

Freedom **O**f **I**nformation



**INFORMATION COMMISSIONER
WESTERN AUSTRALIA
ANNUAL REPORT TO THE
PARLIAMENT 2007/08**



OFFICE OF THE
INFORMATION COMMISSIONER

DEAR MR PRESIDENT
DEAR MR SPEAKER

In accordance with the provisions of the *Financial Management Act 2006* and the *Freedom of Information Act 1992*, I submit my report for the year ended 30 June 2008 which has been prepared in compliance with the provisions and reporting requirements of both Acts.

A handwritten signature in blue ink, appearing to be 'JL', with a long horizontal stroke extending to the right.

JOHN LIGHTOWLERS
A/INFORMATION COMMISSIONER
25 September 2008

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OVERVIEW

1. OVERVIEW



John Lightowers

1.1 COMMISSIONER'S SUMMARY

This is the fifteenth year of operation of laws conferring upon people in Western Australia a legally enforceable right of access to documents of all State and local government agencies, and providing the public with the means to ensure that personal information in documents held by State and local government agencies is accurate, complete, up-to-date and not misleading. Cumulatively during the past 15 years, over 90,000 FOI applications have been made. The majority of applicants seek access to their personal information. About 90% of applicants have been given access to either full or edited copies of what they want. Each year the total number of FOI applications continues to grow. This year, the number of FOI applications made to agencies reached an all time record of 11,255.

“...improvements in timeliness have been achieved...as well as being the highest customer satisfaction level for the past 5 years.”

Most applications seeking external review by the FOI Commissioner of agency's decisions are made by private individuals (about 70%). Applications by corporate bodies (mainly businesses), make up the next largest category of applicants (about 16%), while relatively few applications are made by journalists and politicians (about 6% and 4% respectively).

This last year has been an eventful one:

❖ Proposed legislation intended to reform the way freedom of information laws operate, and to introduce new privacy laws, completed passage in the Legislative Assembly and progressed to the Legislative Council of the State Parliament.

❖ In December 2007 Acting Information Commissioner C P Shanahan SC delivered his decision in *Re West Australian Newspapers Ltd & Anor and Salaries And Allowances Tribunal* [2007] WAICmr 20, which was subsequently the subject of an appeal to the Western Australian Supreme Court.

❖ A review was undertaken by my Office into the Department of Health's FOI processes, implementing a recommendation made to the Parliament by the Corruption and Crime Commissioner in January 2008.

❖ A backlog of complaints before my Office was addressed, with the result that by the end of the financial year no complaints were more than 12 months old; the percentage of complaints on hand aged over 3 months decreased during the year from 54% to 27%; and the average time for dealing with complaints was reduced from 136.4 active days to 91.6.

❖ Improvements in timeliness have been achieved along with a high level of customer satisfaction. The overall satisfaction of parties with the external review process this year was 88%, which is a big improvement over last year's 75% satisfaction level, as well as being the highest customer satisfaction level for the past 5 years.

In November 2007, I was appointed Acting Information Commissioner for a term of up to one year. In February 2008 the office was

relocated to another floor in the building shared with other co-located accountability agencies to make added room available for the Ombudsman's office.

I commend the 9 staff of the office who, during the inevitable disruption associated with appointment of a new Acting Information Commissioner and relocation of the office, were able to significantly improve the timeliness of complaints handling with no loss of quality, while at the same time taking on significant added work associated with considering the impact of proposed amending legislation and carrying out a major review of FOI processes within the Health Department.

Particular developments of note during the year under review were as follows.

