WESTERN AUSTRALIA

Office of the **Information Commissioner**

# ANNUAL REPORT

# 2013/2014

# Significant Issues and Trends

## 7. Decisions of Interest 2013/2014

The following section outlines some particular decisions by the Commissioner during the reporting period which may be of broader interest. In particular, some of the matters demonstrate the increasing complexity of the documents agencies are required to deal with under the FOI Act. They also show how the boundaries have shifted in the time since the FOI Act commenced 20 years ago from the traditional understanding of a document being paper-based to electronic documents, emails, databases and CCTV footage.

### Helping an applicant to reduce the scope of an access application

When a valid access application is made to an agency, the agency must deal with it in the manner described in section 13 of the FOI Act. The only exception is that an agency is permitted to refuse to deal with an application under section 20 of the FOI Act if – after taking reasonable steps to help an access applicant to change the application to reduce the amount of work required to deal with it – the agency considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations. Therefore, to rely on section 20, an agency must first take reasonable steps to assist the access applicant to change the application to reduce the amount of work needed to deal with it.

In *Re Jamieson and City of South Perth* [2013] WAICmr 22, a former councillor of the agency applied to the agency under the FOI Act for a range of documents relating to him, among other things, over a period of time. The agency refused to deal with the application under section 20 of the FOI Act on the basis that dealing with it would divert a substantial and unreasonable portion of the agency's resources away from its other operations. The complainant applied to the Information Commissioner for external review of the agency's decision.

On external review there was nothing before the Information Commissioner to show that the agency had made any attempt to discuss with the complainant practical alternatives for changing the application. There was nothing on the agency's FOI file to evidence that it explained to the complainant why it considered the scope of the application was too large, nor did the agency claim that it provided the complainant with any assistance.

In the absence of any evidence before the Commissioner to demonstrate that the agency had taken any steps to help the complainant to change his access application to reduce the amount of work required to deal with it, the Commissioner considered that the agency had not satisfied its obligation under section 20(1) of the FOI Act. Therefore, the Commissioner found that the agency was not justified in refusing to deal with the complainant's access application under section 20. Accordingly, the Commissioner set aside

the agency's decision and, in substitution, decided that the agency had to deal with the access application in accordance with the provisions of the FOI Act. Note: the agency subsequently dealt with the access application. The agency's decision on access was confirmed by the Commissioner in *Re Jamieson and City of South Perth* [2014] WAICmr 13.

### Deferral of access for an unreasonable period

Section 25(1)(b) of the FOI Act provides that an agency may defer giving access to a document for a reasonable period if the document has been prepared for presentation to Parliament or submission to a particular person or body but is yet to be presented or submitted.

In *Re O'Rourke and Town of Claremont* [2013] WAICmr 24 the complainant applied to the agency for access to certain documents relating to the cultural heritage assessment of his property. The agency identified one document within the scope of the application and decided to defer giving access to it under section 25(1)(b) of the FOI Act on the grounds that the document had been prepared for presentation to the Council of the agency.

On external review, the Commissioner considered whether the agency's decision to defer the giving of access was for a 'reasonable period' as provided for in section 25.

The Commissioner noted that the meaning of 'reasonable period' should be considered in terms of its ordinary dictionary meaning; that is, a period of time which should not be excessive. Given the objects and intent of the FOI Act, the Commissioner was of the view that Parliament considered that a 'reasonable period' would not be an open ended period of time but would be a period which meets the expectations of the ordinary and reasonable person.

In this case, the agency had initially informed the complainant that access would be provided to the requested document in December 2012. However, ten months had elapsed and access had not been provided. The Commissioner decided that access had in effect been deferred for a period of ten months and that was not a reasonable period of time as required by section 25(1). Consequently, the Commissioner found that the agency's decision to defer the giving of access under section 25(1)(b) was not justified. As a result, the agency was required to give immediate effect to its decision to give the complainant access to the requested document.

