



Government of **Western Australia**
Office of the Information Commissioner

The Administration of Freedom of Information in Western Australia

Summary Report

*Review by the Information Commissioner
31 August 2010*

COMMISSIONER'S FOREWORD

Access to government information is a key safeguard of democracy in Western Australia and reminds us that Government is a servant of the people. Parliament must have been very conscious of these sentiments when it passed the *Freedom of Information Act 1992* (the FOI Act), which expressly aims to enable the public to participate more effectively in government, and to make government more accountable to the public. These aims are enshrined in section 3 of the FOI Act, and have recently been referred to by the Supreme Court as *the essential bedrock of open, democratic government [whose] policy importance therefore cannot be overstated*¹.

Overall, the review found high levels of support from Ministers, Chief Executive Officers and FOI Coordinators for the principles of openness and transparency reflected in the FOI Act. The review also found that agencies generally administer the FOI process competently, especially in light of the increasing number and complexity of FOI applications made. However, the review also found room for improvement in a number of areas if there is to be an overall culture within government which is consistent with the aims of the FOI Act.

Part I of the FOI Act indicates that the FOI process supplements, rather than replaces, other procedures for making information available. The Information Commissioner has consistently stated that the FOI process should be used as a last resort for those seeking government information. Agencies should consider making government information available outside the FOI process as much as possible, both proactively and in response to a formal or informal request, unless there is a good reason not to do so. There is considerable variation in how well this is done across agencies.

The review highlights the critical importance of how agencies manage information. It also shows that the first interaction between a government agency and a person seeking information is crucial, whether this interaction is in person, by telephone, by written correspondence or through the Internet. It is at this stage that people may effectively be deprived of the ability to exercise their rights if they receive incorrect advice or if the interaction discourages them from pursuing access to information. This results in a door closing and an injustice being done. It is therefore important that these interactions are designed in a way which encourages openness and transparency, and that staff who are involved in them are suitably trained.

Another area where practice can be improved is in how agencies deal with FOI applications. This has two key elements. The first is that in many cases, agencies should be encouraged to engage early and meaningfully with a person who has applied for access to information. This is usually preferable to shifting into 'process mode'. Early engagement may clarify the scope of an access request and reduce the time and resources required to deal with it, resulting in a better outcome for the applicant and the agency. The second element is how agencies apply the exemptions to disclosure in the FOI Act. The review revealed that some officers in agencies take into account inappropriate or irrelevant factors in deciding whether material is exempt from disclosure under the FOI Act. It is important that those officers who administer the FOI process in their agencies bear in mind that they are making important administrative decisions under legislation and that the legislation specifies what they need to take into

¹ *Water Corporation -v- McKay* [2010] WASC 210 per Martin J at paragraph 38

account in making those decisions. If made correctly, their decisions will contribute to justice being done. If made incorrectly, they will do the opposite.

One of the biggest developments in the administration of the FOI Act is the significant increase in FOI applications made to Ministers by Members of Parliament since the 2008 election. This has been the subject of media attention and much debate in the Parliament. The review found that dealing with these applications has placed a significant strain on the resources of Ministers' offices, particularly when several large applications were received by Ministers in a short space of time. One of the recommendations made by the review is that Ministers should consider exploring the option of a shared capability to assist them in dealing with FOI applications. This could be of particular assistance in relation to searches for electronic documents and advice on the correct application of the FOI Act. However, it is important that Ministers remain personally accountable for their decisions under the FOI Act.

The increase in FOI applications noted in the previous paragraph is directly responsible for the current backlog of complaints before me. Under the FOI Act, I am required to make a decision on a complaint within 30 days unless this is considered impracticable. The average age of complaints is now over 200 days and increasing. It is not surprising that the review found these delays a major source of frustration among parties to the FOI process. One submission to the review made the important point that *justice delayed is justice denied*.

In light of the above, I strongly urge Members of Parliament and Ministers to explore more informal and expedient methods of seeking and disclosing information, rather than relying purely on the FOI process. Members of Parliament who are seeking information from Ministers may be better served by approaching the Minister in the first instance with an informal request for a briefing or a document, instead of submitting a FOI request. Similarly, Ministers may be able to reduce their FOI workload by being more forthcoming with information in response to such requests. Such an approach would be consistent with the legislative intent that FOI should supplement, rather than replace, other methods of disclosing government information. While it may appear naïve to expect this to occur in light of political realities, I believe it could lead to much better outcomes for all parties and would serve the public interest much more efficiently and effectively than the current approach.

