Office of the
Information Commissioner

Freedom of information for Western Australia

Freedom of Information in Western Australia

FOI COORDINATORS MANUAL

IMPORTANT NOTE:

On 1 July 2025 and 1 July 2026, important amendments to *the Freedom of Information Act 1992 (WA)* (**the FOI Act**) commenced. This manual has been updated to reflect some of those amendments. However, most of the decisions cited in this manual pre-date those amendments and should be read in that context.

Readers are encouraged to use the latest version of the FOI Act as the prime reference for access applications received after 1 July 2026. It is available here.

The OIC WA is preparing a new FOI Coordinators Manual that will address the recent legislative changes and other recent decisions and developments.

Prepared by
The Office of the Information Commissioner
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About OIC publications referenced in this manual

Each chapter of the manual includes reference to other OIC publications. These publications are available from the OIC website. Key information is available at:

- For the public: Office of the Information Commissioner
- For agencies: Office of the Information Commissioner
- Manuals and Guides: Office of the Information Commissioner

Note: Extracts/summaries from decisions involving various clauses of the *Freedom of Information Act 1992* (WA)

Since the introduction of FOI in Western Australia in 1993, the Information Commissioner has handed down a number of decisions which have helped clarify the interpretation of various sections and clauses of the FOI Act. The extracts cited in this publication are taken from decisions of the Information Commissioner.

The extracts and/or summaries are intended as a guide and reference. A full copy of each decision may be necessary to fully understand the nature of the documents and the circumstances of each case.

All decisions are published in full or summary form, and are available on our website and on the Australasian Legal Information Institute website.

Disclaimer

The Office of the Information Commissioner has produced this material as part of its Advice and Awareness service to agencies. The content is intended as a general guide to understanding the FOI process and cannot be substituted for the legislation and regulations.

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Chapter 1

INTRODUCTION TO THE *FREEDOM OF INFORMATION ACT 1992* (WA)

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- Objects and Intent
- Duties of agencies
- History of FOI
- Major features
- Jurisdiction of FOI
- What is an "agency"?
- Who makes decisions under the FOI Act?
- Protection against legal action
- Access rights do not apply to information otherwise available
- Information Commissioner's main functions

FURTHER READING

- Access to Government Records – guide for the public about making an access application
- Agency FOI Responsibilities
    - Key FOI principles for agencies
    - Key questions for decision-makers to consider
    - Releasing documents that may be technically exempt
    - Thinking outside the FOI box
- Open Government Principles

OBJECTS AND INTENT

Section 3 of the FOI Act provides:

> *(1) The objects of this Act are to –*
>
> (a) *enable the public to participate more effectively in governing the State; and*
>
> (b) *make the persons and bodies that are responsible for State and local government more accountable to the public.*
>
> *(2) These objects are to be achieved by:*
>
> (a) *creating a general right of access to State and local government documents;*
>
> (b) *providing a means to ensure personal information held by State and local governments is accurate, complete, up to date and not misleading; and*
>
> (c) *requiring that certain documents concerning State and local government operations be made available to the public.*

The Supreme Court of Western Australia noted in *Water Corporation v McKay* [2010] WASC 210 per Martin J at paragraph 38 that the objects of the FOI Act 'form the essential bedrock of open, democratic government whose policy importance cannot be overstated'.

DUTIES OF AGENCIES WHEN APPLYING THE ACT

Section 4 of the FOI Act provides:

> *Agencies are to give effect to this Act in a way that –*
>
> (a) *assists the public to obtain access to documents;*
>
> (b) *allows access to documents to be obtained promptly and at the lowest reasonable cost; and*
>
> (c) *assists the public to ensure that personal information contained in documents is accurate, complete, up to date and not misleading.*

HISTORY

1766	Sweden granted its citizens a right of access to government documents.
1966	FOI laws were enacted in the United States of America.
1982	The Australian Commonwealth government introduced FOI laws.
1993	Western Australian FOI laws commenced operation.
2013	20th anniversary of FOI in Western Australia.
2016	2 December 2016 was the 250th Anniversary of the proclamation of the world's first freedom of information legislation.



KEY MESSAGES FOR FOI COORDINATORS

It is important always to act in a way which furthers the objects of the FOI Act. FOI Coordinators should always bear the following concepts in mind:

- Can the request be dealt with outside of the FOI Act? If so, this is likely to lead to a better outcome for the agency and the applicant.
- Engage in early and meaningful dialogue with the applicant to clarify the scope of the application and seek to find a win-win outcome which allows the applicant to receive the documents quickly without the agency having to undertake unnecessary work.
- An agency may release an exempt document if there is no harm in doing so.
- The notice of decision is an important part of the FOI process and is crucial in ensuring applicants are afforded justice.

Case studies – the following case studies from the Information Commissioner's Annual Report's demonstrate the benefits of an agency engaging constructively with the access applicant to achieve the objects of the FOI Act.

Case study one

The complainant had sought a substantial number of documents relating to particular commercial arrangements of the agency. The agency had provided some, but not all, of the documents to the complainant before the matter came before the Commissioner on external review.

At a conciliation conference conducted by the OIC, the agency considered the threshold question 'what is the harm if the documents are released?' After concluding that much of the material was already known or in the public domain and any potential harm in disclosure was minimal, the agency released the remaining documents to the complainant.

Under the FOI Act agencies have a discretion to release documents that are technically exempt. This office encourages agencies to always consider, before claiming an exemption, the threshold question of whether any real harm will result from disclosure of the requested documents.

Case study two

The agency refused the complainant access to documents on the grounds that they contained information concerning the commercial or business affairs of a third party.

During the conciliation process, the complainant advised the Commissioner that he only wanted information that revealed the actions of the agency, not the commercial affairs of the third party. The complainant agreed to accept access to the disputed documents with information concerning the commercial or business affairs of the third party deleted.

The Commissioner informed the agency and the third party of this agreement and identified the information in the documents that could be deleted on that basis. The Commissioner told the agency and the third party that he considered the remaining information in the documents was not exempt and invited them both to reconsider their positions. As a result, the agency and the third party both agreed to disclosure of the documents to the complainant in the form proposed and the matter was resolved.

Clear communication and the cooperation of all parties resulted in what could have otherwise been a drawn out dispute being resolved quickly and to the satisfaction of all of the parties.

Case study three

The complainant applied to the agency for documents that contained information of a sensitive personal nature about other people. The agency refused access to the requested documents.

At a conciliation conference conducted by the OIC, the agency and the complainant agreed to work on informal access to the information through the creation of a document containing high level information of the type requested by the complainant, but which did not identify individual people. The provision of that document satisfied the complainant's request and the complainant withdrew the application for external review.

The cooperation and constructive approach of both parties resulted in the informal resolution of the matter and is a good example of parties 'thinking outside the FOI box' to achieve an outcome that satisfied both parties.

MAJOR FEATURES OF THE FOI ACT

Section 10	General right of access.
Section 45	Amendment of personal information (**Amendment commenced 1 July 2026**)
Schedules 1, 2	Exemptions protect essential public and private interests.
Sections 13, 26, 30	Reasons for decisions.
Sections 39, 40, 54, 65, 66, 85	Review of decisions – • Internal review • External review (Information Commissioner) • Supreme Court (on a question of law).
Sections 94-97	Information Statements.

- The right of access is the means by which the objects of the FOI Act are achieved. The FOI Act has unlimited retrospectivity, so access can be sought to any document regardless of its age.
- The Minister for Justice, David Smith, when introducing the Western Australian Bill in November 1991, said:

  > *Although the public has an interest in access to information, they also have an interest in the proper functioning of government and in protecting the privacy of individuals and the commercial interests of business organisations.*

- The FOI Act has exemption provisions to protect from disclosure material, which if released, would have a detrimental effect on the functioning of government or harm the interests of private individuals or commercial organisations.
- Agencies are required to give full reasons for denying access to documents. The applicant can then determine whether or not to challenge the decision.
- The FOI Act provides for an agency to review its decision at the request of the applicant.
- If the applicant is still dissatisfied with the agency's decision on internal review then he or she may lodge a complaint with the Information Commissioner seeking external review of the agency's decision.

- To make State and local government bodies more open and accountable and to allow the public to participate more effectively in the governing of the State, agencies are required to publish Information Statements that set out the agency's structure and functions and the categories of documents they hold.

Example of a decision involving the definition of the term "general right of access" - Section 10 of the FOI Act

Re Mackenzie and Western Australia Police **[2011] WAICmr 28**

The Information Commissioner noted at [25]:

> *An access applicant's right of access to documents of an agency under the FOI Act is not an unfettered right. Section 10(1) provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. That means that the right of access is subject to, among other things, the exemption clauses in Schedule 1.*

JURISDICTION OF THE WESTERN AUSTRALIAN FOI ACT

Western Australian:

- Government Departments
- State Boards and Commissions
- State Government Ministers
- Local Government Authorities
- Public Universities
- TAFE Colleges
- Public Hospitals
- Regulatory Bodies
- Contractors (only as defined in the *Court Security and Custodial Services Act 1999, Declared Places (Mentally Impaired Accused) Act 2015* or *Prisons Act 1981*)

WHAT IS AN "AGENCY"

The Glossary to the FOI Act defines the following terms:

"agency" means –

(a) a Minister or

(b) a public body or office,

"the agency" means the agency to which an access application or application for amendment of personal information has been made or to which such an application has been transferred or partly transferred**.**

"public body or office" means –

(a) a department of the Public Service;

(b) an organization specified in column 2 of Schedule 2 to the Public Sector Management Act 1994;

(c) the Police Force of Western Australia;

(d) a local government, regional local government or regional subsidiary;

(e) a body or office that is established for a public purpose under a written law;

(f) a body or office that is established by the Governor or a Minister;

(g) any other body or office that is declared by the regulations to be a public body or office being -

  (i) a body or office established under a written law; or

  (ii) a corporation or association over which control can be exercised by the State, a Minister, a body referred to in paragraph (a), (b), (e), (f) or (g)(i), or the holder of an office referred to in paragraph (f) or (g)(i); or

(h) a contractor or subcontractor.

Examples of decisions that consider the definition of "agency"

A number of decisions of the Supreme Court and the Information Commissioner have considered whether particular entities are 'agencies' for the purposes of the FOI Act. These include:

- *Local Government Elected Members Association (WA) (Inc) v Western Australian Local Government Association* [2026] WASC 102

  The Supreme Cout found the Western Australian Local Government Association (**WALGA**) is a body established for a public purpose under a written law and is therefore a "public body or office" and "agency" under the FOI Act**.** In reaching that conclusion, the Supreme Court noted WALGA's objects are directed to the promotion, enhancement, representation and service of local government, giving it a clear and substantial involvement with the process of government.

- *Community Educational Television Ltd v Inglis* [2001] WASCA 405

  The Supreme Cout found Channel 31 was not a body established for a public purpose under a written law because although the enabling legislation permitted Channel 31 to be incorporated and licensed, the nature of its operations were not determined by that legislation.

- *Re Pisano and Health Solutions (WA) Pty Ltd trading as Peel Health Campus* [2012] WAICmr 24 -

  The Information Commissioner found the Peel Health Campus (**PHC**) is not a "public body or office" or "agency" as defined in the FOI Act.

- *Re Gallop and Water Corporation* [1999] WAICmr 36

  The Information Commissioner found the Water Corporation was an "agency" for the purposes of the FOI Act.

- *Re Taylor and Ministry of the Premier and Cabinet* [1994] WAICmr 26

  In this decision the Information Commissioner considered whether a body or office was established by the Governor or a Minister. This case involved the McCarry Commission, which was established by the Premier in 1993 for the purpose of reviewing Western Australia's public sector finances. The Information Commissioner considered the circumstances of the McCarry Commission's creation, as evidenced by its terms of reference and a media statement issued by the Premier, and found it was a body or office established by a Minister (the Premier) and therefore an "agency" under the FOI Act. In doing so, the Information Commissioner noted at [20]: *'[a]lthough the Commission was an agency with a limited life… that fact does not change its character for the purposes of the FOI Act'.*

WHO MAKES DECISIONS UNDER THE FOI ACT?

Sections 39, 41, 100	• Minister (if application is made to a Minister); • the principal officer (CEO) of the agency; or • officers directed by the principal officer.
Sections 39, 100	The principal officer of an agency can direct other officers in the agency to make decisions in respect of applications made under the FOI Act. **The direction by the principal officer may be verbal or in writing (for example, by internal minute or instrument).** Officers can be directed generally, or in a particular case. Applications made to a Minister have to be decided by the Minister, although the Minister may be assisted by others, such as the Minister's staff or officers in a Department, in the process of dealing with the application. When a Minister or the principal officer (for example, the Director General or Chief Executive Officer) makes the original decision there is no right to internal review.

In relation to applications for access to documents, decision-makers can decide to:

- Give access.
- Give access to an edited copy.
- Refuse to deal with the application.
- Refuse access.
- Defer access (as permitted under section 25).
- Give access to a suitably qualified person (see the *Freedom of Information Regulations 1993* (**the Regulations**) for definition) - applies to medical and psychiatric information – section 28).
- Impose a charge.

Examples of decisions involving "who makes decisions for agencies" (section 100)

***Re Ravlich and Crown Solicitor's Office* [2000] WAICmr 8**

This was an external review concerned mainly with charges. However, the Information Commissioner made the following comment in this decision:

> *Section 100 of the FOI Act provides that decisions by an agency are to be made by the principal officer of that agency or by an officer directed by the principal officer for that purpose, either generally or in a particular case. Clearly, any officer who is directed for that purpose should have the skills, expertise and authority to make the decision for the agency and the access applicant should not be expected to pay for consultation undertaken because the decision-maker does not feel competent to make a decision for the agency.*

***Re MacTiernan and Minister for Regional Development* [2009] WAICmr 29**

The complainant applied to the Minister for Regional Development for access to all documents relating to the formula for grant allocations for the Country Local Government Fund. The Minister's office transferred the application to the Department of Local Government and Regional Development under section 15 of the FOI Act on the basis that the Minister held no documents of that description. However, the complainant obtained information to contradict that view and applied to the Commissioner for external review of the Minister's decision. In the course of dealing with that matter, it became clear that the Minister's officer and not the Minister himself had made the decision to transfer the application.

The Commissioner noted that in cases where the relevant agency is a Minister, section 100 of the FOI Act requires the Minister, and not members of the Minister's staff, to make decisions under the Act, including a decision to transfer an application to another agency: see [16]-[18]. Accordingly, the Commissioner was of the view, on the information before him, that the decision to transfer the complainant's access application was not made by the Minister but by the former FOI Coordinator, in contravention of section 100 of the FOI Act.

PROTECTION AGAINST LEGAL ACTION

Provided officers of agencies act in good faith to give effect to the Act, they are protected from -

- defamation or breach of confidence
- criminal liability
- personal liability

There is no action for failure to consult unless the person acted with malice and without reasonable cause.

Section 104	**Protection from defamation or breach of confidence action:** If a decision is made under the FOI Act, and the decision-maker believes, in good faith, that the FOI Act permitted or required the decision to be made, then no action for defamation or breach of confidence lies against the agency or an officer. A decision-maker does not authorise or approve the publication of a document by deciding to release a document under the FOI Act.
Section 105	**Protection from criminal liability:** An agency or officer of an agency who, in making a decision to release a document, believes in good faith that the FOI Act permits or requires the decision to be made is not guilty of an offence merely because the decision was made.
Section 106	**Protection from personal liability:** Any actions of an officer do not subject the officer personally to any action, liability, claim or demand so long as he or she acted in good faith for the purpose of giving effect to the FOI Act. As long as a decision-maker follows the processes in the FOI Act, he or she cannot be held personally liable for any decision or action he or she might take.

Example of a decision involving "protection from defamation or breach of confidence sections" (section 104)

Re West Australian Newspapers Ltd and Western Australian Tourism Commission **[1998] WAICmr 10**

This external review involved a request for documents relating to the State Government's sponsorship deal with Elle Macpherson and the Elle Racing Syndicate. In this decision the Information Commissioner made the following comment regarding section 104:

> *I note also, in this context, the various protections afforded in respect of disclosure under the FOI Act. Most notably, section 104 provides that, if access to a document is given under a decision, made in good faith, under the FOI Act, 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 that decision or the giving of access, or 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 (although the protection may not extend to the publication of the document by the person to whom access is given: section 104(3)).*

ACCESS RIGHTS IN PARTS 2 & 4 DO NOT APPLY TO DOCUMENTS THAT ARE ALREADY AVAILABLE

Section 6	The access provisions of the FOI Act do not apply to documents that: • are available for purchase by the public or free distribution to the public; • are available of inspection under Part 5 of the FOI Act (ie. information statements and internal manuals) or under another enactment; • can be inspected in the State archives; • are publicly available library material held by agencies for reference purposes; or • are made or acquired by an art gallery, museum or library and preserved for public reference or exhibition purposes.

In effect, section 6 provides that the access procedures set out in the FOI Act do not apply to documents that are already publicly available.

The Commissioner considers that the fact that some information contained in a document may be available publicly, or on public record elsewhere, does not mean that section 6 of the FOI Act applies to that document. This is because section 10(1) of the FOI Act provides a right of access to documents rather than information and section 6 applies to documents that are publicly available, rather than information which is publicly available (see *Re Kolo and Department of Land Administration* [1995] WAICmr 2 and *Re Collins and Ministry for Planning* [1996] WAICmr 39, cited in *Re Walters and Shire of York* [2014] WAICmr 24).

Examples of decisions involving section 6

***Re BGC (Australia) Pty Ltd and Port Hedland Port Authority* [2011] WAICmr 38**

The complainant applied to the agency for a range of documents including those that related to the realignment of part of the Great Northern Highway. Amongst other documents, the agency identified a particular map within the scope of the application but refused access to it on the ground it was exempt under various exemption clauses in Schedule 1 to the FOI Act.

On external review, the Commissioner's office conducted a search on the internet which established that the map is a public document that can be downloaded by any person from the website of Main Roads Western Australia.

The Commissioner decided that because section 6 of the FOI Act provides that the access procedures of the Act do not apply to documents that are publicly available, the complainant could access the map directly and it was not necessary for him to deal with it further. The Commissioner noted at [18] that:

> [i]*t would have been preferable for the agency to ascertain that* [the document] *was available to the public and informed the complainant of this. Such an approach would have been more consistent with section 4 of the FOI Act which places an obligation on agencies to give effect to the Act in a way that assists the public to obtain access to documents.*

***Re X and Department of Local Government* [2010] WAICmr 23**

The complainant sought access to documents relating to the outcome of a prosecution of a local government councillor.

On external review, the Commissioner considered whether the requested documents were already publicly available for free or for inspection or purchase from the Magistrates Court such that section 6 of the FOI Act applied. As it appeared that access to a copy of a Magistrates Court decision under the *Magistrates Court Act 2004* is conditional on, among other things, the reasons for seeking access, the Commissioner decided that section 6 did not apply in the circumstances of the case.

Re Terrestrial Ecosystems and Department of Environment and Conservation [2013] WAICmr 9

In this matter, the Commissioner considered whether the requested document – the relevant parts of a database – was available to the public, for purchase or free distribution, such that under section 6 of the FOI Act, the access rights in the FOI Act did not apply.

The Commissioner noted that section 6 is explicitly concerned with documents not information and did not accept the agency's submission that section 6(a) applies to 'information'. Therefore, the Commissioner considered that for section 6(a) to apply in this case, the requested document must be available to the public for purchase or free distribution. The Commissioner was of the view that the requested document is available for 'free distribution' to the public if that document is given out at no cost to the public.

Ultimately, the Commissioner found that the requested document, apart from certain exempt matter, was available for free distribution to the public because members of the public could access the database through an online portal. In this case, the online portal was not a separate database, but a tool or system to access a number of different databases, one of which was the requested document.

The complainant did not dispute that the requested document could be downloaded from the online portal. Rather, the complainant submitted that it was not easily accessible, because it could not be downloaded all at once, but required downloading in stages. However, section 6 of the FOI Act is not concerned with difficulty or unreasonableness of access. Under section 6, a document is either available or it is not: see [54]-[55] of the decision.

INFORMATION COMMISSIONER'S FUNCTIONS

The *Information Commissioner Act 2024* (WA) (**IC Act**) establishes the statutory roles of the Information Commissioner, the Information Access Deputy Commissioner and the Privacy Deputy Commissioner, and sets out their functions (IC Act, ss 25-27).

For freedom of information matters, the Information Commissioner and the Information Access Deputy Commissioner share the "freedom of information functions" conferred by the FOI Act (FOI Act, ss 97A-97B).

Those functions include conducting external reviews of agency decisions on access applications, helping agencies understand and comply with their obligations under the FOI Act, promoting public awareness of FOI rights, and providing guidance and assistance to agencies and members of the public on FOI matters (FOI Act, section 97A(1)).

The Information Commissioner also reports annually to Parliament on the operation of the FOI Act, including providing statistics on FOI applications received and dealt with by agencies (FOI Act, section 111).

Chapter 2

FOI PROCESSES

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- Requirements of an application
- Application lodgement
- Initial procedures
- Application scope
- Document identification
- Documents of an agency
- Searching for documents
- Documents that cannot be found or do not exist
- Large applications
- Transfers
- Ways of giving access

FURTHER READING

- Access to Government documents - steps on how to apply
- FOI Timeframes and Cost
- Review of Agency Decisions
- What is the best way to gain access to documents for proceedings in a court or tribunal?
- Documents that cannot be found or do not exist – guide for access applicants

OIC Guides

- Calculating time and days guide
- Dealing with requests for documents related to an exempt agency

REQUIREMENTS OF A VALID APPLICATION

Section 12	An access application has to • Be in writing. • Give enough information to identify the documents. • Give an Australian address for correspondence. • Give any other information required under the regulations. • Be lodged at an office of the agency with any application fee.
Section 10	The applicant's reasons, or the agency's belief as to the applicant's reason(s), for seeking access do not affect a person's right to be given access.

REQUIREMENT TO ASSIST THE APPLICANT TO MAKE A VALID APPLICATION

Section 11	An agency has to take reasonable steps to assist a person to make a valid access application. In particular, if the application does not comply with section 12, the agency has to take reasonable steps to help the applicant to change the application so that it complies with those requirements.

In considering whether the application includes enough information to identify the documents as required by section 12, agencies should bear in mind that members of the public are generally not familiar with the terms or expressions used by government agencies to describe documents. Therefore, the applicant can often only guess how to describe a document, with the result that the agency may be unable to determine which documents fall within the ambit of the application.

While the applicant's reasons, or the agency's belief as to the applicant's reason(s), do not affect a person's access right, an awareness of the applicant's reasons may serve to clarify which documents the applicant seeks access to.

APPLICATION LODGEMENT

Sections 12(2) - (5)

An application may be lodged by delivery by hand, by post, by facsimile or by email.

Regardless of the method used, applications are taken to have been lodged on the day received by the agency.

The day on which an application is received is 'Day zero' and is not counted for the purpose of calculating time. The day after an application is received is 'Day 1'.

If an application is sent to an agency by post, it is taken as received by the agency at the end of the fifth day after it is posted. However, if there is evidence that the agency received it before then (e.g. date stamp), the five-day rule will not apply.

For further detail, refer to the Information Commissioner's FOI Process Guide, ***Calculating time and days guide***.

INITIAL AGENCY PROCEDURES

- Register the application
- Create a file
- Determine completion date and fee applicable
- Application fee (if applicable)
- Issue receipt (if applicable)
- Determine decision-maker
- Notify applicant –
    - application accepted;
    - anticipated completion date;
    - contact name and phone number; and
    - agency file reference.
- Consider contacting the applicant early (preferably by telephone or in person) to:
    - clarify any ambiguity in the application;
    - negotiate the scope of the application to allow it to be dealt with more quickly, eg by agreeing to remove any unwanted information about third parties; and
    - look for a win-win situation where the applicant gets the documents quickly while the agency is not required to undertake unnecessary work which will not assist the applicant.

See appendix 5 for a *Sample checklist for agencies*

TIME LIMITS

Section 13(1)	An agency has to deal with an access application as soon as is practicable, but in any event, within the "**permitted period**").
Section 13(2)	If the applicant does not receive a notice of decision within the permitted period the agency is taken to have refused access to the documents.
Section 13(3)	The **permitted period** is 45 days after the access application is received or such other period as agreed between the agency and the applicant or allowed by the Information Commissioner
Section 13(5)	The Information Commissioner can extend the 45-day time limit on the application of the agency where the agency has attempted to comply but it is impracticable in the circumstances.

Reduction in time for agency decision-making

Section 13(3)	The agency and the applicant can agree on a period for the agency to deal with the application that is different to the 45 day permitted period, including a reduction in time to deal with the application.
Section 13(4)	The Information Commissioner can reduce the time to deal with an access application on application of the applicant. The applicant may apply to the Information Commissioner to reduce the time allowed to the agency to deal with the application. However, it is the responsibility of the applicant and the agency in the first instance to reach agreement on the due date for decision-making. If the parties are unable to agree, the Information Commissioner will consider the use of his discretion if the applicant provides sufficient reasons to justify this course of action. The Information Commissioner requires these preliminary steps to be followed unless it is not practicable to negotiate directly with the agency. Although the right of access is not affected by any reasons an applicant may give for wishing to obtain access, in seeking to persuade the Information Commissioner to exercise his discretion to reduce the decision-making time, reasons are both necessary and desirable. The applicant will be required to explain why a decision is required within a certain time frame, why he or she believes the agency is able to adequately deal with the application within this time frame, the adverse consequences (if any) of a decision outside the requested time frame and any other relevant factors.

