



WESTERN AUSTRALIA

Office of the **Information Commissioner**

ANNUAL REPORT 2011/2012

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2.1 Resolution of complaints (External Review)

As outlined under s.65(1) of the Act, an applicant has the right to make an external review application to the Information Commissioner in respect of an agency's decision to:

- ❖ refuse access to documents;
- ❖ give access to documents;
- ❖ give access to edited copies of documents;
- ❖ refuse to deal with access applications;
- ❖ defer giving access to documents;
- ❖ apply s.28 of the Act;
- ❖ impose a charge or require the payment of a deposit; or
- ❖ not amend personal information or make a notation as requested.

During 2011/2012, as shown in Table 1 on page 63, 114 of these applications for external review (i.e. complaints) were received by the OIC (a 9% increase from the previous year) and 101 were finalised.

In addition to these requests, the Information Commissioner received 31 other applications, and finalised 32 other applications (one from a complaint lodged in 2011/12) under the Act, as follows.

- ❖ s.66(4) - request to lodge an external review application out of time: 3 of these requests were received and 4 decided, all of which were refused. The Information Commissioner has the discretionary power to accept applications out time, but each application is considered on its merits and generally only in exceptional circumstances will it be accepted.
- ❖ s.66(6) - request for external review without first applying for an internal review: 13 of these applications were received during the year, 9 of which were refused; 2 were withdrawn by the applicant; and 2 were allowed. Again, the Information Commissioner considers the reasons for the applicant making a request to circumvent the internal review process, and can allow it in exceptional circumstances.

- ❖ s.13(5) - request (by an agency) for an extension of time to deal with an access application: 5 of these applications were received and decided: 1 was allowed; 3 were refused; and 1 was withdrawn. The Information Commissioner will always expect an agency to have previously requested an extension of time from the applicant before considering granting an extension.
- ❖ s.13(4) - request (by an applicant) for a reduction in the time allowed to an agency to deal with an access application: 3 were received and all were refused.
- ❖ s.35(1) - request (by an agency) to waive the requirement to consult with third parties when processing an access application: 7 were received and of these 3 were withdrawn, 2 refused and 2 allowed.

Finally, 27 applications regarded as informal or invalid were received during the year. These include general complaints about the manner in which an agency has processed or dealt with a complainant's access application or application for amendment, but was not a

complaint about a decision of a kind set out in s.65(1) or s.65(3). If the complaint is invalid, the Information Commissioner may refer the issue to the Advice and Awareness section for follow-up with the agency, but the matter cannot be dealt with as an external review.

Further breakdown of the types of applications received and dealt with and the agencies involved can be found in tables 2 - 7 in the appendix.

Decisions of Interest 2011/2012

The following section outlines some particular decisions by the Information Commissioner during the reporting period which may be of broader interest.

Inter-governmental relations

Under clause 2 of Schedule 1 to the FOI Act, matter is exempt if its disclosure could reasonably be expected to damage relations between the Government and any other government or if its disclosure would reveal information of a confidential nature communicated in confidence to the Government (whether directly or indirectly) by any other government. The term 'other government' is defined to mean "*the government of the Commonwealth,*

another State, a Territory or a foreign country or state". The exemption is subject to a public interest test which provides that matter is not exempt if its disclosure would, on balance, be in the public interest.

This exemption has only been considered by the Commissioner in three decisions: *Re Cyclists Rights Action Group and Department of Transport* [1995] WAICmr 16; *Re Ravlich and Department of Productivity and Labour Relations* [2000] WAICmr 58; and, during this reporting period, in *Re The Wilderness Society (WA) Inc. and Department of Environment and Conservation* [2011] WAICmr 24.

Re The Wilderness Society concerned documents which contained communications between the State Government and the Commonwealth Government in relation to the proposal for a liquefied natural gas hub to process gas from the Browse Basin gas field off the State's north coast. The agency claimed the documents were exempt under clause 2(1)(b) on the basis that their disclosure would reveal information of a confidential nature communicated in confidence to the State Government by the Commonwealth Government.

