



# Freedom of Information Newsletter

## Number 28 – July 2020

### *From the Information Commissioner*

As we begin a new financial year and the new annual reporting period, I acknowledge the considerable challenges of the last six months faced by both the public sector and the public we serve. In meeting these challenges, it is important to remember that freedom of information remains a significant part of our democracy framework that encourages an accountable and transparent response to those challenges.

On this theme, in May of this year I joined with the Australian and New Zealand Information Access Commissioners to support the call of our international counterparts for clear documentation, preservation and access to information as governments, businesses and citizens deal with the COVID-19 crisis. More information about this statement is available further below in this newsletter.

During the COVID-19 response, many State and local government agencies have learnt from their experience of operating their FOI functions remotely. My office has also had to adapt to new ways of working during this time. One recent innovation has been to deliver our first agency training session, a Decision Writing Workshop, via video-conferencing technology. We felt the experience, although not without minor hiccups, was largely successful. The use of video-conferencing tools for our training opens up significant opportunities to improve the accessibility of our services, particularly for those agencies operating in the regions. In order to further develop and improve these services we will conduct the remainder of our 2020 workshops for agencies as live online training. In addition to fine-tuning the technical side of our training delivery, we will continue to explore how we can best meet our obligation to ensure agencies are aware of their responsibilities under the FOI Act and are assisted on matters relevant to the FOI Act.

**Catherine Fletcher, Information Commissioner**

### *The AIAC lends support to ICIC pandemic statement - The duty to document does not cease in a crisis, it becomes more essential*

In a [media statement](#) on 6 May 2020, the Information Commissioner joined other members of the Association of Information Access Commissioners (**the AIAC**) from Australia and New Zealand, to endorse the call of the International Conference of Information Commissioners (**the ICIC**) and aligned organisations to recognise and promote sound information management practices during the COVID-19 pandemic. The [ICIC statement](#) calls for three mandatory actions:

1. decisions must be documented;
2. records and data should be secured and preserved in all sectors; and
3. the security, preservation and access to digital content should be facilitated during the shutdown.



*Signatories to the ICIC Statement*

The ICIC statement was published in five languages:

- [COVID-19: The duty to document does not cease in a crisis, it becomes more essential](#)
- [COVID-19 - Bien documenter : un devoir plus que jamais essentiel en période de crise](#)
- [COVID-19 - El deber de documentar en una crisis no cesa, se vuelve más esencial](#)
- [מתמיד חיונית נעשית היא – משבר בעת נעצרת אינה לתעד החובה \)COVID-19\( הקורונה מגיפת](#)
- [COVID-19 : 記録を残す義務は危機的状況下でも失われず、より不可欠となる」を發表しました \(2020年5月4日付\)](#)

### **Agency statistical returns – Thank you to agencies**

Thank you to WA agencies for providing their statistical returns for the 2019/20 annual reporting period. Section 111 of the FOI Act requires the Commissioner to report on the operation of the FOI Act to Parliament as soon as practicable after 30 June each year. Under Section 111(3), agencies have to provide the Commissioner with the information required for the purpose of preparing the report.

The information in the completed statistical returns will be collated in the Information Commissioner's annual report, which will be submitted to Parliament later this year.

### **Agency news – Changes to the statistical returns for 2020/21**

Next year, agencies will be asked to provide additional information in their statistical return about the number of valid access applications where the agency has refused to deal with the access application under section 20 of the FOI Act on the basis that dealing with the application would involve a substantial and unreasonable diversion of the agency's resources. The OIC will provide further details about this data request to each agency in a separate mailing. In the meantime, agencies should keep a record of the number of applications closed under section 20 from July 2020 to enable them to be able to report on this in their statistical return for the 2020/21 financial year.



*Data collected from agency statistical returns is collated in the OIC annual report.*

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

The National Dashboard of Utilisation of Information Access Rights compares certain statistics regarding the utilisation of information access rights across access jurisdictions within Australia. The 2018/19 data has been recently added to the AIAC's National Metrics Dashboard.

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

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

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

The current dashboard of FOI metrics can be found [<here>](#).

The data from the 2018/2019 dashboard also indicates, amongst other things, that Western Australia has:

- the highest number of applications received per capita;
- the third highest percentage of access provided in full or in part (94%) - Victoria and the Northern Territory reported 96% of access applicants received access in part or in full in response to a formal access application; and
- the lowest percentage of external reviews received, as a percentage of the total number of access applications received by agencies.

### **COVID-19 and FOI in WA**

Earlier this month, the Agency FOI Reference Group met remotely to discuss the impact of COVID-19 on FOI in WA state and local government agencies. It was helpful to hear of the challenges faced by FOI officers and units as their wider agency dealt with the COVID-19 response. Some of the observations from that meeting are outlined below.