Extension of time for agency decision-making

Section 13(3)	When an agency requires extra time to deal with an access application, the agency should attempt to reach agreement with the applicant in the first instance and confirm the agreement in writing.
Section 13(5)	If no agreement can be reached, the agency may apply to the Information Commissioner for an extension of time to deal with the access application. The application must specify: • the steps that have been taken to reach agreement with the applicant; • why it is impracticable for the agency to deal with the application within the permitted period of 45 days; and • the period of time required to deal with the application.
Section 13(6)	Where an extension is granted, the agency is required to give written notice of the approved extension to the applicant as soon as practicable and within 45 days of receiving the access application.

SUMMARY OF TIME LIMITS

Agency	Process application as soon as practicable (but in any event within 45 days) 15 calendar days to conduct internal review 30 calendar days to process application for amendment of personal information	**Section 13(1), (3)** **Section 49(2)** **Section 43(2)**
Applicant	30 days to respond to estimate of charges or to pay a deposit 30 days to lodge internal review 60 days to lodge external review	**Section** 19(1)(b) **Section 40(2)** **Section 66(2)**
Third Party	30 days to lodge internal review 30 days to lodge external review	**Section 40(2)** **Section 66(3)**
Information Commissioner	30 days to make a decision on a complaint unless Commissioner considers it impractical	**Section 76(3)**
Supreme Court	Party may lodge an appeal on a point of law only within 21 days, subject to the Rules of the Supreme Court	**Section 85**

For guidance regarding calculating the number of days, refer to the Information Commissioner's FOI Process Guide, ***Calculating time and days guide***.

APPLICATION SCOPE

- Are the documents available outside FOI?
- Can they be inspected or purchased?

DOCUMENT IDENTIFICATION

Can the documents be clearly identified from the subject matter? If not -

- Discuss with the applicant to identify:
  - topic, incident etc; or
  - dates and the applicant's concerns.

DOCUMENTS OF AN AGENCY

What is a document?

- The definitions of 'document' and 'record' in the Glossary to the FOI Act extend to all manner of information, however recorded, in the possession or under the control of an agency.
- Documents include, but are not limited to, maps, plans, diagrams, graphs, drawings, photographs, videos, audiotapes, CCTV footage and electronic records including emails.

Examples of decisions involving the definition of the term "document":

- *Re Terrestrial Ecosystems and Department of Environment and Conservation* [2013] WAICmr 9 – a database known as the Fauna Survey Returns Database was found to be a document for the purposes of the FOI Act.
- *Re Flahive and City of Stirling* [2013] WAICmr 7 – CCTV footage was found to be a document for the purposes of the FOI Act.

Documents of an agency - clause 4(1) of the Glossary

Clause 4(1) of the Glossary to the FOI Act provides:

> *Subject to subclause (2), 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 following concepts about the term 'documents of an agency' emerge from decisions of the Information Commissioner and the Supreme Court of Western Australia:

- The FOI Act is not concerned with ownership or authorship of a document, nor with the entitlement to exclusive possession: *Minister for Transport v Edwards* [2000] WASCA per Hasluck J at [53].
- An agency is in possession of documents, so as to make them documents of the agency, when the agency actually physically holds those documents: *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 per Wheeler J at [20].
- There must be 'possession' in the sense of either actual holding of the requested documents, or some degree of control that is able to be exercised over the documents: *Re Inglis and Curtin University of Technology* [2001] WAICmr 27 at [16].
- Documents can only be under the control of an agency (and therefore 'documents of an agency') if the agency has a present legal entitlement to control the use or physical possession of those documents: *Re Ninan and Department of Commerce* [2012] WAICmr 31 at [37].

Documents held by a Minister

Clause 4(2) of the Glossary to the FOI Act provides:

> *Where the agency is a Minister a reference to a document of an agency is a reference to a document that —*
>
> *(a) is in the possession or under the control of the Minister in the Minister's official capacity; and*
>
> *(b) relates to the affairs of another agency (not being another Minister),*
>
> *and includes a document to which the Minister is entitled to access and a document in the possession or under the control of a member of the staff of the Minister as such a member, but does not include a document of an agency for which the Minister is responsible.*

In *Re Ravlich and Attorney General* [2010] WAICmr 5, the Commissioner noted at [14]:

> *the right of access under section 10(1) to documents held by a Minister is governed by clause 4(2) of the Glossary, which sets out the following conditions for access:*
>
> - *The requested documents must be in the possession or under the control of the Minister in his or her official capacity.*
> - *Those documents must relate to the affairs of another agency (except where that agency is another Minister).*

- *Those documents include documents which the Minister is entitled to access and documents in the possession or under the control of a member of the Minister's staff.*
- *Those documents do not include documents of an agency for which the Minister is responsible.*

Consequently, the following documents will not be accessible under the FOI Act from a Minister, even if they are held by that Minister.

- Documents held by Ministers or their staff in a non-official capacity.
- Documents held by Ministers in their official capacity but which do not relate to the affairs of another government agency.
- Documents held by Ministers in their official capacity which relate only to the affairs of another Minister.
- Documents which are documents of an agency for which the Minister is responsible.

Meaning of the phrase "relates to the affairs of another agency"

In *Re Ravlich* referred to above, the Commissioner did not accept the agency's submission that the disputed document did not "relate to the affairs of another agency" for the purposes of clause 4(2) because it primarily related to the affairs of a third party.

The Commissioner considered that the words 'relates to' in paragraph (b) of clause 4(2) are not qualified by degree or in any other way. The Commissioner noted that, provided the document in question relates to the affairs of another agency (not being another Minister), it is not relevant whether or not it also relates to the affairs of other Ministers or whether it relates more to the latter than the former.

SEARCHING FOR DOCUMENTS

Accountability cannot be achieved, and a general right of access to documents is undermined, if agencies' processes and searches are not sufficient to enable them to locate documents in their possession.

Applicants seeking to exercise their rights of access under the FOI Act must, to some extent, rely on the integrity of the searches conducted by the relevant agency. If additional documents are located after further searches, it is understandable that an applicant may be skeptical about the adequacy of the agency's efforts to meet its obligations under the FOI Act in the first instance.

Good record keeping systems and staff trained to conduct comprehensive searches of those systems – particularly the electronic systems – are essential to ensure the proper functioning of the FOI Act. In particular, it is essential that the agency's FOI Coordinator or Records Officer in charge of conducting searches is fully trained and conversant with the tools to search electronic systems.

It is reasonable for FOI Coordinators, when searching for documents, to use as initial search terms the words used by complainants in their access applications. However, FOI Coordinators should apply their minds to the words used in the access application and make reasonable judgments about how to undertake the searches for documents. Simplistically limiting search terms to those outlined in the access application may not be sufficient to meet the requirement under section 4 of the FOI Act of giving effect to the Act in a way that assists the public to obtain access to documents.

The extent to which the FOI Coordinator needs to look beyond the wording of the access application will depend on the circumstances of any given application. If at any stage it is apparent that other search terms would be relevant, it is incumbent upon the agency to conduct searches using those terms for key word searches. If there is any doubt, the agency should contact the access applicant and discuss the situation at an early stage.

The FOI Act does not require agencies to guarantee that their record-keeping systems are infallible and, in some cases, an agency may not be able to readily find documents that do or did exist because of poor record keeping, misfiling or inadequate training in record management. However, where such deficiencies are uncovered in the course of an external review, the Commissioner may highlight in his published decision any deficiencies in the agency's systems or practices that impact upon the proper functioning of the FOI Act.

Agencies are required to take all reasonable steps to locate documents. The question of whether or not "all reasonable steps" have been taken to locate the requested documents is a judgment for the Commissioner to make (if he is required to determine the matter on external review) based on the circumstances and the material before him. The adequacy of efforts made by an agency to locate documents is to be judged by having regard to what was reasonable in the circumstances.

See *Re MacTiernan and Minister for Regional Development* [2009] WAICmr 29.

Keep a record of the agency's searches

When an applicant applies to the Commissioner for external review of an agency's decision because he or she considers that the agency has not adequately searched for documents that the applicant believes exist, the Commissioner may ask an agency to provide evidence of its searches and inquiries conducted to locate the requested documents.

Agencies are encouraged to keep a record of its searches and inquiries undertaken for documents within the scope of an access application including:

- the names and titles of the officers who conducted the searches and inquiries;
- the dates on which the searches and inquiries were made;
- the instructions given to the persons who conducted the searches;

- details of the areas/locations of the agency in which searches were conducted including the hard copy files and email accounts searched;
- details of the "key words" used in any electronic database searches; and
- the results of all searches conducted.

Searching for electronic documents

In the Commissioner's report to Parliament following a review of the administration of FOI in Western Australia in 2010[1], the Commissioner noted, at pages 33-34, that the level of skill and knowledge of individual officers are relevant to an agency's ability adequately to manage and search for electronic documents. This includes:

- knowledge of the kinds of locations that electronic documents are stored in;
- the skills to conduct reliable searches of those locations including an understanding of how to use available search tools, and awareness of how search results are affected by the use of different search parameters such as the search terms and search operators used;
- awareness of any applicable rules which automatically move emails to different folders in an email account and an understanding of when searches should be made in those folders; and
- knowledge of the agency's electronic recordkeeping practices.

The following matters are also relevant to the ability of an agency to manage and search for documents:

- Ensuring the FOI Coordinator or other officer coordinating the search process has the necessary skills and knowledge to facilitate reliable search results and to give guidance and support to other staff carrying out searches.
- Ensuring individual officers who are asked to carry out searches are given meaningful instructions and guidance to assist them, including reminders of the kinds of locations to check, for example, all relevant folders in Outlook accounts ('Inbox', 'Sent Items', 'Deleted Items' and 'Archives').
- Creating adequate records to demonstrate or evidence the searches undertaken including a description of the locations searched, the search parameters used and the results of those searches.
- The impact of the agency's recordkeeping practices – how are electronic records saved and stored? How hard is it to locate them when conducting searches?

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[1] *The Administration of Freedom of Information in Western Australia* 31 August 2010: Information Commissioner speeches and publications

- Most importantly, ensuring staff are given adequate training and support regarding the retention and storage of electronic documents and how to search for them.

DESTROYING DOCUMENTS TO PREVENT ACCESS

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**,** whether or not an access application has been made, **commits an offence which carries a penalty.**

DOCUMENTS THAT CANNOT BE FOUND OR DO NOT EXIST

Section 26	Section 26 of the FOI Act allows an agency to refuse access to a document if the document cannot be found or does not exist.

Section 26 provides:

> *(1) The agency may advise the applicant, by written notice, that it is not possible to give access to a document if –*
>
> *(a) all reasonable steps have been taken to find the document; and*
>
> *(b) the agency is satisfied that the document –*
>
> *(i) is in the agency's possession but cannot be found; or*
>
> *(ii) does not exist.*
>
> *(2) For the purposes of this Act the sending of a notice under subsection (1) in relation to a document is to be regarded as a decision to refuse access to the document, and on a review or appeal under Part 4 the agency may be required to conduct further searches for the document.*

Accordingly, if a document:

- should exist but cannot be found;
- is known to have been destroyed; or
- never existed,

notify the applicant in writing that for one of the above reasons access is not possible (give a full explanation in the decision).

In cases where the documents cannot be found or do not exist, the agency is regarded to have made a decision to refuse access. In refusing access, an agency has to show that all reasonable steps were taken to locate the documents. Such a decision is subject to review. On external review the Information Commissioner can direct an agency to undertake further searches for the documents.

The Commissioner's role when dealing with section 26 matters

When dealing with an agency's decision to refuse access to documents pursuant to section 26, the following questions should be asked:

- Are there reasonable grounds to believe the requested documents exist or should exist?
- If so, are the requested documents held, or should they be, held by the agency?
- If so, has agency has taken all reasonable steps to find the documents.

Examples of decisions involving section 26 of the FOI Act

'P' and Western Australia Police Force [2026] WAICmr 11

In this decision the Information Deputy Access Commissioner outlines the questions to be asked in dealing with section 26 and states further that

- it is not the function of the Information Commissioner to physically search for documents on behalf of a complainant;
- an agency is not required to take every possible step to locate documents, but only to take all reasonable steps;
- the adequacy of an agency's efforts to locate documents must be judged by what was reasonable in the circumstances;
- the reasonableness of an agency's searches depends, in part, on the likelihood the requested documents exist. The more likely it is a document exists, the more extensive the searches may need to be.

***Re Veale and City of Swan* [2012] WAICmr 12**

In this case, the complainant claimed that the agency had not identified all documents within the scope of his application and that additional documents should exist. On external review, the Commissioner initially considered that, on its face, it was reasonable to expect that the requested documents might exist and might be held by the agency. However, after making further inquiries with the agency, there was no evidence that any additional documents within the scope of the application exist or, if they once existed, could now be found within the agency.

The agency undertook numerous and extensive searches in order to locate the requested documents. On the information before him, the Commissioner was satisfied that the agency had taken all reasonable steps to find the requested documents and that those documents either cannot be found or do not exist.

The Commissioner noted that section 26 of the FOI Act requires an agency to take not 'all steps' but rather "*all reasonable steps*" to find documents.

***Re Farina and Treasurer* [2011] WAICmr 12**

The complainant applied for external review of the Treasurer's decision because she claimed that additional documents within the scope of her access application existed. After reviewing the initial searches conducted by the Treasurer's office, the Commissioner required further searches to be carried out using specific search terms. Those searches located additional documents.

In dealing with the matter, the Commissioner commented on the importance of proper searches being conducted by agencies (including Ministers) in the first instance: specifically, the need for adequate instructions to be given to officers conducting searches – particularly when searching for emails – and for officers to properly record the specific searches made, including the locations searched and the search terms used. The Commissioner noted that had all reasonable steps been taken to find the requested documents in the first instance, and had all documents that fell within the scope of the application been correctly identified, the complaint might have been avoided or resolved much sooner.

***Re Wells and Legal Profession Complaints Committee* [2017] WAICmr 14**

The complainant applied for access to certain documents that included communications between the agency and the Chief Justice of Western Australia. The agency gave the complainant access to two documents and the complainant sought review on the basis that he believed additional documents should exist that were not provided by the agency.

The Commissioner outlined that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the requested documents exist or should exist and are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find those documents.

The Commissioner was satisfied that there were reasonable grounds to believe additional documents of the kind set out in the complainant's access application would or should exist in the agency.

Following additional searches by the agency, the Commissioner was satisfied that that all reasonable steps had been taken by the agency to locate documents and found, under section 26 of the FOI Act, that further documents either cannot be found or do not exist.

APPLICATIONS DIVERTING A SUBSTANTIAL OR UNREASONABLE PORTION OF AGENCY'S RESOURCES

Section 20	Under section 20 of the FOI Act if - after taking reasonable steps to help an access applicant to change the application to reduce the amount of work required to deal with it - the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.

When a valid access application is made to an agency, the agency must deal with it in the manner described in section 13 of the FOI Act. The only exception is that in some circumstances an agency is permitted to refuse to deal with an application under section 20. Agencies should only refuse to deal with an application under section 20 as a **last resort.**

Section 20 provides:

(1) If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.

(2) If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.

(3) If, under subsection (2), the agency refuses to deal with the access application, it has to give the applicant written notice of the refusal without delay.

(4) The notice has to give details of —

(a) the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings are based; and

(b) the rights of review under this Act and the procedure to be followed to exercise those rights.

Requirements under section 20

To rely on section 20, an agency **must** first take reasonable steps to assist the access applicant to change the application to reduce the amount of work needed to deal with it. The Commissioner considers that an agency is not justified in refusing to deal with an application under section 20 if the agency has not satisfied this obligation: see for example *Re Jamieson and City of South Perth* [2013] WAICmr 22.

After providing the required assistance to the applicant, the agency must then be able to demonstrate that dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

If the agency decides to refuse to deal with the application, it must give the applicant a notice advising the applicant of that decision.

Assistance to change the application

Ways to assist an applicant to change the scope of the application to reduce the amount of work needed to deal with it:

- Describe the documents the agency considers the applicant would want; the relevant categories of documents; files by name/subject.
- Suggest reducing the time period covered e.g. 3 months instead of 2 years.
- Ask the applicant to specify the incident/location/people involved.

If the applicant agrees to:

- a reduction in scope;
- an extension of time;
- the application being dealt with in stages; or
- access by inspection only,

confirm the agreement in writing and continue to deal with the application promptly.

Note: The "clock" does not stop during these discussions or negotiations. The 45-day maximum permitted period to deal with an application under the FOI Act is not suspended. However, it is open to an agency to ask an applicant if they will agree to extend the permitted period in these circumstances.

Dealing with the application would still divert a substantial and unreasonable portion of resources

If, after help has been given to change the access application, the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.

In these cases, the agency's FOI file is crucial and should document all efforts to help the applicant change the application.

Notice of decision

The applicant has to be provided with written notice **without delay** stating the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based: see also the section on "Notices of decision".

The notice of decision should describe:

- the scope of the application;
- the agency's efforts to help the applicant to change the application and the applicant's responses;
- the number of documents or potential documents covered by the application;
- the location of those documents and the nature in which they are stored in the agency;
- the number of officers it would take to deal with the application and the normal duties of those officers;
- the amount of time it would take to deal with the application; and
- the reasons which demonstrate that dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations. For example, that it would take 10 members of staff 35 days to deal with the application - and that, in doing so other tasks or core functions would not be able to be carried out.

The applicant has the right to seek review of the decision to refuse to deal with the application and the notice of decision must include details of the rights of review and the procedure to follow.

Examples of decisions involving section 20 of the FOI Act:

Re Ravlich and Attorney General; Minister for Corrective Services **[2009] WAICmr 17**

The complainant sought access to the Minister's diary, daily itinerary documents and documents detailing the expenditure on the Minister's Ministerial credit card over a period of approximately 6 months.

After considering the steps taken by the Minister to help the complainant to change the application to reduce the amount of work needed to deal with it; the work involved in dealing with the access application; the usual work of the Minister's office; and the resources devoted to the task of dealing with the

application in accordance with the statutory requirements of the FOI Act, the Commissioner decided that the Minister's decision to refuse to deal with the complainant's access application under section 20 was justified in the circumstances.

The Commissioner noted that while section 20 places agencies under a duty to assist applicants, an element of reasonableness must be implied in the overall process if the legislation is to work satisfactorily. The Commissioner considered that relevant factors in dealing with a section 20 matter include whether an applicant has taken a cooperative approach in redrawing the boundaries of an application.

In determining whether the Minister had taken reasonable steps to assist the complainant to change the application to a manageable level, the Commissioner had regard to the complainant's experience and knowledge of the Act and her experience as a former Minister of the State. The Commissioner also noted that if a similar application were made to the Minister by a member of the public unfamiliar with the work involved in dealing with it, the Commissioner's view as to the degree of assistance required from the Minister in order to satisfy his obligation under section 20 might be different.

***Re Ballam and Shire of Toodyay* [2009] WAICmr 4**

The agency refused to deal with the complainant's application for the agency's credit card statements for a six month period. The agency made numerous attempts to assist the complainant to reduce the scope of his application by suggesting that he limit his request to specific transactions and dates. On external review, the Commissioner confirmed the agency's decision to refuse to deal with the application under section 20. The Commissioner was satisfied that, in the circumstances, the agency had taken reasonable steps to help the complainant change the application. He also considered on the information before him that it would take the agency 30 hours to deal with the application and that this would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

The Commissioner noted that relevant factors to indicate whether the work in dealing with an application would divert a substantial and unreasonable portion of the agency's resources away from its other operations include the time period to which the application relates; the number of documents or potential documents covered by the application; the ease with which the specific documents can be identified and assessed; the location of those documents and the nature in which they are stored by the agency; and the number of people competent to identify the documents and the normal duties of those people.

The Commissioner also noted that an agency may be justified in claiming that the work involved in dealing with an access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations but, if the agency has not taken reasonable steps to help the

applicant change the application to reduce the amount of work needed to deal with it, the agency is not justified in refusing to deal with that application under section 20.

***Re Mineralogy Pty Ltd and Department of Industry and Resources* [2008] WAICmr 39**

The Commissioner noted at [33] that:

> *In providing assistance to an access applicant, an agency is not obliged, under the FOI Act, to list all possible documents of relevance, identify the precise number of documents falling within the scope of an access application or provide inspection of those documents to enable an applicant to select those that he or she may be interested in, since to do so would defeat a key purpose of section 20, which is to avoid processing of FOI access applications that would divert substantial and unreasonable resources away from operational activities.*

The Commissioner was also of the view that the Parliament of Western Australia could not have intended that the effect of section 20 of the FOI Act would be defeated if that section was to be read so as to enable a person to avoid section 20 simply by dividing what would otherwise obviously be a "voluminous" access application into several parts, none of which, by itself, would offend the provision, but all of which, if considered together, would substantially and unreasonably divert an agency's resources away from its other operations: see [68].

***Re Park and SMHS – Royal Perth Hospital* [2014] WAICmr 18**

The complainant applied to the agency for access to certain documents relating to her medical treatment. The agency decided to deal with the application in two parts. Part One was the complainant's medical record consisting of five volumes of documents, and radiology images to be copied onto five disks.

The agency provided the complainant with full access to all five volumes of her medical record and five disks containing scan images. The complainant sent the documents to a relative in the USA and then asked the agency for another complete set of documents, which the agency provided to the complainant.

Part Two consisted of several large files of documents containing approximately 300 documents relating to a formal complaint made by the complainant's husband against the agency. The agency invoked section 20 of the FOI Act and refused to deal with that part of the complainant's access application.

The complainant did not accept the agency's decision and applied for external review of that decision.

The agency held several long meetings with the complainant's husband, to attempt to narrow the scope of the access application, to no avail. The agency deals with more than 2300 access application each year, with 255 outstanding

and approximately 150 files waiting to be copied, by the agency's sole FOI coordinator. The complainant was not willing to negotiate with the agency to narrow the scope.

The Commissioner considered that, while section 20 imposes on agencies a duty to assist applicants, there must be a corresponding obligation upon applicants to work cooperatively with an agency. An element of reasonableness must be implied into the process if the legislation is to work satisfactorily.

Accordingly, the Commissioner found that the work involved in dealing with Part Two of the complainant's application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, and confirmed the agency's decision.

TRANSFERS (section 15)

Section 15 of the FOI Act provides for transfer of applications between agencies in certain circumstances.

If the agency does not hold the requested documents, it is appropriate for the agency to find out which agency does hold them, as this would conform with the spirit of the FOI Act in providing assistance to the applicant.

Where the agency holds the requested documents, but transfers the application, copies of the relevant documents, together with a copy of the application should be sent to the other agency.

The applicant must be notified in writing of the transfer, including the day on which the application was transferred and to which agency. The contact officer's details should also be provided in the notice.

The transfer should take place as soon as possible because the new agency has the balance of the 45-day period in which to process the application. The time limit does not recommence on the day the new agency receives the transfer.

Procedures for liaison between different agencies that may receive the same request can be established. However, it is important to note that each agency remains responsible for making a decision in accordance with the FOI Act.

The scope of the access application will determine whether the access application is required to be, or may be, transferred **in part or in full**.

When to transfer

Section 15(1)	Applications **must** be transferred to another agency when - • the agency does not hold the requested document but knows, or has reasonable grounds to believe, that another agency (other than an exempt agency) holds the requested documents.
Section 15(2)	Applications **may** be transferred to another agency when – • the agency holds the requested documents but the documents originated with that other agency and are more closely related to that other agency's functions.
Sections 15(3) and (4)	The agency must give the applicant written notice of the transfer. The notice has to state the day on which the transfer was made and the agency to which the application is transferred.
Section 15(5)	The time for dealing with the application applies from the date the valid access application was lodged with the first agency. Still only 45 calendar days.
Section 15(8)	If the requested documents originated with or were received from an exempt agency, the agency has to notify the exempt agency that the access application has been received – an application cannot be transferred to an exempt agency – see Dealing with requests for documents related to an exempt agency, which is available on our website.

TIPS FOR TRANSFERS

- Contact the relevant agency before the transfer to check that they do hold the requested documents.
- If transferring the request for particular documents, provide the new agency with copies of those documents.
- Give the access applicant the contact details for the person in the new agency dealing with the transferred access application.

Example of a decision involving the transfer of an access application

***Re MacTiernan and Minister for Regional Development* [2009] WAICmr 29**

The Commissioner noted that the wording of section 15 makes it clear that an application can be transferred to another agency in two situations. The first (section 15(1)) is where the agency does not hold the requested documents and

the second (section 15(2)) is where it does. In the first situation, a transfer is mandatory; in the second, it is at the agency's discretion.

