

# HEALTH REVIEW REPORT

## OFFICE OF THE INFORMATION COMMISSIONER

REPORT ON MATTERS RELATING TO THE APPROPRIATENESS AND ADEQUACY OF THE FOI PROCESSES OF THE DEPARTMENT OF HEALTH AS DETAILED IN THE CORRUPTION AND CRIME COMMISSION'S "*REPORT ON THE INVESTIGATION OF ALLEGED MISCONDUCT CONCERNING DR NEALE FONG, DIRECTOR GENERAL OF THE DEPARTMENT OF HEALTH*", DATED 25 JANUARY 2008.

26 August 2008

## 1. INTRODUCTION

### 1.1 Background

On 25 January 2008, the Corruption and Crime Commission ('the CCC') tabled its *"Report on the Investigation of Alleged Misconduct Concerning Dr Neale Fong, Director General of the Department of Health"* ('the Report') in Parliament. The CCC made five recommendations. Recommendation 4 said:

*"The Commission recommends that matters relating to the appropriateness and adequacy of the FOI processes and record-handling of the Department of Health, as detailed in this report, be referred to the Office of the Information Commissioner and State Records Commission."*

Section 63(2) of the *Freedom of Information Act 1992* ('the FOI Act') provides that the functions of the Information Commissioner include:

*"(d) ensuring that agencies are aware of their responsibilities under this Act"*.

Section 64 of the FOI Act provides that the Information Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of the Commissioner's functions.

The A/Information Commissioner, John Lightowlers, drafted the criteria for review of the appropriateness and adequacy of the FOI processes of the Department of Health. Those criteria were accepted by the A/Director General of Health, Dr Peter Flett (see Appendix 1). No change was requested or made to the draft criteria. Dr Flett undertook to provide all information and assistance needed to respond to the review. It is acknowledged that staff of the Department of Health were fully cooperative and provided constructive input to the review.

### 1.2 Department of Health

The Department of Health ('the Department') is responsible for the administration of the State's public health system and employs about 1,400 FTEs (and about 26,000 FTEs across the public health system). According to the Department's annual report the Department administers 43 Acts and 98 sets of subsidiary legislation, and carries accountability and compliance obligations in relation to a number of whole of government statutes, including the FOI Act.

Applications under the FOI Act for access to records held by the Department are generally not made to the Department's head office in Royal Street Perth but directly to the relevant hospital or health service. By contrast, the Department's head office deals with comparatively few applications: its statistical return to the Office of the Information Commissioner for 2006/2007 reported 65 FOI access applications: 60% of which related to non-personal information. Over the same period, the hospitals and health services in Western Australia reported that they had received 5,828 access applications. The low amount of application fees and charges collected by the Department suggests that the vast majority of those access applications sought personal information, for example patients' own medical records.

While it may be merely coincidental, the Department's 2006/07 annual report dropped any mention of its obligations under the FOI Act (nor for that matter did the annual report identify other key whole of government statutory accountability requirements impacting the Department's activities). In previous annual reports the Department included a component on its compliance with FOI.

### 1.3 The access application

As noted on pp.13-14 of the Report, on 28 March 2007, Mr John Kime, the Chief of Staff to the Hon. Paul Omodei, then Leader of the Opposition ('the Applicant'), applied under

the FOI Act to the Department as follows:

*“In accordance with the Western Australian Freedom of Information Act I wish to apply for copies of the following records:*

1. *Any correspondence, electronic or otherwise, pertaining to any matter, to Mr Julian Grill from Dr Neale Fong (or his office) during his time as Director General of the Department of Health and also during his previous positions as the Executive Chairman of the Health Reform Implementation Taskforce and the Chief Executive of the North Metropolitan Area Health Service;*
2. *Any correspondence, electronic or otherwise, pertaining to any matter, from Mr Julian Grill to Dr Neale Fong (or his office) during his time as Director General of the Department of Health and also during his previous positions as the Executive Chairman of the Health Reform Implementation Taskforce and the Chief Executive of the North Metropolitan Area Health Service;*
3. *Any correspondence, electronic or otherwise, pertaining to any matter, to Mr Brian Bourke from Dr Neale Fong (or his office) during his time as Director General of the Department of Health and also during his previous positions as the Executive Chairman of the Health Reform Implementation Taskforce and the Chief Executive of the North Metropolitan Area Health Service;*
4. *Any correspondence, electronic or otherwise, pertaining to any matter, from Mr Brian Bourke to Dr Neale Fong (or his office) during his time as Director General of the Department of Health and also during his previous positions as the Executive Chairman of the Health Reform Implementation Taskforce and the Chief Executive of the North Metropolitan Area Health Service.*

*This request includes any record or part of any record, any reproduction, files, computer printouts, plans, briefing notes, compact discs, digital versatile discs, photographs, tape”.(sic)*

In effect, the period covered was from 2 August 2004 to 28 March 2007, the date of the Application.

#### **1.4 The FOI statutory process**

In brief, the FOI Act requires that –

- An access applicant must apply in writing for access to documents to the agency that holds, or is likely to hold, the documents sought.
- The agency – in practice, the agency's FOI Coordinator – locates the documents and makes a decision with respect to them, within the “permitted period” (45 calendar days).
- The applicant is given a written notice of decision which gives details of whether access is granted or the reasons for refusing access on the basis, for example, that the documents are exempt.
- An applicant who is aggrieved with the decision has the right to apply for an internal review conducted by the agency.
- The internal review must be conducted by another person who is not subordinate to the person who made the initial decision.
- The review must be conducted within 15 days and the applicant is given a notice of decision. The internal reviewer can decide to confirm, vary or reverse the decision under review.
- An applicant who is aggrieved with the internal review decision has the right to apply to the Information Commissioner for external review of that decision.

#### **Relevant sections of the FOI Act**

Section 10 of the FOI Act gives the public a right to apply for access to documents held by government agencies. A person's right to apply is not affected by any reasons the person has for wishing to obtain access, or the agency's belief as to what those reasons for applying might be.

Section 4 provides that agencies are to give effect to the FOI Act in a way that assists the public to obtain access to documents and

that allows access to documents to be obtained promptly and at the lowest reasonable cost.