Although the Commissioner was satisfied that the requirements of clause 2(1)(b) had been met, the Commissioner found that disclosure of two of three of the disputed documents would, on balance, be in the public interest. In light of evidence before the Commissioner that the Commonwealth did not object to the release of those two documents, the Commissioner did not accept the agency's claim that their disclosure would be contrary to the public interest because it would adversely affect inter-governmental cooperation. However, the Commissioner considered that it would be contrary to the public interest to disclose the remaining disputed document because there was a real possibility that such disclosure would reduce the free flow of information between governments.

Contravention of a direction of the Coroner

Re Nine Network Australia Pty Ltd and Western Australia Police [2011] WAICmr 27 concerned an application to the agency for voice recordings made from asylum seekers on board a boat which crashed onto rocks at Christmas Island in December 2010. The agency refused access to the voice recordings on the ground they were exempt under clause 5(1)(b) of Schedule 1 to the FOI Act. The

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complainant submitted that the voice recordings had been played in open court before the State Coroner on 18 May 2011 and their content published by major media outlets.

On external review, the Commissioner has the power to 'stand in the shoes' of an agency's decision-maker. Under clause 12(b) of Schedule 1 to the FOI Act, matter is exempt matter if its public disclosure would, apart from the FOI Act and any immunity of the Crown, contravene any order or direction of a person or body having power to receive evidence on oath.

On the information before him, the Commissioner considered that disclosure of the voice recordings would contravene a direction from the Coroner, who has the power to receive evidence on oath under the *Coroners Act 1996*, and found that the voice recordings were exempt under clause 12(b).

Witness statements

Under clause 3 of Schedule 1 to the FOI Act, personal information about an individual – as defined in the FOI Act – is exempt from disclosure, subject to a number of limitations. One of those limitations is where disclosure would, on balance, be in the public interest.

In *Re Mackenzie and Western Australia Police* [2011] WAICmr 28, the complainant, a prisoner convicted of wilful murder, applied to the agency for certain documents relating to the murder investigation, including witness statements. The agency refused access to the witness statements on the ground they were exempt under clause 3(1).

The Commissioner found that those witness statements were *prima facie* exempt under clause 3(1) because they would, if disclosed, reveal personal information about private individuals, which was inextricably interwoven with personal information about the complainant.

The complainant claimed, among other things, that he needed the documents to prove his innocence. The Commissioner accepted that where a complainant's liberty is at stake and there is evidence that the disclosure of disputed documents might assist in proving that individual's innocence, the public interest in disclosure would be a strong one. However, in the present case, it was not evident that the disclosure of the documents would assist the complainant to establish that he did not commit the murder for which he was convicted or to obtain any legal remedy.

The Commissioner recognised that under the FOI Act there is a strong public interest in maintaining personal privacy and that none of the third parties referred to in the documents had consented to the disclosure of their personal information, some of which was sensitive and confronting. While accepting that the disclosure of the third parties' personal information was necessary for the purpose of the police investigation and court processes involving the complainant, the Commissioner considered that the third parties should now have a reasonable expectation that no further disclosure of their personal information would occur unless required by law or subsequent legal proceedings and that there was no demonstrable benefit to the public in making their statements public.

In weighing the competing public interests, the Commissioner considered that the public interests in non-disclosure outweighed those favouring disclosure and found the witness statements exempt under clause 3(1).

Legal professional privilege – improper purpose

Clause 7(1) of Schedule 1 to the FOI Act provides that matter is exempt matter if it

would be privileged from production in legal proceedings on the ground of legal professional privilege.

In *Re Duggan and Department of Agriculture and Food* [2011] WAICmr 31, the agency refused the complainant access under clause 7(1) to certain documents which related to legal action the agency had commenced against him. The complainant claimed that the disputed documents were not exempt as claimed because they were communications made in furtherance of an unlawful or improper purpose and consequently legal professional privilege never attached to them.

On the information before him, the Commissioner was satisfied that the disputed documents would be *prima facie* privileged from production in legal proceedings. The Commissioner took the view that where documents held by an agency are *prima facie* privileged, the decision of the Supreme Court of Western Australia in *Department of Housing and Works v Bowden* [2005] WASC 123 constrains him from considering further matters, including a consideration of whether the communication was made for an improper purpose.

