SIGNIFICANT ISSUES AND TRENDS

3. SIGNIFICANT ISSUES AND TRENDS

3.1 Conciliation rate

The faster turnaround of complaints seeking external review has come at a price in terms of conciliated outcomes. The Office has always had a strong commitment to resolving complaints by mediation and conciliation where practicable. Section 71 of the FOI Act provide wide powers for the Information Commissioner to suspend inquiries, investigations and other proceedings so that efforts can be made to pursue conciliation or negotiation between the parties. During the reporting year, the conciliation rate declined from 73.7% at 30 June 2007 to 61.5% as at 30 June 2008. While the decline in the conciliation rate is disappointing, I am mindful that s.70(2) of the FOI Act requires that external review proceedings are conducted with as little formality and technicality, and as much expedition as the requirements of the FOI Act and a proper consideration of the matter permit, and that s.76(3) further provides that the Information Commissioner has to make a decision on a complaint within 30 days unless it is impracticable to do so. In light of those provisions, I believe that, on balance, it is preferable to resolve complaints quickly, even if it means a reduction in the rate of conciliation of complaints. It is also noted that for the three years to 2004 the Office had an average conciliation rate of about 60%. Thus the current year decline in the conciliation rate should be seen in that context.

3.2 Reduction in the proportion of agency decisions to give full access

An average of over 90% of all access applicants are given full or part access by agencies. This figure has been relatively stable since the FOI Act first commenced operation 15 years ago. However, analysis of data over that 15 year period reveals on its face a worrying trend towards fewer decisions by agencies to give applicants full unedited access to documents, with greater editing of documents.

The proportion of agency decisions to give full access has fallen from a high of 77% in 1993/94 to 55% for 2007/08. While this current year has shown a slight improvement in the proportion of full access given, the long term trend remains a concern. The proportion of edited access decisions has increased over the same period from 14% to 29%. Decisions to refuse access have remained relatively constant at around 10% of applications to agencies. The Office follows up with agencies to ensure that data reported under s.111(2) of the FOI Act accurately reflects the correct FOI processes and decisions within agencies. For example, agencies need to correctly classify applications for access to documents as applications for access to "personal" or "non-personal" information and levy the appropriate application fee. The former Information Commissioner, Ms B Keighley-Gerardy, dealt with this issue in two of her decisions, *Re Burkala and City of Belmont* [1994] WAICmr 25, and *Re Humphrey and Humphrey and the Public Advocate* [1997] WAICmr 23. Where personal information about the applicant only is sought, then the scope of such applications should result in personal information about third parties being removed from the requested documents because it is outside the scope of the application, rather than being treated as exempt personal information that is edited out of the requested documents.

"An average of over 90% of all access applicants are given full or part access by agencies."

The continuing trend away from granting full access to documents does not necessarily point to an increasing culture of concealment. Some comfort is to be gained from closer

analysis of the available data. Since the FOI Act commenced in 1993, many agencies, particularly those that are the chief recipients of FOI applications (the Police Force of WA, public hospitals, Department of Corrective Services and Department of the Attorney General) have put in place arrangements for administrative access to documents as an alternative to using the FOI process. Thus personal health records, criminal histories and court transcripts about an individual are now able to be accessed by that individual outside the FOI process. As a result, individuals can get access to more routine information about themselves rather than needing to rely on their statutory rights under the FOI Act to obtain the information desired. FOI access procedures would have, on this evidence, gradually become used only for access in cases of greater complexity or sensitivity and more 'one off' matters. This practice on the part of State and local government agencies is to be encouraged as it enables members of the public to access personal and non-contentious information held by agencies quickly and readily, and reflects the objects and intent of the FOI Act. Increasing numbers of requests for personal information of this type are now able to be dealt with administratively. As those requests are not counted as FOI applications, they are not, therefore, reflected in the FOI statistics.

Supporting this interpretation is the data on the proportion of FOI applications for non-personal information (which more frequently require edited access). This has increased markedly over time from 21% of all applications in the first full year of FOI (1994/95) to 40% in 2007/08. That is, applications for non-personal information have increased at about the same rate as the decline in the proportion of applications given full access and over the same period. This goes some way to help explain the trend towards a growing proportion of FOI applications being dealt with by way of edited access rather than full access. Nonetheless, the decline in full access is a concern and I intend to more closely examine the reasons for increased edited access to information, and to continue to promote openness and transparency to agencies by way of our *Advice and Awareness* program.