Section 100 provides that decisions made under the FOI Act are to be made by:

- (a) the principal officer of the agency; or
- (b) an officer of the agency directed by the principal officer of the agency for that purpose, either generally or in a particular case.

Schedule 1 lists 15 categories of records which may be exempt from access under the FOI Act.

## 2. SCOPE AND METHODOLOGY

This review deals with the way that the Department handled the Application under the FOI Act focusing on the adequacy and appropriateness of those FOI processes.

The methodology of this review included:

- interviewing the officers who dealt with the Application;
- reviewing the Department's FOI file maintained in respect of the Application;
- considering the notices of decision given by the Department to the Applicant;
- examining the Department's policies concerning retention of emails;
- obtaining further information from the Department on its FOI processes; and
- considering the CCC's Report.

Following consultation between the A/Information Commissioner and the A/Director General of Health on the terms of reference for the review, arrangements were made to interview the officers of the Department involved in dealing with the Application. All relevant officers of the Department cooperated fully with the review and responded openly to questions put to them.

A number of meetings were held between staff from the Office of the Information Commissioner and 15 staff of the Department (see Appendix 2). The meetings took place at the Department from 11 April 2008 - 20 May 2008. Each Department officer was asked to describe as accurately as possible his or her role and involvement with the Application.

The information provided at the meetings included, among other things, information concerning the Department's record-keeping systems; the types of documents kept; the officers' understanding of FOI processes; and their obligations in relation to those processes.

## 3. THE DEPARTMENT'S HANDLING OF THE APPLICATION

### 3.1 The initial searches

At the time that the Department received the Application, its FOI Coordinator, an experienced FOI officer, had been seconded out of the Department to an acting position elsewhere. Consequently, another Level 5 officer, who had limited experience of the FOI process, was acting in the role of FOI Coordinator.

On 2 April 2007, following receipt of the Application, the A/FOI Coordinator began the FOI process by sending a written request to staff in the Department's Records section for any documents falling within the scope of the Application. Another email - attaching a copy of the Application - was sent by the A/FOI Coordinator to the Manager, Director General Support ('Manager, DGS') asking that she commence the necessary searches for the email records held by the Director General. The Manager, DGS, is in charge of the Office of the Director General, and supports the Director General by maintaining his appointment diary and following up any necessary action as directed.

Staff advised that to contact the Director General the protocol within the Department was that requests had to go through the Manager, DGS.

In the course of that process, on 11 April 2007, the A/FOI Coordinator sought advice from the Department's Legal and Legislative Services section.

The Manager, DGS referred the request to those staff in the Office of the Director General that had access to the Director General's email system to conduct the necessary searches.

The staff of the Director General's executive office searched the Director General's personal computer for relevant emails, and found none. No search was, at this point, requested or undertaken of the Department's archives. Nor apparently at this stage was the Department's Information Technology service consulted as to possible areas for further searches.

As noted on page 14 of the Report, on 16 April 2007, a member of the Director General's executive staff contacted the A/FOI Coordinator by email and said "... we are fairly sure there will be no documents that fall within the scope of the application" and further "...Neale is sure there won't be any relevant documents".

On 27 April 2007, another member of the Director General's staff contacted the A/FOI Coordinator stating "...very happy to say that our response is 'NIL' ... we are not aware of any corres to or from Neale to either of these people".

On 3 May 2007, the A/FOI Coordinator contacted the FOI Coordinator who was on secondment elsewhere and sought advice in relation to searches. He responded in an email as follows:

*"The FOI Act requires a diligent effort when searching for records including emails for FOI purposes. Emails are problematic because a lot of people delete their email records. To me a diligent effort is requesting the email author to advise if relevant email records exist and if they do then making arrangement to retrieve those records. In the past this has been*

*undertaken by the author or an assistant on their behalf. (I have never personally experienced problems in this area). If the author advises that the relevant records do not exist that should be sufficient to conclude the search unless there are issues of deceit or misconduct etc. Then senior management advice should be sought as to how to discharge the agency's responsibilities under FOI. The agency is legally required to make a full and diligent search for any relevant records. Seeking the services of the IT Department would be relevant if the author was unco-operative or obstructive and relevant emails clearly existed. This is a grey area because then management authority would have to be forthcoming to use IT assistance ..."*

### 3.2 The first Notice of Decision

On 4 May 2007, the A/FOI Coordinator provided the Applicant with a Notice of Decision that said:

*"All reasonable steps have been taken to locate documents which fit within the scope of your application. None have been found. I am satisfied that the documents do not exist as documents of the Department of Health WA or Health Reform Implementation Taskforce.*

*Under Section 26 of the FOI Act, when a document cannot be found, access is not possible and is deemed to be a decision to refuse access.*

*You have the right to have this decision reviewed. Details of the review process are enclosed."*

At that stage, the Department had taken 38 days to process the Application, which was within the permitted period of 45 days.

### 3.3 The appointment of an internal review decision-maker

On 21 May 2007, the Applicant applied to the Department for internal review of its decision.

Under the FOI Act, the Department had 15 days in which to deal with that internal review. Since the Department did not have standing designated officers to conduct internal reviews, its Legal and Legislative Services section approached the Department's Business Unit requesting that an officer from that section be appointed to conduct the internal review.

Telephone advice was sought on 24 May 2007 by the Legal and Legislative Services section from Ms Grace Grandia, Advisory/Projects Officer of the Office of the Information Commissioner with regard to the requirements of the FOI Act related to the appointment of an internal reviewer. The then A/Executive Director, Health System Support; the Manager, Business Unit, Health System Support; the A/Director and the Senior Legal Advisor of the Legal and Legislative Services section subsequently discussed the matter and agreed to appoint a Level 7 Senior Policy Officer from the Business Unit to conduct the internal review. The officer chosen to conduct the review had no previous experience of the FOI process, but was senior in level to the initial decision-maker, although she did not have direct line authority over the initial decision-maker.

On 28 May 2007, six days after the Applicant had lodged the internal review application, the Internal Reviewer was notified of her appointment, by email, by the A/Chief Information Officer, Health Information Division.

