



# Freedom of Information Newsletter

---

## Number 31 – May 2021

### *From the Information Commissioner*

As we approach the end of the financial year, my office will again be requesting that each Western Australian State and local government agency provide my office with their annual statistical return of their FOI activity. Submission of agency FOI statistics allows me to comply with my statutory responsibility to report to Parliament annually about the operation of the FOI Act. Included in this edition of the newsletter is a snapshot of some of the data provided by agencies over the last ten years.

In March 2021 I hosted *Communication Nation. The trust edition*, on behalf of the Institute of Public Administration Australia in Western Australia (IPAA WA). This event highlighted the importance of openness and transparency in communication whilst also exploring issues of trust, countering misinformation and communicating scientific information.

May is Information Awareness Month (**IAM**). IAM is a collaborative event between various bodies within the records, archives, library, knowledge, information and data management communities. The 2021 theme is "*Building Trust – Adaptability and Capabilities*". In order to raise awareness about IAM, I issued a joint statement with Damian Shepherd, Director State Records WA, encouraging participation in IAM events. That statement is available on the OIC [website](#).

This month we also recognised Privacy Awareness Week (**PAW**), which ran from 3 – 9 May 2021. [PAW](#) is an annual event aimed at highlighting the importance of the protection of personal information and helping organisations, agencies and the public navigate the privacy landscape. There are some useful materials created by the Office of the Australian Information Commissioner on its [PAW webpage](#), which provide guidance about protecting your own personal information and ways that agencies can protect personal information (even if they are not subject to the *Privacy Act 1988* (Cth)).

In an effort to provide effective and accessible training for FOI officers across the State, we have developed the new online training modules – the *FOI Fundamentals Series* – and I am very pleased to see a strong number of registrations. More detailed information on the new training is provided below.

Since the last newsletter, I have also attended a number of agencies to provide FOI briefings for agency staff and/or Corporate Executive groups. Agency briefings can be arranged by contacting my office at [advice\\_and\\_awareness@oic.wa.gov.au](mailto:advice_and_awareness@oic.wa.gov.au).

**Catherine Fletcher, Information Commissioner**

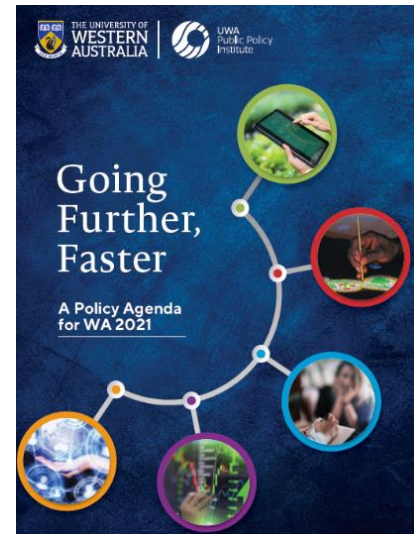
---

## ***'Building trust, transparency and opportunity through access to information'***

This article by the Information Commissioner was published in the University of Western Australia Public Policy Institute ['Going Further, Faster' - A Policy Agenda for WA 2021](#), *Modernising Democratic Institutions, Practices and Culture* chapter.

The article considers the issues of building trust, transparency and opportunity through access to information in Western Australian local and State Government.

Following the launch of this report, UWA has held follow-up events on each chapter of the report. The Commissioner will join Benjamin Reilly, Ullrich Ecker and Jeannette Taylor on a panel discussion on 27 May 2021 at UWA to discuss their articles in the *Modernising Democratic Institutions, Practices and Culture* chapter.



## ***World of FOI - Monash University Research Project***

Monash University - in partnership with the OIC, the Office of the Victorian Information Commissioner and South Australian Ombudsman - has been successful in obtaining funding for a research project into the culture of implementation of Freedom of Information laws in Australia. The project aims to capture and analyse the attitudes and culture among FOI practitioners, government agency managers and political leaders toward information access implementation. The intention is an increased understanding of the culture of administering FOI to inform training/awareness programs and campaigns in order to increase the functionality of FOI.

