SIGNIFICANT ISSUES AND TRENDS

3. SIGNIFICANT ISSUES AND TRENDS

This year the two provisions of the Act that were most frequently the subject of complaints to the Commissioner were decisions relating to s.20 (the work involved in dealing with an application) and s.26 (documents that cannot be found or do not exist), particularly in relation to electronic documents. Members of Parliament again made up a large group of complainants, while Ministers' offices were again the subject of a significant number of access applications.

3.1 Refusal to deal with large applications

A considerable portion of this office's resources was spent dealing with complaints about agencies' decisions to refuse to deal with an access application under s.20 of the Act. Those complaints highlighted the importance of agencies and applicants engaging at an early stage in meaningful communication to clarify the specific documents and information sought. This includes agencies adequately explaining to an applicant why an application is too big to deal with and offering practical suggestions to reduce the application to a manageable level. At the same time, it is important that applicants are reasonable in their expectations and open to negotiating the size of an application to a level that the agency can realistically manage. For the Act to function effectively both parties must be prepared to assist in reducing the amount of work required to deal with large access applications. It is likely that better communication between agencies and applicants would have significantly reduced the number of s.20 complaints made to the Commissioner and the work required from agencies on external review.

3.2 Stopping the clock

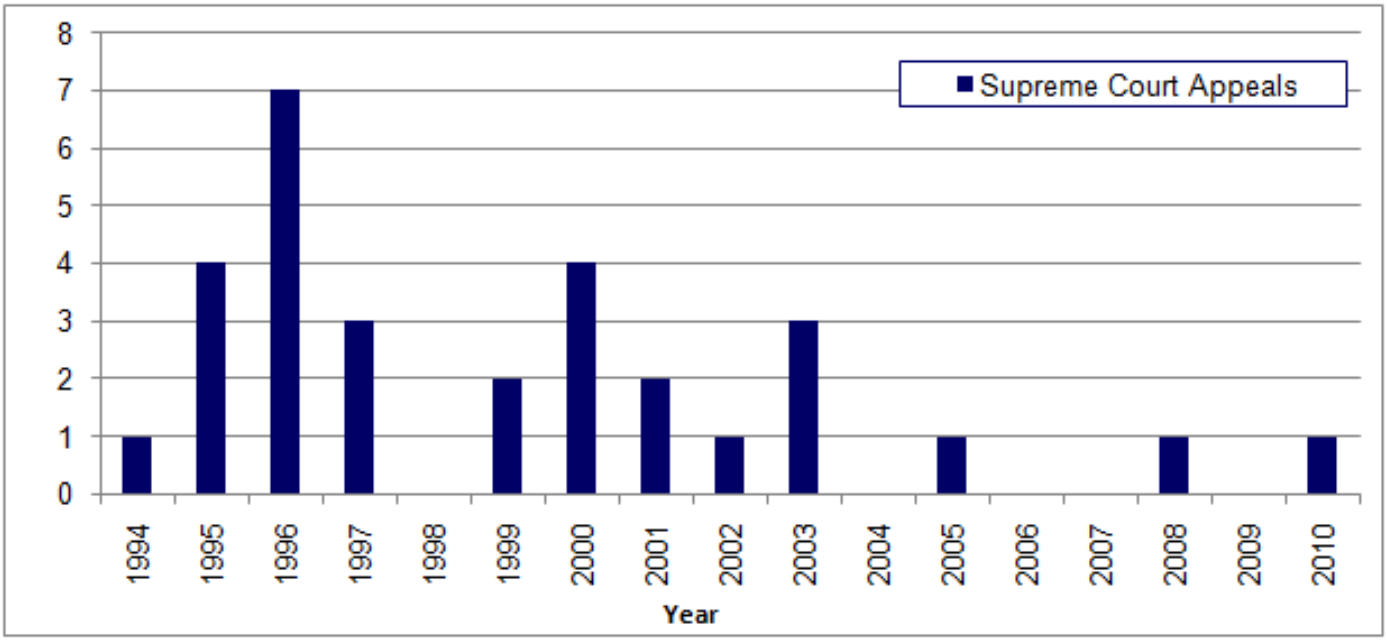
It also became apparent this year that a number of agencies, particularly Ministers, routinely advise applicants that the time for dealing with large applications is suspended until the applicant reduces the scope of the application. Such advice is misconceived. Under s.13 of the Act, an agency has to deal with an access application as soon as practicable but in any event within 45 days (the permitted period) unless the parties agree to some other period or an extension of time is allowed by the Commissioner. In *Re Ravlich and Attorney General; Minister for Corrective Services* [2009] WAICmr 17, the Commissioner noted that the 45 day permitted period may be suspended only for the reasons set out in s.13. In other words, the statutory 'clock' may not be stopped during discussions to clarify or reduce the scope of an application or during the s.20 process.