### Lease of State land vested in a local government - The Indiana Tea House

In *Re Post Newspapers Pty Ltd and Town of Cottesloe* [2013] WAICmr 27, the complainant applied to the agency for access to a copy of the lease between the agency and the lessees of the Indiana Tea House. The agency refused access to the requested documents on the basis that they are exempt under clause 4(3) (information concerning commercial and business affairs) of Schedule 1 to the FOI Act. The complainant applied to the Commissioner for external review of the agency's decision. During the external review process, two third parties who objected to disclosure of the requested documents were joined as parties to the complaint.

After considering the evidence before him including the submissions made by the agency and the third parties, the Commissioner was not persuaded that disclosure of the disputed documents could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the third parties as required by clause 4(3)(b). The Commissioner was also of the view that, in any event, there is a strong public interest in the public, and ratepayers in particular, being able to scrutinise agreements entered into by a local government on behalf of its ratepayers. The Commissioner noted that there is a public interest in local government agencies being accountable for the decisions they make and there should be as much transparency as possible regarding the use of Crown land. The Commissioner considered it to be in the public interest for the public to have confidence that such transactions are dealt with properly by State and local government agencies.

The third parties also made submissions about the purported confidential nature of the disputed documents. Consequently, the Commissioner considered whether the disputed documents are exempt under either clause 8(1) or clause 8(2) of Schedule 1 to the FOI Act. There was no information or evidence before the Commissioner to support a claim that a contractual obligation of confidence exists in respect of the disputed documents. Consequently, the Commissioner was not satisfied that disclosure would be a breach of confidence for which a legal remedy could be obtained, as required by clause 8(1). There was also no evidence before the Commissioner to establish that the information in the disputed documents was of a confidential nature obtained in confidence, as required by clause 8(2).

Accordingly, the Commissioner set aside the agency's decision and found that the disputed documents were not exempt under clauses 4(3), 8(1) or 8(2) of Schedule 1 to the FOI Act.

### Destruction of personal information

Section 45 of the FOI Act gives a person the right to apply to an agency for amendment of personal information about the person contained in a document of the agency if the information is inaccurate, incomplete, out of date or misleading. Section 48(3) provides that an agency is not to amend information in a way that obliterates or removes the information, or results in the destruction of a document containing the information, unless the Commissioner certifies in writing that it is impracticable to retain the information or that, in the opinion of the Commissioner, the prejudice or disadvantage that the continued existence of the information would cause to the person outweighs the public interest in maintaining a complete record of information.

In *Re Larkman and Department of Corrective Services* [2014] WAICmr 1, the complainant – a prisoner – applied to the agency to have personal information about him amended by way of destruction. The agency decided not to amend the information in the manner requested. However, the agency accepted that the information was inaccurate and placed a notation on the complainant's prison files which corrected the

inaccuracy of the disputed information. The complainant did not accept the agency's decision and applied for external review.

On the information before him, the Commissioner was not persuaded that the continued existence of the disputed information would prejudice or disadvantage the complainant. Therefore, the Commissioner did not consider that the prejudice or disadvantage that the continued existence of the information would cause to the complainant outweighed the public interest in maintaining a complete record of information, particularly in light of the notation the agency had inserted on the complainant's prison file. Accordingly, the Commissioner found that there were no grounds for him to certify the destruction of the disputed information and confirmed the agency's decision not to amend the information in the manner requested by the complainant.

### Documents relating to employment and performance of a CEO

Section 26 of the FOI Act provides that an agency may refuse access to a document if all reasonable steps have been taken to find the document and the agency is satisfied that the document is either in the agency's possession but cannot be found or does not exist. On external review the issues for the Commissioner to decide are whether there are reasonable grounds to believe that the requested documents exist or should exist in the agency and, if so, whether or not the agency has taken all reasonable steps to find the documents.

