SIGNIFICANT ISSUES AND TRENDS

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3.1 Complaints made by Members of Parliament

As reported in the last two annual reports, since December 2008 there has been a significant increase in the number of complaints made by Members of Parliament about decisions of Ministers which has resulted in a backlog of complaints and a significant deterioration in this office's ability to resolve complaints under the Act in a timely manner. However, this office has recently received a budget increase to fund two new positions which will greatly assist in tackling the backlog. In addition, the number of complaints made to this office by Members of Parliament has decreased this year. During the current reporting year, 12 complaints were made to this office by Members of Parliament, compared to 21 complaints in 2009/10 and 80 complaints in 2008/09. While these numbers show a downward trend, they remain well above long term averages.

3.2 Non-compliant notices of decision

Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. During the year this office identified a significant number of notices of decision that did not comply with s.30. In particular, s.30(h) requires agencies to ensure that applicants are provided with information on their rights of review and appeal as part of the notice of decision. This information is to include the procedures to be followed by applicants to exercise their rights, and should also include any statutory time limits for the exercise of those rights. When an agency's decision does not contain that information, members of the public unfamiliar with the FOI Act may have no knowledge of their review rights and consequently are denied the opportunity to exercise those rights. Therefore it is imperative that an agency's notice of decision complies with s.30(h).

Further, regulation 8 of the *Freedom of Information Regulations 1993* (the FOI Regulations) specifies that a complaint to the Commissioner for external review must be accompanied by a copy of the agency's notice of decision. Notices of decision issued by agencies must highlight this requirement. A number of decisions received by the Commissioner during the year failed to do so.

An example of the wording to meet the requirements of s.30(h) is available at: *http://www.foi.wa.gov.au/Materials/Non_Compliant_NOD.pdf*

3.3 Consulting officers of an agency about disclosure of personal information

During the year the Commissioner became aware of some misunderstanding in some agencies about the requirement to consult third parties who are officers of an agency before disclosing personal information about them.

Under clause 3 of Schedule 1 to the FOI Act, personal information about an individual is exempt from disclosure, subject to a number of limitations. One of those limitations relates to certain work-related information about officers of agencies, such as an officer's name, title and things done in the course of the officer's duties. This limitation means that such work-related information will usually not be exempt under clause 3(1), even

though it is 'personal information' as defined in the FOI Act[1]. However, as a result of s.32 of the Act, an agency is not to give access to that personal information unless the agency has taken such steps as are reasonably practicable to obtain the views of the officer as to whether the information is exempt under clause 3.

As noted in last year's annual report, the Commissioner considers that there is significant merit in amending the Act to remove the legislative requirement for agencies to consult with officers where the agency only proposes to disclose non-exempt information about those persons. However, as the law currently stands, agencies must comply with s.32 before disclosing personal information about an officer of an agency. In the alternative, the Commissioner strongly recommends agencies engage in meaningful discussions with applicants to explain this issue and attempt to have such information excluded from the scope of the application with the agreement of the applicant.

Further information to assist agencies is available at: *http://www.foi.wa.gov.au/Materials/Consulting_Officers_of_Agencies.pdf*

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 Apache Northwest Pty Ltd arising from the Commissioner's decision in *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35. As at the end of the reporting period, the Court had not delivered its judgment.

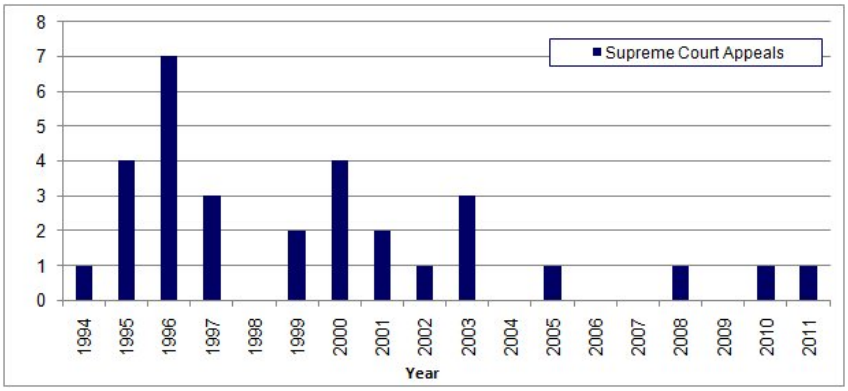
As reported in last year's annual report, on 17 August 2010 the Supreme Court delivered its decision on the appeal of the Commissioner's decision in *Re McKay and Water Corporation* [2009] WAICmr 35 (*Water Corporation v McKay* [2010] WASC 210).

