



**Office of the
Information Commissioner**

Freedom of information for Western Australia

ANNUAL REPORT

2015/2016



Significant Issues and Trends

6. Recommended legislative and administrative changes

The FOI Act requires the Information Commissioner to include in the annual report any recommendations as to legislative or administrative changes that could be made to help the objects of the FOI Act to be achieved.

From 2016, our strategic and operational plan includes an initiative to 'identify and seek to implement changes to the FOI Act that facilitates improved agency practice'. Listed below are some of the legislative changes that the Commissioner has previously recommended and which will be included in this initiative.

Consultation with officers of government agencies

Section 32 of the FOI Act presently requires an agency not to give access to a document containing personal information about a third party unless the agency has taken such steps as are reasonably practicable to obtain the views of that third party as to whether the document contains matter that is exempt personal information under clause 3 of Schedule 1.

Third parties may include officers of government agencies. Certain 'prescribed details' about those officers, such as their names, positions and things done in the course of their duties, are not exempt under clause 3. However, section 32 requires agencies to consult with officers of government agencies,

even when the personal information about them amounts to prescribed details and is not exempt. This is often time consuming without adding to achieving the objects of the FOI Act.

As recommended in previous annual reports to Parliament, the Commissioner recommends the amendment of section 32 to remove the requirement to consult an officer of an agency in respect of the disclosure of personal information about them that consists of prescribed details only. Such an amendment would not prevent an agency from seeking the views of officers where it would still be prudent to do so, for example where the agency considers that disclosure of information to an access applicant may endanger the safety of an officer of an agency.

Outdated references to intellectually handicapped persons and closest relative

Sections 23(5), 32(4) and 98 of the FOI Act refer to 'intellectually handicapped persons'. For consistency with other legislation and in keeping with good practice, this should be replaced by a more appropriate term such as 'persons with intellectual disability'.

Sections 32, 45 and 98(b) currently use the term 'closest relative' which is inconsistent with the term 'nearest relative' in section 3 of the *Guardianship and Administration Act 1990*. This sometimes causes difficulties for agencies in identifying

the closest relative for the purposes of the FOI Act and should be amended to 'nearest relative', as defined in the *Guardianship and Administration Act 1990*, for consistency and to remove ambiguity.

Appointment of staff by the Information Commissioner

Under section 61(1) of the FOI Act, all OIC staff – other than those seconded from other State government agencies – are appointed by the Governor in Executive Council on the recommendation of the Commissioner. This can result in a delay of up to a month in making an offer of employment to a preferred candidate after the selection process has concluded. It also adds to the workload of Cabinet and Executive Council.

The Commissioner recommends an amendment to section 61(1) to allow the Commissioner to appoint staff directly.

7. Submissions and consultations

The Commissioner has made the following submissions in respect of legislative proposals or administrative practices affecting the FOI Act, information disclosure generally or the OIC.

Whole of Government Data Classification Policy

The Commissioner was invited to comment on the draft Policy coordinated by the Office of the Government Chief Information Officer. The Commissioner has made submissions to ensure the Policy works in concert with the objects and intentions of the FOI Act. He and the Principal Legal Officer have attended

a meeting of the Data Classification Sub-group of the Statistical Policy Committee, and the Principal Legal Officer is a member of the Data Classification – Final Stage Working Group.

Review of the Western Australia's Data Linkage Capability

The Commissioner made submission to the Data Linkage Expert Advisory Group in respect of the second key focus area 'to examine the barriers and impediments to data linkage, and address how they can be improved'. The Commissioner submitted that the absence of privacy legislation in WA could frustrate data linkage initiatives, as it potentially does now in respect of information sharing between WA public sector agencies.

Commissioner's Instruction – appointment of former public service officers ceasing employment with statutory offices

The Commissioner provided comment to the Public Sector Commissioner in respect of the draft Instruction as the OIC was listed as a statutory office affected by the Instruction.

Energy Legislation Amendment and Repeal Bill 2016

The Public Utilities Office requested feedback on proposed amendment to the FOI Act resulting from the Bill. The amendments were minor amendments to the Glossary and the A/Commissioner responded with no objections.

Standards for Effectively Managing Mental Health Complaints

The Commissioner provided comment to the Health and Disability Services Complaints Office on the confidentiality aspects of the Standard to ensure it was consistent with access rights under the FOI Act or other legal requirements of disclosure.

8. Supreme Court appeals

An appeal lies to the Supreme Court on any question of law arising out of a decision of the Commissioner – it is not a further full merits review. There is no appeal to the Supreme Court in relation to decisions on a deferral of access, imposition of charges, or the payment of a deposit. During the year, one decision of the Commissioner was the subject of an appeal to the Supreme Court.

In that matter, the complainant lodged an appeal against the Commissioner's decision to stop dealing with her complaint under section 67(1)(b) of the FOI Act. As at the end of the reporting period, the Court has not delivered its judgement.

At the end of 2014/15, there were three outstanding appeals before the Supreme Court arising out of the Commissioner's decisions. The outcomes of those appeals heard are as follows.