In *Re James and City of Albany* [2014] WAICmr 2, the complainant, the agency's former Chief Executive Officer (**the CEO**), applied to the agency for access to certain documents relating to her employment with the agency. The agency gave the complainant access to some documents and refused access to others under clause 4(3) of Schedule 1 to the FOI Act. However, the complainant claimed that additional documents should exist within the scope of her access application. The complainant sought external review of the agency's decision on the basis that it had, in effect, refused access to those further documents under section 26 of the FOI Act.

In the circumstances of the case, the Commissioner considered it good administrative and human resource practice that the agency would have documents of the kind requested by the complainant. This included documents which record the engagement of a consultant to employ the CEO; documents relating to the day to day management of any officer, including the CEO; documents relating to any complaints received about the performance of any officer, including the CEO; and documents relating to the action taken by the agency in relation to those complaints, particularly where it has resulted in the officer having his or her employment terminated. Consequently, the Commissioner made extensive inquiries with the agency regarding the searches it undertook for the requested documents. In accordance with section 26(2) of the FOI Act, the Commissioner required the agency to conduct further searches.

After reviewing all of the information before him, including the further searches conducted by the agency, the Commissioner decided that the agency had taken all reasonable steps to find the requested documents but that the requested documents either cannot be found or do not exist. Accordingly, the Commissioner confirmed the agency's decision.

### Access to a competitor's tender documents

In *Re Butcher and Department of Parks and Wildlife and Another* [2014] WAICmr 6, the complainant applied to the agency for access to the quote submitted by a tenderer for a project run by the agency, excluding pricing information. The agency consulted with the tenderer (**the third party**) who objected to disclosure, claiming that the requested document is exempt under clauses 4(1), 4(2), 4(3) and 8(2) of Schedule 1 to the FOI Act. The agency subsequently refused the complainant access to the requested document under clause 4(3) of Schedule 1 to the FOI Act.

The complainant applied to the Commissioner for external review of the agency's decision and the third party was joined as a party to the complaint. Based on the material before him, the Commissioner informed the parties that he was of the preliminary view that the disputed document was not exempt. As a result, the agency withdrew its exemption claim. However, the third party maintained its objection to disclosure and made further submissions.

After considering all of the information before him, the Commissioner did not accept the third party's claim that the disputed document contains information that is a trade secret and found that the disputed document is not exempt under clause 4(1).

The Commissioner was also not persuaded by the third party's claim that disclosure of the disputed document could reasonably be expected to give the third party's competitors a commercial advantage or that disclosure of the disputed document would enable the third party's competitors to ascertain its costs and likely level of remuneration for its activities. The Commissioner was not satisfied on the information before him that the disputed document had a commercial value to the third party or that disclosure could reasonably be expected to destroy or diminish any commercial value in the information in the disputed document. Therefore, the Commissioner found that the disputed document was not exempt under clause 4(2).

In relation to the third party's clause 4(3) exemption claim, the Commissioner did not consider that disclosure of the disputed document, edited to remove all pricing information, could reasonably be expected to have an adverse effect on the business or commercial affairs of the third party. In addition, the Commissioner was not persuaded that disclosure of the disputed document could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency and noted that potential future tenderers will continue to submit tenders where they feel it is in their commercial interest to do so. Consequently, the Commissioner found that the disputed document was not

exempt under clause 4(3). Accordingly, the Commissioner reversed the agency's decision.

## 8. FOI 'snapshots'

The following are some notable issues that have been identified by the OIC during the year.

### Agencies providing information to Ministers on FOI applications

The OIC often receives enquiries from agencies asking whether it is appropriate to inform their Minister about FOI applications received by the agency. In light of the concept of Ministerial responsibility for portfolio agencies under the Westminster system of government, it is understandable that an agency would want to ensure that its Minister is adequately briefed on matters relevant to their portfolio. This may include being briefed on access applications under the FOI Act, particularly where the release of documents may lead to public debate through the media or Parliament.

