Office of the
Information Commissioner

Freedom of information for Western Australia

ANNUAL REPORT

2018/2019

Significant Issues

Recommended legislative and administrative changes

The FOI Act requires the Commissioner to include in the annual report to Parliament any recommendations as to legislative or administrative changes that could be made to help the objects of the FOI Act be achieved. None of the amendments recommended by the Commissioner in the last annual report were made to the FOI Act in the reporting period. The following recommendations have been made in past annual reports.

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.

Outdated reference to 'intellectually handicapped persons'

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').

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, for example, 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.

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.

Refusal to deal with amendment applications

The former A/Commissioner's decision in *Re Appleton and Department of Education* [2017] WAICmr 20 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 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 former 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

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

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

Section 31 of the FOI Act provides that nothing in the FOI Act requires an agency to give information as to the existence or non-existence of a document containing matter under clauses 1, 2 or 5 of Schedule 1. This provision protects from disclosure documents of the kind where it is apparent that disclosure of their very existence may itself cause the harm the exemption is designed to prevent. Clauses 1, 2 and 5 apply respectively to documents relating to Cabinet and Executive bodies; inter-governmental relations; and law enforcement, public safety and property security.

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).

Reference to 'closest relative'

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.

Supreme Court appeals

An appeal can be made to the Supreme Court on any question of law arising out of a decision made on an external review by the Commissioner. An appeal on a question of law 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 usually not a party to the appeal.

As noted in last year's annual report, at the end of the previous reporting period, there was one outstanding appeal before the Supreme Court arising out of a decision of the Commissioner. The outcome of that appeal was reported in last year's annual report (see page 29). In that matter, the former Commissioner closed his file without making a decision under sections 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, upholding the appeal in part and remitting the matter to the Commissioner: see *Pearlman v The University of Western Australia* [2018] WASC 245.

This year, two decisions of the Commissioner were the subject of an appeal to the Supreme Court.

One appeal arose from the then A/Commissioner's decision in *Re Pearlman and University of Western Australia* [2019] WAICmr 2 (filed by the complainant). That decision related to the matter remitted to the Commissioner by the Supreme

Court in *Pearlman v The University of Western Australia* [2018] WASC 245 referred to above. The Supreme Court delivered its judgement on 19 July 2019, allowing the appeal and remitting the matter to the Commissioner for reconsideration: see *Pearlman v WA A/Information Commissioner* [2019] WASC 257.

The other appeal arose from the decision of another former A/Commissioner in *Re 'S' and Department for Child Protection and Family Support* [2018] WAICmr 2 (filed by the complainant). The Supreme Court delivered its judgement on 22 July 2019, allowing the appeal and setting aside the decision of the Commissioner: see *S v Department of Communities* [2019] WASC 260. On 29 August 2019 the Court made orders consequent upon that judgement: see *S v Department of Communities* [2019] WASC 260.

Summaries of the above Supreme Court decisions are available in our September 2018 and August 2019 newsletters decisions (apart from the orders made on 29 August 2019).

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.

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.

In this reporting period the Commissioner attended two AIAC meetings. The first was held in Sydney in September 2018 and the second was held in Wellington, New Zealand in February 2019. Both meetings were very productive and some of the initiatives or projects to come out of those meetings are described below.

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. Each country demonstrates this by developing a National Action Plan. There are now 79 countries participating in the OGP, including Australia since 2015.

Australia's second National Action Plan for 2018-2020 was published on 24 September 2018 and continues to commit to transparency and accountability in business; open data and digital transformation; access to government information; integrity in the public sector; and public participation and engagement.

For the past four years, AIAC members have contributed to a national dashboard of metrics on the public's use of freedom of information access rights. This information is provided by the OIC from the statistical information we request from all agencies at the end of each financial year. As of 2017/18, the OIC has, for the first time, been able to include data on the percentage of applications completed by agencies within the statutory timeframe. An overview of jurisdictional comparisons is outlined below.

This data 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.

Open Government – National Dashboard – Metrics for Utilisation of Information Access

WA comparative snapshot

Metric 1: count of formal applications for access made to all agencies in each jurisdiction

- For all four years recorded, WA is third highest only behind Victoria and the Commonwealth.

Metric 2: formal applications received per capita

- For all four years recorded, WA has the highest number of applications per capita of all jurisdictions.

Metric 3: percentage of all access decisions by agencies where access was given either in full or in part

- For all four years, WA has been the highest of all jurisdictions, between 96% and 98%.