### **3.4 The searches made on internal review**

The appointed Internal Reviewer sought to ensure that she had an understanding of what was required by seeking advice from the Department's Legal and Legislative Services.

Legal and Legislative Services provided advice to several Departmental officers, including a copy to the Internal Reviewer, by email on 7 June 2007 – which said:

*"The Freedom of Information Act defines document to include electronic documents.*

*The use of Western Australian Government Health Sector computing and communication resources to send and receive email renders any e-mail a government record.*

*As government records, such emails are legally searchable, subject to record keeping policy, Privacy and Freedom of Information legislation and, are subject to the provisions of the Public Sector Management Act and the Western Australian Public Sector Code of Ethics."*

The Internal Reviewer then ascertained what documents had been requested and what searches had been undertaken to locate the documents. Again, because of the requirement to adhere to the Department's protocol, all communication with the Director General was made through the Manager, DGS.

The Internal Reviewer identified that archived records had not been searched during the process leading to the initial FOI decision, and asked the Department's Information Technology section ('IT') to undertake a search. On 29 May 2007, she met with the Manager, Information Strategy and the Manager, Information Technology to ask about the process for searching for electronic correspondence. She was advised of the difficulties in terms of time and resources in undertaking a search of the Department's electronic database.

On the same day, the Manager of the Information Technology section advised the A/Chief Information Officer, Health Information Division, of the request made by the Internal Reviewer and asked for direction. On 6 June 2007, the Internal Reviewer contacted the Applicant requesting a reduction in the scope of the Application and an extension of time until 13 June 2007 for the Department to deal with the internal review. The Applicant agreed.

On 8 June 2007, the search of the email archives was initiated by the Email Administrator, Information Technology. On 11 June 2007, the nine 'logs and headers' were discovered as a result of that search, although no content was located for any of those emails.

On 12 June 2007, the IT staff undertook further searches but they were unable to recover the content of the emails. On the same day, the A/Chief Information Officer, Health Information Division, contacted the Applicant seeking a further extension of time to 20 June 2007, in order to finalise the searches. The Applicant notified the Internal Reviewer of his agreement to that further extension.

On 13 June 2007, the IT staff notified the Director General's executive staff that the contents of the emails identified in the logs could not be recovered. However, on the same day the Internal Reviewer contacted the A/Chief Information Officer, Health Information Division to find out whether IT had completed the searches of the System and was informed that they would be finished "by next Wednesday" 20 June 2007. I understand from the interviews with the Director General's Executive staff that the A/Chief Information Officer, Health Information Division contacted the Director General direct to discuss the process that found the nine logs and headers and the processes to try and locate any further emails.

On 19 June 2007, the A/Chief Information Officer, Health Information Division, sent the Internal Reviewer an email advising:

*"We have the results of the FOI search. The DG is going to discuss with MFH and then I will be advised. Once that has occurred I will advise you and the letter and results can be sent. Can you ensure that legal advice is sought on the response letter"*

The Director General informed the office of the Minister for Health of the status of the FOI search. In the circumstances of this

case, it was appropriate for the Director General to brief the Minister.

On 19 June 2007, the Senior Legal Officer emailed the Manager, DGS – and copied the email to a number of officers including the Internal Reviewer – advising, as follows:

*"Just confirming my advice in our phone conversation of yesterday that third party consultation with the parties identified in the documents needs to take place asap. If you could confirm that the DG is aware of this that would be great."*

Over the period 13 to 20 June 2007, there were numerous email communications between officers which were copied to others to be 'kept in the loop'. An email dated 19 June 2007, from the Manager, DGS to the Internal Reviewer and copied to another senior officer stated:

*"Following advice from Legal regarding consultation on third parties mentioned on the emails, can you please ask Omodei's office if they:*

- 1. want the information as is with third party names blanked out. OR*
- 2. if they want the names we will need to conduct third party consultation for which we will need an extension.*

*If they want the info as is with names blanked out we will provide this late in the afternoon."*

On 20 June 2007, the Internal Reviewer contacted the Applicant to ask whether he wanted unedited access – which would require consultation with third parties and necessitate a further extension of time – or whether he would accept access to the emails in edited form. The Applicant advised the Department by telephone the same day that access in edited form would be acceptable.



### 3.5 The Notice of Decision on internal review

On 20 June 2007, the Internal Reviewer gave the Applicant a Notice of Decision that varied the initial decision and advised, as follows:

*"In reviewing your request the following searches were carried out:*

1. *Mail log – all incoming and outgoing mail from the Director General's Office.*
2. *TRIM (the Agency's Record Management System) database.*
3. *Ministerial and Parliamentary correspondence database.*

*The only documents found which fall within the scope of your access application were found in the search of the agency's electronic backup tapes.*

*The detailed search of this agency's electronic email backup tapes resulted in nine partial emails being found. I advise that this agency's backup tapes do not store complete electronic copies of all emails sent and received by this agency. Rather, the backup tapes only store parts of those emails. Accordingly, this agency has only been able to recover parts of the various emails falling within the scope of the access application."*

The Applicant was given a schedule listing the nine emails and was advised that certain 'personal information' in those emails constituted exempt matter under clause 3(1) of Schedule 1 to the FOI Act and that personal information had been deleted as agreed with the Applicant.

The Notice of Decision on Internal Review was issued within the extended time agreed by the Applicant and the Department.

## 4. EMAILS AS 'DOCUMENTS' FOR THE PURPOSES OF THE FOI ACT

### 4.1 Meaning of 'document'

Clause 1 of the Glossary to the FOI Act defines "document" to mean -

- "(a) any record;*
- (a) any part of a record;*
- (b) any copy, reproduction or duplicate of a record; or*
- (c) any part of a copy, reproduction or duplicate of a record;"*

and "record" to mean any record of information however recorded and on which there is writing, and includes the following -

- "(a) any paper or other material, including affixed papers on which there is writing;*
- (b) any map, plan, diagram or graph;*
- (c) any drawing, pictorial or graphic work, or photograph;*
- (d) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;*
- (e) any article or material from which sounds, images or writing can be reproduced whether or not with the aid of some other article or device;*
- (f) any article on which information has been stored or recorded, either mechanically, magnetically or electronically."*

Clause 4 of the Glossary defines "documents of an agency" to mean: *"...a reference to a document of an agency is a reference to a document in the possession or under the control of the agency including a document to which the agency is entitled to access and a document that is in the possession or under the control of an officer of the agency in his or her capacity as such an officer."*

The question of what constitutes a 'document' for the purposes of the FOI Act - and in particular whether an email is a document - arose as an issue within the

Department in the course of responding to this FOI application.