3.3 Searches for documents

Another issue that was highlighted this year was the need for agencies (including Ministers) to set out in their FOI files the specific searches and inquiries they have made for the requested documents so that, in the event that a decision is the subject of external review, officers would not later have to recall the searches made. Where that has not been done, it is likely that searches will have to be conducted all over again on external review. To avoid that additional workload, it is recommended that agencies note, for each access application dealt with, the electronic and hard copy files searched; the locations searched; the search terms or key words used to locate the documents; and the names and titles of the staff members who conducted those searches. All of that information should be recorded on the agency's FOI file.

If an agency is relying on s.26 in its decision, the agency should set out the searches conducted and the inquiries made for the requested documents in the notice of decision given to the access applicant. This gives applicants the opportunity to suggest further searches or inquiries that could be made, which may avoid the need for an external review. On a number of occasions this year, agencies that conducted additional searches on external review located

FIGURE 2: Supreme Court Appeals relating to FOI matters



further documents within the scope of the application. Those documents could have been identified sooner if the agency had satisfied its obligation under s.26 of the Act to take "*all reasonable steps*" to find those documents at first instance.

3.4 Supreme Court appeals

This year one decision of the Commissioner was the subject of an appeal to the Supreme Court. That appeal was lodged by the Water Corporation arising from the Commissioner's decision in *Re McKay and Water Corporation* [2009] WAICmr 35. The appeal was heard on 17 June 2010. As at the end of the reporting period, the Court had not delivered its judgment.[1]

3.5 Agency Statistics 2010

Section 111 of the Act requires that the Commissioner's annual report to the Parliament includes certain specified information relating to the number and nature of applications dealt with by agencies under the Act during the year. To enable that to occur, agencies are also required by s.111 to provide the Commissioner with the specified information. That information for 2009/10 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 Act rests with agencies. Applications under the Act are made in the first instance to the government agency holding, or likely to hold, the documents sought, and the agency must deal with and decide the application. As can be seen from a review of previous annual reports of the Commissioner, the number of access applications made to agencies under the Act has steadily increased, from 3,323 at the end of the first full financial year of operation of the Act (1994/95) to 12,994 in the year under review. That represents an increase of approximately 291% in 15 years from 1995 and 5.3% from last year (12,336).

3.5.1 Applications

From the statistical tables at the end of this report, it can be seen that, as in recent previous years, the Western Australia Police received the highest number of applications made to a single

[1] *The Court delivered its judgment on 17 August 2010, confirming the Commissioner's decision. The judgment can be found at http://www.foi.wa.gov.au*