- On 7 August 2015, the Supreme Court delivered its judgement on the appeal against the Commissioner's decision in [Re 'H' and Department of Education \[2014\]](#)

[WAICmr 21](#). Justice Chaney dismissed the appeal and upheld the Commissioner's decision: see [H v Department of Education \[2015\] WASC 276](#).

- On 6 April 2016 the Supreme Court delivered its judgment on the appeal against the Commissioner's decision in [Re Latro Lawyers and Department of State Development \[2015\] WAICmr 7](#). Beech J upheld the appeal, set aside the Commissioner's decision and remitted the matter to the Commissioner for rehearing: see [Department of State Development v Latro Lawyers \[2016\] WASC 108](#).
- As at the end of the reporting period, the Court had not delivered its judgement on the appeal arising from the Commissioner's decision in [Re 'I' and Department of Agriculture and Food \[2014\] WAICmr 22](#).

9. FOI in the sector

A total of 16,969 applications were made to agencies during the reporting year, and only a small percentage of these matters comes to the OIC for review. Trends and issues faced by agencies are recognised through the external review process or via our Advice and Awareness service. How agencies manage their FOI responsibilities and information disclosure generally can impact on the volume of matters dealt with by this office.

The OIC endeavours to provide agencies with the tools to promote proactive disclosure and reduce the impact FOI can have on agency resources.

A more detailed analysis of agency statistics can be found in the Disclosures and Legal Compliance section.

- 2015/16 is only the third year in which the number of FOI applications to agencies has been less than the preceding year.
- 90% of decisions made by agencies were to provide access in some form.
- The most used exemption continues to be for the protection of personal information about third parties.
- The average time taken by agencies remains well within the 45 day limit.

Disclosing the identity of a dog owner

Before amendments to the *Dog Act 1976 (WA)* in 2013, any person could inspect and take copies of any entries in the dog register maintained by a local government upon payment of a fee. This meant people could establish the identity of the registered owner of a dog from the entries in the dog register. The 2013 amendments to the *Dog Act* removed this right. As a result, the identity of the registered owner of a dog is no longer publicly available from a dog register.

Since the amendments to the *Dog Act*, the OIC has dealt with a number of matters where people have sought access to documents under the FOI Act that disclose the identity of the registered owner of a dog. All matters were resolved without a published decision.

Case study – access to identity of registered dog owner

The complainant's dog was seriously injured by another dog. The injured party applied to the relevant local government agency for access to the contact details of the owner of the attacking dog. The agency refused access on the ground that the information is personal information and exempt from disclosure.

During the external review process, the Commissioner accepted that the information about the dog owner is personal information, but in this case he considered that the public interest in disclosure of that information outweighed the public interest in protecting the privacy of the dog owner because:

- the *Dog Act* provides that the owner of a dog causing injury to another dog is liable for any damages;
- non-disclosure of the information is likely to result in the denial of justice to individuals seeking damages for injury to people or animals; and
- the ownership of the offending dog was not in dispute.

The Commissioner gave the dog owner the opportunity to provide their views. The dog owner accepted the Commissioner's view and the agency disclosed the information to the complainant.

The Commissioner considers that in cases where a person needs to pursue a legal remedy and there is no other means of obtaining information, there is a strong public interest in favour of disclosure of that information under the FOI Act. However, each matter needs to be considered on its merits and on the facts in each case.

If an agency does propose to give access to personal information about someone other than the access applicant, it must take reasonable steps to seek that person's views about whether that information is exempt. That person does not have a right of veto but does have a right to provide their views and to seek review of an agency's decision to give access to their personal information.

The importance of internal review

If a person is dissatisfied with a FOI decision made by an agency, they can ask for an internal review by the agency. Last year, a quarter of agency decisions were varied or reversed by the agency on internal review.

The internal review is an important aspect of the FOI process. It provides a cost effective, quick and accessible form of review and reduces the likelihood of a matter being subject to external review.

Sometimes agencies elect to have the principal officer of the agency make the initial decision in relation to an access application. The effect of this is that internal review is not available and the only option for a dissatisfied applicant is to apply directly to the Commissioner for external review. This is not a desirable outcome and the Commissioner discourages the practice of the principal officer of an agency routinely making the initial decision.

Alternative access to documents

The FOI Act creates a legally enforceable right to access documents of an agency. The wording of the Act means that this right is limited to documents that are already in existence at the time of the FOI application. As such, agencies are not required to create a document in order to give access to information. However, there is no impediment under the FOI Act for an agency to do so in order to facilitate access to information where circumstances allow.

In this case study, the agency demonstrated a practical and sensible approach in order to resolve a complaint by creating a document.

Case study – creating a document

An application was made to a local government agency for access to the statements from two witnesses to a dog attack. The agency refused access in full as disclosure would reveal personal information about third parties, in part because the handwriting style in the documents may reveal the identity of some individuals.

During the external review process, the agency was invited to consider providing access to a typed extract of each of the witness statements, with personal information – including the handwriting – deleted. Both the agency and the applicant accepted the proposal and the edited typed extracts were released.