

DISCLOSURES
AND
LEGAL
COMPLIANCE

4. DISCLOSURES AND LEGAL COMPLIANCE

4.1 RECOMMENDED LEGISLATIVE AND ADMINISTRATIVE CHANGES

Section 111(4) requires the Information Commissioner to include in his or her annual report any recommendations as to legislative or administrative changes that could be made to help the objects of the FOI Act to be achieved. The following matters are included.

4.1.1 Reporting to the Parliament

When considering the appropriate method and timing for the Information Commissioner to report on the outcome of the review into the FOI processes of the Department of Health, it became apparent that there is no express power in the FOI Act for the Information Commissioner to directly report to Parliament from time to time on any significant issue, other than through the Annual Report. There is no equivalent power to submit and table a report from time to time, such as applies to:

- ❖ the Auditor General under s.24(1) and 25(1) of the *Auditor General Act 2006*;
- ❖ the Commissioner of the Corruption and Crime Commission under s.84, 85 and 88 of the *Corruption and Crime Commission Act 2003*;
- ❖ the Parliamentary Commissioner for Administrative Investigations under s.27 (1) of the *Parliamentary Commissioner Act 1971*;
- ❖ the Public Sector Standards Commissioner under section 21(1)(h) of the *Public Sector Management Act 1994*; and
- ❖ the State Records Commission under s.64 of the *State Records Act 2000*.

While it is arguable that the general power of the Information Commissioner under s.64 of the FOI Act to do “all things necessary or convenient to be done for or in connection with the performance of the Commissioner’s functions” may allow the Information

Commissioner to report on an issue arising in connection with the Commissioner’s functions at any time to the Speaker of the Legislative Assembly and to the President of the Legislative Council and request that officeholder to lay the report before the Parliament, it would be clearer and more in keeping with the model applying to the other independent accountability agencies previously mentioned, for the FOI Act to be amended to explicitly provide that the Information Commissioner may report from time to time to each House of Parliament on any matter arising in connection with the functions of the Commissioner. I recommend such an amendment.

4.1.2 Manner of release of documents requested under FOI

During the year, a number of instances have occurred where documents applied for under FOI have been released outside the FOI process to parties other than the FOI access applicant. That is, where an applicant is going through the FOI process for documents and the agency gives access to the same documents (before giving them to the applicant) either publicly or to separate parties outside the FOI process.

How to allow documents to be made available quickly outside FOI is an issue not just for Western Australia. It was reported in the national press that the Commonwealth Department of Agriculture Fisheries and Forestry had been asked by its Minister to consider ways in which information could be made publicly available ahead of an FOI request where this was in the public interest, rather than waiting for access to be determined as a result of an FOI request.

The FOI Act was not intended to replace alternative practices for giving information outside FOI or to discourage their use. It was intended as a means of exercising rights where access is not available by other customary means.

In June 2008 the Queensland Government received a recommendation that addresses this issue. Section 18.4 of the report by the FOI Independent Review Panel of Queensland's FOI Act chaired by Dr David Solomon AM had this to say (at page 234):

"...The Panel considers that if FOI is to achieve its goals and be effective, it needs to be properly used by journalists, MPs, academic researchers and NGOs. Adopting the UK practice of simultaneous publication of information obtained by requestors (even though the amount of such material put on agency websites only ranges from about 1 to 5 per cent of the total released) would be undesirable. A media organisation that may have paid thousands of dollars to obtain the information would undoubtedly consider itself badly done by if its competitors were to get the information simultaneously and for no cost. The material would not have become available but for the efforts of the organisation's staff in seeking it out, and the time as well as money it had spent on the particular FOI request. In a sense, they have invested intellectual capital in FOI and they are entitled to their reward.

The Panel considers that where an agency is going to publish on its website information that has been provided to a requestor, it should delay posting that information until 24 hours after the requestor has received it. A delay of this length is suggested by the nature of the 24 hour news cycle of most media organisations.

While this will have an important benefit for journalists, it is not intended that they should be singled out for special treatment. The delayed publication rule should apply generally, for all FOI applicants."

I agree with that view. Because the timely release of information outside FOI should be encouraged and not constrained by

statutory rules, no legislative change is recommended. However, I consider that an administrative change would be appropriate. Where an FOI application has been made for documents that are being considered for general release outside FOI, it is recommended to agencies dealing with FOI requests that the FOI access applicant should receive some priority of access (say 24 hours) ahead of the general release. In this way, the applicant's outlay of time, effort and expense in seeking the information, is recognised.

4.1.3 Delegations

The delegation power in s.79 prohibits the Commissioner from delegating the power under s.75 to require production of documents and under s.76 to make decisions. In my view, this restriction means the exercise of the investigatory and decision-making powers is necessarily limited to the individual Commissioner's availability, which, given the Office's commitment to making more timely decisions, is problematic. Consequently, in order to ameliorate this constraint, I recommend that the FOI Act be amended to allow the powers in s.75 and 76 to be exercised by delegation to senior staff members (such as a Deputy or Assistant Commissioner). Consistency of decisions can be assured because the normal rules for construction of the power to delegate (contained in s.59 of the *Interpretation Act 1984*) mean that the Commissioner is not precluded by such a delegation from exercising the power, and can impose conditions, qualifications and exceptions on such delegations.