## ***International Conference of Information Commissioners***

The International Conference of Information Commissioners (**the ICIC**), has produced its first [quarterly newsletter](#). The newsletter includes articles about information access in jurisdictions across the world. This edition includes an article entitled [The Right to Information, Post Pandemic: Where to Now?](#)

The Information Commissioners of Australia, Western Australia, Queensland, New South Wales, Victoria and New Zealand are all members of the ICIC

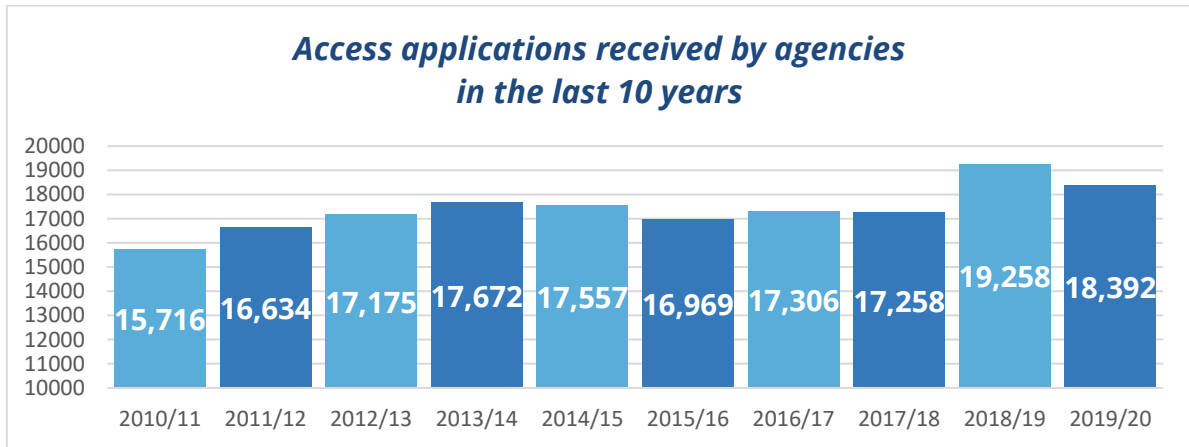
In 2021, the ICIC will hold its 12<sup>th</sup> Annual Conference, with the theme *Access to information for a changing world: using technology to promote inclusion*. Together with closed sessions on 23 and 24 June, the ICIC will also offer [eight open sessions](#) on Wednesdays, once a month. The first Wednesday session – *Transparency and Trust in Pandemic Times* – was held on 26 May and is available on the ICIC [YouTube channel](#). The remaining sessions will also be made available on that channel.

- 30 Jun '21 - *Blurred boundaries in access to information: home office and public records management*
- 25 Aug '21 – *Access to information and Freedom of Press*
- 29 Sept '21 – *Challenges of Transparency in the Digital Governments: Transparency of public administration in the use of Artificial Intelligence*
- 27 Oct '21 – *State Secrecy*
- 24 Nov '21 – *Interplay between data protection and access to information*
- 8 Dec '21 – *Environmental Information and P10*

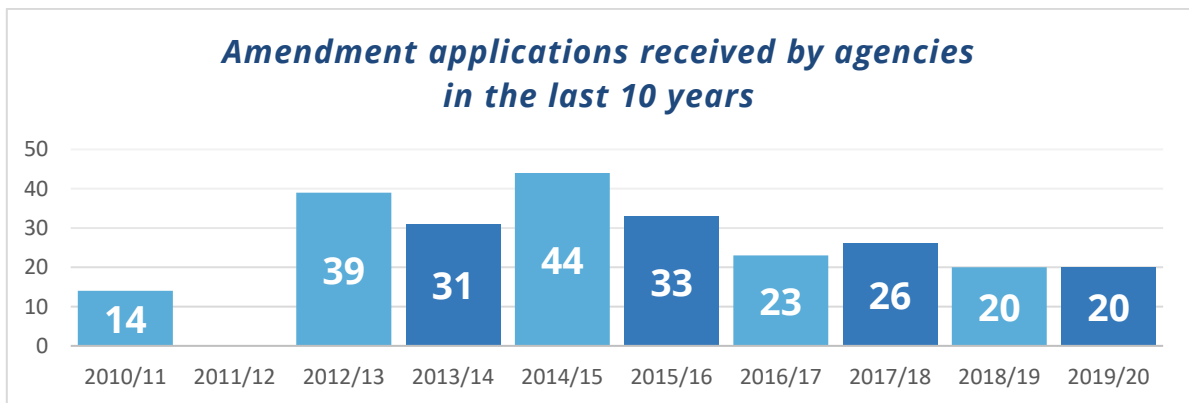
### Statistical Returns – looking at the numbers

