CEOs and FOI Coordinators for the intent of the FOI Act, which is to promote openness, accountability and transparency. This was evident from survey responses and interviews. While this is a positive indicator, it is important that agencies not only agree with this intent, but continue to demonstrate actual commitment to it in how they administer FOI. A notable aberration in this is that a small number of Ministers in their survey responses indicated that they did not agree that the intent of FOI is of benefit to the public. However, this may have been influenced by the extraordinary increase in FOI applications made to Ministers by Members of Parliament since the 2008 election.

The surveys also showed that agencies had more confidence in their FOI processes than in their understanding of and support for the intent of FOI. This result may indicate that some of the confidence of senior staff in agencies in administering the FOI process may be misplaced, or that FOI is treated more as a compliance issue rather than as an important democratic safeguard.

Public submissions indicated that the perceived level of commitment to openness varies between agencies, and suggested that all agencies should subscribe to a culture of active disclosure rather than focussing on compliance.

Agency policy and procedures

While the FOI Act outlines the rights and obligations for the public and agencies in relation to FOI, it does allow for discretion in how agencies go about the process of administering the Act. Consistency in the application of legislative rules to particular fact situations is generally considered an important aspect of good government decision making. Consistency and predictability are important safeguards against the arbitrary use of executive power.

While the review found a strong level of confidence among agencies in the processes they use to administer FOI, a significant number of agencies did not have current policies or processes which document their approach. However, those agencies which did have such policies and processes generally found them to be of value. The review found that there is considerable scope for sharing such resources across agencies to improve the consistency of the process and the predictability of outcomes.

Agency processes and application of the requirements of the FOI Act

Most agencies have confidence in their ability to apply the requirements of the FOI Act. However, a significant number do not have confidence, particularly in local government agencies.

Some public submissions to the review highlighted situations where the requirements of the FOI Act were applied inconsistently across agencies. Examples given of this in the submission included documents being refused by one agency but released by another, inconsistencies in processing applications, disregard for deadlines and judgment calls required on vague and uncertain issues which encouraged caution rather than openness.

Other issues identified in the review included difficulties for some agencies (particularly some Ministers' offices) coping with the significant increase in FOI workload over the last 18 months, the management of electronic documents, application of the public interest test contained in some exemptions in the FOI Act and the standard of recordkeeping on agency files.

The review highlighted that poor recordkeeping can fundamentally undermine the intent of FOI. It is crucial that an agency can quickly and reliably identify all documents which may come within the scope of a FOI request and then make a decision as to whether and how those documents are to be disclosed. The review found that not all agencies are able to meet this goal and that many particularly struggle with managing electronic records such as emails. It is, therefore, important that agencies are mindful of their obligations under the *State Records Act 2000*.

One public submission suggested that it is important for FOI decision-makers to be independent of the subject matter which they are reviewing. In some cases the integrity of the FOI assessment and decision-making process may be strengthened when decisions on access are made by officers who are not closely involved in the subject matter which is the subject of the FOI request. It is, however, important for such decision-makers to work with officers who are familiar with the subject matter to ensure that all relevant documents are identified before a decision is made.

Some recent decisions of the Information Commissioner have highlighted that Ministers' offices face particular challenges in complying with the FOI Act. These include a limited capability to absorb significant increases in FOI workload due to the small size of these offices together with a high rate of staff turnover. These challenges make it difficult for Ministers to dedicate suitably skilled and experienced staff to FOI matters, especially during times of unusually high workload. The challenges also increase the likelihood of inconsistencies in how different Ministers apply the FOI Act.

It is well documented that the significant increase in applications for external review to the Information Commissioner following the 2008 election has led to a significant backlog. This is a source of legitimate frustration for parties who are awaiting the Commissioner's decisions. Justice requires not only good decisions, but timely decisions.

Assistance to applicants

The survey results found that most agencies consider that they attempt to deal with FOI applications as soon as is practicable and that they actively help people who wish to make such applications. While this is encouraging, the effectiveness of such assistance in the eyes of the access applicant may not always be as high as it should. This is borne out of some of the public submissions, as well as a number of matters which come before the Commissioner on external review.

Assistance to applicants is critical to the effective functioning of the FOI process and failure properly to assist applicants can greatly affect the time required to process an application and

the outcome of the decision on access. In particular, clarification of the scope of an application – for the purpose of giving expedient access to as much information as possible – is an important part of the FOI process, and this is an area which can be improved. Problems encountered by agencies, such as dealing with ambiguous or large applications, could be reduced if agencies engaged earlier and more meaningfully with access applicants.

In addition to assisting members of the public in relation to applications under the FOI Act, agencies should consider having a coherent approach to managing and releasing information. The Commissioner's experience in dealing with complaints has shown that agencies and applicants can often avoid the need for a FOI application by engaging in meaningful dialogue at the start of the process. If a matter can be dealt with outside the FOI Act, the applicant may get the desired documents much sooner and the agency is likely to be able to save time and effort in the process.

Interaction with applicant – notice of decision

Overall, the survey results and assessments of notices of decision indicate that FOI Coordinators have a good understanding of the requirements for notifying an applicant about the decision made in relation to their application. However, three areas of concern were identified by the review.

The notices of decision assessed during the review showed that where an exemption is claimed, some explanation is given to the access applicant about why a particular document is exempt. However the Information Commissioner's experience in dealing with disputes on external review show that some notices of decision do not expressly address all elements of the exemption laid down in the FOI Act. An example of this is where an agency claims that a document is exempt under clause 6 of Schedule 1 to the FOI Act because its disclosure would reveal certain information which has been prepared in the course of a deliberative process of an agency. To make out the exemption, a notice of decision also needs to demonstrate that disclosure of such information would be contrary to the public interest. This is not always done.

Second, section 30 of the FOI Act requires the notice of decision to give the findings on material questions of fact underlying the reason why the agency claims the exemption applies. The experience of the Commissioner also indicates that, in some cases, a notice of decision will simply assert that a document is exempt under a particular exemption clause without identifying those material questions of fact which explain why the decision was reached.

Finally, a number of notices of decision did not notify the applicant of their rights of review if they disagree with the decision.

Proactive publishing of information

It is encouraging that, according to survey responses, a majority of agencies proactively publish and provide access to information and documents outside the FOI process. However, a significant number of respondents indicated that their agency is not proactive in this regard. One public submission particularly noted that *information should be provided proactively or promptly on request … rather than being prompted to release information in response to FOI applications*.

Factors influencing decisions

The review found that agencies generally take appropriate factors into account in making decisions about access to government documents. However, the survey results do show that a minority of agencies take into account irrelevant factors such as the potential for political fallout or litigation. The survey results could only be considered truly acceptable if the proportion of agencies which take these matters into account is zero.

Ultimately, agencies need to be reminded that, in dealing with a FOI application, they are making administrative decisions under legislation passed by the Parliament on behalf of all Western Australians. Parliament has seen fit to grant members of the public a right to access government documents subject only to those exemptions expressly provided in the FOI Act itself. Other considerations are not relevant. Agency decisions need to reflect this.

Some agencies also expressed concern that the FOI Act does not allow for common sense treatment of vexatious applicants.

Third parties

The FOI Act seeks to strike a balance between ensuring transparency on the one hand and protecting personal, commercial and other sensitive information on the other hand. Agencies are generally aware of their responsibilities under the FOI Act to help achieve this balance, but some concerns and areas for improvement were identified.

Agencies were particularly concerned about the time and effort required to consult with third parties before making a decision on granting access to third party information in a document. This is a considerable challenge in the public health sector, where the requested documents often contain extensive information about third party health professionals.

Given the potential savings in time and resources to agencies by asking applicants at the outset whether they require access to third party information, it is surprising that most agencies do not routinely seek clarification from the applicant about whether third party information can be excluded from the ambit of an application.

Exemptions

The application of exemptions to complex fact situations can have an element of subjectivity as it relies on the application of a set of rules to particular circumstances. It is not surprising that agencies indicated less confidence in their understanding of the correct application of the exemptions in the FOI Act compared to their confidence in relation to other areas. This is consistent with the Commissioner's experience on external review.

A fact which is often overlooked is that the FOI Act provides that agencies *may* refuse access to an exempt document. It does not provide that an agency *shall* refuse access. It may be appropriate for agencies to consider disclosing exempt matter in circumstance where no harm is likely to result. Agencies would need to make their own judgment as to when this is appropriate in any given case and they should take into account balancing factors such as the impact on third parties. Sections 104 to 107 of the FOI Act provide agencies and their officers with certain protections and immunities in relation to decisions made by them in good faith under the Act.

Fees and charges

The information gathered in the review makes it clear that members of the public and agencies often have different views on the subject of fees and charges under the FOI Act. This should not be surprising. However, there also appears to be a genuine and laudable recognition from some agencies that the cost and effort expended in responding to FOI applications is simply part of the price that must be paid to ensure a robust democracy. It is clear that the FOI Act did not envisage a full cost recovery model for the administration of FOI.

The effectiveness of any tool to safeguard democracy should be determined by how easily that tool can be wielded by the most vulnerable members of our society. One measure that exists in this regard is the number of complaints made to the Commissioner in relation to the imposition of fees and charges. Overall, the total number of complaints made to the Office of the Information Commissioner (OIC) on that issue is very low, with only three complaints over the last four years. While it cannot be taken that this figure is completely representative of all opinions in regard to charges, it does suggest that charges are not presenting a significant barrier to persons exercising their rights under the Act.

Information statements

The FOI Act requires most agencies to publish Information Statements. These Information Statements inform the public of the structure and functions of the agency. They also outline the types of documents held by the agency, and give advice on how they can be accessed by the public.

The review, together with the Commissioner's experience with reviewing Information Statements, shows an enormous variation in their quality and usefulness. Some agencies publish information statements which are a very useful resource for members of the public, while others effectively treat them as a compliance exercise. One symptom of the latter approach is that some information statements grow larger and more unwieldy every year, presumably because agencies add information to ensure compliance but are less willing to remove older or superseded information for fear of non-compliance. The result is a document which is not readily understandable and which does not serve the objects of the FOI Act.

Websites

Of the sample of agency websites assessed, the majority were considered poor in relation to the ease with which a person could locate information about FOI. However, some websites were clear leaders in this regard and can serve as models for other agencies to consider. These included the Department of Commerce, Department of the Attorney General, WA Land Authority, Department of Sport and Recreation, Shire of Broome, City of Kalgoorlie-Boulder, Department of Local Government and Department of Culture and Arts. Given that the review only assessed a limited number of websites, there are likely to be other examples of good practice which are not specifically identified in this report.

Agency resources and costs

The review found that, overall, FOI Coordinators are dedicated individuals, committed to assisting people obtain documents which they have a right to access. However the review also noted from interviews held with a number of FOI Coordinators that many requests for information under FOI are treated outside the FOI process and these are not included in

reported statistics. Therefore, the workload in some agencies was potentially even greater than reported. In addition, there was a problem in attracting and retaining staff to undertake FOI duties due to the role being perceived as complex and legalistic by nature, time consuming and sometimes of limited benefit to career progression.

A significant proportion of survey respondents considered that their agency does not provide adequate resources to deal with FOI applications in a timely manner or that their agency cannot reliably search across its records management systems for documents that fall within the ambit of a FOI request. The first of these issues was found to be particularly relevant to Ministers' offices.

Training and support

The FOI Act requires the Commissioner to provide training to agencies. Investment in training pays large dividends in more efficient and consistent levels of service, better and more timely FOI decision-making and greater trust in government. However, current resources do not allow OIC to meet the significant agency demand for training and support. Staff turnover in agencies greatly contributes to this ongoing demand. One ramification of the limited training on offer is that fee-for-service providers are now offering FOI courses to agencies to supplement the OIC's free courses.

RECOMMENDATIONS

The following are all the recommendations which arise out of the review.

Perceptions about the intent of FOI and agency culture

1. In dealing with requests for access to documents, agencies should demonstrate a commitment to the objects, intent and principles of administration of the FOI Act.

Agency policy and procedures

2. Agencies with a significant FOI workload should develop, or adopt from other similar agencies, better practice FOI policy and procedures. Agencies that already have policy and procedures about FOI should review these to ensure they are useful and relevant.

3. Agencies in particular sectors such as health and local government should work with the OIC to further develop and share FOI procedures, checklists and tools which improve the administration of FOI in agencies.

Agency processes and application of the requirements of the FOI Act

4. Agencies should share knowledge and resources, in particular between similar agencies (such as Ministers' offices) or agencies which deal with similar subjects (such as those dealing with health), to help improve levels of quality and consistency in how the FOI Act is applied.

5. Health services in particular should investigate options for further sharing knowledge and improving the quality and consistency of FOI processing. This may include a formalised central Health FOI role, to assist and promote more consistent practice on FOI across the public health sector.

6. Agencies should be aware of the importance of complying with their obligations under the *State Record Act 2000*, particularly in relation to matters raised in the review including the management of electronic and hard copy documents.

7. Agencies should ensure that FOI decisions are made in a way which prevents inappropriate considerations from being taken into account. In some cases this may best be done by appointing a decision-maker who is not intricately involved with the subject matter of the FOI application. However, in such a case it is important that the decision-maker still liaises with officers familiar with the subject matter to ensure all relevant documents are found and considered.

8. Agencies should ensure their officers are sufficiently trained, competent and supported to be able to conduct complete searches of electronic documents.

9. Ministers may wish to explore with the Department of the Premier and Cabinet the option of a more formal shared capability to assist their offices in dealing with FOI applications, noting that responsibility for decisions on access must remain with the relevant Minister.

Assistance to applicants

10. Agencies should engage in meaningful and early discussion with members of the public who seek information, starting before a FOI application is even made.

11. Agencies should design their customer interfaces and information management systems to enhance the ability of members of the public to obtain access to information.

12. Agencies should comply with the requirement of the FOI Act to take reasonable steps to assist access applicants to make a valid access application in a spirit of openness and transparency, and assist applicants to identify documents most likely to satisfy their requirements.

Interaction with applicant – notice of decision

13. Agencies should ensure Notices of Decision comply with all of the requirements of section 30 of the FOI Act.

Proactive publishing of information

14. Agencies should, unless there is a good reason not to, disclose information on request without requiring a formal FOI application and should investigate means of more proactive, automated and timely disclosure of information, particularly through websites, using information stored in electronic records management systems and other records databases.

15. As part of their annual review of Information Statements, agencies should periodically review what information they routinely make available to the public outside the FOI process.

Factors influencing decisions

16. Agencies should be mindful that, in dealing with FOI applications, they are making administrative decisions under legislation passed by the Parliament, and that matter is only exempt from disclosure if one or more of the exemptions in the Act is fully made out.

Third parties

17. Agencies should routinely ask applicants whether they consent to third party information being removed from the scope of applications, to encourage faster disclosure of documents.

Exemptions

18. Agencies should consider disclosing exempt matter in circumstance where no harm is likely to result, noting the protections and immunities provided in the FOI Act for decisions made in good faith. Agencies would need to make their own judgment as to when this is appropriate in any given case, and should take into account balancing factors such as the impact on third parties.

19. Agencies should ensure they are trained in the correct application of exemptions.

Fees and charges

20. Agencies should ensure they are trained on the correct procedure for dealing with fees and charges under the FOI Act.

Information statements

21. Agencies should develop Information Statements as an integral element of their overall approach to information management.

Websites

22. Agencies should ensure their websites support the FOI objectives of government transparency and public participation, particularly with a view to improving the profile of FOI and ensuring that the public can access government information with relative ease.

Agency resources and costs

23. Agencies should investigate, and address where appropriate, the resources they commit to satisfactorily meeting statutory obligations in the administration of FOI and the disclosure of information generally.

24. Agencies, in particular groups of similar agencies, should develop and share strategies and approaches to assist them to better manage FOI applications.

Training and support

25. The OIC should conduct a review of the training it currently offers to ensure it appropriately targets resources.

26. Agencies should consider further developing networks of experienced FOI Coordinators that could be supported through the OIC website, to assist those who are new to the subject or less experienced than themselves.

27. The OIC website should be enhanced to allow agencies to share resources, policies, procedures and tools.

28. The Information Commissioner should engage with Government as a priority in regard to appropriate resourcing to fulfil statutory training obligations.

Part B – Detailed Report

1. INTRODUCTION

Freedom of information is now considered an essential element of most robust democracies. This is certainly the case in Western Australia, where the FOI Act has been in operation for over 17 years. During this time, much information has been disclosed to individuals, the media, Parliament and organisations as a result of over 100,000 access requests.

The 1992 Royal Commission into Commercial Activities of Government and Other Matters explained the rationale for FOI legislation in the following way:

Both the democratic and trust principles demand that government be conducted openly. They require that the public be informed of the actions and purposes of government, not because government considers it expedient for the public to know, but because the public has a right to know. Openness in government is the indispensable prerequisite to accountability to the public. It is a democratic imperative.[2]

Western Australia was one of the last Australian jurisdictions to pass freedom of information legislation in 1992. As a result, the FOI Act is in some ways already more encouraging of proactive disclosure than recently superseded legislation in other Australian jurisdictions. The FOI Act already requires agencies proactively to publish annual Information Statements. Section 3(3) of the Act also expressly notes that nothing in the FOI Act is intended to prevent or discourage the publication of information outside the Act, if that can lawfully be done. This indicates a lesser degree of urgency of significant legislative reform than may have been the case in other Australian jurisdictions.

The Economic Audit Committee final report of October 2009[3] made the following observation in regard to the future public sector and what it considered would be *routine features of governance in Western Australia*:

Citizens will have access to processes and information that enable them to influence strategic policy directions of Government and assess the performance of government and the public sector in meeting their expectations.

This is a significant and explicit statement about the role and importance of the public sector in ensuring citizens have access to government information.

In the first year of operation of the FOI Act, 2,128 applications for documents were made. This number has risen to 12,336 in 2008/09. Annually there are around 100 appeals for external review to the Information Commissioner, a figure which has remained relatively stable except for two notable spikes following elections which resulted in a change of government.

In 2008/09, 181 appeals were received by the Commissioner. This was an unusually high figure, and the increase was entirely due to appeals from Members of Parliament in relation to FOI requests they had made to Ministers. The number of such appeals increased from 4 to 80 in a single year, resulting in an enormous backlog of appeals which will take some years to

[2] Report of the Royal Commission into Commercial Activities of Government and Other Matters, Govt Printer Perth, 1992, Part II, para 2.1.3.

[3] WA Government 'Putting the Public First - Partnering with the Community and Business to Deliver Outcomes' Final Report 2009 pg 10.

clear. Of the remaining 101 appeals last year, 66 came from individual citizens, 21 from businesses, seven from community groups, three from journalists, two from government agencies and two from prisoners.

Effective operation of FOI is heavily dependent on sound recordkeeping. The following are minimum requirements in this regard:

- Accurate and complete records of government and public sector information need to be prepared and recorded.
- Records of government and public sector information need to be stored effectively and efficiently as a matter of course.
- Government and public sector records need to be easily and quickly retrieved.
- Members of the public need to be aware of the types of information held by government agencies.

The OIC Policy and Practice 1996 manual (reprinted 1999) states – *[t]he prime responsibility for the administration of the FOI Act rests with State and local government agencies and it is incumbent upon officers of those agencies to make the legislation work effectively*.

The Information Commissioner has previously expressed the view that the most important people in the FOI process are agency frontline staff who respond to initial queries from members of the public. If these officers are well informed and demonstrate a helpful attitude, it is much more likely that justice will ultimately be done. On the other hand if these officers have not been properly trained in FOI law and processes, or demonstrate an obstructionist attitude, it is very likely that a person will effectively be deprived of their legal rights.

FOI is a system supporting open and accountable government that is all about people – this includes people who request access to documents and those who administer those requests. The integrity and effectiveness of the FOI system is affected by the knowledge, skills and resources available to effectively and efficiently process requests.

Since the introduction of the FOI Act and inception of the OIC, there has been one other review of FOI, which was conducted in 1997. That review was the outcome of a requirement under section 113 of the Act for a review of the operation and effectiveness of the FOI Act as soon as practical after the expiration of three years from its commencement, and a report based on the review to be tabled in Parliament within four years after the commencement of the Act.

2. BACKGROUND

2.1 Objective

This review arose from a commitment of the Government and subsequent request to the Information Commissioner to *review the manner in which Departments are administering the FOI process to ensure that Government is accountable and open in accordance with the spirit of the FOI Act*.

2.2 Scope

The review examined the manner in which agencies are administering the FOI Act as currently in force, and focussed on assessing the effectiveness of the processes used by agencies to administer FOI, rather than on the content of the current legislation.

The review covered all State Government Ministers' offices, and State and local government agencies. The Terms of Reference for the review are attached as Appendix 1.

The review did not include re-examining individual decisions made by agencies or the Information Commissioner in relation to specific requests for documents.

2.3 Approach

The approach taken in conducting the review was broad and included the following qualitative and quantitative methods:

- OIC sent 354 survey invitations to all Ministers and State and local government public sector agency Chief Executive Officers inviting them to complete an online survey[4], with 88 surveys completed.
- OIC sent 325 survey invitations to all State and local government agency FOI Coordinators inviting them to complete an online survey, with 181 surveys completed. A profile of FOI Coordinators in Ministers' offices, State and local government agencies was taken from the 181 respondents to the FOI Coordinators survey and is contained in Appendix 3.
- OIC conducted interviews with 60 agency staff from 33 agencies involved in the administration of FOI. These agencies received 70% of the 12,163 FOI applications submitted to agencies in 2008/09.
- The Commissioner discussed and responded to calls about FOI generally and the FOI review on the *Morning Program* of ABC local radio across Western Australia.
- OIC called for public submissions through prominent advertisements placed on two occasions in *The West Australian* newspaper with 15 submissions received. Submissions were invited about all aspects of the administration of FOI in Western Australia.

[4] Both the Minister/CEO and FOI Coordinators online surveys were developed by the OIC in conjunction with TNS Social Research. TNS Social Research managed the online survey process and produced two reports with all charts, tables and related statistical analysis used in this report.

– OIC conducted an assessment of 150 agency websites to gauge the ease with which people could locate information about FOI and make an FOI application.

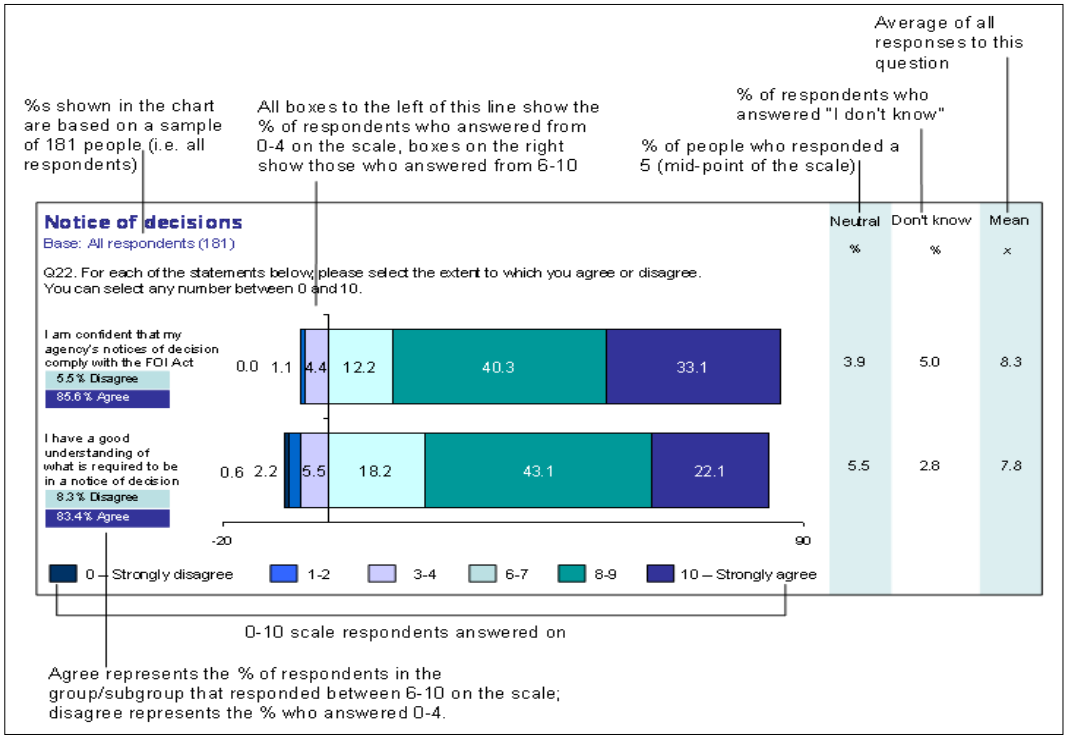
– OIC conducted an assessment of 135 agency Notices of Decision issued by 99 agencies to FOI applicants in the last 12 months.

To encourage maximum and candid participation in both surveys, OIC gave a commitment to agencies and survey participants that responses would be treated anonymously. To honour this commitment, where the identity of an individual or agency was removed in the report, this is shown as *(identity removed)*. For public submissions a commitment was also given that the identity of a person or organisation making a submission would remain confidential in the report, and where the identity of an individual or organisation was removed from the comments provided, this is also indicated by *(identity removed)*.

2.4 Presentation of survey results

There are two primary ways in which the data collected from the two surveys are reported. One example of each type is shown below, with supporting explanatory text in terms of how to read and interpret the results.