In *Re Mackay*, the Commissioner found that valuation information relating to land owned by the complainants – which the Water Corporation was seeking to purchase – was not exempt under clause 6(1) of Schedule 1 to the FOI Act because its disclosure would not be contrary to the public interest. In dismissing the appeal and confirming the Commissioner's decision, Martin J said *that "*'[b]*earing in mind the* [Water Corporation's] *ultimate compulsory acquisition powers, its public interest contention that its commercial position may be undermined in negotiations, if it is required to* [disclose the valuation information] *cannot be accepted". His Honour* noted that *"*[i]*n the context of a longer term potential use by the appellant of its compulsory land acquisition powers, the need for wholesale transparency in respect of the* [Water Corporation's] *workings as a public agency is overwhelmingly the greater public interest, in the present case"*.

Notably, Martin J also observed that the objects of the FOI Act as expressed in section 3 – that is, to enable the public to participate more effectively in governing the State and make the persons and bodies that are responsible for State and local government more accountable to the public – *"form the essential bedrock of open, democratic government"*. The full judgment of the Court can be found at *http://www.foi.wa.gov.au.*

[1] *Agencies should note that the information could be exempt for other reasons.*

Figure 2: Supreme Court Appeals



3.5 Agency Statistics 2010/11

Section 111 of the Act requires that the Commissioner's annual report to the Parliament is to include 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 2010/11 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 15,716 in the year under review. That represents an increase of approximately 372% in 16 years from 1995 and 21% from last year (12,994).

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 agency (2,377 - an increase of 8% from last year), with the next highest number received by Royal Perth Hospital (1,873 - an increase of 12.9% from last year), followed by Sir Charles Gairdner Hospital (1,112 - an increase of 5.5% from last year). A further 5,504 applications were received by various other health service providers (hospitals, health services and the Department of Health), representing an increase of 35.6% over last year.

Of the 15,716 applications received by agencies in 2010/11, 604 (just over 3.8%) were received by local government agencies and 12,427 (96.2%) by State government agencies. Of the local government agencies, the City of Stirling received the highest number of applications (68), followed by the City of Joondalup (38), the City of Swan (35), the City of Bayswater (26), the Shire of Kalamunda (24) and the City of Cockburn (23). A number of local government agencies located in country areas reported having received either no applications or very few applications.

Of the applications made to State government agencies, 125 were made to Ministers, which was slightly less than the number made to Ministers last year (140). The Minister receiving the highest number of applications was the Hon E Constable MLA, Minister for Education with 17 applications, with the equal next highest (11) being shared by the Hon J Day MLA, Minister for Planning; Culture and the Arts; Science and Innovation and the Hon K Hames MLA, Deputy Premier; Minister for Health; Tourism.

3.5.2 Decisions

Of the decisions on access made by Ministers in the reporting period, 4 (3.8%) were to give full access; 78 (74.3%) were to give access to edited copies of documents; and 14 (13.3%) were to refuse access. The statistical tables also reveal that 13,505 decisions on access applications were made by State government agencies i.e. exclusive of local government agencies and Ministers, under the Act in 2010/11. Of those decisions, 58.5% resulted in the applicant being given access in full to the documents sought; 30.6% resulted in the applicant being given access to edited copies of the documents sought; and 0.9% 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 7.1% of applications the agency could not find the requested documents. Only 2.8% of the decisions made were to refuse access. The above figures indicate that approximately 89.1% of the 13,505 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 below) was clause 3, which exempts from disclosure personal information about individuals other than the applicant. That clause was claimed 4,337 times in the