3.3 Information Statements

Part 5 of the FOI Act provides for publication of information about agencies in Information Statements. Section 96(1) requires all State and local government agencies, other than a Minister or an exempt agency, to publish or update annually Information Statements about their operations and decision-making functions, and to provide a copy to the Information Commissioner. Soon after commencement of the FOI Act, the then Attorney General, as Minister responsible for administration of the FOI Act, approved under s.96(1) the publication of Information Statements by agencies as either discrete documents, or by incorporation into the agency's Annual Report. The Attorney General had also indicated that agencies should follow guidelines for the preparation of these documents issued by the Information Commissioner from time to time. Agencies are also required to make available their internal manuals, rules, guidelines and policies that affect members of the public. It is common practice for agencies to publish their Information Statement and relevant manuals, rules and guidelines electronically on their internet site.

When they were first introduced, the publication requirements in Part 5 of the FOI Act were said, according to the FOI Implementation Committee's 1993

"...the decline in full access is a concern and I intend to more closely examine the reasons for increased edited access to information, and to continue to promote openness and transparency..."

Guidelines, to form part of the means by which State and local government agencies are accountable, by increasing opportunities for effective participation by members of the public in government.

Agencies are required to provide the Information Commissioner with a copy of its Information Statement as soon as practicable after publication. Most, but not all, agencies conform to this statutory requirement. While the FOI Act does not prescribe a role for the Information Commissioner with respect to these documents, nor is there a sanction for non-compliance, the Information Commissioner's Office has implemented a program to survey all State and local government agencies to ascertain how they have published their Information Statements during the year. The Office follows up with those agencies that have not confirmed in the latest survey responses that they have complied with their statutory responsibilities to publish their Information Statement.

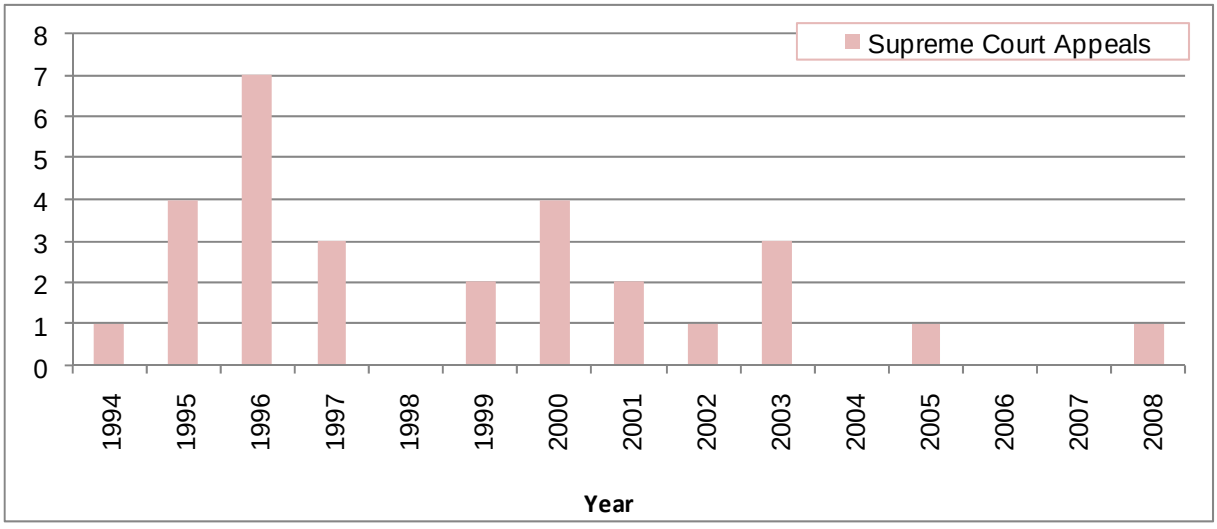
It is arguable that the statutory Information Statement requirement in its current form is now reaching its "use by" date. The recently published review of Queensland's Freedom of Information Act in June 2008 (http://www.foireview.qld.gov.au/) provides a glimpse of a possible future direction. It noted that that State's "statement of affairs" model, which is similar to Western Australia's Information Statements, requiring agencies to publish general categories of information holdings, was 15 years old and out of date. The review recommended the adoption of a new model which would provide an online single entry point of searchable metadata comprising published information from all agencies. As a first step, agency-based pilot programs would be established as a means of ironing out practical issues ahead of a public sector wide endeavour.