Example 1: Chart



Example 2: Table by sub-group

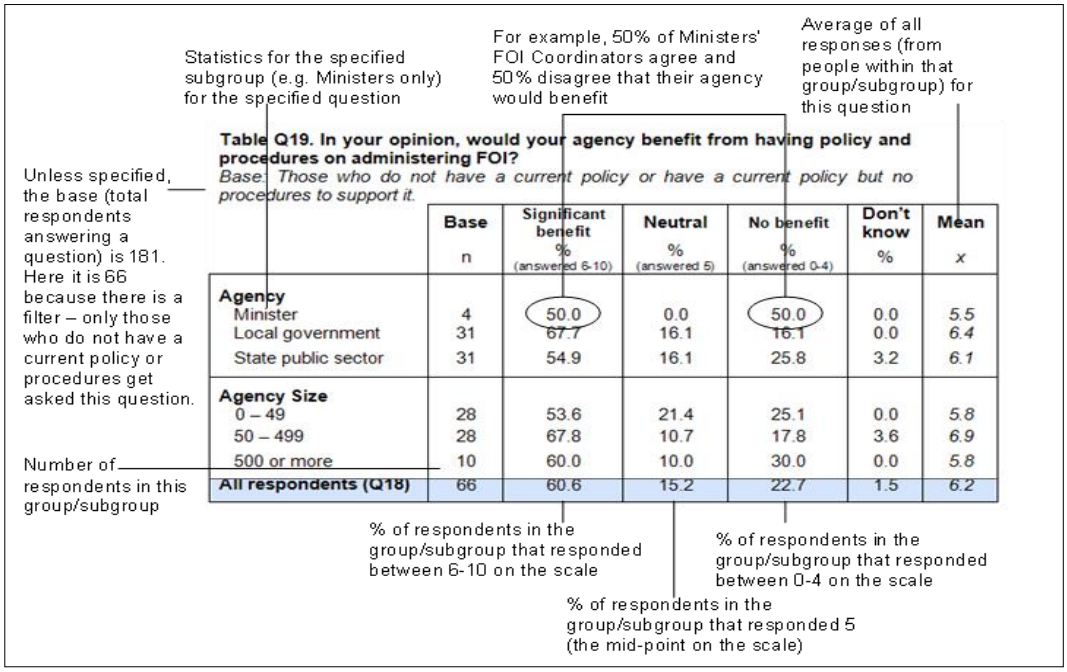


Table Q19. In your opinion, would your agency benefit from having policy and procedures on administering FOI?

Base: Those who do not have a current policy or have a current policy but no procedures to support it.

	Base n	Significant benefit % (answered 6-10)	Neutral % (answered 5)	No benefit % (answered 0-4)	Don't know %	Mean x
Agency						
Minister	4	50.0	0.0	50.0	0.0	*5.5*
Local government	31	67.7	16.1	16.1	0.0	*6.4*
State public sector	31	54.9	16.1	25.8	3.2	*6.1*
Agency Size						
0 – 49	28	53.6	21.4	25.1	0.0	*5.8*
50 – 499	28	67.8	10.7	17.8	3.6	*6.9*
500 or more	10	60.0	10.0	30.0	0.0	*5.8*
All respondents (Q18)	66	60.6	15.2	22.7	1.5	*6.2*

Information contained in the charts and tables in the report are also supplemented with additional information reported (where received and considered relevant) under the following headings.

- Survey comments – Ministers/CEOs or FOI Coordinators
- Themes and subjects raised from interviews held with agency senior staff and FOI Coordinators.
- Public submissions

Some verbatim comments about people and agencies which were received from the survey, public submission and interview processes are reproduced in this report for completeness. The accuracy of matters raised in these comments were not checked with the individuals and agencies mentioned, but any reference to people and agencies were removed and are indicated by *(identity removed)* in the report. It is therefore important to consider the inclusion of such verbatim comments as being for the purpose of reflecting a particular person's views, not as an indication that any allegations contained in them have been investigated or proven.

3. FINDINGS AND RECOMMENDATIONS

3.1 Perceptions about the intent of FOI and agency culture

Having sound FOI legislation is no guarantee of openness and transparency. The legislation needs to be administered in a way that is consistent with its aims. A Canadian study[5] 'Administrative Discretion and the Access to Information Act: An "Internal Law" on Open Government' on the application and use of FOI stated:

Whether an FOI law succeeds … depends heavily on the predispositions of the political executives and officials who are required to administer it. Statutory entitlements could be undermined if government institutions refuse to commit adequate resources for implementation, or consistently exercise discretionary powers granted by the law in ways that are inimical to aims of the legislation. In fact, critics in many jurisdictions argue that FOI laws have been weakened by the emergence of internal practices designed to ensure that governments are not embarrassed or surprised by the release of certain *kinds of politically sensitive information. However, it is often difficult to confirm the existence of such internal practices, or to gauge what influence they have on rights granted in legislation.*

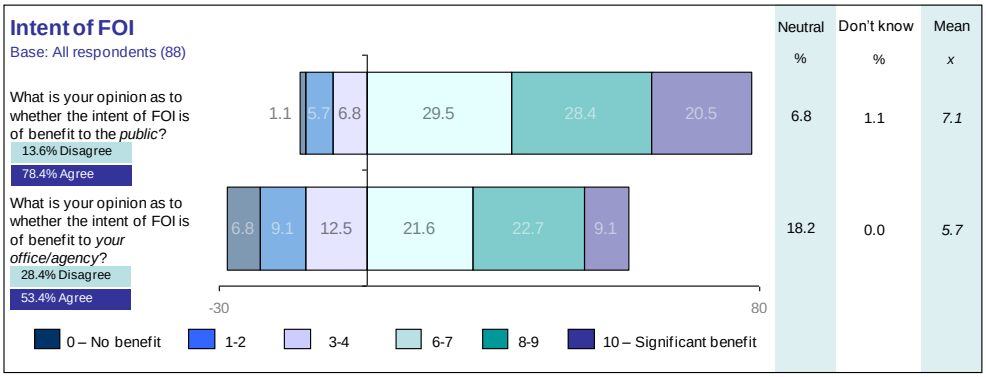
Intent of FOI

The intent of the FOI Act is to promote openness, accountability and transparency within State and local government agencies and enhance public participation in the decision-making processes of government. An agency's overall approach to the release of documents to the public is considered to be inherently influenced by the attitude of the Minister or agency CEO to promoting a culture where staff are encouraged and supported in the administration of FOI.

Survey results – Ministers/CEOs

78.4% consider the intent of FOI is of benefit to the public. Of the 29.5% of respondents answering this question with a 6 or 7, the majority 22.7% responded a 7 and only a minority of 6.8% responded a 6. This shows a tendency towards the positive end of the scale, with relatively few clustering around the mid-point and lower end of the scale. 53.4% consider the intent of FOI is of benefit to their agency.

Figure 1: Intent of FOI – Ministers and CEOs



[5] Roberts, A 'Administrative Discretion and the Access to Information Act: An "Internal Law" on Open Government' 2002 42 *Canadian Public Administration* 174

The following table represents a break-up by sub-groups of survey respondents.

Table 1: Ministers/CEOs (Sub-groups) – What is your opinion as to whether the intent of FOI is of benefit to the public?

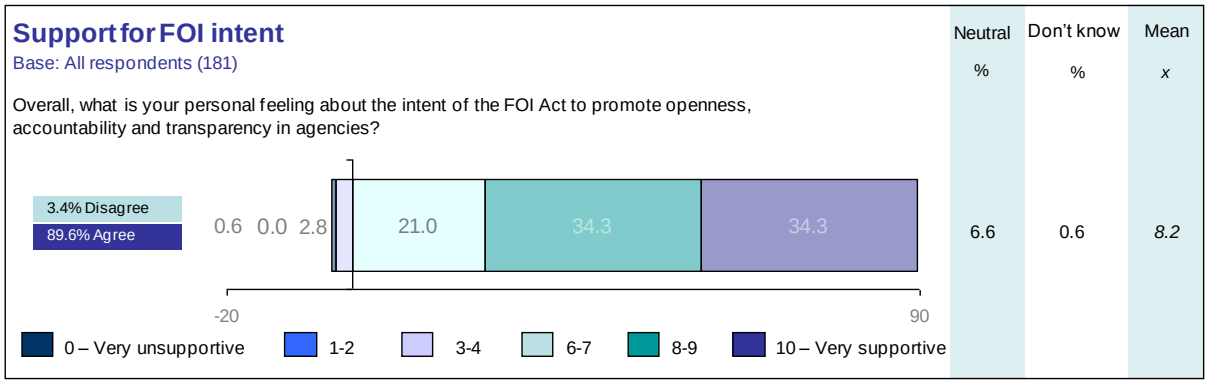
	Base n	Agree % (answered 6-10)	Neutral % (answered 5)	Disagree % (answered 0-4)	Don't know %	Mean *x*
Agency						
Minister	9	55.5	0.0	44.4	0.0	*5.3*
Local government	28	82.2	10.7	7.2	0.0	*7.5*
State public sector	51	80.5	5.9	11.8	2.0	*7.3*
All respondents	88	78.4	6.8	13.6	1.1	*7.1*

Analysis of sub-groups shows that local government (82.2%) and State public sector (80.5%) agencies recorded similar levels of agreement that the intent of FOI is benefit to the public. Although based on a small sample size (n=9), Ministers are slightly more polarised in their agreement that the intent of FOI is to benefit the public with just over half 55.5% agreeing and just under half 44.4% disagreeing, compared to disagreement within local government 7.2% and State public sector 11.8%.

Survey results – FOI Coordinators

There is a high level of support for the intent of the FOI Act among FOI Coordinators, with 89.6% stating they are supportive of the intent of the FOI Act to promote openness, accountability and transparency in agencies.

Figure 2: Support for FOI intent – FOI Coordinators



Agency culture

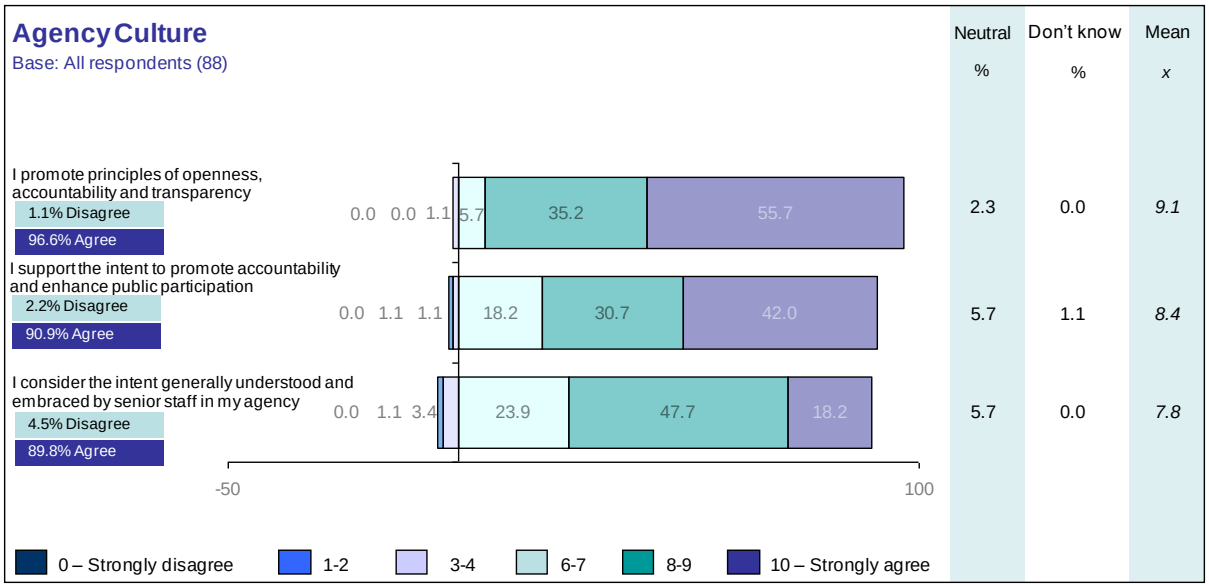
The culture of an agency in regard to attitudes about concepts of openness, accountability and transparency is considered inextricably linked to how well FOI applications are administered by the agency and whether the intent of the FOI Act is met. For FOI to be administered effectively, efficiently and 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.

Survey results – Ministers/CEOs

The survey indicated there is a high level of claimed personal promotion of the principles of openness, accountability and transparency by Ministers/CEOs in their agency, with 96.6% of respondents agreeing with this statement. In addition, there is a high level of claimed personal support for the intent of the FOI Act to promote accountability and enhance public participation, with 90.9% total agreement.

In comparison with the survey question asked about *confidence in processes their office/agency uses to administer the FOI* process (31.8% 10 out of 10 ratings, 93.2% agree overall – refer to 3.3), there are significantly fewer who strongly agree that *the intent of the FOI Act is generally understood and embraced by senior staff in their office/agency* (18.2% 10 out of 10 ratings). However, a high proportion still agree with this statement overall (89.8%). That is, this data indicates higher confidence in organisation/agency processes than in individual understanding and support.

Figure 3: Agency culture – Ministers/CEOs

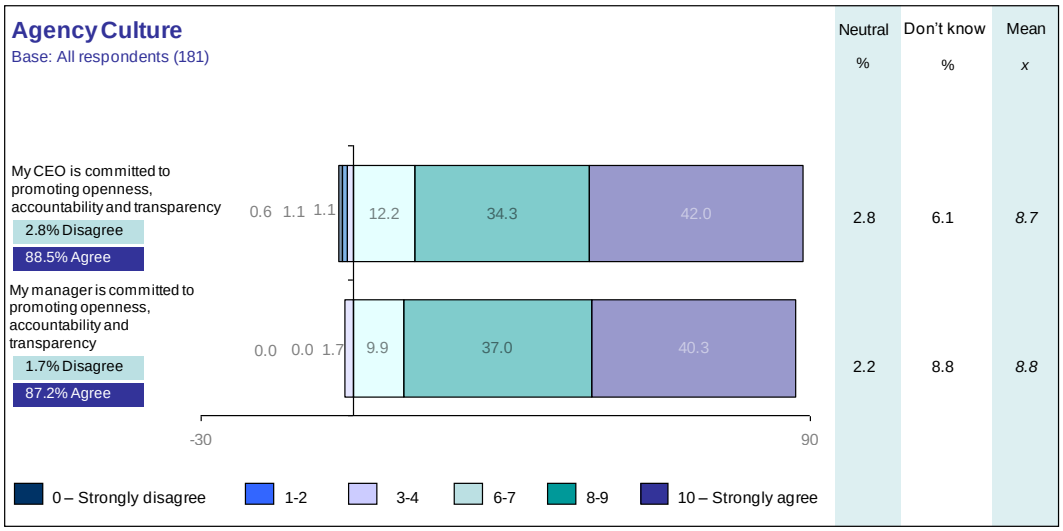


Survey results – FOI Coordinators

FOI Coordinators believe there is a high level of agency commitment to the principles of openness, accountability and transparency, with 88.5% agreeing that their CEO is committed to promoting openness, accountability and transparency.

87.2% of FOI Coordinators agree that their manager is committed to promoting openness, accountability and transparency.

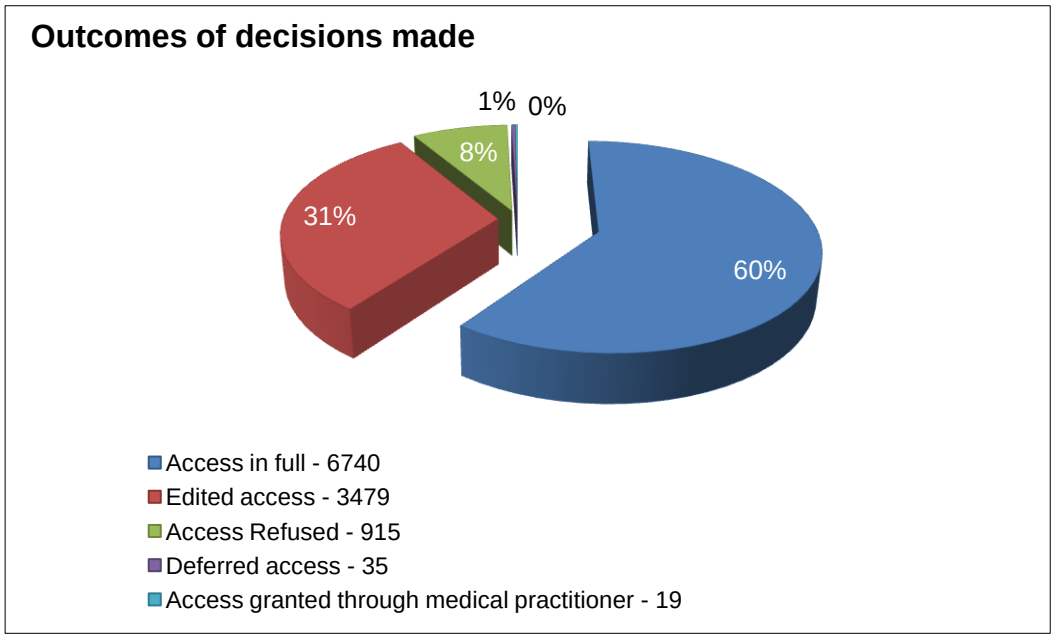
Figure 4: Agency culture – FOI Coordinators



Outcomes of decisions made by agencies in 2008/09

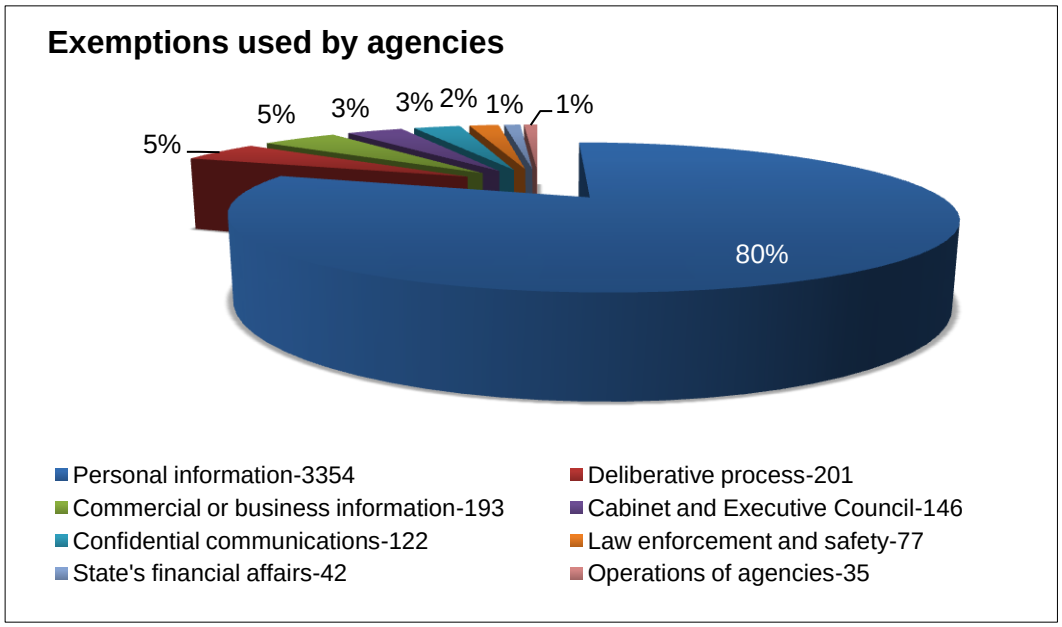
In 2008/09, agencies made 11,188 decisions in relation to FOI applications. Of these, 60% resulted in full access, 31 % resulted in edited access, and 8% refused access. Of the decisions to grant edited access, 80% deleted third party personal information about individuals other than the applicant. Excluding such edited access about third party personal information, the results show that 85% of applications resulted in full access.

Figure 5: Outcomes of decisions made by agencies 2008/09[6]



[6] Office of the Information Commissioner Annual Report 2008/09.

Figure 6: Exemptions[7] used by agencies



Public submissions

The following are extracts from public submissions that are relevant to the culture of agencies in administering FOI.

It is clear that the culture and attitude in Minister's officers towards Freedom of Information applications is different to Government Departments. One part of the solution to changing this attitude is comprehensive training for both Ministers and their staff. However, without a change in attitude from the Premier and his Ministers, I do not believe that training will be sufficient.

[Member of Parliament]

It would also be of assistance if the Information Commissioner's staff numbers could be increased to deliver this training but also so that, in the case of Ministers invoking Section 20 of the FOI Act and refusing to deal, Information Commissioner staff can visit Ministers offices and verify that the numbers of documents claimed have actually been located and that they are not just duplicates of emails or documents that are [publicly] available.

[Member of Parliament]

Agencies should place less emphasis on compliance with procedure and should instead facilitate the information transfer process by subscribing to a culture of active disclosure.

[Media body]

[7] Categories with 6 or fewer exemptions claimed were excluded from this chart for practical reasons.

Discussion

The survey results for Ministers/CEOs and FOI Coordinators about the intent of the FOI Act and their agency culture are encouraging and broadly considered a positive outcome, in that overall there is a high level of commitment to the principles of openness, accountability and transparency. While the survey results are a positive indicator of the approach taken by Ministers/CEOs and FOI Coordinators in administering FOI, agencies must continue to demonstrate in their actions actual commitment to their intent. When taking into account edited access of FOI applications involving third party personal information, the 2008/09 OIC Annual Report figures show that for the 11,188 FOI applications reported in 2008/09 (where decisions were made by agencies about FOI applications) the rate of disclosure was 85%. These statistics are considered supportive of the positive survey results received about agency culture toward FOI.

Views from some Ministers' offices received about their opinion as to whether the intent of FOI is of benefit to the public indicate that 44% of the respondents did not agree with this statement. This result is based on a small sample size (n=9) but is surprising and concerning. However it is likely that this result was heavily influenced by matters raised in section 3.3 in regard to challenges faced in Ministers' offices, particularly the extraordinary increase in FOI applications in the last few years made of Ministers by Members of Parliament.

The surveys also showed a concerning difference between the perceived *confidence in processes their office/agency uses to administer the FOI process* (31.8%, 10 out of 10 ratings), and those who strongly agree that *the intent of the FOI Act is generally understood and embraced by senior staff in their office/agency* (18.2%, 10 out of 10 ratings). This result may indicate that the confidence of senior staff in agencies in administering the FOI process may be somewhat misplaced. If so, it indicates the need for an increase in training for senior agency staff about general awareness and the intent of the FOI Act, and the processes which should be used to administer it.

Recommendation

1. In dealing with requests for access to documents, agencies should demonstrate a commitment to the objects, intent and principles of administration of the FOI Act.

3.2 Agency policy and procedures

Policy and procedures are considered to be key components for the consistent and effective enactment of legislative requirements to occur in public sector agencies. A lack of proper and well considered policy and procedures may contribute to poor and inconsistent decision-making in agencies, legislative requirements not being met and a breakdown in public trust in government.

The 'FOI Standards and Performance Measures' guide for agencies, developed in 1998 by agency FOI Practitioners in conjunction with the OIC, noted that a key activity of agencies in dealing with FOI was developing policy in agencies. The guide states that *policies within the agency reflect the requirements and spirit of FOI, including policy impacts of decisions by the Information Commissioner and the Supreme Court.*

The OIC has developed a range of materials since the establishment of the OIC to assist agencies to administer FOI, which include:

- *Freedom of Information – Policy and Practice* 1996 (reprinted 1999);
- *FOI Standards and Performance Measures* 1998;
- *Guidelines for Using FOI in Western Australia*; and
- numerous articles on the OIC website providing guidance on FOI processes.

While it is not a legislative requirement, the Commissioner encourages agencies to develop or adopt policy and procedures to assist staff to consistently apply the requirements of the FOI Act. While policy and procedures alone are no assurance that compliance with legislation will occur, they provide a point of referral to assist staff to undertake their role, and this becomes particularly important in an environment where a high volume of work exists and staff turnover is an issue.

Policy and procedures should set out the position of an agency in regard to the release and publishing of documents, and provide an easy-to-read guide to assist FOI Coordinators to do their job. A number of good examples of policy and procedures were viewed during the course of the review, and the OIC encourages agencies to share these resources where possible. However it is important for agencies to bear in mind that they must at all times comply first and foremost with the FOI Act, and agency policies and procedures are no substitute for this.

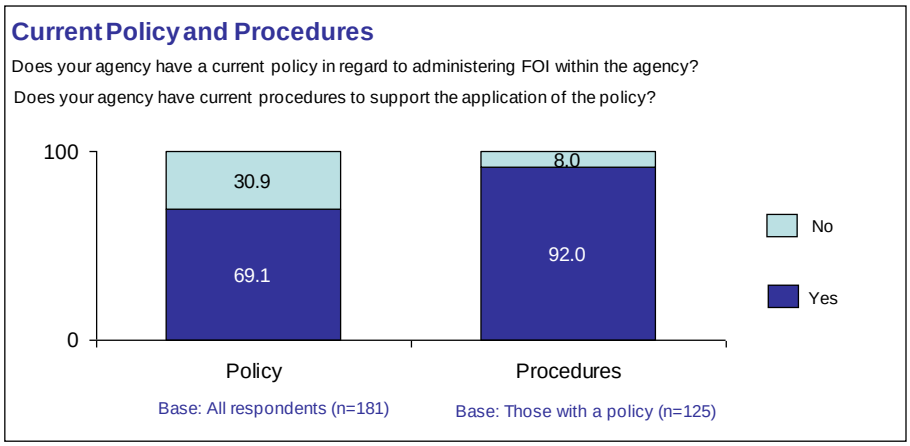
In addition to policy and procedures on FOI, agencies can draw knowledge from decisions from external reviews conducted by Information Commissioners since the FOI Act was introduced in 1992 on matters such as exemptions and the public interest. Those decisions are discoverable through a search tool on the Information Commissioner's website.