The Commissioner considered that the statement in section 15(1): "*If the agency does not hold the requested documents …"* implies that the agency has conducted searches for those documents and that, until an agency has conducted searches, it cannot know whether or not it holds the requested documents.

While he does not have the power to review an agency's decision to transfer an access application, the Commissioner noted that he does have jurisdiction to review an agency's decision to refuse access on the ground that it does not hold the requested documents.

Further, as a decision to transfer an application under section 15(1) implies that the relevant agency has decided that it does not hold the requested documents, the Commissioner considered that he may deal with a complaint against a decision to transfer an application under section 15(1) as a review of a deemed decision of the Minister to refuse the complainant access to documents, pursuant to section 26 of the FOI Act: see [7]-[13].

See also *Re Bartucciotto and Guardianship and Administration Board* [2004] WAICmr 16.

WAYS OF GIVING ACCESS

Section 27(1)	Access may be given in the following ways: • inspection; • copy of documents; • viewing or hearing of films, video or sound recordings; • copy of film, video or sound recordings; • transcript of sound recordings; • transcript of shorthand notes or encoded information; • computer printout; or • electronic media (including e-mail).
Section 27(2)	An agency must give access in the form requested by the applicant unless it would: • interfere unreasonably with the agency's other operations; • damage or harm the document or would be inappropriate because of the physical nature of the document; or • involve an infringement of copyright belonging to a person other than the State. The applicant and agency can agree on a form of access.

Example of a decision involving "ways in which access can be given" (section 27)

***Re Hoyts Multiplex Cinemas Pty Ltd and City of Gosnells* [1997] WAICmr 1**

The complainant sought access by way of inspection to documents relating to a planning and development application lodged with the agency with respect to a proposed cinema complex. The complainant was granted access to certain documents and provided access by way of inspection to the plans. The complainant subsequently requested copies of the plans. The Information Commissioner found that the plans were subject to copyright and confirmed the agency's decision to give access by way of inspection only. (Section 27(2)(c)).

(See also *Re Zurich Bay Holdings Pty Ltd and City of Rockingham* [2006] WAICmr 12; *Re City of Subiaco and Subiaco Redevelopment Authority* [2009] WAICmr 23; and *Re 'R' and City of Greater Geraldton* [2012] WAICmr 25)

Other forms of access

In certain circumstances an agency may defer giving access (section 25) or may give indirect access through a suitably qualified medical practitioner (section 28).

An agency must still make a decision on whether to give access to a document in the first place. Only once an agency has decided to grant access is it appropriate to consider whether to give deferred or indirect access.

Section 25	Deferred access. An agency may defer giving access to a document for a reasonable period if the document is required by law to be published but is yet to be published or has been prepared for presentation to Parliament or submission to a particular person or body but is yet to be presented or submitted. The agency has to notify the applicant of the likely period to which access is to be deferred. See *Re Rourke and Town of Claremont* [2013] WAICmr 24 – an example where a decision under section 25 was not justified and the agency was required to give immediate effect to its decision to give the complainant access to the requested document.
Section 28	Access to medical and psychiatric information about applicant. An agency can decide to give access to documents which contain information of a medical or psychiatric nature concerning the applicant through a suitably qualified person nominated by the applicant. This only applies when the principal officer is of the opinion that providing direct access to the applicant may have a substantial adverse effect on the physical or mental health of the applicant.

Chapter 3

APPLICATION FEE & CHARGES

CONTENTS

- Application fee
- Charges
- What can an agency charge for?
- Scale of fees and charges
- Estimate of charges
- Deposits
- Suspension of time
- Waiver or reduction of charges

FURTHER READING

- FOI Timeframes and Cost

APPLICATION FEE AND CHARGES

Section 16(1)(d)	No charge is payable for providing an applicant with access to personal information that relates to the applicant. **Amendment commenced 1 July 2026**
Section 53	No charge is payable for amendment of personal information.

Where the access applicant only requests access to their own personal information , no application fee or charges apply. This means any information in the requested documents that is not the applicant's personal information, such as the names of other people, can be deleted on the basis it is outside the scope of the application.

If the applicant is seeking more than just their own personal information (defined as "non-personal information"), an application fee of $30 applies and charges may be imposed.

APPLICATION FEE

An application fee of $30.00 is payable for applications seeking access to information other than their own personal information . These are often referred to as "applications for non-personal information", even though they may contain personal information about third parties. There is no express discretion to waive or reduce the application fee.

Examples of decisions involving application fees

Re Georgeson and Government Employees Superannuation Board **[2013] WAICmr 10** **NOTE:** some sections of the FOI Act considered in this decision have been amended since this decision

The primary issue before the Commissioner in this case concerned the question of whether the agency was justified in deleting information about other people, on the basis that the complainant's application was for personal information about herself only.

In this case, the Commissioner noted at [19]:

> *There is no express discretion under the FOI Act for an agency to waive the $30 application fee payable for non-personal information; that if an applicant does not pay the $30 application fee, the application is a valid application for access to personal information, as defined in the FOI Act, about the applicant only; and, in that case, it follows that any information in the requested documents about people other than the applicant is outside the scope of the application and need not be disclosed.*

After reviewing the information before him, the Commissioner considered that the complainant applied for personal information in relation to herself only and that any information which is more than personal information about the applicant, such as personal information about other people, is outside the scope of the complainant's application and the agency was entitled to delete that information.

***Re Simonsen and Edith Cowan University* [1994] WAICmr 10**

This case involved an application for documents containing personal and non-personal information. It raised the questions:

- was the agency justified in charging an application fee; and
- is there provision to waive or reduce the application fee if applicant is impecunious?

The Commissioner decided that the agency was justified in charging an application fee, required to be paid at the time of lodging the application (section 12(1)(e)).

CHARGES

An agency has discretion to impose or not to impose charges for access to documents in accordance with the charges set out in the Regulations.

Section 16(1)(g) a charge must be waived or reduced if the applicant is impecunious (not the application fee).

Agencies must apply the Regulations according to the spirit and intent of the FOI Act, which is to provide access at the lowest reasonable cost (section 4(b)).

Scale of fees and charges

The scale of fees and charges has been set by the FOI Regulations. Briefly, the charges set out in Schedule 1 to the Regulations are:

1.	**Type of fee**	
	Application fee (for applications for non-personal information).	**$30**
2.	**Type of charge**	
	Staff time dealing with the application, supervised access, photocopying, transcribing information from tape etc (per hour, or *pro rata* for a part of an hour).....	**$30**
	Photocopies (*per copy*).....	**20 cents**
	Duplicating a tape, film or computer information.....	**Actual Cost**

	Delivery, packaging and postage.....	**Actual Cost**
3.	**Advance Deposits**	
	Percentage of estimated charges payable.....	**25%**
	Further percentage of estimated charge may be required.....	**75%**

There are no fees or charges payable for internal or external review.

WHAT CAN AN AGENCY CHARGE FOR?

In *Re Hesse and Shire of Mundaring* [1994] WAICmr 7 and *Re Butcher and Agriculture Western Australia* [2000] WAICmr 62*;* the Information Commissioner dealt with the issue of charges. In these cases the Information Commissioner outlined the administrative steps that may attract charges when dealing with an access application for non-personal information. The Information Commissioner found that -

An agency cannot charge for:

- receiving the application and issuing a receipt for the fee (where applicable);
- creating an FOI file or otherwise recording the application in the existing record system;
- searching records for the relevant documents; or
- identifying and collating the documents in dispute.

An agency can charge for:

- consulting with third parties if necessary;
- examining the documents, exercising a judgement and making a decision about access;
- deleting exempt matter where appropriate;
- preparing a notice of decision in the required form; and
- providing access in the manner required by the applicant (or in an alternative manner).

The Information Commissioner stated in these decisions that the administrative actions for which a charge may be payable under item 2(a) in the Schedule to the Regulations are those steps described in the preceding paragraph. It is only at the point where a decision-maker "considers and decides" the issue of access that it can be said that he or she "deals with" the application according to the obligation in section 13(1).

Charges do not have to be imposed – an agency has a discretion whether or not to ask for processing charges.

ESTIMATE OF CHARGES

It is preferable that the agency decides at the outset whether or not the applicant will be charged and advises the applicant as soon as possible what the estimated charge will be.

Section 17(1)-(2)	At the time of making the access application, the **applicant may ask for an estimate of the charges** that might be payable and the agency must notify the applicant of its estimate and the basis for it.
Section 17(3)	Even if the applicant has not requested an estimate**, if the estimated charge might exceed $25, the applicant must be notified** and the agency must inquire whether or not the applicant wishes to proceed with the application. **Note:** the applicant is not required to pay all charges at this time.
Section 19(1)(a)	The **45 day limit is suspended** on the day the applicant is given written notice of the estimate of charges and resumes on the day after the applicant advises the agency of his or her intention to proceed with the application.
Section 19(1)(a)	If the applicant does not give notice of their intention to proceed with the application within 30 days, the application is regarded to have been withdrawn.
Sections 17(3) and 19(1)(b)	The applicant is to be notified of the requirement to respond within 30 days and the outcome of failing to respond within that time.
Section 16(2)	Other than a deposit under section 18, the charge is not required to be paid before the applicant is given the agency's decision to release information. The agency may require any charges according to the regulations to be paid by the applicant before access to documents is given.
Section 30(g)	The applicant is to be notified of any charge payable for dealing with the application and the basis on which it was calculated when being notified of the decision on access.
Section 39(2)(vi)	The applicant can seek internal review of the decision to impose a charge or require a deposit if he or she considers it to be unreasonable. **TIP:** the Commissioner considers that an applicant cannot seek review of an estimate of charges where no deposit has been required.

DEPOSITS

Sections 17(3), 18(1) and 18(2)	When the agency provides an estimate of charges that exceeds $25, the agency may, in the same or a separate notice, ask the applicant to pay a deposit. In response, the applicant may request the agency to discuss alternatives for changing the application or reducing the estimated charge in exchange for the applicant waiving the requirement for the agency to deal with the application within the 45-day period.
Section 19(2)(a)	The 45 day limit is suspended on the day the applicant is notified of the requirement to pay a deposit and resumes on the day the deposit is paid.
Section 19(2)(b)	If the deposit is not paid within 30 days, the application is regarded to have been withdrawn.
Sections 18(3)(c) and 19(2)(b)	The applicant must be notified of the requirement to pay the deposit within 30 days and the outcome of failing to respond within that time (section 18(3)(c)).
Section 39(2)(a) (vi)	The applicant can seek an internal review of the decision to require payment of a deposit if he or she considers it to be unreasonable.

TIP: Where an estimate of charges is given to an applicant it is common for a requirement to pay a deposit to be issued at the same time.

STARTING & STOPPING THE CLOCK

Sections 19(1)(a) and 19(2)(a)	45-day limit suspended on day applicant notified of the charges and/or requirement to pay a deposit. Resumes on the day after the applicant notifies intention to proceed and/or when the deposit is paid. Note that this is the only circumstance, other than with the agreement of the applicant, in which the "clock" can be stopped.

WAIVER OR REDUCTION OF CHARGES

Section 16(1)(g)	Imposition of charges for dealing with an application is entirely at an agency's discretion. Charges can be waived in full or in part, and do not have to be imposed. Regulation 3 makes provision for a mandatory reduction in charges of 25% if an applicant is considered to be "impecunious" or is the holder of certain types of concession cards.

Chapter 4

EXEMPTIONS

CONTENTS

- Introduction
- Types of exemption
- Editing to remove exempt information
- Clause 3 – Personal Information (NOTE: Clause 3 of Schedule 1 to the FOI was amended on 1 July 2026)
- The Public Interest Test
- Clause 4 – Commercial or Business Information
- Extracts from key decisions on various exemption clauses

FURTHER READING

- The FOI exemptions
- What is personal information?

OIC guides

- Clause 4(2) – Information that has a commercial value
- Clause 4(3) – Business, professional, commercial or financial affairs
- Clause 6 – Deliberative processes of Government
- Clause 7 – Legal professional privilege

INTRODUCTION

Some documents which, if released, would hinder the proper functioning of government, or would have an adverse effect on the private or business interests of individuals, are protected from disclosure.

In determining whether or not an exemption should be claimed for a particular document, consideration should be given, firstly, to whether the document is sensitive; secondly, what harmful effects could reasonably be expected to result from disclosure; and, thirdly, who might be adversely affected by disclosure.

Exemptions should not be claimed merely because an exemption is technically available for a particular document. Not only may there be no disadvantage in disclosing the document, there may be a positive benefit in its disclosure.

Agencies should only claim an exemption when there are good reasons to do so and when the public interest requires nondisclosure, rather than merely because an exemption is potentially available to be claimed.

Decision-makers will often come across internal policy that prohibits disclosure of documents. Policy, unlike law, is not generally binding on the decision-maker. The requirements of policy are a relevant consideration and should guide the decision-maker in exercising his or her discretion. Policy cannot dictate the final outcome. The decision-maker must consider the merits of the case and determine whether the facts justify a departure from policy.

TWO TYPES OF EXEMPTIONS

Based on nature of document or information	Based on expected results
Clause 1	**Clause 2**
Cabinet and Executive Council	Inter-governmental relations
Clause 3	**Clause 4(2) and 4(3)**
Personal information	Commercial and business information
Clause 4(1)	**Clause 5**
Trade secrets	Law enforcement, public safety, and property security
Clause 5(2) and 5(3)	**Clause 6**
Documents created by certain exempt agencies or by Commonwealth intelligence or security agency	Deliberative processes of Government
Clause 7	**Clause 8**
Legal professional privilege	Confidential communications
Clause 12	**Clause 9**
Contempt of Parliament or court	**State's economy**
Clause 13	**Clause 10**
Adoption or artificial conception	**State's financial or property affairs**
Clause 14	**Clause 11**
Information protected by certain secrecy provisions	**Effective operation of agencies**
Clause 15	
Precious metal transactions	
Clause 4A	
Information given to the Treasurer under the Bank of Western Australia Act 1995	
Clause 13A	
Abortion information	

EDITING TO DELETE EXEMPT INFORMATION

Section 24 of the FOI Act provides:

> *If —*
>
> *(a) the access application requests access to a document containing exempt matter; and*
>
> *(b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and*
>
> *(c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,*
>
> *the agency has to give access to an edited copy even if the document is the subject of an exemption certificate.*

In *Police Force of Western Australia v Winterton* (Unreported, Supreme Court of WA, Library No 970646, 27 November 1997), Scott J considered the meaning and interpretation of section 24 of the FOI Act and said, at page 16:

> *It seems to me that the reference in s24(b) to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context.*

Accordingly, agencies should consider whether it is practicable to give access to an edited copy of the requested document with exempt information deleted.

However, bear in mind that in cases where an applicant seeks access to documents relating to a specifically named individual, it may not be possible to edit the documents so as not to disclose personal information about those individuals: see *Re Ninan and Department of Commerce* [2012] WAICmr 31 at [82] and *Re McGowan and Shire of Murray* [2010] WAICmr 29 at [46]; and *Re Post Newspapers Ltd and Town of Cambridge* [2006] WAICmr 25 at [65]. In those cases, no amount of editing would be possible because it would still be clear that any information in the requested documents would relate to the named individual.

***Re Banovic and Edwards and Racing and Wagering Western Australia* [2016] WAICmr 16**

The complainants sought access to a transcript of the proceedings of a Stewards' Inquiry. The Commissioner was satisfied that the transcript contained personal information about a number of third parties which was, on its face, exempt under clause 3(1) of Schedule 1 to the FOI Act.

The Commissioner considered that the public interest in the transparency and accountability of government agencies was served by the public availability of

the Racing Penalties Appeal Tribunal's decision and by the agency providing a copy of the relevant stewards' findings to the complainants.

The Commissioner did not consider that the public interests favouring disclosure outweighed the very strong public interest in the protection of the personal privacy of third parties in this instance. The Commissioner found that the transcript was exempt under clause 3(1).

The Commissioner considered that it was not practicable to give access to an edited copy of the document with the exempt information deleted in accordance with section 24 of the FOI Act. In his view, the personal information on every page of the disputed document was of such a significant quantity and was so intermingled with non-personal information that to delete the personal information would be impractical and would render the remainder of the document unintelligible to a reader.

PERSONAL INFORMATION - CLAUSE 3 OF SCHEDULE 1

NOTE: Amendments to clause 3 of Schedule 1 to the FOI Act commenced on 1 July 2026

Clause 3 of Schedule 1 to the FOI Act provides:

> *(1) Matter is exempt matter if its disclosure would reveal personal information that relates to an individual (whether living or dead).*
>
> *(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information that relates to the applicant.*
>
> *(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to —*
>
> *(a) the person;*
>
> *(b) the person's position or functions as an officer; or*
>
> *(c) things done by the person in the course of performing functions as an officer.*
>
> *(4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to —*
>
> *(a) the person;*
>
> *(b) the contract; or*
>
> *(c) things done by the person in performing services under the contract.*
>
> *(5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

Regulation 9 of the FOI Regulations 1993 provides:

(1) In relation to a person who is or has been an officer of an agency, details of —

(a) the person's name;

(b) any qualifications held by the person relevant to the person's position in the agency;

(c) the position held by the person in the agency;

(d) the functions and duties of the person, as described in any job description document for the position held by the person; or

(e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person,

are prescribed details for the purposes of Schedule 1, clause 3(3) of the Act.

(2) In relation to a person who performs or has performed services for an agency under a contract for services, details of —

(a) the person's name;

(b) any qualifications held by the person relevant to the person's position or the services provided or to be provided pursuant to the contract;

(c) the title of the position set out in the contract;

(d) the nature of services to be provided and described in the contract;

(e) the functions and duties of the position or the details of the services to be provided under the contract, as described in the contract or otherwise conveyed to the person pursuant to the contract;

(f) anything done by the person in the course of performing or purporting to perform the person's functions or duties or services, as described in the contract or otherwise conveyed to the person pursuant to the contract; or

(g) anything done by the person in the course of performing or purporting to perform the person's functions or duties or services as described in the contract or otherwise conveyed to the person pursuant to the contract,

are prescribed details for the purposes of Schedule 1, clause 3(4) of the Act.

Definition of Personal Information

NOTE: Amendments to the definition of 'personal information' commenced on 1 July 2026

'Personal information' is defined in the Glossary to the FOI Act:

> *personal information*
>
> *(a) means information or an opinion, whether true or not, and whether recorded in a material form or not, that relates to an individual, whether living or dead, whose identity is apparent or can reasonably be ascertained from the information or opinion; and*
>
> *(b) includes information of the following kinds to which paragraph (a) applies —*
>
> *(i) a name, date of birth or address;*
>
> *(ii) a unique identifier, online identifier or pseudonym;*
>
> *(iii) contact information;*
>
> *(iv) information that relates to an individual's location;*
>
> *(v) technical or behavioural information in relation to an individual's activities, preferences or identity;*
>
> *(vi) inferred information that relates to an individual, including predictions in relation to an individual's behaviour or preferences and profiles generated from aggregated information;*
>
> *(vii) information that relates to 1 or more features specific to the physical, physiological, genetic, mental, behavioural, economic, cultural or social identity of an individual;*

The definition of personal information means:

- Personal information is information that relates to an identifiable individual.
- Personal information can only apply to individuals.
- The information or opinion can be that relates to and individual either living or dead.
- The information does not have to be true.

In many situations it may be appropriate to ask the applicant if they actually want personal information about third parties (that is, parties other than the applicant themselves) or if it can be deleted. This will reduce the amount of work required to deal with the application and should allow the agency to deal with the request more quickly.

Purpose of clause 3 exemption

The purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

Limitations on the clause 3 exemption

Personal information is exempt from disclosure under clause 3(1) unless one of the limits on the exemption in clauses 3(2)-3(6) applies.

Clause 3(2) **Amendment commenced 1 July 2026**	Information that is merely the applicant's personal information is not exempt under clause 3(1).
Clauses 3(3) and 3(4)	Information is not exempt under clause 3(1) if its disclosure would merely reveal prescribed details relating to an agency's own officer or former officer, or a person who performs or has performed services for the agency to which the access aplication has been made under a contract for services (clauses 3(3) and 3(4)). Prescribed details include certain work-related information such as an officer's name, title, work-related qualifications, functions and duties, and things done in the course of the officer's functions or duties (see regulation 9 of the FOI Regulations). [2]
Clause 3(5)	Personal information is not exempt under clause 3(1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the information to the applicant. **TIP:** To satisfy this limitation on the clause 3(1) exemption, the onus is on the applicant to provide the agency with consent. An agency is not required to seek consent from a third party under clause 3(5). This contrasts with the requirement to seek the views of a third party under section 32 the FOI Act if the agency is of the view the personal information about the third party is not exempt and it proposes to disclose that information – see chapter 5 of this manual – *Consultation.*
Clause 3(6)	Personal information is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest.

[2] For more information about prescribed details of an officer of another agency, see *Dealing with personal information about an officer of an agency*.

Considerations when a document contains exempt personal information

Section 24	In certain circumstances it will be appropriate in accordance with section 24 for the agency to give access to a copy of a document from which the exempt personal information has been deleted.
Section 27(1)(f)	In cases where the identity of an individual can be ascertained from the information, consideration may be given to providing access in another form. For example, giving the applicant a typed version of a hand-written letter.
Section 32	Personal information about a person other than the applicant (a third party) should not be disclosed without first taking such steps as are reasonably practicable to obtain the views of the third party as to whether the information is exempt under clause 3.

Privacy of private individuals respected

Personal information that relates to individuals (other than the applicant) whose identity can be ascertained is exempt unless:

- the individual concerned consents to disclosure (clause 3(5)); or
- disclosure would, on balance, be in the public interest (clause 3(6)).

Clause 3 is a recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals and that the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned where there is no demonstrable benefit to the public interest in doing so. The FOI Act is intended to make government, its agencies and its officers more accountable, not to call into account or unnecessarily intrude upon the privacy of private individual.

The Information Commissioner considers that the public interest in protecting the privacy of individuals is strong and may only be displaced by some other stronger and more compelling public interest or interests favouring disclosure.

For example: ***Re 'X' and City of Rockingham*** **[2025] WAICmr 11**.

Examples of decisions that consider the clause 3 exemption

***Public Transport Authority* [2018] WASC 47**

Supreme Court decision that considers what is 'personal information' in CCTV footage

The agency appealed the Commissioner's decision in *Re Seven Network (Operations) Limited and Public Transport Authority* [2017] WAICmr 12 that certain CCTV footage was not exempt under clause 3(1) of Schedule 1 to the FOI Act. The Commissioner had found that the CCTV footage was not personal information as defined in the Glossary to the FOI Act because he was not satisfied that the identities of the individuals in the footage were apparent or could reasonably be ascertained from the footage. The Honourable Acting Justice Smith held at [72]:

> *The issue is whether a person's identity can reasonably be ascertained. The question to be asked is whether, on an objective assessment of all relevant circumstances when examining CCTV footage, it can reasonably be said that at least one or more persons, including the person or persons whose image(s) are shown in the CCTV footage, could have the necessary knowledge of contextual information to ascertain the identity of the individual or individuals.*

The appeal was upheld.

(see also *Re Papalia and Western Australia Police* [2016] WAICmr 1 at page 77)

***Re 'M' and WA Country Health Service – South West* [2012] WAICmr 8**

Disclosure of personal information about third parties (contained in the applicant's medical records) not in the public interest

In this case, the complainant sought access to his medical records including his mental health records. The agency decided to give him access to those records in accordance with section 28 of the FOI Act, which provides, in certain specified circumstances, for documents to be given to a medical practitioner nominated by the applicant.

On external review, the Commissioner was not satisfied that the agency's decision was justified, as there was insufficient material to establish that the principal officer of the agency held the opinion that direct disclosure of those records to the complainant may have a substantial adverse effect on his physical or mental health, as required by section 28.

Consequently, the agency withdrew its claim under section 28 and gave the complainant a copy of his medical records, edited to delete personal information about private individuals.

*(NOTE: The definition of 'personal information' and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult **WALW - Freedom of Information Act 1992 - Home Page**.*

The Commissioner found that the deleted information consisted of personal information about third parties that was prima facie exempt under clause 3(1). In balancing the competing public interests for and against disclosure of that information under clause 3(6), the Commissioner considered that the public interest in maintaining the privacy of third parties and the ability of the agency to carry out its functions in respect of mental health on behalf of the wider community, outweighed the public interests in favour of disclosure in that case. Accordingly, the Commissioner decided that the limit on the exemption in clause 3(6) did not apply and that the deleted information about private individuals other than the complainant was exempt under clause 3(1).

Re 'K' and City of Canning and 'L' **[2012] WAICmr 3**

Disclosure of personal information about third parties (travel expense claims of local government councillors) in the public interest

The complainant applied for 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 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 private in nature. 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.

Re Mackenzie and Western Australia Police **[2011] WAICmr 28**

Disclosure of personal information about third parties (witness statements) not in the public interest

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).

(NOTE: The definition of ' personal information' and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult ***WALW - Freedom of Information Act 1992 - Home Page****.*

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).