#### 4.2 Background: the Department's electronic record keeping system

The Report at pages 15-16 sets out the background to the retention of electronic documents by the Department. In 2004, the State Records Office ('the SRO') approved the Department's Record Keeping Plan ('the Plan') and associated policies, pursuant to the *State Records Act 2000* ('the SR Act'). The Plan requires the Department to have an electronic records management system to capture, store and manage electronic and hard copy records. The Report notes, at page 16:

*"The DOH has an electronic record keeping system called 'TRIM' that electronically captures all incoming records that pass through the DOH central mail office, although the full functionality of TRIM was not deployed due to its complex user interface. Internal memos and outgoing communications are not captured and it is not the current practice at DOH that emails deemed to be Departmental Records are captured in TRIM.*

*The DOH's Records Policy and Procedures 2004 requires the recipient of emails to determine their value as a record and if necessary print and place a copy on file. In the case of a Senior Manager this can be delegated to a subordinate. An email is deemed a record if it records "what happened, what was decided, what advice was given, who was involved, when it happened and the order of events" in regard to DOH matters. Where messages are of a personal nature, such as lunch appointments, they are considered to be ephemeral in nature and do not need to be saved.*

*The SR Act, and the DOH's Records Policy & Procedures 2004, requires that emails which are considered records of*

*business activity must be saved into a proper record keeping system. Furthermore it is the individual employee's responsibility to ensure appropriate record keeping is maintained in accordance with the policies.*

*In early 2006, the DOH identified shortcomings in relation to the management of electronic records and commissioned a business case to articulate a fully functional electronic records keeping system. Retention of each individual employee's emails is limited by the storage limit allocated. Full backups of the exchange information databases, system software and system transactions are run every evening and a three month tape rotation cycle is currently employed by DOH. These tapes are overwritten on a three monthly cycle.*

*Therefore the only records in existence of email content beyond a three month period would be contained in the individual employee's inbox, sent items folder or copied to a personal folder or stored on disc or on their personal drive."*

On 9 May 2008, the SRO issued an information sheet to agencies in relation to email records which, among other things clarifies what constitutes a "business" email:

*"A business email contains information created or received by an officer, via an email server application, in the course of his/her duties and contains information which is owned by the organisation. A business email may have any or all of the following attributes:*

- *information which is of evidential and/or historical value and is not recorded elsewhere on the public record;*
- *formal communications and/or a transaction between officers (for example a report or submission) or between an officer and another party; or*
- *documents the rationale behind organisation policy, decisions or directives.*

*These emails are State records and must be captured in the official recordkeeping system to provide evidence of business activity and meet legal requirements. Business email must be retained for as long as required, giving consideration to the subject matter of the record, and may only be destroyed in accordance with an approved records disposal authority” (emphasis added).*

### 4.3 Assessment

The officers interviewed generally understood that they had individual responsibility for managing their own emails. It was noted in the Report, at pages 29-30, that the Director General retained responsibility for the management of his own emails:

*“Evidence from both Dr Fong and his staff was consistent in that Dr Fong is proactive in the management of his emails. He manages his emails primarily from his handheld Blackberry PDA device. Whilst various members of his staff have access to his emails he is the only one who deletes messages, other than those which are clearly inconsequential”.*

However, while some officers understood the requirement to retain and maintain a complete record of email correspondence concerning Departmental business, it was not a view held by all.

Clause 9 of the Department’s “Records Policy and Procedures (Non-Patient Records)” policy document dated 11 November 2004, states that: “...important email messages must be captured into corporate recordkeeping systems where they can be preserved securely and found easily.” Clause 10 says that important messages are to be either “...printed out on paper and filed or saved electronically...”.

At least one senior officer interviewed has advised that those directives are not always followed. In consequence, it appears that email correspondence between officers

concerning Departmental matters is not always retained and stored electronically or printed and filed on the appropriate file. This is notwithstanding the Department’s 2004 Record Keeping Plan requiring that systems capture, manage and store electronic records. It is apparent that this requirement was not well understood and implemented across the Department.

In addition, there was a mistaken belief held by some officers that emails are not ‘documents’ for the purposes of the FOI Act which has the potential for relevant email documents to be excluded from a search. This issue arose at the initial decision stage and was not resolved until the Department’s Legislative and Legal Services Section provided advice on 7 June 2007, in response to a request from the Internal Reviewer. The mistaken view among some officers involved in the Department’s FOI processes that emails are not ‘documents’ for the purposes of the FOI Act demonstrates that some staff are not fully aware of the plain and inclusive definitions of ‘document’ and ‘record’ in the Glossary to the FOI Act as well as a series of guidelines and published decisions issued over many years clearly indicating that emails fall within the purview of the FOI Act.

It is evident that, as emails fall outside the scope of the Department’s TRIM records management system and it is left to individuals to decide on what should be retained, retention of email records by the Department is likely to be a hit and miss affair.

A potential problem is that some individual email users ostensibly have sole control over local email repositories (PST files) and manage, retain or delete email records within those repositories. The cost of bringing emails within the scope of TRIM has been tentatively estimated by the Department’s IT staff at \$14 million – but such expenditure is required to be balanced against the Department’s other core priorities.