The statistical returns completed by agencies each year provide information about various aspects of access and amendment applications they receive each year. This newsletter considers some of those numbers over the last 10 years.

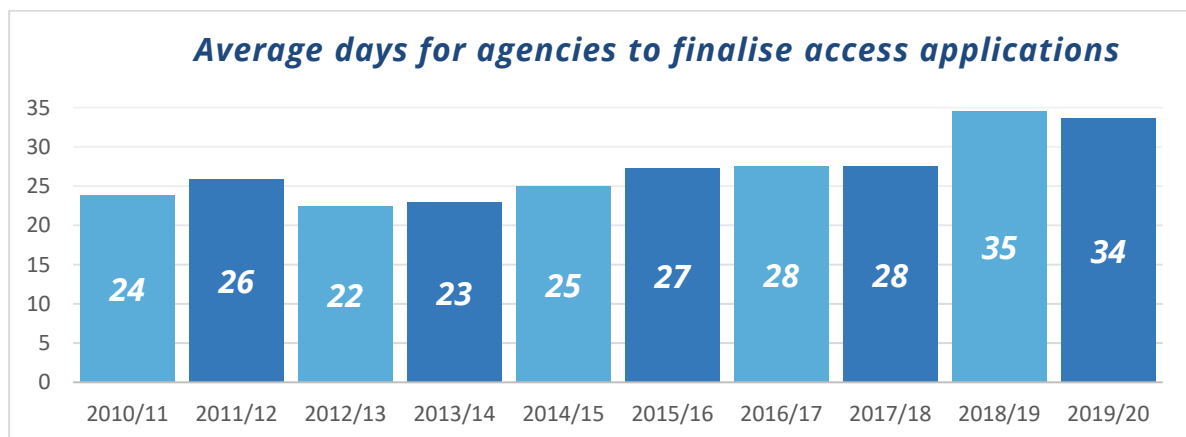
#### Access and amendment applications received



2018/19 saw an 11.5% increase in access applications received by agencies, compared to the previous year. 2019/20 followed with a 4.5% decline in access applications received. 17% more access applications were reported as received in 2019/20 than in 2010/11.



#### Timeliness in dealing with access applications



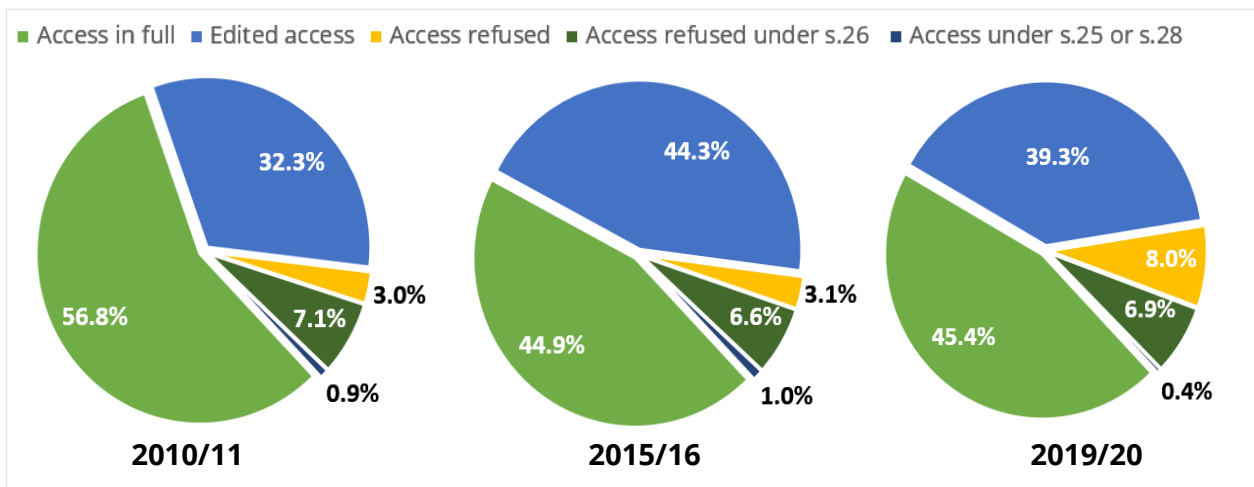
Agencies are required to deal with an access application as soon as is practicable or, in any event, within the 'permitted period' (which is 45 days or as agreed between the