***Re Australia First Party (NSW) Inc and Department of Commerce* [2010] WAICmr 32**

Disclosure of personal information about third parties (membership records of a political party) not in the public interest

In this case, the Commissioner considered that the membership records of a political party were prima facie exempt under clause 3(1) because it would clearly identify particular individuals.

In weighing the competing public interests for and against disclosure pursuant to clause 3(6), the Commissioner did not accept that, in joining a political party, individuals gave up a certain element of privacy to the elected officers of that party. The Commissioner noted that the FOI Act is intended to make government more accountable, not to unnecessarily intrude upon the privacy of individuals. In the circumstances, the Commissioner held that the strong public interest in protecting privacy outweighed the public interests in favour of disclosure.

*(NOTE: The definition of ' personal information' and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult **WALW - Freedom of Information Act 1992 - Home Page**.*

***Re U and Department of Health* [2010] WAICmr 3**

Disclosure of personal information about a third party (review into the clinical care of a deceased relative) in the public interest

This case is one of the rare decisions in which the Commissioner has held that, on balance, it was in the public interest to disclose personal information about one private individual to another.

The complainant sought medical information relating to his deceased wife who had been under the clinical care of certain health service agencies at the time of her death. The relevant document was the Chief Psychiatrist's review into the clinical care of the deceased up to the time of her death. The agency had disclosed an edited copy of that review to the complainant which revealed, in effect, only the recommendations arising from the conduct of the review.

In considering the public interest, the Commissioner took into account the following facts:

- the complainant was the deceased's closest relative, next of kin and carer of the children of the marriage;
- other close members of the deceased's family supported the access application;
- a good deal of information about the deceased's medical condition and treatment had already been disclosed to the complainant; and
- the deceased had in the past indicated a level of consent to the disclosure of information about her health and treatment to her husband (the complainant).

Although the Commissioner recognised that there was a strong public interest in protecting the privacy of an individual (including a deceased person) and a public interest in preserving the trust and confidence of the public in the confidentiality of health records, there is a public interest in informed public debate about the operations of public health services, especially when - as here - there are concerns about whether they have operated effectively. The Commissioner considered that, on balance, the public interests in disclosure outweighed those favouring non-disclosure in this case. Accordingly, the Commissioner decided that the relevant information was not exempt under clause 3.

***Re Seven Network (Operations) Limited and Western Australia Police* [2015] WAICmr 14**

Documents relating to traffic infringements issued to senior public officers including Ministers

The complainant applied to the agency for access to documents relating to traffic infringements or parking fines involving government vehicles assigned to certain senior public office holders including Ministers. The agency gave the

*(NOTE: The definition of 'personal information', section 32 and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult **WALW - Freedom of Information Act 1992 - Home Page**.*

complainant access to an edited copy of each of the documents located. The disputed information was the name of the person in the address line of each traffic infringement, which the agency deleted on the basis it was personal information and exempt under clause 3(1) of Schedule 1 to the FOI Act.

The Commissioner accepted that the disputed information is personal information which is, on its face, exempt under clause 3(1). The Commissioner considered that the only limits on the exemption that were relevant in this matter were clauses 3(3), 3(5) and 3(6).

The Commissioner was of the view that, having regard to the context of the disputed information and the details in the traffic infringements already disclosed, the disputed information would reveal more than prescribed details. As a result, the Commissioner considered that clause 3(3) did not operate to limit the exemption in clause 3(1) in this case.

The Commissioner was also of the view that the limit on the exemption in clause 3(5) applies where there is evidence that an individual consents to the disclosure of their personal information. As two of the persons named in the traffic infringements advised the Commissioner that they consented to disclosure of their personal information, the Commissioner found that the limit in 3(5) applied to that information and it was not exempt under clause 3(1).

In determining whether disclosure of the disputed information would, on balance, be in the public interest, the Commissioner recognised that there is a strong public interest in maintaining personal privacy. The Commissioner was of the view that election to office or appointment as a Minister, or appointment to a senior public office, does not mean that the office holder forfeits the right to privacy.

In favour of disclosure, the Commissioner considered that there is a public interest in senior government officers being accountable, and being seen to be accountable, for acting in accordance with the law. The Commissioner also considered that the objects of the FOI Act and the Ministerial Code of Conduct reflect a public interest in Ministers being individually accountable to the public for acting in accordance with the law, particularly when they are using publicly funded resources. The Commissioner was also of the view that senior public officers who are provided vehicles at expense to the taxpayer should be accountable to the public for their use of publicly funded resources.

The Commissioner concluded that the public interest factors in favour of disclosure outweighed the public interest factors against disclosure and that the limit on exemption in clause 3(6) applied. The Commissioner found that the disputed information was not exempt under clause 3(1) and set aside the agency's decision.

(NOTE: The definition of ' personal information' and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult WALW - Freedom of Information Act 1992 - Home Page.

Re Shuttleworth and Town of Victoria Park [2016] WAICmr 13

Disclosure of certain personal information about the declarant of a statutory declaration was, in the circumstances of the case, on balance, in the public interest

The complainant sought access to a copy of a statutory declaration that had been executed by a third party and provided to the agency for the purpose of verifying that certain work had been carried out on a block prior to its subdivision and sale as a strata titled block. The agency gave the complainant an edited copy of the document, deleting the name, address, occupation and signature of the third party. The Commissioner found that the third party's signature was exempt under clause 3(1). However, in the circumstances of the particular complaint, the Commissioner decided that disclosure of the name, address and occupation of the third party would, on balance, be in the public interest and he found that information was not exempt under clause 3(1).

***Re McGowan and Department of the Premier and Cabinet* [2015] WAICmr 3**

The Information Commissioner found documents relating to an inquiry into the conduct of a ministerial officer were not exempt under clauses 3(1) or 11(1)(c) of Schedule 1 to the FOI Act as claimed by the agency.

On external review the complainant advised that he did not seek access to any information in the documents that related to the health and wellbeing of Government officers or certain other information about officers including their direct contact details. Accordingly, information of that kind was outside the scope of the complaint.

The Commissioner found that all the remaining personal information in the documents consisted of prescribed details about officers of an agency which was not exempt under clause 3(1) by virtue of the limit on the exemption in clause 3(3). The Commissioner also considered that there was evidence that a number of the third parties had consented to disclosure of edited copies of the documents and that, as a result, the limit on exemption in clause 3(5) applied to the personal information about those third parties contained in the documents.

In considering the public interest factors for and against disclosure of the documents, the Commissioner acknowledged that there was a strong public interest in protecting personal privacy and considered that the matter turned on whether that public interest was outweighed by the public interest factors in favour of disclosure.

*(NOTE: The definition of ' personal information' and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult **WALW - Freedom of Information Act 1992 - Home Page** Act.*

The Commissioner noted that the documents concerned an investigation undertaken at the most senior levels by a key central government agency into the conduct of other senior government officers following events which related to a former Minister. The Commissioner was of the view that the strong public interest in ensuring that such investigations are conducted fairly, robustly and with integrity would be furthered by disclosure of the documents in this case.

The Commissioner considered that the weight of the public interest factors against disclosure was somewhat lessened in the particular circumstances of this matter because the documents concerned the actions of senior current or former public officers in influential positions. The Commissioner concluded that disclosure of the documents would, on balance, be in the public interest pursuant to clause 3(6) and found that the documents were not exempt under clause 3(1).

Further, the Commissioner was not satisfied on the evidence before him that disclosure of the documents could reasonably be expected to have a substantial adverse effect on the agency's management or assessment of its personnel and found that the documents were not exempt under clause 11(1)(c). The Commissioner was not persuaded by the agency's claim that public servants' willingness to co-operate with inquiries would substantially be compromised if the documents were disclosed. The Commissioner considered that the agency's claim that public officers would be reluctant to provide information in the future was inconsistent with the standards and values contained in the public sector code of ethics and code of conduct which apply to officers in such positions.

For more examples of decisions that considered clause 3 and the public interest see page 75.

Disclosure to applicants of their own personal information

Section 29 **Amendment commenced 1 July 2026**	If an agency gives an applicant access to personal information about the applicant, the agency has to take reasonable steps to satisfy itself of the identity of the applicant and ensure that only the applicant or the applicant's agent, nominated in writing, receives the document.
Section 28	If a document to which the agency has decided to give access contains information of a medical or psychiatric nature concerning the applicant, and the principal officer of the agency is of the opinion that disclosure of the information to the applicant may have a substantial adverse effect on the physical or mental health of the applicant, it is sufficient compliance with the FOI Act if access to the document is given to a suitably qualified person nominated in writing by the applicant and the agency may withhold access until a person who is, in the opinion of the agency, suitably qualified is nominated.

*(NOTE: The definition of ' personal information' and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult **WALW - Freedom of Information Act 1992 - Home Page**.*

Evidence of identity of the applicant

As noted above, when access is sought to personal information that relates to the applicant, section 29 requires an agency to take reasonable steps to satisfy itself of the identity of the applicant. The agency must also ensure the document is provided only to the applicant or the applicant's agent.

The agency should ask for proof to establish the applicant's identity. The level of identity verification required will depend on the nature of the documents requested and the sensitivity of the information they contain.

When obtaining evidence of identity, agencies should consider their obligations under the PRIS Act. In particular, central to IPP 1 (collection) is the concept of 'data minimisation' – collecting only the minimum personal information necessary for a specific purpose.

Agencies should consider whether identity can be verified by sighting evidence of identity rather than collecting a copy. For example, an agency may sight an original identity document in person or during a secure video call and make a note that the document was sighted, without having to make a copy of the identity document.

If a copy of an identity document is collected, schedule 88.2 in the General Retention and Disposal Authority for Local Government Information DA 2023-005 and schedule 71.2 in the General Retention and Disposal Authority for State Government Information DA 2023-004 allows the destruction of documents sighted as proof of an individual's identity once the verification and validation process has been completed.

What documentary proof is required?

The FOI Act does not prescribe the evidence required to establish an applicant's identity. However, primary identification documents may be the most reliable. For example:

- Original birth certificate
- Certified copy of a birth extract
- Current Australian passport
- Current Western Australian Motor Drivers Licence (preferably with photograph)
- Other documents which may be of reasonable evidentiary value are:
    - Naturalisation certificate
    - Marriage certificate
    - Overseas passport with current entry permit
    - Official identification card issued by Local, State or Commonwealth Government department
    - Apprenticeship indenture papers

- A degree, school examination certificate or report that is less than 2 years old from an Australian school, college or university
- Title deed to real estate or registered mortgage papers for a home or property

Any combination of documents may be required as proof of identity, particularly where more sensitive information is involved.

When an applicant seeks access to their own personal information, an agency should request proof of identity early on, so that access is not delayed unnecessarily once a decision about access to the requested documents is reached. The decision-maker is not entitled to extend the permitted period for dealing with an access application because of the time it may take for the applicant to provide proof of identity and must make a decision on access within the permitted period. However, the giving of access may be delayed if proof of identity is not forthcoming.

TRADE SECRETS, COMMERCIAL AND BUSINESS INFORMATION - CLAUSE 4 OF SCHEDULE 1

Clause 4 of Schedule 1 to the FOI Act provides:

> *(1) Matter is exempt matter if its disclosure would reveal trade secrets of a person.*
>
> *(2) Matter is exempt matter if its disclosure —*
>
> *(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*
>
> *(b) could reasonably be expected to destroy or diminish that commercial value.*
>
> *(3) Matter is exempt matter if its disclosure —*
>
> *(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
>
> *(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> *(4) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
>
> *(5) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*
>
> *(6) Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
>
> *(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.*

Trade Secrets, Commercial and Business Information - State & Local Government context

- Service providers
- Financial information
- Tender documentation
- Outsourced functions

The exemption in clause 4 of Schedule 1 to the FOI Act protects certain commercial or business information supplied to government by third parties and about third parties dealing with government. It does not protect information

concerning the business or commercial affairs of an agency: see clause 10, which is the applicable exemption for information of that kind**.**

Clause 4 applies to documents containing commercial or business information about any person or organisation.

The term 'person' is defined in section 5 of the *Interpretation Act 1984* to mean bodies corporate or unincorporated, as well as natural persons.

Clause 4 recognises that the business of government is frequently mixed with that of the private sector and that such business should not be adversely affected by the operation of the FOI Act: see *Re Kimberley Diamond Company NL and Department for Resources Development and Anor* [2000] WAICmr 51.

There are three separate exemptions in clause 4. The three exemptions are mutually exclusive. In all three circumstances the company or business concerned needs to be consulted before the relevant information is released. However, if the agency has formed the view that the relevant information is exempt, then the company or business need not be consulted, as the agency is not proposing to release the information.

The exemptions in subclauses 4(1), 4(2) and 4(3) are intended to protect different kinds of information from disclosure. The terms of those provisions make it clear that information that may be found to be exempt under one subclause cannot also be exempt under one of the other subclauses. However, it is open to an agency or a third party to make alternative submissions as to which of the subclauses applies. It is also possible that a single document may contain a mixture of information, some of which is exempt under one subclause and some of which is exempt under another subclause: see *Re Rogers and Water Corporation and Others* [2004] WAICmr 8 at [37].

The limits on exemption in clauses 4(4), 4(5) and 4(6) apply to the exemptions in clause 4(1), 4(2) and 4(3), whereas the public interest limitation in clause 4(7) only applies to the exemption in clause 4(3).

CLAUSE 4(1): TRADE SECRETS

Clause 4(1) is concerned with protecting information that would reveal trade secrets of a person.

The term 'trade secret' is not defined in the FOI Act. If relying on this exemption, an agency should identify the particular information in a document that is claimed to be a trade secret of a person.

There are few published decisions where the Commissioner has considered the application of the exemption in clause 4(1) as it is extremely rare for an agency to hold trade secrets.

Relevant factors in determining whether particular information is a trade secret

Matters that may be relevant in determining the existence or otherwise of a trade secret include:

- the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality;
- that information, originally secret, may lose its secret character with the passage of time;
- that the relevant information be used in, or useable in, a trade or business;
- that the relevant information would be to the advantage of trade rivals to obtain; and
- that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.

See *Re Greg Rowe & Associates and Minister for Planning* [2001] WAICmr 4 at [14]-[16]; *Re West Australian Newspapers Ltd & Anor and Salaries and Allowances Tribunal* [2007] WAICmr 20 at [97]; and *Re Butcher and Department of Parks and Wildlife and Steven Edwards* [2014] WAICmr 6 at [14]-[21].

CLAUSE 4(2): COMMERCIALLY VALUABLE INFORMATION

The exemption in clause 4(2) consists of two parts and both parts must be satisfied to establish a prima facie claim for exemption.

Clause 4(2) provides that matter is exempt if its disclosure:

(a) would reveal information that has a commercial value to a person; **and**

(b) could reasonably be expected to destroy or diminish that commercial value.

Clause 4(2) is not subject to a public interest test.

In *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 the Full Federal Court of Australia said, at 190, that the words "*could reasonably be expected to*" in the Commonwealth FOI Act were intended to receive their ordinary meaning. That is, they require a judgment to be made by the decision maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the relevant outcome. That approach was accepted as the correct approach in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.

The Commissioner considers that the applicable legal principles in relation to clause 4(2) are as set out in *Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20 at [115]-[125], which are, in brief:

- Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation. That is, information may be valuable because it is important or essential to the profitability or viability of a continuing business operation or a pending 'one-off' commercial transaction.
- Information may have a commercial value if a genuine 'arms-length' buyer is prepared to pay to obtain that information.
- It is not necessary to quantify or assess the commercial value of the relevant matter.
- It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.
- The investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value.
- Information that is aged or out-of-date has no remaining commercial value.
- Information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation.

***Re Pillsbury and Department of Mines and Petroleum and Others* [2013] WAICmr 1**

The complainant sought access to an environmental management plan and occupational hygiene management plan concerning a demolition project at the Derby Export Facility. After consulting with the two third parties who prepared the requested documents, the agency refused access on the basis that the documents were exempt under clause 4(2) and clause 4(3). The complainant applied to the Commissioner for external review of the agency's decision and the two third parties were joined as parties to the complaint.

On external review, the Commissioner was not persuaded that disclosure of the requested documents could reasonably be expected to give the third parties' competitors a commercial advantage nor that an independent buyer would pay to obtain the information in the documents as the third parties claimed. The Commissioner was not satisfied that the requested documents had a commercial value to either of the third parties or that their disclosure could reasonably be expected to destroy or diminish any commercial value in the information in the documents. Consequently, the Commissioner found that the documents were not exempt under clause 4(2).

The Commissioner was also not persuaded by the third parties' claim that disclosure of the documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency, in light of the apparent statutory requirement to provide the information in the requested documents. In the absence of material to establish that disclosure of the requested documents could reasonably be expected to have an adverse effect on the commercial or business affairs of the third parties, the Commissioner found that the requested documents were not exempt under clause 4(3).

CLAUSE 4(3): OTHER COMMERCIAL AND BUSINESS INFORMATION

The exemption in clause 4(3) is more general in its terms than the exemption in clause 4(2).

Clause 4(3) is concerned with protecting from disclosure information about the business, professional, commercial or financial affairs of persons or organisations having business dealings with government agencies, where disclosure could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of that kind of information to the Government or its agencies.

The Commissioner considers that private organisations or persons having business dealings with government must necessarily expect greater scrutiny of, and accountability for, those dealings than in respect of their other dealings but should not suffer commercial disadvantage because of them.

The exemption consists of two parts and the requirements of both paragraphs (a) and (b) must be satisfied in order to establish a prima facie claim for exemption.

Clause 4(3) provides that matter is exempt matter if its disclosure:

(a) would reveal information about the business, professional, commercial or financial affairs of a person; **and**

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

The application of the exemption in clause 4(3) is subject to the public interest test set out in clause 4(7). The public interest test in clause 4(7) envisages that some kinds of business or commercial information may be disclosed if, on balance, it would be in the public interest to do so.

Limits on the exemption in clause 4

As noted, the limits on exemption in clauses 4(4), 4(5) and 4(6) apply to the exemptions in clauses 4(1), 4(2) and 4(3).

The public interest test in clause 4(7) only applies to the exemption in clause 4(3).

Clause 4(4) – matter is not exempt matter under subclauses (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.

Clause 4(5) – matter is not exempt matter under subclauses (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.

Clause 4(6) – matter is not exempt matter under subclauses (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.

Clause 4(7) – matter is not exempt matter under subclauses (3) if its disclosure would, on balance, be in the public interest.

Examples of decisions that consider the clause 4 exemptions

Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor **[2010] WAICmr 35**

In this case, the agency decided to give an applicant access to documents relating to the facilities on Varanus Island, where a gas pipeline explosion in June 2008 resulted in a 30% reduction in natural gas supplies to Western Australia for a two month period. The operator of the facilities on Varanus Island, Apache Northwest Pty Ltd (**Apache**), objected to disclosure of the documents and sought external review of the Department's decision, claiming that the documents were exempt under clauses 4(2) and 4(3), among other exemptions.

Apache claimed that disclosure of the disputed documents would provide its competitors with a competitive advantage and correspondingly disadvantage Apache. However, the Commissioner considered that even if the relevant documents were disclosed to a competitor, their commercial value to Apache would not be diminished because such disclosure would not harm the Varanus Island operations. After considering all of the information before him, the Commissioner was not persuaded that disclosure of the disputed documents could reasonably be expected to destroy or diminish any commercial value in the information in the documents and found that the documents were not exempt under clause 4(2) as claimed by Apache.

In relation to Apache's clause 4(3) exemption claim, the Commissioner accepted that the documents contain information about Apache's business affairs and that the requirements of clause 4(3)(a) were satisfied. However, the Commissioner was not satisfied that disclosure of the disputed documents could reasonably be expected to have an adverse effect on Apache's business affairs. In this case, Apache did not identify the specific information which might, if disclosed, have the adverse effect claimed. Although Apache claimed that disclosure of the disputed documents would have a significant adverse effect on its competitive position in the industry, it provided no information as to how its competitive position would be significantly impacted by disclosure of the documents.

The Commissioner also did not accept Apache's claim that potential oil and gas producers would, in the future, refuse to provide information of the required kind to the Government, given that a licensee or potential licensee must provide that information in order to comply with its obligations under the relevant legislation. Accordingly, the Commissioner found that the documents were not exempt under clause 4(3).

Both the Supreme Court and the Court of Appeal upheld the Commissioner's decision on appeal – see:

- *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [No 2] [2011] WASC 283
- *Apache Northwest Pty Ltd v Department of Mines and* Petroleum [2012] WASCA 167

***Re Greg Rowe Pty Ltd and City of Swan* [2014] WAICmr 15**

The complainant applied to the agency for access to the Operational Management Plan submitted to the agency by the operator of an egg farm (**the disputed document**). The agency consulted with the operator (**the third party**) who objected to disclosure, claiming that the disputed document is exempt under clauses 4(1), 4(2) and 4(3) of Schedule 1 to the FOI Act. The agency subsequently refused the complainant access to the disputed document under clause 4(1) of Schedule 1 to the FOI Act.

The complainant applied to the Commissioner for external review of the agency's decision and the third party was joined as a party to the complaint. Based on the material then before her, the A/Commissioner informed the parties that she was of the preliminary view that the disputed document was not exempt and, as a result, the agency withdrew its exemption claim. However, the third party maintained its claim that the disputed document is exempt under clause 4(3) and made further submissions.

After considering all of the information before him, the Commissioner did not accept the third party's claim that disclosure of the disputed document could reasonably be expected to have an adverse effect on the business or commercial affairs of the third party, as required by clause 4(3). In addition, the Commissioner was not persuaded that disclosure of the disputed document could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. The Commissioner noted that potential future applicants seeking building approvals from the agency will continue to submit the necessary documents to support their applications, where they feel it is in their commercial interest to do so. Consequently, the Commissioner found that the disputed document was not exempt under clause 4(3).

For another example of a decision that considered clause 4 and the public interest see page 76

THE PUBLIC INTEREST TEST

Some of the exemption provisions, including clauses 3 and 4 require an agency's decision-maker to apply a public interest test. The FOI Act provides that certain information is not exempt if its disclosure "*would, on balance, be in the public interest*". In comparison, material relating to deliberative processes of an agency (clause 6) is only exempt if certain conditions are met and disclosure "*would, on*

*balance, be **contrary** to the public interest*". In the majority of exemptions a "public interest test" operates to limit the scope of the exemption if it can be shown that the public interest lies in disclosing the relevant documents. Some exemptions do not have a public interest test, for example, clause 7 (legal professional privilege).

The public interest

To apply a public interest test it is necessary to understand what 'the public interest' means in the context of the FOI Act.

The term public interest is not defined in the FOI Act. This recognises that many factors can be relevant to the concept of the public interest.

The Information Commissioner considers that the term is best described in the decision of the Supreme Court of Victoria in *DPP v Smith* [1991] 1 VR 63, where the Court said, at [75]:

> *The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals … There are … several and different features and facets of interest which form the public interest. On the other hand, in the daily affairs of the community, events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest.*

Consideration of the public interest under the FOI Act is not primarily concerned with the personal interests of the particular access applicant or with public curiosity. The public interest is a matter in which the public at large has an interest as distinct from the interest of a particular individual or individuals. The question is whether disclosure of the information under consideration in a particular matter would be of some benefit to the public generally.

The applicant's private interests are not in themselves determinative of the public interest test. For example, the applicant may have a grievance they are pursuing and may think the information they want will help them. This could be a persuasive public interest factor if it could be shown that there is a wider public interest that would be served by disclosing the information.

What is the public interest test?

The public interest test is a balancing test that involves weighing competing interests against one another and deciding where the balance lies.

Determining whether or not disclosure would, on balance, be in the public interest involves:

- identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure;
- weighing those public interests against each other; and
- making a judgement as to where the balance lies in the circumstances of the particular case.

Decision-makers must consider the weight to give to the competing public interest factors in the circumstance of each case. It may assist to draw up a list showing the factors for and against disclosure, to help to assess the relative weight of the arguments for and against disclosure. However, it is not the case that simply identifying a greater number of public interests either in favour or against disclosure determines where the balance lies. Each public interest factor must be weighed. The weight given to each factor will turn on the facts of the matter and the nature of the requested document.

What are the factors to be considered?

It is not possible to list every factor which should or could be taken into account to decide where the public interest lies in any particular case. Because the categories of public interest are not exhaustive, relevant factors will vary from case to case. Examples of some potential public interest factors, which may apply depending on the circumstances of each case, are listed on the next page.

While section 10 provides that an applicant's reasons for seeking access does not affect his or her right to be given access, knowing the purpose for which access is sought can often identify the end use of the requested information. This may assist to identify a relevant public interest factor to be taken into account in the public interest balancing process.

Under section 21 of the FOI Act, if an applicant requests access to documents containing their personal information, that must be considered as a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the matter to be disclosed, or the effect that the disclosure of the matter might have.

Public interest weighing process

Below is a brief list of some of the considerations that may be relevant in determining public interest factors.

