

Office of the Information Commissioner (Western Australia) — Annual Report (1995–96)

In the Annual Report 1995–96 of the Western Australian Information Commissioner, the Commissioner makes note of certain important publications and reports which were released during 1995–96, and which had both direct and indirect implications for the administration of FoI in Western Australia. These included the Western Australian Commission on Government Report, the Report of the Australian Law Reform Commission — Open Government: A Review of the Federal Freedom of Information Act 1982, and the release of the Public Sector Code of Ethics by the Public Sector Standards Commissioner.

FoI 'snapshots'

The Commissioner highlights some notable occurrences during the year that illustrated various aspects of FoI and its operation in WA. Some of these were:

discussions with the Medical Board of Western Australia about the number of complaints received from applicants involving refusals by the Board to make documents available under FoI;

Ministers seeking information on FoI applications, of which the Commissioner was concerned with privacy issues related to FoI applicants;

a meeting with the Minister for Planning, and the somewhat interesting behaviour displayed by him towards the Commissioner;

comments made by a member in the Legislative Assembly about the operation of FoI and the Information Commissioners' Office;

proposals for amendment to the *Freedom of Information Act 1992 (WA)*, which occurred without prior notification or consultation with the Information Commissioners Office. A protocol has since been established for an appropriate consultation process.

Consultation about proposed Amendments to the FoI Act

The Commissioner outlines the circumstances relevant to whether an agency should be granted 'exempt' status from the operation of the *FoI Act*. These are:

the type of information that is held by the agency;
whether the existing exemptions are insufficient to protect that type of information from disclosure;
the nature of the public interest considerations at stake;

whether there has, in fact, been any demonstrated need for absolute protection for that type of information.

The Commissioner noted that only the 'operational' functions of the existing exempt agencies should be immune to scrutiny from FoI legislation, and that information about the normal administrative functions of those agencies should not be exempt from the Act.

The Commissioner also discusses the approaches made to the Office in seeking her comment in respect of proposals to create further exemptions for particular agencies (ie the Minister for Commerce and Trade, the Police Force (Witness Protection Unit), and Health Services (Conciliation and Review) Bill.

Emerging FoI Issues

The Commissioner notes the following emerging FoI issues:

- *The definition of 'agency' for FoI purposes.* A number of requests for external review have concerned the meaning of 'agency'. While the term is defined in the Act, it remains to be seen whether an incorporated body under the *Associations Incorporation Act 1987* is sufficient to fulfil the definition of 'public body'.
- *FoI and corporatisation.* The implications of FoI on agencies or parts of government agencies that are increasingly being privatised is unclear.
- *FoI and contracting out of government services.* In the Commissioner's opinion there is a need for any outsourcing arrangements to contain explicit reference to access rights under FoI and to address the issue of ownership of relevant records
- *FoI and privacy.* While the Commissioner endorses the need for privacy legislation, it is her opinion that the access and amendment provisions in the *FoI Act*, so far as they relate to personal information, should be repealed and re-enacted in a Privacy Act.

Legislative change during 1995–96

The Commissioner discusses the six minor amendments that were made to the Act during the year. Two of these were: deleting the Bank of Western Australia from, and adding the 'Witness Security Unit' to, the list of exempt agencies in Schedule 2 of the Act.

Recommended amendments

The Commissioner discusses a number of procedural amendments which she considers necessary to overcome practical difficulties and to assist the objectives and the workings of the *FoI Act*. Some of these include:

- *Section 32 — consultation with third parties about documents containing personal information.* Clause 3, Schedule 1 provides an exemption for matter that would reveal information about an individual other than the applicant. However, prescribed details relating to the officer of an agency or a person who has performed services for an agency under contract are not exempt by virtue of subclauses 3(3) and (4). Section 32 provides that an agency is not to give access to a document containing information about a third party unless it has taken steps as reasonably practicable to obtain the views of that party. The Commissioner considers that an amendment is necessary to remove this obligation to consult with respect to subclauses 3(3) and (4) as it is quite clear that such details are not exempt in the first place.
- *Section 65 — grounds for complaint.* The Commissioner suggests that an additional ground for complaint against an agency's decision is required, as the present provision is unclear with respect to appeal rights. It is recommended that s 65 be amended so that a complaint may be made to the Information Commissioner about an agency's decision as to the form of access to be given. It is predicted that this will cater for situations where, for example, a person has

requested copies of documents, but the agency has only agreed to allow inspection of the documents.