Survey results – FOI Coordinators

Do agencies have policy and procedures for FOI?

The following results indicate that 69.1% of FOI Coordinators reported their agency has a current policy in regard to administering FOI, and 92.0% of those agencies with a policy, have current procedures to support the application of the policy. That is, if an overarching policy exists, the likelihood of supporting procedures is high.

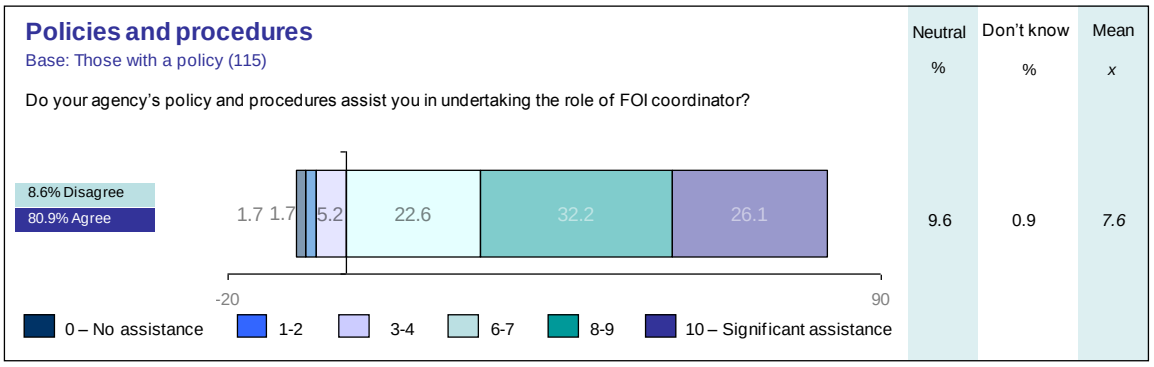
Figure 7: Current policy and procedures – FOI Coordinators



Do policy and procedures assist FOI Coordinators?

For the agencies that reported they had policy and procedures on FOI (115), 80.9% reported their agency's policy and procedures assist them in undertaking the role of FOI Coordinator, and 9.6% are neutral.

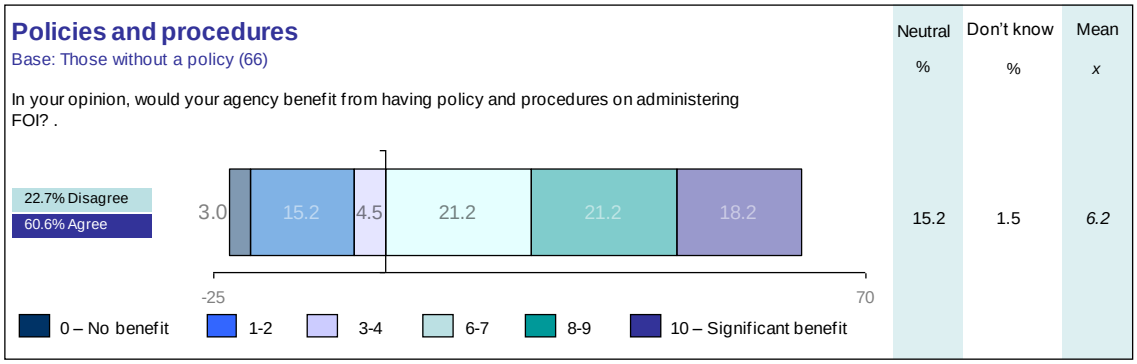
Figure 8: Assistance to FOI Coordinators of having policies and procedures – FOI Coordinators



Would agencies benefit from having policy and procedures?

Among the agencies which do not currently have policies in regard to administering FOI, the perception that their agency would benefit (refer Figure 9) is less than that among those who already have policies (refer Figure 8). However, 60.6% of agencies which do not currently have policies in regard to administering FOI still consider policy and procedures would be of benefit.

Figure 9: Benefit of agencies without policy, having policy and procedures – FOI Coordinators



By agency sub-group, the survey results on policy and procedures also indicate:

- Those in State public sector agencies are significantly more likely than those in local government agencies to have a current policy in regard to administering FOI within the agency (75.5% compared to 59.1% respectively).
- Those in larger agencies (500 or more) are significantly more likely than those in agencies of less than 500 people to have a policy (81.8% compared to 65.0% respectively).
- Those who deal with >20 applications over the 2008/09 period are the most likely to have a policy (87.0% compared to 63.0% respectively).

Interviews with agency staff

FOI Coordinators interviewed from agencies in the health and local government sectors commented that many of them face the same complexities and challenges in administering FOI within their sector and that they may benefit from developing common policy, procedures and checklists to promote consistent practice across those sectors.

Public submissions

The following is an extract from one public submission received which is relevant to the application of FOI and agency policy and procedures.

> *The approach taken by (identity removed) is different again. They do not appear to have a policy at all. I recommended that they should have an enforcement policy rather than a 'we treat every case on its merits' approach, because with four Directors that approach results in inconsistencies.*
>
> [Member of the public]

Discussion

Consistency in the application of legislative rules to particular fact situations is generally considered an important aspect of good government decision-making. Consistency and predictability are important safeguards against the capricious or arbitrary use of executive power.

While the FOI Act itself creates rights for members of the public and imposes consistent legislative obligations on all Ministers and government agencies, it also provides scope for agencies to exercise a certain amount of discretion. Examples of situations where agencies can exercise discretion include decisions to make information available outside the FOI process, or the discretion to disclose material which may be technically exempt. Further, the process which agencies use to make decisions under the FOI Act or to deal with access applicants can vary between agencies, or even between different FOI applications within the same agencies. It is in the consistent application of such discretion or processes that agreed policies and procedures can have the greatest benefit.

Overall, the survey results are encouraging in that they indicate a high proportion of agencies, particularly those who dealt a large number of applications have a policy about FOI. A high proportion of these agencies have procedures to support the policy which assists their FOI Coordinator to administer FOI.

Agencies that indicated confidence in administering FOI were generally those with experienced FOI Coordinators (two or more years) who also tended to have policy and procedures, or those agencies with less experienced FOI Coordinators who have policy and procedures to which they can refer.

Where possible, policy and procedures should be developed collaboratively and shared across agencies, and in particular across large sectors such as health and local government. This approach would help in reducing the work required and provide a more consistent approach to assessing and making decisions on FOI applications.

Recommendations

2. Agencies with a significant FOI workload should develop, or adopt from other similar agencies, better practice FOI policy and procedures. Agencies that already have policy and procedures about FOI should review these to ensure they are useful and relevant.

3. Agencies in particular sectors such as health and local government should work with the OIC to further develop and share FOI procedures, checklists and tools which improve the administration of FOI in agencies.

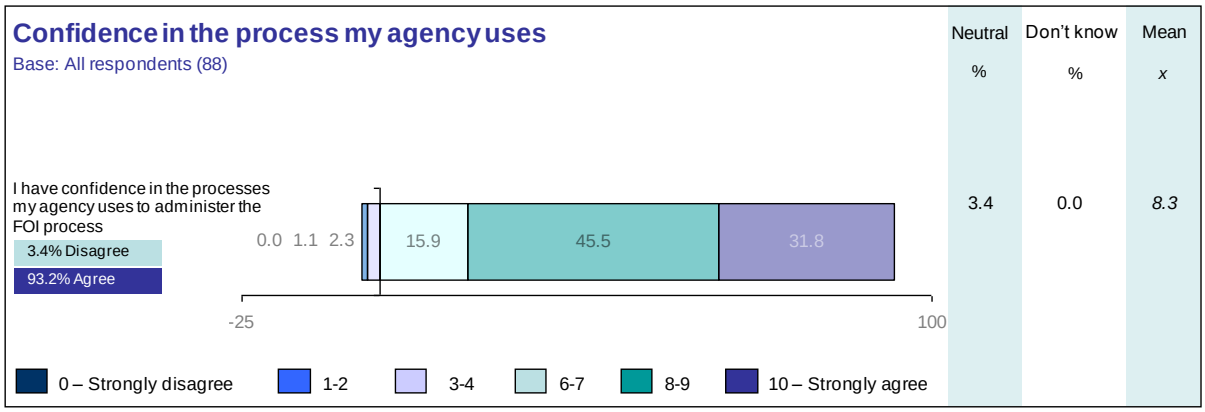
3.3 Agency processes and the application of the requirements of the FOI Act

Confidence in agency processes

Survey results – Ministers/CEOs

A high proportion of Ministers/CEOs agree that they have confidence in the processes their office/agency uses to administer the FOI process (93.2% agree overall).

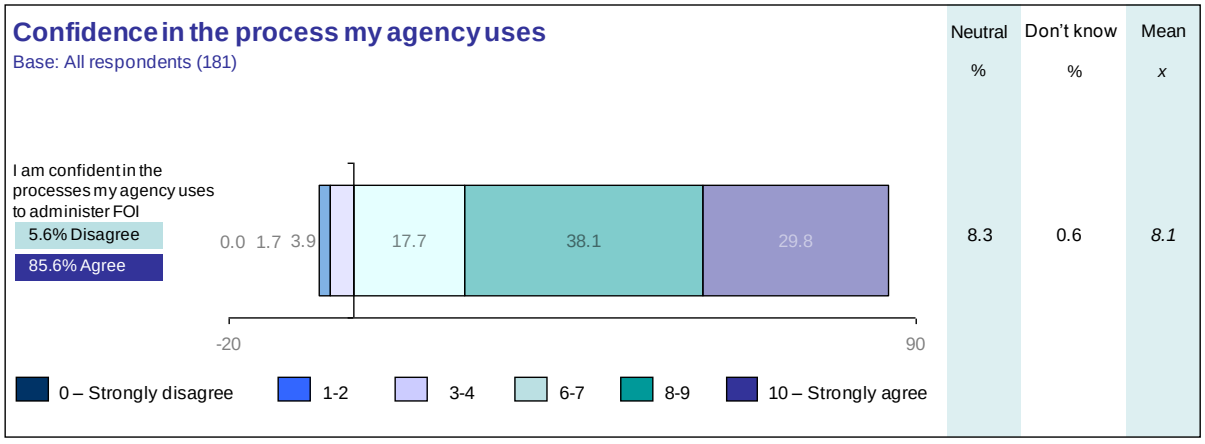
Figure 10: Confidence in agency process – Ministers/CEOs



Survey results – FOI Coordinators

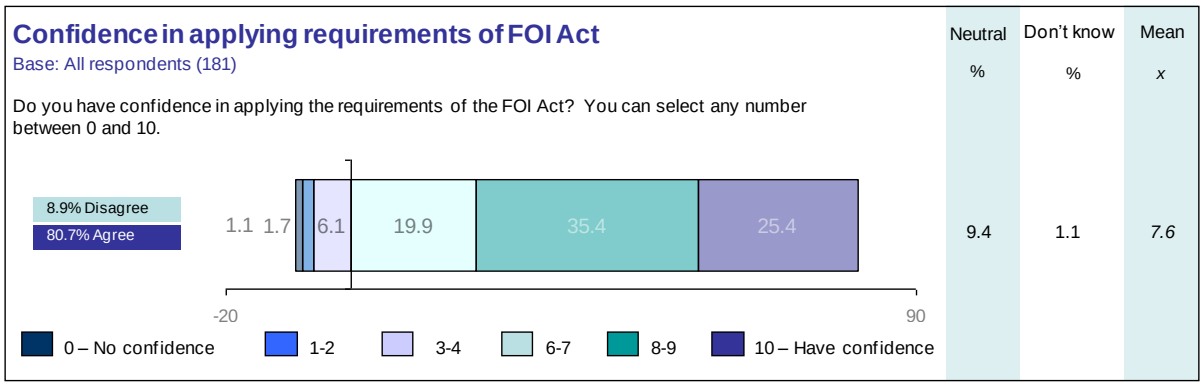
Although lower than the response for Ministers/CEOs, 85.6% of FOI Coordinators agree that they have confidence in the processes their office/agency uses to administer the FOI process.

Figure 11: Confidence in agency process – FOI Coordinators



There is a high level of confidence by FOI Coordinators in applying the requirements of the FOI Act, with 80.7% indicating they have confidence in applying the requirements of the FOI Act.

Figure 12: Confidence in applying the requirements of the FOI Act – FOI Coordinators



By sub-group – the application of requirements of the FOI Act

There are several significant differences in the survey results by sub-group:

– State public sector FOI Coordinators are significantly more confident than local government coordinators. This would be influenced by the fact that (as referred to under 3.14), nearly 37.9% of local government coordinators have never attended FOI training conducted by the OIC, whereas only 17% state public sector coordinators have not attended training.

– Larger agencies are significantly more confident than smaller agencies. However, the survey results also indicate larger agencies are more likely to have policy and procedures (refer to 3.2) and attended training (refer to 3.14).

Documents of agencies

The integrity and completeness of the FOI process and the ability of an applicant to obtain, subject to exemptions, access to all documents relevant to their request, is underpinned by a requirement that agency documents are adequately recorded and stored in hard copy or electronic recordkeeping systems.

The following are extracts from the second reading of the *Freedom of Information Bill 1992*[8], relevant to public recordkeeping:

The absence of effective public record keeping has dogged this Commission in its inquiries. Records provide the indispensable chronicle of a government's stewardship. They are the first defence against concealment and deception.[9]

It is excellent to have freedom of information legislation, but if documentation is to be shredded or destroyed or pages ripped out in any way, that freedom of information legislation

[8] Hansard Vol 16 1992 page 6470.
[9] Report of the Royal Commission into Commercial Activities of Government and other matters page 27 – 4 Part 1 Vol 6.

is irrelevant because people will be denied access to those very vital Government documents.[10]

In regard to an enquiry to the State Records Office as to whether policy exists for the management of hard copy records, the review received the following advice:

Though there is no current up-to-date State Records Office policy for the management of hard copy records, State Records Commission Standard 1: Government Recordkeeping *requires government agencies to adopt the* Australian Standard AS15489 Records Management *as the model for best practice recordkeeping within the organisation. AS15489, among other things, covers the management of hard copy records.* State Records Commission Standard 2: Recordkeeping Plans *requires agencies to produce policies and procedures to cover records in all formats and all aspects of their management including, creation, capture and control, security and protection, access, and appraisal, retention and disposal.*

The publication of Standards and Guidelines for the management of electronic records was designed to meet the need of government agencies and set the standard for electronic recordkeeping.

Anecdotal evidence observed over the course of the review suggests that the practice of numbering every page of every document on an official file (folioing) is not widespread in State government agencies. In simple terms, if original hard copy documents are not folioed, there is scope for documents to be more easily removed from agency files.

Corrupt or unethical behaviour will not be prevented merely by the numbering of documents, however the practice of ensuring that documents on files are folioed sends a clear message that an agency does take the responsibility of keeping public records seriously and attempts to keep an audit trail of records kept. The integrity of recordkeeping in public sector agencies is an integral part of honest, open and accountable government. If the public cannot be assured that government records are proper and complete, then trust in government is compromised.

Electronic documents

During the review, comments were also received about issues faced by agencies in the management of electronic documents, and specifically gaining access to and obtaining information from emails and email systems for FOI applications. A number of agency staff also commented that a search for emails relied on individuals being asked to search their own emails relevant to a request, and this process relies on each person's understanding of the email system and their ability and intent to perform a full search to identify all relevant information.

From OIC experience in conducting external reviews, the following matters are also relevant in regard to the ability of agencies adequately to manage and search for electronic documents:

– The level of skill and knowledge of individual officers carrying out searches including knowledge of the kinds of locations that electronic documents are stored in; the skills to conduct reliable searches of those locations including an understanding of how to use available search tools, and awareness of how search results are affected by the use of different search parameters such as the search terms and search operators used;

[10] Hon Cheryl Edwardes MLA Hansard Vol 16 1992 pp6470.

awareness of any applicable rules which automatically move emails to different folders in an email account and an understanding of when searches should be made in those folders; and knowledge of the agency's electronic recordkeeping practices.

- Ensuring the FOI Coordinator or other officer coordinating the search process has the necessary skills and knowledge to facilitate reliable search results and to give guidance and support to other staff carrying out searches.
- Ensuring individual officers who are asked to carry out searches are given meaningful instructions and guidance to assist them, including reminders of the kinds of locations to check, for example, all relevant folders in Outlook accounts ('Inbox', 'Sent Items', 'Deleted Items' and 'Archives').
- Creating adequate records to demonstrate or evidence the searches undertaken including a description of the locations searched, the search parameters used and the results of those searches.
- The impact of the agency's recordkeeping practices – how are electronic records saved and stored? How hard is it to locate them when conducting searches?
- Most importantly, ensuring staff are given adequate training and support regarding the retention and storage of electronic documents and how to search for them.

Matters raised by agencies about electronic documents in relation to the administration of FOI in agencies included:

- Whether emails should only be searched for by the individual employee.
- Employees mix personal and business messages in emails, not realising that under the State Records Act these are a State record.
- Some agency staff are under the impression that emails that are received, sent or 'deleted' are permanently deleted from information systems.
- Misunderstandings and inconsistencies in agencies about proper methods to conduct thorough and complete searches for electronic documents.

The State Records Office of WA has issued *SRO Guideline – Management of Email Records*. The guideline states that emails can be categorised as business, ephemeral, personal or combination types, and in relation to where an email is a combination email comprising both personal and business related information and if the email incorporates both personal and business related information, the email is to be considered a State record (or business email) and must be managed accordingly.

FOI administration in Ministers' offices

Discussions held with Ministers' staff indicated that the management of FOI in their offices can be both challenging and contentious for a number of reasons. These include:

- Turnover and retention of staff.
- Spikes in the number of FOI applications received.
- Difficulty in recruiting staff where FOI forms part of the duties of the position advertised.
- Loss of employed staff due to them having to administer FOI as part of their duties.

- Limited resources to cover multiple facets of a Minister's office administration.
- Difficulty sometimes in searching for information, in that the Department of the Premier and Cabinet IT systems (which manages all emails for each Minister's office) and the Minister's home agency IT systems are often not the same.
- FOI can often comprise only a small part of a Minister's staff member's duties, but sometimes takes up a considerable amount of time.
- FOI requests and Parliamentary questions on the same matter can often result in a duplication of effort required.
- FOI in the political environment can be abused through inappropriate use of FOI.

The following suggestions for alternate approaches for managing FOI in Ministers' offices were discussed:

- Investigate a centralised method for processing FOI applications, where all FOI requests to Ministers are directed through a dedicated and appropriately resourced Ministerial FOI unit; or
- Adopt the approach taken in the Commonwealth government where the 'home' agency of each Minister manages FOI requests received by the Minister.

Survey comments – Ministers/CEOs

It is a very time consuming process for the agency, although I understand the importance of having the process in place.

Ministerial offices do not have the amount of resources that agencies do to administer applications, i.e. Ministerial offices do not have a dedicated FOI officer – this responsibility is usually given to the office manager whose normal workload is demanding in itself. Some allowance needs to be made to assist Ministerial offices in dealing with applications such as a longer permitted period for processing or a greater capacity to levy charges to pay for extra personnel required.

The process could be improved by offering prescription on reasonable time to respond rather than a set number of days. Some FOI requests require extensive research and involve thousands of documents whilst others are minor. I think the community wants to know how long their FOI request will take. Providing benchmarks will assist both citizens and agencies. For example, a benchmark could be 80% of a category of request responded within a timeframe of days. Categories could be fleshed out. Similarly, reviews by the Commissioner should offer transparency in benchmarks of performance so an applicant knows how long a review should take (i.e. when can they expect a decision).

I found if I have had any concerns regarding the FOI process the FOI Commission has always been available to help so I am very comfortable with the process.

I consider the FOI legislation is fine in its current format.

Survey comments – FOI Coordinators

A 'best practice' manual would be extremely helpful, covering staffing levels, procedures, forms, form letters, etc – a model 'FOI Policy' would be very useful – a model 'Information Policy' would be very useful.

A standardised software application for recording FOI activities would be useful. Suggest a standardised template be devised and made available for download on the FOI website for use by all agencies. I find that applicants sometimes give the impression they feel we are not taking them seriously by telling them there is no official application form, that they must simply write us a letter making the request.

The agency rarely receives FOI applications. It strongly feels, however, that the State Solicitor's Office should be prepared to provide FOI advice.

Interviews

There are approximately 140 local governments and 17 large to medium sized health services that receive applications and face circumstances in administering FOI that are specific to their agency role and functions. The review found that a number of these agencies have considerably different views and processes about matters such as understanding what could and could not be released outside the FOI process, dealing with third parties named in documents, applying fees and charges, and what to include in a Notice of Decision to an applicant.

Public submissions

I have found that many Ministers' offices ignore deadlines, make little effort to clarify understanding, sometimes show little understanding of FOI procedures, and there are major inconsistencies between Ministers' offices and between Ministers' offices and other agencies:

Documents that are refused by one office are released by another.

Documents that have details removed by one agency have those details left in by another office but different details removed and then a third office may give you a document.

[Member of Parliament]

These inconsistencies, disregard of deadlines and misinterpretation of sections of the Act all indicate a flippant disregard for the FOI Act. Ministers and their staff do not seem to realise that these requirements are law. They are not optional extras – they are required by an Act of this Parliament, assented to by the Governor of this State and gazetted into law.

[Member of Parliament]

FOI reform in WA has become a political football to be kicked about. A party in Opposition tends to criticise the operation of FOI and promises reform but turns volte-face when it is in government.

[Media body]

What is required is a complete review and the introduction of a new FOI model altogether with attention to key areas. Such areas, taking the cue from the Queensland review, for example, could include attention to the evaluation of the 'public interest' so that the administration of the public interest test…is more transparent, understandable and credible, to make it more likely that it will be applied in the way the legislation intended. In addition,

the State's FOI administering body should be properly resourced and not be subject to difficulties of the kind identified by the Commissioner in September 2009.

[Media body]

Aside from the fact that the time taken to deal with applications has increased rather than decreased, it is noteworthy that the Act itself entrenches the culture of delay by allowing for a long time to process applications. From a media perspective such delays are too long, especially in respect of matters of urgent public concern.

[Media body]

The Act is very useful for agencies which wish to withhold information as there are so many exemptions available that the nuts and bolts of the Act is much more about withholding information than about releasing it.

[Member of the public]

Currently (identity removed) can avoid release by declaring a document to be missing until a period is expired and then destroying the document upon "finding" it. I submit that such is not in the spirit of the Act.

[Member of the public]

In my view, FOI would be much more effective and much less of a burden to administer if the Act itself, or interpretive rulings from the OIC, could be more explicit and less obscure. All too often, the Act and rulings require the FOI coordinator and decision-maker to make very fine judgement calls and weigh up vague and uncertain values –such as "the public interest" – against other, equally vague and uncertain values. This can only encourage caution, rather than openness.

[Public sector employee]

In dealing with FOI applications, (identity removed) has on the majority of occasions been able to process these within the 45 day permitted period as required by the Act. On average, (identity removed) has managed to successfully deal with FOI applications it has received within 21 days. However, the 45 day permitted period can be quite restrictive when dealing with difficult applications such as those involving neighbour disputes. The need to consult with various parties within limited timeframes can be quite onerous.

[Local government agency]

Important information critical to my defence of this matter was deleted, and the following wording was used in copies of emails obtained about the application:

- Any thoughts on how we can justify this?

- I am a bit reluctant to give too much more as we could be criticised.

The person appointed to be the "Decision Maker" was privy to emails and attending meetings where my alleged breaches of the Act were discussed. Accordingly, HE MUST have been aware of the attempt to "cover up" or at least mitigate the actions of the (identity removed). The "Decision Maker," had received 6 emails and attended at least 2 meetings on issues directly concerning my alleged breaches of the Act and in my opinion he should have not accepted this role, having a conflict of interest.

I am not suggesting that this person acted corruptly, however I believe a person who was in no way connected with this matter should have been appointed to ensure fairness and accountability in the decisions to allow documents and providing me access to information of third parties.

I recommend that guidelines be drafted to ensure the "Decision Maker" appointed by Government agencies is in no way named or involved with either the applicant or the matter requiring the FOI information.

I am suspicious that the "Decision Maker's" appointment by (identity removed) was intended to sanitize, or "cushion" information requested and the failure of (identity removed) to supply documents that could assist my defence supports this assertion.

The failure to include any one item … could be construed to be human error. The failure to include so many items and items paradoxically where important decisions have been made relative to my prosecution has, in my opinion, demonstrated a pattern of behaviour intended to deprive me of information which would assist my defence in this matter and, excuse (identity removed) employees of misfeasance.

[Member of the Public]

(Identity removed) received [over 30] applications for the 2008/09 financial year. The average processing time of the applications was 20 days. The speed of the process is directly related to the amount of information requested, the speed as to which a consulted third party provides a response and the speed with which applicants respond to requests for deposits. What generally delays the process is awaiting payment of deposit costs from applicants. Although the 45 day time period is suspended upon the issue of an estimate of costs the applicant has 30 days to provide payment or notification of intent to proceed with the application. If this notification and/or payment is not received until the 29th day the application has ultimately been dragged out for an extra month through no fault of the agency. This could lead to the applicant forming the perception that process is a long drawn out one.

