WESTERN AUSTRALIA

Office of the **Information Commissioner**

ANNUAL REPORT

2011/2012

3.1 Non-compliant notices of decision

As was the case in the previous reporting period, this office has again identified a significant number of notices of decision that did not comply with section 30 of the FOI Act.

Section 30 sets out the details that must be included in an agency's notice of decision given to an access applicant. In cases where an agency decides to refuse access to a document, section 30(f) of the FOI Act provides that an agency's notice of decision must include the reasons for the refusal; the findings on any material questions of fact underlying those reasons; and reference to the material on which those findings were based.

It is not sufficient compliance to cite the particular exemption clause claimed. For example, agencies frequently cite clause 4(2) but fail to explain why the information in the document has commercial value or why disclosure of the document in question could reasonably be expected to destroy or diminish that commercial value. It is necessary to explain the elements of the exemption and how they apply in a given case. The FOI Act has been in operation for nearly 20 years and, in my opinion, there is no excuse for any government agency to be ignorant of its obligations concerning the legislation.

The obligation to provide applicants with notices of decision that contain all of the information prescribed by s.30 is intended to ensure that the true basis of a decision is clearly explained to the applicant. If an agency gives an applicant a notice of decision that does not contain sufficient findings of fact and a clear statement of the basis on which an exemption is claimed, it is unlikely that the applicant will have a clear understanding of the reasons why access is refused and why the requirements of any exemption clause are satisfied. An applicant is entitled to reasons for the agency's decision. Only if applicants understand all of the elements involved in applying a particular exemption and why access is refused are they in a position to decide whether to accept the decision or to test it by way of external review on complaint to the Information Commissioner.

An inadequate notice of decision from an agency invariably increases the time it takes for this office to deal with a matter on external review.

3.2 Consultation with third parties

Another significant issue that has arisen during the year relates to third party consultation, with agencies unnecessarily consulting third parties or placing undue reliance on the objections of third parties.

Under sections 32 and 33 of the FOI Act, agencies are required to take reasonable steps to obtain the views of third parties before giving access to a document that contains personal, commercial, business, professional or financial information about that party.

However, in cases where an agency does not propose to give access to the relevant information because the agency has formed the view that the information is exempt, consultation with third parties is not required. Unnecessary consultation with third parties in such cases increases the time it takes for an agency to deal with an access application. In addition, consultation in those circumstances often raises unnecessary concerns and is likely to hinder rather than assist in the process of dealing with the application.

Where an agency does obtain the views of a third party, this should be done in a

targeted and clear manner. The agency should make it clear to that party that the agency has already formed the view that the information should be disclosed and invite the third party to provide persuasive arguments as to why the party considers that the information is exempt under the FOI Act. The consultation process should not be an open ended invitation for the third party to express a general preference about disclosure of the information.

If the views of a third party are obtained, those views are not decisive of a matter. An agency should take those views into account but must make its own decision based on the information before it. Agencies should not place undue weight on the objections of a third party, without supporting information. In cases where an agency is not persuaded by the objections of a third party, agencies should make a decision to give access. Of course, the agency should then defer giving effect to this decision to allow the third party to exercise its rights of review under the FOI Act as outlined in section 34 of the Act.

Agencies should note that a considerable amount of time can be saved when dealing with an FOI application if they consult with an applicant at the commencement of the FOI process as to whether he or she requires third party information or whether that information can be excluded from the scope of the application by agreement.

3.3 Supreme Court appeals

This year there has been no new appeal made to the Supreme Court from a decision of the Commissioner

On 17 October 2011, the Court delivered its decision on the appeal from the Commissioner's decision in *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35 (*Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2]* [2011] WASC 283). This appeal was lodged with the Supreme Court in the previous reporting year.

In *Re Apache*, the Department of Mines and Petroleum decided to give an applicant access to documents relating to the facilities on Varanus Island, where a gas pipeline explosion on 3 June 2008 resulted in a 30% reduction in natural gas supplies to Western Australia for a two month period. The operator of the facilities on Varanus Island, Apache Northwest Pty Ltd ('Apache'), objected to disclosure of the documents and sought external review of the Department's decision. With some limited exceptions, the Commissioner confirmed the Department's decision.

Apache appealed the Commissioner's decision to the Supreme Court. On 17 October 2011, Edelman J dismissed the appeal. Apache subsequently appealed against the decision of Edelman J. That appeal was heard by the Court of Appeal on 7 June 2012. As at the end of the reporting period, the Court had not delivered its judgment[2].

[2] The Court of Appeal delivered its judgment on 23 August 2012, dismissing the appeal. A link to the judgment can be found at http://www.foi.wa.gov.au

3.4 Agency statistics 2011/12

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 required by s.111 to provide the Commissioner with the specified information. That information for 2011/12 is set out in detail in the statistical tables found in the Appendix 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 16,634 in the year under review. That represents an increase of approximately 400% in 17 years from 1995 and 5.8% from last year (15,716).