FIGURE 3
Number of Applications Decided — All Agencies

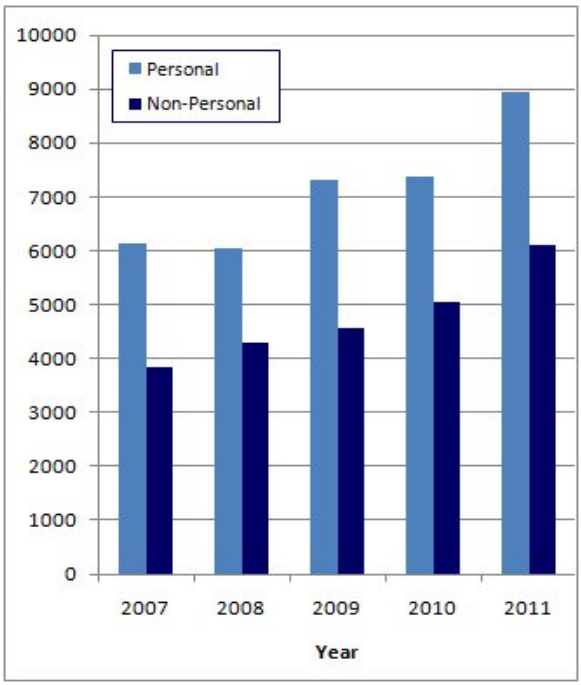


FIGURE 4
Outcome of Decisions – All agencies

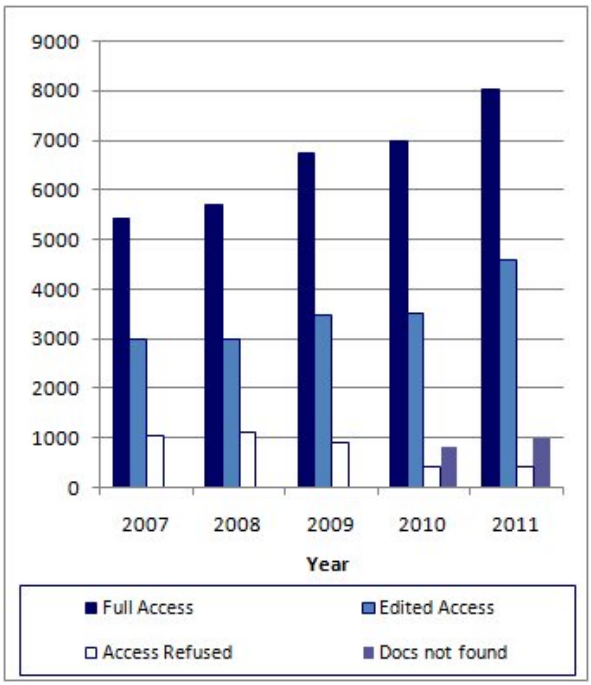
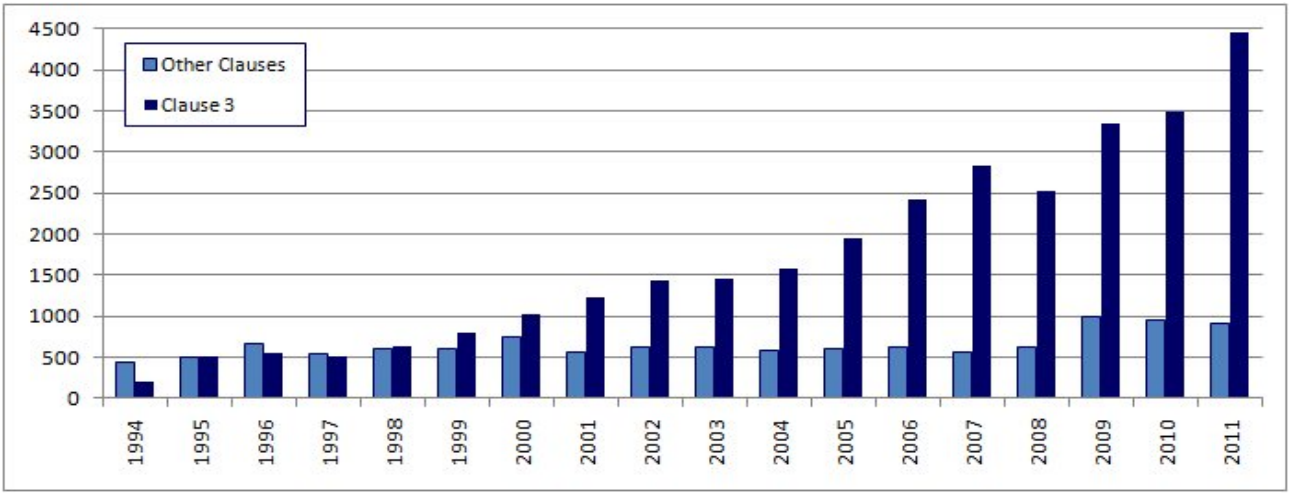