[Local government agency]

Length of time unacceptable (> 6 months).

Spurious claims of the department were never properly addressed by the Commissioner and accordingly [the agency] will be free to assert similar unwarranted exemptions in future.

Justice delayed = justice denied!

I had taken considerable effort with the application for review and given the delay this was a complete and utter waste of my time.

[Member of Parliament]

Discussion

The survey results indicate that a significant proportion of Ministers/CEOs and FOI Coordinators agree they have confidence in the processes their office/agency uses to administer FOI, and there is a high level of confidence of FOI Coordinators in applying the requirements of the FOI Act. These results may also be an indicator and reflective of the relatively low proportion of total FOI complaints received by the OIC (123[11] for 2007/08 and 198[12] for 2008/09), in comparison to the total number of applications received across all agencies (12,336 for 2008/09).

The difference in confidence levels between State public sector (90.1% have confidence) and local government (68.3% have confidence) agencies in applying the requirement of the Act is noted, and requires further consideration and addressing by the OIC.

Although based on anecdotal evidence, the issue raised about the integrity of agency processes to ensure that all documents received and produced by an agency (particularly hard copy documents) are available to form part of any search for documents is of concern. Also related to records management, document storage and retrieval is the matter raised about the treatment and processes used for searching for emails.

Some pertinent matters were raised via the public submission process about a perceived inconsistency of FOI processes within and across some agencies, and the questioning of the integrity of the FOI processes used in some agencies. These matters require further consideration by the OIC and agencies in regard to action and education required. These matters should also be considered in light of the discussion on policies and procedures under section 3.2. A specific matter was raised in a public submission that it is important for FOI decision-makers to be independent of the subject matter which they are reviewing. In some cases the integrity of the FOI assessment and decision-making process may be strengthened when decisions on access are made by officers who are not closely involved in the subject matter which is the subject of the FOI request. It is however important for such decision-makers to work with officers who are familiar with the subject matter to ensure that all relevant documents are identified before a decision is made

Suggestions about how to improve FOI administration were raised by FOI Coordinators and senior agency staff through the survey and interview process. These include the development of a FOI 'best practice manual', a model FOI policy, standardising reporting software and templates and investigating better approaches to the management of FOI in Ministers' offices.

A number of the suggestions made, including a best practice manual and guidelines, are already available for agencies to refer to, and all of the suggestions made in the review have been noted by the OIC for future consideration and implementation where necessary.

Some recent decisions by the Commissioner have highlighted that Ministerial offices face particular challenges in complying with the FOI Act. These include a severely limited capability to absorb a spike in FOI workload and the fact that the small size of these offices coupled with a high staff turnover makes it difficult for Ministers to dedicate suitably skilled

[11] Office of the Information Commissioner Annual report 2007-08
[12] Office of the Information Commissioner Annual report 2008-09

and experienced staff to FOI matters, especially during times of unusually high workload. The challenges also increase the likelihood of inconsistencies in how different Ministers apply the FOI Act. Particular areas where the Commissioner has identified a need for improvement include the quality and consistency of notices of decision and the thoroughness and precision of searches for electronic documents. The latter in particular requires Ministers to have access to staff with knowledge of IT systems and search terms. The level of access to such staff varies significantly between Ministers.

A particular suggestion to help address the above issues is that there should be some sort of appropriately resourced capability which can assist all Ministers in discharging their obligations under the FOI Act. This could be a new or existing office within a central government agency. However any such arrangement would need to be set up very carefully to ensure that Ministers remain fully responsible and accountable for their FOI decisions. The agency would merely assist Ministers with processing applications, carrying out complete and effective searches for relevant documents, consulting with third parties where required, and drafting notices of decision for review by the relevant Minister. However the relevant Minister must still apply her or his mind to the FOI application and must remain fully responsible for the ultimate decision on access.

Currently a somewhat similar arrangement is in place in relation to the Office of the Premier which, under regulation 10 of the *Freedom of Information Regulations 1993*, is to be regarded not as a separate agency, but as part of the Department of the Premier and Cabinet for the purposes of the FOI Act. Establishing a capability to assist other Ministers in the administration of the FOI Act would not necessarily require a similarly formal arrangement, as the creation of such a capability would not remove or decrease the Minister's responsibility, but would simply assist him or her in the FOI process.

A further issue raised during the review is that Members of Parliament who wish to seek documents or information from agencies, particularly from Ministers, should be encouraged to approach those agencies or Ministers, and seek the information outside the process prescribed by the FOI Act. Of course this would only be effective if the relevant agencies and Ministers were forthcoming in providing such information where there is no good reason to withhold it, for example by offering briefings to Members of Parliament who request them. While such an approach has enormous potential to improve democracy and reduce Ministers' FOI workloads, the Commissioner does not consider it to be within the remit of his role to make any formal recommendations in this regard. However, he would certainly encourage Members of Parliament and Ministers to give it some consideration.

It is well known that the extraordinary increase in applications to the Information Commissioner for external review following the 2008 election has led to a significant backlog[13] in the Commissioner's office. The average age of complaints before the Commissioner as at 30 June 2010 was 223 days, and this figure is still increasing. Parliament clearly intended that the Commissioner should resolve complaints in a much shorter period of time, as indicated by section 76(3) of the FOI Act which requires the Commissioner to make a decision on a complaint within 30 days unless this is considered impracticable. To address the unacceptable current delays, the Commissioner has made a number of changes to the complaints management process. While these changes have started to bring down the overall backlog, on current projections it will still be a number of years before complainants will no

[13] OIC Annual report 2009 and article in the West Australian "FOI appeals face up to 5-year delay" – 8 September 2009, p 16

longer need to wait an unacceptably long time to have their complaints resolved. Justice requires not only good decisions, but timely decisions. As one party to a matter before the Commissioner noted, *justice delayed is justice denied*.

Recommendations

4. Agencies should share knowledge and resources, in particular between similar agencies (such as Ministers' offices) or agencies which deal with similar subjects (such as those dealing with health), to help improve levels of quality and consistency in how the FOI Act is applied.

5. Health services in particular should investigate options for further sharing knowledge and improving the quality and consistency of FOI processing. This may include a formalised central Health FOI role, to assist and promote more consistent practice on FOI across the public health sector.

6. Agencies should be aware of the importance of complying with their obligations under the *State Record Act 2000*, particularly in relation to matters raised in the review including the management of electronic and hard copy documents.

7. Agencies should ensure that FOI decisions are made in a way which prevents inappropriate considerations from being taken into account. In some cases this may best be done by appointing a decision-maker who is not intricately involved with the subject matter of the FOI application. However, in such a case it is important that the decision-maker still liaises with officers familiar with the subject matter to ensure all relevant documents are found and considered.

8. Agencies should ensure their officers are sufficiently trained, competent and supported to be able to conduct complete searches of electronic documents.

9. Ministers may wish to explore with the Department of the Premier and Cabinet the option of a more formal shared capability to assist their offices in dealing with FOI applications, noting that responsibility for decisions on access must remain with the relevant Minister.

3.4 Assistance to applicants

The FOI Act places requirements on agencies to assist applicants to exercise their rights. These obligations include:

Section 4: Agencies are required to give effect to the FOI Act in a way that:

- assists the public to obtain access to documents;
- allows access to be obtained promptly and at the lowest reasonable cost; and
- assists the public to ensure that personal information in documents is accurate, complete, up to date and not misleading.

Section 11(2): Agencies are required to take reasonable steps to help an access applicant make an application in a manner that complies with the FOI Act.

Section 11(3): Agencies are required to take reasonable steps to help an access applicant to change an application so that it complies with the requirements of the FOI Act.

Section 13(1): Agencies are required to deal with an access application as soon as practicable.

Section 15: Agencies are required to transfer the access application to another agency (where appropriate) without delay.

Section 20(1): Agencies are required to take reasonable steps to help an access applicant to change an application to reduce the amount of work needed to deal with it.

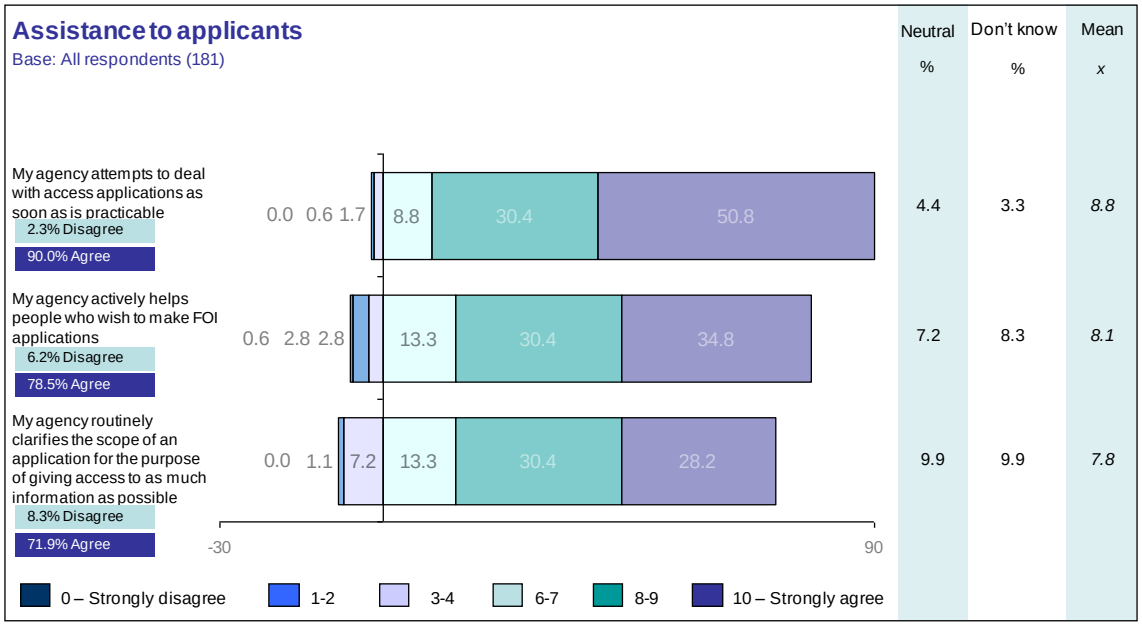
Survey results – FOI Coordinators

Overall there is a high level of agreement with each of the statements in Figure 13 relating to assistance to applicants. 90.0% of FOI Coordinators agree that their agency attempts to deal with access applications as soon as is practicable, and 50.8% selected the highest level of agreement (10 out of 10 ratings) with this statement. Figures from 2008/09[14] indicate that, on average, agencies provided notices of decision within 27 days of receiving access applications.

There is also relatively strong agreement among FOI Coordinators that their agency actively helps people who wish to make FOI applications. However, this level of agreement is lower than the preceding statement (78.5% total agreement, 34.8% 10 out of 10 ratings).

71.9% of FOI Coordinators agree that their agency routinely clarifies the scope of an application for the purpose of giving access to as much information as possible. However, it is noted that FOI Coordinators are significantly less likely to agree strongly with this statement (28.2% 10 out of 10 ratings) than with the statement relating to dealing with applications as soon as is practicable (50.8% 10 out of 10 ratings).

Figure 13: Assistance to applicants – FOI Coordinators



[14] OIC Annual Report 2009

Interviews

Interviews held with FOI Coordinators also indicated a high level of commitment from the majority of interviewees to assist applicants to gain access to the documents requested. Often this assistance is provided in a busy environment where FOI can be one of a number of functions undertaken by the FOI Coordinator and the subject of the application is complex and emotionally charged.

Public submissions

Comments received about agencies assisting applicants included:

My dealings with Government Departments have been largely satisfactory with FOI requests greeted with professionalism and efficiency

[Member of Parliament]

My complaint is not about the FOI representatives from [identity removed], I have dealt with 3 in as many months. I have found them to be polite, efficient and helpful.

[Member of the public]

Should an applicant require further assistance lodging an application (identity removed) provides any assistance necessary with regards to the identification of documents applicants may wish to apply for access to and any other part of the FOI process. The FOI Coordinators' contact details are on the website so potential applicants are able to speak directly to the [our agency's] decision maker at any time during business hours.

[Local government agency]

I worked … with (identity removed) for 18 years. Their approach was (in my view) what was intended when the legislation was introduced. (Identity removed) had a dedicated officer dealing with FOI in an attempt to ensure consistency. If the information was readily available (identity removed) did not require a formal FOI application or fee.

[Member of the public]

The approach of this agency is diametrically opposite to that of (identity removed). They will not provide any information that is not already on their website without a formal request that must be accompanied by a fee.

[Member of the public]

Discussion

As noted previously, the Commissioner considers that the first interaction between a member of the public and an agency is crucial in ensuring that justice under the FOI Act is ultimately achieved in a particular case. While it is encouraging that FOI Coordinators consider that they assist applicants to deal with access applications as soon as is practicable, the

effectiveness of such assistance in the eyes of the access applicant may not always be as high as it should. This is borne out of some of the public submissions, as well as a number of matters which come before the Commissioner on external review. Assistance to applicants is critical to the effective functioning of the FOI process within agencies, and failure properly to assist applicants can greatly affect the time required to process an application and the outcome of the decision about providing access.

There is also a relatively strong amount of agreement by agencies in regard to the statements that their agency actively helps people who wish to make FOI applications and routinely clarifies the scope of an application for the purpose of giving access to as much information as possible. However there is some concern that for both these important points in the FOI process, there are a reasonably significant number of respondents (between 21-28%) who do not agree.

The OIC considers the clarification of the scope of an application an important part of the FOI process, leading to applications being dealt with as soon as is practicable. Often problems encountered by agencies in administering FOI applications, such as dealing with large scope applications and dealing with applicants who are not sure about which specific documents they seek, could be reduced if agencies actively helped people make their FOI application and if better communication occurred between the agency and applicant. The Commissioner's experience in dealing with complaints about agencies' decisions also highlights that agencies and access applicants often have differing views about what constitutes effective and timely assistance.

In addition to assisting members of the public in relation to applications under the FOI Act, agencies should consider having an overall approach to releasing information. The Commissioner's experience in dealing with complaints has shown that agencies and applicants can often reach a win-win situation by engaging in meaningful dialogue before a FOI application is even made. If a matter can be dealt with outside the FOI Act, the applicant may get the desired documents much sooner and the agency is likely to be able to save time and effort in the process.

Recommendations

10. Agencies should engage in meaningful and early discussion with members of the public who seek information, starting before a FOI application is even made.

11. Agencies should design their customer interfaces and information management systems to enhance the ability of members of the public to obtain access to information.

12. Agencies should comply with the requirement of the FOI Act to take reasonable steps to assist access applicants to make a valid access application in a spirit of openness and transparency, and assist applicants to identify documents most likely to satisfy their requirements.

3.5 Interaction with applicant – notice of decision

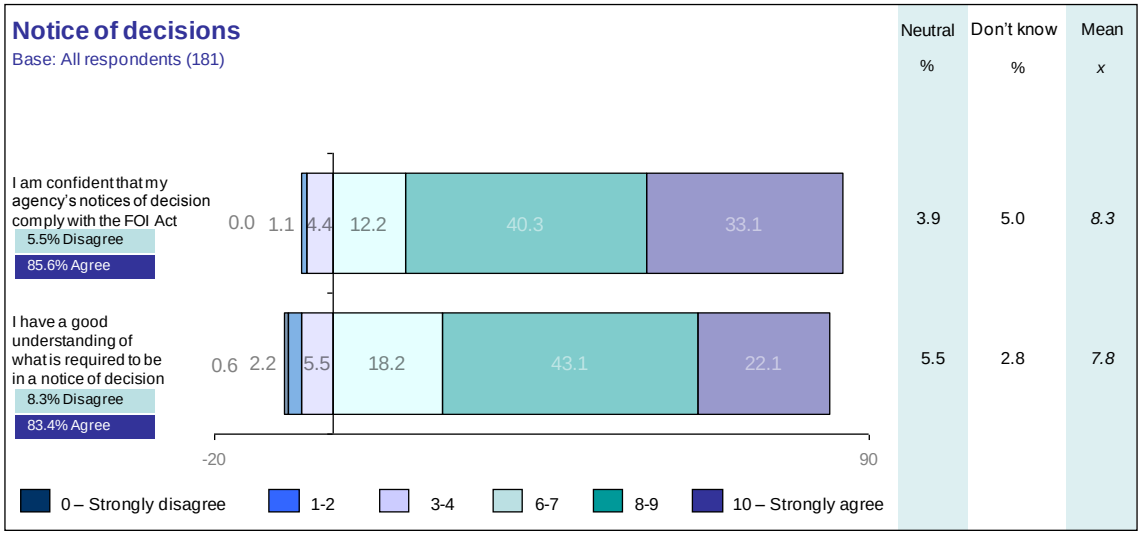
A Notice of Decision (Notice) is the primary formal communication that an agency has with an applicant regarding the decision made about their application. Notices should be clearly written and contain relevant information to assist applicants to easily understand the rationale

for the decision. In relation to an agency advising an applicant about the decision made, section 30 of the FOI Act states the requirements that should be met.

Survey results – FOI Coordinators

Survey results indicate that a high proportion of FOI Coordinators agree that they are confident that their agency's Notices comply with the FOI Act (85.6% agreement) and that they have a good understanding of what is required to be in a Notice (83.4% agreement). However it is noted that the proportion agreeing strongly ('10' out of 10) with their confidence in compliance (33.1%) is significantly higher than their understanding (22.1%). This raises the question of whether agencies' confidence may in some cases be misplaced.

Figure 14: Notices of Decisions – FOI Coordinators



Assessment of agency notices of decision

The review assessed 135 Notices from 99 agencies in relation to meeting the following requirements that should be included in a Notice:

- the date when the decision was made;
- the name of the decision-maker;
- whether exemptions were claimed, and reasons why they were claimed;
- details of whether charges were applied and what those charges comprised; and
- an explanation of the applicant's rights of review in regard to the decision.

The assessment found that for the Notices reviewed:

- 99% included the date when the decision was made.
- 93% advised the name of the decision-maker.
- 98% detailed whether exemptions were claimed, and reasons why they were claimed.
- 83% included information about the applicant's rights of review in regard to the decision.

Discussion

Overall the survey results and testing of Notices indicate that FOI Coordinators have a good understanding of the requirements for notifying an applicant about the decision made in relation to their application.

Under section 30(h) of the Act, all Notices are required to include advice about the applicant's right to have the decision reviewed, and whether nil, edited or full access is granted.

Significantly, of the sample Notices tested (135 Notices from 99 agencies) 17% did not include advice about a right of review being communicated to the applicant. When this 17% is applied across the total number of FOI applications where decisions were made by agencies in 2008/09, this equates to potentially around 1,900 applicants being denied a right to review. The OIC believes the reason for this oversight may be due to some agencies incorrectly being of the understanding that because they have released documents to an applicant, they are not obliged to advise the applicant of their right of review.

Section 30(g) of the Act states *if the decision is that the applicant is liable to pay a charge to the agency – the amount of the charge and the basis on which the amount was calculated* should be included in the Notice. Because the FOI Act only requires reference in a Notice if a charge is to be applied, on the sample received from agencies the testing undertaken could not ascertain a level of compliance with this requirement, as it was not known whether charges applied or not to each example in the review sample. However, it was noted there was considerable inconsistency in regard to how agencies reported fees and charges in Notices. Agencies should be clear in their Notices about what fees apply, whether charges were applied or not and if charges were applied, the amount of the charge and the basis on which it was calculated.

While the FOI Act does not stipulate a particular format for Notices, the review highlighted the variations in the approaches taken by agencies in the format of their Notice to applicants, with some being assessed as good and others poor and lacking adequate detail.

Information gathered during the review, together with the Commissioner's experience in dealing with external review of agency decisions, highlight particular shortcomings in the following areas:

- Some Notices claim that a document is exempt but do not consider all elements of the exemption. An example of this is where an agency claims that a document is exempt under clause 6 of Schedule 1 to the FOI Act because its disclosure would reveal certain information which has been prepared in the course of a deliberative process of an agency. To make out the exemption, a Notice also needs to demonstrate that disclosure of such information would be *contrary* to the public interest. This is not always done.
- Where an agency claims an exemption, section 30 requires the Notice to give details on the findings of material questions of fact underlying the reason why the agency claims the exemption applies. In some cases, a Notice will simply assert that a document is exempt under a particular exemption clause without identifying those material questions of fact.
- In many cases, it is desirable for a Notice to provide full details of the searches undertaken by the agency to find the requested documents. This will allow an access applicant to make an informed decision about whether to ask for a review of the

agency's decision on the basis that further documents exist which fall within the scope of the application.

Recommendation

13. Agencies should ensure Notices of Decision comply with all the requirements of section 30 of the FOI Act.

3.6 Proactive publishing of information

In the OIC annual report 2008/09, the following view was expressed by the Commissioner:

Information available to me indicates a high level of technical compliance by agencies in respect of their obligations under the Act. However, based on information gathered through the external review process, *I am growing concerned that this is not always done in the spirit which Parliament originally envisaged. This concern is based on a number of observations. The first is that some agencies appear to view the Act as the primary or sole mechanism for making government information available. The Act itself makes it clear that it is not intended to discourage agencies from making information available outside the processes prescribed by the Act, if this can properly be done. I believe that in many cases, an administrative process for making information available to the public, either proactively or on request, is preferable to making such information available only under the freedom of information process.*

Section 3(3) of the Act states:

Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access *to documents (including documents containing exempt matter), or the amendment of personal information, otherwise than under this Act if that can properly be done or is permitted or required by law to be done.*

With the ever increasing type and amount of information produced and received by public sector agencies, agencies periodically reviewing what information they hold and how they make relevant information available to the public, is considered good practice in information management, and contributing to FOI principles of promoting openness, accountability and transparency in the public sector. The OIC also considers that the use of technology to assist in the assessment and management of information can provide opportunities to decrease workload for agencies in regard to FOI.

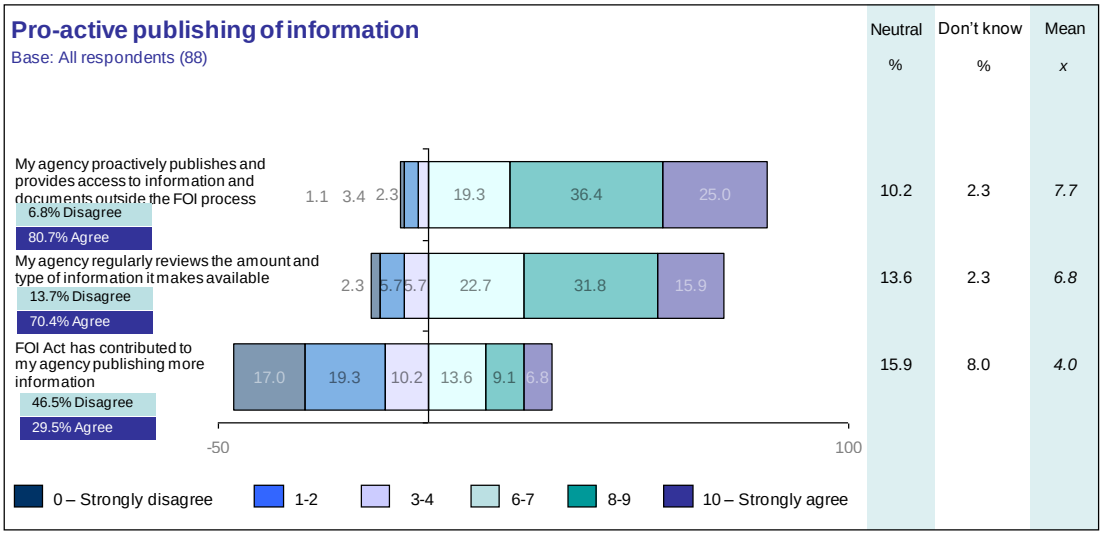
Survey results – Ministers/CEOs

80.7% of Ministers/CEOs agree that their agency proactively publishes and provides access to information and documents outside the FOI process, and 25.0% agree with this statement strongly. This corresponds with the relatively high proportion disagreeing that the FOI Act has contributed to their agency publishing more information than would have occurred without the FOI Act, with close to 46.5% disagreeing with this statement. The following verbatim comment received helps explain this whereby openness, accountability and publishing information outside the FOI process can be expressed as a method to avoid FOI requests:

Our approach is to be as open and accountable as we can with information in order to avoid any FOI requests.

Regular agency review of the amount and type of information it makes available to the public is less frequently agreed with 70.4% total agreement, and 13.7% recording disagreement with this statement.

