



**Office of the
Information Commissioner**

Freedom of information for Western Australia

ANNUAL REPORT

2016/2017



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Outdated references to intellectually handicapped persons and closest relative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.

Not confirming the existence of documents exempt under clause 14(5) of Schedule 1

The exemption in clause 14(5) of Schedule 1 to the FOI Act provides that matter is exempt if its disclosure would reveal or tend to reveal the identity of certain persons whose identity needs to be protected in the public interest. It would be desirable for section 31 of the FOI Act to be amended expressly to provide that nothing in the Act requires an agency to give information as to the existence or non-existence of a document containing matter that would be exempt under clause 14(5).

Public health facilities operated by non-government operators

A number of privately operated health facilities provide public patient services to Western Australians pursuant to contracts between the operator and the Minister for Health. A recent example of this is the Midland Health Campus. Unlike the operators of privately run correctional facilities, these operators are not subject to the FOI Act even to the extent that they are providing publicly funded health services to the public. The FOI Act should be amended to close this gap. One mechanism to do so would be to amend the definitions of 'contractor' and 'subcontractor' to include such operators.

7. Association of Information Access Commissioners (AIAC)

The AIAC was established in 2010 and consists of the statutory officers in each Australian and New Zealand jurisdiction responsible for freedom of information and information access.

The purpose of the AIAC is to exchange information and experience about the exercise of their respective oversight responsibilities and promote best practice and consistency in information access policies and laws. Meetings were held in Sydney in November 2016 and in Melbourne in March 2017.

Right to Know Day

On 28 September 2016 the Australian AIAC members issued a joint media statement to promote their commitment to the importance of open government and the right to access government-held information and data on international Right to Know Day. The centrepiece of the Right to Know campaign was the Solomon Lecture 'Collaboration in Place: the central role of information and data in securing Queensland's future prosperity', held in Queensland.

Open Government Partnership and National Action Plan

The multilateral Open Government Partnership (**OGP**) was created to secure commitments from governments to promote transparency, empower citizens, fight corruption, and harness technologies to strengthen governance. There are now 70 countries – including Australia – participating in the OGP.

On 7 December 2016, the Australian Government announced the finalisation of Australia's first Open Government National Action Plan. The Plan contains 15 commitments focused on: transparency and accountability in business; open data and digital transformation; access to government information; integrity in the public sector; and public participation and engagement.

Australian AIAC members, led by New South Wales, contributed to the development of the Plan through the inclusion of Commitment 3.2 on information access rights utilisation.

Further information on Australia's involvement in the OGP, including the Plan, is available at ogpau.pmc.gov.au. See also our website for a summary of the OIC's involvement: http://foi.wa.gov.au/Open_Government.

8. 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.

Strengthening Information Sharing Arrangements – discussion paper

The Commissioner was invited to comment on issues raised in the discussion paper by the Royal Commission into Institutional Responses to Child Sexual Abuse. The Commissioner raised the following points:

- The FOI Act is generally not well suited to information sharing in respect of the subject matter as the FOI Act does not allow any restrictions to be placed on what a recipient of information can do with the information they receive. Due to the sensitive nature of much of the information contemplated by the Discussion Paper, such restrictions would often be highly desirable, if not essential.
- The FOI Act requires an agency to seek the views of any third parties whose personal information it proposes to disclose. In the context of the Discussion Paper, this could result in the problematic situation of an agency needing to

seek the views of a perpetrator or potential perpetrator before disclosing information to another agency about a child at risk.

- Victims of child abuse and survivors experience difficulties in accessing records about their time in institutional care, including where access is sought under freedom of information legislation. These include an applicant's requirement to be specific, the costs involved, potential editing of exempt material and the consideration of third party privacy.
- Individuals seeking access to such documents would be better suited to first approach agencies outside the confines of the FOI process. The FOI Act expressly provides that nothing in that Act is intended to prevent or discourage the giving of access to documents otherwise than under the FOI Act if that can properly be done, and State and local government agencies are consistently encouraged by the OIC to deal with requests for information outside the FOI process unless there is good reason not to do so.

Inquiry into education, training and communications initiatives of Victorian oversight agencies

The Commissioner provided details of the awareness raising and training activities of the OIC, which is the Western Australian equivalent of the Victorian Freedom of Information Commissioner's office; the benefit of those activities to the work of the OIC, government agencies and the wider

community; the challenges in engaging stakeholders; and the value of collaboration between related information access agencies across Australia and internationally.

9. 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, three decisions of the Commissioner were the subject of an appeal to the Supreme Court.

Those three appeals, arising from the Commissioner's decisions in *Re Johnston and Department of State Development* [2017] WAICmr 1 (filed by the agency); *Re 'S' and Department for Child Protection and Family Support* [2017] WAICmr 10 (filed by the complainant); and *Re Seven Network (Operations) Limited and Public Transport Authority* [2017] WAICmr 12 (filed by the agency) had not been heard by the Court as at the end of the reporting period. However, after the end of the reporting period, the agency withdrew its appeal in the Johnston matter.

At the end of 2015-16, there were two outstanding appeals before the Supreme Court arising out of the Commissioner's decisions. The outcome of those appeals heard are as follows.

- On 26 August 2016, the Supreme Court delivered its judgement on the appeal against the Commissioner's decision in *Re 'I' and Department of Agriculture and Food* [2014] WAICmr 22. Justice Corboy upheld the appeal: see *I v Department of Agriculture and Food [No 2]* [2016] WASC 272.

The effect of this decision has resulted in the 'prescribed details' limit of the personal information exemption to apply only to officers of the agency to which the FOI application was made. The OIC has published a guide '[Dealing with personal information about an officer of an agency - FOI process guide](#)' to assist agencies in this regard.

- On 17 October 2016, the Supreme Court delivered its judgement on the appeal against a decision of the Commissioner to stop dealing with a complaint under section 67(1)(b) of the FOI Act on the basis that the complaint was lacking in substance. Justice Corboy dismissed the appeal. His Honour noted that the Court's jurisdiction is limited to determining questions of law; it cannot conduct a review of the merits of the Commissioner's decision: see *Morris v Information Commissioner at WA Office* [2016] WASC 336.

It was also reported last year that, in *Department of State Development v Latro Lawyers* [2016] WASC 108, the Supreme Court upheld the appeal against the Commissioner's decision in *Re Latro Lawyers and Department of State Development* [2015] WAICmr 7, set aside the Commissioner's

decision and remitted the matter to the Commissioner for rehearing. Before the matter was reheard the complainant withdrew its complaint to the Commissioner and the matter did not proceed.

10. FOI in the sector

- 17,306 applications were made to agencies.
- 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 to process FOI applications remains well within the 45 day limit.

The total of applications made to agencies in 2016/17 increased by just under 2% from the previous reporting year, and only a small percentage of these matters come 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.

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 34% 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.