



WESTERN AUSTRALIA

Office of the **Information Commissioner**

ANNUAL REPORT

2012/2013

3 SIGNIFICANT ISSUES AND TRENDS

3.1 Release of information outside FOI

The contact that this office has had with agencies and members of the public in the past year has highlighted the importance of agencies making government information available outside the FOI process as much as possible, unless there is a good reason not to do so.

Part I of the FOI Act indicates that the FOI process supplements, rather than replaces, other procedures for making information available. Agencies and applicants can often avoid the need for a FOI application by engaging in meaningful dialogue at the start of the process. If a matter can be dealt with outside the FOI Act, an applicant is likely to obtain the requested documents much sooner and the agency is likely to be able to save time and effort in the process.

As recommended in the Commissioner's report to Parliament following a review of the administration of FOI in Western Australia in 2010², agencies should,

² *The Administration of Freedom of Information in Western Australia* 31 August 2010: <http://www.foi.wa.gov.au/Materials/FOI%20Review%202010%20-%20Comprehensive%20Report.pdf>

unless there is a good reason not to, disclose information on request without requiring a formal FOI application and should investigate means of more proactive, automated and timely disclosure of information. To this end, an agency's Information Statement can be a valuable tool. The FOI Act requires most agencies to publish Information Statements, which should inform the public of the structure and functions of the agency. They also outline the types of documents held by the agency, and give advice on how they can be accessed by the public. As also recommended in the above report, as part of their annual review of Information Statements, agencies should periodically review what information they routinely make available to the public outside the FOI process. A good Information Statement can be a very useful resource for both agencies and members of the public.

3.2 Removal of requirement to consult officers of an agency about disclosure of personal information

The requirement to consult officers of an agency before disclosing work-related

information about them continues to be a significant issue.

As noted in last year's annual report, 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, will usually not be exempt under clause 3(1) of Schedule 1 to the FOI Act, even though it is 'personal information' as defined in the FOI Act³. However, as a result of s.32 of the FOI 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. Compliance by agencies with the current statutory obligation can be time consuming and delay access to documents without achieving a significant benefit.

The Commissioner has previously drawn to Parliament's attention the merit of amending the FOI 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. As noted in this office's 2011 annual report,

³ Agencies should note that the information could be exempt for other reasons

the Commissioner strongly recommends agencies engage in meaningful discussions with applicants to explain the requirement to consult with officers and attempt to have such work-related information excluded from the scope of the application with the agreement of the applicant. However, in cases where applicants want such work related information, it is likely they would obtain access to the relevant documents in a more timely fashion if the requirement to consult under s.32 is removed.

In the past year this office has spent considerable time dealing with this issue when dealing with external review matters and requests by agencies under s.35(1) to waive the requirement to consult with third parties (mostly officers of an agency) when processing an access application; when responding to requests for advice and inquiries from agencies; when delivering training services to agencies; and during regional visits by the Information Commissioner. This issue contributes to the time it takes for this office to finalise external review applications and can cause confusion in agencies. For example, in one recent matter an agency refused an applicant access to work-related information about

officers on the basis that it had not complied with its obligation to consult with the relevant officers under s.32. The position taken by the agency added to the time it took to resolve the matter.

If the FOI Act were to be amended as suggested above, agencies would still need to be vigilant to ensure that information about officers of agencies which may be exempt for other reasons, such as where a threat has been made to an officer or where the information amounts to more than prescribed details, is not inappropriately disclosed.

3.3 Access to documents from private providers of government services

Section 10 of the FOI Act creates for any person a general right of access to documents of an agency. 'Agency' is defined in the Glossary to the FOI Act as a Minister or a public body or office. The definition of "public body or office" includes departments of the public service, local government and contractors or subcontractors. The term "contractor" is given a specific meaning in the Glossary to the FOI Act, applying only to private

providers of prison management, court security and prisoner transport services.

Contracting out of certain services by government is now established practice. For example hospital and health care services, some community housing arrangements, disability services, certain community services and infrastructure projects may all be undertaken by non-government providers through contract arrangements with government.

While the definition of agency in the Glossary to the FOI Act includes limited types of contractors and subcontractors, the Commissioner's decision in *Re Pisano and Health Solutions (WA) Pty Ltd trading as Peel Health Campus* [2012] WAICmr 24⁴ shows that where government services are delivered by a private provider, it may not be possible for a member of the public to obtain documents from the private provider under the FOI Act.

⁴ See 'Decisions of interest 2012/2013' in this annual report

3 SIGNIFICANT ISSUES AND TRENDS

3.4 Supreme Court appeals

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

As noted in last year's annual report, on 23 August 2012 the Court of Appeal delivered its judgment on the appeal against the decision of Edelman J in *Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2]* [2011] WASC 283, which arose out of the Commissioner's decision in *Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor* [2010] WAICmr 35. The Court of Appeal dismissed the appeal and upheld the Commissioner's decision.

