

## FREEDOM OF INFORMATION: LESSONS AND CHALLENGES IN WESTERN AUSTRALIA

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Freedom of information is now considered an essential element of most robust democracies. This is certainly the case in Western Australia, where the *Freedom of Information Act 1992* (WA) (*the FOI Act*) has been in operation since November 1993; during this time much information has been disclosed to individuals, the media, Parliament and organisations as a result of over 100,000 access requests.

This paper provides a brief overview of the Western Australian FOI legislation and the role of the Information Commissioner. It also highlights some of the current challenges.

### **The Western Australian legislation**

On 28 November 1991, as part of his second reading speech to the Western Australian Parliament, the then Minister for Justice said:

Freedom of Information legislation represents a fundamental reform of the relationship between state and local governments and the communities they serve. It enshrines in legislation rights which are at the heart of the democratic processes... FOI strengthens democracy, promotes open discussion of public affairs, ensures the community is kept informed of the operations of government and opens government performance to informed and rational debate.

Those statements are reflected in the *FOI Act*, which has as its objects:

- to enable the public to participate more effectively in governing the State; and
- to make the persons and bodies that are responsible for State and local government more accountable to the public.

In Western Australia, these objects are given effect in three ways. The first is by providing a general right of access to government documents, with some exceptions, and a corresponding duty to provide detailed reasons when access is denied. The second is a requirement that agencies proactively publish certain information about their structure, functions, operations, policies and practices. Finally, the *FOI Act* provides a means for members of the public to access and, where appropriate, amend personal information about themselves which is held by government agencies.

The right of access under the *FOI Act* applies to documents of agencies, including Ministers, public bodies and offices. The latter two are broadly defined and include State government departments, local governments, boards and commissions, public universities and colleges, public hospitals and certain types of contractors. A small number of agencies are exempt from the Act, including Parliament, the Corruption and Crime Commission, the Auditor General and the Prisoners Review Board.

The *FOI Act* also provides limited exemptions for certain types of documents.

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In order to apply for information under the *FOI Act*, a person need only put his/her request in writing and lodge that request with the agency that they believe holds the information they want. In most cases people will easily be able to identify which agency holds that information. However, even if they approach the wrong agency, the agency which receives the application has a duty to try to identify the correct one and transfer the application to that agency either in whole or in part.

Having received the application, the agency must deal with it as soon as practicable, but in any event within 45 days. This means that the agency must locate the documents and make a decision as to access. If the agency decides to claim an exemption for any part of the document, it must provide a detailed written explanation to the applicant as to the reasons for this decision. The onus is on the agency to justify the exemption claim. The applicant does not need to give reasons for seeking access.

If the applicant does not accept the agency's decision, he/she has, in most cases, the right to request an internal review. This means that someone who is not subordinate to the original decision maker goes through the process again. The reviewer may decide that the first decision was appropriate, or may vary or overturn it. The agency has 15 days to complete the internal review and provide a decision and reasons for the decision to the applicant.

### **Exemptions for certain types of information**

Certain types of information are exempt from the general right of access. These exemptions are outlined in Schedule 1 of the *FOI Act*. The most frequently applied exemptions are outlined below.

#### ***Personal information***

The *FOI Act* aims to strike a balance between access to information on the one hand, and the protection of personal information on the other. To this end, information is exempt if its disclosure would reveal personal information about an individual other than the applicant, unless disclosure is in the public interest or the individual consents. Certain prescribed information about government officers and contractors is not exempt from disclosure under this exemption.

Personal information is defined broadly in the Glossary of the *FOI Act* and includes information such as a person's name, address and telephone number (see, *Re Cumming and City of Stirling* [2001] WAICmr 3).