Some public interests in favour of disclosure:

- A person being able to access their own personal information which is held by a government agency (see section 21 of the FOI Act).
- Ensuring that personal information held by government is accurate, complete, up to date and not misleading.
- The transparency of government decision-making.
- Disclosure to inform the public of the basis for government decision-making and of the material considered relevant to the decision-making process.
- The information will make a valuable contribution to public debate on a matter.
- The information will assist in reaching a conclusion on an ongoing issue, or problem or dispute.
- The right to participate in and influence the processes of government decision-making on any issue of concern to citizens.

Some public interests against disclosure:

- Protecting the privacy of individuals.
- The premature release of tentative and partially considered policy matters may mislead and encourage ill-informed speculation (this needs to be considered carefully if it is used as a factor against disclosure, given that one of the objects of the FOI Act is to enable the public to participate more effectively in governing the State).
- The need to preserve confidentiality having regard to the subject matter and the circumstances of communication and the effect that disclosure may have.
- The efficient and economical conduct of an agency will be significantly affected by disclosure.
- The need to protect the integrity and viability of the decision-making processes of government.

The Information Commissioner has considered the application of the public interest test in many published decisions, which are all available at Decisions: Office of the Information Commissioner.

Examples of decisions considering the public interest in relation to clause 3(1) of Schedule 1 to the FOI Act

Re Australia First Party (NSW) Inc and Department of Commerce **[2010] WAICmr 32**

Disclosure of personal information about third parties, being names of members of a particular political party, was found not, on balance, to be in the public interest

The Commissioner considered that the membership records of a political party were prima facie exempt under clause 3(1) because it would clearly identify particular individuals.

In weighing the competing public interests for and against disclosure, the Commissioner did not accept that, in joining a political party, individuals gave up a certain element of privacy to the elected officers of that party.

The Commissioner noted that the FOI Act is intended to make government more accountable, not to unnecessarily intrude upon the privacy of individuals.

In the circumstances, the Commissioner held that the strong public interest in protecting privacy outweighed the public interests in favour of disclosure.

Re Papalia and Western Australia Police **[2016] WAICmr 1**

Disclosure of particular CCTV footage would disclose personal information about third parties – disclosure of the footage was not, on balance, in the public interest

The documents in dispute in this matter consisted of CCTV footage of an incident outside a business premises that was investigated by the Police. The complainant was acting on behalf of a constituent who was involved in the incident.

The Commissioner found that the CCTV footage was exempt under clause 3(1) of Schedule 1 to the FOI Act. The Commissioner was satisfied that the CCTV footage would, if disclosed, reveal personal information, as defined in the FOI Act, about individuals. In this particular instance, the Commissioner was satisfied that the public interest in ensuring community confidence in the way the agency conducts investigations into incidents such as those captured in the footage had been largely satisfied by the information already given to the complainant's constituent. In balancing the competing public interests for and against disclosure, the Commissioner was of the view that the public interest in protecting the privacy of third parties outweighed the public interest in disclosure. The Commissioner also considered that it was not practicable for the agency to edit the footage pursuant to section 24 of the FOI Act, to delete the exempt information. The Commissioner confirmed the agency's decision.

(NOTE: The definition of ' personal information' and Clause 3 in Schedule 1 to the FOI Act have been amended since these decisions were published – consult ***WALW - Freedom of Information Act 1992 - Home Page****.*

See also *Re Weygers and Department of Education & Training* [2007] WAICmr 16; *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23 and *Re Byrnes and Department of Environment and Anor* [2006] WAICmr 6.

For more examples of decisions that considered clause 3 and the public interest see page 56.

Example of a decision considering the public interest in relation to clause 4(3) of Schedule 1 to the FOI Act

***Re Tallentire and Department of Agriculture and Food and Others* [2015] WAICmr 2**

The Information Commissioner found information consisting of the biophysical viability rating assigned to 41 individual pastoral leases contained in a report (**the disputed information**) was not exempt under clauses 3(1), 4(3) or 8(2) of Schedule 1 to the FOI Act.

Both the agency and a number of the pastoral lessees who were joined to the complaint (**the third parties**) claimed that disclosure of the disputed information would have an adverse effect on the business affairs of the third parties because it would result in financial lenders reconsidering their valuation of the pastoral leases for finance or purchase. The third parties additionally claimed that the disputed information is inaccurate, outdated and misleading and provided information in support of those claims. The Commissioner considered that it was not his role to assess the validity of the analysis in the report and that it was open to the third parties to persuade their financial lenders that the disputed information is inaccurate, out of date or misleading.

The Commissioner was not persuaded by the submissions made by the agency or the third parties that disclosure of the disputed information could reasonably be expected to have an adverse effect on the business affairs of the third parties, as required by clause 4(3). Further, the Commissioner did not accept that disclosure of the disputed information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. The disputed information was partly derived from information provided in Annual Returns completed by the pastoral lessees in accordance with the provisions of the *Land Administration Act 1997*. The Commissioner was of the view that, where supply of information is a statutory requirement and a condition attached to the granting of a pastoral lease, it is difficult to demonstrate that an agency's ability in the future to obtain such information could reasonably be expected to be prejudiced.

The Commissioner also considered that the public interest in the public being informed of the condition of lands subject to pastoral leases, which are a public

resource, was stronger than the public interest afforded to the individual pastoralists in maintaining confidentiality of their business affairs. The Commissioner also considered that the accountability of State Government agencies or bodies responsible for ensuring appropriate management of pastoral land was a factor in favour of disclosure of the disputed information. The Commissioner found that, on balance, the public interest factors in favour of disclosure outweighed those against disclosure pursuant to clause 4(7).

Examples of decisions considering the public interest in relation to clause 6 of Schedule 1 to the FOI Act

Re Travers and Public Transport Authority **[2015] WAICmr 20**

The documents in dispute in this matter related to the proposed extension of the Thornlie train line to Cockburn Central. The agency claimed that those documents were exempt under clauses 1(1), 1(1)(b) and 6.

In determining whether the disputed documents were exempt under clause 6, the Commissioner accepted that they contain opinion or advice obtained in the course of the agency's deliberations to determine the route, station locations and other associated works involved in the development and construction of a potential rail extension. However, the Commissioner was not persuaded that disclosure of the disputed documents would, on balance, be contrary to the public interest, as required by clause 6(1)(b).

The Commissioner recognised that there may be a public interest in agencies carrying out their deliberations on particular issues without those deliberations being undermined by the premature disclosure of relevant documents. However, the Commissioner noted that there was already a large amount of information about the proposed rail link and station locations in the public domain and considered that disclosure would facilitate, not hinder, future debate within the community. While the Commissioner considered that sectional interests may use the information in the documents to support or undermine options according to their own interests, the Commissioner was of the view that it is part of the role of government to make project decisions which are in the best interests of the public, even in the face of various lobbying efforts.

The Commissioner found that the disputed documents were not exempt and set aside the agency's decision.

Re Johnston and Department of State Development **[2017] WAICmr 1**

The complainant sought access to documents relating to a proposed gas pipeline between Bunbury and Albany, including the agency's draft invitation for expressions of interest to perform work on the pipeline project. The agency refused access to the requested documents.

The Commissioner found that the disputed documents were not exempt under clauses 1(1)(b), 1(1)(d), 6(1), 10(1) or 10(5) of Schedule 1 to the FOI Act as claimed by the agency.

In considering the public interest in relation to clause 6(1), Commissioner found that the agency did not establish that disclosure of the disputed documents would, on balance, be contrary to the public interest. The Commissioner referred to the Productivity Commission's report titled 'Public Infrastructure – Productivity Commission Inquiry Report' dated 27 May 2014, which concluded that public disclosure of cost-benefit analyses is unlikely to jeopardise a government's ability to optimise value for money through competitive tender processes if the bidding process is truly competitive.

The Commissioner stated there is strong public interest in the disclosure of a document that is fundamental to the agency's accountability for the performance of its functions and expenditure of public funds relating to the development of a major infrastructure project.

***Re MacTiernan and Main Roads Western Australia* [2017] WAICmr 2**

The complainant sought access to documents relating to the Perth Freight Link project. The commission found that the disputed information was not exempt under clauses 6(1), 10(3) and 10(4) of Schedule 1 to the FOI Act.

In considering clause 6(1), the Commissioner was satisfied that disclosure of the documents would reveal opinions, advice or recommendations or consultation or deliberations that had taken place in the course of, or for the purpose of, the deliberative processes of Government. While the Commissioner acknowledged that the deliberative process had not been completed for some stages of the project, he did not consider that meant disclosure would necessarily be contrary to the public interest.

The Commissioner noted that there is a strong public interest in the public, as a whole, being informed about the costs and benefits of major public infrastructure projects and how they are to be delivered, and that responsible government requires an appropriate degree of transparency and capacity for public scrutiny of important projects and government decisions.

The Commissioner also observed that it is the role of government to make and effectively communicate

EXTRACTS FROM DECISIONS COVERING OTHER EXEMPTION CLAUSES

Clause 1: Cabinet and Executive Council

***Re Watson and Minister for Forestry* [2011] WAICmr 8**

In this matter, the Minister for Forestry refused the complainant access to a report concerning a review of the Forest Products Commission on the ground that it was exempt under clause 1(b). On external review, the Commissioner was satisfied that the report was brought into existence to provide policy options and recommendations for submission or possible submission to Cabinet. The Commissioner considered that the fact that the disputed document was used for other, secondary, purposes does not undermine the application of clause 1(1)(b). The Commissioner agreed with the view of the former Commissioner in *Re Ravlich and Minister for Regional Development; Lands* [2009] WAICmr 9 that the meaning of 'deliberations' includes not only active discussion and debate but also information that discloses that an Executive body has considered, gathered information on, analysed or looked at strategies in relation to a particular issue.

***Re Ravlich and Minister for Regional Development; Lands* [2009] WAICmr 9**

The Commissioner considered in detail the application of clauses 1(1), 1(1)(a) and 1(1)(b) of Schedule 1 to the FOI Act and used extrinsic material taken from the debates following the Second Reading of the *Freedom of Information Bill 1992* to assist in interpreting those provisions. The decision also provides a guide to what form the 'official publication' of the fact of a deliberation or decision might comprise, when interpreting the limit on the exemption in clause 1(2).

Clause 2: Inter-governmental relations

***Re The Wilderness Society (WA) Inc. and Department of Environment and Conservation* [2011] WAICmr 24**

This matter concerned documents which contained communications between the State Government and the Commonwealth Government in relation to the liquefied natural gas hub proposal 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 such disclosure would not adversely affect inter-governmental cooperation. However, the Commissioner considered that it would be contrary to the public interest to disclose one of the disputed documents because there was a real possibility that disclosure would reduce the free flow of information between governments.

Clause 5: Law enforcement, public safety and property security

Re Apache Northwest Pty Ltd and Department of Mines and Petroleum and Anor **[2010] WAICmr 35**

In this case, the agency decided to give an applicant access to documents relating to the facilities on Varanus Island, where a gas pipeline explosion in June 2008 resulted in a 30% reduction in natural gas supplies to Western Australia for a two month period. The operator of the facilities on Varanus Island, Apache Northwest Pty Ltd (**Apache**), objected to disclosure of the documents and sought external review of the Department's decision, claiming that the documents were exempt under clauses 5(1)(a), 5(1)(b), 5(1)(d) , 5(1)(e), 5(1)(f) and 5(1)(g) of Schedule 1 to the FOI Act, among other exemptions.

Apache claimed that disclosure of the disputed documents could reasonably be expected to impair the effectiveness of any inquiry or investigation into the pipeline explosion for the purpose of investigating any contravention or possible contravention of the law (clause 5(1)(a)); or prejudice an investigation of any contravention or possible contravention of the *Petroleum Pipelines Act 1969* (WA) or similar law (clause 5(1)(b)). However, as the relevant inquiries into the pipeline explosion had concluded, the Commissioner considered that disclosure of the disputed documents could not have the effect of impairing the effectiveness, or prejudicing, those particular investigations. Accordingly, the Commissioner found that the disputed documents were not exempt under clauses 5(1)(a) or 5(1)(b) as claimed by Apache.

The Commissioner also considered that Apache failed to identify any real risk of prejudice to the fair trial of Apache or the impartial adjudication of the proceedings the State Government had commenced to prosecute Apache in relation to the pipeline explosion and did not accept that there was any reasonable basis to expect that the disputed documents, if disclosed, could prejudice the fair trial of Apache or the impartial adjudication of the case. Accordingly, the Commissioner decided that the disputed documents were not exempt under clause 5(1)(d).

On the information before him, the Commissioner was satisfied that certain information in some of the documents that related to the layout of the facilities

on Varanus Island, facility schematics, process flow diagrams and the stock level and location of hazardous substances could, if disclosed, reasonably be expected to endanger the life or physical safety of persons and the security of Apache's property. Accordingly, the Commissioner found that that information was exempt under clauses 5(1)(e) and 5(1)(f).

In relation to clause 5(1)(g), Apache claimed that disclosure of some of the documents could reasonably be expected to prejudice Apache's ability both to restrict access to Varanus Island and to material describing the Facilities and that its ability to do those things amounts to a lawful measure or measures to protect public safety. However, the Commissioner was not persuaded that the maintenance or enforcement of those measures would be prejudiced by the disclosure of the relevant documents because those measures would remain in place. As a result, the Commissioner decided that those documents were not exempt under clause 5(1)(g) as claimed by Apache.

NOTE: This case was appealed to the Supreme Court of Western Australia and to the Court of Appeal of the Supreme Court of Western Australia. Both appeals were dismissed and the Commissioner's decision was upheld. See *Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2]* [2011] WASC 283 and *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.

***Re 'B' and Western Australia Police* [2011] WAICmr 9**

The complainant sought access to various documents relating to any criminal, alleged criminal or detrimental allegations recorded against his name. The complainant sought external review of the agency's decision to refuse him access to some of the information in two of the documents on the basis that it was exempt under clauses 5(1)(a) and 5(1)(c).

The Commissioner was satisfied that the information identified the source of information provided to the former Child Abuse Unit of the agency in relation to allegations made to it. The Commissioner was satisfied that the former Child Abuse Unit of the agency received and acted upon complaints or allegations concerning the alleged abuse of children and had statutory responsibility for the enforcement of the criminal law relating to the abuse of children. The Commissioner accepted that information of that kind was provided to the agency in confidence. The Commissioner was satisfied that disclosure of the information could reasonably be expected to enable the identity of a confidential source of information in relation to the enforcement or administration of the law to be discovered and that none of the limits on the exemption in clause 5(4) applied. Accordingly, the Commissioner found that the disputed information was exempt under clause 5(1)(c) and did not need to consider whether that information was also exempt under clause 5(1)(a).

Clause 6: Deliberative processes

***Re McKay and McKay and Water Corporation* [2009] WAICmr 35**

The Commissioner reviewed a decision made by the Water Corporation (**the agency**) to refuse the complainants access to valuation information contained in two valuation reports that the agency had obtained in respect of land owned by the complainants under clause 6(1). The agency was seeking to purchase a portion of the complainants' land by negotiated agreement to enable the construction of a pipeline. Under the *Land Administration Act 1997*, the agency has the power to acquire land for public works by compulsory acquisition, where negotiation efforts fail.

The Commissioner accepted that the valuation information was obtained as part of the agency's deliberations to determine the value of the land and the range of prices the agency was willing to pay for it. In deciding whether disclosure of that information would, on balance, be contrary to the public interest, the Commissioner recognised a public interest in the agency carrying out negotiations to acquire land by agreed purchase without the risk of those negotiations being undermined by the disclosure of sensitive information. However, in the circumstances of the case, the Commissioner was not persuaded that the disclosure of the valuation information was reasonably likely to damage negotiations between the parties either at present or in future, as those negotiations had effectively broken down and because the valuation information was out of date.

The Commissioner observed that where government agencies seek to acquire land from private citizens, transparency in the acquisition process serves to achieve the objects of the FOI Act. Those objects include making the persons and bodies that are responsible for State and local government more accountable to the public (section 3(1)(b)). The Commissioner recognised a strong public interest in agencies, which possess extraordinary powers and resources in respect of the acquisition of property that are not available to private citizens, being seen to act fairly and transparently.

After weighing up the competing public interests for and against disclosure, the Commissioner was not persuaded that disclosure of the valuation information would be contrary to the public interest. The Commissioner decided that the valuation information was not exempt under clause 6(1) and set aside the agency's decision to refuse access to it.

This decision was the subject of an appeal by the agency under section 85 of the FOI Act to the Supreme Court. In dismissing the appeal and confirming the Commissioner's decision, Martin J said that:

> *Bearing in mind the* [Water Corporation's] *ultimate compulsory acquisition powers, its public interest contention that its commercial position may be undermined in negotiations, if it is required to* [disclose the valuation information] *cannot be accepted.*

His Honour noted that:

> I*n the context of a longer term potential use by the appellant of its compulsory land acquisition powers, the need for wholesale transparency in respect of the* [Water Corporation's] *workings as a public agency is overwhelmingly the greater public interest, in the present case.*

***Re Thompson and Department of Corrective Services* [2012] WAICmr 4**

The Information Commissioner found the minutes of a review meeting held at a prison exempt under clause 6(1) of Schedule 1 to the FOI Act.

The Commissioner found that the relevant deliberative process - the agency's assessment of risks in relation to the ongoing management of the complainant within the prison system - had concluded, so that disclosure of the minutes could not adversely affect that process. However, in the circumstances of this particular case, the Commissioner considered that, in balancing the competing public interests, the public interest factors against disclosure, including the public interest in the agency maintaining its ability to manage the prison system whilst having due regard to individual needs within that system, outweighed the public interest factors favouring disclosure of the minutes.

***Re Park and City of Nedlands* [2016] WAICmr 14**

The complainant applied for access to a copy of the agency's draft Local Planning Strategy submitted to the Western Australian Planning Commission (WAPC). The agency refused access to that document on the basis that it was exempt under clause 6(1) of Schedule 1 to the FOI Act. The Commissioner was satisfied that the disputed document contains opinion, advice or recommendations that have been obtained or prepared by officers of the agency in the course of, or for the purpose of, the deliberative processes of the agency and the WAPC.

While the Commissioner accepted that disclosure of documents may not be in the public interest when the relevant deliberations in an agency are ongoing or have not been completed, he considered that is only the case when disclosure will undermine, hamper or adversely affect those continuing or future deliberations. The Commissioner was not persuaded that that would be the case in this matter.

The Commissioner was not satisfied that disclosure of the disputed document would adversely affect the deliberative processes of the agency or the WAPC or that any other public interest would be harmed or adversely affected by disclosure such that disclosure would, on balance, be contrary to the public interest. The Commissioner found that the disputed document was not exempt.

Clause 7: Legal professional privilege

***Re X and Department of Local Government* [2010] WAICmr 23**

The complainant sought access to documents relating to the outcome of a prosecution of a local government councillor. The agency refused access to the requested documents under clause 3 of Schedule 1 to the FOI Act. On external review the Commissioner found that two of the documents, consisting of letters to the agency from its legal advisers with attachments, were confidential communications between the agency and its legal advisers made for the dominant purpose of giving legal advice to the agency. The Commissioner also decided that part of another document consisting of a briefing note which contained a record of communications between the agency and its legal advisers was privileged because it relates to advice sought by the agency. The Commissioner found those documents and information exempt under clause 7.

***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 the course 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 his role 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, the disputed documents were not 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).

See also ***Re Wells and Legal Profession Complaints Committee* [2018] WAICmr 3**

Re Gascoine and Shire of Chittering [2017] WAICmr 11

The disputed documents in this matter consisted of legal opinions and correspondence relating to those opinions. The Commissioner was satisfied that the disputed documents consisted of confidential communications between clients and their legal advisers made for the dominant purpose of giving or obtaining legal advice.

Applying the Supreme Court decision in *Department of Housing and Works v Bowden* [2005] WASC 123, the Commissioner considered that it is not within his jurisdiction to consider whether the agency had waived legal professional privilege. Accordingly, the Commissioner found that the disputed documents were exempt under clause 7 of Schedule 1 to the FOI Act on the basis that they would be privileged from production in legal proceedings on the ground of legal professional privilege.

Clause 8: Confidential communications

***Re MacTiernan and Department of the Premier and Cabinet* [2010] WAICmr 2**

The complainant sought access to a development agreement concerning the development of a deepwater port and open access rail line at Oakajee, near Geraldton. The agency refused access to the requested document on the ground that it was exempt under a number of exemption clauses including clause 8(1) of Schedule 1 to the FOI Act.

On external review, the Information Commissioner examined the requested document, which was an executed agreement between the State and six private companies. The Commissioner was satisfied that disclosure of the document by the agency would be a breach of a contractual obligation of confidence for which a legal remedy could be obtained by the other parties to the agreement. Accordingly, the Commissioner found that the document was exempt under clause 8(1).

In this matter, the complainant submitted that the Government should not be allowed to undermine the FOI Act by including confidentiality provisions in agreements of this type. However, the Commissioner noted that his role is to determine the facts and to apply the law as he finds it and that it is the responsibility of Parliament to amend the FOI Act if more transparency is required in the dealings of Government.

The Commissioner also did not accept the complainant's submission that he was obliged to call for other documents which may throw light on matters including the preparation of the agreement and the inclusion of the confidentiality clause. In light of the decision of the Supreme Court of Western Australia per Heenan J in *BGC (Australia) Pty Ltd v Fremantle Port Authority and Anor* [2003] WASCA 250;

(2003) 28 WAR 187, the Commissioner found that if there was anything in the material before him which cast doubt upon the usual presumptions of good faith and regularity relating to the preparation and content of the requested document, or which gives rise to any grounds to suspect the genuineness and authenticity of the grounds for exemption under clause 8(1), he was obliged to determine that issue. However, as neither was the case in this matter, the Commissioner considered that his responsibilities were discharged by his examination of the material before him, including the agreement in question, which he accepted on face value as it appeared to be a properly executed, legally binding agreement.

***Re Pillsbury and Department of Mines and Petroleum and Others* [2013] WAICmr 1**

The complainant applied to the agency for access to an environmental management plan and occupational hygiene management plan concerning a demolition project at the Derby Export Facility. After consulting with the two third parties who prepared the requested documents, the agency refused access on the basis that the documents were exempt under clause 4(2) and clause 4(3). On external review, the two third parties claimed that the documents were also exempt under clause 8(2). On the information before him, the Commissioner accepted that the information in the documents may have been of a confidential nature because it was not in the public domain and appeared to be only known to a small number of people. However, the Commissioner was not satisfied that the documents were obtained in confidence as required by clause 8(2)(a) and noted the agency's advice that there was no evidence that the documents were given to or received by the agency on a confidential basis. Further, as the third parties conceded that the disputed documents were required to be provided to the agency by a particular regulation, the Commissioner did not consider that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency. The Commissioner found that the documents were not exempt under clause 8(2).

***Re Yoo and Sir Charles Gairdner Hospital* [2009] WAICmr 10**

The agency refused the complainant, who had suffered complications following surgery, access to documents that were collected as part of a voluntary incident management system. The agency claimed that the disclosure of such documents would reveal confidential information obtained in confidence that could reasonably be expected to prejudice the future supply of information of that kind to medical service providers and were, thus, exempt under clause 8(2) of Schedule 1 to the FOI Act.

The Commissioner considered whether the disclosure of information collected on a voluntary basis about a medical incident would, on balance, be in the public

interest. While recognizing that the balance of public interests was difficult, the Commissioner decided in the circumstances of the case, that it would be prejudicial to the proper and effective working of hospitals and health services to disclose the disputed documents. Accordingly, the Commissioner found the documents exempt under clause 8(2).

Clause 9: State's economy.

***Re McGowan and Minister for Regional Development; Lands and* Anor [2011] WAICmr 2**

A mining company joined as a third party to the complaint before the Commissioner claimed that certain matter concerning the mining company was exempt under clause 9. The third party submitted that disclosure of the disputed matter should not occur where doing so would have a substantial adverse effect on the ability of the State to manage the economy and that effective administration and management of the State's economy cannot be achieved if confidential and sensitive information submitted to government agencies for consideration or decision-making is disclosed to the public prematurely. However, other than making those assertions, the third party provided the Commissioner with no material to support the requirements of clause 9. After examining the disputed matter and considering the third party's claims, the Commissioner considered the third party's claim to be merely speculative and found that the disputed matter was not exempt under clause 9.

Clause 10: State's financial or property affairs

***Re BGC (Australia) Pty Ltd and Port Hedland Port Authority* [2011] WAICmr 38**

The agency claimed that certain documents and information requested by the complainant were exempt under clauses 10(3) and 10(4) because their disclosure would adversely affect the agency's position in its negotiations to sell or lease to the complainant land vested in the agency by the State and its ability to act in accordance with prudent commercial practices during its negotiations. The agency also claimed that disclosure had the potential to interfere with the agency's commercial operations and could reasonably be expected to destroy or diminish the commercial value of the information to the agency. Further, the agency submitted that disclosure would not, on balance, be in the public interest because it would adversely affect its commercial affairs.