Under the FOI Act, Ministers are separate agencies to the Departments and other bodies which they oversee. Section 100 provides that FOI decisions are to be made by the principal officer of the agency or an officer directed by that principal officer. In the case of a Department of State, the principal officer is the Director General. In other types of agencies, it is usually the CEO or equivalent.

In all cases it is the principal officer of an agency, not the Minister, who is responsible for making decisions of the agency under the FOI Act. Decisions must be made with regard to the provisions of the FOI Act as passed by the Parliament, not by reference to inappropriate considerations of political expediency or convenience.

While there is no prohibition in the FOI Act against informing a Minister of specific FOI applications or decisions, doing this before a decision is made could lead to the perception, whether justified or not, that the Minister is being given an opportunity to influence the decision-making process in a way which allows inappropriate considerations to be taken into account. Further, informing the Minister of the identity of any particular access applicant, while not expressly prohibited by the FOI Act, may be contrary to an applicant's expectation of privacy and confidentiality. It may also result in a greater reluctance to use the FOI process in the future, which would run contrary to achieving the objects of the FOI Act.

**"Decisions must be made with regard to the provisions of the FOI Act as passed by the Parliament, not by reference to inappropriate considerations of political expediency or convenience."**

Agencies should take the above considerations into account in deciding whether, when and how they brief Ministers on FOI applications received by the agency. To avoid perceptions of inappropriate influence, it may be prudent not to brief a Minister on any individual matters until the agency has made a decision on access. Where the applicant is an individual, respect for that individual's privacy would best be served by briefing the Minister in a way which does not disclose the identity of the access applicant. In any event, knowing the identity of the access applicant in a particular mattter is unlikely to assist the Minister discharge his or her executive responsibilities.

## Local government

This year the Commissioner has observed a disappointing attitude towards compliance with the FOI Act from a small number of local government agencies when dealing with complaints against decisions of those agencies. This manifested itself in various ways across the various agencies, including in an inordinate difficulty in locating documents requested by the OIC; in a reluctance to speak to either the access applicant or the OIC; in an apparent lack of understanding of an agency's obligations under the FOI Act (including placing inappropriate weight on the unsubstantiated views of third parties – see for example *Re Post Newspapers Pty Ltd and Town of Cottesloe* [2013] WAICmr 27); through inadequate notices of decision; and in not treating FOI as a genuine legislative obligation.

In his report to Parliament following a review of the administration of FOI in Western Australia in 2010 (*The Administration of Freedom of Information in Western Australia* 31 August 2010), the Commissioner made the following observations about agency culture towards FOI, at page 23:

> *The culture of an agency in regard to attitudes about concepts of openness, accountability and transparency is considered inextricably linked to how well FOI applications are administered by the agency and whether the intent of the FOI Act is met. For FOI to be administered effectively, efficiently and fairly within agencies, it is important for Ministers, CEOs and FOI Coordinators to have a strong commitment to the principles and promotion of openness, accountability and transparency.*

**"… an FOI decision made by a local government is around eight times more likely to be subject to external review than an FOI decision made by a State government agency."**

The Commissioner has considered the proportion of external review applications made to him in respect of decisions of local government agencies compared to State government agencies (other than Ministers) over the past three years. In 2011/2012, a total of 633 access applications were received by local government agencies and external review was sought in 26 cases (4.11%). In the same period 15,855 access applications were received by State government agencies and external review sought in 79 cases (0.50%). In 2012/2013, a total of 660 access applications were received by local government agencies and external review was sought in 29 cases (4.39%). In the same period 16,450 access applications were received by State government agencies and external review sought in 97 cases (0.59%). In 2013/2014, 790 access applications were received by local government agencies and external review sought in 28 cases (3.54%). In the same period 17,541 access applications were received by State government agencies and external review sought in 76 cases (0.43%).