The final and perhaps most important point this review makes is that most of the areas for improvement identified in the review can be addressed by my office providing more training and support for government agencies. This is one of my statutory functions, but current resources do not allow my office to meet the significant agency demand in this regard. However, the review sheds much light on exactly where this demand lies and how it can best be met.

I would like to acknowledge those members of the public, Members of Parliament, Ministers, Chiefs of Staff, agency Chief Executive Officers and agency staff who have contributed to the review either through making submissions, completing surveys or making themselves available for interview.

Finally, I would like to thank Mr Grant Washer who managed the overall review process, and all members of my staff who assisted in undertaking the review.

Sven Bluemmel
Information Commissioner

31 August 2010

ABOUT THE REVIEW

This review arose from a commitment of the Government to review the manner in which government departments are administering the FOI process to ensure that Government is accountable and open in accordance with the spirit of the FOI Act. The review was undertaken by Western Australia's independent Information Commissioner.

The review examined the manner in which agencies administer the FOI Act as currently in force. It focussed on assessing the effectiveness of the processes used by agencies to administer FOI, rather than the content of the current legislation.

The Information Commissioner took a broad approach in conducting the review. This included calling for public submissions, sending over 700 surveys to all Ministers and agency Chief Executive Officers, seeking submissions from Members of Parliament and conducting interviews with staff from 33 agencies based in the metropolitan region, the Kimberley and the South West.

SUMMARY OF FINDINGS

The following findings are based on results from two surveys, public submissions, interviews with agency staff, assessments of agency documents and processes, and the Information Commissioner's experience in reviewing agency FOI decisions. They are described in more detail in Part B of the report.

Perceptions about the intent of FOI and agency culture

Overall, there is a very high level of support from Ministers, CEOs and FOI Coordinators for the intent of the FOI Act, which is to promote openness, accountability and transparency. This was evident from survey responses and interviews. While this is a positive indicator, it is important that agencies not only agree with this intent, but continue to demonstrate actual commitment to it in how they administer FOI. A notable aberration in this is that a small number of Ministers in their survey responses indicated that they did not agree that the intent of FOI is of benefit to the public. However, this may have been influenced by the extraordinary increase in FOI applications made to Ministers by Members of Parliament since the 2008 election.

The surveys also showed that agencies had more confidence in their FOI processes than in their understanding of and support for the intent of FOI. This result may indicate that some of the confidence of senior staff in agencies in administering the FOI process may be misplaced, or that FOI is treated more as a compliance issue rather than as an important democratic safeguard.

Public submissions indicated that the perceived level of commitment to openness varies between agencies, and suggested that all agencies should subscribe to a culture of active disclosure rather than focussing on compliance.

Agency policy and procedures

While the FOI Act outlines the rights and obligations for the public and agencies in relation to FOI, it does allow for discretion in how agencies go about the process of administering the Act. Consistency in the application of legislative rules to particular fact situations is generally considered an important aspect of good government decision making. Consistency and predictability are important safeguards against the arbitrary use of executive power.

While the review found a strong level of confidence among agencies in the processes they use to administer FOI, a significant number of agencies did not have current policies or processes which document their approach. However, those agencies which did have such policies and processes generally found them to be of value. The review found that there is considerable scope for sharing such resources across agencies to improve the consistency of the process and the predictability of outcomes.

Agency processes and application of the requirements of the FOI Act

Most agencies have confidence in their ability to apply the requirements of the FOI Act. However, a significant number do not have confidence, particularly in local government agencies.

Some public submissions to the review highlighted situations where the requirements of the FOI Act were applied inconsistently across agencies. Examples given of this in the submission included documents being refused by one agency but released by another, inconsistencies in processing applications, disregard for deadlines and judgment calls required on vague and uncertain issues which encouraged caution rather than openness.

Other issues identified in the review included difficulties for some agencies (particularly some Ministers' offices) coping with the significant increase in FOI workload over the last 18 months, the management of electronic documents, application of the public interest test contained in some exemptions in the FOI Act and the standard of recordkeeping on agency files.

The review highlighted that poor recordkeeping can fundamentally undermine the intent of FOI. It is crucial that an agency can quickly and reliably identify all documents which may come within the scope of a FOI request and then make a decision as to whether and how those documents are to be disclosed. The review found that not all agencies are able to meet this goal and that many particularly struggle with managing electronic records such as emails. It is, therefore, important that agencies are mindful of their obligations under the *State Records Act 2000*.