The developments in Queensland will be monitored by my Office. In the meantime, I consider that the Information Statement still performs a useful role in helping to ensure that information concerning the operation of agencies (and in particular the policy, rules and practices followed by agencies in their dealings with members of the public) and the documents they hold are kept up-to-date and made available to the public, thereby promoting an increased awareness of how government operates.

3.4 Supreme Court appeals

Under s.85 of the FOI Act a party to a complaint may appeal to the Supreme Court on a question of law arising out of certain decisions of the Information Commissioner relating to an application for access to a document or amendment of personal information. The agency to which the access application was made or transferred is a party to the appeal, even if it is neither the

FIGURE 2: Supreme Court Appeals relating to FOI matters



appellant nor the respondent. Various other appeal avenues also apply where an exemption certificate has been issued, although it should be noted that, in Western Australia, no exemption certificate has ever been issued under s.36 of the FOI Act and the *Freedom of Information Amendment Bill 2007* proposes to abolish exemption certificates.

This year there was one appeal to the Supreme Court. Since commencement of the FOI Act in 1993, there has been a gradual decline in the number of Supreme Court appeals relating to FOI matters, as indicated in Figure 2 on the previous page.

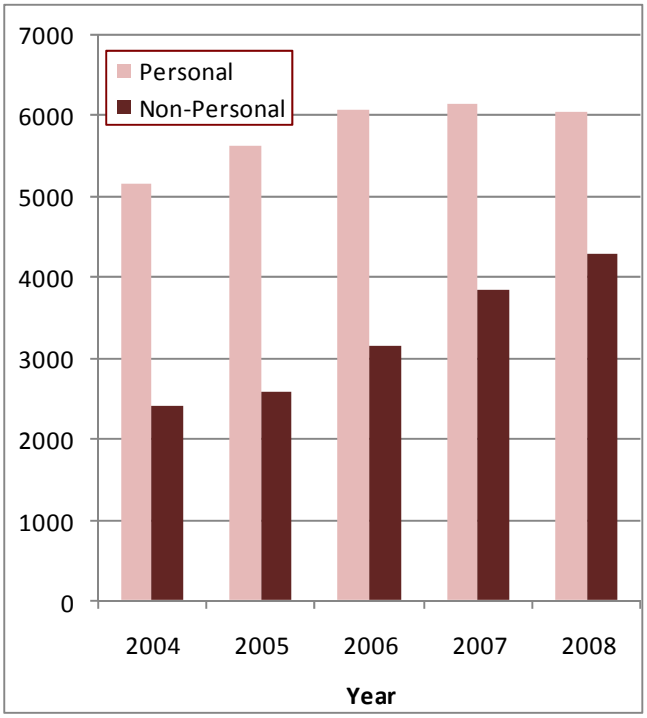
In all, since commencement of the FOI Act, there have been 12 FOI appeals to the Supreme Court that have proceeded to a decision (although a number of additional appeals reflected in Figure 2 were lodged but were withdrawn or otherwise did not proceed to a decision). Nine of the 12 appeals heard have been made by an agency as appellant, rather than by individual complainants. Since 2002, there have been only 3 appeals, two made by agencies and one by an applicant. The reducing trend in appeals is an indicator that the scope and interpretation of the FOI Act is becoming better understood and accepted as experience with the FOI Act

3.5 Agency Statistics 2008

Section 111 of the FOI Act requires that the Information Commissioner's annual report to the Parliament includes certain specified information relating to the number and nature of applications under the FOI Act dealt with by agencies during the year. To enable that to occur, agencies are also required by s.111 to provide the Information Commissioner with the specified information. That information for 2007/08 is set out in detail in the statistical tables at the end of this report. The following is an overview.