FIGURE 3
Number of Applications Decided — All Agencies

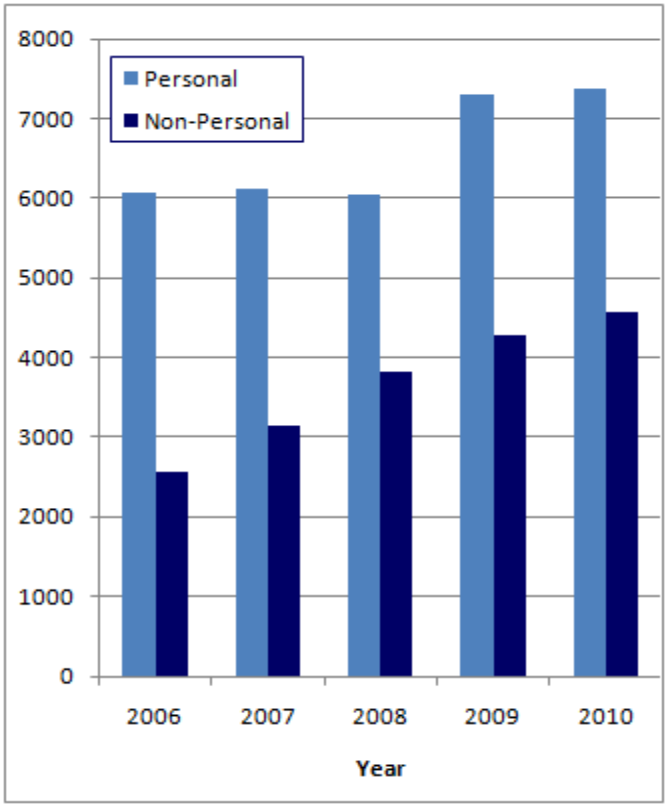
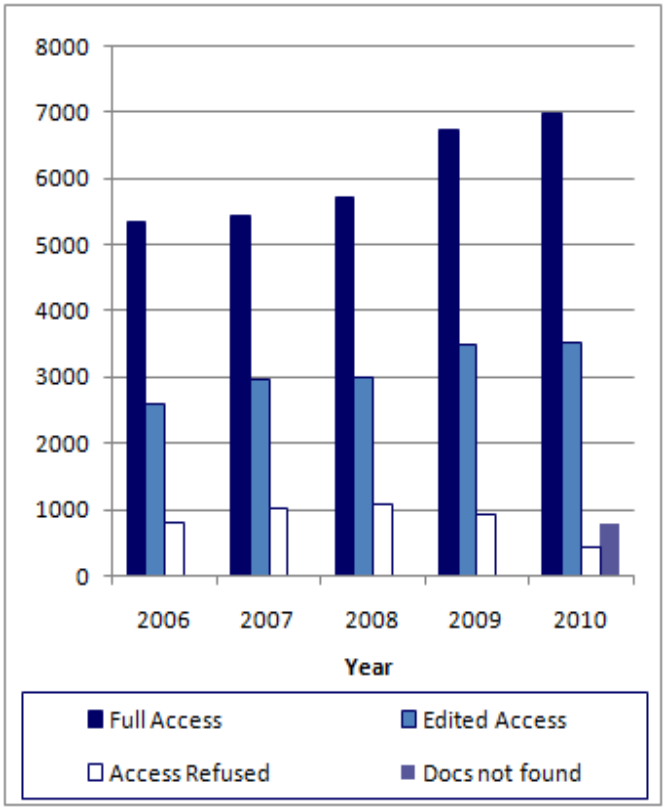


FIGURE 4
Outcome of Decisions — All Agencies



agency (2,198 - an increase of 19.0% from last year), with the next highest being received by Royal Perth Hospital (1,659 - an increase of 1.34%from last year), followed by Sir Charles Gairdner Hospital (1,054 - an increase of 6.6% from last year), and another 4,060 in total received by various other health service providers (hospitals, health services and the Department of Health), representing a slight decrease of 0.87% over last year.