A recent case which explored the issue of the public interest involved a person who was undergoing mental health treatment in a public hospital. After leaving the hospital, she travelled overseas and committed suicide. The Chief Psychiatrist of Western Australia undertook an investigation into her treatment and prepared a report. The deceased patient's family applied to the Department of Health for a copy of this report but was refused. On appeal, the Commissioner found that disclosure of the report to the family would certainly disclose personal information about the deceased. However in this case it was clear that there was some concern about the operation of public health services. The Commissioner considered that it was in the public interest that there should be public awareness of those matters to facilitate the accountability of the public sector for what occurred; to keep the community informed; and to promote discussion of public affairs. As a result, the Commissioner ordered disclosure of the report (see, *Re "U" and Department of Health* [2010] WAICmr 3).

### ***Commercial or business information***

The *FOI Act* also contains exemptions for commercial or business information. This exemption is much narrower than is sometimes believed; it is certainly not sufficient to show that information is commercial in nature in order to show that it falls under this exemption. In addition, this exemption does not apply to commercial or business information of an agency; however, such information may be exempt under other provisions of the *FOI Act*.

In the first instance, matter is exempt if its disclosure would reveal trade secrets of a person. Mere assertion that certain information is a trade secret is insufficient, some probative material needs to be provided (see, *Re Greg Rowe and Associates and Minister for Planning and Anor* [2001] WAICmr 4). Historically this exemption is rarely claimed or made out.

Matter is also exempt if its disclosure would reveal information (other than trade secrets) that has a commercial value, which value can reasonably be expected to be diminished by disclosure. However the mere fact that money has been expended in creating or collating information does not mean that the information has commercial value (see, *Re Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation and Department of Indigenous Affairs and Mineralogy P/L* [2008] WAICmr 53). Owen J of the Supreme Court of Western Australia noted that an argument that matter is exempt must be “based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker” (see, *Manly v Ministry of the Premier and Cabinet* (1995) 14 WAR 550).

Disclosure to an access applicant under the *FOI Act* is, in effect, disclosure to the whole world, including the business competitors of the third party: see the comments of Woodward J in *News Corporation v National Companies and Securities Commission* (1984) 57 ALR 350 at 559. This needs to be taken into account in determining whether any commercial value in information could reasonably be expected to be destroyed or diminished by disclosure.

Finally, matter is exempt if its disclosure would reveal information (other than trade secrets or information referred to in the preceding paragraphs) about the business, professional, commercial or financial affairs of a person, and disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of information of that kind to the Government or to an agency. This last instance of exemption does not apply if disclosure would be in the public interest.

### ***Cabinet and Executive Council***

Matter is exempt if its disclosure would reveal the deliberations or decisions of an Executive body, defined as Cabinet and its committees, as well as the Executive Council. The exemption is limited and does not protect purely factual, statistical, scientific or technical information, unless disclosure of such information would reveal any deliberation or decision of an Executive body which has not yet been published. Information is also not protected from disclosure merely because it was *submitted* to an Executive body, unless it was originally brought into existence for the *purpose* of such a submission.

### ***Deliberative processes***

Under the *FOI Act*, matter is exempt if its disclosure would reveal certain information, consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency. However, this exemption is also subject to a public interest test. In the case of this exemption, the onus is on the party seeking to resist disclosure to show that disclosure would be *contrary* to the public interest.

### ***Confidential communications***

Information is exempt if its disclosure would be a breach of confidence for which a legal remedy could be obtained. The previous Information Commissioner was of the view that this exemption extends only to disclosure which would give rise to a cause of action for breach of a common law obligation of confidence, such as a contractual obligation of confidence, and not to disclosure which would give rise to a cause of action for breach of an *equitable* duty of confidence only (see *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Rail Technology International Pty Ltd* [1997] WAICmr 29).

In addition, matter is exempt matter if its disclosure would reveal information of a confidential nature obtained in confidence and could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. However this second exemption for confidential communications is subject to a public interest test.

### **The role of the Information Commissioner**

A person aggrieved by a decision of an agency has the right to appeal to the Information Commissioner for external review of the agency's decision. This is a full merits review and is usually only available following internal review by the agency. The Commissioner can confirm, vary or set aside the agency's decision, the Commissioner's decisions are legally binding. There is a limited right of appeal to the Supreme Court on questions of law arising out of the Commissioner's decisions. To ensure the integrity of the external review process, the Information Commissioner is appointed by the Governor and reports directly to Parliament.

