



Freedom of Information Newsletter

Number 25 – August 2019

Welcome to the new Information Commissioner – Catherine Fletcher

On 16 July 2019, Catherine Fletcher was appointed the Western Australian Information Commissioner for a term of five years. The Information Commissioner was sworn in by the President of the Legislative Council, Hon. Kate Doust MLC, on 16 July 2019. The Attorney General's media statement about the Commissioner's appointment is available [<here>](#).



From the Information Commissioner

I have just returned from two days of meetings of the Association of Information Access Commissioners (**the AIAC**) in Brisbane. The AIAC consists of Commissioners and Ombudsmen with information access jurisdictions in Australia and New Zealand. This year we were hosted by the Queensland Office of the Information Commissioner. These meetings are a wonderful opportunity to share knowledge and insight into the issues experienced by the various jurisdictions.

In my concurrent role as a State Records Commissioner, I was a judge for this year's Margaret Medcalf Award. This annual Award for excellence in referencing and research using the State Archive, honours Miss Margaret Medcalf OAM, the second State Archivist for Western Australia (from 1971 to 1989), for her valuable contribution to the development of archives in Western Australia. At a ceremony on 27 June 2019, Hon. David Templeman MLA, Minister for Culture and The Arts, presented this year's Award to **Dr Robin Barrington** for her journal article *A Race War: Tracing emotions on the Murchison frontier in Western Australia 1880-1915*. More information about the award is available [<here>](#).



I am pleased to report that the OIC has joined with other Government tenants of Albert Facey House (AFH) to sign a statement of intent to establish AFH as a Cultural Competency Hub. More particularly, the OIC, together with the Office of the Auditor General, the Ombudsman, the Office of the Inspector of Custodial Services, the Economic Regulation Authority, the Health and Disability Services Complaints Office and the Mental Health Tribunal, have agreed to work together where appropriate, and within each Office's legislative mandate to:

- take both symbolic and practical action to promote systemic appreciation of, and learning from Aboriginal culture;
- provide opportunities for Aboriginal members of the WA community to work with us and gain experience in public administration;
- listen to and, wherever possible, act upon the guidance offered by the AFH Aboriginal Representatives Committee and wide consultation with Aboriginal members of the community; and
- encourage staff to support cultural initiatives and events.

As part of the NAIDOC celebrations this year, the Office of the Auditor General hosted a NAIDOC event for AFH tenants. The OIC appreciates the opportunity to participate in this event. OIC officers also attended community events during NAIDOC week.

I encourage you to consider registering for our FOI in WA Conference being held on 21 November 2019. The program is coming together well and participants can look forward to an informative and stimulating day about freedom of information. Read more about the conference later in this newsletter.

Finally, on 10 June 2019, the late Su Lloyd was posthumously awarded the Medal of the Order of Australia (OAM) in the Queen's Birthday 2019 Honours List for service to public administration in Western Australia, and to the law (see <https://honours.pmc.gov.au/honours/awards/2004765>).

Su was the Acting Information Commissioner in 2017-2018 and the OIC's Principal Legal Officer for five years prior to that appointment. Staff of the OIC and I would like to acknowledge this well-deserved award and the significant contribution Su made to freedom of information in Western Australia.

Catherine Fletcher, Information Commissioner

World of FOI – 28 September 2019 is International Right to Know Day

A 2002 meeting of information access advocates in Bulgaria developed the idea of an international Right to Know Day (**RTK Day**). RTK Day is now celebrated around the world with a variety of events and initiatives to raise awareness of the right to information and to promote the benefits of open, transparent, and accountable government.

Members of the AIAC will release a joint statement about the Right to Know around RTK Day.

The Office of the Australian Information Commissioner has produced a webpage with information about the Right to know - <https://www.oaic.gov.au/s/rtk/>

The Office of the Victorian Information Commissioner will celebrate RTK Day 2019 with a public forum on 24 September – *Community expectations and FOI - are they at odds?* This will be live streamed via Twitter. For more information go to <https://ovic.vic.gov.au/all-events/right-to-know-day-public-forum/>

World of FOI - 10-year anniversary of the Queensland Right to Information and Information Privacy Acts

1 July 2019 marked the 10th anniversary of the *Right to Information Act (RTI Act)* and *Information Privacy Act (IP Act)* in Queensland. The RTI Act and the IP Act replaced the *Queensland Freedom of Information Act 1992*. The Queensland Office of the Information Commissioner (**the Qld OIC**) describes the introduction of the RTI Act and the IP Act as a fundamental shift in how government provided access to information. Queensland moved to a 'push model' where information is released proactively, unless there is a good reason not to, while protecting and respecting personal information.

The Qld OIC has undertaken a variety of projects as part of its 10th anniversary celebrations. It has produced an interactive history of freedom of information and privacy from the *Freedom of the Press Act 1766*, through the introduction of the RTI and IP Acts and beyond – [Information Access and Privacy Legislation in Qld: A journey](#).

In addition, the Qld OIC asked for and published stories about the benefits and positive outcomes achieved through information access and privacy legislation - <https://www.oic.qld.gov.au/training-and-events/10-year-anniversary-of-rti-and-ip/your-stories>.

Agency News – thank you for completing the statistical returns

Thank you to all the agency officers who completed the agency statistical returns for the 2018/19 financial year. Under section 111 of the FOI Act, the Information Commissioner’s annual report to Parliament must include certain specified information relating to the number and nature of applications dealt with by agencies under the FOI Act during the year. The information in the completed statistical returns will be collated in the Information Commissioners annual report, which will be submitted to Parliament later this year.

