OFFICE OF THE INFORMATION COMMISSIONER

WESTERN AUSTRALIA

TENTH ANNUAL REPORT 2003

PRESENTED TO BOTH HOUSES
OF PARLIAMENT

GOVERNMENT OF WESTERN AUSTRALIA

DEAR MR PRESIDENT
DEAR MR SPEAKER

In accordance with the provisions of the *Financial Administration and Audit Act 1985* and the *Freedom of Information Act 1992*, I submit my report for the year ended 30 June 2003.

This is the tenth annual report of the Office of the Information Commissioner and has been prepared in compliance with the provisions and reporting requirements of both Acts.

B KEIGHLEY-GERARDY
INFORMATION COMMISSIONER
6th October 2003

CONTENTS

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FOREWORD

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FOREWORD

Bronwyn Keighley-Gerardy

This is my tenth Annual Report and I am pleased to report another year of positive FOI outcomes across the public sector.

During the preparation of this report, I was informed by the Director General, Department of the Premier and Cabinet, that upon expiry of my term of appointment on 31 October 2003, the Attorney General intends to appoint an Acting Information Commissioner pending legislation to amalgamate this office with that of the State Ombudsman. As a consequence, I have decided to retire on 31 October 2003.

In 2001, it was recommended by the Machinery of Government Taskforce that the independent accountability agencies, including the Information Commissioner, consider the feasibility of co-locating to provide better services to the public. It has never been clear to me exactly how co-location could improve the level or quality of the services, which I presently provide. The surveys conducted by my office of agencies and applicants have consistently indicated a high level of satisfaction with the professionalism, timeliness and quality of its work. However, in accordance with government policy, I agreed to co-locate my office with that of the State Ombudsman at the expiry of our current lease and commenced planning for that change.

Assuming that the latest advice to me from the Director General, Department of the Premier and Cabinet, is correct, I have serious concerns about the consequences of amalgamation. At no time have I been consulted about that proposal, its timing, the effect it would have on the on-going work of my office or, indeed, on the legislative amendments that are necessary to give effect to the decision. I accept that all agencies, including FOI, must operate under budget constraints and that any duplication of costs and services should be eliminated. However, it remains to be seen whether the intended changes produce better FOI outcomes for the public, or whether FOI will now be left to languish in the back-water of public administration. History will tell. Personally, I do not consider that the amalgamation of two statutory offices, with entirely different functions and no obvious duplication, will necessarily provide better FOI services to the public, especially not after 10 successful years of the Information Commissioner operating as an independent merits review tribunal with determinative powers.

In Western Australia, FOI has been successfully integrated into the public sector as part of contemporary public administration. The constant efforts by me and my staff have ensured that the rhetoric of openness and accountability, which is commonplace in governments today, is actually matched by action. It could be assumed, therefore, that nothing more needs to be done and it is, perhaps, not surprising that this office was targeted to achieve savings. However, in the context of the total State Budget, any savings achieved by amalgamation are miniscule and, if FOI suffers in the process, the public is entitled to ask—What is the price of accountability in Western Australia?

History elsewhere clearly indicates that governments are less enthusiastic about openness and accountability when they are on the receiving end of FOI requests and cynics might view the decision as a deliberate attempt to destroy the effectiveness of FOI in this State. Clearly, the passing of time has dimmed the collective consciousness of the public sector. However, it is worth recalling that the FOI Act was enacted following a crisis in public confidence about the activities of government in the late 1980's, which culminated in a Royal Commission. FOI is a vital tool of accountability and the only legitimate means for citizens to obtain access to documents and information about the activities of State and local government agencies. It operates to limit secrecy in government and to curb the power of the Executive to control the flow of information available to the public.

If FOI is to be an effective tool to make agencies and government accountable, it requires a strong and independent advocate, together with a culture across the public sector and in government, which accepts that information is a public resource that is acquired or generated for the discharge of public duties, not for the benefit of elected and appointed public officials. Such information has been paid for, through one means or another, by the public. It exists for public purposes and, unless exceptional circumstances exist, the public should be able to have access to the information it requires, not merely the information fed to it by officials.

In 1992, when the FOI Bill was introduced into the Parliament by the Hon. D L Smith, Member for Mitchell and then Minister for Justice, the Minister stated that the Government regarded the position of Information Commissioner as important as that of the State Ombudsman and the Auditor General. The Government did not consider that the State

Ombudsman ought to be given the task of dealing with FOI because the then Ombudsman had enough to do with his own legislation. In the intervening years, nothing has changed.