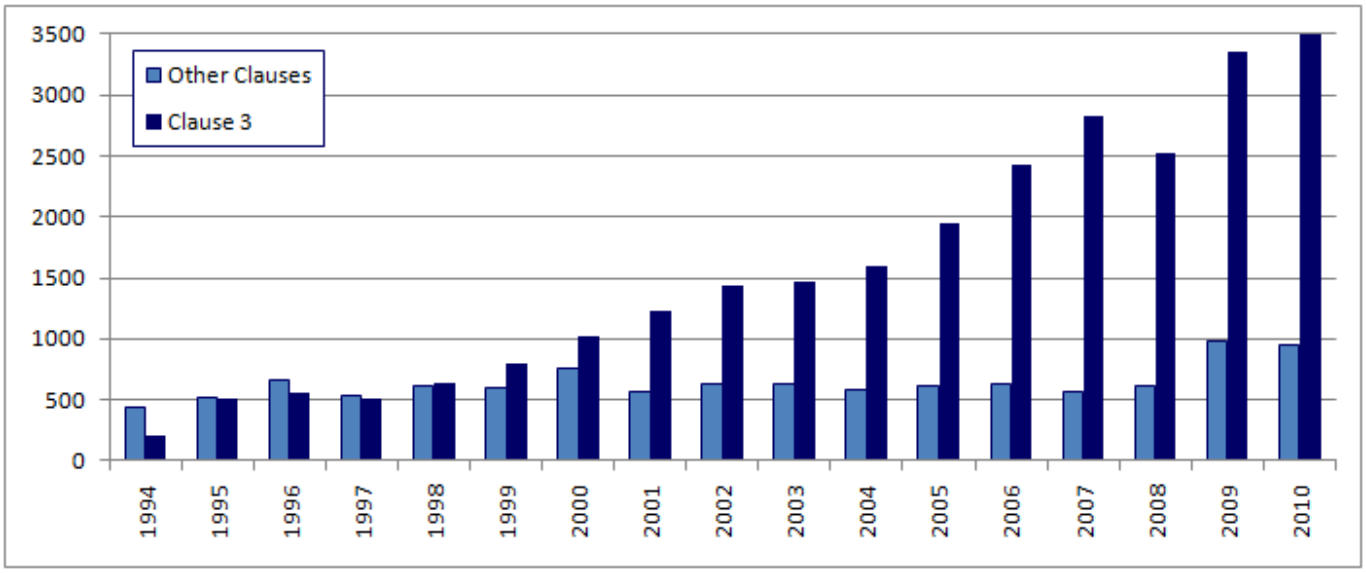
Of the 12,994 applications received by agencies in 2009/10, 567 (just over 4.4%) were received by local government agencies and 12,427 (95.6%) by State government agencies. Of the local government agencies, the City of Stirling received the highest number of applications (70), followed by the City of Swan (38), the City of Joondalup (32), the City of Bayswater (27), the Shire of Murray (25) and the City of Fremantle (20). A number of local government agencies located in the country areas reported having received either no applications or very few applications.

Of the applications made to State government agencies, 140 were made to Ministers, which was significantly less than the number made to Ministers last year (267). The Minister receiving the highest number of applications was the Hon T Buswell, Treasurer; Minister for Commerce; Science and Innovation; Housing and Works with 29 applications (up until the Minister's resignation in April 2010), with the next highest being the Hon C Porter, Attorney General; Minister for Corrective Services (16).

3.5.2 Decisions

Of the decisions on access made by Ministers in the reporting period, 9 (7.7%) were to give full access; 86 (73.5%) were to give access to edited copies of documents; and 13 (11.1%) were to refuse access. The statistical tables also reveal that 11,135 decisions on access applications were made by State government agencies i.e. exclusive of local government agencies and Ministers, under the Act in 2009/10. Of those decisions made, 61.5% resulted in the applicant

FIGURE 5: Use of Exemption Clauses — All Agencies



being given access in full to the documents sought; 28.0% resulted in the applicant being given access to edited copies of the documents sought; and 0.4% resulted in either access being given but deferred, or being given in accordance with s.28 of the Act (by way of an approved medical practitioner). In 6.8% of applications the agency could not find the requested documents. Only 3.3% of the decisions made were to refuse access. Those figures indicate that approximately 89.8% of the 11,135 decisions made by State Government agencies on FOI applications were to the effect that access in some form was given. That is consistent with the statistics for the previous year.

