



**Office of the
Information Commissioner**

Freedom of information for Western Australia

ANNUAL REPORT

2017/2018



Significant Issues and Trends

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.

Refusal to deal with amendment applications

The A/Commissioner's decision in *Re Appleton and Department of Education* [2017] WAICmr 20 (see page [14](#) of this report) highlighted the potential merit in amending the FOI Act so that an agency is expressly permitted to refuse to deal with an application to amend personal information made under Part 3 of the FOI Act, if 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.

As the A/Commissioner noted in *Re Appleton* at [67], section 20 of the FOI Act permits an agency to refuse to deal with an access application but does not expressly extend to or apply to applications for amendment of personal information. The A/Commissioner considered that Parliament did not envisage or intend that the amendment provisions in the FOI Act would require an agency to deal with an application for amendment of the size the complainant had made in that case.

As an example of this type of provision, section 60 of Queensland's *Information Privacy Act 2009* permits an agency to refuse to deal with an access or amendment application when the agency considers the work involved in dealing with the application would substantially and unreasonably divert the resources of the agency from their use by the agency in the performance of its functions.

Refusal to deal with repeat applications

Another legislative change that continues to have merit is an amendment that would give agencies a discretion to refuse to deal with repeat applications for the same document from the same access applicant. This issue has been raised by previous Commissioners in past annual reports, most recently in 2010, and was among the proposed amendments in the *Freedom of Information Amendment Bill 2007*.

Listed below are the legislative changes that the Commissioner recommended in last year's report. These recommendations remain.

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 anything towards 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 and modern 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 to expressly 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 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' in the FOI Act to include such operators.

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. The Commissioner is not a party to the appeal.

This year, one decision of the Commissioner was the subject of an appeal to the Supreme Court. In that matter, the Commissioner closed his file without making a decision under section 67 or 76 of the FOI Act on the basis that the matter had been resolved by conciliation. The complainant lodged

an appeal. The Supreme Court delivered its judgement on 15 August 2018 (which is outside the reporting period), upholding the appeal in part and remitting the matter to the Commissioner. See *Pearlman v The University of Western Australia* [2018] [WASC 245](#).

At the end of the previous reporting period there were three outstanding appeals before the Supreme Court arising out of the Commissioner's decisions. The outcome of those appeals are as follows:

- On 11 July 2017, an order was made by Justice Martino discontinuing the appeal arising from the Commissioner's decision in *Re Johnston and Department of State Development* [2017] [WAICmr 1](#) upon consent orders filed by the parties.
- On 26 October 2017, the Supreme Court delivered its judgement on the appeal filed by the complainant against the Commissioner's decision in *Re 'S' and Department for Child Protection and Family Support* [2017] [WAICmr 10](#). Acting Justice Smith upheld the appeal in part and remitted the matter to the Commissioner: see *S -v- Department for Child Protection and Family Support* [2017] [WASC 305](#).
- On 16 February 2018, the Supreme Court delivered its judgement on the appeal filed by the agency against the Commissioner's decision in *Re Seven Network (Operations) Limited and Public Transport Authority* [2017]

[WAICmr 12](#). Acting Justice Smith upheld the appeal: see *Public Transport Authority* [2018] [WASC 47](#).

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 for members 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.

In addition to the Commissioner's participation at AIAC meetings, officers from the OIC and the other jurisdictions have participated in working groups arising from the OIC's participation in the AIAC. By phone conference, the OIC have participated in a communications networking group, a working group about the national open government metrics and a working group to consider features that might be present in an optimal freedom of information legislative framework.

Cooperation between jurisdictions allows the sharing of information, which in turn assists each jurisdiction to more effectively utilise their own resources based on the learning and work of other jurisdictions.

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**). The Plan contains 15 commitments which focus 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.

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

On 27 November 2017, the respective AIAC members released national metrics on FOI access rights and published the inaugural dashboard of metrics on the public's use of freedom of information access rights.

The metrics will enable the community to examine the performance of their local FOI laws and to advocate accordingly, as well as improving community understanding of how FOI laws work and how to access them.

‘The right to access information is a fundamental tenet of Open Government. The dashboard of metrics on public use of FOI access laws is a first for Australia. The dashboard reflects the currently available data that is reasonably comparable across jurisdictions and the priority in Australia’s first Open Government National Action Plan to promote the importance of better measuring and improving our understanding of the public’s use of rights under freedom of information laws. We encourage the community to use the dashboard to better understand how FOI laws can be used to ensure government is releasing and providing access to more information to build public trust and promote an effective and contemporary model of Open Government that is fair, accountable and transparent.’