I have also expressed my concerns about the perception of bias, as both the Commissioner for Public Sector Standards and the Office of Health Review are part of the co-location proposal and both agencies are subject to the FOI Act. From time to time, the Information Commissioner also makes decisions concerning the exempt status of documents created by the State Ombudsman. In my view, serious doubts about the impartiality of decisions made under the FOI Act could arise especially when decisions concern documents of the other three agencies and, in particular, when the amalgamated office of State Ombudsman/Information Commissioner must make a decision under the FOI Act about the exempt status of documents, which relate to the investigative functions of the State Ombudsman under the *Parliamentary Commissioner Act 1971*.

If the public perceive that decisions by the State Ombudsman/Information Commissioner are biased, whether or not that is in fact the case, there may well be an increase in appeals to the Supreme Court against such decisions on the ground of perceived bias, which will involve agencies in additional costs and inconvenience. I made the Government aware of my concerns. The Premier acknowledged that my concerns were valid, but stated that they could be managed appropriately through the co-location process. However, it was never explained to me just how they would be managed. I am not convinced that such administrative reassurances will change the perception of the average person or complainant. Therefore, I remain concerned that the credibility, independence and impartiality of the statutory office of Information Commissioner, which I have worked hard to establish over the last 10 years, will suffer a serious blow.

When the FOI Bill was debated in 1992, it was apparent that Members of Parliament expected the administration of FOI in Western Australia would be the start of a new regime offering a speedy, informal and less legalistic way of dealing with complaints about access. Over the past 10 years, I have continually refined and streamlined procedures in my office to better meet the expectations of Parliament, to fairly balance competing interests, and to ensure that the culture of the public sector in Western Australia does not revert to one of self-protective reticence and denial.

Section 111(4) of the FOI Act requires me to include in my report to the Speaker of the Legislative Assembly and the President of the Legislative Council any recommendations as to legislative or administrative changes that could be made to help the objects of the Act to be achieved. I have not heard any convincing arguments, which persuade me that the decision to either co-locate or amalgamate will actually help the objects of the FOI Act to be achieved.

Accordingly, I cannot, in good conscience, recommend to the Speaker or the President that those changes be facilitated by legislative amendments.

Complaints dealt with by my office

The number of applications for external review lodged with my office over the years has averaged around 190 in a full year (198 received this year). The rate of complaints has reduced significantly as a proportion of total applications, a result which I attribute to the education and advisory services provided by my office.

However, the number of complaints does not reflect the range and complexity of those matters dealt with by my office. A complaint may involve a single document of one or more pages, which may be exempt under one or more exemption clauses. In other cases, a complaint may involve tens or even hundreds of documents that can be the subject of multiple claims for exemption.

Notwithstanding the complexity of such matters, or the number of documents involved, each complaint is only recorded as a single complaint for reporting purposes, regardless of the number of issues for determination and decision.

The investigation of complaints is a time consuming process because I must deal with each matter according to law and settled principles of natural justice. The successful resolution of complaints also depends on the willingness of the parties to resolve matters by conciliation, which is my preferred approach. Suffice to say that the average days taken by my officers to finalise complaints has been reduced, with 97% of all complaint files closed within 3 months. The timeliness with which I am able to deal with FOI complaints after 10 years of experience is further confirmation that the present model in operation in Western Australia provides the public with the most efficient and effective means of dealing with FOI disputes.

Applications dealt with by Agencies

The data relating to the operation of FOI in the preceding years and again during 2002/03 speaks for itself (see figures 1-4).