In any event, the Commissioner noted that, on the information before him, he was not persuaded that the disputed documents were prepared in furtherance of any illegal or improper activity or purpose, for the detailed reasons given in his decision. Accordingly, the Commissioner found the disputed documents exempt under clause 7(1).

Contempt of court

In *Re West Australian Newspapers Limited and Department of Mines and Petroleum* [2011] WAICmr 37, the complainant had applied to the agency for the investigation report into the pipeline explosion that occurred on Varanus Island on 3 June 2008, entitled “*Offshore Petroleum Safety Regulation Varanus Island Incident Investigation*” (‘the Report’). The agency refused access to the Report under clause 12(a) of Schedule 1 to the FOI Act, which provides that matter is exempt matter if its public disclosure would, apart from this Act and any immunity of the Crown, be in contempt of court.

The Commissioner was satisfied that the disclosure of the Report to the complainant would be in contempt of court in that its disclosure would be in

contravention of an undertaking which the Minister for Mines and Petroleum (‘the Minister’) had given to the Supreme Court and could, in addition, prejudice the then current prosecution of Apache Northwest Pty Ltd and Apache Energy Limited (‘Apache’). Accordingly, the Commissioner found that the Report was exempt under clause 12(a)¹.

Travel expense claims of a local government councillor

Re "K" and City of Canning and "L" [2012] WAICmr 3 involved documents relating to the travel expense claims of a local government councillor.

The Commissioner considered that some information in the documents - the name of the councillor and the references to the councillor’s attendances at various places and events in the course of performing functional duties as an elected member – consisted of prescribed details about the

¹ After fulfilling the undertaking to the Court “*not to release the Report to any member of the public without first affording Apache a reasonable opportunity to be heard in relation to the contents of the Report*”, the Minister subsequently tabled the Report in Parliament on 24 May 2012.

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councillor which are not exempt under clause 3(1) because of the application of the limit on exemption in clause 3(3).

The Commissioner found that information consisting of the travel expenses claimed by the councillor was not exempt under clause 3(1) because disclosure would, on balance, be in the public interest. The Commissioner considered that the details of travel and the amount claimed in respect of the travel was not personal or private information. The Commissioner deemed it desirable for public officers to be accountable for the expenditure of public funds and that the provision of information about the travel expenses of the councillor would assist in informing the public as to how ratepayer funds are distributed.

In balancing the competing public interests, the Commissioner was of the view that the public interests in the disclosure of that information outweighed any right to privacy in this case.

Infringing the privileges of Parliament

In *Re Saffioti and Minister for Transport; Housing* [2012] WAICmr 10, the Commissioner found documents, which consisted of contentious issues

briefing notes and emails sent internally between the Minister for Transport's staff and emails from those staff to staff at the offices of the Premier and other Ministers, exempt under clause 12(c) of Schedule 1 to the FOI Act.

Clause 12(c) provides, in brief, that matter is exempt matter if its public disclosure would infringe the privileges of Parliament. The Commissioner noted that clause 12(c) is an absolute exemption designed to protect parliamentary privilege.

The Commissioner looked at the meaning of 'public disclosure' in clause 12(c) and considered that only intentional and general waiver of parliamentary privilege may be taken into account when applying clause 12(c). The Commissioner considered the meaning of the terms 'the privileges of Parliament' and 'infringe the privileges of Parliament'.

The Commissioner accepted that where information is directly referable to 'proceedings in Parliament', because documents have been prepared for the purpose of, or incidental to, the transacting of parliamentary business, parliamentary

privilege attaches to those documents and they may be brought within the exemption in clause 12(c).

In considering the meaning of 'infringe', the Commissioner had regard to the plain meaning of that word and was of the view that clause 12(c) requires him to determine whether the public disclosure of the disputed matter would encroach or trespass upon the privileges of Parliament.