The Commissioner was not persuaded that the disputed matter had a commercial value to the agency because most of it appeared to be information that was known to the complainant from its negotiations with the agency. Accordingly, the Commissioner found that the disputed matter was not exempt under clause 10(3). In relation to clause 10(4), although the Commissioner was

satisfied that disclosure of the disputed matter would reveal information concerning the commercial affairs of the agency, the agency provided no explanation of its claims that disclosure could reasonably be expected to have an adverse effect on those affairs. Noting that most of the information in the disputed documents would already be known to the complainant, the Commissioner cited the observation of the former Information Commissioner in *Re Conservation Council of Western Australia (Inc) and Western Power Corporation* [2006] WAICmr 7 at [78] that "It cannot logically be argued that any adverse effect could be expected to follow from making available information that is already available."

***Re Hemsley and City of Subiaco and Another* [2008] WAICmr 46**

In this case, the Information Commissioner noted at [43] that the specific language of clauses 10(1), 10(3) and 10(4) makes it clear that those subclauses are directed at protecting different kinds of information from disclosure under the FOI Act. Whilst an agency may claim exemption for the disputed matter under more than one subclause of clause 10, clauses 10(3) and 10(4) are mutually exclusive exemption clauses.

The Commissioner also noted at [45] that clause 10 reflects the commercial reality that many State and local governments are increasingly engaged in commercial activities and is intended to ensure that the commercial and business affairs of government agencies - conducted by those agencies for and on behalf of the Western Australian public - are not jeopardised by the disclosure of documents under the FOI Act unless there is a public interest that requires such disclosure.

***Re University of Western Australia and Water Corporation* [2000] WAICmr 31**

The complainant applied to the agency for a copy of its strategic development plan, which the agency refused access to under clauses 4(3), 10(3) and 10(4).

On external review, the Commissioner found the disputed documents exempt under clause 10(4). In the particular circumstances of the matter, the Commissioner was satisfied that disclosure of the disputed documents would place the agency in the position of having its short to medium term business plans, including detailed financial data and planning assumptions, in the public domain. The Commissioner considered that result would give the agency's competitors access to information about the agency's operations in circumstances where the agency does not have access to the same information about its competitors.

At the time of the review, the agency was one of five proponents being invited to bid for major water projects in another country. The Commissioner was of the view that the agency's capacity to compete successfully in the market place would be adversely affected by that outcome and its commercial affairs would

suffer as a result. In balancing the factors in favour of disclosure against the public interest in the commercial viability and effective operation of the agency, the Commissioner was not persuaded that disclosure of the disputed documents would, on balance, be in the public interest.

***Re Scriven and Rottnest Island Authority* [2015] WAICmr 5**

The complainant applied to the agency for access to raw survey data held by the agency that included numerous questions and answers to those questions by survey respondents (**the disputed information**). The survey was conducted, in part, to research the needs of visitors to Rottnest Island and to identify strategies that would stimulate more visits to Rottnest Island. The agency originally refused access to the disputed information under clause 4 of Schedule 1 to the FOI Act. However, on external review, it withdrew the claim under clause 4 and instead claimed the disputed information was exempt under clause 10(3).

On external review the agency submitted that the survey was conducted for the purpose of producing a range of strategic documents to give the agency a commercial competitive advantage over other tourist destinations, including the agency's direct competitors on Rottnest Island. The agency contended that disclosure of the disputed information would destroy its commercial value as it would allow its competitors to use the information for their own commercial gain.

The agency also submitted that, on balance, it was not in the public interest, as provided by clause 10(6), to disclose the disputed information because the adverse financial effect from the loss of the commercial value of the disputed information would result in additional costs falling on the Western Australian Government and, consequently, the community. The agency further submitted that any public interest in disclosure of the disputed information was satisfied by the release of the Rottnest Island Management Plan, which provided an indication of the agency's proposals for the strategic direction for Rottnest Island.

The Information Commissioner did not consider on the evidence before him that the disputed information had commercial value for the purposes of clause 10(3)(a). Specifically, the Commissioner was not persuaded that the disputed information was important or essential to the profitability or viability of the agency's business operations or any pending commercial transactions. In doing so, the Commissioner recognised the agency's broad statutory powers to determine the proposed use of tourist services and facilities on Rottnest Island, to the exclusion of other competitors.

In addition, the Commissioner considered that even if the agency could satisfy the requirements of clause 10(3), there were persuasive arguments in favour of disclosure in the public interest, as provided by clause 10(6).

The Commissioner acknowledged a public interest in an agency keeping sensitive commercial information confidential. However, the Commissioner was of the view that the disputed information was not sensitive commercial information.

The Commissioner found there is a strong public interest in State and local government agencies being accountable for decisions made concerning the management and development of the State's resources. After considering the public interest factors for and against disclosure, the Commissioner concluded that, on balance, the public interest favoured the disclosure of the disputed information. Accordingly, the Commissioner found that the disputed information was not exempt under clause 10(3) of Schedule 1 to the FOI Act.

See also:

Re Johnston and Department of State Development **[2017] WAICmr 1**

The complainant sought access to documents relating to a proposed gas pipeline between Bunbury and Albany, including the agency's draft invitation for expressions of interest to perform work on the pipeline project. The agency refused access to the requested documents.

The Commissioner found that the disputed documents were not exempt under clauses 1(1)(b), 1(1)(d), 6(1), 10(1) or 10(5) of Schedule 1 to the FOI Act as claimed by the agency.

Re MacTiernan and Main Roads Western Australia **[2017] WAICmr 2**

The complainant sought access to documents relating to the Perth Freight Link project. The Commissioner found that the disputed information was not exempt under clauses 6(1), 10(3) and 10(4) of Schedule 1 to the FOI Act.

Clause 11: Effective operation of agencies.

Re Whitely and Curtin University of Technology **[2008] WAICmr 24**

The agency claimed that certain documents relating to a research project into Attention Deficit Hyperactivity Disorder were exempt under clause 11. The agency claimed that disclosure of the disputed documents could reasonably be expected to impair the effectiveness of the committee whose role it was to approve funding for the research project.

However, the Commissioner did not accept that was sufficient to meet the requirements of clause 11(1)(a) because disclosure could not reasonably be expected to impair the effectiveness of a method or a procedure for the conduct of tests, examinations or audits by the agency. There was also no evidence before the Commissioner to establish that disclosure of the disputed documents could reasonably be expected to prevent the objects of any future testing by the

agency from being attained or the objects of tests conducted by the agency from being attained, as required by clause 11(1)(b). Accordingly, the Commissioner found that the disputed documents were not exempt under either clause 11(1)(a) or (b).

***Re Barndon and Police Force of Western Australia* [2006] WAICmr 13**

The complainant sought access to documents relating to his unsuccessful application to join the agency as a recruit constable. The agency gave him access to some documents but refused access to those that related to his assessment interview (including the interview questions, the complainant's responses to those questions and the completed interview evaluation sheets) and the agency's psychological testing of the complainant (including the complainant's scores in a particular test and a summary of his test results), claiming exemption under clause 11.

On external review, the Commissioner found the disputed documents exempt under clause 11(1)(a) and (b). The Commissioner was satisfied that the disclosure of the documents that related to the complainant's assessment interview could reasonably be expected to render them less effective as test instruments in the particular way in which they are used by the agency and thereby impair the effectiveness of the method of testing by the agency. The Commissioner also considered that disclosure could reasonably be expected to prevent the objects of any future test by that method of the complainant – or any other person to whom the documents may be disclosed – from being attained if they were to be disclosed.

In relation to the documents relating to the psychological testing, the Commissioner considered that if the complainant was given the questions and his answers and the interviewers' assessment of those answers, it would enable him to calculate the kind of responses that were considered appropriate. Therefore, the Commissioner accepted that disclosure of those documents could reasonably be expected to adversely affect the interview process, as interviewers could not be confident that the answers given were genuine and not rehearsed and tailored to the results sought by the agency. Accordingly, the Commissioner accepted that disclosure of those documents could reasonably be expected to render the interview process less effective as a means of assessing the suitability of candidates to be police officers and thereby also prevent the objects of those examinations from being attained.

***Re 'H' and Department of Education* [2014] WAICmr 21**

The complainant sought access to test questions in a year 9 chemistry test completed by his child (**the disputed information**). The agency refused access to the disputed information on the basis that it was exempt under clause 11(1)(a) of Schedule 1 to the FOI Act because disclosure could reasonably be expected to

impair the effectiveness of the chemistry tests administered by the complainant's child's school (**the School**). The complainant applied to the Information Commissioner for external review of the agency's decision.

Clause 11(1)(a) provides that matter is exempt if disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests or examinations by an agency. The exemption is limited by clause 11(2), which provides that matter is not exempt under clause 11(1)(a) if its disclosure would, on balance, be in the public interest.

The School contended that if the disputed information was released, developing suitable new questions, which complied with the requirements of the Curriculum Council, would be difficult and time-consuming. The complainant did not accept this and challenged the estimates given by the agency. However, on the information before him, the Commissioner was satisfied that devising new tests was a significant impost on the School. In particular, the Commissioner accepted the School's explanation that any new test must also meet the 'Principles of Assessment' from the Curriculum Framework.

After considering all the relevant material, the Commissioner concluded that disclosure of the disputed information would allow students to study selectively and to anticipate the questions that would be asked in a test. As a result, the effective use of the test as an indication of a student's knowledge and the application of that knowledge in a test environment could reasonably be expected to be damaged. The Commissioner considered that giving some students an advantage by disclosing the disputed information may be damaging to the integrity of test results. The Commissioner also considered that disclosure of the disputed information could encourage parents and others to challenge each question and the marking of each question in each test by the School, thus detracting from the finality of the marking procedure. Consequently, the Commissioner was satisfied that disclosure of the disputed information could be reasonably expected to impair the effectiveness of its methods or procedures for conducting tests as provided by clause 11(1)(a).

The Commissioner then considered whether disclosure of the disputed information would, on balance be, in the public interest and whether the limit on the exemption in clause 11(2) applied. Under section 102(3) of the FOI Act, the onus was on the complainant to establish that disclosure of the disputed information would, on balance, be in the public interest and, therefore, the disputed information is not exempt under clause 11(1)(a).

Although the Commissioner accepted that it is in the public interest for parents to have a contribution to students' learning, he did not consider that the complainant had established that there is a public interest in parents being able to debate the content of each test and the teachers' marking of each individual test. In particular, the Commissioner did not consider that the complainant had shown that the quality of the tests was such that parental debate, of the kind contemplated by the complainant, would improve the quality of the tests or their marking and thus add to a student's education. In addition, the Commissioner

considered that, if the disputed information were disclosed, the complainant would seek to subject exam questions to 'informal collateral disagreement', which would undermine the finality of the assessment and review process. The Commissioner considered that this would be contrary to the public interest.

After considering the public interest factors for and against disclosure, the Commissioner concluded that the complainant had not established that disclosure of the disputed information would, on balance, be in the public interest. As a result, the Commissioner confirmed the agency's decision and found that the disputed information was exempt under clause 11(1)(a).

The Commissioner's decision was the subject of an appeal by the complainant under section 85 of the FOI Act to the Supreme Court. Justice Chaney dismissed the appeal and upheld the Commissioner's decision: see *H v Department of Education* [2015] WASC 276.

Clause 12: Contempt of Parliament or court.

***Re West Australian Newspapers Limited and Department of Mines and Petroleum* [2011] WAICmr 37**

The complainant 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 not comply with an express undertaking which the Minister for Mines and Petroleum had given to the Supreme Court and could, in addition, prejudice the then current prosecution of Apache Northwest Pty Ltd and Apache Energy Limited. Accordingly, the Commissioner found that the Report was exempt under clause 12(a)[3].

[3] 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 Report was subsequently tabled in the Parliament by the Minister on 24 May 2012.

Re Nine Network Australia Pty Ltd and Western Australia Police **[2011] WAICmr 27**

The complainant applied to the agency for the voice recordings made to the agency from people on board the asylum boat which crashed onto rocks at Christmas Island in December 2010. The complainant submitted that the voice recordings had been played in open court before the State Coroner and their content published by major media outlets.

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.

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).

Re Ravlich and Department of the Premier and Cabinet **[2011] WAICmr 3**

The Commissioner found that documents consisting of communications made in the course of, or for the purposes of, or incidental to, transacting the business of a House or a committee of Parliament - in this case, letters sent by a Standing Committee of Parliament to the Chief Executive Officers of two government agencies - are protected by parliamentary privilege. The Commissioner held that the disclosure of the letters under the FOI Act would infringe the privileges of Parliament and noted that the *Parliamentary Privileges Act 1891* sets out relevant privileges in section 1, including the control of publication of Parliamentary proceedings, and found the documents exempt under clause 12(c).

Re Saffioti and Minister for Transport; Housing **[2012] WAICmr 10**

The Information Commissioner found documents, which consisted of contentious briefing notes and emails sent internally between the Minister for Transport's staff and emails from those staff to staff at the Premier's and other Ministers' offices, exempt under clause 12(c) of Schedule 1 to the FOI Act on the basis that the public disclosure of that matter 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).

Clause 13: Adoption or artificial conception information.

***Re 'L' and Department for Child Protection and Family Support* [2015] WAICmr 16**

The complainant applied to the agency for documents relating to her son and his adoptive parents including notes of an interview between the complainant and a named person around the time of her son's birth relating to the adoption.

The Commissioner found the agency's decision to refuse the complainant access to the requested documents under section 23(2) of the FOI Act was justified on the basis that the documents are exempt under clause 13(a) of Schedule 1 to the FOI Act. Clause 13(a) provides that matter is exempt if its disclosure would reveal information relating to the adoption of a child or arrangements or negotiations for or towards or with a view to the adoption of a child. Section 23(2) provides that an agency may refuse access to the requested documents without having identified any or all of those documents and without specifying the reason why matter in any particular document is claimed to be exempt if it is apparent, from the nature of the documents as described in the access application, that all of the documents are exempt documents and there is no obligation under section 24 to give access to an edited copy of any of the documents.

The Commissioner considered that it was apparent from the nature of the documents described in the complainant's access application that they would all reveal information relating to the adoption of a child, and therefore that those documents are all exempt under clause 13(a). The Commissioner decided that there was no obligation on the agency under section 24 to give the complainant access to an edited copy of any of the requested documents because it would not be practicable for the agency to delete the exempt information when the very nature of the documents requested by the complainant suggested that disclosing any part of them would reveal information relating to the adoption of a child, which is exempt information. The Commissioner confirmed the agency's decision to refuse access.

Clause 14: Information protected by certain statutory provisions.

Re Kin Resorts Pty Ltd and Ministry for Planning **[1999] WAICmr 9**

The complainant sought access to planning documents, concerning the complainant's land, which were lodged by the Shire of Manjimup with the agency. The complainant was given access to a number of the requested documents and refused access to the remainder, which the agency claimed to be exempt under clause 14(2). The documents in dispute consisted of extracts from the State Ombudsman's draft findings on the complainant's complaint, letters between the agency's Chief Executive Office and the Ombudsman and copies of documents. The Information Commissioner found that the disputed matter was exempt under clause 14(2) which provides that "matter is exempt matter if it is matter to which a direction given under section 23 (1a) of the *Parliamentary Commissioner Act* applies."

Re J and Office of the Public Sector Standards Commissioner **[2009] WAICmr 12**

In this matter the Commissioner considered the meaning and scope of the exemptions in clause 14(5)(a) and (b), which provides that matter is exempt if its disclosure would reveal or tend to reveal the identity of anyone as (a) a person who has made an appropriate disclosure of public interest information under the *Public Interest Disclosure Act 2003* (**the PID Act**); or (b) a person in respect of whom a disclosure of public interest information has been made under the PID Act.

As part of that consideration, the Commissioner had regard to the Parliamentary debates held prior to the enactment of the PID Act and the inclusion of clause 14(5) in the Act, as recorded in *Hansard*. The Commissioner took the view that Parliament clearly intended that the identities of persons of the kind referred to in clause 14(5) should be protected from disclosure under the Act and that the Act should not be used to obtain that information.

The Commissioner noted that actual disclosure of the relevant identity is not required for the exemption to apply. It is sufficient that the relevant identity would tend to be revealed by disclosure of the information. The Commissioner held that the fact that a complainant knows or claims to know the identity of relevant persons from other sources is not determinative of the question as to whether the disputed documents would, if disclosed, reveal or tend to reveal the identities of the relevant persons.

The Commissioner decided that documents will be exempt under clause 14(5) if there is a real risk - as distinct from just a remote or fanciful risk or possibility - that their disclosure would identify or tend to identify a person of the kind described in paragraphs (a) or (b) of that provision.

Re Neilson and City of Swan [2002] WAICmr 11.

The Commissioner was satisfied in this case that a letter to the agency from the agency's solicitors contained information of the kind described in section 23(1) of the *Parliamentary Commissioner Act 1971,* that is, information obtained by the State Ombudsman, in the course of, or for the purpose of, an investigation under that Act. Accordingly, the Commissioner found that the letter was exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

***Re Helm and Department of Planning* [2016] WAICmr 9**

The document in dispute in this matter was a briefing note from a department to a Minister. The disputed information consisted of the information which the agency deleted from the edited copy of that document given to the complainant. The agency claimed that the information deleted was exempt under clauses 3(1) (personal information) and 7(1) (legal professional privilege) of Schedule 1 to the FOI Act. On external review, the Commissioner found that the disputed information was exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

Clause 14(1)(c) provides that matter is exempt if it is matter of a kind mentioned in section 23(1) of the *Parliamentary Commissioner Act 1971* (WA) (**the PC Act**). The Commissioner considered that matter of the kind described in section 23(1) of the PC Act is information obtained by the Parliamentary Commissioner for Administrative Investigations (**the Ombudsman**), the Deputy Ombudsman or a member of the Ombudsman's staff (**the Ombudsman or his officers**) in the course of, or for the purpose of, an investigation under the PC Act. The agency provided the Commissioner with material to establish that the agency had provided the disputed document to the Ombudsman's office for the purposes of an investigation under the PC Act. Consequently, the Commissioner was satisfied on the information before him that the disputed information consisted of information obtained by the Ombudsman or his officers during the course of, or for the purposes of, an investigation under the PC Act. It was not necessary to establish that the information would be protected from disclosure under the PC Act. As a result, the Commissioner found that the disputed information is matter of a kind mentioned in section 23(1) of the PC Act and is therefore exempt under clause 14(1)(c) of Schedule 1 to the FOI Act.

Clause 15: Precious metal transactions.

***Re Bennett & Philp Pty Ltd and Gold Corporation* [2019] WAICmr 1**

The complainant requested access to documents broadly concerning (1) the Perth Mint's position on whether GST applied to certain acquisitions made by the Perth Mint and (2) documents relating to complaints, including those made to the Government of India, about the importation of Australian-mined gold into India. The agency refused the complainant access to all requested documents.

The A/Commissioner found:

- certain documents were outside the scope of the complainant's access application;
- certain documents were exempt under clause 15(1)(b) of Schedule 1 to the FOI Act because their disclosure would reveal information about a transaction relating to gold or other precious metal received or held by the agency;
- certain documents were exempt under clause 10(4) as their disclosure would reveal information concerning the commercial affairs of the agency; disclosure could reasonably be expected to have an adverse effect on those affairs; and disclosure would not, on balance, be in the public interest;
- certain documents were exempt under clause 5(1)(c) because their disclosure could reasonably be expected to enable identification of a confidential source of information in relation to the enforcement or administration of the law to be discovered.

Chapter 5

CONSULTATION

CONTENTS

- When to consult
- Whom to consult
- How to consult

FURTHER READING

- Third party rights under the FOI Act

OIC Guides

- Dealing with personal information about an officer of an agency
- Dealing with requests for documents related to an 'exempt agency'
- Third parties and their rights - guide for the public

CONSULTING THE APPLICANT AND OTHER AGENCIES

When dealing with an access application, it may be necessary or appropriate to contact or consult with a variety of people. For example:

- In many circumstances it will assist to consult with or contact the applicant, for example, about the scope of the access application.
- In some circumstances it may be appropriate to consult with or contact other agencies if the documents include information about those agencies. Consultation with another agency may reveal sensitivities that were not apparent to the decision-maker. However, an agency is not a third party for the purposes of the consultation requirements outlined in sections 32 and 33 of the FOI Act - see section 33(3).
- If the requested documents originated with or were received from an exempt agency the agency is required to notify the exempt agency that the access application has been made – see section 15(8).[4]

Information Commissioner's comment

A common feature of many of the complaints received by my office is a breakdown of communication between agencies and applicants. Communication with applicants is a vital aspect of an agency meeting its duties as required by the FOI Act.

Poor communication with applicants can often mean the difference between an applicant agreeing to narrow the scope of his or her application or not, agreeing to an extension of time for an agency to provide a decision or not and an agency's notice of decision regarding access being accepted or not.

Communicating with applicants need not be a time consuming activity and will often lead to a saving of time in the long run. A quick phone call may be all that is needed in order to narrow the scope of an application and save many hours of unnecessary work. In some instances, my staff have found that the only communication an applicant has had with an agency is a telephone call on the 43rd or 44th day requesting an extension of time. An applicant who has been informed along the way of the steps being taken to deal with his or her application is much more likely to be amenable to a request for more time or a modification of the request.

Agencies are encouraged to consider whether they are currently communicating with applicants as effectively as possible and to review their practices in this regard.

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4 For more information about notifying exempt agencies see *Dealing with requests for documents related to an exempt agency*.

CONSULTATION WITH THIRD PARTIES - Sections 32 and 33

Note: Amendments to Section 32 commenced on 1 July 2026

Under sections 32 and 33, an agency is not to give access to a document that contains:

- personal information that relates to;
- trade secrets of;
- information that has a commercial value to; or
- information concerning the business, professional, commercial or financial affairs of

a third party unless the agency has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the document is exempt under clause 3 or clause 4.

Third parties do not have a power of veto over the decision to release documents – the agency seeks their views to assist in determining the sensitivities of the documents. However, third parties can seek an internal review and subsequent external review by the Information Commissioner if the agency decides to release documents contrary to their assertions that the documents are exempt under clause 3 or clause 4.

Is consultation with third parties necessary?

There is no duty to consult if:

- the agency does not propose to grant access; or
- the agency releases the document with the relevant personal information or commercial or business information deleted from the document because the deleted information is either outside the scope of the access application or exempt.

An agency should first determine whether the documents to which access is sought contain personal information that relates to, or commercial or business information about, a third party.

If they do, the agency should contact the access applicant to see whether he or she seeks access to third party information - if they do not seek access to third party information, then that information is outside the scope of the application and can be deleted before access is given, without having to consider whether the information is exempt. In such a case, there is no requirement to consult with the third party.

If the documents contains personal information that relates to, or commercial or business information about, a third party and an agency decides that it is exempt information and does not intend to give access to the exempt information, consultation with the third party is also not necessary.

Therefore, there is no duty to consult if the agency decides to release a document with the relevant personal information or commercial or business information deleted under section 24 of the FOI Act.

Nature of consultation

It is not sufficient that the agency merely ascertain whether a third party objects to the release of the document. A third party should identify the information in the requested document that is exempt under clause 3(1) (personal information) or clauses 4(1), (2) or (3) (trade secrets, commercial or business information) and should identify any public interest factors weighing against disclosure of the documents if applicable.

A third party has the right to put forward his, her or its views as to whether a document should be released. However, the decision lies with the agency. The third party does not have a right of veto.

Procedure for consultation

Identify the third parties as quickly as possible.

The agency is required to take 'such steps as are reasonably practicable' to obtain the views of the third party as to whether the relevant information is exempt under clause 3 or clause 4.

Form of consultation

The FOI Act does not prescribe any particular form of consultation. It will depend upon the circumstances of the particular application. In some instances –

- a telephone call may be sufficient;
- a face to face meeting may be more appropriate; or
- a formal letter may be necessary**.**

An agency should:

- notify the third party that it is proposing to give access to personal information or commercial and business information about them and that before giving access to the information, the FOI Act requires the agency to seek their view as to whether the information is exempt under clause 3 or clause 4 of Schedule 1 to the FOI Act (whichever is applicable);
- provide sufficient information about the documents to enable the third party to make an informed decision about whether they contain information that is exempt under clauses 3 or 4. This does not necessarily require an agency to provide the third party with a copy of the relevant documents and a description of the documents may be sufficient. However, in cases where an agency considers it is appropriate to give the third party a copy of the documents, care should be taken to delete information about other third parties.

- Inform the third party that, if it is of the view that the information is exempt under clause 3 or 4 (as appropriate), the third party will need to give the agency persuasive reasons to substantiate their claim. It is not enough simply to express a preference for the information not to be disclosed;
- request the third party's view within a specified time; and
- advise of the consequences if their response is not received within the specified time.

If the third party does not respond within the time specified by the agency, the agency can make a decision to give the applicant access to the documents without further reference to the third party - their third party status no longer applies (see section 34).

Privacy of applicant

The third party may ask for the name of the applicant. The name of the applicant may assist with third party consultation. However, it is good practice to speak to the applicant before revealing the applicant's identity to the third party.