The primary responsibility for making decisions on FOI applications and otherwise giving effect to the provisions of the FOI Act rests with agencies. Applications under the

FIGURE 3
Number of Applications Decided—All Agencies



FOI Act are made in the first instance to the government agency holding, or likely to hold, the document sought, and the agency must deal with and decide the application. As can be seen from a review of previous annual reports of the Information Commissioner, the number of access applications made to agencies under the FOI Act has steadily increased, from 3,323 at the end of the first full financial year of operation of the FOI Act (1994/95) to 11,255 in the year under review. That represents an increase of approximately 238% in 13 years from 1995 and 8% from last year (10,416).

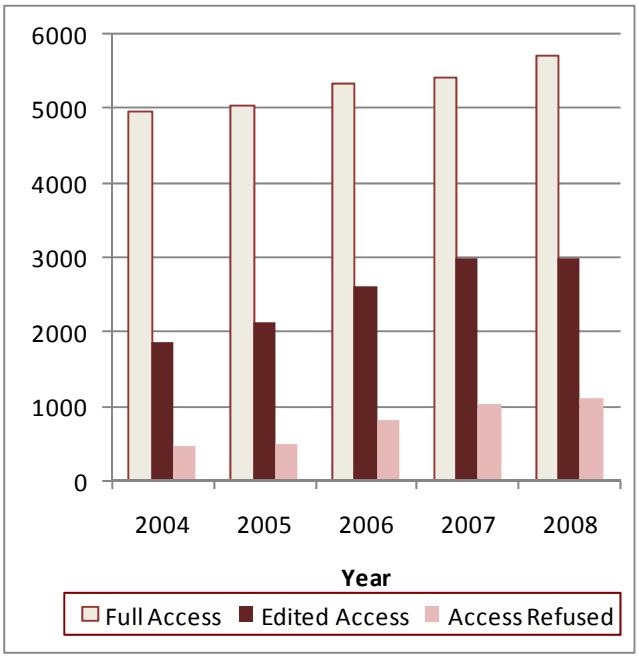
From the statistical tables at the end of this report, it can be seen that, as in recent previous years, the Police Force of Western Australia received the highest number of applications made to a single agency (1,696 - a decrease of 4% from last year), with the next highest being received by Royal Perth Hospital (1,468 - an increase of 23.7% from last year) and Sir Charles Gairdner Hospital (961 - an increase of 8.3%), and another 3,877 in total received by various other health service providers (hospitals, health services and the Department of Health), representing a total increase of 17.7% over last year.

The very low amount of application fees and charges collected by the health services (for example, a total of $270.00 in application fees - i.e. nine application fees - and $0 in additional charges collected by Royal Perth Hospital) suggests that the vast majority of access applications to health-related agencies was for personal information - for example, medical records - about the access applicant, for which no application fee or other charge is payable.

Of the 11,255 applications received by agencies in 2007/08, 516 (just over 4.6%) were received by local government agencies and 10,739 (95.4%) by State Government agencies. Of the local government agencies, the City of Joondalup received the highest number of applications (47), followed by the City of Mandurah (37), the City of Stirling (33), the Shire of Kalamunda (31), the City of Swan (28) and the City of Wanneroo (24). A number of local government agencies located in the country areas reported having received either no applications or just the one application.

Of the applications made to State Government agencies, 94 were made to Ministers, similar to the number made to Ministers last year (86). The Minister receiving the highest number of applications was the Hon J A McGinty, Attorney General; Minister for Health; Electoral Affairs (22), with the next highest being the Hon A MacTiernan, Minister for Planning and Infrastructure (19). Hon F M Logan, the Minister for Energy; Resources; Industry and Enterprise and Hon M McGowan, Minister for Education and Training; South West received 10 and 8 applications respectively. Of the decisions on access made by Ministers in the reporting period, 24 (34%) were to give full access; 33 (47%) were to give access to edited copies of documents; and 12 (17%) were to refuse access. The exemptions claimed by Ministers were 13 x clause 1 (Cabinet and Executive Council documents); 29 x clause 3 (personal information); 3 x clause 4 (commercial or business information of private persons); 6 x clause 6 (deliberative processes of government); 6 x clause 7 (legal professional privilege); 1 x clause 8 (confidential communications); and 1 x clause 10 (the State's financial or property affairs).