Metric 4: percentage of all access decisions by agencies where access was refused

- For all four years, WA has been the lowest of all jurisdictions, between 2% and 4%.

…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…

Joint AIAC media statement

Metric 5: timeliness - percentage of applications dealt with by agencies within permitted time

- In 2017/18 WA had the second highest compliance rate by agencies with 91%.

Note: this is difficult to compare because of variations across jurisdictions as to actual periods in legislation and ability to negotiate an extended period in some cases. 2017/18 was the first year WA was able to provide this data.

Metric 6: Percentage of applications received by agencies which are subject of external review

- For all four years, WA has had the lowest rate, between 0.7% and 1%.

The 2018/19 data will be compiled in the coming months.

The full dashboards including the data for all jurisdictions for the four years 2014/15 to 2017/18 can be found on the NSW Information Privacy Commissioner's website.]

Community attitudes survey

In conjunction with other select members of the AIAC, the OIC participated in a study that surveyed residents in each jurisdiction to measure public awareness on the right to access government information, and the experiences and outcomes in exercising that right. The study was coordinated by the Information and Privacy Commissioner of New South Wales and conducted by Woolcott Research and Engagement.

350 WA residents were surveyed in a mixed mode survey using online panel and computer assisted telephone interviewing.

Some of the highlights of the research from the WA survey are:

- 48% of respondents felt that the right to access information held by government agencies was very important and a further 39% felt it was quite important.
- If they wanted to seek information from a WA State or local government agency, 44% would attempt to access the information through a specific agency's website, while 24% would call or visit the agency.
- One in six respondents were unsure about how they would access information held by a WA State or local government agency.

A summary of the survey across the various jurisdictions have been used to compile an Information Access Study that will be published in the coming months and will be available on the OIC website by early October 2019.

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.

Proposed introduction of State privacy and information sharing legislation

The FOI Act provides some privacy protection, particularly the exemption in clause 3 of Schedule 1 to the Act which protects personal information from disclosure, subject to exceptions.

Successive Information Commissioners have consistently, in the absence of specific State privacy legislation, said in published decisions that the purpose of the exemption in clause 3 is to protect privacy.

Part 3 of the FOI Act also deals with applications for amendment of personal information. These provisions provide a means of ensuring that personal information held by State and local government is accurate, complete, up-to-date and not misleading.

As observed in the Second Reading Speech of the *Freedom of Information Bill 1992* (**FOI Bill**) (see Hansard, Legislative Assembly, 1 September 1992, 4156), the provisions in Part 3 were originally intended for inclusion in privacy legislation proposed at the time but were included in the FOI Bill when privacy laws were not enacted. Similar provisions are found in most privacy legislation in other states and territories and the Commonwealth.

The FOI Act does not, however, provide privacy regulation or create rights or remedies when privacy is breached.

As this office administers the FOI Act and the Commissioner makes binding determinations about whether personal information is exempt from disclosure and in relation to an agency's decision not to amend personal information, this office's view is often sought by agencies and members of the public in privacy related matters, despite it not having a specific privacy remit.

An *Information Privacy Bill 2007* was introduced into the WA Parliament in March 2007 which proposed that privacy oversight would sit with the Information Commissioner. However that Bill was never passed into law.

As reported in last year's annual report (at page 32), in January 2018, the Department of the Premier and Cabinet (**DPC**) 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. After attending the first

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meeting of the Advisory Group in February 2018, this office decided that, as an independent statutory office, it was not appropriate to be involved in the development or endorsement of a particular government policy. As a result, this office did not attend further meetings of the Advisory Group but indicated a willingness to provide future assistance to the project on specific issues within the constraints of our role when requested.

In early 2019, the Commissioner decided to prepare an issues paper to highlight some key issues for the Government to consider in the area of privacy and data sharing law reform. A copy was provided to the Attorney General and DPC.

The key points arising from the paper were:

- While matters of policy are entirely a matter for Government and Parliament, this office considers that the Government should enact privacy legislation as separate stand-alone legislation to data sharing legislation.
- It is generally accepted that the protection of privacy under the common law is inadequate and that privacy legislation in Western Australia is long overdue.
- Community trust is critical to the success of data sharing legislation.
- Privacy laws should be viewed as an enabler instead of a barrier to information sharing.
- Data sharing models in other Australian jurisdictions may provide useful insight when designing data sharing legislation.
- Issues raised by other Australian Information Commissioners in response to the proposed Commonwealth Data Sharing and Release Legislation should be closely examined.
- Oversight of privacy laws in most Australian jurisdictions sits with the Office of the Information Commissioner.