In dealing with a complaint, the Information Commissioner will call for the documents and review the agency's decision. This may often involve requesting the agency to provide supporting evidence.

The Commissioner has the power to obtain information and documents from, and compel attendance by, any person the Commissioner believes has information relevant to a complaint. The Commissioner may administer an oath or affirmation to a person who is so required to attend before the Commissioner, and may examine such a person on oath or affirmation. Failure to comply with a requirement of the Commissioner in this context is an offence which attracts a penalty.

The Commissioner's decisions are published at <http://www.foi.wa.gov.au> and at <http://www.austlii.edu.au/au/cases/wa/WAICmr/>.

### **Offences and protections under the *Freedom of Information Act***

The *FOI Act* creates a number of offences. Under section 109 a person who, in order to gain access to a document containing third party information, knowingly misleads or deceives, commits an offence. Under section 110, a person who conceals, destroys or disposes of a document, or part of a document, to prevent an agency being able to give access to that document, commits an offence. Each of these offences carries a penalty.

To prevent officers of agencies from unduly avoiding disclosure of documents for fear of prosecution, the *FOI Act* also provides a number of protections. If a person acting in good faith decides to grant access to a document, believing that the *FOI Act* permits or requires the decision to be made, then an action for defamation or breach of confidence does not lie against the Crown, an agency or an officer of an agency merely because of the making of the decision or the giving of access - s.104(1)(a). In similar circumstances, an action for

defamation or breach of confidence in respect of any publication involved in, or resulting from, the giving of access does not lie against the author of the document or any other person by reason of the author or other person having supplied the document to an agency - s.104(1)(b).

If access to a document is given under a decision under the *FOI Act*, and the person who makes the decision believes in good faith when making the decision that the *FOI Act* permits or requires the decision to be made, neither the person who makes the decision nor any other person concerned in giving access to the document is guilty of an offence merely because of the making of the decision or the giving of access – s.105.

Officers also enjoy certain protections against personal liability. Section 106 provides that a matter or thing done by the principal officer of an agency or a person acting under the direction of an agency or the principal officer does not subject the principal officer or any person so acting personally to any action, liability, claim or demand so long as the matter or thing was done in good faith for the purposes of giving effect to the *FOI Act*. Further, section 107 specifically provides that an action does not lie against the Crown, an agency or an officer of an agency merely because of a failure to comply with an obligation to consult with a third party prior to releasing documents about them unless the person responsible for the failure is shown to have acted with malice and without reasonable cause.

### **Challenges and lessons learnt**

The *FOI Act* has been in force in Western Australia for 17 years and is now considered an important safeguard of democracy. In its first full year of operation 2,128 applications for documents were made under the Act. This annual figure has risen steadily to 12,336 applications in 2008/09. Each year there are approximately 100 appeals to the Information Commissioner, a figure which has remained relatively stable except for two notable spikes following elections which resulted in a change of government.

The single biggest current challenge to ensuring administrative justice under the *FOI Act* is the time taken to resolve disputes before the Commissioner. In the financial year 2008/09, 181 appeals were received by the Commissioner. This was an increase of around 80% on the previous year, which was entirely due to appeals from Members of Parliament in relation to *FOI* decisions made by Ministers. These appeals increased from 4 in 2007/08 to 80 in 2008-09. An increase of this magnitude predictably resulted in an enormous backlog of appeals which will take some years to clear. Already the average time of matters before the Commissioner has increased from about 50 days to over 200 days, since the last election.

Other aspects of freedom of information in Western Australia are generally considered to work well. In this author's opinion, this is due to a number of reasons. The primary reason is that the legislation provides that all documents are accessible unless they are exempt, and this is backed up by strong enforcement mechanisms, which include the Information Commissioner's powers to obtain information and make legally binding decisions. It is very likely that if the Commissioner's decisions were not binding or could be appealed further, complex disputes would take longer to be resolved. A counterbalance to this is that the Information Commissioner is expected to confine himself to making legally correct decisions on appeal and should not on his own initiative get involved in broader issues of commenting on policy or general government administration unless they specifically relate to his statutory duties.