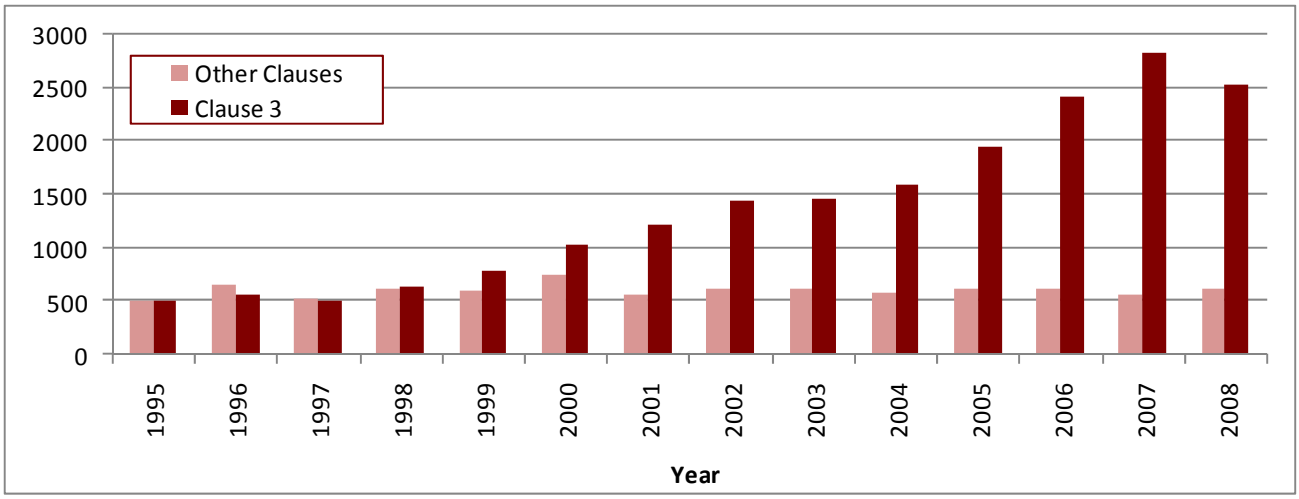
FIGURE 4
Outcome of Decisions—All Agencies



The statistical tables also reveal that 9770 decisions on access applications were made by State Government agencies under the FOI Act in 2007/08. Of those decisions made, 58.2% resulted in the applicant being given access in full to the documents sought; 30.3% resulted in the applicant being given access to edited copies of the documents sought; and just over 0.3% resulted in either access being given but deferred, or being given in accordance with s.28 of the FOI Act (by way of an approved medical practitioner). Those figures indicate that approximately 89% of the 9,770 decisions made by agencies on FOI applications were to the effect that access in some form was given. Only 11% of the decisions made were to refuse access. That is consistent with the similar statistics for the previous year.

Also consistent with previous years, the exemption clause most frequently claimed by agencies from both state and local government sectors was clause 3, which exempts from disclosure personal information

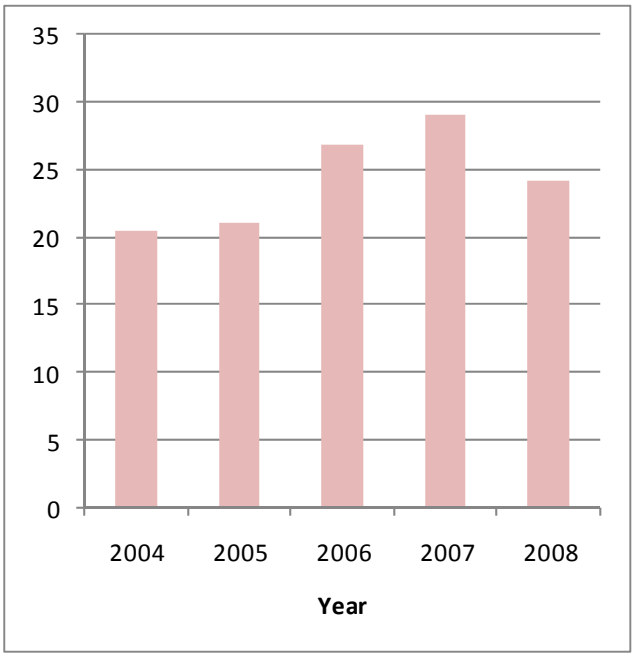
FIGURE 5: Use of Exemption Clauses —All Agencies