The Department has advised that changes to backup practices are currently being made

that increase the likelihood that email documents are appropriately archived and then made accessible as and when necessary. On 14 November 2007, the Department published on its "Online Information Intranet" pertaining to management of electronic records, a flyer entitled: "*Management of Electronic and Hardcopy Corporate Records*". The flyer stipulates where corporate electronic records are to be stored. It specifically states what media cannot be used for storage and will help to ensure that corporate records are appropriately stored and therefore potentially accessible to any future FOI applicants. The flyer states:

***"Electronic Records Received via Email***

*Electronic letters or official reports received as attachments to emails should be printed out and placed on a relevant corporate file, unless they can be saved electronically directly into an approved electronic document management system or saved into shared folders on corporate file servers. Such documents are not to be left attached to emails in personal folders.*

***Storage, Retention and Disposal***

*Other electronic records including email that constitute official agency records should be printed out and filed or may be saved into shared folders on corporate file servers and managed in accordance with the State Records Office's Standard for the Management of Electronic Documents in Networked Computer Environments. [<http://intranet.health.wa.gov.au/Records/policies.cfm>]. To avoid storage of multiple copies of emails, the original creator of the email or owner of the e-mail (if it is not the creator) should review these and only store the versions that provide the complete record on the subject.*

*Personal email folders available within the Microsoft Outlook system, C drives on personal computers or personal U drives on shared file servers should not be used*

*as a repository for corporate electronic records."*

The matter of the adequacy and appropriateness of record-handling of the Department is the subject of a separate review being undertaken by the State Records Commission in response to the CCC's Report recommendations.

**5. WERE THE FOI PROCESSES APPROPRIATE AND ADEQUATE?**

**5.1 The officers dealing with the application**

The Application highlights the difficulties which arise when an application is made for documents held by a senior officer of a government agency. In most cases, FOI Coordinator's appointed by agencies are not in senior positions. That is usually not an issue since the majority of applications made under the FOI Act are for personal information about the applicant or for particular documents. Such applications are generally adequately dealt with by the FOI Coordinator.

However, where, as here, the documents sought were correspondence between the Department's principal officer – the Director General – and others, there was a case for the Department to take steps to elevate the level of decision-making at first instance to a more senior and experienced officer. In hindsight, such a step may well have mitigated the failure to recognise at first instance that emails are subject to FOI access, and that a thorough and effective electronic search should be undertaken.

Section 100 of the FOI Act requires that decisions made under that Act are to be made by an agency's principal officer or an officer directed by the principal officer for that purpose. The Department's procedure was that all FOI applications were automatically dealt with by the Department's FOI Coordinator. It is not clear from the records and policies examined that that person was acting at the direction of the Department's

Director General or a former Director General, or simply in accordance with standard operating procedures. Nor is it clear that the A/FOI Coordinator or the Internal Reviewer in this case were directed to make their decisions under the FOI Act by the Director General. The evidence is that the Internal Reviewer was authorised and appointed to make her decision by a group of senior officers.

An FOI Coordinator or Internal Reviewer searching for documents must have sufficient authority, delegated by the principal officer, to conduct thorough and timely searches. This is contingent on all officers of the agency also being made aware that FOI officers have been provided with this authority.

An agency's decision-maker must have the authority to require documents to be produced; searches and inquiries to be made, including the retrieval of electronic documents; and, if necessary to have awkward questions answered. In the circumstances of this case, it would have been appropriate for the Director General to have appointed another more senior officer to deal with the Application.

The A/FOI Coordinator and to a lesser extent the Internal Reviewer did not carry the necessary authority, by virtue of their relative lower seniority and lack of experience in the Department, to deal with the Application as decision makers. One result of those appointments was that those officers had to depend upon the timely cooperation and commitment, as a priority, of human resources, information technology and other resources of the Department to carry out the searches for information and the production of the documents sought. There were barriers to their directly questioning the Director General and in asking for time-consuming information technology system searches to be made. Time was spent consulting more experienced officers on the relevant FOI processes.

With regard to the initial searches, a more experienced and senior officer acting as the

decision-maker might have commanded a more thorough search at first instance, and more closely questioned the adequacy of the searches undertaken. The initial search by the Director General's staff did involve an electronic search of records held but did not include a search of the Departmental archives.

However, the A/FOI Coordinator was placed in a difficult situation. In addition, without any evidence that the requested documents existed or should exist, that officer depended upon the assurances relayed by the Director General and his executive staff that they were not aware of any correspondence of the kind sought by the Applicant. That information formed the basis of the initial notice of decision sent to the Applicant. There was no indication in that decision as to the thoroughness of the searches undertaken, nor as to who made them or whether the searches for documents encompassed a search of electronic records.

The two decision-makers, the A/FOI Coordinator and the Internal Reviewer, were given the responsibility to deal with the Application but with many other senior staff becoming involved in advising how the review should be conducted. A number of senior staff who were sent copies of every email communication about the progress of the Application (to be 'kept in the loop') did not appear to make any significant contribution to the process, despite the opportunity to do so.

In addition, when the Internal Reviewer sought advice from the Legal and Legislative Services section, matters were referred to the State Solicitor's Office (the SSO) for further legal advice and verification of the process, which contributed to the time taken to resolve the matter.

In all, some fourteen officers of the Department, many at a senior level, were involved one way or another in the progress of the Application. Notwithstanding this, the decision at first instance, and on review, was taken at a relatively junior level in the

Department.

The lack of sufficiently senior, trained and experienced staff familiar with the FOI processes and procedures to be followed is a problem that needs to be addressed. The FOI Act places the responsibility for decision-making on the agency's principal officer or the officer directed by the principal officer. Clearly, any officer who is directed for that purpose should have the skills, expertise, independence and authority to make the decision on behalf of the agency.

In this case, although the Internal Reviewer lacked relevant FOI experience, the Department was fortunate that she had the skills and ability to make the appropriate inquiries, seek the necessary advice, and obtain the outcome that she did.

## 5.2 Were adequate searches conducted?

Clearly, the searches conducted prior to the issuing of the Department's first decision were inadequate to locate the emails identified at the internal review stage.

However, the A/FOI Coordinator did not have – in view of the subject matter – sufficient experience and seniority to cause adequate searches to be undertaken. In the event, she did the best she could in the circumstances she found herself in, including seeking advice both from the Department's Legal and Legislative section and from the FOI Coordinator on secondment.