Figure 15: Proactive publishing of information – Ministers/CEOs

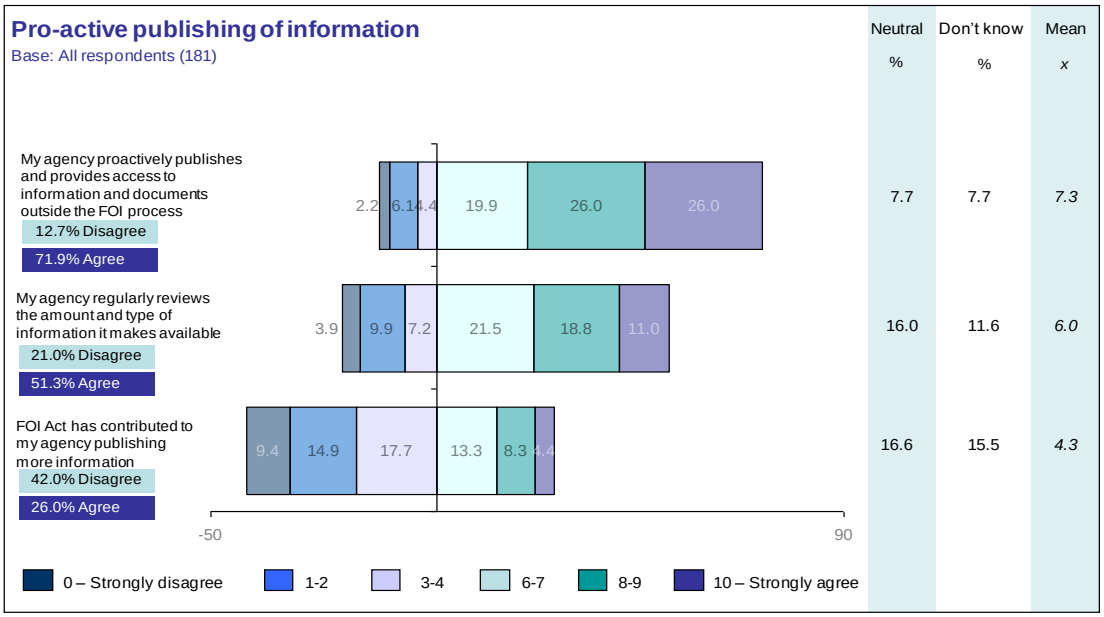


Survey results – FOI Coordinators

71.9% of FOI Coordinators agree that their agency proactively publishes and provides access to information and documents *outside* the FOI process. However the FOI Act has not necessarily contributed to agencies publishing more information, with more disagreeing (42%) than agreeing (26%) with this statement, and the remainder either neutral or unsure.

51.3% of agencies agree and 21.0% disagree they regularly review the amount and type of information they make available, with the remainder either neutral or unsure.

Figure 16: Proactive publishing of information – FOI Coordinators



Public submissions

Our approach is to be as open and accountable as we can with information in order to avoid any FOI requests.

[CEO/Minister]

(Identity removed) fully endorses the view that information should be provided proactively or promptly on request by agencies rather than being prompted to release information in response to FOI applications.

[Media body]

Agencies should place less emphasis on compliance with procedure and should instead facilitate the information transfer process by subscribing to a culture of active disclosure.

[Media body]

Discussion

It is encouraging that 80.7% of Ministers/CEOs and 71.9% of FOI Coordinators agree that their agency proactively publishes and provides access to information and documents outside the FOI process. However, there is a significant difference between Ministers/CEOs (70.4%) and FOI Coordinators (51.3%) in regard to their total agreement about whether their agency regularly reviews the amount and type of information it makes available to the public. While there is no statutory requirement for an agency periodically to review the information it makes available to the public, the OIC suggests it would be beneficial to do so and this could form part of meeting the requirements of section 94 of the FOI Act dealing with Information Statements.

While being mindful of the intent of section 3(3) of the Act and the limitations of publishing information that may contain reference to personal, commercial or contractual matters, agencies are encouraged to view FOI as a last resort for citizens to access information, and proactively to consider what information they publish outside the FOI Act

Recommendations

14. Agencies should, unless there is a good reason not to, disclose information on request without requiring a formal FOI application and should investigate means of more proactive, automated and timely disclosure of information, particularly through websites, using information stored in electronic records management systems and other records databases.

15. As part of their annual review of Information Statements, agencies should periodically review what information they routinely make available to the public outside the FOI process.

3.7 Factors influencing decisions

Decisions made in agencies about FOI applications are subject to the specific requirements of the FOI Act. These include matters such as exemptions and the rights of third parties which provide limits on the release of documents to an applicant. In relation to the requirements of the FOI Act, individuals within agencies who are FOI Coordinators and/or Decision-makers are also required to make a judgment about each application they receive.

A review[15] conducted in Canada of the federal statute, the *Access to Information Act* which was adopted in 1982 stated:

Coordinators, or other officials with delegated authority, are administrative decision-makers when they decide on a right conferred by the Act. [T]heir decision has to be made fairly and without bias. Neither decisions on disclosure nor decisions on the timing of disclosure may be influenced by the identity or profession of the requester, any previous interactions with the requester, or the intended or potential use of the information.

In regard to the deliberation and judgments made by Ministers, agency CEOs, FOI Coordinators and decision-makers, survey participants were asked to rate a series of statements in relation to their perceived influence on a decision in their office/agency about giving access to a document under FOI.

Survey results – Ministers/CEOs

Third party information

The two strongest factors in terms of influence in the decision making process relate to third party information:

– *Privacy of third parties* (47.7% 10 out of 10 agreement, 92% agree overall)

– *Commercial or business information of third parties* (42.0% 10 out of 10 agree, 87.4% agreement overall)

The right to information

The 'right to know' is also a key decision influencer:

– *The applicant's right to know* (31.8% 10 out of 10 agreement, 86.4% agree overall)

– *The public's right to know* (30.7% 10 out of 10 agreement, 84.4% agree overall)

Dealing with individuals

46.6% do not agree and 36.4% agree that *history of past dealings with the applicant* have an influence on a decision in their office/agency to give access to a document under FOI.

Cost and effort required

55.6% disagree and 34.1% agree that the *cost and effort of dealing with the application* can influence their decision.

[15] Access to Information review Task Force 2002: 124.

Potential for fall-out and litigation

The perceived potential for fall-out and litigation are significantly less likely to be agreed with in terms of their likelihood to influence a decision in their office/agency about giving access to a document under FOI.

However, of the statements which related to fall-out and litigation, the *potential for litigation against their office/agency* is the most frequently agreed with (33% agree it has an influence) and there are significantly few who report that it has 'no influence' (20.5% no influence) compared to the other statements relating fall-out and litigation which refer to fall-out for their agency's governing body, the government, the Minister and themselves.

Political fall-out for themselves is the most disagreed-with statement in terms of its potential to influence a decision in their office/agency about giving access to a document under FOI, with three quarters (73.9%) disagreeing.

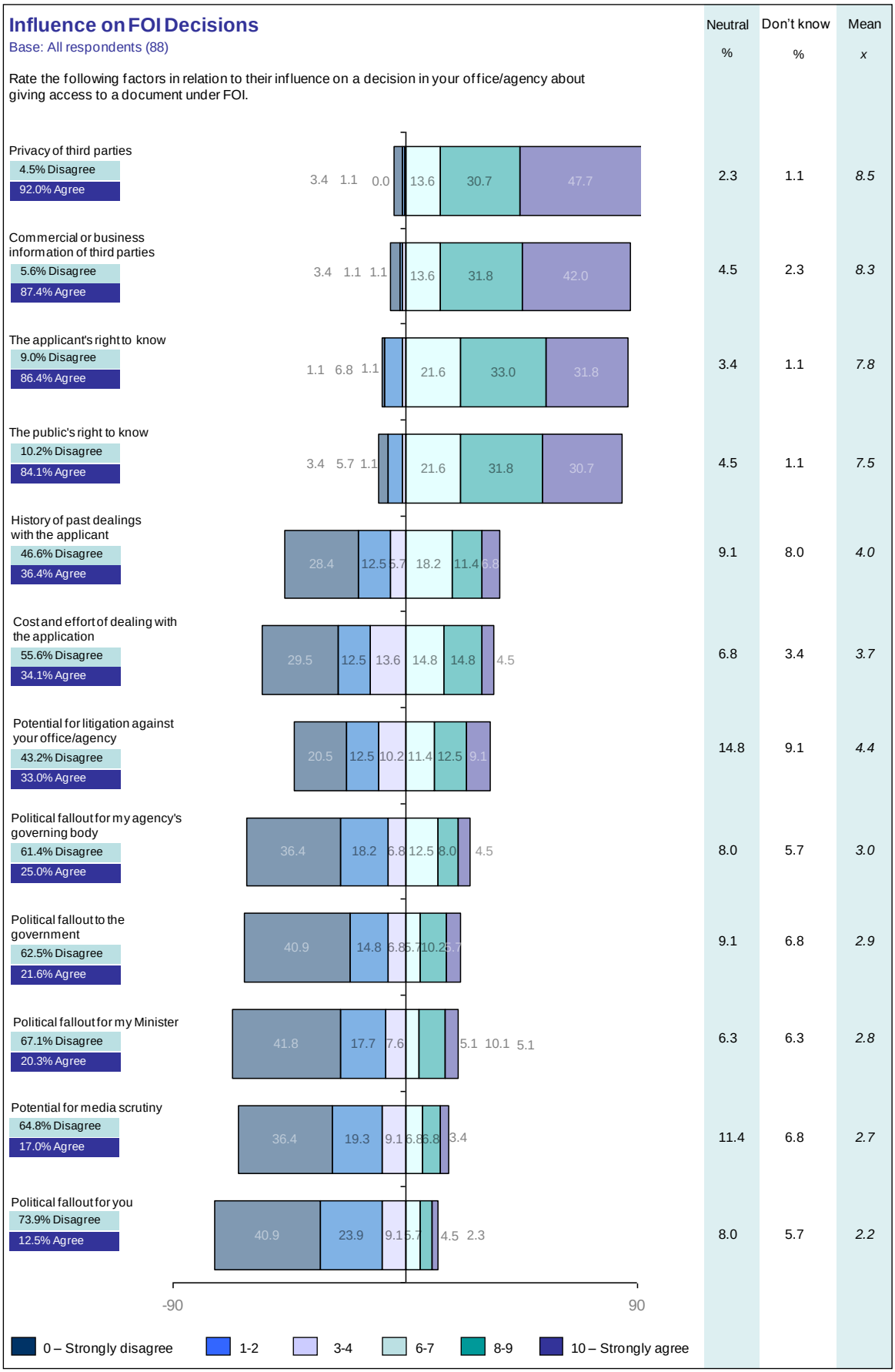
Overall, there is a high level of consistency between agency types and agency sizes in terms of the factors that influence FOI decisions.

Ministers are less likely to agree than local government and State public sector that an *applicant's right to know* and the *public's right to know* influences their agency's decision in giving access to a document under FOI. Conversely, Ministers are more likely than local government and State public sector to agree (albeit from a small sample size) that *history of past dealings with the applicant* will influence a decision in their office/agency about giving access to a document under FOI.

As may be expected, smaller agencies (0-49) are more likely to agree that the cost and effort involved in giving access to a document under FOI will influence their decision. Conversely, Ministers and larger agencies are more likely to agree that the potential for litigation influences their decision in their office/agency about giving access to a document under FOI.

Political fall-out to the government is least likely to be agreed with at the local government agency level. Larger agencies are significantly more likely to say the potential for media scrutiny impacts their decision about giving access to a document under FOI (27.6% agree), however, most agencies still rate it as having little or no bearing on the decision.

Figure 17: Influence on FOI decisions – Ministers/CEOs



Survey comments – Ministers/CEOs

My only concern re FOI is the sad reality of deviousness where the aim is to look for means of personal gain or to look for loop holes to avoid responsibility. FOI is good, sometimes people and motives are not.

[There needs to be a] development of Whole of Government processes for dealing with nuisance applications.

The only purpose that FOI has been used within my organisation is by subjects of professional complaints who are dissatisfied with the outcome of the complaint against them. Invariably, there is significant time, resource and money spent on compliance which serves no constructive purpose – especially in providing benefit to the public.

Survey results – FOI Coordinators

Of the prompted list of factors, privacy of third parties was the most frequently agreed with factor that can influence decisions within an office/agency. Overall, three quarters (77.9%) of FOI Coordinators agree this factor has an influence, and 38.7% select the highest level of agreement (10 out of 10).

The applicant's right to know, and the public's right to know also record high proportions of agreement that they can influence decisions within an office/agency (64.6% and 55.2% respectively). As shown, the applicant's right to know is more strongly agreed with than the public's right to know.

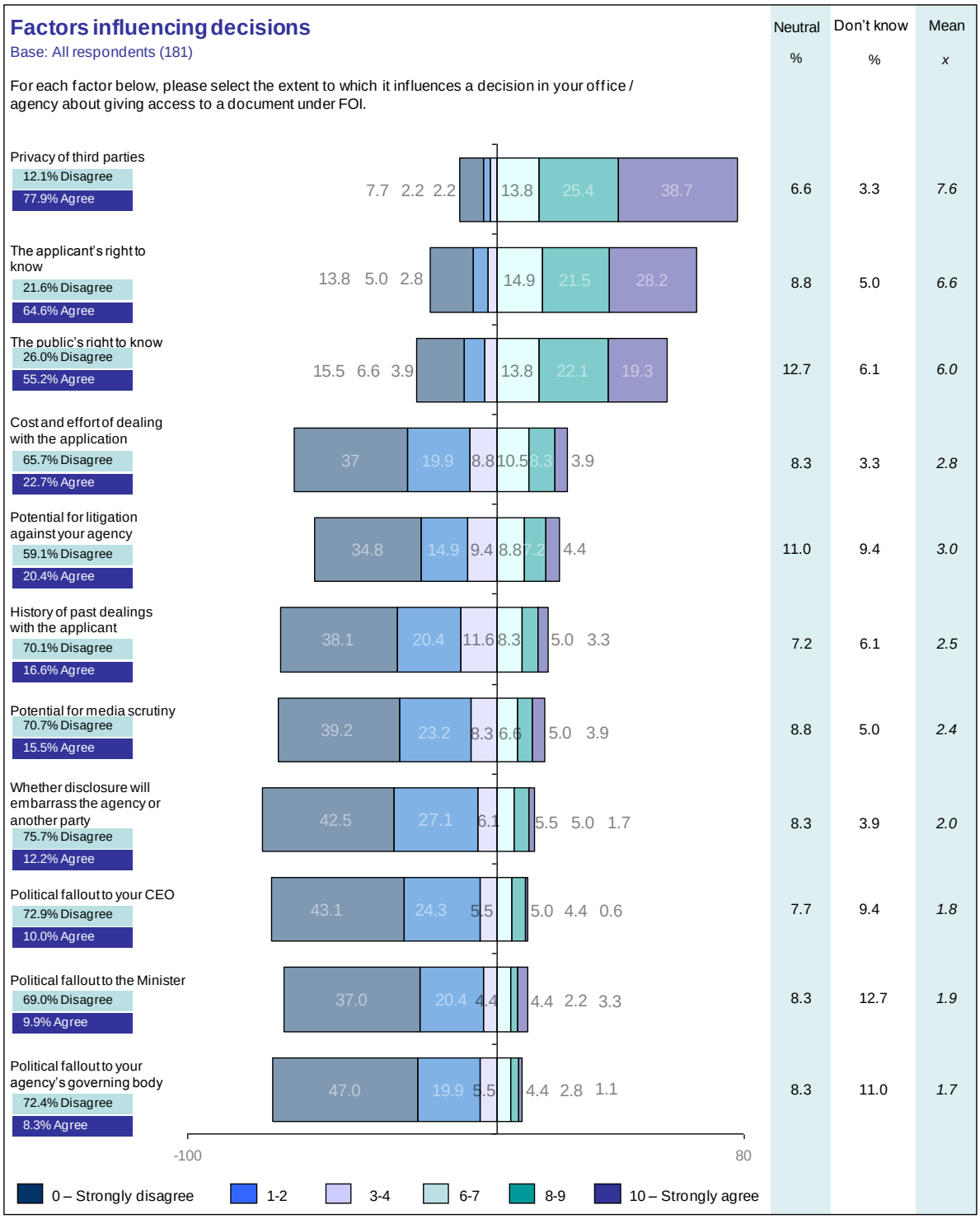
Overall, there are significantly more FOI Coordinators who disagree (65.7%) than agree (22.7%) that the cost and effort of dealing with the application influences the decision to give access to a document under FOI. In fact, 37.0% indicate the strongest level of disagreement (0 out of 10) with this factor.

There are also significantly more FOI Coordinators who disagree than agree with all other factors prompted:

- *Potential for litigation against your agency* (59.1% disagree, 20.4% agree)
- *History of past dealings with the applicant* (70.1% disagree, 16.6% agree)
- *Potential for media scrutiny* (70.7% disagree, 15.5% agree)
- *Whether disclosure will embarrass the agency or another party* (75.7% disagree, 12.2% agree)
- *Political fall-out to your CEO* (72.9% disagree, 10.0% agree)
- *Political fall-out to the Minister* (69.0% disagree, 9.9% agree)
- *Political fall-out to your agency's governing body* (72.4% disagree, 8.3% agree)

As referenced above, one in six (16.6%) FOI Coordinators agree that history of past dealings with the applicant can influence a decision within their office/agency about giving access to a document under FOI. On average, this factor rates as only 2.5 out of 10 and is therefore considered low, however, several of the open-ended responses indicate the potential reasons why past dealings with an applicant can impact.

Figure 18: Factors influencing decisions – FOI Coordinators



Survey comments – FOI Coordinators

The FOI Act does not allow for commonsense treatment of vexatious applications. After a certain number of applications on the same subject, the agency should have the right to refuse to respond further.

I believe that FOI provides accountability and transparency but there needs to be more protection from FOI applications that seem to be purely vexatious in nature that wastes limited resources especially in a small agency.

Discussion

The responses received from Ministers/CEOs and FOI Coordinators provide an insight into the factors influencing FOI decision-making across agencies. These results should be of interest to Ministers/CEO and FOI Coordinators as they are a barometer of various influences that are encountered by, and affect, FOI Coordinators and decision-makers in undertaking their roles in the administration of FOI.

The results highlight the complexity of administering FOI applications and there are subjects that play more of a role than others in the FOI decision-making process within agencies. It is also important to acknowledge that some FOI applicants can be very difficult or unreasonable to deal with.

The responses for some questions received from Ministers/CEOs in comparison to those received from FOI Coordinators were markedly different for some questions. This was not completely unexpected given the different roles and positions held in each agency. However the results and significance of the difference in the results for some questions were surprising, for example:

- 64.6% of FOI Coordinators compared to 86.4% of Ministers/CEOs agreed that *the applicant's right to know* influences a decision in their office/agency about giving access to a document under FOI;
- 55.2% of FOI Coordinators compared to 84.1% of Ministers/CEOs agreed that *the public's right to know* influences a decision in their office/agency about giving access to a document under FOI; and
- 70.1% of FOI Coordinators compared to 46.6% of Ministers/CEOs disagreed that *history of past dealings with the applicant* influences a decision in their office/agency about giving access to a document under FOI.

The above results are a reminder that administering FOI can be very challenging, and that vigilance in regard to remaining objective in the assessment and decision-making processes for FOI is paramount, if public confidence in the process is to be maintained.

The survey results also identify areas where the Commissioner needs to focus his awareness-raising activities to ensure that inappropriate considerations do not form part of agency decision-making. Examples of this include the potential for political fall-out or litigation. While the survey results in this regard show that most agencies do not take these factors into account, a small number of agencies do. Arguably, the survey results could only be considered truly acceptable if the proportion of agencies which take these matters into account is zero.

Ultimately, agencies need to be reminded that in dealing with a FOI application, they are making administrative decisions under legislation passed by the Parliament on behalf of all Western Australians. Parliament has seen fit to grant members of the public a right to access government documents subject only to those exemptions expressly provided in the FOI Act itself. Other considerations are not relevant. Agency decisions need to reflect this.

Recommendation

16. Agencies should be mindful that, in dealing with FOI applications, they are making administrative decisions under legislation passed by the Parliament, and that matter is only exempt from disclosure if one or more of the exemptions in the Act is fully made out.

3.8 Third parties

The consideration of the rights of third parties in an FOI application is an important part of the FOI process. Failure properly to assess applications to identify third parties and take action to consult them when required, may contribute to a breach of the FOI Act.

It is not a requirement under the FOI Act to consult with third parties simply because a document contains personal or commercial or business information. The requirement only arises where an agency proposes disclosure of such third party information. A considerable amount of time can be saved in processing an FOI application if agencies consult with an applicant at the commencement of the FOI process about whether they require third party information. This is another reason why agencies should engage early and meaningfully with access applicants to try to find a win-win situation, rather dealing with a FOI application as purely an administrative process.

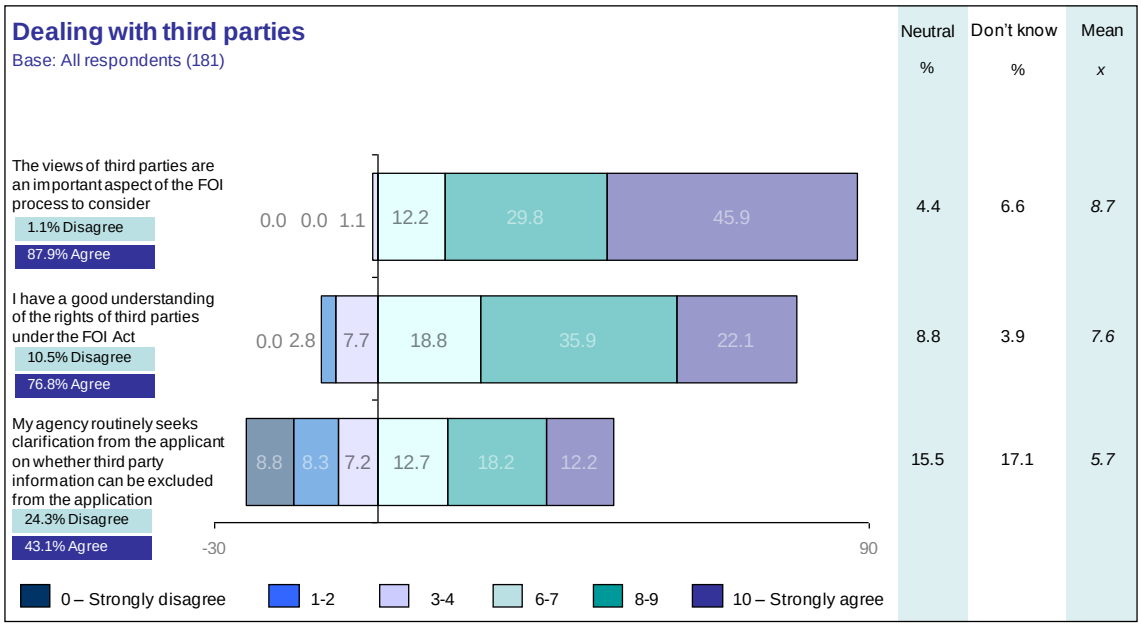
Survey results – FOI Coordinators

The views of third parties are agreed as an important consideration. 87.9% FOI Coordinators agree that the views of third parties are an important aspect of the FOI process to consider, and close to half (45.9%) give the highest level of agreement possible (10 out of 10).

By comparison, a significantly lower proportion agree (both in terms of 'total agreement', and the proportion indicating 10 out of 10) that they have a good understanding of the rights of third parties under the FOI Act, but 76.8% of FOI Coordinators still agree with this statement and the average is 7.6 out of 10.

43.1% of FOI Coordinators report that their agency routinely seeks clarification from the applicant on whether third party information can be excluded from the application, and 24.3% disagree with this statement (with the remainder neutral or unsure).

Figure 19: Dealing with third parties – FOI Coordinators



By sub-group – third party information

Analysis by sub-group showed the following:

– Agencies who received no FOI applications in 2008/09 rate lower on their understanding of the rights of third parties under the FOI Act (6.1 out of 10, compared to averages of 7.8 and above for agencies receiving larger volumes of applications). There is also a directional relationship between agency size and understanding rights of third parties. Averages increase with agency size – 6.6 for agencies with fewer than 50 employees, 7.7 for those with 50 to 499 employees, and 8.8 for those with 500 or more employees.

– Relatively low averages of 5.5 and 5.7 were recorded for the local government and State public sector about whether their agency routinely seeks clarification from the applicant on whether third party information can be excluded from the application.

Survey comments – FOI Coordinators

In the Public Health Sector many access applications are from hospital patients who seek access to personal information of their treatment as recorded in medical records. Most hospitals have insufficient FOI resource to remove non-personal information from these records or consult with the third parties whom this non-personal information is about (medical/allied health staff). Consequently access is provided to many medical records without consultation of third parties as is required under the FOI Act.

This issue could be addressed by removing the requirement to consult with third parties in such situations where the third party has no reasonable grounds to object to disclosure of their details (i.e. when performing their duties as a public officer). An informed and experienced FOI Coordinator could identify the rare occasions when third party issues may arise (e.g. public safety concerns in disclosure of mental health information). Generally, the need to consult with third parties when the information about them that is subject to access concerns the discharge of their public service duties should be reviewed.

Interviews

FOI Coordinators from four health service agencies commented about the difficulties they experienced in dealing with the rights of third parties in applications. Issues raised included the following:

- Third party information in the health environment can be complex and time consuming to manage because of the nature of subject matter and the volume of information involved.
- Some health services staff are not consulted where they are named in documents that are the subject of a request.
- It is not practical to edit out nurses' and doctors' names, and some health agencies don't do this.
- Health records are much more complex than other agencies and the hospital could not deal with current numbers of requests if they had to consult with every third party mentioned in a requested document.
- Third parties are not consulted because practicality and time wouldn't allow, but the health service is aware this approach does not comply with the Act.