about individuals other than the applicant. That clause was claimed 2,530 times in the year under review. Figure 5 above compares the use of this clause with all other clauses used since 1994/95, which indicates increasing use of the exemption to protect personal privacy. The next most frequently claimed exemptions were: clause 7, which protects from disclosure documents which would be privileged from production in legal proceedings on the ground of legal professional privilege (131 times); clause 4, which relates to certain commercial or business information of private individuals and organisations (also 131 times); and clause 6, which relates to the deliberative processes of government (94 times). The amendment made to the FOI Act in 2004 to clause 5, which relates to law enforcement, public safety and property security, resulted in a significant decrease in the use of this exemption from 170 in 2005 to 90 in 2008. Prior to the amendment, clause 5(1)(b) exempted from disclosure documents that would reveal the investigation of a contravention or possible contravention of the law in a particular case. The amendment was to delete the words “reveal the” and replace them with “prejudice an”. The effect of that is that, to establish the exemption, an agency must now be able to show that disclosure could reasonably be expected to cause some harm to an investigation.

Agencies received 226 applications for internal review of decisions relating to access applications during 2007/08. This represents about 2% of all decisions made and about 21% of decisions made to refuse access. In the year under review, 221 applications for internal review were dealt with. The decision under review was confirmed on 142 occasions, varied on 63 occasions, reversed on six occasions and the application for internal review was withdrawn on 10 occasions. Ten applications for amendment of personal information were made to agencies during the year. All ten applications

FIGURE 6
Average Days —All Agencies

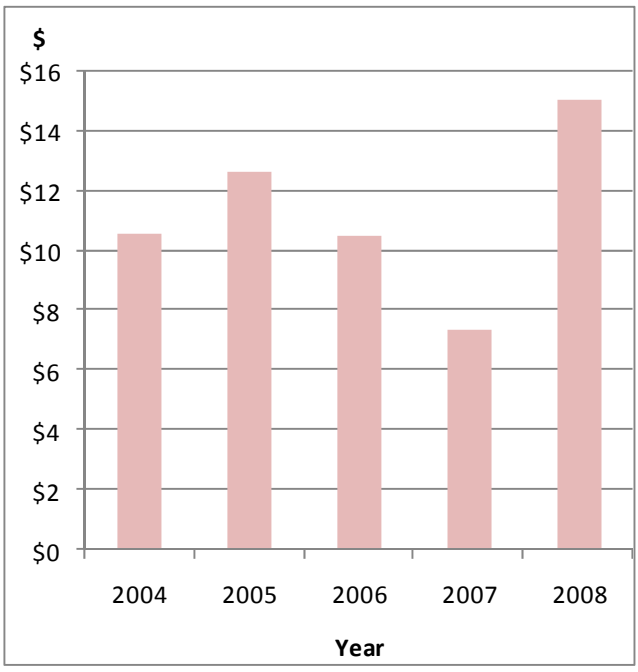


were dealt with, resulting in personal information being amended on three occasions, not amended on three occasions and amended, but not as requested, on four occasions The five reported applications for internal review of decisions relating to the amendment of personal information resulted in the initial decision being confirmed on four occasions and reversed on one occasion.

The number of applications decided by agencies increased, as did the number of occasions on which full access was given.

The average time taken by agencies to deal with access applications (24 days) decreased by approximately five days from the previous year, and is still well within the maximum period of 45 days permitted by the FOI Act. The decrease in the average is welcome, given the increase in the number of access applications being dealt with.

FIGURE 7
Average Charge for Access —All Agencies



The average amount of charges imposed by agencies for dealing with access applications increased substantially in comparison with the previous year—by almost double from $7 per non-personal application in 2006/07 to over $15 in 2007/08, reversing the downward trend over the preceding 2 years. The rise in average access charges would be consistent with the observed trend towards more complex FOI applications.

Although the conclusions that can be drawn from statistics such as these are limited, in my view, these figures are a positive indicator that, overall, agencies are giving effect to the FOI Act in the manner in which it is intended to operate. Of course, there continue to be particular instances where that is not the case, and it is the ongoing goal of my Office, both through the external review of complaints and through our advisory and educational activities, to ensure these positive trends continue and that problem areas are identified and addressed.