These figures show that in the past three years, an FOI decision made by a local government is around eight times more likely to be subject to external review than an FOI decision made by a State government agency.

The Commissioner understands that this due to a number of factors, some of which are outside the control of individual local governments. However, a more positive and open attitude to information disclosure can significantly reduce the potential strain on an agency's resources by reducing or eliminating the need to deal with individual FOI applications for that information. The Commissioner encourages local government agencies to adopt a more positive and open attitude in this regard. This can manifest itself in the proactive publication of information and by being responsive and open to both formal and informal requests for information from members of the public.

### Access to documents by another means

The Commissioner encourages agencies to make government information available outside the FOI process as much as possible, unless there is good reason not to do so.

To that end, the Commissioner considers it good practice for agencies to make as much material as possible publicly available on an agency's website, for example, information relating to credit card expenditure and tender processes. As an example of this, all transactions undertaken on the purchasing cards issued to OIC staff from 1 July 2013 are now available on the OIC website.

The OIC continues to regularly receive queries from the public about accessing documents through FOI when they are involved in, or may become involved in, court proceedings. There is nothing in the FOI Act that prevents a person from pursuing other avenues, such as the discovery process in litigation, in conjunction with the FOI process. However, in some cases mechanisms such as subpoena and discovery may be more appropriate to use than FOI as they may be faster and are not subject to the exemptions in the FOI Act.

**"The Commissioner encourages agencies to make government information available outside the FOI process as much as possible, unless there is good reason not to do so."**

### Production of documents by agencies on external review

After receiving a complaint, the Commissioner usually writes to the principal officer of the agency advising of the complaint. That letter also requires the agency to produce certain documents to the Commissioner within a specified time period. Failure to comply is an offence under section 83 of the FOI Act.

In recent years the OIC has experienced some difficulties when agencies produce documents to the Commissioner. This includes inadequate compliance with the Commissioner's request for the production of documents and a lack of appreciation from some agencies that the request for documents is made pursuant to a legislative power.

Since early 2013, the Commissioner has provided agencies with a copy of a 'Guideline for agencies when producing documents to the Information Commissioner', which is also available on the OIC website. That guideline was produced to address the issues encountered by the OIC. While there have been improvements in that time, this matter remains an issue of concern.

When documents are produced to the Commissioner, he expects them to be produced in a form that enables the OIC to commence the external review of the agency's decision. This means that the disputed documents should be clearly identified and numbered or labelled. When an agency has deleted any information from documents it has given to an access applicant, that information must be clearly highlighted or marked. Unfortunately this does not always happen and OIC resources are unnecessarily spent remedying and dealing with these administrative matters. This places a strain on the OIC's limited resources and leads to frustration and delay.

## 9. Report on agency statistics 2013/14

Section 111 of the FOI 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 FOI Act during the year. To enable that to occur, agencies are required by section 111 to provide the Commissioner with the specified information. That information for 2013/14 is set out in detail in the statistical tables at the end of this report. The following is an overview.

As can be seen from a review of previous annual reports of the 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 17,672 in the year under review. That represents an increase of approximately 432% in 19 years from 1995 and a 2.9% increase from last year (17,175).