FIGURE 1

Number of Applications Decided—All Agencies

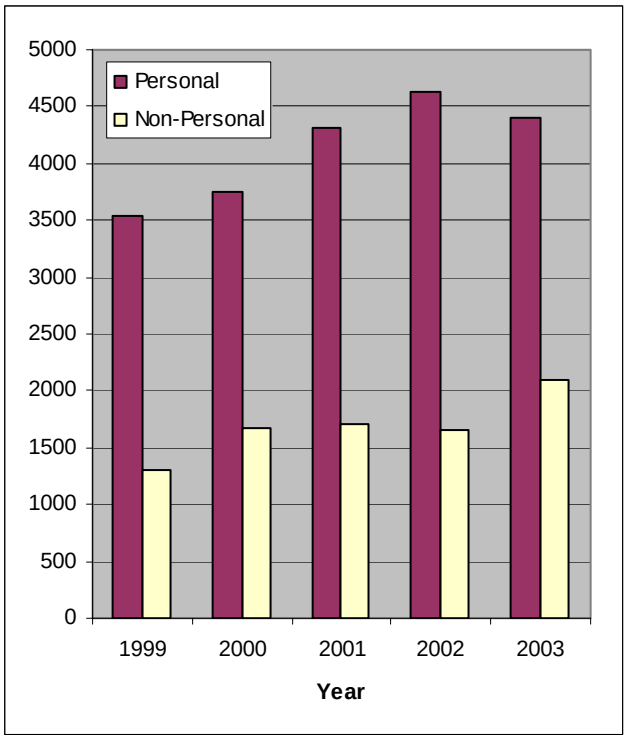


FIGURE 2

Average Days Taken to Deal with Applications – All Agencies

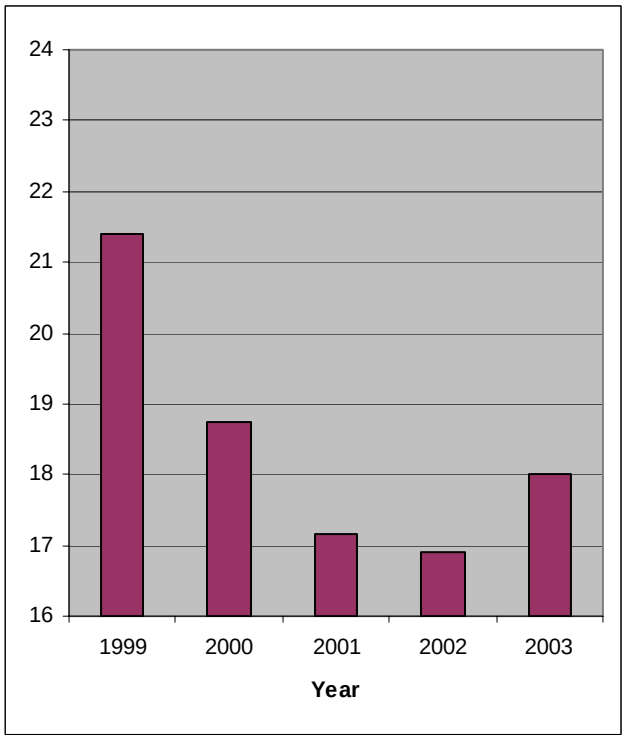


FIGURE 3

Average Charges Imposed —All Agencies ($)

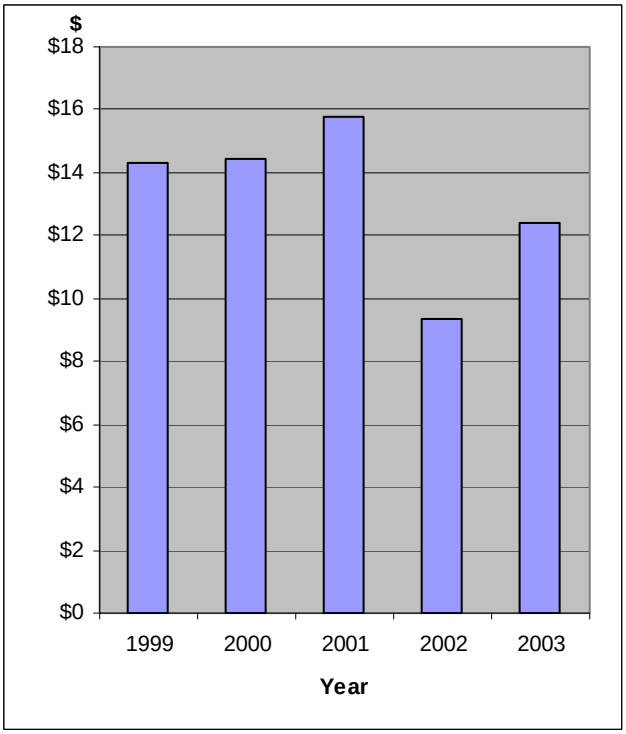
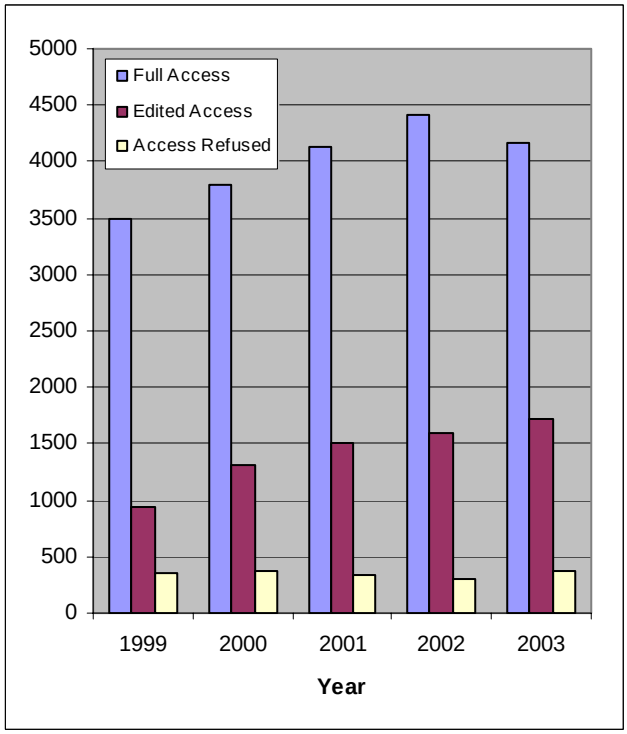


