



# Freedom of Information Newsletter

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## Number 11 – January 2017

### *From the Information Commissioner – You're invited to the first "FOI in WA" Conference*

FOI coordinators and decision makers play a critical role in helping to achieve the legislative objects of enabling greater public participation in our democracy and making government more accountable to the public. I recognise that the work of an FOI coordinator or decision maker is not easy. Decisions made under the FOI Act have a direct impact on a citizen's rights. Sometimes those decisions are complex. But the Parliament has entrusted agencies with the power to make those important decisions based on the circumstances of each particular access application.

With this in mind, I am pleased that this year my office will hold an FOI Conference to recognise the role of freedom of information and provide an opportunity for officers to enhance their understanding and skills in relation to the FOI Act. Anybody else with an interest in an effective regime for access to government information is also welcome.

More information about the program will be forthcoming soon. Meanwhile ...

### **Save the date – FOI in WA - 10 August 2017.**

### *Did you know? – It is important to give accurate advice about review rights*

This office has recently received a number of applications for external review where the applicant had not first sought internal review of the agency's initial decision. Having examined the individual cases, it is apparent that the access applicant has misinterpreted the review options available to them based on the language used in the initial notice of decision.

In particular, where the initial notice of decision describes both the internal and external review rights, it should be clear that the applicant is required to first seek internal review.

An example of misleading language is where, under the heading External Review Rights, the sentence states that: 'If you are not satisfied with this decision, you have the right to lodge a complaint with the Information Commissioner'. The applicant is likely to incorrectly interpret that 'this decision' refers to the initial decision and not the internal review decision that will be issued at a later time.

To avoid any misunderstanding, in the above example, you could simply substitute the phrase 'if you are not satisfied with this decision...' with 'if you are not satisfied with the internal review decision...'.

In many cases, it may be preferable only to advise a party of their rights to internal review when providing the initial decision. Advice about external review rights can then be given in an internal review decision. See the FOI Coordinators Manual at pages 131 -133 for suggestions about how to avoid misunderstandings and for suggested wordings.

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### ***Agency news – Updated FOI Coordinators Manual available***

The OIC FOI Coordinators Manual has been updated. The updated version is available on our website at: <http://foi.wa.gov.au/Materials/FOI%20Coordinators%20Manual.pdf>. The FOI Coordinators Manual is a resource for FOI practitioners. It includes basic information about FOI processes and examples of relevant decisions of the Information Commissioner when considering various requirements of the FOI Act. The Manual is used in the FOI Coordinators Workshop.

### ***Good news story – Happy anniversary to the DPC FOI Unit***

The Department of the Premier and Cabinet's FOI Unit marked a five-year anniversary this month. In 2010, the Information Commissioner conducted a comprehensive review of the administration of the FOI Act. One of the recommendations arising from the review was that:

*Ministers may wish to explore with the Department the option of a more formal shared capability to assist their offices in dealing with FOI applications, noting that responsibility for decisions on access must remain with the relevant Minister.*

In response to this recommendation, the structure and functions of the Department's FOI Unit were expanded and, on 23 January 2012, the FOI Unit began processing FOI applications made to the Offices of WA Ministers. Since commencement, the Manager and four staff of the FOI Unit have dealt with applications on a wide variety of topics and continue to provide support for the coordination and processing of FOI applications made to the Office of the Premier, Ministerial Offices and the Department of the Premier and Cabinet.

### ***Recent decisions of the Information Commissioner***

#### ***Re Banovic and Edwards and Racing and Wagering Western Australia [2016] WAICmr 16 (PDF)***

The complainant sought access to a transcript of the proceedings of a Stewards' Inquiry. The Commissioner was satisfied that the transcript included personal information about a number of third parties. He found that the transcript was exempt under clause 3(1) and none of the limits on exemption apply. He found that it was not practicable to give access to an edited copy of the document with the exempt information deleted.

The agency's decision was varied.

#### ***Re John Holland Pty Ltd and Department of Treasury [2016] WAICmr 17 (PDF)***

The complainant sought review of the agency's decision to give access to documents relating to the commissioning and opening of the Perth Children's Hospital. The Commissioner found that the disputed information was not exempt under clauses 4(2), 5(1)(e), 5(1)(f) or clause 8(2) of Schedule 1 to the FOI Act.

The agency's decision to give access to the documents was confirmed.

#### ***Re Jennings and City of Nedlands [2016] WAICmr 18 (PDF)***

The complainant disputed the agency's interpretation of the scope of her access application. The agency claimed that the complainant agreed to exclude all commercial or business information about third parties. The Commissioner considered that there was some ambiguity in the language used by the parties, but he was ultimately satisfied that the complainant agreed to exclude commercial or business information about third parties from the scope of her access application only if it is exempt information. The Commissioner found that the commercial or business information about third parties contained in the disputed documents was not exempt under clause 4(3) of Schedule 1 to the FOI Act and that the disputed documents were within the scope of the complainant's access application.

The agency's decision was set aside.

***Re Johnston and Department of State Development*** [\[2017\] WAICmr 1 PDF](#)

The complainant sought access to documents relating to a proposed gas pipeline, including the agency's draft invitation for expressions of interest to perform work on the pipeline project. The Commissioner found that the disputed documents are not exempt under clauses 1(1)(b), 1(1)(d), 6(1), 10(1) or 10(5) of Schedule 1 to the FOI Act as claimed by the agency. In considering the public interest in relation to clause 6(1), the Commissioner stated there is strong public interest in the disclosure of a document that is fundamental to the agency's accountability for the performance of its functions and expenditure of public funds relating to the development of a major infrastructure project.

The agency's decision was set aside.

***Re MacTiernan and Main Roads Western Australia*** [\[2017\] WAICmr 2 PDF](#)

The complainant sought access to documents relating to the Perth Freight Link project. The agency claimed that the disputed information was exempt under clauses 6(1), 10(3) and 10(4) of Schedule 1 to the FOI Act. The Commissioner found that disclosure of the disputed information was not, on balance, contrary to the public interest and therefore that it was not exempt under clause 6(1). The Commissioner was not persuaded that the disputed information had a commercial value to the agency (clause 10(3)) or that it concerned the commercial affairs of the agency (clause 10(4)). The Commissioner found that the disputed information was not exempt under clause 10(3) or clause 10(4).

The agency's decision was set aside.

***Re Appleton and Public Sector Commission*** [\[2017\] WAICmr 3 \(PDF\)](#)

The Commissioner found that the disputed matter was exempt under clause 7 of Schedule 1 to the FOI Act on the basis that it would be privileged from production in legal proceedings on the ground of legal professional privilege. The Commissioner also found that the agency's decision to refuse access to additional documents under section 26 of the FOI Act on the basis that they cannot be found or do not exist was justified.

The agency's decision was confirmed.

***FOI training news – Spaces still available for February FOI Coordinators Workshop***

Upcoming training dates for agencies can be found [<HERE>](#).

The **FOI Coordinators Workshop** introduces participants to the objects and principles of the FOI Act and the major features of the legislation. Topics include the role of decision-makers; FOI applications; exemptions; consultation with third parties; charges; notices of decision and review; amendment of records; publication of information; statistics and reporting.

The **Decision Writing Workshop** is designed to enhance decision-makers' skills and confidence in writing a notice of decision that complies with the *Freedom of Information Act 1992 (WA)*. Participants will be expected to already have a basic understanding of the requirements of the FOI Act.

***Subscription and feedback***

Click [<HERE>](#) to provide your feedback or suggestions for the FOI Newsletter.

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