Procedures following consultation

If the third party advises the agency that their view is that the relevant documents or information is exempt under clause 3 or clause 4, the agency should take that view into account before *making its own decision.*

Written notification to the applicant and the third party is required if a decision is made to release documents contrary to the third party's view that the documents are exempt under clause 3 and/or clause 4. The applicant is notified of the decision to grant access but that a third party has objected to release and access cannot be given until the third party's review rights have expired. At the same time the third party is notified in writing of the decision to release the documents and advised of their review rights.

If, after considering the third party's view, the agency decides to release the documents or information:

- the agency must give the applicant and third party a notice of decision;
- the third party has 30 days to exercise their right of review;
- if the third party does not seek review within 30 days, the agency can release documents to applicant;
- if the third party applies for review, the agency must defer giving the applicant access to the documents until the process of internal and possibly external review has been finalised.

Section 32(2) **Amendment commenced 1 July 2026**	Requirement to seek the views of a third party, or the third party's nearest relative if they are deceased, before giving access a third party's personal information, as to whether the document contains matter that is exempt under clause 3.
Section 32(3) **Amendment commenced 1 July 2026**	Requirements where the third party, or the nearest relative, is a child who has not turned 16.
Section 32(4) **Amendment commenced 1 July 2026**	Requirements where the third party, or the nearest relative has a cognitive impairment.
Section 34	If a third party claims that the document contains matter that is exempt under clause 3 (personal information) or clause 4 (commercial or business information) and the agency still decides to give access to the document the agency must: • give the third party written notice of the decision without delay; (section 34(1)(d)) • defer giving access to the document until the decision is final; (section 34(1)(e)) and • give the applicant written notice of decision that the third party is of the view the document is an exempt document; and that access will be deferred until the decision is final (section 34(3)).
Section 39(2)(b)	The third party has 30 days to lodge an application for internal review. The decision becomes final after this period has elapsed and no application for review has been lodged.
Section 66 (3)	The third party has 30 days to lodge an application for external review following an internal review or after an initial decision that was made by the agency's principal officer. The decision becomes final after this period has elapsed and no application for review has been lodged.

Agency policies of consultation

There is nothing in the FOI Act to preclude an agency consulting with any person the agency considers it desirable or necessary to consult and, indeed, consultation may be valuable in assisting an agency in the decision-making process. Agencies may consider developing their own policies and procedural

guidelines for consultation, which are in addition to the requirement of the FOI Act.

Waiver of requirement to consult

In limited circumstances, it may be appropriate for an agency to apply to the Information Commissioner, under section 35, for approval not to consult.

Section 35(1) provides:

> *The agency may apply to the Information Commissioner for approval to make its decision on whether to give access to a document without complying with section 32 or 33, and the Commissioner may give approval on being satisfied that -*
>
> *(a) it would be unreasonable to require the views of third parties to be obtained having regard to the number of third parties that would have to be consulted; and*
>
> *(b) the document does not contain matter that is exempt matter under clause 3 or 4 of Schedule 1.*

Before making a section 35 application to the Commissioner, agencies should consider contacting the access applicant to clarify whether third party information can be excluded from the scope of the application by agreement.

An agency's application to the Commissioner under section 35 should include:

- information about the scope of the access application and any discussions with the access applicant about excluding third party information;
- information as to the permitted period for dealing with the application;
- a copy of the relevant documents;
- information as to why the agency considers it would be unreasonable to require the agency to obtain the views of the third parties including an estimate of the number of third parties involved and the time it would take to obtain their views; and
- information as to why the documents do not contain information that is exempt under clause 3 or clause 4 of Schedule 1 to the FOI Act.

Chapter 6

NOTICES OF DECISION

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- What does section 30 require?
- Reasons for decision
- Quality of decisions
- The schedule of documents
- Internal review
- Complaints to the Information Commissioner – External review

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- Review of Agency Decisions
- Agency FOI Responsibilities, refer to page section "Writing a notice of decision"
- Agency FOI Responsibilities, refer to page section "Making submissions to the Information Commissioner"
- Review of Agency Decisions, refer to page section "What happens in an external review?"

OIC Guides

- External Review Procedure - Guide for Parties
- Producing documents to the Information Commissioner - guide for agencies
- Preparing for a conciliation conference - guide for parties
- Understanding the conciliation process - guide for parties
- Consulting with third parties during external review - guide for agencies

NOTICE OF DECISION – SECTION 30

Section 30	A notice of decision must be in writing and include – (a) the date of the decision; (b) the name and designation of the decision-maker; (c) reasons for deleting exempt matter and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based (if applicable); (d) reasons for deferring access and, if applicable, the period for which access is likely to be deferred (if applicable); (e) the arrangements for giving access to a document in the manner referred to in section 28 (if applicable); (f) reasons for refusing access and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based (if applicable); (g) the amount and basis for calculation of any charge (if applicable); and (h) rights of review and procedures to be followed.

What makes a good notice of decision?

A good notice of decision will:

- Enable the applicant to see what was taken into account (findings on any material questions of fact) and whether an error has been made (reasons for the decision) so that he or she may determine whether to challenge the decision.
- Stimulate the decision-maker to identify and formulate the reasons which motivate the decision.
- Stimulate the decision-maker to carefully consider the fairness and correctness of the decision.
- Be less likely to be appealed.

A good notice of decision should be:

- Intelligible to the applicant.
- Expressed in clear, unambiguous language.
- Written in plain English.

An agency should tell the applicant:

- what documents are of concern, describing them as fully as possible without revealing exempt material;
- what exemptions are claimed for which documents or parts of documents and why;
- the expected consequences of the release of specific information (where this is relevant to the exemptions claimed) and why it is reasonable to expect those consequences; and
- what aspects of the public interest favour the disclosure of information claimed to exempt, as well as those, which are against disclosure (where this is relevant to the exemption claimed).

MATERIAL FACTS

Material facts are the facts which are essential to the decision. They provide the factual basis for the decision. All material facts taken into account should be stated in the decision.

The facts which are material to any decision will depend on the decision being made. A key fact that will be material to all applications is what is the scope (or ambit) of the access application. A decision maker should be clear about the scope and this should be outlined in the notice of decision. In circumstances where there has been negotiation to reduce the scope of the access application, this may be a material fact.

Identification of documents

One of the primary material questions of fact is the identification of all documents falling within the scope of the access application.

If documents are not properly identified and described there can be no finding on the most basic material fact of all, namely - what documents are in issue?

A schedule of documents may assist – see page 109 of the Manual.

All material facts considered should be stated in the decision as far as possible (observing privacy issues where relevant).

Other material facts that may be relevant to particular kinds of decisions

Decision to refuse to deal with an application under section 20:

- resources required to deal with the scope of the access application;
- attempts by the agency to assist the applicant to reduce the work for dealing with the application; and

- other priorities of the agency and its available resources to deal with access applications.

Decision to defer access to documents under section 25:

- the law, if any, under which the document is required to be published;
- the person or body for which the document was prepared; and
- when the document will be released.

Decision to refuse access under section 26 on the basis that the documents cannot be found or do not exist:

- the searches conducted to find the documents; and
- information about the agency's record retention and disposal policies.

Decision to defer access under section 32 and 33:

- Third parties were consulted and claimed that the information is exempt under clause 3 or clause 4.

Findings on material questions of fact

Findings on material questions of fact are the conclusions drawn from available information. When considering whether disclosure would, on balance, be in the public interest, the decision maker will make findings on the particular facts of the application about the various public interests for and against disclosure of the information. Those findings may be weighted – some public interests may be more important than others based on the facts associated with the documents and the application.

Include conclusions on which decision is based:

- Description of harm/reasons for denial.
- The requested document's nature, content and purpose for creation e.g. clause 7 – advice from agency's solicitors.
- Other related documents.
- Views of the third parties and if you agree with them.

From the written decision, the applicant should be able to understand all the elements involved in claiming an exemption and why that particular exemption applies to that specific document or part of a document.

KEY REQUIREMENTS FOR NOTICE OF DECISION

Section 30(f): Reasons for Refusal.

Section 30(h): Rights of Review.

General guidance

- Every decision should be capable of logical explanation.
- Steps of reasoning linking facts to the decision need to be explained for the applicant to understand how the decision was reached.
- A notice of decision should be intelligible to the applicant and be of sufficient precision to give the applicant a clear understanding of why the decision was made.
- A notice of decision will be deficient if it states conclusions without particulars or explanations for those conclusions and is more likely to attract an application for review.
- Experience indicates that the reasons given for a decision are crucial to an applicant. Often they are the deciding factor in an applicant seeking further review of the decision, whether internally or externally. It is crucial for decision-makers to approach their task with this in mind.

WHY MAKE A QUALITY NOTICE OF DECISION?

- Responsibility is with the agency to comply with the Act.
- Decision is more likely to be challenged if you don't produce convincing reasons for refusal.
- Information Commissioner relies on decision as a basis for review.

THE SCHEDULE OF DOCUMENTS

An agency may wish to prepare a schedule of documents as part of its decision, especially where numerous documents have been identified. Where a schedule is prepared, it should list the documents sequentially by number unless to do so would disclose matter claimed to be exempt. The schedule should include for each document:

- the date of the document;
- the author of the document and the person or persons to whom it was directed;
- a brief but sufficient description of the contents to show a prima facie claim for exemption;

- where applicable, a brief statement as to the grounds of public interest that support the claim for exemption; and
- where the claim for exemption relates only to part of the document, a clear indication of the part or parts involved (e.g. paragraph 6 or line 3 in paragraph 5 etc.).

The use of schedules concerning disputed documents will enable agencies to organise basic facts concerning those documents that are in issue. In all but the simplest of cases, agencies will usually find that it is an advantage to prepare a schedule at the earliest opportunity and to use this in conjunction with the decision-making process. When the decision is made, a schedule can be attached as part of the notice of decision and can be readily supplied to the Information Commissioner in the case of a complaint being made.

Example of a decision involving a schedule of documents

***Re Bartucciotto and State Administrative Tribunal* [2006] WAICmr 9**

In this case, the agency provided the complainant with a schedule of documents with its decision which appeared to describe only those documents to which access had been provided and only referred in very general terms to those documents to which access had been refused. The Commissioner noted at [56]:

> *The FOI Act does not require an agency to provide an applicant with a schedule of documents. It does, however, require the agency, when its decision is to refuse access to documents, to provide a notice of decision that among other things gives the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based. In some cases, that can be done adequately in the notice of decision without individually identifying each of the documents to which access has been refused. However, in other cases, particularly where more than a few documents are involved and they are not all similar in nature, meeting those requirements can best be achieved by providing a schedule of documents.*

Chapter 7

REVIEW OF DECISIONS

CONTENTS

- Internal review
- Complaints to the Information Commissioner – External review
- Judicial review

FURTHER READING

- Review of Agency Decisions,
- Agency FOI Responsibilities, refer to page section “Making submissions to the Information Commissioner”

OIC Guides

- Apply to OIC WA for an FOI external review
- External review application form
- External Review Procedure - Guide for Parties
- Producing documents to the Information Commissioner – guide for agencies
- Preparing for a conciliation conference - guide for parties
- Understanding the conciliation process - guide for parties
- Consulting with third parties during external review - guide for agencies
- Decisions of the Information Commissioner – guide for access applicants
- Decisions of the Information Commissioner – guide for agencies
- Decisions of the Information Commissioner – guide for third parties

INTERNAL REVIEW

Section 39(1)	A person who is aggrieved by a decision made by the agency has a right to have the decision reviewed by the agency – ie a right to internal review.

Section 39(2) outlines the agency decisions about which an access applicant and a third party may seek review.

Internal review is not available in respect of a decision made by the principal officer of the agency or of a decision that was itself an internal review decision made under the FOI Act – section 39(3).

Requirements for an application for internal review

Section 40	An application for internal review must: • be in writing; • give particulars of the decision to be reviewed; • specify an Australian address for correspondence; and • be lodged at the agency's office within 30 days of being given a notice of the decision.
Section 40(3)	The agency's principal officer may allow an access applicant to lodge an application for internal review after the 30 days have expired.

Internal review process

Section 41	Internal reviews need to be undertaken by an officer who is not subordinate to the initial decision-maker.
Section 42	The internal reviewer is required to deal with the application as if it were an initial application and make a new decision about the documents.
Section 43(1)	The internal reviewer can decide to confirm, vary or reverse the decision under review.
Section 43(2)	The applicant must be notified of the decision on internal review within 15 days of the agency receiving the application. If an agency fails to give notice of its decision on an application for internal review within 15 days after it is lodged, or such longer period as is agreed between the agency and the access applicant, the agency is taken to have decided to confirm the decision under review. As a result, the Commissioner considers that, when an agency is dealing with an internal review request from a third party, the agency cannot extend the period by which it gives the third party its

	internal review decision without the agreement of the access applicant or such time as agreed between the agency and the access applicant.
Section 44	There is no application fee or charge in respect of an application for review.

COMPLAINTS TO THE INFORMATION COMMISSIONER - EXTERNAL REVIEW

Section 65(1)	A complaint may be made against an agency's decision to: (a) to give access to a document; or (b) to give access to an edited copy of a document; or (c) to refuse to deal with an access application; or (d) to refuse access to a document; or (e) to defer the giving of access to a document; or (f) to give access to a document in the manner referred to in section 28 or withhold access under that section; or (g) to impose a charge or require the payment of a deposit.
Section 65(2)	A complaint may be made under section 65(1) by an access applicant or a third party.
Sections 65(3) and 65(4)	A complaint may be made by an applicant for amendment against an agency's decision: (a) not to amend information in accordance with an application for amendment under Part 3; or (b) not to comply with a request by the applicant for amendment to make a notation or attachment to information.

Requirements for an application for external review

Section 66(1) **Amendment commenced 1 July 2025**	A complaint has to — (a) be given in writing to the Commissioner; and (b) give particulars of the decision to which the complaint relates; (c) give an address in Australia to which notices under the Act can be sent; (d) give any other information or details required under the regulations (Regulation 8 provides that the complaint must include a copy of the agency's internal review decision or initial decision if internal review was not available).
Section 66(2) **Amendment commenced 1 July 2025**	The applicant may make a complaint with the Information Commissioner within 60 days after being given a notice of decision.
Section 66(3) **Amendment commenced 1 July 2025**	A third party may make a complaint to the Information Commissioner within 30 days after being given a notice of decision.
Section 67(1) **Amendment commenced 1 July 2025**	The Information Commissioner may decide not to deal with a complaint if it is frivolous, vexatious, misconceived or lacking in substance.
Section 69 **Amendment commenced 1 July 2025**	The complainant and the agency are parties to every complaint and any third party or the access applicant is entitled to be joined as a party to a complaint on giving written notice to the Commissioner.

Written complaints about decisions of an agency must be lodged with the Information Commissioner:

- by applicants within 60 days.
- by third parties within 30 days.

Information Commissioner's powers include the power to:

- require information to be given (section 72(1)(a));
- require the production of documents (section 72(1)(b));
- require the attendance before the Commissioner of persons to answer questions (section 72(3)); and

- administer an oath or affirmation and to examine a person on oath or affirmation (section 73(1)).

Failure to comply with a requirement of the Information Commissioner to give information, produce a document or attend before the Commissioner is an offence which carries a penalty (section 83).

External review - the process

Sections 65, 70, 72, 73 and 75	The FOI Act provides the Information Commissioner with a general power to do all things necessary or convenient to be done for or in connection with the Information Commissioner's functions and specific powers. These powers are exercised so that the review function can be conducted expeditiously as circumstances allow.
Sections 67(1) and 68(1)	When the Office of the Information Commissioner receives a request for an external review, the complaint is first assessed in terms of its validity and whether there is jurisdiction to deal with it. A formal letter of advice and acknowledgement is then sent to the complainant and the relevant agency is formally notified of the complaint.
Section 72(1)(b)	Where necessary, the Information Commissioner will immediately call for the original copies of the documents in dispute together with the agency's FOI file on the matter and may request a schedule listing the documents.
Section 75(1)-(2)	Agencies are obliged to produce the documents within a specified period. Where possible, agencies are to provide copies of the documents, which will be verified against the originals as true copies, and the originals returned to the agency. The Information Commissioner then examines the documents in order to make a preliminary assessment of the complaint and the method to be used to determine the issue between the parties.
Section 71(1)	The Commissioner aims to resolve as many complaints as possible by conciliation. This process commences as soon as possible and continues until the matter is resolved or it becomes apparent that no further progress towards settlement or resolution is possible. At this point a formal review will usually commence in a manner determined by the Information Commissioner.
Sections 67(1) and 70	Usually the matter is determined on the basis of written submissions without any of the participants appearing before the Information Commissioner. In cases where it appears that an agency's claims for exemption lack substance, the Information Commissioner or one of his officers will raise this with the agency.

Section 70(3)	The Commissioner has to ensure that the parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner. Before proceeding to a formal decision on the complaint, the Information Commissioner will usually inform all parties of his preliminary view. One or more parties, as appropriate, will be invited to reconsider their positions and to either withdraw some or all their claims for exemption/complaint, or to provide further evidence and submissions in support.
Section 76	If necessary, the Information Commissioner makes a formal decision in writing either confirming, varying or setting aside the agency's decision. Included in the decision are the reasons for the decision and findings on material questions of fact underlying those reasons, referring to the material on which those findings were based.
Sections 76(6) and 76(7)	A copy of the decision is provided to the complainant and the agency and any other party to the complaint. Having received the decision, it is the responsibility of the agency to put it into effect. It is also the responsibility of the agency at this stage to arrange for the retrieval of the documents being held by the Information Commissioner's office.
Sections 76(7) and 85(4)	The Information Commissioner's decisions are final and binding on agencies, subject to appeal to the Supreme Court of a question of law arising out of the Commissioner's decision.
Section 102(1)	The onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made.

Chapter 8

AMENDMENT OF PERSONAL INFORMATION

CONTENTS

- Requirements of an application for amendment
- Ways that amendment can be made
- Requirements for certification by the Information Commissioner in certain circumstances

FURTHER READING

- Amendment of personal information

Right to Apply – Section 45

Section 45(1) **Amendment commenced 1 July 2026**	An individual has a right to apply for amendment of their personal information if the information is inaccurate, incomplete, out of date or misleading. The information must be the personal information that relates to the applicant.
Section 45(2) **Amendment commenced 1 July 2026**	A dead person's nearest relative has a right to apply for amendment of personal information that relates to the dead person.
Section 45(5) **Amendment commenced 1 July 2026**	Application to amend personal information cannot be made under the FOI Act if another enactment provides a means or procedure for amendment.

Section 46 – Requirements for a valid application for amendment

Section 46	Under the FOI Act an application for amendment of personal information has to – • be in writing; • give enough details to identify the document; • give details of the matters in relation to which the person believes the information is inaccurate, incomplete, out of date or misleading; • give the person's reasons for holding those beliefs; • give details of the requested amendment; • give an Australian address for correspondence; • state whether the person wishes the amendment to be made by altering, striking out or deleting, inserting or inserting a note in relation to information; and • be lodged at an office of the agency.

Dealing with amendment applications

An agency must first decide that the information is personal information that relates to the applicant.

If the agency decides that the information is inaccurate, incomplete, out of date or misleading, then it may make an appropriate amendment in one or more of the four ways listed.

It is not the responsibility of the agency to prove that the applicant's assertions are false. If the applicant does not produce supporting material to justify an amendment, the agency may refuse to amend the record.

The agency should consult with the author of the documents if possible where they contain opinions, advice or recommendations, especially where the documents are medical or other professional reports or examinations.

If the opinion of the author was properly based on all the evidence available at the time, it should remain unaltered.

If the applicant claims that an earlier opinion is no longer correct because of the passage of time, agencies should consider the age of the document, how the opinion was reached, whether the applicant is the subject of the opinion, the evidence produced and the form of that evidence.

Section 46(1)(b)	While it is not necessary for the applicant to have had access to the information which he or she wants amended, the application for amendment must give enough details to enable identification of the document. Where the agency is aware that the applicant has not in fact seen the relevant documentation, it is suggested that the agency make arrangements for the applicant to view the document, if appropriate. This may avoid difficulties in processing the application for amendment.
Sections 46(1)(c), (d)	The application must state what information the applicant believes is inaccurate, incomplete, out of date or misleading and the applicant's reasons for holding that belief. In many cases this will require the applicant to provide supporting evidence.
Section 46(1)(e)	The application must specify in which of the ways listed in section 46(2) the applicant wants the information amended. Section 46(2) provides that the applicant must state whether they wish amendment to be made by – altering information; striking out or deleting information; inserting information; inserting a note in relation to the information; or in two or more of those ways.
Sections 47(1); 47(3)-(5)	The agency may transfer the application to another agency if the first agency does not hold the relevant documents. Transfer arrangements are the same as those for transferring an access application.

Section 49	The agency must decide whether the record is inaccurate, incomplete, out of date or misleading as alleged and should require supporting evidence from the applicant. The agency is required to provide the applicant with a written notice of decision within 30 days of receiving the application.
Section 49(4)	If the agency decides to amend the information, details of the amendment must be provided to the applicant.
Section 49(5)	If the agency decides not to amend the information, it must give the reasons for the decision and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based. The applicant must be informed of the right to seek internal review of the decision and the right to request that a notation or attachment be made to the information.
Section 50	An agency may add a notation, giving their reasons for deciding not to amend the information in accordance with the application.

Form of Amendment - Section 48

Section 48(1)	If the agency decides to amend the information it may make the amendment by – • altering information • striking out or deleting information • inserting information • inserting a note or in two or more of those ways.

Obliterating or destroying the information

Section 48(3)	The agency may not amend a document by any of those methods in such a way that obliterates or removes the information or destroys the document containing the information without written certification from the Information Commissioner in accordance with section 48(3).

Request for Notation or Attachment - Section 50

Section 50(1)	Should an agency decide not to amend the information as requested, the applicant can request, in writing, that the agency make a notation or attachment to the information.
Sections 50(1)(a)-(b)	The notation or attachment request must give details of the information that is claimed to be inaccurate, incomplete, out of date or misleading and (where appropriate) set out the information the person claims is needed to complete the information or bring it up to date.
Section 50(3)	The agency is obliged to comply with the request unless the notation or attachment is considered to be defamatory or unnecessarily voluminous.
Section 50(4)	If the agency does not comply with the request, a notice of decision must be provided to the applicant.
Section 50(5)	The agency can decide to make a notation or attachment in an abbreviated or edited form. However, this is not regarded as compliance with the applicant's request.

Examples of decisions involving applications for amendment of personal information

Re 'B' and Department for Family and Children's Services [2000] WAICmr 5

The complainant applied to have certain documents amended by the deletion of references to allegations made against him and any reference that allegations about him were "substantiated". The agency was prepared to add on its files a detailed notation covering the issues of concern to him, but not to delete that information. The Information Commissioner, in this case, dealt with the question of whether the information contained in the agency's records was inaccurate or misleading. The Information Commissioner stated in the decision that there is a public interest in an agency retaining a complete record of its investigations and found that the records of allegations against the complainant, made by third parties, are a record of the statements made and therefore there is no basis for deletion or amendment. After taking into consideration the submissions from the agency and the complainant the Information Commissioner concluded that certain records containing references to allegations against the complainant having being 'substantiated', were misleading. The Information Commissioner, in this case, issued a certificate in accordance with section 48(3) of the FOI Act for those references to be obliterated or removed from the agency's records. As proposed by the agency and confirmed by the Information Commissioner it was open to the

*(NOTE: The definition of ' personal information' and section 45 of the FOI Act have been amended since these decisions were published – consult **WALW - Freedom of Information Act 1992 - Home Page** Act.*

complainant to have a detailed notation attached to each allegation which he maintains is inaccurate or misleading.

***Re 'B' and Armadale Health Service* [2007] WAICmr 4**

The complainant applied for amendment of personal information about her contained in her medical records claiming that certain information was inaccurate, incomplete, out of date or misleading and sought to have the information amended by alteration and insertion of a notation. The agency refused to amend the information in the manner requested. However, the agency agreed to attach the application for amendment as a notation to her medical records. The Information Commissioner considered the fact that the complainant disagrees with or disputes the accuracy of the information. Although the complainant made numerous written submissions, she did not provide any evidence to establish that the information is inaccurate, incomplete, out of date or misleading.