FIGURE 4

Outcome of Decisions—All Agencies



I have seen several recent examples of documents (contracts) containing confidentiality clauses, which has the effect of making such documents exempt under the FOI Act.

The Government policy on such contracts is to make them publicly available, ensure that specific claims of commercial confidentiality (for example, to protect intellectual property rights) are strictly and independently validated on a case by case basis, and ensure that businesses are aware that any contract that arises will be open to the public, through the publication of appropriate guidelines. I have not seen any amendments to the FOI Act or published guidelines, which would give effect to that policy. However, there have been instances in past years of some government contracts being published on agency web sites.

Since the enactment of the legislation on 1 November 1993, 50,147 applications for access to documents have been received by State and local government agencies. During the same period, 1,777 applications for external review have been received by me, which represents about 3.5% of the total number of applications. However, the balance of the decisions made by agencies has not been subject to any detailed scrutiny.

It is generally accepted that the number of access applications made to agencies, together with the number of complaints to me about refusals of access, are imperfect measures of whether the FOI Act is meeting its stated goals of making agencies more accountable and enabling public participation in the processes of government. Ideally, FOI principles should be incorporated in the management ethos of agencies and reflected in administrative practices if those goals are to be achieved. To determine the extent to which that has occurred in the public sector, my office commenced a review of FOI practices in agencies, starting with the Department for Community Development. I have included a brief summary of the DCD review in this report.

Interstate Visitors

In July 2002, the Information Commissioner in Queensland, Mr David Bevan and his Assistant Commissioner, Mr Peter Shoyer visited my office. Both Commissioners were interested in various case management techniques employed by my office to achieve the timely resolution of complaints, and in the advisory function, which is unique to Western Australia.

Commissioner Bevan followed his visit with a letter of appreciation and stated:

"Peter and I found the discussions very informative. I was particularly impressed by your advice and awareness activities and the 'more active' *approach you take to resolving applications for large volumes of material."*

In October 2002, we were visited by Ms Zoe Marcham, Policy Officer for the Department of Justice in the Northern Territory. At that point, the Northern Territory Government was due to enact its own FOI legislation and her tasks were to report on the FOI model in operation in Western Australia and its effectiveness because of the successful FOI outcomes achieved in this State.

Following that visit, the Northern Territory Government invited me to participate as a panel member in the selection process for the position of Information and Privacy Commissioner in the Northern Territory. Mr Peter Shoyer was subsequently appointed to that position.

Finally, I wish to take this opportunity to place on the public record my sincere praise and gratitude to all of my present and former staff members for their efforts over the past 10 years. I will be leaving an efficient and effective office staffed by an experienced team, who has served the public well. I also acknowledge the efforts of FOI Coordinators in State and local government agencies who have worked tirelessly to advance the goals of openness and accountability in their own agencies.