3.4.1 Applications

From Table 12, found on page 79 of the Appendix to 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 (2,446 - an increase of 3% from last year), with the next highest number received by Royal Perth Hospital (1,969 - an increase of 5.1% from last year), followed by Sir Charles Gairdner Hospital (1,208 - an increase of 8.6% from last year). A further 5,923 applications were received by various other health service providers (hospitals, health services and the Department of Health), representing an increase of 8.24% over last year.

Of the 16,634 applications received by agencies in 2011/12, 633 (just over 3.8%) were received by local government agencies and 16,001 (96.2%) by State government agencies. Of the local government agencies, the City of Stirling received the highest number of applications (63), followed by the City of Swan (45), the City of Joondalup (40), the City of Cockburn (22) and the cities of Canning and Melville (21 each). 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, 146 were made to Ministers, which was slightly more than the number made to Ministers last year (125). The Minister receiving the highest number of applications was the Hon T Buswell MLA, Minister for Transport with 22 applications, with the Hon E Constable MLA, Minister for Education and the Hon R Johnson MLA, Minister for Police each receiving 14 applications.

3.4.2 Decisions

Of the decisions on access made by Ministers in the reporting period 7 were to give full access; 98 were to give access to edited copies of documents and 6 decisions were to refuse access. In 16 cases, no documents could be found.

Table 13 (on page 84) also reveals that 14,683 decisions on access applications were made by State government agencies (exclusive of local government agencies and Ministers), under the Act in 2011/12. Of those decisions, 56.8% resulted in the applicant being given access in full to the documents sought; 32.9% resulted in the applicant being given access to edited copies of the documents sought; and 0.8% 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% of applications the agency could not find the requested documents. Only 2.5% of the decisions made were to refuse access. The above figures indicate that approximately 89.7% of the 14,683 decisions made by State Government agencies on FOI applications were to the effect that access in some form was given. That is a slight improvement from the previous year (89.1%).

Figure 1
Number of applications decided – all agencies

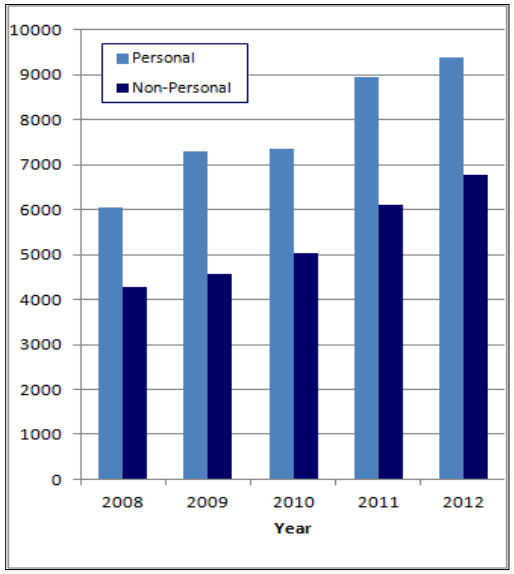
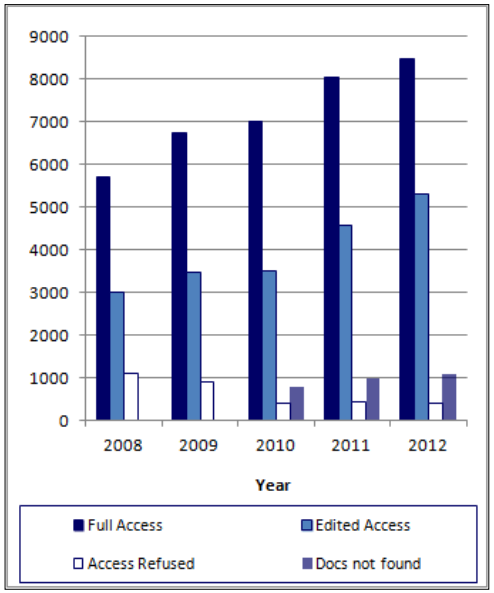


Figure 2
Outcome of decisions – all agencies



3.4.3 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 4,609 times in the year under review. Figure 3 (on the next page) 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 (248 times); clause 6, which relates to the deliberative processes of government (247 times); clause 7, which protects from disclosure documents which would be privileged from production in legal

proceedings on the ground of legal professional privilege (187 times); clause 1, which relates to Cabinet and Executive Council documents (121 times); clause 5, which relates to law enforcement, public safety and property security (120 times); and clause 8, which protects certain types of confidential communications (86 times).