One public submission suggested that it is important for FOI decision-makers to be independent of the subject matter which they are reviewing. In some cases the integrity of the FOI assessment and decision-making process may be strengthened when decisions on access are made by officers who are not closely involved in the subject matter which is the subject of the FOI request. It is, however, important for such decision-makers to work with officers who are familiar with the subject matter to ensure that all relevant documents are identified before a decision is made.

Some recent decisions of the Information Commissioner have highlighted that Ministers' offices face particular challenges in complying with the FOI Act. These include a limited capability to absorb significant increases in FOI workload due to the small size of these

offices together with a high rate of staff turnover. These challenges make it difficult for Ministers to dedicate suitably skilled and experienced staff to FOI matters, especially during times of unusually high workload. The challenges also increase the likelihood of inconsistencies in how different Ministers apply the FOI Act.

It is well documented that the significant increase in applications for external review to the Information Commissioner following the 2008 election has led to a significant backlog. This is a source of legitimate frustration for parties who are awaiting the Commissioner's decisions. Justice requires not only good decisions, but timely decisions.

Assistance to applicants

The survey results found that most agencies consider that they attempt to deal with FOI applications as soon as is practicable and that they actively help people who wish to make such applications. While this is encouraging, the effectiveness of such assistance in the eyes of the access applicant may not always be as high as it should. This is borne out of some of the public submissions, as well as a number of matters which come before the Commissioner on external review.

Assistance to applicants is critical to the effective functioning of the FOI process and failure properly to assist applicants can greatly affect the time required to process an application and the outcome of the decision on access. In particular, clarification of the scope of an application – for the purpose of giving expedient access to as much information as possible – is an important part of the FOI process, and this is an area which can be improved. Problems encountered by agencies, such as dealing with ambiguous or large applications, could be reduced if agencies engaged earlier and more meaningfully with access applicants.

In addition to assisting members of the public in relation to applications under the FOI Act, agencies should consider having a coherent approach to managing and releasing information. The Commissioner's experience in dealing with complaints has shown that agencies and applicants can often avoid the need for a FOI application by engaging in meaningful dialogue at the start of the process. If a matter can be dealt with outside the FOI Act, the applicant may get the desired documents much sooner and the agency is likely to be able to save time and effort in the process.

Interaction with applicant – notice of decision

Overall, the survey results and assessments of notices of decision indicate that FOI Coordinators have a good understanding of the requirements for notifying an applicant about the decision made in relation to their application. However, three areas of concern were identified by the review.

The notices of decision assessed during the review showed that where an exemption is claimed, some explanation is given to the access applicant about why a particular document is exempt. However the Information Commissioner's experience in dealing with disputes on external review show that some notices of decision do not expressly address all elements of the exemption laid down in the FOI Act. An example of this is where an agency claims that a document is exempt under clause 6 of Schedule 1 to the FOI Act because its disclosure would reveal certain information which has been prepared in the course of a deliberative process of an agency. To make out the exemption, a notice of decision also needs to demonstrate that disclosure of such information would be contrary to the public interest. This is not always done.

Second, section 30 of the FOI Act requires the notice of decision to give the findings on material questions of fact underlying the reason why the agency claims the exemption applies. The experience of the Commissioner also indicates that, in some cases, a notice of decision will simply assert that a document is exempt under a particular exemption clause without identifying those material questions of fact which explain why the decision was reached.

Finally, a number of notices of decision did not notify the applicant of their rights of review if they disagree with the decision.

Proactive publishing of information

It is encouraging that, according to survey responses, a majority of agencies proactively publish and provide access to information and documents outside the FOI process. However, a significant number of respondents indicated that their agency is not proactive in this regard. One public submission particularly noted that *information should be provided proactively or promptly on request ... rather than being prompted to release information in response to FOI applications.*

Factors influencing decisions

The review found that agencies generally take appropriate factors into account in making decisions about access to government documents. However, the survey results do show that a minority of agencies take into account irrelevant factors such as the potential for political fallout or litigation. The survey results could only be considered truly acceptable if the proportion of agencies which take these matters into account is zero.

Ultimately, agencies need to be reminded that, in dealing with a FOI application, they are making administrative decisions under legislation passed by the Parliament on behalf of all Western Australians. Parliament has seen fit to grant members of the public a right to access government documents subject only to those exemptions expressly provided in the FOI Act itself. Other considerations are not relevant. Agency decisions need to reflect this.

Some agencies also expressed concern that the FOI Act does not allow for common sense treatment of vexatious applicants.

Third parties

The FOI Act seeks to strike a balance between ensuring transparency on the one hand and protecting personal, commercial and other sensitive information on the other hand. Agencies are generally aware of their responsibilities under the FOI Act to help achieve this balance, but some concerns and areas for improvement were identified.