Public submissions

The general public has a misconception about the principles of rights to information with the associated exemptions under the Act, especially personal information about third parties. This becomes difficult to explain when the applicant and the third party are known to each other. The (identity removed) endeavours to explain the reasons and consult with each to reach an amicable outcome to the application within the requirement of the Act.

[Local government agency]

The slowest part of the process is consultation with third parties……requirement sometimes borders on the absurd.

[Public sector employee]

Currently, the Act is silent on whether the identity of the applicant can be disclosed to third parties in the course of third party consultation. (Identity removed) acknowledges that there can be very good reasons behind an applicant's wish to remain anonymous. However it is difficult to explain to a third party that they have no right to know who may end up being provided copies of documents concerning them. This is most common when the applicant is a landowner making an acquisition compensation claim against (identity removed) and is interested in finding out how (identity removed) has approached similar claims with other landowners. The landowner's identity can be determined from land title details even when their name is removed for released documents and not all information is capable of being subject to exemptions.

[Public sector agency]

It is invariably easier to conduct third party consultation when the applicant's name can be disclosed to the applicant. Any means by which applicants could be encouraged to consent to have their name disclosed to third parties on request would be beneficial to the overall operation of FOI from (identity removed) point of view. However, (identity removed) appreciates there are potential problems that could arise if applicants who don't consent to the disclosure of their names are seen to be open to disadvantage.

[Public sector agency]

Discussion

While it is encouraging that 87.9% of the FOI Coordinators agree that the views of third parties are an important aspect of the FOI process to consider, the FOI Act itself makes it clear that the rights of third parties are a key consideration in the administration of FOI. This essentially requires *all* FOI Coordinators to consider such rights as an important aspect of the FOI process.

Some FOI Coordinators' understanding of the rights of third parties under the FOI Act needs to improve, particularly in small to medium-sized agencies, where a significant 23.2% of respondents were in the *disagree/neutral/don't know* category on this point.

Given the potential savings in time and resources to agencies by proactively engaging applicants about whether they require access to third party information, it is also surprising that only 43.1% of FOI Coordinators report that their agency routinely seeks clarification about whether third party information can be excluded from an application.

Recommendation

17. Agencies should routinely ask applicants whether they consent to third party information being removed from the scope of applications, to encourage faster disclosure of documents.

3.9 Exemptions

Exemptions in regard to FOI applications are described in Schedule 1 of the FOI Act and afford protection to certain public and private interests.

In accordance with the general right of access to documents stated in the FOI Act, exemptions should not be claimed by agencies unless there are valid reasons to deny access to the particular request.

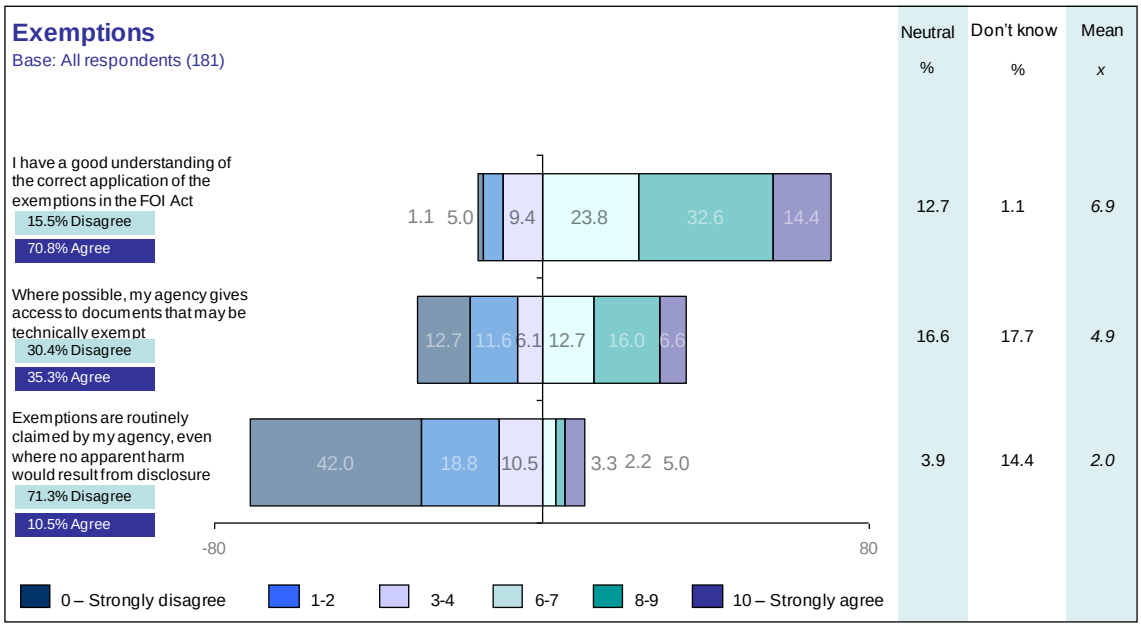
Survey results – FOI Coordinators

70.8% of FOI Coordinators agreed they have a good understanding of the correct application of the exemptions in the FOI Act. While still high, this is significantly lower than the proportion who agreed they had a good understanding of what is required to be in a Notice of Decision (83.4%) by way of comparison. Some of the verbatim comments received help explain this result.

Agreement with the statement that, where possible, their agency gives access to documents that may be technically exempt is relatively low – with a roughly equal proportion agreeing (35.3%) as disagreeing (30.4%), a high level of neutrality (16.6%) and a high proportion of

uncertainty (17.7%). Few FOI Coordinators agreed that exemptions are routinely claimed by their agency, even where no apparent harm would result from disclosure (71.3% disagree, 42.0% 0 out of 10).

Figure 20: Exemptions – FOI Coordinators



By sub-group – the handling of exemptions

The average scores on the questions regarding exemptions reveal the following:

– Agencies who received no FOI applications in 2008/09 record lower averages in terms of their understanding of the correct application of exemptions while those with more than 20 applications record higher averages (averages of 5.6 out of 10 and 8.1 respectively).

– There is a relationship between agency size and understanding of the correct application of exemptions, with larger agencies having a better understanding. Agencies with fewer than 50 employees recorded an average of 5.8, compared to 7.1 for agencies with 50 to 499 employees, and 8.2 for agencies with 500 or more employees.

– In relation to their understanding of the correct application of exemptions, the averages reported were by agency sub-group; Ministers' offices (5.9), Local government (6.5) and State public sector (7.3).

Survey comments – Ministers/CEOs

The process is very time consuming. The exemption provisions in the Act need to be clearer.

I think it would be helpful to have more information sheets available from the OIC addressing exemption clauses, in plain simple language. A lot of people who process applications have no legal experience in interpreting an Act or applying a previous Commissioner's decision. Simple leaflets giving information would be helpful (e.g. Clause 3 Personal Information): Personal information can include people's names, their home addresses (but not their work addresses unless it is also their home address); personal mobile phone numbers, signatures, bank details, handwriting ... etc. Where the identify (sic) of a person could be interpreted from the content of the document the entire document may be exempted. Would be helpful too

if such leaflets referred you to specific Decisions of the Commissioner to read and/or cite in the Notices of Decision.

Survey comments – FOI Coordinators

Much more training needs to be given. Better written instructions for exemptions.

Additional information about what constitutes 'Personal Information' and when exemptions in general can be applied would be helpful.

Public submissions

Necessarily balanced against the public right to access information under the FOI Act, as the FOI Act expressly acknowledges is the range of exemptions it contains, among other things the need for government to preserve the integrity and confidentiality of certain information in order to govern effectively and the public's right to privacy.

[Private sector body]

The Act is very useful for agencies which wish to withhold information as there are so many exemptions available that the nuts and bolts of the Act is much more about withholding information than about releasing it.

[Member of the public]

Discussion

The application of exemptions to particular factual circumstances can be difficult, and it is not surprising that the percentage of FOI Coordinators who agree (70.8%) they have a good understanding of the correct application of the exemptions in the FOI Act, is relatively low compared to the proportion who agreed (83.4%) they had a good understanding of what is required to be in a Notice of Decision (refer to 3.5) or confidence reported (80.7%) in applying the overall requirements of the FOI Act (refer to 3.3). Experience of the OIC in conducting external reviews also indicates that agencies do not always apply all necessary elements to justify an exemption.

The application of exemptions is a very important aspect of the administration of FOI, and requires an increased focus of the OIC to improve the understanding of FOI Coordinators in sub-group agencies that reported a relative poor understanding of this subject.

Section 23(1)(a) of the FOI Act provides that agencies may refuse access to an exempt document. It does not provide that an agency shall refuse access. While section 76(4) of the FOI Act provides that the Commissioner does not have the power to order the disclosure of an exempt document, agencies should consider disclosing exempt matter unless they have reason to believe that an adverse effect would come from such disclosure. Sections 104 to 107 of the FOI Act provide agencies and their officers with certain protections and immunities in relation to decisions made by them in good faith under the Act.

Recommendations

18. Agencies should consider disclosing exempt matter in circumstance where no harm is likely to result, noting the protections and immunities provided in the FOI Act for decisions made in good faith. Agencies would need to make their own judgment as to when this is appropriate in any given case, and should take into account balancing factors such as the impact on third parties.

19. Agencies should ensure they are trained on the correct application of exemptions.

3.10 Fees and charges

It is not uncommon for a significant amount of time and effort to be committed by agencies to managing FOI requests. However it is apparent that Parliament did not intend that a cost recovery system would apply to the administration of FOI. Section 4 (b) of the FOI Act also provides that applicants are entitled to have access to documents at the *lowest reasonable cost.*

The *Freedom of Information Regulations 1993* include a schedule of fees and charges payable under the FOI Act for access to documents containing non-personal information[16], and as described under section 12(e) of the FOI Act and within the regulations, an application fee of $30 is payable for making a valid access application.

Agencies have discretion to impose charges. In many instances charges do not reflect the actual cost of managing a request, are significantly reduced or are not applied at all.

The general view about the application of any charges for access since the inception of the FOI Act in 1992 is that they must be reasonable and that estimates of charges should not be made as a deterrent to access.

Survey results – FOI Coordinators

Overall, there is a high level of agreement in terms of compliance, with 81.8% agreeing that the fees and charges applied by their agency comply with the requirements of the Act, 49.7% selecting the highest rating possible (10 out of 10) and there is an average of 8.9 out of 10.

There is also high agreement in terms of FOI Coordinators' understanding of fees and charges, with 85.1% agreeing that they understand when an application fee is applicable (an average of 8.3 out of 10) and 83.4% agreeing that they understand when charges may be imposed (an average of 8.1 out of 10).

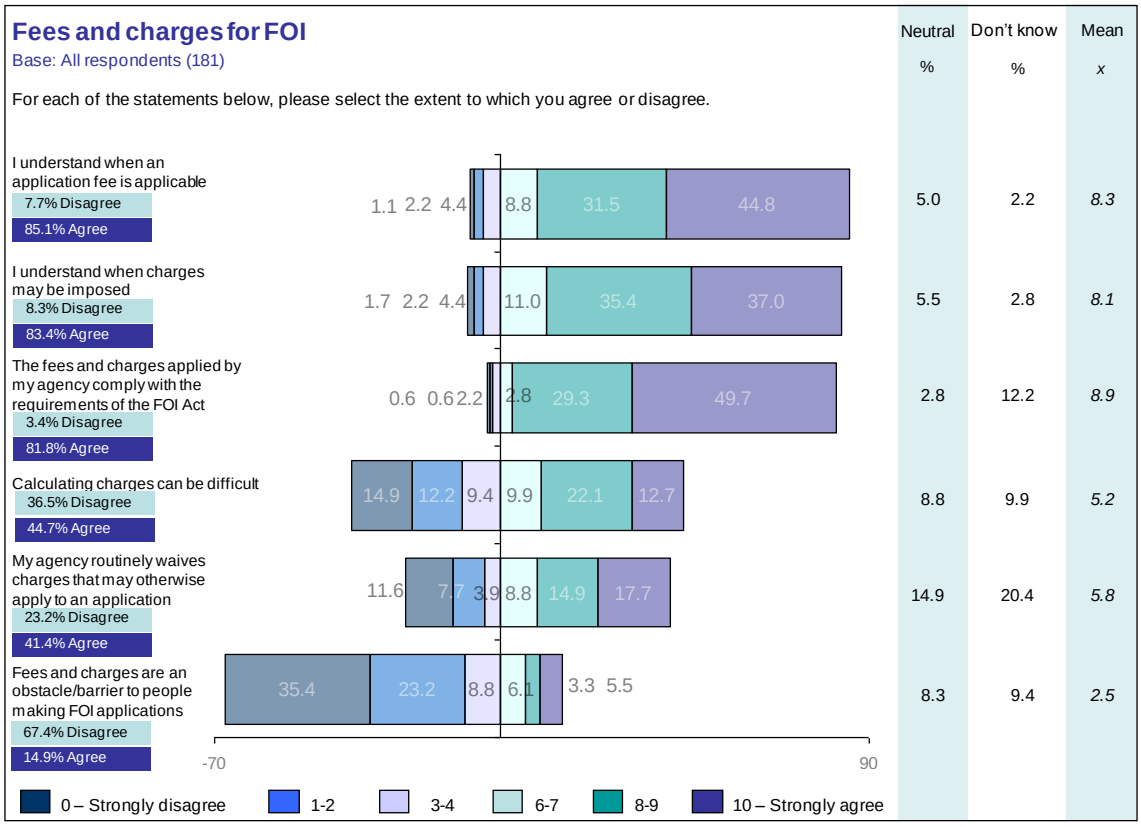
There is less consensus in terms of perceived ease of calculating fees and charges, with 44.7% of FOI Coordinators agreeing that calculating charges can be difficult, whereas 36.5% disagree with this statement. However the majority of FOI Coordinators do not perceive fees and charges to be an obstacle/barrier to people making FOI applications with 67.4% disagreeing that fees and charges are an obstacle/barrier, 35.4% selecting the highest disagreement possible (0 out of 10) and an average of 2.5 out of 10.

[16] No fees or charges are payable where an applicant only seeks access to personal information about themselves.

41.4% of FOI Coordinators agree that their agency routinely waives charges that may otherwise apply.

In 2008/09, 144 agencies collected application fees for FOI applications. Of these, 58% were assessed as having occurrences of not applying the correct fee and 59 (41%) applied charges. The lowest total of charges applied for the year for one agency was $5.00 with a total of 5 applications. The highest total of charges collected for one agency was $52,176 with a total of 1,847 applications (average $28 per application).

Figure 21: Fees and charges for FOI – FOI Coordinators



Survey comments – Ministers/CEOs

Application fee is unrealistic to determine scope. Fees that can be charged are unclear and not equitable, e.g. cannot charge for finding documents which can take up considerable time.

The agencies should be able to be better compensated for the amount of work that requires an FOI.

I wonder if the fees associated with lodging and processing applications should be reviewed every few years? Obviously the costs are set to enable the public to access information without prohibitive costs, but it does end up costing the Agency a lot more than what is charged to the Applicant. Not talking about a significant hike in charges, but perhaps $35 instead of $30 to lodge, and 40c/page for copying rather than 20c/page etc. Also suggest the requirement to provide an Estimate of Cost if anticipated being over $25 increased. We find almost every application is going to fall over $25, even for a few documents.

Survey comments – FOI Coordinators

I believe the fee structure should be reviewed. The legislation has now been in for 18 years without any changes.

The fees have been charged are not sufficient enough. My suggestion is to raise the fees up to $40 for an application.

Consideration to be given re charges as lawyers are charging clients for the information but the agency is doing all the work and not charging. The FOI Act needs to allow for the nature of medical information requests as most are sensitive and complex in nature.

The FOI Act has been used in certain circumstances as a tool of harassment, rather than as a tool to release information. If possible, consideration would be appreciated for a separate schedule of charges where a lawyer has made an application.

I feel that there should be set guidelines for the calculation of charges so that there is consistency across all agencies since some applicants lodge requests with several different agencies.

Perhaps it's time to consider increasing the FOI fees and charges in line with CPI. These have remained the same since 1993. Also, I think the Act should be amended so that the applicant has 30 days from the date of the Decision to apply for an internal review. It currently reads that applicants have 30 days from receiving the Decision to apply. The Act also states that the agency has 15 days to respond to an internal review. I find this too short a timeframe to provide a response, especially in circumstances where there's a large number of documents involved and third parties to contact. I realise that you can negotiate with the applicant for more time, however I feel that 15 days is not enough and I would suggest 30 days would be better.

Public submissions

In the case of the (identity removed) the fee was simply used as a barrier to prevent me obtaining the information I sought.

[Member of the public]

However, I seek to draw your attention to the thousands of households who can't pay on time for electricity, gas and/or water. People of these householders would have no chance of affording a FOI fee. Despite the mining booms stories, I ask that you be aware that lots of people are doing it very tough out there in WA. Please allow me to comment on the poverty and homelessness in WA as it is highly unlikely that the effected parties will be contacting you in numbers. Yet, notionally at least, these people should have FOI available to them too.

[Member of the public]

(Identity removed) is reluctant to charge for copies of documents nor the costs of searching for them. The main reasons for this are:

a) not wishing for there to be a monetary barrier to people applying for information;

b) in the case of smaller applications, the administrative cost in issuing invoices and processing payments for the amounts of money involved;

c) in the case of larger applications, the difficulty in accurately estimating the costs involved in advance for the purposes of section 17 of the FOI Act where a similar search as not been made previously;

d) the Information Commissioner's office has historically encouraged agencies to exercise restraint in charging applicants; and

e) the true costs that can be recovered under the FOI Act and regulations do not reflect the true time and costs involved in processing FOI applications (reviewing documents, undertaking third party consultation, the various costs involved in scope reduction and contractor costs).

[Public sector agency]

The fees are a deterrent to seeking information that should be readily available. I appreciate that a fee should apply if information has been archived and more than a short amount of time is required to recover it, but when the information is readily available then I see no reason for a fee. I liken it to ringing up, or writing, and asking for information. In either of these cases most Government agencies would provide the information without charge, recognising that taxpayers already pay the salaries of the public servants whose time is involved in providing the information.

[Member of the public]

(Identity removed) does not believe the fees and charges prescribed by the FOI Act to be a barrier to the public in making an FOI application. In fact, it appears the fees and charges as prescribed by the FOI Regulations have remained static since 1994. Information is provided to applicants at the least cost and in most cases, the (identity removed), as a service to its customers, has only applied the statutory $30.00 application fee for non-personal information to cover the processing of an application. The application fee does not cover the actual staff time involved in dealing with an application. Other fees and charges under the Regulations are able to be charged to an applicant, but the (identity removed) only does this when the application is difficult and involved or is submitted by legal practitioners.

[Local government agency]

The (identity removed) feels that the fees and charges imposed by the legislation present no barrier in making an FOI application. The (identity removed) has never received any feedback from an applicant advising that they are unable to make an application due to the required application fee.

Furthermore if applicants can provide a valid seniors card or prove to be impecunious the (identity removed) will either waive all processing charges associated with the application or grant a 25% reduction in the applicable charges. The (identity removed) has never had an applicant withdraw their application due to the processing charges imposed. If an applicant was to advise that they were unable to proceed with their application due to the charges the

(identity removed) would negotiate with the applicant to either reduce the charges or narrow the scope of their application.

[Local government agency]

Discussion

The information gathered in the review makes it clear that members of the public and agencies often have a different view on the subject of fees and charges under the FOI Act. This should not be surprising. All other things being equal, a person paying for a service or product would generally like to pay less, and a person receiving payment for providing a service or product would generally like to receive more. However there also appears to be a genuine and laudable recognition from some agencies that the cost and effort expended in responding to FOI applications is simply part of the price that must be paid to ensure a robust democracy.

Although agencies may not always be correctly applying application fees, the evidence indicates that they are under-applying the fee rather than over-applying it. In addition, charges for dealing with an application are often not imposed or are significantly reduced by agencies. Such practices are considered to demonstrate a commitment to the principles of the FOI Act and the Commissioner acknowledges agency decision-making in this regard.

Arguably, the effectiveness of any tool to safeguard democracy should be determined by how easily that tool can be wielded by the most vulnerable members of our society. One measure that exists in this regard is the number of complaints made to the Commissioner in relation to the imposition of fees and charges. Overall, the total number of complaints made to the OIC in relation to the application of charges is very low, with only three complaints over the last four years. While it cannot be taken that this figure is completely representative of all opinions in regard to charges, it does suggest that charges are not presenting a significant barrier to persons exercising their rights under the Act.

Recommendation

20. Agencies should ensure they are trained on the correct procedure for dealing with fees and charges under the FOI Act.

3.11 Information Statements

Part 5 of the FOI Act describes the requirement for publication of information about agencies, and section 96(1) requires all State and local government agencies, other than a Minister or an exempt agency, to publish Information Statements about their operations and decision-making functions, and to provide a copy to the Information Commissioner.

This review did not specifically assess Information Statements from agencies, as a relatively recent survey of agencies about Information Statements was conducted as part of their 2007/08 statistical return to the OIC. The survey asked 292 State and local government agencies to respond to the following questions about their agency Information Statement:

– *Are the details contained in your Information Statement current?*

– *When was the Information Statement last reviewed and updated?*

– *When was your Information Statement last republished?*

- *Is the Information Statement published in your agency's annual report or as a 'standalone' document?*
- *In what form is the Information Statement published (hard copy, electronic, both)?*
- *If available in electronic form, what is the web address of the document?*
- *If only available in hard copy form, and a copy has not been provided within the last 12 months, when can a current copy be expected to be delivered to my office?*

Responses were received from 271 agencies and results[17] of this survey included:

- 29% of responding agencies last reviewed their Information Statements in 2008; 39% in 2007; 9% in 2006; and 8.5% before 2005. 14.5% did not indicate or did not respond.
- 23% published an Information Statement in 2008; 39% in 2007; 10% in 2006; and 8% before 2005. 28% did not indicate or did not respond.
- 170 agencies advised that their Information Statement is published as a standalone document; 98 agencies incorporated the statement in their annual report; and a number did not respond.
- 109 agencies (40%) stated that the Information Statement was available in hard copy; 44 (16%) stated that it was available electronically; and 115 (43%) stated it was available both as a hard copy document and electronically, and a number did not respond.

In the OIC Annual Report 2008/09, the following comment was also made in regard to agency Information Statements:

[T]he level of technical compliance with this requirement is high, however the quality of Information Statements varies enormously. Some Information Statements are useful tools for members of the public and genuinely contribute to greater transparency and accountability. Other Information Statements are less approachable and may be quite overwhelming or irrelevant to members of the public, either due to their sheer length and complexity, or to the lack of relevant information. I believe that much can be gained by highlighting effective Information Statements and sharing the lessons behind those statements with other agencies. I will encourage such cooperation wherever I can.

Public submissions

(Identity removed) notes the Information Commissioner's concerns about the Information Statements which agencies are required to publish under the FOI Act.[18]

[Private sector body]

Bearing in mind the importance of these statements to the public seeking access to information from an agency, of concern are comments made by the former acting Information

[17] Reported in the Office of the Information Commissioner Annual Report 2007/08
[18] Office of the Information Commissioner Annual Report 2008-09 para 1.1.

Commissioner in his 2007/08 Annual Report, following the Information statement Survey he conducted.[19] *These included comments about the actual contents of the statements provided.*

[Private sector body]

In light of the recent Queensland FOI review, (identity removed) also agrees with the former Acting Information Commissioner's view that it is arguable the statutory Information statement requirement in its current form is now reaching its "use by" date.[20] *The Queensland FOI review recommended a new model which would provide an online single entry point of searchable 'metadata' comprising published information from all agencies.*

[Private sector body]

The actual model which has been implemented in Queensland could provide future guidance in WA. This model appears to involve agencies making information available to the public proactively where possible, through agency publication schemes, responding to requests through an administrative access scheme and as a last resort, responding through legislative access processes.[21]

[Private sector body]

[Identity removed] supports the Information commissioner's aim to improve the usefulness of these Information Statements for the public, referred to in evidence before the Standing Committee on Estimates and Financial Operations:[22]

[Private sector body]

Information Statements should be made user-friendly

[Media body]

Discussion

Overall, a range of views and matters exist about the effectiveness of Information Statements and how agencies treat the requirement to publish these as stated in the FOI Act. These matters include those concerns raised by the OIC and from public submissions, and also include:

- a significant number of agencies do not publish or annually update Information Statements;
- concern about the quality and content of Information Statements; and
- a significant number of agencies do not provide a copy of their Information Statement to the Information Commissioner.

[19] Information Commissioner Annual Report to The Parliament 2007-08 para 2.4.7.
[20] Information Commissioner Annual Report to The Parliament 2007-08 para 3.3.
[21] Office of the Information Commissioner; Queensland.
[22] Standing Committee on Estimates and Financial Operations; Transcript of Evidence 7 September 2009 pg 25.

The Act requires certain requirements to be met in regard to Information Statements, and the OIC expects agencies to make every effort to meet these requirements. The OIC will continue to highlight and share better practice examples of these with agencies, with the objective of increasing the quality of Information Statements across all agencies.

The Commissioner's experience with reviewing Information Statements also shows an enormous variation in their quality and usefulness. Some agencies publish Information Statements which are a very useful and approachable resource for members of the public, while others effectively treat them as a compliance exercise. One symptom of the latter approach is that some Information Statements grow bigger and more unwieldy every year, presumably because agencies add information to ensure compliance, but they are less willing to remove older or superseded information for fear of non-compliance. The result is a document which is not approachable and does not serve the objects of the FOI Act.