FIGURE 5: Use of Exemption Clauses – All Agencies



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 4, which relates to certain commercial or business information of private individuals and organisations (170 times); clause 7, which protects from disclosure documents which would be privileged from production in legal proceedings on the ground of legal professional privilege (162 times); clause 6, which relates to the deliberative processes of government (161 times); clause 5, which relates to law enforcement, public safety and property security (106 times); and clause 8, which protects certain confidential communications (77 times). The exemption clauses claimed most by Ministers were clause 3 (personal information); clause 12 (contempt of Parliament or court); clause 8 (confidential communications); and clause 1 (Cabinet and Executive Council documents).

3.5.4 Internal Review

Agencies received 226 applications for internal review of decisions relating to access applications during 2010/11.

In the same period 222 applications for internal review were dealt with. The decision under review was confirmed on 169 occasions, varied on 42 occasions, reversed on 6 occasions and the application for internal review was withdrawn on 5 occasions.

3.5.5 Amendment of Personal Information

Fourteen applications for amendment of personal information were made to agencies during the year. Thirteen applications were dealt with, resulting in personal information being amended on 5 occasions, not amended on two occasions and amended, but not as requested, on 5 occasions. The two reported applications for internal review of decisions relating to the amendment of personal information resulted in the initial decision being confirmed.

3.5.6 Average Time

The average time taken by agencies to deal with access applications (24 days) decreased by approximately eight days from the previous year and remains 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 on page 41.

3.5.7 Charges

The average amount of charges imposed by agencies for dealing with access applications increased in comparison with the previous year – by $2.99 per non-personal application over and above the 2009/10 average charge of $15.42

FIGURE 6
Average Days – All Agencies

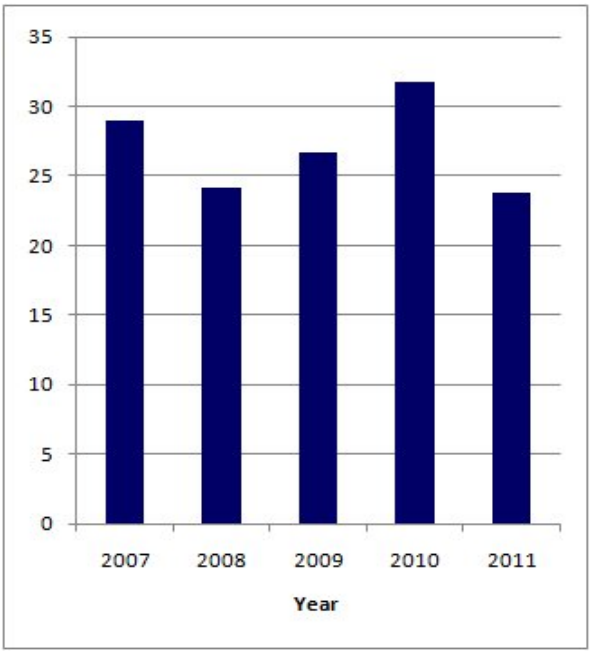


FIGURE 7
Average Charge for access – All Agencies