**Figure 1**
**Number of applications decided – all agencies**

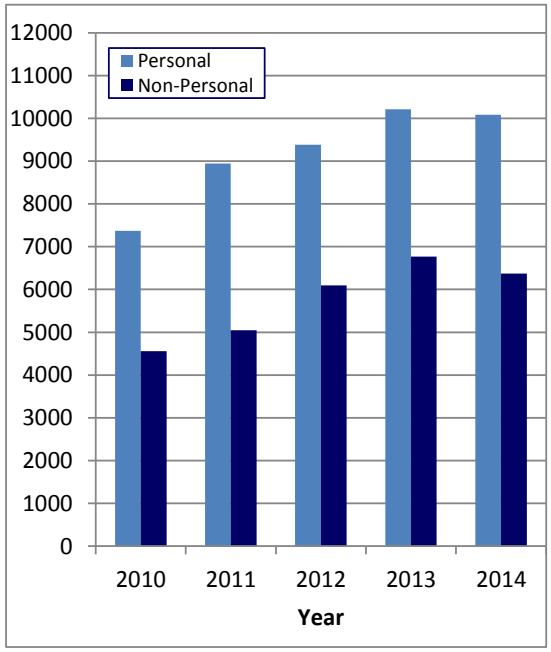
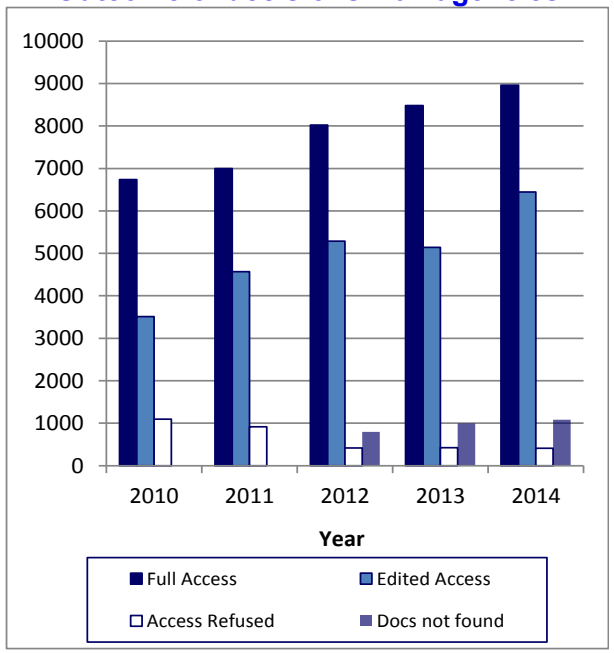



**Figure 2**
**Outcome of decisions – all agencies**




## Decisions

As can be seen in Table 13 (on page 91), of the decisions on access made by Ministers in the reporting period, two were to give full access; 36 were to give access to edited copies of documents; and four decisions were to refuse access. In six cases, no documents could be found.

Table 13 also reveals that 15,653 decisions on access applications were made by State government agencies (exclusive of local government agencies and Ministers) under the Act in 2013/14. Of those decisions, 52.8% resulted in the

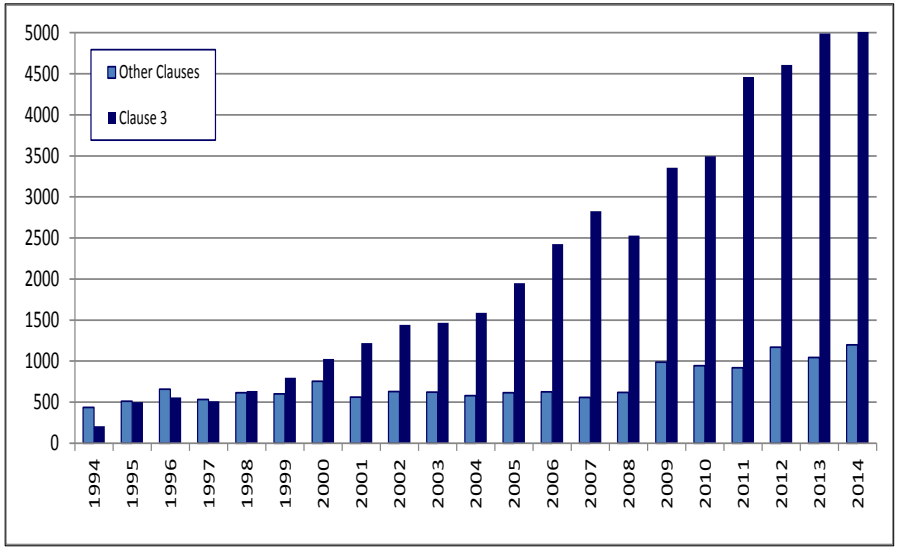
applicant being given access in full to the documents sought; 37.8% resulted in the applicant being given access to edited copies of the documents sought; and 0.9% resulted in either access being given but deferred, or being given in accordance with section 28 of the FOI Act (by way of a medical practitioner). In 6.4% of applications the agency could not find the requested documents. Only 2.1% of the decisions made were to refuse access. The above figures indicate that approximately 90.6% of the 15,653 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 89.8%).