The A/FOI Coordinator appears to have been restricted by the Director General's office protocol to the extent that she could not ask the Director General directly about the existence or otherwise of the emails but had to rely on feedback from the Director General's staff. The A/FOI Coordinator was advised on 16 April 2007, by the Manager, DGS that the Director General was sure that there wouldn't be any relevant documents and on 27 April 2007, by the Executive Officer DGS that there were none. On 16 April 2007, the Manager, DGS asked the Executive Liaison Officer to conduct

searches for documents. On 19 April 2007, the Executive Liaison Officer informed the A/FOI Coordinator of the outcome of the searches. On 19 April 2007, the Manager, DGS asked the Executive Officer to conduct further searches and, on 27 April 2007, the Executive Officer notified the A/FOI Coordinator of the results of that search. Even without the benefit of hindsight, there were ample indicators that should have pointed to the potential for conflict between the then Director General's personal interest in, and exposure to, the outcome of the FOI application, and the appropriateness of relying on his own recollection of whether the requested documents existed as the sole or main basis on which the outcome of the search relied upon.

The comments made by the Director General's staff – as set out earlier in this review – could be viewed in a number of ways but I am satisfied that they were simply expressing the understandable view of staff that it would be good not to have to deal with this particular application.

At that stage, the A/FOI Coordinator did not know what questions had been asked of the Director General as regards the existence of the requested documents or what searches had been or should be made. No approach had at that stage been made to IT to determine whether the emails could be located anywhere on the Department's IT systems.

However, prior to issuing a notice of decision, the A/FOI Coordinator contacted the FOI Coordinator who was on secondment in relation to the searches made and was advised that "*if the author of the records advises that the relevant records do not exist that should be sufficient to conclude the search ...*". Given that advice; the assurances of the Director General's staff; and her lack of seniority and relative FOI experience, it is understandable, though regrettable, that the A/FOI Coordinator did not insist on further searches or inquiries being conducted or other corroboration being sought.

In this instance, the Department's consideration of all the potential places that email records falling within the scope of the Application might be found did not occur until after the internal review process commenced. It was not a well-documented, systematic process that might have served to identify relevant documents much earlier than occurred.

Following the receipt of the notice of decision, the Applicant sought internal review. An internal reviewer is required to deal with the application 'de novo' and make a separate decision about the requested documents. An internal reviewer should (as was the case in this instance) be an officer senior to the initial decision-maker.

In this case, the Internal Reviewer ascertained what searches had been conducted and, in light of that information, properly and promptly asked IT to conduct its own searches to determine the existence or otherwise of any relevant documents.

The Internal Reviewer felt it necessary to obtain advice on the scope of the FOI process from the Department's Senior Legal Officer. Quite correctly the Senior Legal Officer identified that emails fell within the scope of documents for the purposes of the FOI Act. The Senior Legal Officer consulted the SSO. The SSO's advice referred to previous decisions of the Information Commissioner which dealt with the question of what constituted adequate searches for documents. The SSO also referred the Department to the Information Commissioner's requirement for Notices of Decision to include a description of the searches made and details of the locations searched.

In the event, the searches conducted by the IT staff on internal review, at the request of the Internal Reviewer, were successful and the nine logs and headers of the emails retained on the Department's backup tapes were located. That outcome serves to illustrate that an internal review can effectively remedy any shortcomings in the

initial FOI process, where the internal reviewer has or is perceived to have sufficient authority, experience and, as here, initiative.

### 5.3 The Notices of Decision

The Department's initial Notice of Decision was not adequate because it did not detail the searches undertaken for the requested documents in the Notice of Decision on Internal Review. Had that been done, the Applicant would have had an opportunity to request searches to be made of the Department's database and its backup systems. The published decisions of the Information Commissioner contain detailed examples of what constitutes an adequate Notice of Decision in relation to a sufficiency of search issue but the A/FOI Coordinator was not fully aware of that information.

In addition, both notices would have been improved by the Department listing those officers who had made searches or been consulted in the course of its inquiries.

Access applicants must rely on the thoroughness and integrity of the searches for records conducted by government agencies. The FOI Act does not require agencies to guarantee that their systems are infallible. Documents may not be found for a variety of reasons, including misfiling, poor record-keeping practices, unclear policies, inadequate training or the fact that they do not exist. However, where the question relates to sufficiency of search, an adequate notice of decision that explains in full what searches were carried out, and how and by whom, will enable the access applicant to understand what searches were conducted and what inquiries were made. In that way, the applicant is better equipped to determine whether or not other avenues of inquiry should be pursued in order to locate the requested document.

## 5.4 Was the decision to give edited access to the documents correct?

The Department's IT staff located nine documents which consisted of 'logs and headers' that contained the names of the senders and recipients of the emails. The question of third party consultation arose because that matter contained the names and personal details of private individuals, and the Internal Reviewer sought advice on that issue from the Senior Legal Officer. The Senior Legal Officer consulted the SSO, which correctly advised that an agency is not to give access to documents unless the agency has obtained the views of third parties as to whether the documents contain matter that is exempt under clause 3 (*personal information*) of Schedule 1 to the FOI Act. In the alternative, the Department was advised that it could seek agreement from the Applicant to accept access to the logs and headers with the information about third parties deleted, so that the deadline in place could be met. The Applicant agreed to accept access to the documents in edited form. Giving edited access in this case appears, at first sight, to have been an appropriate course of action. However, consultation with the affected third parties did not precede the deletion of the third party information.

### **Third party rights**

The FOI Act provides an exemption for 'personal information' about someone other than the applicant. Personal information is relevantly defined in the Glossary to the FOI Act as:

*"... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*

*(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*

*(b) ...".*

The privacy rights of individuals are an inherent aspect of the FOI Act. The FOI Act provides that, except in certain prescribed circumstances, personal information about individuals is exempt from disclosure unless the person concerned consents to the release of that information. There is a public interest in protecting the privacy of individuals recognised in the FOI Act and, generally speaking, it would require compelling arguments that third party information should be disclosed without the third party having been consulted or consenting to disclosure.

Under s.32(6) of the FOI Act, there is no duty to consult third parties if an agency decides to release documents with the personal information about those third parties deleted from the documents. However, in this case, by the very nature of the documents sought - that is, emails between named individuals - it was not possible for the Department to give the Applicant edited access in such a way as to avoid disclosure of the identity of those third parties.