Significantly, this was the first occasion since the passage of the FOI Act that the Court of Appeal has heard an appeal arising out of a decision of the Information Commissioner.

3.5 Agency statistics 2012/13

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 2012/13 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 17,175 in the year under review. That represents an increase of approximately 417% in 18 years from 1995 and a 3.25% increase from last year (16,634).

3.5.1 Applications

From Table 12, found on page 80 of the Appendix to this report, it can be seen that Royal Perth Hospital received the highest

number of applications made to a single agency (2,333 - an increase of 18.5% from last year), with the next highest number received by the Western Australia Police (2,248 - a decrease of 8.1% from last year), followed by Sir Charles Gairdner Hospital (1,288 - an increase of 1.65% from last year). A further 6,611 applications were received by various other health service providers (hospitals, health services and the Department of Health), representing an increase of 12.4% over last year.

Of the 17,175 applications received by agencies in 2012/13, 660 (just over 3.8%) were received by local government agencies and 16,515 (96.2%) by State government agencies. Of the local government agencies, the City of Swan received the highest number of applications (60), followed by the cities of Joondalup (51) and Stirling (46).

Of the applications made to State government agencies, 65 were made to Ministers, which was less than half the number made to Ministers last year (146). The Minister receiving the highest number of applications was the Hon T Buswell MLA, Treasurer; Minister for Transport; Fisheries with 14 applications.

3.5.2 Decisions

As can be seen in Table 13 (on page 85), of the decisions on access made by Ministers in the reporting period, five were to give full access; 35 were to give access to edited copies of documents and five decisions were to refuse access. In 15 cases, no documents could be found.

Table 13 also reveals that 15,033 decisions on access applications were made by State government agencies (exclusive of local government agencies and Ministers) under the Act in 2012/13. Of those decisions, 58.6% resulted in the applicant being given access in full to the documents sought; 31.2% 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 a medical practitioner). In 6.8% 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 89.8% of the 15,063 decisions made by State Government agencies on FOI applications were to the effect that access in some form was given (similar to the previous year of 89.7%).

Figure 1
Number of applications decided – all agencies

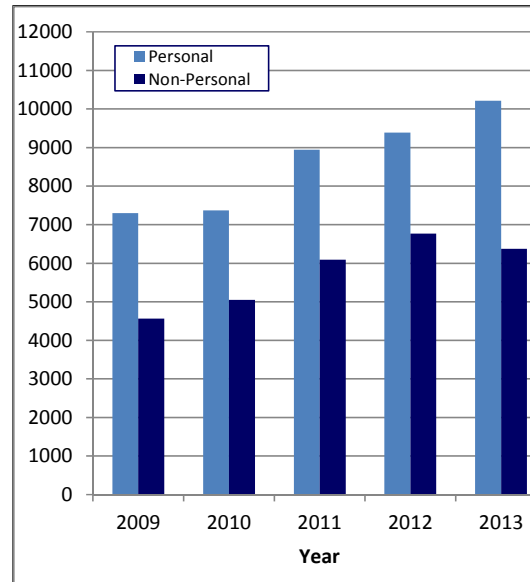
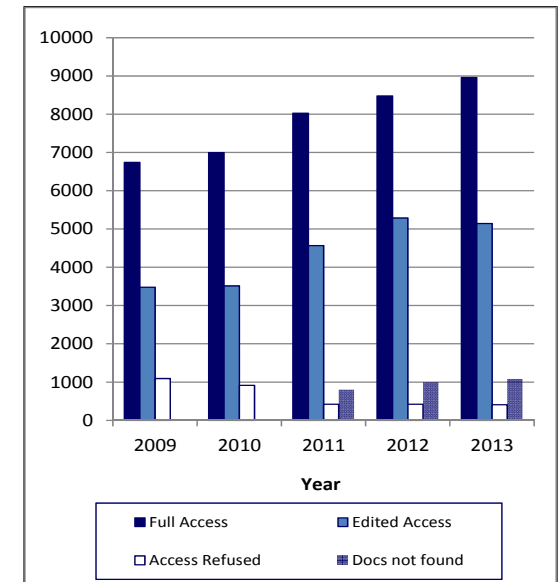


Figure 2
Outcome of decisions – all agencies



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 4,958 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 7, which protects from disclosure documents which would be privileged from production in legal proceedings on the ground of legal professional privilege (221 times); clause 4, which relates to certain commercial or business information of private individuals

3 SIGNIFICANT ISSUES AND TRENDS

and organisations (214 times); clause 6, which relates to the deliberative processes of government (141 times); and clause 5, which relates to law enforcement, public safety and property security (135 times).