3.5.3 Exemptions

Also consistent with previous years, the exemption clause most frequently claimed by agencies from both State and local government sectors (excepting those claimed by Ministers and described above) was clause 3, which exempts from disclosure personal information about individuals other than the applicant. That clause was claimed 3,495 times in the year under review. Figure 5 compares the use of this clause with all other clauses used since 1994/95, which indicates continued use of the exemption to protect personal privacy. The next most frequently claimed exemptions were: clause 6, which relates to the deliberative processes of government (201 times); clause 7, which protects from disclosure documents which would be privileged from production in legal proceedings on the ground of legal professional privilege (186 times); clause 8, which protects confidential communications (161 times); clause 4, which relates to certain commercial or business information of private individuals and organisations (142 times); and clause 5 which relates to law enforcement, public safety and property security (104 times). The exemption clauses claimed most by Ministers were clause 3 (personal information); clause 6 (deliberative processes of government); and clause 1 (Cabinet and Executive Council documents).

3.5.4 Internal Review

Agencies received 208 applications for internal review of decisions relating to access applications during 2009/10. This represents about 2% of all decisions made and about 17% of decisions made to refuse access including those where documents could not be found. In the year under review, 201 applications for

internal review were dealt with. The decision under review was confirmed on 156 occasions, varied on 39 occasions, reversed on 4 occasions and the application for internal review was withdrawn on 2 occasions. Thirteen applications for amendment of personal information were made to agencies during the year. Twelve applications were dealt with, resulting in personal information being amended on 8 occasions, not amended on one occasion and amended, but not as requested, on 3 occasions. The three reported applications for internal review of decisions relating to the amendment of personal information resulted in the initial decision being confirmed on two occasions, with one application remaining to be decided.

3.5.5 Average Time

The average time taken by agencies to deal with access applications (32 days) increased by approximately five days from the previous year, but is still within the maximum period of 45 days permitted by the Act. A chart depicting the average days taken by agencies in dealing with access applications appears below.

3.5.6 Charges

The average amount of charges imposed by agencies for dealing with access applications decreased in comparison with the previous year—by $4.20 per non-personal application. There had previously been an obvious upward trend over the 3 years from 2006/07 to 2008/09 so this is a welcome change.

FIGURE 6
Average Days — All Agencies

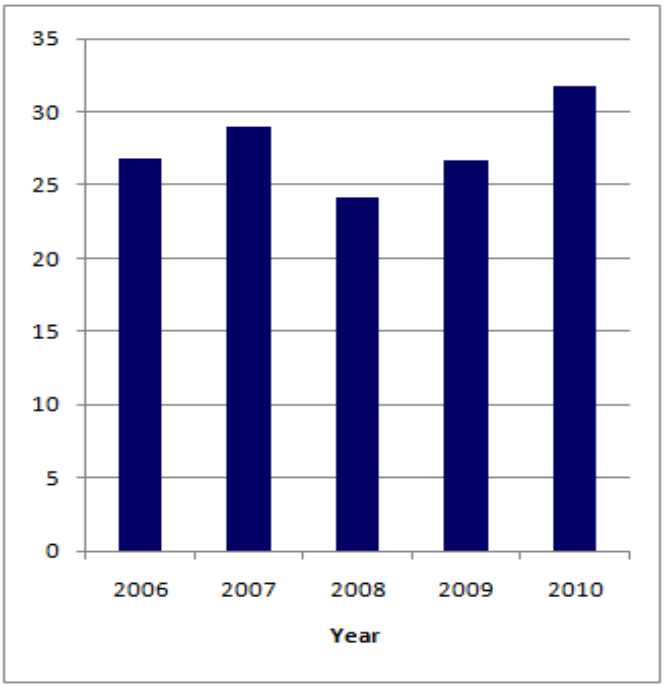


FIGURE 7
Average Charge for Access — All Agencies