FOI Amendments and Privacy Legislation:

The *Information Privacy Bill 2007* and the *Freedom of Information Amendment Bill 2007* completed passage in the Legislative Assembly in November 2007 and were, at the close of the financial year, before the Legislative Council. If these Bills are enacted in their current form, the Office of the Information Commissioner will be replaced by the newly created Office of the Privacy and Information Commissioner, which will have functions under both pieces of legislation. The legislation will allow, but not require, concurrent appointment of the Ombudsman to the new office. The external review decision making function of the Information Commissioner will be removed from the Information Commissioner and transferred to the State Administrative Tribunal, with the new Privacy and Information Commissioner no longer undertaking a determinative

function but retaining a conciliation function. It is hoped that these proposals will facilitate the timely disposition of disputed requests for access to documents. Notably in this regard, the Office of the Information Commissioner has shown in the past year it is able to deal with and resolve complaints in a timely fashion. The achievement of reducing the average time taken to finalise complaints from 136.4 days to 91.6 days and resolving all outstanding complaints over 12 months old, demonstrates that the Office of the Information Commissioner, following the current processes, is able to meet and exceed benchmark performance in dispute resolution.

Supreme Court Appeal: One appeal to the Supreme Court was lodged during the current financial year. That appeal related to two concurrent complaints dealt with by Acting Information Commissioner C P Shanahan SC, who was found to have correctly concluded that the Salaries and Allowances Tribunal is not a 'court' for the purposes of the FOI Act. Those complaints raised some unique issues. The disputed document contained information directly related to the remuneration of then Acting Information Commissioner Wookey. She decided to disqualify herself from dealing with those two complaints, in order to avoid any perception of a conflict of interest and possible perceptions of bias. Acting Information Commissioner CP Shanahan SC was appointed for the purpose of dealing with the relevant complaints. While in these very unusual circumstances it took some 9 months to locate a suitably experienced person who was available to act as Commissioner to deal with these complaints, once Acting Commissioner Shanahan was appointed he was able to promptly produce a preliminary view on an initial point of law within 2 months of his appointment. The agency's response to that preliminary view then required additional time to be allowed for submissions from the parties; the need to consult some 80 additional third parties; and

“...the Office of Information Commissioner, following the current processes, is able to meet and exceed benchmark performance in dispute resolution.”

a detailed response to matters raised in those submissions which was contained in a second preliminary view that was issued on 23 October 2007. This resulted in a total of 9 months passing between the Acting Commissioner's initial appointment and delivery of his final decision on 10 December 2007. A further 3 months passed between delivery of the Acting Commissioner's decision and the outcome of the Supreme Court appeal on 20 March 2008. In dismissing the appeal and confirming the Acting Information Commissioner's decision (*Salaries and Allowances Tribunal v West Australian Newspapers Ltd* [2008] WASC 39), His Honour Chief Justice Martin noted the importance of the timely determination of requests for information access in the achievement of the objects of the FOI Act.

Review of Department of Health FOI Processes: In its report dated 25 January 2008 on the investigation of alleged misconduct concerning Dr Neale Fong, former Director General of the Department of Health, the Corruption and Crime Commission recommended to the Parliament that matters relating to the appropriateness and adequacy of the FOI processes and record-handling of the Department of Health, as detailed in its report, be referred to the Office of the Information Commissioner and the State Records Commission. A detailed review was undertaken into the FOI process followed by the Department of Health in that particular matter, with the full cooperation of that Department. The results of that review, and recommendations for improvements to those processes, are included in full later in this annual report.

Resolution of Outstanding FOI Complaints: On 1 July 2007, there were 6 complaints before the Information Commissioner that were more than 12 months old. By 30 June 2008 all 6 had been resolved and there were no complaints aged 12 months or more awaiting determination. The percentage of complaints on hand aged

over 3 months has also decreased over this period from 54% to 27%. As previously mentioned, during the year under review the average time to finalise complaints was reduced from 136.4 active days to 91.6, and at the same time parties surveyed have indicated the highest level of satisfaction with the external review process for five years. However, the improved timeliness in resolving complaints has come at a cost in terms of the rate of conciliation, which has declined over this period from 73.7% to 61.5%.