Agency News – access applications forms

The OIC has become aware that some agencies have advised access applicants that they must fill in an agency application form to make an access application. Completion on an agency application form is **not** a requirement for making an access application under the FOI Act. Under section 12 of the FOI Act, an access application must:

- be in writing;
- give enough information to enable the requested documents to be identified;
- give an Australian address for notices to be sent; and
- be lodged at an office of the agency with the appropriate fee.

Providing a person with an application form may help a person to make an access application and is consistent with the obligation of an agency to assist people to make a valid access application. It may also help an applicant to frame an application in a way that will assist the agency to deal with an application efficiently. However, the agency cannot require completion of form to make an access application and officers should consider the language they use in providing the form so that it does not give the impression that all the information in the form is required to make a valid application.

The OIC has a publication for the public about the requirements of an access application under the FOI Act – [Requirements for a valid access application](#).

New publication - What if the agency delays making a decision?

Consistent with the Commissioner’s function of ensuring members of the public are aware of their rights under the FOI Act, the OIC has produced a new guide about their rights when an agency does not deal with an access application within the time frame provided in the FOI Act – ‘the permitted period’ - [What if the agency delays making a decision?](#)

FOI in WA Conference – 21 November 2019

An outline of the FOI In WA conference schedule is now available at <https://www.oic.wa.gov.au/en-au/Home/FOI-in-WA-Conference>. Don’t miss out. Almost two-thirds of the available tickets have been sold.

Recent decisions of the Information Commissioner

Re Lee and Department of Health [\[2019\] WAICmr 4 \(PDF\)](#)

The complainant sought access to certain emails between named officers of the agency relating to a health inspection of a particular business. The agency refused access to the requested documents under section 26 of the FOI Act on the ground that no documents existed or could be found within the scope of his access application. The Acting Information Commissioner (**the Acting Commissioner**) found that the agency had taken all reasonable steps to identify all documents of the kind requested by the complainant and did not require the agency to make any further inquiries or conduct any further searches.

The agency's decision was confirmed.

Re Humphreys and Forest Products Commission [\[2019\] WAICmr 5 \(PDF\)](#)

The complainant claimed that the agency had not identified all documents within the scope of his application. The Acting Commissioner recognised that applicants seeking to exercise their rights of access under the FOI Act must, to some extent, rely on the integrity of the searches conducted by the relevant agency.

The Acting Commissioner also recognised that, in some circumstances, an applicant may be sceptical about the adequacy of an agency's efforts to meet its obligations under the FOI Act. However, the Acting Commissioner considered that there were insufficient grounds to expect that additional documents exist within the scope of the complainant's access application and that, in any event, the agency had taken all reasonable steps to find additional documents and that they either cannot be found or do not exist.

Accordingly, the Acting Commissioner did not require the agency to make any further inquiries or conduct any further searches and found that the agency's decision to refuse access to documents pursuant to section 26 of the FOI Act was justified.

The agency's decision was confirmed.

Recent decisions by the Supreme Court

Pearlman v WA A/Information Commissioner [\[2019\] WASC 257](#)

This appeal considered a matter that had been remitted to the Acting Information Commissioner - *Pearlman v The University of Western Australia* [\[2018\] WASC 245 \(Re Pearlman\)](#).

In the current appeal by the access applicant (**the appellant**), the Supreme Court of Western Australia considered the Acting Commissioner's decision in *Pearlman and The University of Western Australia* [\[2019\] WAICmr 2](#). The decision of the Acting Commissioner was that the matter was lacking in substance and the matter was finalised pursuant to section 67(1)(b) of the FOI Act on the basis that the agency had agreed to deal with the application with a reduced scope. Justice Smith decided that it was no longer open to the Information Commissioner to consider the agency's decision to refuse to deal with the application pursuant to section 20 as the issue in dispute between the parties. The Court remitted the matter back to the Commissioner to make a decision on the access to be given to the appellant.

S and Department of Communities [\[2019\] WASC 260](#)

On appeal by the access applicant, the Supreme Court considered a decision of the former Acting Information Commissioner (**AIC**) in *Re S and Department for Child Protection and Family Support* [\[2018\] WAICmr 2 \(Re S\)](#). This was the second appeal to the Supreme Court by the access applicant arising from her application requesting access to documents about a complaint that she had made to the agency.

In *Re S*, the AIC decided that disclosure of the disputed information was not, on balance, in the public interest, as described in clause 3(6) of Schedule 1 to the FOI Act. The AIC took into account that disclosure under the FOI Act was disclosure to the world at large. The AIC considered that it was not in the public interest to disclose sensitive personal information about other individuals.

The earlier Supreme Court appeal found that refusing access to statements of information about third parties, of which the appellant was the sole and only source, could not be said to further the public interest in the maintenance of the personal privacy of those third parties.

The Supreme Court decided that the decision in *Re S* failed to engage with that finding. Therefore, the AIC did not give proper consideration to a matter that had been held on an earlier appeal to be a material consideration.

As a result, the Supreme Court held that the decision made by the AIC was not one she was authorised to make – it fell outside the bounds of legal reasonableness.

The AIC's decision was set aside.

FOI training calendar

The 2019 dates for the FOI Coordinators Workshops and the FOI Decision Writing Workshops are available on our website [<here>](#). The calendar includes newly added dates for FOI Coordinators Workshops in October and early December 2019.

Subscription and feedback

Click [<here>](#) to subscribe to the FOI Newsletter and decision announcements.

Click [<here>](#) to provide your feedback or suggestions for the FOI Newsletter and for our other Advice and Awareness services.

Office of the Information Commissioner

Phone: (08) 6551 7888

Freecall (WA country landline callers only): 1800 621 244

Fax: (08) 6551 7889

Email: info@oic.wa.gov.au

Web: <https://www.oic.wa.gov.au>

Address: Albert Facey House, 469 Wellington Street, Perth WA 6000