Agencies were particularly concerned about the time and effort required to consult with third parties before making a decision on granting access to third party information in a document. This is a considerable challenge in the public health sector, where the requested documents often contain extensive information about third party health professionals.

Given the potential savings in time and resources to agencies by asking applicants at the outset whether they require access to third party information, it is surprising that most agencies do not routinely seek clarification from the applicant about whether third party information can be excluded from the ambit of an application.

Exemptions

The application of exemptions to complex fact situations can have an element of subjectivity as it relies on the application of a set of rules to particular circumstances. It is not surprising that agencies indicated less confidence in their understanding of the correct application of the exemptions in the FOI Act compared to their confidence in relation to other areas. This is consistent with the Commissioner's experience on external review.

A fact which is often overlooked is that the FOI Act provides that agencies *may* refuse access to an exempt document. It does not provide that an agency *shall* refuse access. It may be appropriate for agencies to consider disclosing exempt matter in circumstance where no harm is likely to result. Agencies would need to make their own judgment as to when this is appropriate in any given case and they should take into account balancing factors such as the impact on third parties. Sections 104 to 107 of the FOI Act provide agencies and their officers with certain protections and immunities in relation to decisions made by them in good faith under the Act.

Fees and charges

The information gathered in the review makes it clear that members of the public and agencies often have different views on the subject of fees and charges under the FOI Act. This should not be surprising. However, there also appears to be a genuine and laudable recognition from some agencies that the cost and effort expended in responding to FOI applications is simply part of the price that must be paid to ensure a robust democracy. It is clear that the FOI Act did not envisage a full cost recovery model for the administration of FOI.

The effectiveness of any tool to safeguard democracy should be determined by how easily that tool can be wielded by the most vulnerable members of our society. One measure that exists in this regard is the number of complaints made to the Commissioner in relation to the imposition of fees and charges. Overall, the total number of complaints made to the Office of the Information Commissioner (OIC) on that issue is very low, with only three complaints over the last four years. While it cannot be taken that this figure is completely representative of all opinions in regard to charges, it does suggest that charges are not presenting a significant barrier to persons exercising their rights under the Act.

Information statements

The FOI Act requires most agencies to publish Information Statements. These Information Statements inform the public of the structure and functions of the agency. They also outline the types of documents held by the agency, and give advice on how they can be accessed by the public.

The review, together with the Commissioner's experience with reviewing Information Statements, shows an enormous variation in their quality and usefulness. Some agencies publish information statements which are a very useful resource for members of the public, while others effectively treat them as a compliance exercise. One symptom of the latter approach is that some information statements grow larger and more unwieldy every year, presumably because agencies add information to ensure compliance but are less willing to remove older or superseded information for fear of non-compliance. The result is a document which is not readily understandable and which does not serve the objects of the FOI Act.

Websites

Of the sample of agency websites assessed, the majority were considered poor in relation to the ease with which a person could locate information about FOI. However, some websites were clear leaders in this regard and can serve as models for other agencies to consider. These included the Department of Commerce, Department of the Attorney General, WA Land Authority, Department of Sport and Recreation, Shire of Broome, City of Kalgoorlie-Boulder, Department of Local Government and Department of Culture and Arts. Given that the review only assessed a limited number of websites, there are likely to be other examples of good practice which are not specifically identified in this report.

Agency resources and costs

The review found that, overall, FOI Coordinators are dedicated individuals, committed to assisting people obtain documents which they have a right to access. However the review also noted from interviews held with a number of FOI Coordinators that many requests for information under FOI are treated outside the FOI process and these are not included in reported statistics. Therefore, the workload in some agencies was potentially even greater than reported. In addition, there was a problem in attracting and retaining staff to undertake FOI duties due to the role being perceived as complex and legalistic by nature, time consuming and sometimes of limited benefit to career progression.

A significant proportion of survey respondents considered that their agency does not provide adequate resources to deal with FOI applications in a timely manner or that their agency cannot reliably search across its records management systems for documents that fall within the ambit of a FOI request. The first of these issues was found to be particularly relevant to Ministers' offices.

Training and support

The FOI Act requires the Commissioner to provide training to agencies. Investment in training pays large dividends in more efficient and consistent levels of service, better and more timely FOI decision-making and greater trust in government. However, current resources do not allow OIC to meet the significant agency demand for training and support. Staff turnover in agencies greatly contributes to this ongoing demand. One ramification of the limited training on offer is that fee-for-service providers are now offering FOI courses to agencies to supplement the OIC's free courses.