agency and the applicant or allowed by the Commissioner). While the average time for dealing with an access application has increased over the 10 years, it remains within the 45 days allowed under the FOI Act.

If you would like to know more about timeframes under the FOI Act, see our publications:

- [Calculating time and days guide](#)
- [How long should it take to deal with an access application?](#)
- [What if the agency delays making a decision?](#)

### Access applications outcomes – Agency decisions



It is interesting to note the increase in the number of access applications where access has been refused in full. This does not necessarily indicate that agencies are generally refusing access to more documents in 2019/20. If a great portion of access is being given to documents outside of the FOI Act, saving FOI for the more sensitive or contentious information, this may result in a greater percentage of the requests that require a formal access application being refused in full. The total number of valid access applications that resulted in the applicant receiving access in full or in part has increased by 15% since 2010/11.

### Open Government - Statistical returns inform the National Metrics

In 2017, Australian Information Access Commissioners and Ombudsmen released the inaugural dashboard of metrics on public use of freedom of information access rights, which fulfils a commitment made in the Open Government National Action Plan.

The metrics for each jurisdiction reflect current available data that is reasonably comparable across jurisdictions. The metrics for Western Australia are compiled from the agency statistical data provided to this office each year.

As the data provided by this office is only part of that which is contributed across the Australian jurisdictions there is some delay in reporting on the combined results. [Published National Metrics](#) reports are now published for the periods 2014/15 to 2018/19.

## ***2020/2021 FOI Annual Statistical Return***

The FOI Act requires the Information Commissioner to report to the Western Australian Parliament on the operation of the Act as soon as practicable after 30 June each year. The FOI Act requires agencies to provide the Commissioner with such information as is required for the purposes of that report.

At the end of the financial year, all agencies will be invited by email to complete an online statistical survey related to their FOI activity for the 2020/2021 financial year. In addition to this statistical data is a request for feedback on our Advice and Awareness service – which forms one of our key performance indicators – and information about agency information statements. Agencies who have not received any FOI applications during the financial year are still required to complete the survey.

### ***Reporting on Section 20***

Under section 20 of the FOI Act, an agency may refuse to deal with an access application if it considers that 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 and the agency has taken reasonable steps to help the applicant to change the application to reduce the amount of work to deal with it.

The 2020/2021 statistical survey will include an **optional** question concerning decisions made under section 20 of the FOI Act. Whilst this year the response will be optional, from next year (the 2021/2022 survey) this question will sit in a mandatory field requiring a response.

Agencies will be asked to specify the number of valid access applications in the reporting period that were finalised on the basis that the agency has refused to deal with the access application under section 20 of the FOI Act.

Previously in the statistical returns, decisions under section 20 were included in the category 'access refused'. In answering this new question, agencies will need to distinguish between decisions to refuse access to all of the requested documents, and decisions to refuse to deal with an access application under section 20.