In other words, even though the Department deleted the names of the third parties from the logs and headers, it is likely that the identity of Mr Burke and/or Mr Grill as participants in that correspondence was reasonably ascertainable from the disclosure of that information.

The proper process for consulting with third parties is set out in Part 2, Division 3 of the FOI Act. Section 32(2) provides that where a document contains personal information about a third party an agency is not to give access to the document unless the agency has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the document contains matter that is exempt under clause 3 of Schedule 1. If the third party consents to disclosure, the document can be released.

If an agency decides to release documents contrary to the views of a third party, the agency must:



- give the third party notice of its decision - including rights of review;
- defer the giving of access to the documents; and
- give the applicant written notice of decision that the third party is of the view that the documents are exempt and that access is deferred until the decision is final.

That process was not followed by the Department and no attempt appears to have been made to consult with either Mr Burke or Mr Grill before the edited logs and headers were disclosed to the Applicant. There was also no record on the Department's FOI file that consideration had been given to, or a judgement made as to, the practicability of obtaining the views of those third parties.

### **Public interest and privacy considerations**

Many of the exemption provisions in the FOI Act, including clause 3 (*personal information*) require the decision maker to apply a public interest test. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. The test operates to limit the scope of the exemption if it can be shown that the public interest lies in disclosing a document. An agency's decision is generally only made following consideration of the arguments for and against disclosure.

In this case, it was open to the Department to argue that there was a public interest in the disclosure of the logs and headers – either in full or in an edited form – pursuant to clause 3(6). Such an approach would still have required consultation with the third parties, who would then have had an opportunity to put counter arguments forward.

The public interest in protecting the privacy of the individual is recognised in the FOI Act. While the personal information exemption (clause 3) pertains to documents of an agency, the principles of privacy should also include the way in which an application is dealt with. This has implications for officers dealing with FOI applications, who should

respect the privacy of the identity of an applicant or details of an application and avoid revealing that information to third parties or to agency staff and others not directly involved in dealing with the application unless reasonably necessary in order to deal adequately with the application.

Agencies need to take a common sense approach to this issue. In some cases the work of dealing with an application necessitates revealing the identity of the applicant to other officers within the agency. However, the details revealed about the applicant should be on a need to know basis and directly relevant to the processing of the application.

In this case, the number of staff involved who did not have a direct role in processing the FOI application but who were being kept informed of the progress of the Application appears very broad. In some cases, their involvement added nothing to the process and appeared to serve no purpose other than to keep those staff informed of developments.

As noted, an internal reviewer is required to deal with the application as if it were an initial application and to make a separate and independent decision '*de novo*' about the documents. The person directed by the Principal Officer to undertake that role should be seen to have full authority in the conduct of the review and it is up to that person to obtain advice from other officers of the agency, as required.

### **5.5 Was the Application dealt with in a timely manner?**

Section 4 of the FOI Act requires agencies to assist the public to obtain access to documents and to allow access to documents to be obtained promptly.

Section 13 requires an agency to deal with the access application as soon as practicable (and, in any event before the end of the permitted period).

The permitted period to deal with an access application is 45 calendar days after the application is received. In the present case, the initial decision was finalized in 38 days, which was within the permitted statutory period.

The FOI Act requires that an internal review is to be conducted within 15 days after the application for review is lodged, or such other period as agreed between the parties. In this case, the appointment of the Internal Reviewer took six days. As a result, only nine days remained for the Internal Reviewer to conduct and finalise the review. The Department correctly sought and obtained two extensions of time from the Applicant.

In the event, the Department dealt with the application for review within the extended time agreed to by the Applicant.

Decisions on access should be made promptly and applicants informed of the outcome as soon as possible. While the Application was dealt with within the permitted period, the decision in this particular case could have been completed in a shorter time frame. It is evident that there were periods when the Application was not progressed promptly. The lack of experienced officers, the lack of a standing appropriate authority appointing an internal reviewer from the Principal Officer, and the consultation and conferring between numerous officers all contributed to the time taken for dealing with the Application being longer than it need have been.

## **6. RECOMMENDATIONS**

### **6.1 Training and Awareness**

- Appropriate levels of understanding and acceptance of FOI principles and compliance with FOI obligations should exist across the Department. There was evidence that some staff are either not fully aware of their obligations and responsibilities under FOI Act, its processes and procedures, or do not fully understand its implications.

- All officers dealing with or advising on FOI applications (including relevant legal and IT staff) should have training in dealing with the FOI process. The Office of the Information Commissioner can provide briefings to management and staff of the Department to assist in that training.
- Policies within the Department should reflect the requirements and spirit of FOI, including policy impacts of decisions by the Information Commissioner. There is a need within the Department to develop and promote awareness of, and access to, policy decisions.

### **6.2 Appointment of FOI decision-makers**

- The Department's A/Director General should appoint the holders of a number of senior offices as internal reviewers who, when required, can be directed to conduct an internal review. Those officeholders should undertake FOI training so that they become familiar with the processes, procedures, responsibilities and obligations under the FOI Act. Those appointments should be regularly reviewed.
- The A/Director General as the principal officer under the FOI Act should provide written directions to the FOI Coordinator and any internal reviewers to make decisions under the FOI Act either generally or in a particular case, pursuant to s.100 of the FOI Act. Directions should include sufficient authority to require the production of documents that are held by any officers of the agency for the purpose of dealing promptly and fully with an FOI access application.
- The A/Director General's direction to the FOI Coordinator and internal reviewer/s should be communicated to all officers of the Department so that they are aware of their obligation to produce

documents to the FOI decision-makers, to provide information and to make diligent searches.

- When dealing with an application for documents that directly involve an individual senior executive officer, an officer of sufficient seniority - preferably with experience in FOI matters - should be directed to deal with that application. In the course of identifying documents within the scope of such an application, consideration should be given by the decision-maker to require that, where appropriate, such a senior executive officer provide a statutory declaration as to the existence, identity and location of documents the subject of the access application.
- It should be clearly understood by all officers that the person directed to be the decision-maker when dealing with an FOI application is principally responsible for determining the FOI process to be undertaken, subject to and in accordance with relevant statutory requirements.

