



Freedom of Information Newsletter

Number 27 – April 2020

From the Information Commissioner

Welcome to the first OIC Newsletter for 2020. Our last newsletter was published shortly before we held our FOI in WA Conference in November 2019 (which is discussed in this newsletter). What a very different world we now all find ourselves in just a few months on.

I acknowledge that it has been a challenging first quarter of the year for the entire community including the public sector. Together with my staff, I sincerely hope that all our readers are safe and well in these difficult times.

To assist agencies with FOI Act timeframes for dealing with access applications during the COVID-19 pandemic period, my office has published a guide, which is referenced below. Other new or revised guidance material recently published by OIC is also described further below.

Also in response to the COVID-19 pandemic, I recently joined with other Australian Information and Access Commissioners to re-affirm the importance of access to information for transparency and public trust as governments and the community respond to and recover from the wide ranging effects of the pandemic. The Commissioner's joint statement, published on 17 April 2020, endorses a recent statement of the International Conference of Information Commissioners (ICIC). Both the joint statement and our membership of the ICIC are referenced below.



Returning to the FOI in WA Conference held in November 2019, I was thrilled that more than 300 State and local government officers attended the conference in the Education Building at Fiona Stanley Hospital in Murdoch. Thank you to all our speakers, panel members and participants who attended the conference. A particularly big thank you to the members of the conference steering group who worked tirelessly to ensure a successful conference. Our enormous gratitude also goes to Fiona Stanley Hospital for hosting us for a second time at their wonderful educational facilities.

Emeritus Professor Geoff Gallop AC set an inspiring tone for the day. Professor Gallop specifically acknowledged the challenges of being an FOI decision maker in the context of the need for openness in government, which he described as an indispensable prerequisite to government accountability and a democratic imperative. Professor Gallop's presentation slides are available [here](#). The video of his speech is also available [here](#). Professors Gallop's message remains relevant as we move between the response and the recovery phases of the COVID-19 pandemic.



I am pleased that my office was able to provide an opportunity for agency officers to increase their understanding of various aspects of FOI practice in WA and of the role that we all play in giving effect to the objects of the FOI Act which speak to the public's participation in State governance and State and local government accountability to the public. Additional information about the FOI Conference appears further below.



Following on from the FOI Conference, the start of 2020 was also busy for the OIC. In February, I delivered an FOI lecture to UWA law students enrolled in the Government Accountability - Law and Practice Unit. My staff have also presented FOI Decision Writing and FOI Coordinators Workshops in the first quarter.

Discussion panel members at the FOI in WA Conference: Joanne Kummrow, Deputy Access Commissioner, Office of the Victorian Information Commissioner; Ian Cowie, CEO, City of Gosnell; Catherine Fletcher, Information Commissioner, Office of the Information Commissioner, WA; Professor Geoff Gallop AC, Emeritus Professor, Sydney University, NSW; and Caroline Spencer, Auditor General of WA.

Whilst we have made the decision to suspend face-to-face agency training and briefings until at least June 2020, we will aim to recommence this again as soon as it is safe to do so within public health guidelines. If you are interested in attending one of our future OIC workshops, please visit our training schedule and registration page <[here](#)>. Further updates about training and our other operations can be found on our website.

Finally, you will also find in this newsletter a summary of my recent decisions and two Supreme Court appeal decisions affirming two of my earlier decisions.

Catherine Fletcher, Information Commissioner

New OIC Guide – COVID-19 and managing timeframes

To assist agencies with the required timeframes under the FOI Act for dealing with access applications during the COVID-19 pandemic period, my office has published a guide which can be found <[here](#)>.

New OIC Guide – Documents that cannot be found or do not exist – External review guide for access applicants

The OIC has produced a guide for access applicants seeking external review of an agency's decision under section 26 of the FOI Act to refuse access to documents on the basis that they cannot be found or do not exist. This publication will assist an access applicant to understand what information the Commissioner considers when deciding whether an agency's decision under section 26 is justified. The publication will also assist agency FOI Coordinators and Decision-makers to understand the issues the Commissioner will consider in reviewing a decision they may make under section 26.