In the circumstances of this case, the Commissioner was satisfied that the public disclosure of the disputed matter would infringe the privileges of Parliament because Parliament had not authorised its public disclosure. Consequently, disclosure would infringe upon Parliament's power to control the publication of documents and information incidental to transacting the business of the Legislative Assembly. Accordingly, the Commissioner found the disputed matter exempt under clause 12(c).

2.2 Advice and awareness

The *Advice and Awareness* team provides members of the public and agencies with assistance in exercising their respective rights and obligations under the Act. Many potential disputes are resolved informally with the assistance of the OIC.

The OIC also encourages agencies to develop, promulgate and implement policies and procedures dealing with information disclosure. Such policies can make a positive contribution to achieving the objects of the FOI Act.

All members of the OIC contribute to the advice and awareness function, including through assisting in the delivery of training courses, workshops, briefings, responding to queries and maintenance of statistical data to assist in reporting to Parliament.

Training courses and briefings

The OIC is proactive in raising awareness and understanding of the procedures and processes prescribed by the Act. Apart from requests received for training or assistance, public sector needs are identified from a survey of agencies. Due to staff turnover in agencies, there is a periodic need for new agency staff to be briefed on the FOI process and agencies'

obligations. This is done by conducting workshops, special forums, briefings, seminars or presentations for FOI Coordinators and decision-makers. These are conducted on an interactive basis, allowing for immediate response to questions and clarification of issues concerning FOI procedures and practices.

The OIC provides speakers in response to invitations from organisations requiring an explanation of the FOI process. A number of formal briefings, presentations and training sessions were conducted throughout the year under review. Briefings are tailored in each case to meet the needs of applicants or agencies.

The Legal Practice Board of Western Australia recognises the OIC as a QA Provider for the purposes of the *Legal Profession Rules 2009*. Accordingly, legal practitioners may claim CPD points for attendance at training provided by the OIC as outlined on the OIC website.

A summary of training courses and briefings delivered during the reporting period is shown in Table 8 on page 76. A summary of attendees at these events is shown in Table 9 on page 77.

FOI coordinators workshops

The OIC delivers intensive workshops to agencies at no charge. Eight full-day FOI coordinators workshops were delivered for agencies in metropolitan and regional areas during the year. The workshops introduce participants to the FOI legislation and the requirements which must be observed when dealing with an FOI application. Each session covers requests for information and the process to follow; exemptions; third party consultation; application fees and charges; notices of decision; and the role of the Commissioner. Participants have the opportunity to raise issues of concern and have the process explained to them in a practical way. Participants meet staff of the OIC who can subsequently be contacted should they require assistance when dealing with FOI requests. A comprehensive manual is provided to each participant at the course for future reference.

A benefit of the shared resources arising from co-location with other accountability agencies is that OIC was able to host the majority of the FOI coordinators workshops in 2011/12 at its own premises. Feedback from participants who attended the workshops was very positive.

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Decision-makers forums

The half-day decision-makers forum assists staff in agencies, including senior managers, to act as the decision-maker in respect of FOI applications or requests for internal review. It covers the options available to agencies when responding to large applications; assisting an applicant to re-define the scope of an application; refusing to deal with an application; considering exemptions; applying the public interest test; preparing a notice of decision that complies with the Act; understanding the internal and external review processes; and making decisions. Attendees also establish a relationship with staff of the OIC who may be contacted for advice in the future, which is especially useful for those agencies that do not receive many applications. Five decision-makers forums were conducted in 2011/12.

Regional awareness program

Regional visits offer the opportunity to raise public and agency awareness of FOI procedures and processes to improve decision-making.

On 18 June 2012, OIC presented two briefing sessions to staff of the Western Australian Country Health Service via video-link which covered country and

regional hospitals. Video-conferencing is an effective and efficient way to deliver an interactive FOI briefing session to a number of officers at country hospitals and remote area health services.

OIC conducted a comprehensive FOI briefing session for officers of the Shire of Chittering on 11 April 2012.

The Regional Awareness Program will continue into next year with a visit to the Pilbara in August 2012. This will include seminars for community groups, members of the public and regionally-based public sector agencies from State and local government.