## 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 5,629 times in the year under review. Figure 3 compares the use of this clause with all other clauses used since 1993/94, 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 (291 times); clause 4, which relates to certain commercial or business information of private individuals and organisations (201 times); clause 5,

**Figure 3 – Use of exemption clauses**




which relates to law enforcement, public safety and property security (182 times) and clause 6, which relates to the deliberative processes of government (113 times).

Consistent with the previous reporting period, 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).

## Internal review

Agencies received 232 applications for internal review of decisions relating to access applications during 2013/14 (see Table 15 on page 107). This represents about 1.4% of all decisions made and about 64.8% of those decisions in which

access was refused. In the year under review, 236 applications for internal review were dealt with (including some that were received in the previous period). The decision under review was confirmed on 156 occasions, varied on 63 occasions, reversed on 10 occasions and the application for internal review was withdrawn on 7 occasions.

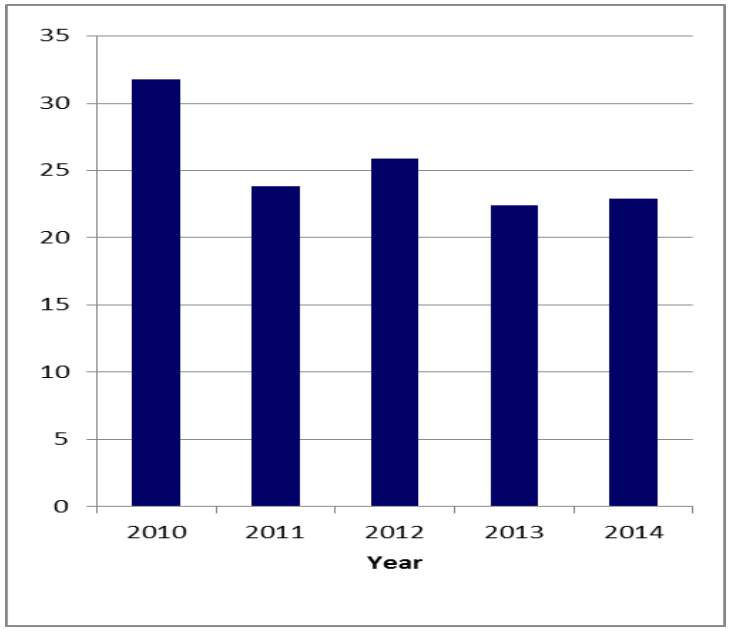
## Amendment of personal information

Agencies dealt with 35 applications for amendment of personal information during the year (see Table 16 on page 112), resulting in personal information being amended on six occasions;, not amended on 19 occasions; and amended, but not as requested, on five occasions. Of the 11 applications for internal review of decisions relating to the amendment of personal information dealt with during the year, nine decisions were made to confirm the original decision; one decision was varied; and one decision reversed (see Table 17 on page 113).

## Average time

The average time taken by agencies to deal with access applications (22.9 days) is similar to the previous year (22.4 days) and remains within the maximum period of 45 days permitted by the FOI Act (see Figure 4).

**Figure 4**
**Average days – all agencies**



## Average charges

The average amount of charges imposed by agencies for dealing with access applications increased to $12.34. This is similar to the 2012/13 average charge of $12.04 (see Figure 5).

**Figure 5**
**Average charge for access – all agencies**