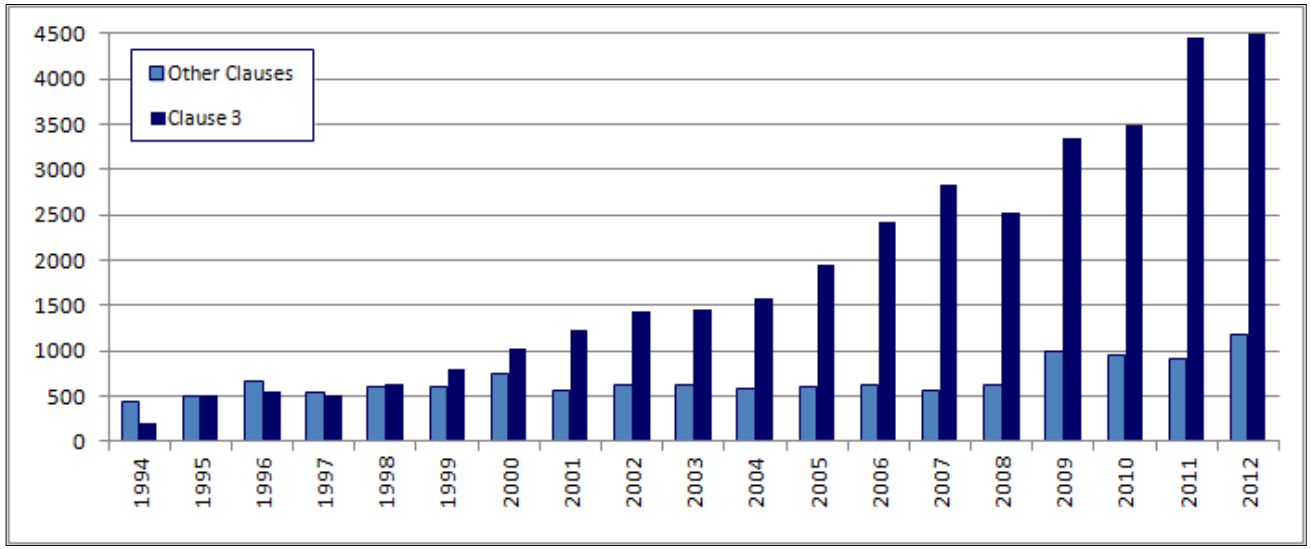
The exemption clauses claimed most by Ministers were clause 3 (personal information); clause 1 (Cabinet and Executive Council documents); and clause 12 (contempt of Parliament or court).

3.4.4 Internal review

Agencies received 330 applications for internal review of decisions relating to access applications during 2011/12. This represents about 2.1% of all decisions made and about 22% of those decisions in which access was refused. In the year under review, 334 applications for internal review were dealt with (including some that were received in the previous period). The decision under review was confirmed on 244 occasions, varied on 72 occasions, reversed on 9 occasions and the application for internal review was withdrawn on 9 occasions.

No new applications for amendment of personal information were made to agencies during the year. However, two applications made to NMAHS - Osborne Park Hospital in a previous period were withdrawn.

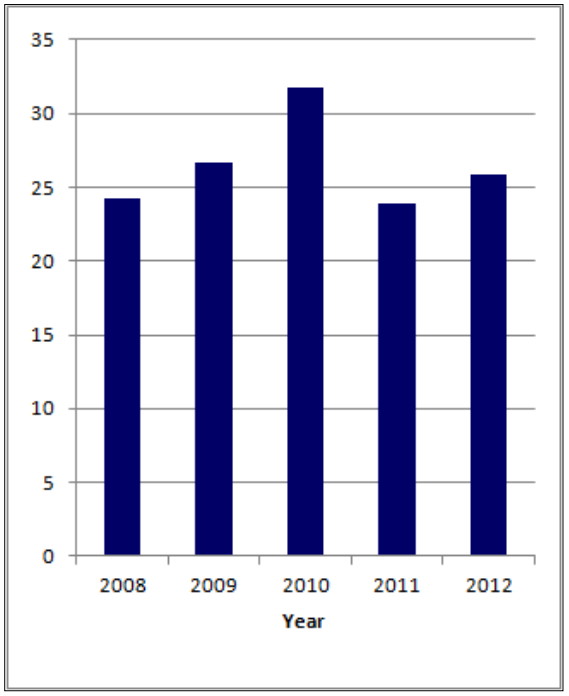
Figure 3 – Use of exemption clauses – all agencies



3.4.5 Average time

The average time taken by agencies to deal with access applications (25.9 days) increased by just over two days from the previous year (23.9 days) and remains within the maximum period of 45 days permitted by the Act. Figure 4, which depicts the average days taken by agencies in dealing with access applications, is shown below.

Figure 4
Average days – all agencies



3.4.6 Average charges

The average amount of charges imposed by agencies for dealing with access applications decreased to $12.44. This was $5.97 per non-personal application less than the 2010/11 average charge of $18.41 (see Figure 5 - below).

Figure 5
Average charge for access – all agencies