Web site and electronic communications

The OIC web site (www.foi.wa.gov.au) contains extensive information about the FOI process. It is structured into sections including: *About FOI* which provides assistance with the objects of the Act including *Frequently Asked Questions (FAQs)*, guides to the *FOI process* and some of the most frequently cited exemption clauses; *Publications* which contains links to the Act and Regulations, annual reports, brochures and articles giving guidance on the FOI process; and *Decisions* which contains copies of all

formal decisions made on complaints, including links to appeal decisions of the Supreme Court.

The web site allows searches of published decisions to be conducted in a variety of ways, such as: searching by agency or complainant name; by exemption clause; by section of the Act; or by catchword. This is a valuable resource for agencies and members of the public who may be researching the interpretation given to particular exemptions and sections of the Act. Such ready access to precedents contributes to a higher level of understanding and application of the legislation by decision-makers.

The section entitled *Training* contains the latest news and training information available and a facility to register for training courses. The *Miscellaneous* section provides ancillary information, such as our contact details and feedback facilities. There are also links to other related web sites.

The patronage of the web site remained generally consistent with that experienced in previous years. There was an average of 10,337 separate visits per month recorded with each visitor, on average, accessing two web pages per visit. Visitors were less

prevalent in the earlier months of the year with only 8,000 - 9,000 visitors increasing to 13,415 visitors in May 2012, dropping slightly to 12,476 in June 2012. Visitors were recorded as having spent an average of approximately 7 minutes per visit compared with an average of approximately 9 minutes per visit in 2010/11. As in previous years the page most frequented, apart from the home page, was that describing the FOI process. Other pages frequently accessed were those listing reports and the page showing our training schedule.

Telephone enquiries

There were 1,401 telephone enquiries received during the year (1,627 in 2010/11). Over 56% of telephone enquiries received (59% in 2010/11) were from members of the public seeking advice on how to make an application or to enquire about or confirm their review rights. The balance was from officers of State government (32%) and local government (11%) agencies seeking assistance in dealing with access applications or advice regarding other statutory obligations under the Act.

Written enquiries

Written requests for advice and misdirected access applications are dealt with almost exclusively by members of the *Advice and Awareness* team. The average turnaround time for responses to written enquiries of this nature is two days. These matters are separately identified and reported on as part of the *Advice and Awareness* output.

There were 224 written enquiries for advice and assistance received and dealt with during the year. The written enquiries were received by letter and by email. 29 of these were misdirected access applications. That is, they were applications which should have been sent to the agency holding the documents sought and not to this office. As in past years, the agencies the subject of the greatest number of misdirected applications were the Western Australia Police (11) and the Department of Corrective Services (6).

Written enquiries, including misdirected applications, resulted in advice being given to the correspondent as to the proper procedures to be followed or other matters relating to the administration of the Act. In some cases, where the enquiry was from an applicant, enquiries were also made with the agency concerned to ascertain the

status of the application to assist the office in responding helpfully to the applicant and, if necessary, advice was also given to the agency in those cases.

Table 10 on page 78 shows a summary of applications that were mistakenly directed to the OIC instead of to the agency holding the documents.

Of the remaining written enquiries, 182 were requests for advice concerning applications made under the FOI Act and a further 13 dealt with written advice dealing with other matters.

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2.3 Administration

The Commissioner's statutory function under the Act necessitates the delivery of a range of services to the public, agencies and Parliament, including:

- ❖ complaint resolution;
- ❖ giving advice about the Act and procedures;
- ❖ the publication of formal decisions on complaints;
- ❖ the distribution of awareness raising and educational material;
- ❖ talks and information sessions for community groups;
- ❖ a free call telephone line for WA country callers;
- ❖ a web site located at:
<http://www.foi.wa.gov.au>;
- ❖ a telephone advisory service;
- ❖ FOI training sessions;
- ❖ specifically tailored meetings or advisory sessions for agencies; and
- ❖ providing an annual report on the workings of the legislation.

The OIC has a Customer Service Charter and Code of Conduct, which all staff are required to observe. Copies are available on request.

Performance standards have been established to ensure that all staff undertake their duties in a manner that is a credit to the professional and independent status of the OIC