Recommendation

21. Agencies should develop Information Statements as an integral element of their overall approach to information management.

3.12 Websites

Agency websites are significant communication channels and sources of information for citizens.

The results of a study[23] reported in 2009 by the Department of Finance and Deregulation (Australian Government Information Management Office) about Australians' use and satisfaction with e-government services stated the use of the internet to contact both state and territory government represented 39% of all interactions in 2008 rising to 42% in 2009, with local government 34% in both years. The study also reported:

- Half (50%) of those contacting government by internet were seeking but not providing information, a third (30%) were exchanging information, and one in five (20%) used the internet to provide information but did not seek any.
- A quarter (26%) of internet users and 2% of those who reported not to be internet users said that they tried unsuccessfully to find government information or services online in the previous 12 months.
- The main reasons cited were that the website did not have the information they wanted (42%) and that the website was too hard to use or understand (28%).

A sample of 150 agency (Ministers and State and local government agency) websites[24] were assessed in the review to determine the relative ease with which a person could locate information about FOI. Of the websites assessed:

- 81% did not have reference to FOI on the main webpage or on the first page of search results from a search of FOI entered in the search box;
- 63% did not have a description about FOI on the website;

[23] Interacting with Government: Australians' use and satisfaction with e-government services pg 18.
[24] Websites of 150 agencies that received FOI applications in 2008/09 were tested.

- 79% did not have a description about the agency's position on releasing documents;
- 61% did not have information about how to make an FOI application;
- 68% were assessed as not having reasonable information to assist a person make an application; and
- 63% did not have the contact details of a person that could assist a person to make an application.

Of the sample of websites assessed, 5% were rated[25] as excellent, 22% were rated as good, and 73% were as rated poor in relation to the ease with which a person could locate information about FOI. Examples of excellence observed in regard to FOI being described in agency websites included; Department of Commerce, Department of the Attorney General, WA Land Authority, Department of Sport and Recreation, Shire of Broome, City of Kalgoorlie-Boulder, Department of Local Government and the Department of Culture and Arts. Given that the review only assessed a sample of websites, there are likely to be other examples of good practice which are not specifically identified in this report.

Public submissions

Perhaps the agencies' websites could be expanded to show what information they hold? This would at least help the computer literate members of the community and perhaps they, in turn, could help those who aren't computer literate.

[Member of the public]

The (identity removed) publishes a host of information on its website in order to assist potential applicants make an application. These documents include copies of the (identity removed) Information Statement as well as brochures produced by the Office of the Information Commissioner namely "Guidelines for Using FOI in Western Australia. A copy of the Freedom of Information Act 1992 is also available on the website.

[Local government agency]

Discussion

Agency websites now form an integral communication channel between agencies and citizens. The use of agency websites to raise the profile of FOI and send a message to citizens that an agency promotes openness, accountability and public participation in government decision-making, is considered very important.

It is understood that agency websites are required to include significant amounts of information about an agency's total functions and operations, and many agencies would consider that they utilise this form of communication well. However, the results of the assessment of agency websites in regard to reference about FOI are less positive than anticipated, particularly when the subject forms such an integral part of a citizen's right to access agency information.

[25] Ratings were based on matters including the ease of finding information about FOI on the website, whether a description about FOI existed and information to assist a person make an FOI application were present.

The OIC website provides a number of resources for agencies and members of the public in relation to FOI. Agencies are free to link to this information from their websites as they see fit.

Recommendation

22. Agencies should ensure their websites support the FOI objectives of government transparency and public participation, particularly with a view to improving the profile of FOI and ensuring that the public can access government information with relative ease.

3.13 Agency Resources and Costs

The ability of agencies to efficiently and effectively manage FOI applications is directly affected by the resources provided to enable the efficient capture, storage and retrieval of information.

The review found that for FOI Coordinators:

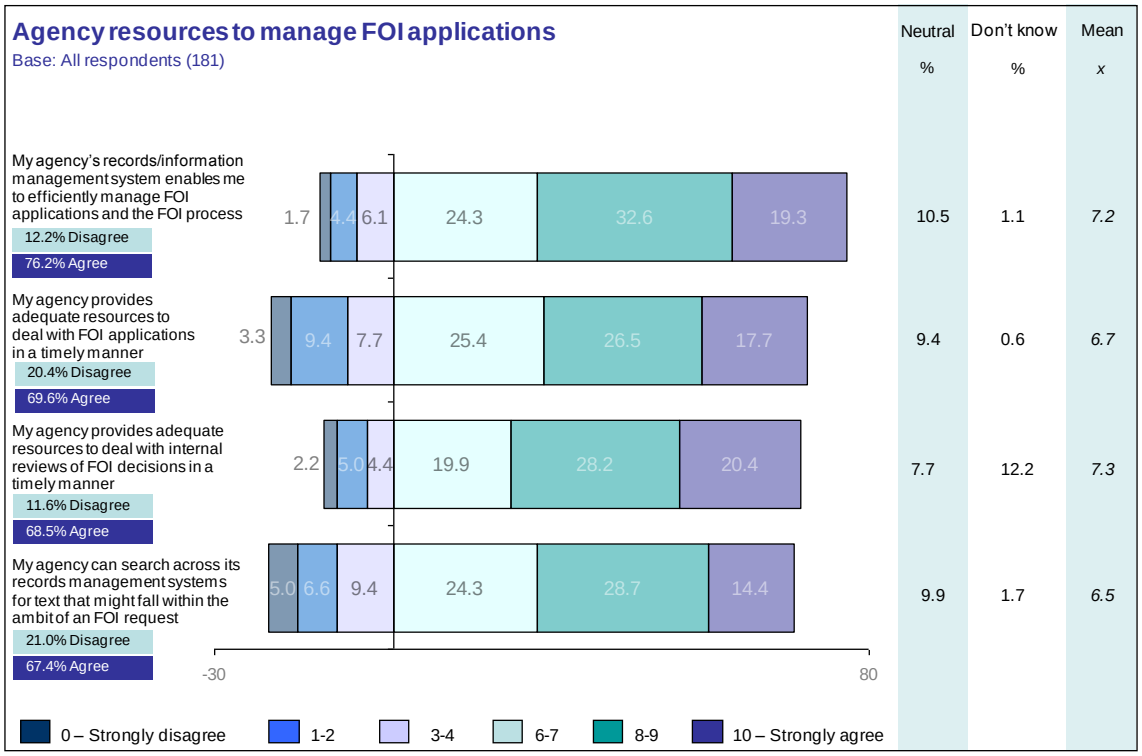
– 69.6% agree and 20.4% disagree that their agency provides adequate resources to deal with FOI applications in a timely manner.

– 67.4% agree and 21.0% disagree that their agency can search across its records management systems for text that might fall within the ambit of an FOI request.

– 68.5% agree and 11.6% disagree that their agency provides adequate resources to deal with internal reviews of FOI decisions in a timely manner.

– 76.2% agree and 12.2% disagree their agency's records/information management system enables them to efficiently manage FOI applications and the FOI process.

Figure 22: Agency resources to manage FOI applications – FOI Coordinators



By subgroup – agency resources to manage FOI applications

By sub-group, there are a number of differences relating to the availability of agency resources to manage FOI applications:

– Ministers' offices recorded significantly lower averages (4.9 out of 10) on the adequacy of agency resources to deal with FOI applications in a timely manner, compared to 7.2 for local government agencies, and 6.6 for State public sector agencies.

– Agencies receiving larger volumes of FOI applications were more likely to rate their agency lower on the adequacy of resources to deal with requests (an average of 6.1 out of 10 for agencies receiving more than 20 applications in the 2008/09 financial year, and 5.9 for those receiving 6 to 20 applications, compared to an average of 7.4 for agencies receiving no applications, and 7.3 for those receiving 1 to 5 applications).

FOI Coordinators are generally employed on full-time basis in regard to managing the FOI process in larger agencies with high volumes of applications such as the Health Services (hospitals), WA Police, the Department of the Premier and Cabinet, and the Department of Corrective Services. However for the large majority of agencies, the person who is the FOI Coordinator undertakes this role as part of other core duties. Often within the smaller to medium sized agencies, it is not unusual for the role of FOI Coordinator to be filled through an expression of interest for a person to perform this function in addition to their core functions.

The review found that overall the people who are FOI Coordinators are dedicated individuals with a general commitment to assisting people to obtain documents which they have a right to access. However, the review also noted from interviews held with a number of FOI Coordinators that many requests for information under FOI are treated outside the FOI process and these are not included in reported statistics. Therefore the workload in some agencies (particularly WA Police and the larger health services) was potentially even greater than what was reported, and there was often a problem in attracting and retaining staff to undertake FOI duties due to it being perceived as; complex and legalistic by nature, can be very time consuming, is often seen as an addition to normal 'core' duties and of limited benefit to career progression.

Table 2: Experience of FOI Coordinators

For how long, approximately, have you undertaken the role of FOI Coordinator? **Total Respondents: 181**	**Number**	**% Sample**
Up to 6 months	22	12.2
Between 6 months and 1 year	16	8.8
More than 1 year and up to 2 years	35	19.3
Between 2 and 5 years	59	32.6
More than 5 years	49	27.1

21% of respondents had undertaken the role of FOI Coordinator for one year or less.

Survey comments – Ministers/CEOs

Often FOI is just 'absorbed' by agencies and by giving additional responsibility to an officer who has other jobs.

It needs to be taken into account that Ministerial offices do not have the amount of resources that agencies do to administer applications, i.e. Ministerial offices do not have a dedicated FOI officer – this responsibility is usually given to the office manager whose normal workload is demanding in itself. Some allowance needs to be made to assist Ministerial offices in dealing with applications such as a longer permitted period for processing or a greater capacity to levy charges to pay for extra personnel required.

Cost of determining the scope of the request can be excessive (financial and human resource). Proliferation of 'fishing exercises'. Multiple FOI's from the same applicant. Anecdotally the FOI information requested often comes to nothing.

One of the limiting factors is internal cost to agencies for FOI requests and somehow that has to be addressed.

The agencies should be able to be better compensated for the amount of work that requires an FOI.

Survey comments – FOI Coordinators

Any problems our agency has with resourcing the processing of FOIs start with the shortcomings in the operation of section 20. Section 20 encourages applicants to ask for the sun and expect to receive the earth. Section 20 needs to be amended to reduce incentives to applicants to be uncooperative in the reduction of scope of large or difficult applications. Currently applicants can apply pressure by lodging a big application, question every statement made by the agency about the workload involved, constantly refer to the 45 day and refrain from being specific about what they really want to get the agency to agree a scope which is unworkable. Suspending the 45 day rule and providing for agencies to revisit the scope when they have had an opportunity to go through the documents would help.

When FOI applications require the involvement of external and internal areas the impact on staff working in these areas must also be taken into consideration when assessing the total resource cost of complying with the current FOI legislation. The impact on clinical care as a result of clinicians being required to review and assess FOI applications can be substantial.

Public submissions

The following comments were provided by one member of the public in regard to agency costs and resources in managing FOI:

Agencies may make submissions to you about the high cost to them of running their FOI sections but it would be good if you can keep FOI alive.

I know that (identity removed) have complained about the costs of processing a number of applications from me yet chose to expend resources by keeping a tally of how many applications I had made despite there being nothing in the Act to limit the number of applications any applicant could make.

I point out the resources (time etc) are required to submit any application and I submit that each application should be treated on its merits rather than an agency biasing the processing according to the identity of the applicant.

[Member of the Public]

Discussion

The relatively low levels of agreement on the survey questions, and high proportion of respondents who disagree that their *agency provides adequate resources to deal with FOI applications in a timely manner* (20.4%) and that their *agency can search across its records management systems for text that might fall within the ambit of an FOI request* (21.0%) are considered significant, and cause for concern in regard to reflecting the perceived capacity of agencies to satisfactorily meet statutory obligations. These results are balanced against OIC statistics reported for agencies in the OIC annual report that the average time taken by agencies to deal with access applications is 27 days.

A particular area highlighted in the survey in relation to the adequacy of resources allocated to manage FOI applications was in Ministers' offices, who recorded a significantly lower average (4.9 out of 10) than State and local government agencies.

Matters were raised during the review by Ministers' staff about the challenges in processing FOI applications, which was particularly a problem when there was a spike in the number of applications. Staff involved in FOI in Ministers' offices also advised that because FOI generally only formed one aspect of an employee's role in the office, but could take up significant amounts of time, this presented challenges and impacted what were seen as 'core' duties to support the Minister. Options were discussed about how FOI may be better managed in Ministers' offices and these are discussed in Section 2.3 Agency processes. Any alternative approach to managing FOI in Ministers' offices would still require the Minister to be accountable for FOI decisions, i.e. as the decision-maker.

The matter of managing FOI in some agencies and in particular those that receive significant volumes of applications can be extremely challenging for the dedicated staff in agencies such as the WA Police Service, Royal Perth Hospital, Sir Charles Gairdner Hospital, Fremantle Hospital, various Country Health Services and Community Service departments. These challenges need to be considered and addressed where necessary through agency workforce planning solutions and investigating more efficient processes to administer FOI, and information disclosure generally, in these agencies.

Recommendations

23. Agencies should investigate, and address where appropriate, the resources they commit to satisfactorily meeting statutory obligations in the administration of FOI and the disclosure of information generally.

24. Agencies, in particular groups of similar agencies, should develop and share strategies and approaches to assist them to better manage FOI applications.

3.14 Training and support

FOI applicants should rightly expect their applications for agency documents to be managed by agency staff with a good knowledge of the requirements of the FOI Act and the processes applying to the proper and efficient administration of FOI. To ensure this expectation is met, comprehensive and timely training of FOI Coordinators is considered critical to the proper administration of FOI within agencies.

FOI Coordinators were asked the following questions in regard to training on FOI:

- *Have you attended training conducted by the OIC in relation to the administration of FOI?*
- *Would you benefit from additional training on FOI?*
- *Preferred method/s for receiving FOI training?*

Surveys results indicate that 24.9% of FOI Coordinators have not received any training from the OIC in relation to the administration of FOI, and several sub-groups that showed a significant difference in regard to not receiving any training:

- Those in local government (37.9%) relative to state public sector (17.6%).
- Those who receive no applications (44.7%) relative to those who receive applications (25.6% 1 to 5 applications; 15.6% 6 to 20 applications; 13.0% >20 applications).
- Those who have been in the position for less than two years (37.0%) relative to those who have been in the position for two years or longer (16.7%).
- Those who report their agency does not have a current FOI policy (33.9%), relative to those in agencies who do (20.8%).

The desire for additional training on FOI is strong, with 76.2% reporting they would benefit from additional training on FOI. This is equally high regardless of when respondents attended their last training on FOI. It is, however higher among:

- Those who have been in their position for less than two years (86.3%) relative to those who have been in the position for two years or longer (69.4%).
- Those who report their agency does not have a current FOI policy (89.3%), relative to those in agencies who do (70.4%).

When provided with a list of preferred training methods, the following percentages were recorded from the sample:

- Face-to-face workshops/training sessions – 71.8%
- Specific training on particular FOI matters – 50.3%
- Printed materials – 40.3%
- Online access via video tutorials – 31.5%
- Online webinars – 25.4%

There was strong support from the interviews conducted with Ministers' Chiefs of Staff, CEOs and FOI Coordinators for improvements to and exploring different options for the training conducted and support materials provided by the OIC.

Comments received from the surveys and public submissions about FOI training are listed below.

Survey comments – Ministers/CEOs

I would like to suggest that basic FOI awareness training for all staff be part of their induction to all Local Government positions. If there was a free one hour online course that

staff could participate in, this would assist this process and give staff a better understanding of FOI and how it relates to their job.

FOI website is geared toward applicant and is not useful for FOI staff. Useful if sample list of Local Government documents suitable for release was published as a guide (Department of Local Government should be involved with this).

I think it would be helpful to have more information sheets available from the OIC addressing exemption clauses, in plain simple language. A lot of people who process applications have no legal experience in interpreting an Act or applying a previous Commissioner's decision. Simple leaflets giving information would be helpful, e.g. Clause 3 (Personal Information): Personal information can include people's names, their home addresses (but not their work addresses unless it is also their home address); personal mobile phone numbers, signatures, bank details, handwriting... etc. Where the [identity] of a person could be interpreted from the content of the document the entire document may be exempted. Would be helpful too if such leaflets referred you to specific Decisions of the Commissioner to read and/or cite in the Notices of Decision.

Survey comments – FOI Coordinators

Would like some sort of training and/or guidelines and access to perhaps a 'mentor' especially initial appointees.

Much more training needs to be given. Better written instructions for exemptions.

More advanced training for experienced FOI Coordinators would be good, rather than the run of the mill courses on offer. Agencies should be encouraged to be prepared to pay the cost of seminars run by eastern states companies. These often get cancelled from lack of interest (read lack of willingness of agencies to pay the fee).

I would like to see an increase in the variety of training offered, specifically training that is solely Local Government based which can demonstrate the application of the FOI Act on the types of documents created/stored by Local Governments, e.g. Development Applications, Dog Barking Complaints.

While adequate training is available about the actual requirements of the Act, very few seminars are based on actual examples, it's one of those pieces of legislation that despite the fact that you know and understand the law, you always have some difficulty in particular circumstances applying it. Would be good if training focussed on that issue.

Distance from Perth and nature of transient staff movements we lack the ability to have good training in place for FOI processing. Standard health procedures would benefit us immensely.

Continuous training provided on a state level, across agencies will improve consistency in how FOIs are approached and dealt with. I really believe that the FOI Commissioner's Office is ideally suited to have a training/mentoring type of role – this could also potentially reduce the number of complaints lodged with the Commissioner.

Thank you for the opportunity to complete this survey. I have only been in the position for a few months but the support from the Information Commission staff has been wonderful.

Regular FOI training through the Office of the Information Commissioner would be of good assistance.

I would like more support from the FOI Commissioners office when I seek (advice). Even with general questions, I feel that more support could be given at times.

Discussion

There is a legislative requirement for timeframes to be met in the FOI Act, as well as a direct correlation between training provided on FOI and the quality and timeliness of service provided. This is reflected in the legislative requirement in the FOI Act for the Commissioner to provide training to agencies. Investment in training pays dividends, in more efficient and consistent levels of service, better and more timely FOI process decision-making and greater trust in government. Due to staff turnover within agencies (around 350 agencies are required to administer FOI), the demand will continue to be high.

It is pleasing to see such a strong demand for training on FOI. Providing adequate training and resource materials for agencies spread over a vast geographical area is an ongoing challenge for the OIC. The OIC currently only has resources to employ one full-time employee to undertake this role, which also includes conducting awareness-raising sessions and providing daily telephone and email advice to agencies and members of the public. At the moment, therefore, the demand for training greatly exceeds the OIC's ability to provide it. One ramification of this is that fee-for-service providers are now offering FOI courses to agencies to supplement the OIC's free courses.

A number of issues identified elsewhere in the report could benefit significantly by the OIC providing a mechanism for agencies to share resources, policies, procedures and tools. This allows good practice to be identified and shared. The OIC website provides a logical place for such a mechanism.

Recommendations

25. The OIC should conduct a review of the training it currently offers, to ensure it appropriately targets resources.

26. Agencies should consider further developing networks of experienced FOI Coordinators that could be supported through the OIC website, to assist those who are new to the subject or less experienced than themselves.

27. The OIC website should be enhanced to allow agencies to share resources, policies, procedures and tools.

28. The Information Commissioner should engage with government as a priority in regard to appropriate resourcing to fulfil statutory training obligations.

4. OBSERVATIONS

The following are observations made through the review process from interviews and general discussions held with agency employees involved in the administration of FOI and information received that was outside the scope of the review.

4.1 The scope and complexity of FOI in agencies

The complexity and volume of information dealt with through the FOI process in agencies range from relatively simple applications for documents such as updating or correcting personal records, or requesting copies of planning documents, to applications involving health records, criminal and violence related matters and multi-million dollar business transactions involving applications from law firms on behalf of clients.

One public sector agency informed the review that examples of the types of large applications they receive from FOI applicants included receiving ten pages describing the types of documents being sought, and the review of 27,000 electronic documents across ten works projects to determine if these were within the applicant's proposed scope of request. The review was also advised by the same agency that:

The level of cooperation from law firm applicants in widely scoped applications have tended to follow a similar pattern. On occasion, applicants purporting to be offering to reduce the scope of an application have submitted a new reduced scope of application which is as wide or wider than the original.

There is little or no incentive for the applicant law firms to be cooperative in agreeing a workable scope.

The applicants can get the documents through court processes if they really need them.

They are billing their client at between $300-$450 per hour to discuss the matter with the agency and to write lengthy letters dissecting the agency's own correspondence almost line by line.

There are few if any opportunities for the agency to recover its costs for negotiating a reduction in scope or many of the other costs associated with the application.

Their client is not concerned with the cost to the State Government.

The applicant is prepared to refuse to grant extensions to the 45 day time limit if sought.

Section 10(2) of the FOI Act prevents the agency from considering any perceived or stated reasons for the applicant seeking access to the document.

Dealing with the impact of very wide FOI applications is not a question of simply dedicating greater staff resources to do FOI's when a large application comes in and not just because of budgetary restrictions and [staff] limits. To a large extent, the people needed to identify documents (or overseeing their identification) in the first instance are not FOI trained staff but the people involved in the subject matter of the application.

The result of the above problems are that it can be difficult for agencies to negotiate a scope that does not place an unreasonable burden on the agency. It is not always evident at this

early stage how many documents or how much work is involved with a given scope. Other applicants can be disadvantaged by the agency's reduced capacity to provide documents in a timely manner.

Comment

The OIC is committed to working with all agencies to improve FOI processes, and will take into consideration the matters raised and actively work with agencies in an attempt to find, where possible, solutions to the matters raised. This work should however proceed in the knowledge that Parliament intended the FOI Act to allow greater public participation in the democratic process and to improve government transparency and accountability. It should be acknowledged that achieving these benefits is likely to continue to incur costs for agencies.

One particular area of concern relates to the strict obligations placed on agencies with respect to disclosure of third party personal information and the consultation process with affected third parties. This is not a new issue, particularly as it relates to the obligation to consult officers of agencies and former officers of agencies. The former Information Commissioner recommended legislative amendment as far back as 1996. More recently, I note that this issue was again recognised in the *Freedom of Information Amendment Bill 2007*. Clause 14 of the Explanatory Memorandum to that Bill stated:

Section 32 of the FOI Act presently requires an agency not to give access to a document containing personal information about a third party unless steps have been taken to obtain the views of that third party as to whether the document contains matter which is exempt personal information. Third parties include, among others, officer of government agencies. Prescribed personal information about those officers, such as their names and positions, are not exempt under clause 3 of Schedule 1 to the FOI Act. The amendment to section 32(1) removes the requirement to consult in respect of prescribed personal information in relation to a person who is or has been an officer of an agency.

It may be appropriate to revisit this issue in the future.

4.2 Frivolous, vexatious and misconceived complaints

Section 67 of the Act states:

Commissioner may decide not to deal with a complaint

(1) The Commissioner may, at any time after receiving a complaint, decide not to deal with the complaint, or to stop dealing with the complaint, because —

(a) it does not relate to a matter the Commissioner has power to deal with; or
(b) it is frivolous, vexatious, misconceived or lacking in substance.

The power provided to the Commissioner under section 67 is evidence that Parliament, in passing the FOI legislation, considered that applications could be received by agencies that were considered frivolous, vexatious, misconceived or lacking in substance. However it is also important to note that Parliament did not give agencies the power to refuse to deal with such applications.

The subject of vexatious and malicious intent has been raised and debated over a number of years since the introduction of FOI legislation in Western Australia in regard to its affect on

the efficient use of agency resources and the potential harmful effect on those persons subject to such applications.

The following comments were provided as part of the survey of Ministers/CEOs and relate to their perceptions about inappropriate use of FOI.

Survey comments – Ministers/CEOs

I am greatly concerned that while I (strongly) believe in the process it is being totally misused as a political tool to fish for information and waste valuable time. The intent as I understand in the case of government should be to ensure that government is being fair and honest in its dealings not to provide others with information that is being discussed to either progress an issue or to decide what may be an appropriate way to deal with something, if it is a particular matter then that may be a reasonable request but not for all information between particular parties.

My only concern re FOI is the sad reality of deviousness where the aim is to look for means of personal gain or to look for loop holes to avoid responsibility. FOI is a good, sometimes people and motives are not.

As a commercial arm of Government the most common application for information comes from organisations trying to take advantage of the fact that the FOI Act applies to the agency and not to them. This is of concern.

The only purpose that FOI has been used within my organisation is by subjects of professional complaints who are dissatisfied with the outcome of the complaint against them. Invariably, there is significant time, resource and money spent on compliance which serves no constructive purpose – especially in providing benefit to the public.

Development of Whole of Government processes for dealing with nuisance applications.

Survey comments – FOI Coordinators

The FOI Act does not allow for commonsense treatment of vexatious applications. After a certain number of applications on the same subject, the agency should have the right to refuse to respond further.