- There was no real consistency across the agencies as to whether there were more, less or about the same number of access applications received during the COVID-19 emergency period. Anecdotally, local governments generally saw some increase in the number of access applications received.
- FOI timeframes were a challenge in some cases due to changed operations, or the threat of changed operations, during the COVID-19 response.
- The technicalities of working remotely was challenging in dealing with some kinds of access applications. Some documents are only available in hard copy that can only be accessed at an agency office.
- In-person payment of application fees and inspection of documents was problematic when agency offices were shut down or only allowed limited access.
- Agencies worked hard to be flexible in their processes to enable members of the public to exercise their access rights under the FOI Act.
- Members of the public were often very understanding about delays resulting from the challenges of the COVID-19 response.
- Many officers worked very hard to ensure processes ran as smoothly as possible when working remotely. Some technological issues were solved more quickly than would have occurred in a non-emergency.
- Many agencies provided information proactively to ensure members of the public were informed of agency decisions. It was felt that the sharing of information via websites, social media and enquiry lines enabled the public to be informed without the need to make a formal access application.



**United Nations  
International Day for  
Universal Access to  
Information (IDUAI) - 28  
September 2020**

This year UNESCO's theme for IDUAI is *Access to Information – Saving Lives, Building Trust, Bringing Hope*. UNESCO's IDUAI resources are available [<here>](#).

International Day for Universal Access to Information



**Office of the Information Commissioner acknowledges and celebrates International Access to Information Day**

The OIC will hold a number of events during the week of IDUAI.

This will include webinars for agency officers on the opportunities and challenges of information access. One webinar will focus on a comparison of the 'push' versus 'pull' models of freedom of information systems. Another webinar will have a special local government focus.

We will also host a webinar for advocates who assist individuals to make access applications.

Register your interest in attending one of our webinars [<here>](#). The webinars will be held between 29 September and 2 October 2020.

**OIC training to be online for the remainder of 2020**

As noted above, the OIC will deliver its training workshops online for the remainder of 2020. The online interactive training will be provided via Zoom meetings. The full day FOI Coordinators Workshop will now be delivered as the 'FOI Coordinators Workshop Series' in four modules over several days. The *Decision Writing Workshop Series* will consist of two, two hour modules delivered over two days.

Details about the new training schedule is available [<here>](#).

**Recent decisions of the Information Commissioner**

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

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

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

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

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

The Commissioner confirmed the agency's decision.

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

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

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

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

The Commissioner confirmed the agency's decision.

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

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

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

The Commissioner was satisfied that any information recorded during the conciliation conference would comprise information of a confidential nature obtained in confidence. The Commissioner considered that, if parties believed that any information shared during the conciliation conference could be disclosed to the world at large, then those parties would not volunteer information to try to resolve the matters between them. Accordingly, she considered that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind.

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

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

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

The complainant made two applications for access to documents recording the accessing of the integrated court management system by officers, in relation to two named businesses. The complainant disputed the agency's decision to give access to edited copies of two documents. The agency deleted the names of agency officers, under clause 5(1)(e), on the ground that the disclosure of the information could reasonably be expected to endanger the life or physical safety of a person. The agency deleted the logon identities of the officers under clause 3(1).

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

The Commissioner varied the agency's decision.

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

The complainant sought access to a copy of the Independent Children's Lawyer (ICL) correspondence in relation to an identified legal file. The file comprised documents arising from the ICL's representation of a child. The agency refused the complainant access to the requested documents pursuant to section 23(4) of the FOI Act, on the basis that it was not in the best interests of the child to disclose the documents. The agency additionally claimed that it was not required to identify the documents as it was apparent from the nature of the documents as described in the access application that all of the documents are exempt documents, pursuant to section 23(2) of the FOI Act.

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

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

The Commissioner confirmed the decision of the agency.

***Re Brookes and Western Australia Police*** [\[2020\] WAICmr 9](#) (PDF)

The complainant sought access to documents, including photographs, relating to a named individual's past interactions with the criminal justice system. The agency refused the complainant access to the documents pursuant to section 23(2) of the FOI Act on the ground that it was apparent from the nature of the documents as described in the access application that all of the documents are exempt documents.

The Commissioner found that it was apparent from the nature of the documents as described in the complainant's access application that, if any such documents exist, they would be exempt under clause 3(1) and that there was no obligation on the agency to give the complainant access to an edited copy of those documents, pursuant to section 24 of the FOI Act.

The Commissioner confirmed the decision of the agency.

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