RECOMMENDATIONS

The following are all the recommendations which arise out of the review.

Perceptions about the intent of FOI and agency culture

1. In dealing with requests for access to documents, agencies should demonstrate a commitment to the objects, intent and principles of administration of the FOI Act.

Agency policy and procedures

2. Agencies with a significant FOI workload should develop, or adopt from other similar agencies, better practice FOI policy and procedures. Agencies that already have policy and procedures about FOI should review these to ensure they are useful and relevant.
3. Agencies in particular sectors such as health and local government should work with the OIC to further develop and share FOI procedures, checklists and tools which improve the administration of FOI in agencies.

Agency processes and application of the requirements of the FOI Act

4. Agencies should share knowledge and resources, in particular between similar agencies (such as Ministers' offices) or agencies which deal with similar subjects (such as those dealing with health), to help improve levels of quality and consistency in how the FOI Act is applied.
5. Health services in particular should investigate options for further sharing knowledge and improving the quality and consistency of FOI processing. This may include a formalised central Health FOI role, to assist and promote more consistent practice on FOI across the public health sector.
6. Agencies should be aware of the importance of complying with their obligations under the *State Record Act 2000*, particularly in relation to matters raised in the review including the management of electronic and hard copy documents.
7. Agencies should ensure that FOI decisions are made in a way which prevents inappropriate considerations from being taken into account. In some cases this may best be done by appointing a decision-maker who is not intricately involved with the subject matter of the FOI application. However, in such a case it is important that the decision-maker still liaises with officers familiar with the subject matter to ensure all relevant documents are found and considered.
8. Agencies should ensure their officers are sufficiently trained, competent and supported to be able to conduct complete searches of electronic documents.
9. Ministers may wish to explore with the Department of the Premier and Cabinet 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.

Assistance to applicants

10. Agencies should engage in meaningful and early discussion with members of the public who seek information, starting before a FOI application is even made.
11. Agencies should design their customer interfaces and information management systems to enhance the ability of members of the public to obtain access to information.
12. Agencies should comply with the requirement of the FOI Act to take reasonable steps to assist access applicants to make a valid access application in a spirit of openness and

transparency, and assist applicants to identify documents most likely to satisfy their requirements.

Interaction with applicant – notice of decision

13. Agencies should ensure Notices of Decision comply with all of the requirements of section 30 of the FOI Act.

Proactive publishing of information

14. Agencies should, unless there is a good reason not to, disclose information on request without requiring a formal FOI application and should investigate means of more proactive, automated and timely disclosure of information, particularly through websites, using information stored in electronic records management systems and other records databases.
15. As part of their annual review of Information Statements, agencies should periodically review what information they routinely make available to the public outside the FOI process.

Factors influencing decisions

16. Agencies should be mindful that, in dealing with FOI applications, they are making administrative decisions under legislation passed by the Parliament, and that matter is only exempt from disclosure if one or more of the exemptions in the Act is fully made out.

Third parties

17. Agencies should routinely ask applicants whether they consent to third party information being removed from the scope of applications, to encourage faster disclosure of documents.

Exemptions

18. Agencies should consider disclosing exempt matter in circumstance where no harm is likely to result, noting the protections and immunities provided in the FOI Act for decisions made in good faith. Agencies would need to make their own judgment as to when this is appropriate in any given case, and should take into account balancing factors such as the impact on third parties.
19. Agencies should ensure they are trained in the correct application of exemptions.

Fees and charges

20. Agencies should ensure they are trained on the correct procedure for dealing with fees and charges under the FOI Act.

Information statements

21. Agencies should develop Information Statements as an integral element of their overall approach to information management.

Websites

22. Agencies should ensure their websites support the FOI objectives of government transparency and public participation, particularly with a view to improving the profile of FOI and ensuring that the public can access government information with relative ease.

Agency resources and costs

23. Agencies should investigate, and address where appropriate, the resources they commit to satisfactorily meeting statutory obligations in the administration of FOI and the disclosure of information generally.
24. Agencies, in particular groups of similar agencies, should develop and share strategies and approaches to assist them to better manage FOI applications.

Training and support

25. The OIC should conduct a review of the training it currently offers to ensure it appropriately targets resources.
26. Agencies should consider further developing networks of experienced FOI Coordinators that could be supported through the OIC website, to assist those who are new to the subject or less experienced than themselves.
27. The OIC website should be enhanced to allow agencies to share resources, policies, procedures and tools.
28. The Information Commissioner should engage with Government as a priority in regard to appropriate resourcing to fulfil statutory training obligations.