I would like to see the Information Commissioner deal with Vexatious Applicants. The Commissioner in the past has stepped away from confronting this issue. There are some applicants that are just a pest and have plenty of time to waste on unending requests. This causes a lot of stress and aggravation for the FOI Coordinator and the rippling effect it has on other staff in the organisation who are affected. There needs to be a circuit breaker to cut these people off. They tie up too many resources for what are either trivial requests or just a means to stroke the ego of the applicant who either think that there is some grand conspiracy that they think they are uncovering or they just want to show us how clever they are. They seem to have no end of time in submitting their requests and think that we have a similar amount of time in dealing with them. The Information Commissioner needs to step in and assist agencies. It is a real problem. The Commissioner likes to assist applicants but there are times when agencies need assistance with some applicants that are just a nuisance eroding limited resources.

I believe that FOI provides accountability and transparency but there needs to be more protection from FOI applications that seem to be purely vexatious in nature that wastes limited resources especially in a small agency.

As indicated in this survey I am a strong supporter of FOI. However, I am aware of applicants who pursue agencies through FOI for the 'nuisance' they believe it causes agencies. Some means of obtaining an independent view of whether or not an application is 'Vexatious' would assist those agencies which might receive numerous applications from the same source.

In local government a large number of FOI's are in relation to neighbourhood disputes and the FOI Act is used to try and get documents to assist in civil matters. I do not believe this is the intent of the FOI Act.

The FOI Act has been used in certain circumstances as a tool of (harassment), rather than as a tool to release information. If possible, consideration would be appreciated for a separate schedule of charges where a lawyer has made an application.

Exclude the Opposition from lodging FOI claims not in the interest of the public. Government should have FOI team not individual Minister's as office of only 10 people with high workload.

I do not think that Politicians should use FOI as a means to fish for documents in order to get a story or to gain political standing. Quite a few FOI applications are requested by Politicians to substantiate responses to a Parliamentary Question (double handling) it's a waste of time as they already have the information.

Comment

The OIC is aware there are strong views held in agencies about applications that are considered frivolous, vexatious, misconceived or lacking in substance and about the time taken in dealing with these. However, under section 10(2)(a) and (b) of the FOI Act a person's right to access documents is not affected by any reasons the person may give for wishing to obtain access, nor by the agency's belief as to what the person's reasons are. Had Parliament intended the FOI Act to allow agencies to refuse to deal with applications they considered frivolous or vexatious, Parliament could easily have included a provision in the FOI Act to this effect.

There is a particular level of concern in agencies with regard to repeat applications which seek further copies of documents which have already been provided by the agency. This issue was recognised in the *Freedom of Information Amendment Bill 2007*. In the Explanatory Memorandum to that Bill, a number of proposed amendments were described that would have given some additional power to agencies and to the Information Commissioner to refuse to deal with repeat applications. In particular, an additional provision was proposed that allowed for an agency to refuse to deal with an access application that is in substantially the same terms as an application previously made by that applicant to that agency.

Although the review's terms of reference exclude a review of the current legislation, I consider it appropriate in this case to note the above in the context of the ongoing difficulties being encountered by agencies and described in this report.

Part C – Appendices

APPENDIX 1 – TERMS OF REFERENCE

REVIEW OF THE ADMINISTRATION OF FREEDOM OF INFORMATION IN WESTERN AUSTRALIA

TERMS OF REFERENCE
JANUARY 2010

Background

This review arises from a commitment of the Government, and a request to the Information Commissioner, to *review the manner in which Departments are administering the FOI process to ensure that Government is accountable and open in accordance with the spirit of the FOI Act*

The *Freedom of Information Act 1992* (the FOI Act) enables the public to participate more effectively in governing the State and makes the persons and bodies that are responsible for State and local government more accountable to the public[26]. It does this primarily by creating a general right of access to State and local government documents.

Authority for the Review

The review is being conducted under the provisions and power of sections 63(2)(d) and (f), and section 64 of the FOI Act, which provide as follows:

63. Functions of Commissioner

(2) The functions of the Commissioner also include —

(d) ensuring that agencies are aware of their responsibilities under this Act;

(f) providing assistance to members of the public and agencies on matters relevant to this Act.

64. General powers

The Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of the Commissioner's functions.

Scope of the Review

The review will examine and report on the manner in which agencies[27] are administering the FOI Act as currently in force. The review will not include re-examining individual decisions made by agencies or the Information Commissioner in relation to specific requests for documents.

Timeline

The review process will be managed by Mr Grant Washer under the direction of the Information Commissioner. A report detailing the analysis, findings and recommendations of the review is expected to be completed by August 2010.

[26] Section 3(1) of the FOI Act.
[27] As defined in the Glossary to the *Freedom of Information Act 1992.*

APPENDIX 2 – EXTRACTS FROM THE FREEDOM OF INFORMATION ACT 1992

…

3. Objects and Intent

(1) The objects of this Act are to —

(a) enable the public to participate more effectively in governing the State; and

(b) make the persons and bodies that are responsible for State and local government more accountable to the public.

(2) The objects of this Act are to be achieved by —

(a) creating a general right of access to State and local government documents;

(b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and

(c) requiring that certain documents concerning State and local government operations be made available to the public.

(3) Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents (including documents containing exempt matter), or the amendment of personal information, otherwise than under this Act if that can properly be done or is permitted or required by law to be done.

4. Principles of Administration

Agencies are to give effect to this Act in a way that —

(a) assists the public to obtain access to documents;

(b) allows access to documents to be obtained promptly and at the lowest reasonable cost; and

(c) assists the public to ensure that personal information contained in documents is accurate, complete, up to date and not misleading.

…

10. Right of access to documents

(1) A person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with this Act.

(2) Subject to this Act, a person's right to be given access is not affected by —

(a) any reasons the person gives for wishing to obtain access; or

(b) the agency's belief as to what are the person's reasons for wishing to obtain access.

11. Access applications

(1) A person who wishes to obtain access to one or more documents of an agency (other than an exempt agency) may make an application to the agency.

(2) If the circumstances of the applicant require it, an agency has to take reasonable steps to help a person to make an access application to the appropriate agency in a manner that complies with this Act.

(3) In particular, if an application does not comply with the requirements of section 12 the agency has to take reasonable steps under subsection (2) to help the applicant to change the application so that it complies with those requirements.

…

30. Form of notice of decisions

The notice that the agency gives the applicant under section 13(1)(b) has to give details, in relation to each decision, of

(a) the day on which the decision was made;

(b) the name and designation of the officer who made the decision;

(c) if the decision is that a document is an exempt document and that access is to be given to a copy of the document from which exempt matter has been deleted under section 24 —

(i) the fact that access is to be given to an edited copy; and

(ii) the reasons for classifying the matter as exempt matter and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based;

(d) if the decision is that access to a document is to be deferred — the reasons for the deferral and, if applicable, the period for which access is likely to be deferred;

(e) if the decision is to give access to a document in the manner referred to in section 28 — the arrangements to be made for giving access to the document;

(f) if the decision is to refuse access to a document — the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based;

(g) if the decision is that the applicant is liable to pay a charge to the agency — the amount of the charge and the basis on which the amount was calculated; and

(h) the rights of review and appeal (if any) under this Act and the procedure to be followed to exercise those rights.

…

32. Documents containing personal information

(1) This section applies to a document that contains personal information about an individual (the ***third party***) other than the applicant.

(2) The agency is not to give access to a document to which this section applies unless the agency has taken such steps as are reasonably practicable to obtain the views of —

(a) the third party; or

(b) if the third party is dead, his or her closest relative,

as to whether the document contains matter that is exempt matter under clause 3 of Schedule 1.

(3) If the third party, or the closest relative of a dead third party, is a child who has not turned 16 and who, in the agency's opinion, does not have the capacity to appreciate the circumstances and make a mature judgment as to the nature and significance of the document, the views of the child's guardian, or the person who has custody or care and control of the child, may be obtained for the purposes of subsection (2).

(4) If the third party, or the closest relative of a dead third party, is an intellectually handicapped person, the views of the person's closest relative or guardian may be obtained for the purposes of subsection (2).

(5) Where the views of a person are obtained under subsection (2)(b) that person is to be regarded as being the third party for the purposes of Division 5 and Part 4.

(6) This section does not apply if access is given to a copy of the document from which the personal information referred to in subsection (1) has been deleted under section 24.

33. Documents containing commercial or business information

(1) This section applies to a document that contains —

(a) information concerning the trade secrets of;

(b) information (other than trade secrets) that has a commercial value to; or

(c) any other information concerning the business, professional, commercial or financial affairs of,

a person (the ***third party***) who is not the applicant.

(2) The agency is not to give access to a document to which this section applies unless the agency has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the document contains matter that is exempt matter under clause 4 of Schedule 1.

(3) An agency is not a third party for the purposes of this Part or Part 4.

(4) This section does not apply if access is given to a copy of the document from which the information referred to in subsection (1) has been deleted under section 24.

34. Procedure following consultation

(1) If —

(a) the agency obtains the views of a third party in relation to a document under section 32 or 33;

(b) those views are that the document contains matter that is exempt matter under clause 3 or 4 of Schedule 1; and

(c) the agency decides to give access to the document,

the agency has to —

(d) give the third party written notice of the decision without delay; and

(e) defer giving access to the document until the decision is final.

(2) The notice that the agency gives under subsection (1)(d) has to give details of —

(a) the day on which the decision was made;

(b) the name and designation of the person who made the decision;

(c) the reasons for the decision to give access despite the views of the third party and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based; and

(d) the rights of review and appeal under this Act and the procedure to be followed to exercise those rights.

(3) If the agency has given a notice to a third party under subsection (1)(d) in relation to a document, the notice that the agency gives the applicant under section 13(1)(b) has to inform the applicant —

(a) that a third party believes that the document is an exempt document; and

(b) that access to the document will be deferred until the decision is final.

(4) For the purposes of this section an agency's decision to give access to a document is final if —

(a) the time prescribed by Division 5 of this Part or Division 3 of Part 4 for third parties to lodge applications for review of the agency's decision, or make complaints against the agency's decision, has elapsed and no application or complaint has been made by a third party; or

(b) the time prescribed by Division 3 of Part 4 for third parties to make complaints against a decision made under Division 5 of this Part confirming the agency's decision has elapsed and no complaint has been made by a third party; or

(c) the time prescribed under Division 5 of Part 4 for lodging an appeal arising out of a decision under Division 3 of Part 4 relating to the agency's decision, or to a review of the agency's decision, has elapsed and no appeal has been lodged; or

(d) on the determination of an appeal under Division 5 of Part 4 the agency's decision has been confirmed.

35. Requirement to consult may be waived

(1) The agency may apply to the Commissioner for approval to make its decision on whether to give access to a document without complying with section 32 or 33, and the Commissioner may give approval on being satisfied that —

(a) it would be unreasonable to require the views of third parties to be obtained having regard to the number of third parties that would have to be consulted; and

(b) the document does not contain matter that is exempt matter under clause 3 or 4 of Schedule 1.

(2) The agency may proceed in accordance with approval given under subsection (1).

…

94. Information statements

A reference in this Act to an ***information statement***, in relation to an agency, is a reference to a statement that contains —

(a) a statement of the structure and functions of the agency;

(b) a description of the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public;

(c) a description of any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the performance of the agency's functions;

(d) a description of the kinds of documents that are usually held by the agency including —

(i) which kinds of documents can be inspected at the agency under a written law other than this Act (whether or not inspection is subject to a fee or charge);

(ii) which kinds of documents can be purchased; and

(iii) which kinds of documents can be obtained free of charge;

(e) a description of the agency's arrangements for giving members of the public access to documents mentioned in paragraph (d)(i), (ii) or (iii) including details of library facilities of the agency that are available for use by members of the public;

(f) a description of the agency's procedures for giving members of the public access to the documents of the agency under Part 2 including —

(i) the designation of the officer or officers to whom initial inquiries as to access to documents can be made; and

(ii) the address or addresses at which access applications can be lodged;

(g) a description of the agency's procedures for amending personal information in the documents of the agency under Part 3 including —

(i) the designation of the officer or officers to whom initial inquiries as to amendment of personal information can be made; and

(ii) the address or addresses at which applications for amendment of personal information can be lodged.

95. Internal manuals

A reference in this Act to an ***internal manual***, in relation to an agency, is a reference to —

(a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents;

(b) a document containing particulars of any administrative scheme;

(c) a document containing a statement of the manner, or intended manner, of administration of any written law or administrative scheme;

(d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any written law or administrative scheme; or

(e) any other document of a similar kind,

(other than a written law) that is used by the agency in connection with the performance of such of its functions as affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject.

96. Publication of information statements

(1) An agency (other than a Minister or an exempt agency) has to cause an up-to-date information statement about the agency to be published in a manner approved by the Minister administering this Act —

(a) within 12 months after the commencement of this Act; and

(b) at subsequent intervals of not more than 12 months.

(2) In giving approval under subsection (1) the Minister has to have regard, amongst other things, to the need to assist members of the public to exercise their rights under this Act effectively.

(3) In the case of an agency that comes into existence after the commencement of this Act the reference in subsection (1)(a) to the commencement of this Act is to be read as a reference to the time when the agency commences its operations.

(4) A subcontractor does not have to comply with subsection (1) if the relevant contractor has complied with that subsection on behalf of the subcontractor.

97. Information statements and internal manuals to be made available

(1) An agency (other than a Minister or an exempt agency) has to cause copies of —

(a) its most up-to-date information statement; and

(b) each of its internal manuals,

to be made available for inspection and purchase by members of the public but may delete any exempt matter from those copies.

(2) An agency has to provide a copy of its information statement to the Commissioner as soon as is practicable after the statement is published under section 96.

(3) A subcontractor does not have to comply with subsections (1) and (2) if the relevant contractor has complied with those subsections on behalf of the subcontractor.

SCHEDULE 1

[Glossary cl. 1]

Exempt matter

1. Cabinet and Executive Council

Exemptions

(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it —

(a) is an agenda, minute or other record of the deliberations or decisions of an Executive body;

(b) contains policy options or recommendations prepared for possible submission to an Executive body;

(c) is a communication between Ministers on matters relating to the making of a Government decision or the formulation of a Government policy where the decision is of a kind generally made by an Executive body or the policy is of a kind generally endorsed by an Executive body;

(d) was prepared to brief a Minister in relation to matters —

(i) prepared for possible submission to an Executive body; or

(ii) the subject of consultation among Ministers relating to the making of a Government decision of a kind generally made by an Executive body or the formulation of a Government policy of a kind generally endorsed by an Executive body;

(e) is a draft of a proposed enactment; or

(f) is an extract from or a copy of, or of part of, matter referred to in any of paragraphs (a) to (e).

Limits on exemptions

(2) Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless —

(a) its disclosure would reveal any deliberation or decision of an Executive body; and

(b) the fact of that deliberation or decision has not been officially published.

(3) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1)(f), the original matter, came into existence before the commencement of section 10 and at least 15 years have elapsed since it or the original matter (as the case may be) came into existence.

(4) Matter is not exempt matter under subclause (1) if it, or, in the case of matter referred to in subclause (1)(f), the original matter, came into existence after the commencement of section 10 and at least 10 years have elapsed since it or the original matter (as the case may be) came into existence.

(5) Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.

Definition

(6) In this clause ***Executive body*** means —

(a) Cabinet;

(b) a committee of Cabinet;

(c) a subcommittee of a committee of Cabinet; or

(d) Executive Council.

[Clause 1 amended by No. 57 of 1997 s. 62(3).]

2. Inter-governmental relations

Exemptions

(1) Matter is exempt matter if its disclosure —

(a) could reasonably be expected to damage relations between the Government and any other government; or

(b) would reveal information of a confidential nature communicated in confidence to the Government (whether directly or indirectly) by any other government.

Limit on exemptions

(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

Definition

(3) In this clause —

other government means the government of the Commonwealth, another State, a Territory or a foreign country or state.

3. Personal information

Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

Limits on exemption

(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.

(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to —

(a) the person;

(b) the person's position or functions as an officer; or

(c) things done by the person in the course of performing functions as an officer.

(4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to —

(a) the person;

(b) the contract; or

(c) things done by the person in performing services under the contract.

(5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

4. Commercial or business information

Exemptions

(1) Matter is exempt matter if its disclosure would reveal trade secrets of a person.

(2) Matter is exempt matter if its disclosure —

(a) would reveal information (other than trade secrets) that has a commercial value to a person; and

(b) could reasonably be expected to destroy or diminish that commercial value.

(3) Matter is exempt matter if its disclosure —

(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemptions

(4) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.

(5) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.

(6) Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.

(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.

4A. Information provided to Treasurer under section 22 of *Bank of Western Australia Act 1995*

Matter is exempt matter if it consists of information provided to the Treasurer under section 22 of the *Bank of Western Australia Act 1995*.

[Clause 4A inserted by No. 14 of 1995 s. 44(1).]

5. Law enforcement, public safety and property security

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to —

(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;

(b) prejudice an investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;

(c) enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered;

(d) prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings;

(e) endanger the life or physical safety of any person;

(f) endanger the security of any property;

(g) prejudice the maintenance or enforcement of a lawful measure for protecting public safety; or

(h) facilitate the escape of any person from lawful custody or endanger the security of any prison.

(2) Matter is exempt matter if it was created by —

(a) the Bureau of Criminal Intelligence, Protective Services Unit, Witness Security Unit or Internal Affairs Unit of the Police Force of Western Australia; or

(b) the Internal Investigations Unit of Corrective Services.

(3) Matter is exempt matter if it originated with, or was received from, a Commonwealth intelligence or security agency.

Limits on exemptions

(4) Matter is not exempt matter under subclause (1) or (2) if —

(a) it consists merely of one or more of the following —

(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;

(ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; or

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;

and

(b) its disclosure would, on balance, be in the public interest.

Definitions

(5) In this clause —

Commonwealth intelligence or security agency means —

(a) the Australian Security Intelligence Organization;

(b) the Australian Secret Intelligence Service;

(c) that part of the Department of Defence of the Commonwealth known as the Defence Signals Directorate; or

(d) that part of the Department of Defence of the Commonwealth known as the Defence Intelligence Organisation.

contravention includes a failure to comply;

the law means the law of this State, the Commonwealth, another State, a Territory or a foreign country or state.

[Clause 5 amended by No. 31 of 1993 s. 43; No. 11 of 1996 s. 41; No. 56 of 2004 s. 4.]

6. Deliberative processes

Exemptions

(1) Matter is exempt matter if its disclosure —

(a) would reveal —

(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place,

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and

(b) would, on balance, be contrary to the public interest.

Limits on exemptions

(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).

(3) Matter that is merely factual or statistical is not exempt matter under subclause (1).

(4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence.

7. Legal professional privilege

Exemption

(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.

Limit on exemption

(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).

8. Confidential communications

Exemptions

(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.

(2) Matter is exempt matter if its disclosure —

(a) would reveal information of a confidential nature obtained in confidence; and

(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemption

(3) Matter referred to in clause 6(1)(a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than —

(a) a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or

(b) an agency or the State.

(4) Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.

9. The State's economy

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to —

(a) have a substantial adverse effect on the ability of the Government or an agency to manage the economy of the State; or

(b) result in an unfair benefit or detriment to any person or class of persons because of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State.

Limit on exemption

(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

10. The State's financial or property affairs

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.

(2) Matter is exempt matter if its disclosure would reveal trade secrets of an agency.

(3) Matter is exempt matter if its disclosure —

(a) would reveal information (other than trade secrets) that has a commercial value to an agency; and

(b) could reasonably be expected to destroy or diminish that commercial value.

(4) Matter is exempt matter if its disclosure —

(a) would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and

(b) could reasonably be expected to have an adverse effect on those affairs.

(5) Matter is exempt matter if its disclosure —

(a) would reveal information relating to research that is being, or is to be, undertaken by an officer of an agency or by a person on behalf of an agency; and

(b) would be likely, because of the premature release of the information, to expose the officer or person or the agency to disadvantage.

Limit on exemptions

(6) Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.

11. Effective operation of agencies

Exemptions

(1) Matter is exempt matter if its disclosure could reasonably be expected to —

(a) impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;

(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;

(c) have a substantial adverse effect on an agency's management or assessment of its personnel; or

(d) have a substantial adverse effect on an agency's conduct of industrial relations.

Limit on exemptions

(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

12. Contempt of Parliament or court

Exemptions

Matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown —

(a) be in contempt of court;

(b) contravene any order or direction of a person or body having power to receive evidence on oath; or

(c) infringe the privileges of Parliament.

13. Information as to adoption or artificial conception

Exemption

Matter is exempt matter if its disclosure would reveal —

(a) information relating to the adoption of a child or arrangements or negotiations for or towards or with a view to the adoption of a child; or

(b) information relating to the participation of a person in an artificial fertilization procedure as defined in the *Human Reproductive Technology Act 1991* or as to a person having been born as a result of such a procedure.

14. Information protected by certain statutory provisions

Exemptions

(1) Matter is exempt matter if it is matter of a kind mentioned in —

(a) section 167(1)(a), (1)(c), (2)(a) or (2)(b) of the *Equal Opportunity Act 1984*;

(b) section 64(2)(a), (2)(b) or (3) of the *Legal Aid Commission Act 1976*;

(c) section 23(1) of the *Parliamentary Commissioner Act 1971*; or

(d) section 47 of the *Inspector of Custodial Services Act 2003*.

(2) Matter is exempt matter if it is matter to which a direction given under section 23(1a) of the *Parliamentary Commissioner Act 1971* or section 48 of the *Inspector of Custodial Services Act 2003* applies.

(3) Matter is exempt matter if its disclosure would reveal anything said or admitted for the purposes of a conciliation under —

(a) Division 3 of Part 3; or

(b) administrative instructions under section 23,

of the *Health Services (Conciliation and Review) Act 1995*.

(4) Matter is exempt matter if it is matter of a kind mentioned in section 29(3) of the *Industry and Technology Development Act 1998*.

(5) Matter is exempt matter if its disclosure would reveal or tend to reveal the identity of anyone as —

(a) a person who has made an appropriate disclosure of public interest information under the *Public Interest Disclosure Act 2003*; or

(b) a person in respect of whom a disclosure of public interest information has been made under the *Public Interest Disclosure Act 2003*; or

(c) a person who has made, or a person who is mentioned in, a report under the *Children and Community Services Act 2004* section 124B(1); or

(d) a person who is a notifier as defined in the *Children and Community Services Act 2004* section 240(1), or a person about whom the information mentioned in that definition is given; or

(e) a person who has given, or a person who is mentioned in, a notification under the *Commonwealth Family Law Act 1975* section 67ZA(2) or (3) or the *Family Court Act 1997* section 160(2) or (3).

[Clause 14 amended by No. 94 of 1994 s. 3; No. 50 of 1995 s. 3; No. 75 of 1995 s. 80(4); No. 13 of 1998 s. 34(2); No. 43 of 1999 s. 20; No. 29 of 2003 s. 28; No. 75 of 2003 s. 56(1); No. 26 of 2008 s. 13.]

15. Information as to precious metal transactions

Exemption

(1) Matter is exempt matter if its disclosure would reveal information about —

(a) gold or other precious metal received by Gold Corporation from a person, or held by Gold Corporation on behalf of a person, on current account, certificate of deposit or fixed deposit; or

(b) a transaction relating to gold or other precious metal received or held by Gold Corporation.

Definition

(2) In this clause —

Gold Corporation means the Gold Corporation constituted under section 4 of the *Gold Corporation Act 1987* or a subsidiary of Gold Corporation within the meaning of that Act.

GLOSSARY

[Section 9]

1. Terms used

In this Act, unless the contrary intention appears —

agency means —

(a) a Minister; or

(b) a public body or office,

and ***the agency*** means the agency to which an access application or application for amendment of personal information has been made or to which such an application has been transferred or partly transferred;

public body or office means —

(a) a department of the Public Service;

(b) an organization specified in column 2 of Schedule 2 to the *Public Sector Management Act 1994*;

(c) the Police Force of Western Australia;

(d) a local government or a regional local government;

(e) a body or office that is established for a public purpose under a written law;

(f) a body or office that is established by the Governor or a Minister;

(g) any other body or office that is declared by the regulations to be a public body or office being —

(i) a body or office established under a written law; or

(ii) a corporation or association over which control can be exercised by the State, a Minister, a body referred to in paragraph (a), (b), (e), (f) or (g)(i), or the holder of an office referred to in paragraph (f) or (g)(i);

or

(h) a contractor or subcontractor;

APPENDIX 3 – PROFILE OF FOI COORDINATORS

To provide context to the group of people who administer FOI in agencies as FOI Coordinators the following information was obtained:

In your position that includes responsibility as a FOI coordinator, what is your current total annual gross salary (before tax)?	% of sample
Less than $50,000	5.6
$50,000 to $59,999	11.6
$60,000 to $69,000	25.4
$70,000 to $79,000	21.0
$80,000 to $89,000	9.9
$90,000 to $99,999	9.9
$100,000 and over	16.6
What is your work classification for your position?	% of sample
Permanent full-time	82.9
Permanent part-time	5.0
Fixed term full-time	9.9
Fixed term part-time	0.0
Casual	0.6
Sessional	0.0
Other	1.7
For how long, approximately, have you undertaken the role of FOI coordinator?	% of sample
Up to 6 months	12.2
Between 6 months and 1 year	8.8
More than 1 year and up to 2 years	19.3
Between 2 and 5 years	32.6
More than 5 years	27.1
Estimate how many individuals within your agency are regularly asked to make decisions under the FOI Act.	% of sample
1	49.7
2 to 3	36.5
4 to 5	7.2
6 to 10	3.3
More than 10	3.3
Do you have supervisory or managerial responsibility?	% of sample
Yes	76.2
No	23.8