DPC subsequently consulted with the OIC and we provided some assistance on its responsible information sharing project, within the constraints of our role and legislative remit.

On 5 August 2019 the Government announced that it is committed to introducing *Privacy and Responsible Information Sharing* legislation and released a discussion paper for public comment. Among other things, the Government proposes to appoint a WA Privacy Commissioner to ensure accountability and transparency (see page 30 of the discussion paper).

There are ten questions under consideration which are summarised on page 47 of the discussion paper. These questions include:

- What issues should be considered when developing privacy and information sharing legislation for Western Australia?
- What should the role of a Privacy Commissioner be, and how can this role best protect privacy and ensure public trust?
- How should breaches of privacy be managed, and what action should be taken in response to a breach?

- When should government agencies be allowed to share personal information?
- Under what circumstances would it be considered acceptable to share confidential information within the public sector?

The discussion paper notes (at page 30) that '[o]ften privacy oversight is performed through an agency that also has oversight of a freedom of information regime. A similar structure could be adopted in WA'.

Closing date for submissions to DPC is 1 November 2019.

Response to Parliamentary petition

In October 2018 a petition was tabled in Parliament on behalf of a member of the public requesting an inquiry into the performance of the OIC, the Public Sector Commission and the Parliamentary Commissioner for Administrative Investigations (the Ombudsman) in relation to the handling of complaints and applications regarding local government.

At the invitation of the Legislative Council's Standing Committee on Environment and Public Affairs the Commissioner provided her response to the petition.

A copy of the petition and the Commissioner's response is available on Parliament's website.

Feedback on the draft Information Classification policy – Office of Digital Government

In January 2019 the Commissioner provided feedback regarding the draft Western Australian Government Information Classification Policy ('the Policy'). While the OIC is not required to comply with the Policy (being a non-SES organisation), we can elect to do so and respect the use of the policy by other agencies. The Commissioner has made recommendations to ensure the Policy works in concert with the objects and intentions of the FOI Act. She also observed that any particular sensitivity classification will not determine whether a document is exempt from disclosure under the FOI Act.

Review of the *Criminal Investigation (Covert Powers) Act 2012*

In February 2019 the Hon. Peter Martino, who had been appointed by the Minister for Police to conduct a review of the operation and effectiveness of Parts 2 and 3 of the *Criminal Investigations (Covert Powers) Act 2012* (**the CP Act**), invited the Commissioner to make a submission to that review.

In her submission the Commissioner noted that sections 9 and 45 of the CP Act exclude the application of the FOI Act in respect of 'investigations, operations, activities or records' under Part 2 dealing with 'Controlled operations' and in respect of the 'activities or records' under Part 3 dealing with 'Assumed identities'. In a detailed submission made to a Parliamentary committee inquiry into the *Criminal Investigations (Covert Powers) Bill 2011* the former Information Commissioner did not support the proposal in the Bill to exclude the FOI Act from applying to these types of documents.

In the Commissioner's submission to the 2019 review she agreed with the former Commissioner's views and noted that the recordkeeping and consequential reporting requirements imposed under the CP Act provide some measure of public accountability regarding the exercise of such powers during controlled operations.

Public disclosure and accountability in the delivery of major projects

In May 2019, at the invitation of the Deputy Under Treasurer, the Commissioner and key OIC staff met with the newly formed Disclosure Working Group to discuss the Group's promotion of public sector transparency and accountability around the delivery of major projects. We provided reference material from the National Action Plan developed as part of the Open Government Partnership, a copy of this office's 2017 submission made to the Special Inquiry into Government Programs and Projects (the 'Langoulant Inquiry') and guides from other Australian jurisdictions regarding proactive disclosure and administrative release of documents.

Use of the term 'complaint' in the FOI Act

The FOI Act describes the main function of the Information Commissioner as dealing with 'complaints' made under Part 4 of the Act about decisions made by agencies in respect of access applications and applications for amendment of personal information (section 63).

Under section 65 of the FOI Act, a complaint can be made to the Information Commissioner by an access applicant or a third party against an agency's decision of the kinds described in section 65(1)(a)-(g) and section 65(3)(a)-(b). Those complaints are, in effect, applications for external review of an agency's decision. Although Part 4 of the FOI Act is titled 'Part 4 – External review of decisions; appeals', the term 'external review' is not otherwise used in the FOI Act and the term 'complaint' is used throughout.