Section 82 — secrecy. At present it is feasible that neither the Information Commissioner, nor the Information Commissioner's staff could avoid a court order, subpoena or a search warrant requiring the production of documents obtained under the *Fol Act*. It is recommended that s.82 be amended to overcome this problem in similar terms to s.30(4) of the *Parliamentary Commissioner Act 1971*, which ensures that neither the Parliamentary Commissioner nor his staff may be called to give evidence or be required to produce any document in court, in respect of any matter coming to his knowledge in the exercise of his functions under the Act.

Section 97 — information statements and internal manuals be made available. It is recommended that s.97 be amended to give the Information Commissioner discretion to: require an agency to submit an information statement to the Information Commissioner, if an agency fails to publish it in accordance with the requirements of the Act; evaluate information statements to ensure they meet the minimum requirements of s.94 of the Act; recommend to the Chief Executive Officer (CEO) of an agency amendments to information statements, which must be given effect by the CEO.

Section 31. Section 31 of the *Fol Act* enables an agency to 'neither confirm or deny' the existence of documents containing matter which is considered exempt matter under clauses 1, 2 or 5 of Schedule 1 to the *Fol Act*. The discretion to use the response arises in the following two situations. The first situation is when a document requested by an applicant actually exists in an agency, but that it contains matter which is exempt under clauses 1, 2 or 5 of Schedule 1. The second situation is that a document requested by an applicant does not exist, but would if it existed, contain exempt matter under those clauses. The Information Commissioner recommends that it would make for fairer external review, if the Information Commission were empowered to decide to inform an applicant of the existence of the requested document (after appropriate investigation) and proceed with the external review in the normal way to determine whether the document contains the exempt matter.

Fol activity during the year

Under s.111(3) of the *Fol Act*, agencies are required to provide the Information Commissioner with information about their Fol activity during the year, in order that the Information Commissioner may prepare a report to Parliament on the number of applications received and dealt with during the year and the various outcomes of those applications. This section of the Report contains much statistical data relating to the applications received by agencies, some of which can be summarised as follows:

over 4341 Fol requests were received by agencies in Western Australia, representing a 23% increase in the number of applications reported by agencies during the previous year.

the majority of applications sought access to personal information (approx 77%) consistent with the proportion of personal to non-personal information over the previous years.

the Police Force of Western Australia received the third highest number of applications in total and the highest number of applications for non-personal information.

- consistent with previous years, 13 of the top 20 requested agencies were health related.
- 38 agencies reported a total of 111 Fol applications from the media, accounting for 2.5% of all applications received by agencies.
- access in full to the information requested was provided in the majority (73%) of applications made to agencies, in part attributable to the high proportion of applications for personal information received by agencies.
- with regard to access to non-personal information, access was provided in full for 45% of all applications, access to edited documents for 36% of applications and access was refused in 17% of applications. Access in some form was still provided for 81% of applications.
- the personal information exemption was the most frequently cited reason for refusing access to applicants. It is likely that agencies have used this exemption in order to protect the privacy of individuals, other than the applicant, who are identified in the document.
- a total of \$20,205 in application fees was collected by agencies for applications involving non-personal requests (the application fee for non-personal information was \$30).
- of the charges calculated by agencies, a total of \$7179 was waived and \$23,137 was actually collected.
- there were 213 requests for internal review of access decisions reported as having been received by agencies, representing approximately 5% of decisions made about access to agencies.
- internal review led to the original decision being confirmed in 67% of cases, and either varied or reversed in approximately 29% of cases.
- there were 214 applications for external review of decisions of agencies, representing approximately 5% of decisions made by the agencies.
- almost 60% of applications for review to the Information Commissioner were resolved through conciliation.
- during 1995–96 there were seven appeals filed in the Supreme Court on questions of law arising out of formal decisions of the Information Commissioner.

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