### **6.3. Application of FOI Act to electronic records**

- The Department should consider developing systems to enable the backup of all electronic documents upon receipt and rely on the FOI processes and exemptions to exclude matter that is 'personal information', which may be encompassed in that material.
- The SRO governs the retention and disposal of records within agencies. Staff should be reminded that emails and other electronically stored or recorded information may constitute 'documents' for the purposes of the FOI Act and should be managed and retained in accordance with the Department's stated record keeping policy.

The recently published SRO information sheet serves to clarify and reinforce what constitutes a "business email". However, it remains a matter for the professional judgement and decision of each email recipient as to whether any particular email is to be classified as ephemeral or as a business email and managed accordingly.

- Staff must be reminded that emails received or sent via work facilities including personal or private emails or messages are accessible by management and may be subject to FOI processes.
- Third-party products are available as add-ons to Microsoft Exchange that may serve to assist in the Department's management and retention of email messages stored in PST files. The Department should evaluate those tools if it continues to permit email storage in PST files outside the central Microsoft Exchange environment.
- Department policies and any FOI application forms designed for use by applicants seeking access to Department records, should reiterate that 'documents' include electronic media.
- The Department's proposed improvements to backup practices should incorporate a facility to remotely search a PST file which might contain records that come within the scope of an FOI application. This should occur prior to the user/controller of that PST file being made aware of the existence of the FOI application and, therefore, the fact that personal PST files might be searched.

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## APPENDIX 1

### TERMS OF REFERENCE

#### REVIEW OF FOI PROCEDURES OF THE DEPARTMENT OF HEALTH

**Background:** The Corruption and Crime Commission (the CCC) report dated 25 January 2008 on the Investigation of Alleged Misconduct concerning Dr Neale Fong, former Director General of the Department of Health recommends (recommendation 4) that

*“matters relating to the appropriateness and adequacy of the FOI processes and record-handling of the Department of Health, as detailed in [the CCC] report, be referred to the Office of the Information Commissioner and State Records Commission”.*

**Purpose:** To carry out an independent review of the appropriateness and adequacy of the FOI processes of the Department of Health, in its handling of an FOI application made on 28 March 2007 by Mr John Kime, the Chief of Staff to the Hon Paul Omodei, Leader of the Opposition, seeking correspondence, electronic or otherwise, pertaining to any matter between Dr Neale Fong, Mr Julian Grill and Mr Brian Burke, as detailed in the CCC report.

#### Criteria for review:

- Management and conduct of the Department of Health’s FOI process, and in particular as regards:
  - Impartiality
  - Confidentiality
  - Timeliness
  - Notice of decisions
  - Internal review
  - Level of assistance to applicant
- Identification of any FOI legislative policy or procedural gaps or weaknesses that inhibited attainment of the objects and intent of the FOI Act (s3 of the FOI Act) or were a barrier to the Department providing adequate assistance to the access applicant to obtain access to the documents and to allow access to the documents to be obtained promptly and at the lowest reasonable cost.

#### References:

- FOI Act and OIC policies;
- CCC Report findings;
- Department of Health FOI policies and procedures;
- FOI Standards and Performance Measures (OIC May 1998);
- Administrative Review Council Best Practice Guides for Administrative Decision Makers, August 2007 ([www.law.gov.au/arc](http://www.law.gov.au/arc)).

**Scope of review:** The review will consider the adequacy of and compliance with FOI processes and procedures within the Department of Health in relation to this application. The review will comprise

- consideration of the adequacy of the search undertaken by the Department for information falling within the terms of the application;
- adequacy of steps to assist and advise the parties;
- an examination of the processes and procedures applied in the initial decision relating to the application;
- an examination of the processes and procedures applied in the internal review of the above decision;
- consideration of the appropriateness of the Department's policies and practices supporting its FOI responsibilities including :
  - internal training;
  - agency Information Statement;
  - internal manuals;
  - evaluating performance;
  - fees and charges; and
  - discretionary disclosure (outside FOI Act).

**Review steps:**

- examination of the relevant Department of Health FOI files and records;
- interviews with FOI coordinator, Department of Health staff who participated in or contributed to the search of records, and Department of Health FOI decision makers;
- examination of statistical information relating to Department of Health FOI; and
- discussion with CCC investigatory staff and consideration of CCC transcripts of interviews relevant to the FOI issues.

**Consultation:** The Acting Director General Department of Health will be consulted on the proposed terms of reference. CCC to be provided with copy of terms of reference when settled. A draft report will be submitted to the Acting Director General for comment prior to completion of the final report. Consultation with State Records Commission will take place as required in course of review.

**Proposed timeline:** Completion before 30 June 2008

**Resources:** Information Services Manager and Advisory/Projects Officer with oversight by A/Senior Legal Officer.

**Key deliverables:** A review report. Key findings and recommendations of review report to be included in OIC 2007/08 Annual Report, provided to A/Director General Department of Health, CCC, and State Records Commission. The full report would be made available on the OIC website.

## APPENDIX 2

DEPARTMENT OF HEALTH STAFF  
WITH WHOM MEETINGS WERE HELD

Mary Adams	Senior Legal Advisor, Legal & Administrative Services
Alison Burch	A/Policy Officer, Business Unit 1
Martin Ley	A/Recordkeeping Policy Consultant, Information and Resources Services
Molly Abbott	Executive Liaison Officer, Office of the Director General
Debbie Pantany	Executive Officer, Office of the Director General
Heidi Borgas (nee McLachlan)	Administration Assistant, Royal Perth Hospital
Linda Adnyana	Manager, Director General Support
Angela Kelly	Manager, Business Unit, Director General's Division
Suzanne Hillier	A/Director, Legal & Legislative Services
Young Yoo	Manager Information Technology, Information Policy and Support
Gopal Warriar	A/Manager E-Health Policy, Information Policy and Support
Robert Holme	External Contractor, Email Administrator Information Technology
Colin Xanthis	A/Chief Information Officer, Health Information Division
Tony Hooper	FOI Coordinator, Department of Health
Caterina Amalfi	Internal Reviewer, Department of Health

## **FURTHER INFORMATION**

For any further information on the Office of the Information Commissioner's role and functions, please contact the office at:

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