Unlike some other jurisdictions in Australia (for example, Victoria and the Commonwealth), the Commissioner does not have jurisdiction to deal with or investigate complaints about the actions taken by an agency under the FOI Act or how an agency handles or deals with an FOI request or access application. The Commissioner also does not have an oversight, audit or enforcement function under the FOI Act.

In recent years, this office has observed that the use of the term 'complaint' in the FOI Act, and by this office, can create confusion and misconceived expectations by members of the public about the role and powers of this office and the possible outcomes of making a 'complaint' to this office.

As a result, this office has commenced a review of its materials and the appropriateness of the use of the term 'external review' rather than 'complaint' to better reflect the nature of the external review mechanism. This has included a review of the language used in other Australian jurisdictions and legislation and consideration of whether it is appropriate for the Commissioner to recommend to Parliament in next

year's annual report any resulting legislative changes to the FOI Act (under section 111(4)). This review is ongoing.

Advising applicants of their rights of review when an agency does not make a decision within the time allowed under the FOI Act

In some cases when an applicant makes an application to an agency under the FOI Act the agency does not issue a written notice of decision within the specified timeframes set out under the FOI Act.

An agency's notice of decision (both an initial decision and internal review decision) must include details of the rights of review and the procedure applicants should follow. This means that when an applicant receives a notice of decision from an agency, they should be informed of their review rights.

However, when a notice of decision is not provided to an applicant and the agency does not otherwise inform them of their review rights, applicants may be completely unaware that those rights are available to them.

It is difficult for this office to know how often people do not exercise their rights of review in these circumstances.

The FOI Act does not require an agency to notify or inform an applicant of their review rights when it hasn't dealt with an application within the legislative timeframes. However, the OIC considers that it is good practice for an agency to do so and is consistent with both the objects of the FOI Act and the required duties of an agency to assist the public to obtain access to documents.

In the last year, a significant number of external review applications have been received by this office in respect of an agency's deemed decision to confirm its initial decision (that is, where the agency did not give the applicant its internal review decision within the time allowed under the FOI Act). In each of these cases, the agency did not give the applicant a notice of decision informing them of their review rights. In some cases, the agency separately advised the applicant of their review rights and in other cases the applicant was otherwise aware of their rights to pursue the matter with this office.

In an effort to educate the public about their rights in these circumstances, the OIC published a new guide titled 'What if the agency delays making a decision?' available on our website.

Over the next year, this office proposes to consider how this issue is addressed in other Australian FOI legislation and whether the FOI Act should be amended to require agencies to advise applicants of their rights of review in some manner when a notice of decision is not issued.

Audit outcomes

Internal audit

In June 2019, OIC engaged Braxford Consultancy to conduct the annual internal audit of the OIC's finance and human resource processes.

Braxford made six recommendations based on their observations which the OIC have taken on board. It was also noted that the ongoing difficulty in appropriate segregation of duties has been alleviated following the appointment of another administrative support officer in February 2019. This new position has taken over the financial and human resource processing duties, providing a distinct separation between the functions of process and review which had previously been lacking.

The results of the two audits (Finance & HR) indicate a good result and the Office has continued to operate effectively with limited resources. We have made a number of observations which are not uncommon for an organisation of this size. However, none of them concern high risk issues and agreement has been reached to address the recommendations as detailed in the report. We have also made two efficiency recommendations, which we believe will potentially streamline effort in some areas.

Internal audit conclusion

External audit

As in previous years, the external audit of the OIC by the Office of the Auditor General has been conducted in two stages: the first stage for the financial statements and the second stage for the key performance indicators. Delaying the audit of key performance indicators allows survey data collected throughout July from State and local government agencies to be properly collated and reviewed.

During this years' audit, there were instances of inconsistency when reconciling leave balances. This had also been noted during the internal audit. Employee leave balances are audited when an employee separates from the OIC, either permanently or temporarily. Quarterly leave reports are also provided to the Commissioner in order to monitor excessive balances. We have undertaken to conduct a more thorough audit of leave balances for current staff members in the coming year.

Last year the auditors highlighted the need to incorporate our finance policies into a comprehensive finance manual and we provided a completion date of 31 December 2019. Work has progressed during the year to finalise the manual for submission by the end of 2019.