OIC revised guide enables electronic production of documents

When the Commissioner receives a valid application for external review of an agency decision under the FOI Act, the Commissioner will generally request a copy of the agency FOI file and of the

disputed documents. This has traditionally been done by requesting hard copy documents. The Commissioner is now requesting documents be produced to this office electronically. Agencies will be provided assistance to produce electronic documents securely and in a timely way. Our guide for agencies [Producing documents to the Information Commissioner](#) has been updated to reflect this change in practice.

FOI in WA Conference - participant surveys

During the FOI in WA Conference, conference participants were given the opportunity to respond to a number of questions using the app *Slido*. Questions included: 'Should agency officer names be disclosed routinely (with relevant protections)?'; and 'What is the main thing you would change about the FOI Act?' A summary of the responses to those questions is available [<here>](#).

FOI in WA Conference – resources

Copies of many of the presentations made at the FOI in WA Conference are currently available [<here>](#) as a useful resource. They will be available from the OIC website until 11 May 2020.



FOI in WA Conference – Videos

Video of the conference opening address by Emeritus Professor Geoff Gallop AC is available [<here>](#).

Video of the conference panel session is available [<here>](#).

Joint statement of Australian Information and Access Commissioners - Transparency and access to information in the context of a global pandemic

The statement of Australian Information and Access Commissioners (some of whom are also Ombudsmen) made on 17 April 2020, which endorses a recent statement of the International Conference of Information Commissioners, is available [<here>](#). The PS News carried an article about the WA Information Commissioner's involvement in the transparency statement on 23 April 2020. That news item is available at <https://psnews.com.au/2020/04/22/ombudsman-backs-virus-transparency-2/?state=wa>.

The Open Government Partnership – Learn more about Open Government in Australia

Australia is a member of the Open Government Partnership (OGP), which is a multilateral initiative that aims to secure contract commitments from governments to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance.

Australia has released two National Action Plans since it became a member of the OGP in 2015 – [Open Government National Action Plan 2016-18](#) and [Open Government National Action Plan 2018-20](#).

Work is now underway for Australia's third Open Government National Action Plan 2020-2022. There is an opportunity to participate in the development of the plan through a public engagement process. For details see at <https://ogpau.pmc.gov.au/australias-third-national-action-plan-2020-22>. All are encouraged to participate. The OIC took part in a recent meeting to discuss the development of the third plan in Perth on 26 February 2020.

World of FOI – International day for Universal Access to Information declared by the United Nations

On 15 October 2019, the 74th UN General Assembly (**UNGA**) adopted a resolution to proclaim 28 September as the International Day for Universal Access to Information. This was one of two related resolutions adopted by the UNGA. The other resolution was a political declaration by which Member States renewed their commitment to implementing the 2030 Agenda for Sustainable Development.

When introducing the draft resolution to proclaim September 28 as International Day for Universal Access to Information, Dee-Maxwell Saah Kenahay Sr of Liberia stated that access to information is essential for the democratic functioning of a society. “None of these Sustainable Development Goals can be achieved without access to information”. For more information about the proclamation go to: <https://en.unesco.org/news/proclaims-international-day-universal-access-information>. The UNGA press release about the two resolutions is available at <https://www.un.org/press/en/2019/ga12201.doc.htm>.

World of FOI – Five Year Review of the Victorian Freedom of Information Act

The Office of the Victorian Information Commissioner (**OVIC**) recently published a report giving an overview of five years administration of the *Freedom of Information Act 1982* (Vic) (**the FOI Act (Vic)**). The report measures the effectiveness of the FOI Act (Vic), illustrates trends and highlights challenges for a period in Victoria. The full report is available at [State of Freedom of Information in Victoria: Five Years in Review 2014 – 2019](#).