4.1.4 Waiver of application fees

FOI applications for access to personal information are free. An application fee (currently \$30) is prescribed for FOI applications for non-personal information. In addition to the application fee, agencies can impose an hourly processing charge and photocopying costs for dealing with an application for non-personal information.

The *Freedom of Information Regulations 1993* empower agencies to waive the processing charges and copying costs and set out the principles for doing so. Under s.16(1) of the FOI Act, agencies may waive collection of a charge for processing an application under FOI for access to documents, in accordance with those principles. However there is some uncertainty whether s.16(1) authorises waiver of the application fee as distinct from the processing charges, taking into account clause 8 of the Glossary to the FOI Act which applies an inclusive definition of the meaning of charges for dealing with applications. The Office is aware that a few agencies either do not collect or choose to waive the application fee in certain instances, notwithstanding that there is some doubt whether they have power to waive this fee. There seems to be no good reason why agencies should be empowered to waive the processing charge but not the application fee. It is recommended that the FOI Act be amended to make it clear that agencies are empowered to waive both application fee and processing charges, in accordance with the principles set out in the regulations. This will remove the existing uncertainty.

4.2 Compliance with Other Acts

Compliance with legislative and associated reporting requirements which apply to the Office and which is not dealt with elsewhere in this report is reported below.

Disability Services Act 1993 (s.29): Development of a Disability Access and Inclusion Plan (DAIP) has now been completed. The six desired outcomes of our DAIP have largely been met, with ongoing initiatives planned to be introduced in 2008/09 to address issues identified.

Equal Opportunity Act 1984 (s.146): An EEO/Diversity Management Plan was submitted in September 2003 and is effective to 2008. The Office has developed strategies for EEO outcomes so no action in this area

was required in the reporting period. Apart from the Acting Information Commissioner, no recruitment was undertaken in the reporting period. The Office currently has only 10 officers, including the Information Commissioner, comprising of 6 women (60%) and 4 men (40%). One is part-time and there is a diversity of backgrounds, including one officer from a non-English speaking background.

Electoral Act 1907 (s.1752E): There was no expenditure incurred on advertising, market research polling, direct mail or media advertising activities during the year.

State Records Act 2000 (s.61), and *State Records Commission Standards, Standard 2, Principle 6*: The Office Record Keeping Plan was approved by the State Records Office in November 2003 for a term of 5 years. Also in 2003, the Office administrative record keeping system was redesigned to adhere to the Keyword AAA record keeping system, and as part of that process the Office administrative and functional thesaurus was created. All previous administrative files were closed on 1 January 2003 and records from that date are now filed as set out in the thesaurus. The Office Records Manager has the responsibility of ensuring that all records are properly logged and filed. The Records Manager (and select other staff) have attended workshops and seminars on records management issues, and further staff instruction on the record keeping practices of the office will be conducted when the current Record Keeping Plan is reviewed in November 2008, as required by the State Records Office.

Occupational Health and Safety Act 1984: The Office is committed to an occupational safety and health and injury management system which has been established by the Office for the benefit of all staff. An injury management system was developed during the 2007/08 financial year which is compliant with the *Workers' Compensation and Injury Management Act 1981* and the associated

Workers' Compensation Code of Practice (Injury Management) 2005. The office has appointed the Information Services Manager as the occupational safety and health representative. A committee that consists of officers from the collocated accountability agencies meets on a regular basis to discuss a range of issues including matters related to occupational health and safety. Any matters of note to employees are raised at the bi-weekly office management meeting. Performance against injury management targets for 2007/08 is outlined in the table below:

Indicator	Target 2007/08	Actual 2007/08
Number of fatalities	Zero (0)	0
Lost time injury/ diseases incidence rate	Zero (0) or 10% reduction on previous year	0
Lost time injury severity rate	Zero (0) or 10% improvement on previous year	0

Premier's Circular 2005/02: Corruption Prevention: During the year the Office updated its Code of Conduct which outlines what is expected from staff in ensuring that high levels of independence, impartiality, honesty and confidentiality are observed at all times. The Office has also introduced a Public Interest Disclosure Policy, supported by internal procedures.

Public Sector Management Act 1994, s.31(1): There were no compliance issues arising during the financial year regarding the Public Sector Standards, the WA Code of Ethics, or our own agency Code of Conduct. The Office has also introduced a Grievance Policy based on the OPSSC Employee Grievance Resolution Standard.

Government Policies

The Office endeavours to comply with government policies insofar as they do not interfere with or compromise the independence of the operation of the Office from executive government.

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