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

3.5.4 Internal review

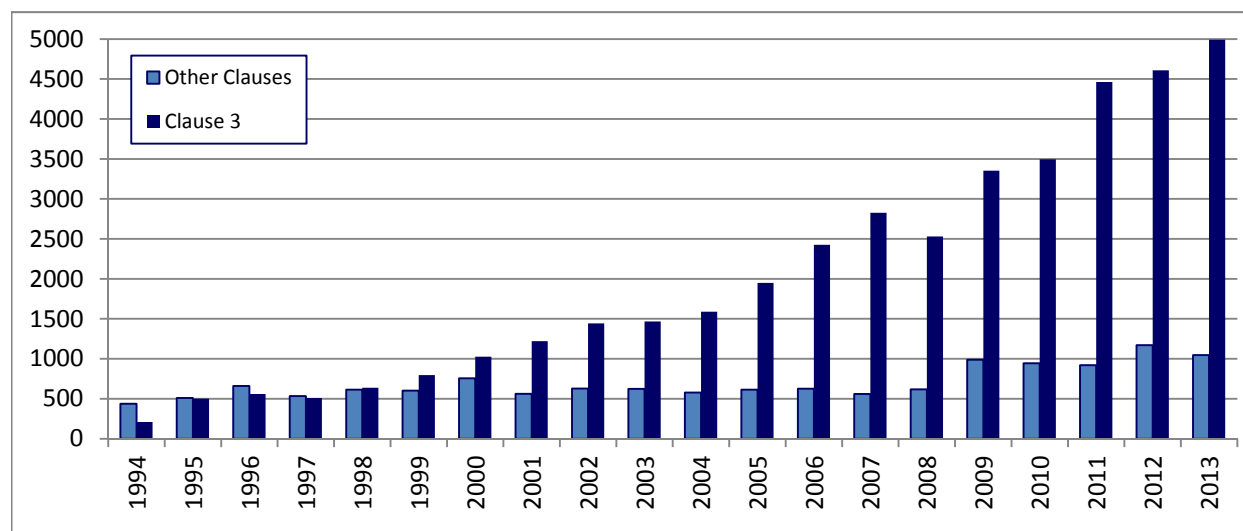
Agencies received 251 applications for internal review of decisions relating to access applications during 2012/13 (see Table 15 on page 101). This represents

about 1.6% of all decisions made and about 17% of those decisions in which access was refused. In the year under review, 256 applications for internal review were dealt with (including some that were received in the previous period). The decision under review was confirmed on 185 occasions, varied on 55 occasions, reversed on 10 occasions and the application for internal review was withdrawn on 6 occasions.

3.5.5 Amendment of personal information

Thirty nine applications for amendment of personal information were made to agencies during the year (see Table 16 on page 106). Thirty eight of these applications were dealt with, resulting in personal information being amended on 15 occasions, not amended on 12 occasions and amended, but not as requested, on 7 occasions. Of the 14 reported applications for internal review of decisions relating to the amendment of personal information, only two were varied (see Table 17 on page 107).

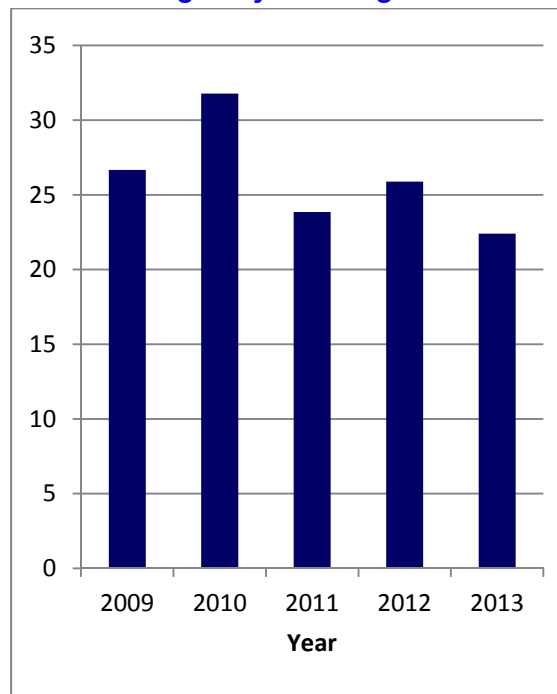
Figure 3 – Use of exemption clauses – all agencies



3.5.6 Average time

The average time taken by agencies to deal with access applications (22.4 days) decreased by 2.5 days from the previous year (25.9 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



3.5.7 Average charges

The average amount of charges imposed by agencies for dealing with access applications decreased to \$12.04. This was \$0.40 per non-personal application less than the 2011/12 average charge of \$12.44 (see Figure 5 - below).

Figure 5
Average charge for access – all agencies