### ***FOI Training***

#### ***FOI Fundamentals Series***

The FOI Fundamentals Series is now available and fully in operation online. The series consists of eight online modules and is aimed at State and local government officers dealing with FOI in their agency. The material covered throughout the series includes the material from the FOI Coordinators Workshop, previously offered in-house at the OIC's premises.

- Module 1 – *FOI Basics*
- Module 2 – *Dealing with an access application – Part 1*
- Module 3 – *Dealing with an access application – Part 2*
- Module 4 – *The exemptions – Part 1*
- Module 5 – *The exemptions – Part 2*
- Module 6 – *'Third parties'*
- Module 7 – *Notices of decision and review rights*
- Module 8 – *Other requirements of the FOI Act and series summary*

Completion of all modules will help participants to understand your agency's obligations when dealing with access applications under the FOI Act and learn tools and strategies to deal with access applications efficiently and effectively.

To register go to: <https://www.oic.wa.gov.au/TrainingSchedule>.

Online training modules that cover the topics previously covered in our FOI Decision Writing workshops are in development.

More information about the OIC's training services to agency staff and community groups is available on our website at <https://www.oic.wa.gov.au/Training>.

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

#### ***Re Toohey and School Curriculum and Standards Authority [2021] WAICmr 3 (PDF)***

The complainant sought access to documents that showed the names of markers, and the chief marker, for a particular unit of the Australian Tertiary Admission Rank (ATAR) course examination for 2019.

The agency refused access to two documents on the basis that they were exempt under clause 11(1)(a) of Schedule 1 to the FOI Act. Matter is exempt under clause 11(1)(a) if its disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency. Matter is not exempt under clause 11(2) if its disclosure would, on balance, be in the public interest.

The Commissioner was satisfied, on the material before her, that the disclosure of the disputed documents could reasonably be expected to impair the effectiveness of the procedure for the conduct of examinations by the agency in that dissatisfied students/parents could contact the markers direct, which would reduce the pool of markers. The Commissioner considered that because of mechanisms in place, including the recruitment process and moderation/appeals processes, the public interest in the accountability of the individuals and the agency was satisfied. She found that, on balance, the public interest factors weighing against disclosure of the disputed documents outweighed those in favour and, as a result that the clause 11(2) limitation did not apply. The disputed documents were exempt under clause 11(1)(a). The agency's decision was confirmed.

### ***Recent decisions by the Supreme Court***

#### ***Lee v Department of Justice [2021] WASC 119***

The complainant appealed the Commissioner's decision to stop dealing with his complaint on the ground that it was lacking in substance under section 67(1)(b) of the FOI Act. The sole ground of appeal was that the Commissioner had erred in law by failing to recognise that the term 'document', as defined in the Glossary to the FOI Act, includes metadata.

The Supreme Court determined that the Commissioner recognised that 'document' includes metadata and therefore, the assertion that the Commissioner had failed to recognise that 'document' includes metadata was incorrect. The Supreme Court found that this alone was sufficient to dismiss the appeal.

The Supreme Court was satisfied that metadata is a 'document' capable of forming the subject of a FOI application. The Court distinguished between a question of law, which can be appealed to the Supreme Court and a question of fact, which cannot. The Court



considered that the relevant inquiry was whether, having regard to the Commissioner's reasons, she had found that metadata did not fall within the definition of 'document' (a question of law), or whether she found that metadata did not fall within the scope of the particular access application (a question of fact). The Court accepted that the Commissioner was of the view that the terms of the particular access application did not encompass a request for metadata. As such the appellant was seeking to challenge a finding of fact (rather than a question of law), which cannot be the subject of an appeal to the Supreme Court. The Supreme Court dismissed the appeal.

### ***Subscription and feedback***

[Subscribe](#) to the FOI Newsletter and decision announcements.

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

## **Office of the Information Commissioner**

Phone: (08) 6551 7888

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

Email: [info@oic.wa.gov.au](mailto:info@oic.wa.gov.au)

Web: [www.oic.wa.gov.au](http://www.oic.wa.gov.au)

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

### **Acknowledgement of Country**

*The Office of the Information Commissioner acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community. We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders both past and present.*