Timeliness: While section 71 of the FOI Act gives the Commissioner a wide discretion to suspend inquiries or proceedings on a complaint in order to pursue a negotiated settlement, ultimately the passage of time can erode the relevance and meaning of the information being sought. Accordingly, I have taken the approach that effluxion of time may itself make it necessary for me to cease efforts for a conciliated outcome and to determine a complaint by formal decision, rather than extend to the parties the maximum amount of time within which to reach a conciliated outcome. I have also confined the range of complaints in which parties may be given a "preliminary view" of the possible outcome of their complaint, to those where there are significant uncertainties about facts or circumstances underlying the complaint, so that the parties can correct possible errors of fact and bring further evidence or make additional submissions. However, in most cases, as long as the parties are given a reasonable opportunity to make submissions, I have proceeded to a formal decision where negotiations or conciliation have not been productive.

"...I have taken the approach that effluxion of time may itself make it necessary for me to cease efforts for a conciliated outcome and to determine a complaint by formal decision..."

My appointment as Acting Information Commissioner took effect on 1 November 2007 for a term of up to 12 months. While I have done what I can to plan for and prepare the office for the possible passage of the FOI amendments and privacy legislation referred previously, I have been principally guided by the mandate in section 63(1) of the FOI Act which says that the main function of the Commissioner is to deal with complaints about access applications and applications for amendment of personal information. This has therefore been the primary focus of my attention and the efforts of the office during my period of appointment. Measured in terms of dealing with increasing workloads within existing resources while delivering both improved timeliness and customer satisfaction, I believe the office has succeeded in its main task, and I thank all the staff for their dedication and professionalism.

“Section 70(2) of the FOI Act requires the FOI Commissioner to conduct FOI proceedings with as little formality and technicality and with as much expedition as will allow for proper consideration of the issues and as permitted by the FOI Act.”

1.2 OPERATIONAL STRUCTURE

The office of Information Commissioner is established by s.55(1) of the FOI Act and the occupant is directly accountable to Parliament for the performance of the functions prescribed by the FOI Act. The office is independent of executive government and reports directly to the Parliament and not to, or through, a Government Minister. The Acting Information Commissioner is appointed under s.59(1) of the FOI Act by the Governor and is empowered to exercise all the functions of the Information Commissioner. The Attorney General is the Minister responsible for the administration of the FOI Act, but has no role under the legislation.

The main function of the office is to provide independent external review of agencies' decisions by dealing with complaints about

decisions made by agencies under the FOI Act. Other responsibilities prescribed by the FOI Act include:

- (i) ensuring that agencies are aware of their responsibilities under the FOI Act [s.63(2)(d)];
- (ii) ensuring members of the public are aware of the FOI Act and their rights under it [s.63(2)(e)];
- (iii) providing assistance to members of the public and agencies on matters relevant to the FOI Act [s.63(2)(f)]; and
- (iv) recommending to Parliament legislative or administrative changes that could be made to help the objects of the FOI Act be achieved [s.111(4)].

The Mission Statement and desired outcome reflect the functions and the broad ideals of openness, accountability and responsibility behind the FOI legislation.

MISSION

Public understanding and confidence in the decision-making process of government agencies through access to relevant information

The following principles or values are part of the corporate philosophy of the office:

- ❖ Being accepted by participants as an independent and impartial review authority.
- ❖ Being recognised by agencies as a model of “best practice” for the FOI complaint review process.
- ❖ Serving as an example to agencies of accountability and responsibility.