[joint AIAC media statement]

The dashboard of FOI metrics is available from the NSW Information Privacy Commissioner’s [website](#).

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.

Submissions and consultations

The Commissioner and A/Commissioners have made the following submissions in respect of legislative proposals or administrative practices affecting the FOI Act, information disclosure generally or the OIC.

Transparency in Government Projects

In August 2017, the Commissioner was given a copy of a discussion paper entitled: Transparency in Government Projects by the Special Inquiry into Government Programs and Projects (**the Inquiry**) and was invited to provide a [submission](#) on the paper’s contents, which the A/Commissioner provided on 29 September 2017. In February 2018, the Inquiry published its report that it had provided to the State Government and item 4.3 on page 83 of Volume 1 of the Inquiry’s report deals with transparency. The full report of the Inquiry can be accessed from the Public Sector Commission’s website using the following links:

- [Volume 1](#)
- [Volume 2](#)

Data Sharing Advisory Group

As noted in the OIC's 2015/16 annual report (at page [24](#)), in 2016 the Commissioner made a 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. This office remains of the view that any data sharing regime should appropriately protect the privacy of personal information.

The Data Linkage Expert Advisory Group Report (**the Report**) entitled '[Review of Western Australia's Data Linkage Capabilities](#)' dated December 2016 was publicly released on 13 October 2017. The Report recommended, among other things, that the State Government draft privacy legislation and consider the formulation of data sharing legislation (page 16). The Report also recommended that this office be a member of the Policy & Legislation Working Group to implement the recommendations relating to privacy and data sharing legislation.

The [Final Report](#) of the Service Priority Review published in October 2017 recommended that immediate steps be taken to develop legislation to facilitate information sharing while protecting sensitive personal and other information (recommendation 6.1).

In January 2018, the Department of the Premier and Cabinet invited this office to join a small inter-agency Data Sharing Advisory Group, to review and comment on data sharing policy, drafting instructions and draft legislation, for consideration by Government in 2018.

After attending the first meeting of the Advisory Group in February 2018, this office decided that, as an independent statutory office, it is not appropriate to be involved in the development or endorsement of a particular government policy. As a result, this office has not attended further meetings of the Advisory Group but remains willing to provide future assistance to the project on specific issues within the constraints of our role when requested.

Working Group on Public Sector Efficiency – reducing red tape

The Public Sector Efficiency Working Group was convened by the Public Sector Commissioner to identify opportunities to reduce internal 'red tape', waste and inefficiencies in the public sector. In July 2017 the Commissioner provided a submission outlining opportunities to reduce inefficiencies related to the administration of the FOI Act. These included: proactive disclosure outside the FOI Act; investment in well-trained FOI officers with commensurate levels of authority; and the importance of raising awareness of FOI responsibilities and possibilities within agencies.

The Working Group's final report dated 31 October 2017 (available on the Public Sector Commission's [website](#)) recommended that the Commissioner should 'consider building on recent efforts to avoid agencies over complicating responses to freedom of information requests' (Recommendation 28.4).

'Well planned and coordinated information disclosure policies and procedures in agencies that reflect a default position of public disclosure wherever practicable, would reduce the time and resources that would otherwise be required to process formal information access requests under the FOI Act.'

[from the Commissioner's submission to the Working Group on Public Sector Efficiency]

FOI in the sector

The total number of applications made to agencies in 2017/18 decreased by approximately 0.3% 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

- 17,258 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.

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 (as required under the FOI Act) 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 request an internal review by the agency. Last year 32% of agency decisions were varied or reversed by agencies 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 practice of the principal officer of an agency routinely making the initial decision is discouraged.

Cooperation among agencies

It is pleasing to note that number of agency information sharing groups are operating in the freedom of information area. Like-agencies are cooperating to share resources and knowledge specific to the kinds of issues they deal with in relation to the FOI Act. The OIC is aware of a Local Government Networking Group, a University FOI Networking Group and a Public Sector Networking Group. This year a representative from the OIC was invited to attend a meeting of the Local Government Networking Group.

The OIC is more than happy to provide information to these groups while allowing the participants the opportunity to discuss issues they may face with specific kinds of information among themselves. For participants in these groups, it is an opportunity to share resources and ideas and to support each other in a context where there may be a limited number of FOI practitioners or knowledge within their own agency, or none at all.