World of FOI – OIC joins as a member of the International Conference of Information Commissioners

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



Recent decisions of the Information Commissioner

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

The complainant claimed that additional documents existed within the scope of the access application. The Commissioner considers that, when dealing with section 26 of the FOI Act, the following questions must be answered. First, whether there are reasonable grounds to believe that the additional documents exist or should exist and, second, whether the additional documents are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency had taken all reasonable steps to find the additional documents. On the material before her, the Commissioner was satisfied that there were not reasonable grounds to expect that additional documents exist or should exist. On that basis, and having regard to the searches conducted by the agency, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate the additional documents and did not require the agency to conduct additional searches.

The agency’s decision was confirmed.

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

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

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

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

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

The Commissioner varied the decision of the agency

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

The complainant sought access to audio records of interviews referred to in an investigation report into workplace allegations made against him (**the disputed documents**). The agency refused access to the disputed documents on the ground they were exempt under clauses 3(1) and 8(2) of Schedule 1 to the FOI Act.

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

In weighing the competing public interest factors for and against disclosure, the Commissioner did not consider that those favouring disclosure outweighed the public interests against disclosure. Weighing against disclosure, the Commissioner was satisfied that the interviewees participated in the interviews on a voluntary basis, and on the understanding that the interviews were being recorded and that the information provided during the interview was given in confidence. The Commissioner considered that, in workplace grievance matters – where information is given to investigators voluntarily and steps are taken to ensure that such information is given in confidence – there is a real risk that disclosure of that information would dissuade some staff members from volunteering information in similar situations in future. Similarly, staff may be less likely in the future to consent to their interview being recorded if the audio records of such interviews are disclosed under the FOI Act.

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

Recent decisions of the Supreme Court

***Lee v Department of Health* [\[2020\] WASC 103](#)**

The complainant appealed the Commissioner's decision in *Re Lee and Department of Health* [\[2019\] WAIComr 4](#) to confirm the decision of the agency, under section 26 of the FOI Act, to refuse access to emails sent or received by officers of the agency on the basis that those documents did not exist.

The appellant asserted that the Commissioner had not paid sufficient attention to certain considerations and that, as a result, the decision of the Commissioner was unreasonable.

The Supreme Court did not accept that the Commissioner had failed to take into account mandatory considerations. In particular, the Court agreed that the existence of one hard copy document, rather than an email, did not require the agency to search a hard copy file.

The Court concluded that the Commissioner's decision was not unreasonable and it was open to the Commissioner to conclude that the agency's decision was justified.

The Court did not accept the appellant's claim that the Commissioner had denied the appellant procedural fairness.

The Supreme Court dismissed the appeal.

***Lee v Department of Justice* [\[2020\] WASC 105](#)**

The complainant appealed against a decision by the Commissioner to stop dealing with his complaint on the ground that it was lacking in substance pursuant to section 67(1)(b) of the FOI Act.

Before making her decision, the Commissioner issued a preliminary view to the parties advising that, in her view, the agency's decision was justified on the basis that further documents could not be found or did not exist, as set out in section 26 of the FOI Act. In particular, the Commissioner was not satisfied that there were reasonable grounds to believe that further documents within the scope of the access application should exist.

The appellant claimed that the Commissioner failed to take into account relevant considerations and took into account irrelevant considerations in concluding that it was not reasonable to expect that further documents within the scope of the access application should exist. In considering the factors taken into account by the Commissioner, the Court determined that there is an interrelationship between the reasonableness of searches and the likelihood that a document exists. Further, it was open to the Commissioner to conclude, in light of the information before her, that there were no reasonable grounds to believe that further documents existed within the scope of the access application, without first considering the nature and extent of the searches that were made.

The Supreme Court dismissed the appeal.

FOI training calendar

The 2020 dates for the FOI Coordinators Workshops and the FOI Decision Writing Workshops are available [<here>](#) on our website. Due to the COVID-19 response, workshops were cancelled in April and May. We continue to monitor when the resumption of the face to face workshops is appropriate.

Subscription and feedback

Click [<here>](#) to subscribe to the FOI Newsletter and decision announcements.

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