RELEVANT LEGISLATION

Freedom of Information Act 1992

Freedom of Information Regulations 1993

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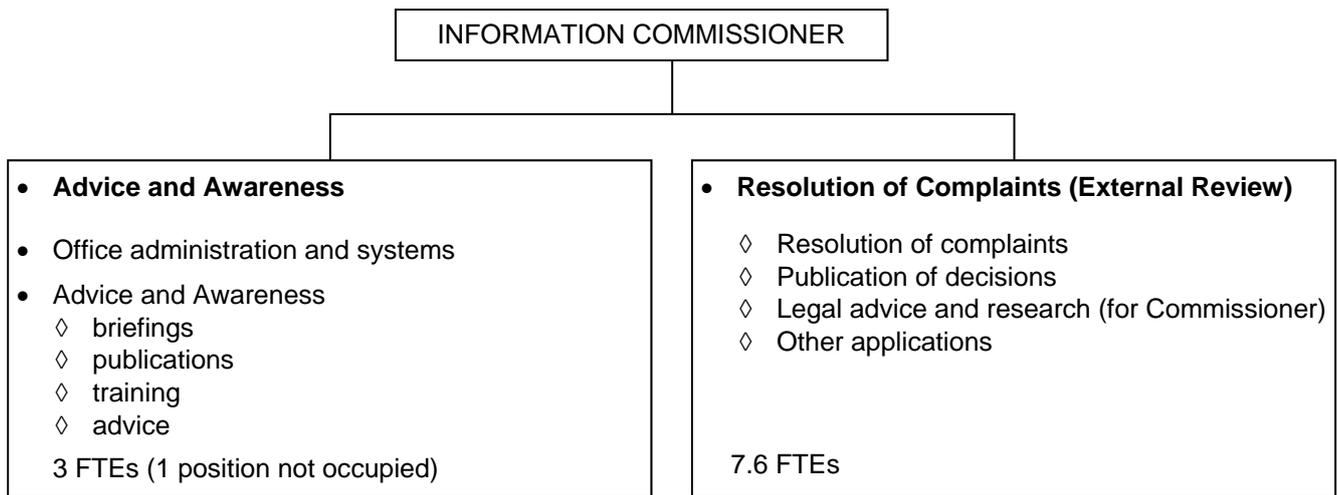
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STAFF


Back row L to R: Tony Pruyn, Senior Investigations Officer; Vivien Hillyard, Investigations Officer; John Lightowlers, A/Information Commissioner; Kim Bracknell, Information Services Manager; Rachel Crute, Legal Officer (Research and Investigations).

Front row L to R: Sylvie de Laroche, Personal Assistant; Michelle Fitzgerald, Administrative Assistant; Grace Grandia, Advisory/Projects Officer; Tim Kennedy, Senior Legal Officer; Anne Marshall, Legal Officer.

OFFICE STRUCTURE



1.3 PERFORMANCE MANAGEMENT FRAMEWORK

1.3.1 Outcome Based Management Framework

Desired Outcome: The primary desired outcome is access to documents and observance of processes in accordance with the FOI Act.

The Office of the Information Commissioner provides an FOI complaint mechanism and advisory service which is independent, objective and fair, and which balances the competing needs of applicants, agencies and Parliament, subject to the requirements and processes prescribed in the FOI Act. The Information Commissioner has a statutory duty to undertake these functions and the Office accordingly has two service teams – *Resolution of Complaints (External Review)* and *Advice and Awareness*.

The desired outcome of the Office of the Information Commissioner is aligned with the strategic planning framework for the public sector developed by the Department of the Premier and Cabinet entitled: *Better Planning: Better Futures*, available at: <http://www.dpc.wa.gov.au/PSMD/Publications/Pages/Publications.aspx>.

In particular, of the five goals espoused by the public sector framework, the mission statement, desired outcome and services provided by the Office of the Information Commissioner directly support 2 of these goals in the manner outlined in the table below.

The Office of the Information Commissioner’s outcome-based management framework did not change during 2007/08.

The Office of the Information Commissioner did not share any responsibilities with other agencies in 2007/08.

Government Goals	Desired Outcome of the Office of the Information Commissioner	Services provided by the Office of the Information Commissioner
Better Services - Enhancing the quality of life and wellbeing of all people throughout Western Australia by providing high quality, accessible services.	Access to documents and observance of processes in accordance with the FOI Act	Advice and Awareness
Governance and Public Sector Improvement - Developing and maintaining a skilled, diverse and ethical public sector serving the Government with consideration of the public interest.		Resolution of Complaints (External Review)