A key lesson learnt is that it is important for officers in government agencies to receive training in the administration of the *FOI Act*. In Western Australia this responsibility is given to the Information Commissioner. This has the considerable advantage of allowing the Commissioner to target training at those agencies and to those topics which he considers

require the most attention. It also allows him to ensure that his most current decisions on appeal are reflected in the training content. A disadvantage is that it sometimes places the Commissioner in a situation of conflict where his office has previously provided advice to an agency on a particular matter which then comes before the Commissioner on appeal. This situation is currently managed by maintaining a clear division between the Commissioner's advisory staff and his investigations staff, and also by aiming to limit the advice to matters of general interpretation of the *FOI Act*, rather than providing a definitive opinion on whether a particular document is exempt or not.

One of the challenges faced in delivering training and advice to agencies is the geographical size of Western Australia. The Commissioner's staff often travel great distances to provide training to agencies, ensuring that frontline staff are able to help members of the public who wish to access government documents. Those staff are the first gatekeepers of government information and their level of skill and knowledge makes an enormous difference to the effectiveness of the freedom of information process.

The Information Commissioner is currently developing a communications plan which will make much greater use of technology to deliver training and advice remotely - through the Internet and by the use of teleconferencing.

Another positive aspect of the *FOI Act* is the requirement for all agencies (there are over 300 in Western Australia) to provide detailed information to the Information Commissioner every year by way of an online survey. Agencies need to report on the number of FOI applications received, whether information was given out in full, in part or not at all, which exemption clauses were used to justify withholding of information, and the amount of fees and charges which were collected. The Information Commissioner then reports the full detail of this survey to Parliament. This allows the Commissioner and Parliament to identify trends. For example, in 2008-2009, 63% of applications resulted in full disclosure, 29% resulted in limited (edited) disclosure and 8% resulted in no disclosure.

While the current Commissioner has not found any evidence of deliberate breaches of the *FOI Act* by agencies, there is a culture among many (perhaps most) agencies that it is "safer" not to disclose information, especially if there is any doubt as to whether it is exempt. The *FOI Act* was intended to be a last resort, to be used in those cases where an agency would not make information available in response to an informal request. However, since the introduction of the *FOI Act*, some agencies will not disclose any information without a formal FOI request. This is disappointing.

Another area in which improvement is needed is in agency interaction with the applicant. Some agencies, on receiving an application, will immediately enter "process mode" and undertake searches and assess the resultant documents. This may be appropriate for simple applications. For larger or more complex applications, it is often better for agencies to talk to the access applicant to find out exactly what they are seeking. This is particularly important where an application is very broad or poorly defined, and where some documents are likely to be exempt. Early discussion with the applicant can result in finding a solution which gets the applicant the documents they want much more quickly; for example, by agreeing to deal with certain documents first, or agreeing to delete some part of documents to avoid lengthy consultation processes.

### **Potential future developments in Western Australia**

Western Australia was one of the last Australian jurisdictions to pass freedom of information legislation and benefited from earlier experience in Queensland and federally. The *FOI Act* already requires agencies to publish annual Information Statements. Section 3(3) of the Act expressly notes that nothing in the *FOI Act* is intended to prevent or discourage the

publication of information outside the Act, if that can lawfully be done. This indicates a lesser degree of urgency of significant legislative reform than may have been the case in some other Australian jurisdictions.

An area where legislative reform is more likely in the short to medium term is in information privacy. Currently Western Australia does not have a legislative framework for the handling of personal information by State government agencies; however, administrative instructions encourage agencies to handle personal information in accordance with the Commonwealth Information Privacy Principles. One major factor to consider in this regard is that the Commonwealth has proposed a significant overhaul of its privacy regime in response to a detailed report by the Australian Law Reform Commission.

### **Conclusion**

The legislative right of access to government information remains a cornerstone of Australia's robust democracy. The *Freedom of Information Act 1992* has served Western Australians well in this regard.