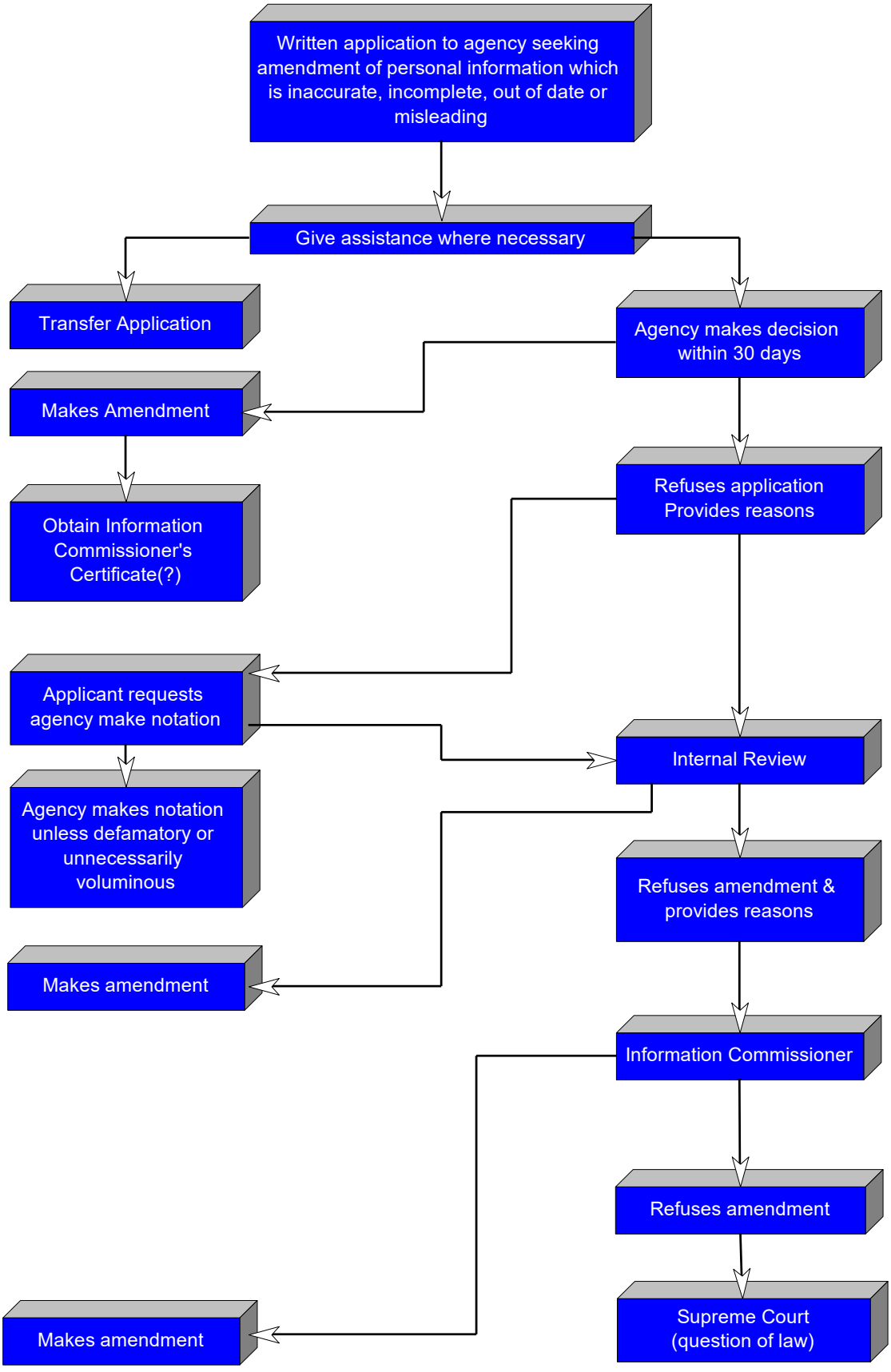
The Information Commissioner stated that:

> *even if she were persuaded that some form of amendment were justified, altering, striking out or deleting the disputed information would not be the appropriate means of amending most of the disputed information. Amendment in that way would create an untrue record, in that it would lead a reader of the disputed documents to conclude, amongst other things, that the complainant had not been a patient at the agency and that she had not been diagnosed and treated for the illnesses described in the disputed documents.*

The Information Commissioner suggested that the complainant accept the agency's offer of having the notation or attachment of the complainant's views placed on the file.

(NOTE: The definition of 'personal information' and section 45 of the FOI Act have been amended since these decisions were published – consult ***WALW - Freedom of Information Act 1992 - Home Page****.*

Flow chart for dealing with applications for amendment



Chapter 9

OTHER REQUIREMENTS OF THE FOI ACT

CONTENTS

- Information Statement (Sections 94-97)
- Related agencies
- Exempt agencies
- Annual Statistical Returns

FURTHER READING

OIC Guides

- Information Statement Guidelines

INFORMATION STATEMENT GUIDELINES

Part 5 of the FOI Act requires each agency to prepare and publish an information statement within 12 months after the commencement of the FOI Act, and to update the statement at intervals of not more than 12 months (sections 96 and 97 of the FOI Act).

The OIC has produced guidelines regarding the production and updating of agency Information Statements – Information Statement Guidelines.

PUBLICATION OF INFORMATION ABOUT AGENCIES - BENEFITS TO THE AGENCY

- The Information Statements and list of internal manuals are to be made available for inspection or purchase by members of the public.
- It is in the interest of agencies to make full use of the Information Statement. The more information that can be given out without the need for a formal FOI application, the less time agencies will have to devote to the FOI process and the more time agencies will have to carry out their functions.
- Agencies should assess current records they hold to determine what can be made available outside FOI.
- Members of the public who are well informed on the functions of agencies can direct their enquiries to the relevant agency. This will save agencies' resources in explaining to individuals that the agency is not responsible for the particular issue that person is interested in and that another agency would be able to help them.
- Individuals who are informed of the categories of documents held by agencies can frame their FOI applications accordingly.
- Commonly, FOI applications are from individuals who want to see his or her file with the aim of finding out why a particular decision was made which denied that person a benefit. Access to the relevant internal manual may satisfy the person's requirements without the need to see the whole file, and without the need to submit a formal FOI application.

RELATED AGENCIES FOR FOI PURPOSES

As there are administrative processes prescribed by the FOI Act which must be observed, it is desirable in the interests of efficiency, that many smaller agencies should be declared part of another agency within the relevant Minister's portfolio.

The FOI Act enables regulations to be made declaring that a specified office or body is not to be regarded as a separate agency but is to be regarded as part of a specified agency for FOI purposes. Offices and bodies declared by the *Freedom of Information Regulations 1993* (**the Regulations**) to be regarded in that way are referred to as 'related agencies.'

Regulation 10 of the Regulations provides that each body or office set out in column 2 of Schedule of the Regulations is a related agency to the office or body in column 1 of Schedule 2 to the Regulations. Amendments can be made to this list periodically to specify other agencies (either existing or newly created) to be regarded as part of another agency for the purposes of the FOI Act.

EXEMPT AGENCIES

Under section 10 of the FOI Act, a person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with the FOI Act. The Glossary to the FOI Act defines exempt agency as a person or body mentioned in Schedule 2 and includes staff under the control of the person or body.

An application cannot be made to an exempt agency for access to documents under the FOI Act. Under section 15(8), if the requested documents originated with or were received from an exempt agency, the agency has to notify the exempt agency that the access application has been received – an application cannot be transferred to an exempt agency.

For more information see the OIC publication – Dealing with requests for documents related to an 'exempt agency'

STATISTICS AND REPORTING

Section 32 of the Information Commissioner Act provides that the Information Commissioner is required to report every twelve months on the operations of the FOI Act and the PRIS Act and the operations of the Information Commissioner and the Information Access Deputy Information Commissioner and the Privacy Deputy Information Commissioner.

Section 111 of the FOI Act provides the annual report must include details in relation to FOI applications agencies receive.

Agencies are required to provide to the Information Commissioner for inclusion in the annual report, details of applications as outlined in section 111.

Section 111(2) provides that the Commissioner's annual report is to include in relation to each agency the following -

(a) the number of access applications received and dealt with;

(b) the number of decisions to -

  (i) give access to documents;

  (ii) give access to edited copies of documents;

  (iii) defer giving access to documents;

  (iv) give access to a document in the manner referred to in section 28;

  (v) refuse access to documents;

(c) the number of times each of the clauses in Schedule 1 was used to characterise documents as exempt documents;

(d) the number of applications for internal review under Part 2 and the results of the reviews;

(e) the number of applications for amendment of personal information received and dealt with;

(f) the number of decisions -

  (i) to amend personal information in accordance with an application;

  (ii) not to amend personal information in accordance with an application;

(g) the number of applications for internal review under Part 3 and the results of the reviews;

(h) the number of complaints made to the Commissioner and the results of the complaints;

(i) the number of other applications made to the Commissioner and the results of those applications;

(j) the number of appeals to the Supreme Court and the results of those appeals;

(k) the amounts of fees and charges collected and details of fees and charges that were reduced or waived; and

(l) such other information as is prescribed.

Section 111(3) provides that each agency must provide the Commissioner with such information as the Commissioner requires for the purpose of section 111 and comply with any prescribed requirements concerning the providing of that information and the keeping of records for the purpose of this section.

Agencies should have established procedures by which to collect the required information.

ANNUAL STATISTICAL RETURN REPORTING

At the end of each financial year each agency must provide to the Information Commissioner details of applications including -

- Number of applications.
- Decision e.g. full/edited etc.
- Exemption clauses cited.
- Internal review applications.
- Applications for amendment.
- Decision e.g. amend/refuse/other.
- Internal review applications.
- Fees and charges.

Shortly after the end of each financial year, the Office of the Information Commissioner sends advice to agencies on how to provide their statistics electronically to the Office of the Information Commissioner.

All statistics are required to be completed and submitted to the Information Commissioner's office by the date displayed in the email and on the survey form (usually 2 weeks after 30 June).

Agencies that have not received any FOI applications are still required to lodge a 'nil' return.

The statistical data collected is compiled and presented in the Information Commissioner's annual report.

REQUIREMENTS OF THE RETURN

The return form is designed to be easy to complete.

All returns should be reconciled with the previous return to ensure that carry overs of applications not finalised have been made correctly.

Guidance about completing the return is included in the online statistical return provided to the agency. For further guidance contact the OIC.

APPENDICES

OBJECTIVE

The following are intended as a guide and reference.

The Office of the Information Commissioner produced the samples as part of the Advice and Awareness function to assist agencies in applying the provisions of the FOI Act.

CONTENTS

- Sample Notice of Decision
- Sample Document Schedule
- Sample Estimate of Charges
- Sample Time Recording Sheet
- Checklist for Agencies

APPENDIX 1:
SAMPLE NOTICE OF DECISION

NOTE:

This example is intended as a guide and reference. The content should be tailored according to the particular application being dealt with by the agency.

The Office of the Information Commissioner produced the samples as part of the Advice and Awareness function to assist agencies in applying the provisions of the FOI Act. They cannot be interpreted as standard, or substituted for the obligations placed on decision-makers in agencies, which require the exercise of judgment in each case.

[Agency Letterhead]

[Access applicant (name)]
[Address]

Dear [Applicant]

I refer to your Freedom of Information application received on (insert date), requesting access to a document concerning a complaint made about you to this agency.

It was decided on (insert date), by Mr/Ms (Decision Maker), (Title of officer), for the reasons given in the attached Notice of Decision, to refuse access to the requested document.

If you are not satisfied with the decision, you have the right to apply for an internal review. Details of the review process are set out at the end of the Notice of Decision.

Yours sincerely

(Signed)

FOI COORDINATOR

(insert date)

NOTICE OF DECISION
UNDER SECTION 30
OF THE *FREEDOM OF INFORMATION ACT 1992*

Applicant: Name of access applicant

Decision Maker: Name of Decision Maker
Title of Decision Maker

Date of Decision: [insert date]

Decision:

For the reasons set out below, I have decided to refuse access to the requested document on the ground that it is exempt under clause 3 of Schedule 1 to the *Freedom of Information Act 1992* (**the FOI Act**).

Background

1. On (insert date), the agency received a letter of complaint about the management and condition of your business (name of the business). (Officer name and title) has discussed the contents of the letter with you at a meeting on (insert date). A copy of the letter was not given to you. However, you were provided with a typed extract from the complainant's letter which lists the allegations made.
2. You responded to the complainant's allegations by letter dated (insert date).
3. (Officer name) wrote to you on (insert date) and advised that, after considering your response to the allegations, he was satisfied that no further action should be taken.

Your access application

4. On (insert date), you lodged an FOI application with the agency for a copy of a "complaint made about the (name of the business)." You stated that you know who the complainant is and want confirmation of this by obtaining a copy of that person's letter.

The requested document

5. The agency has identified one document within the scope of your application (**the requested document**).
6. I have examined the requested document and note that it contains personal information that relates to another individual.

The exemption

7. Personal information that relates to an individual is, on its face, exempt under clause 3 of Schedule 1 to the FOI Act. Clause 3 provides:

Personal information

(1) Matter is exempt matter if its disclosure would reveal personal information that relates to an individual (whether living or dead).

(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information that relates to the applicant.

(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -

(a) the person,

(b) the person's position or functions as an officer, or

(c) things done by the person in the course of performing functions as an officer.

(4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -

(a) the person;

(b) the contract, or

(c) things done by the person in performing services under the contract.

(5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance be in the public interest.

8. The purpose of the exemption in clause 3(1) is to protect the privacy of individuals whose information may be contained in documents held by State and local government agencies.

9. The term 'personal information' is defined in the Glossary to the FOI Act: *personal information*

(a) means information or an opinion, whether true or not, and whether recorded in a material form or not, that relates to an individual, whether living or dead, whose identity is apparent or can reasonably be ascertained from the information or opinion; and

(b) includes information of the following kinds to which paragraph (a) applies —

(i) a name, date of birth or address;

(ii) a unique identifier, online identifier or pseudonym;

(iii) contact information;

(iv) information that relates to an individual's location;

(v) technical or behavioural information in relation to an individual's activities, preferences or identity;

(vi) inferred information that relates to an individual, including predictions in relation to an individual's behaviour or preferences and profiles generated from aggregated information;

(vii) information that relates to 1 or more features specific to the physical, physiological, genetic, mental, behavioural, economic, cultural or social identity of an individual;

10. In this case, the requested document contains information that relates an identifiable individual which consists of their name, address, signature, hand writing, and opinion. In my view, all of that information consists of 'personal information', as defined in the FOI Act, which is on its face exempt under clause 3(1) of Schedule 1 to the FOI Act.

11. The exemption in clause 3(1) is, however, subject to a number of limits which are set out in clauses 3(2)-3(6). In this case, the only limit on exemption that I consider might apply is clause 3(6), which provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest

Public interest

12. The application of the public interest test in clause 3(6) involves identifying the public interest factors for and against disclosure and weighing them against each other to determine where the balance lies.

13. I have identified public interest factors both in favour and against disclosure of the requested document. In relation to the factors favouring disclosure, I consider that the following are relevant:

    (a) the public interest in individuals being able to access their own personal information under the FOI Act;

    (b) the public interests in providing a person with access to allegations made against them and giving them an opportunity to respond to those allegations.

14. In relation to the factors against disclosure, I consider that the following are relevant:

    (a) the public interest in protecting the privacy of individuals; and

    (b) the public interest in ratepayers and other members of the public coming forward with information to assist an agency to perform its regulatory functions.

15. In this case, I consider that the public interests in a person being informed of allegations made against them and being given an opportunity to

respond to those allegations was satisfied by your meeting with (officer name) on (insert date) and the provision of the typed extract of the allegations. I do not consider that disclosure of the identity of the complainant would further satisfy that public interest.

16. In weighing the competing factors for and against disclosure, I consider that the public interest in protecting the privacy of third parties outweighs the public interests favouring disclosure in this case.

17. Accordingly, I am of the opinion that disclosure of the requested document would not, on balance, be in the public interest and that the limit on the exemption in clause 3(6) does not apply. Therefore, I have decided to refuse access to the requested document on the ground that it is exempt under clause 3.

18. I have also considered whether it would be possible to give you a copy of the requested document with the exempt information deleted. However, in my opinion, it is not practicable to delete the exempt information because the extent of editing required would render the document meaningless.

Right of review

19. If you are not satisfied with this decision, you have a right to apply for an internal review. [Include relevant information about the rights of review and the procedure to be followed to exercise those rights as set out in the following attachments - see notes below].

Notes for agencies about explanation of review rights

- If internal review is available, only include an explanation of the internal review right and procedure as set out in Option 1.
- If internal review is not available (which would only arise when the initial decision is made by the principal officer of the agency or by a Minister), only include an explanation of the external review right and procedure, as set out in Option 2.
- Do not include an explanation of both internal AND external review rights in the initial decision as this can create confusion about the procedure to follow.

Option 1: Suggested explanation of review rights to include with initial decision (when internal review is available):

If you are not satisfied with this decision, you have a right to apply for an internal review.

An application for internal review may be lodged with this agency within 30 days after being given this written notice of decision, and must:

- be in writing;
- provide particulars of the decision to be reviewed; and
- give an address in Australia.

There is no lodgement fee for an application for internal review and there are no charges for dealing with an internal review request.

If an application for internal review is received, it will not be dealt with by the person who made the initial decision, or by any person who is subordinate to the original decision maker. The outcome of an application for internal review will result in the initial decision under review being either confirmed, varied or reversed. You will be advised of the outcome within 15 days of receipt of your application for internal review.

The address for lodgement of an internal review request by mail or in person is:

The Chief Executive Officer
(Agency address)
WESTERN AUSTRALIA 6XXX

Or in person at

(Agency address)
WESTERN AUSTRALIA

You may also lodge an application for internal review by:

- Facsimile to (agency facsimile number); or
- Email to (agency email address)

Option 2: Suggested explanation of review rights to include with initial decision when internal review is not available (or to include in an internal review notice of decision).

If you are not satisfied with the internal review decision [or 'this decision' if internal review is not available], you have the right to apply for external review of the agency's decision by the Information Commissioner (called a complaint under the FOI Act).

You must make your application for external review to the Information Commissioner's office within 60 days after being given the agency's internal review notice of decision [note that this will be 30 days in the case of a notice of decision sent to a third party – section 66(3)]

An external review application must:

- be given in writing to the Information Commissioner
- give particulars of the decision to which the external review application relates;
- have attached to it a copy of the agency's internal review notice of decision; and
- give an address in Australia.

There is no charge for making a complaint with the Information Commissioner's office.

The Information Commissioner has an **External Review (complaint) form** available at: Apply to OIC WA for an FOI external review

You can send your application for external review to the Information Commissioner:

- by mail:

  Office of the Information Commissioner
  Albert Facey House
  469 Wellington Street
  PERTH WA 6000

- by email
  info@oic.wa.gov.au

Should you have any further queries or require any further information about your review rights at this stage, you may contact the Office of the Information Commissioner on (08) 6551 7888.

APPENDIX 2:
SAMPLE DOCUMENT SCHEDULE

NOTE:

This example is intended as a guide and reference. The content should be tailored according to the particular application being dealt with by the agency.

The Office of the Information Commissioner produced the samples as part of the Advice and Awareness function to assist agencies in applying the provisions of the FOI Act. They cannot be interpreted as standard, or substituted for the obligations placed on decision-makers in agencies, which require the exercise of judgment in each case.

EXAMPLE ONLY OF A COMPLETED SCHEDULE

Document Schedule: **Applicant:**		**Freedom of Information Application No.** **Decision Maker:**		**File No.**	
Doc. No.	**Source / Location**	**Description**	**Decision**	**Exemption**	**Reasons for decision**
1.	FILE 4/84 vol. 1 folios: 22a-c	Letter dated 23/6/94 from a member of the public	Release with name and address of correspondent deleted.	Clause (3)(1)	Letter was sent by a member of the public who expressed an opinion about an issue that had been given media attention. On balance, while the opinion itself can be released, the personal information exemption is applicable to the person's name and address.
2.	FILE 6/84 vol 2 folios: 9-22:	Report dated 31/7/94	- Release	N/A	No personal or commercial information about third parties.
3.	FILE 2/94 vol 1 folio 22	File Note By CEO dated 12/8/94	- Release	N/A	No difficulty in releasing in full.
4.	FILE 2/94 Vol 1 Folio 26	Internal Memo to CEO dated 6/10/94	- Release with editing	Clause 14	Exempt 3rd & 4th para's. Contains information of a type referred to in Clause 14(1)(C) and the Parliamentary Commissioner does not agree to its release.

APPENDIX 3:
SAMPLE ESTIMATE OF CHARGES

NOTE:

This example is intended as a guide and reference. The content should be tailored according to the particular application being dealt with by the agency.

The Office of the Information Commissioner produced the samples as part of the Advice and Awareness function to assist agencies in applying the provisions of the FOI Act. They cannot be interpreted as standard, or substituted for the obligations placed on decision-makers in agencies, which require the exercise of judgment in each case.

[Agency Letterhead]

[Access applicant (name)]
[Address]

Dear [Applicant]

NOTICE OF ESTIMATE OF CHARGES

I refer to your access application made under the *Freedom of Information Act 1992* (WA) (**the FOI Act**), which was received by this agency on (insert date).

By your application, you seek access to the following documents: (outline of documents requested)

A search of the agency's records has identified (number of documents falling within the ambit of the application) within the scope of your request.

At this stage, a final decision on access has not yet been made. However, the purpose of this letter is to provide you with an estimate of the charges for dealing with your application and to ask whether you still wish to proceed with your application.

To assist you, please see the attached explanatory notes concerning the charges payable under the FOI Act.

Estimate of charges

Based on a representative sample of the requested documents, I estimate that the charges payable, in accordance with the *Freedom of Information Regulations 1993* (**the FOI Regulations**) are as follows:

Charge for staff time for dealing with application: [ ] hours @ $30 per hour = [$....]

Charge for photocopying, staff time: [ ] hours @ $30 per hour = [$....]

Charge for (number of photocopies) [ ] hours @ 20c per copy = [$....]

Estimated charges = [$.....]

Advance deposit

In accordance with section 18 of the FOI Act, the agency requires a deposit of [$...25% estimated charges], for dealing with your application.

Next steps

If you wish to proceed with your access application, you must within 30 days after the day on which this notice is given:

- notify the agency of your intention to proceed; and
- pay the required deposit.

Please note that if, within 30 days after the day on which this notice is given, the agency does not receive notice of your intention to proceed and/or payment of the required deposit, your application will be regarded as withdrawn.

If you would like to discuss alternatives for changing your application or reducing the anticipated charges, or if you have any questions, please do not hesitate to contact me (insert contact details).

Right of Review

Notes for agencies about explanation of review rights

- If internal review is available, only include an explanation of the internal review right and procedure as set out in Option 1.
- If internal review is not available (which would only arise when the initial decision is made by the principal officer of the agency or by a Minister), only include an explanation of the external review right and procedure, as set out in Option 2.
- Do not include an explanation of both internal AND external review rights in the initial decision as this can create confusion about the procedure to follow. If you do include both ensure that it is clear that external review should only be sought if the applicant is not satisfied with the internal review decision.
- The Commissioner considers that an applicant cannot seek review of an estimate of charges where no deposit has been required.

Option 1: Suggested explanation of review rights to include with initial decision on charges (when internal review is available):

If you are not satisfied with this decision to impose a charge, or the requirement to pay a deposit, you have a right to apply for an internal review.

An application for internal review may be lodged with this agency within 30 days after being given this written notice of decision, and must:

- be in writing;
- provide particulars of the decision to be reviewed; and
- give an address in Australia.

There is no lodgement fee for an application for internal review and there are no charges for dealing with an internal review request.

If an application for internal review is received, it will not be dealt with by the person who made the initial decision, or by any person who is subordinate to the original decision maker. The outcome of an application for internal review will result in the initial decision under review being either confirmed, varied or reversed. You will be advised of the outcome within 15 days of receipt of your application for internal review.

The address for lodgement of an internal review request by mail or in person is:

The Chief Executive Officer
(Agency address)
WESTERN AUSTRALIA 6XXX

Or in person at:

(Agency address)
WESTERN AUSTRALIA

You may also lodge an application for internal review by:

- Facsimile to (agency facsimile number); or
- Email to (agency email address)

Option 2: Suggested explanation of review rights to include with initial decision when internal review is not available (or to include in an internal review notice of decision)

If you are not satisfied with the internal review decision [or 'this decision' if internal review was not available] to impose a charge, or the requirement to pay a deposit,], you have the right to apply for external review of the agency's decision by the Information Commissioner (called a complaint under the FOI Act). You must make your application for external review to the Information Commissioner's office within 60 days after being given the agency's internal review notice of decision [note that this will be 30 days in the case of a notice of decision sent to a third party – section 66(3)]

An external review application must:

- be given in writing to the Information Commissioner
- give particulars of the decision to which the external review application relates;
- have attached to it a copy of the agency's internal review notice of decision; and
- give an address in Australia.

There is no charge for making a complaint with the Information Commissioner's office.

The Information Commissioner has an External Review (complaint) form available at: Apply to OIC WA for an FOI external review.

You can send your application for external review to the Information Commissioner:

- by mail:

  Office of the Information Commissioner
  Albert Facey House
  469 Wellington Street
  PERTH WA 6000

- by email
  info@oic.wa.gov.au

Should you have any further queries or require any further information about your review rights at this stage, you may contact the Office of the Information Commissioner on (08) 6551 7888 or 1800 621 244 (WA country callers).

Attachment: Explanatory notes regarding charges for dealing with an access application under the *Freedom of Information Act 1992*

The FOI Act provides that if an agency estimates that the charges for dealing with an application might exceed $25, the agency is required to notify the applicant of its estimate, and the basis on which the estimate is made, and inquire whether the applicant wishes to proceed with the application (section 17(3)).

An agency may also require an applicant to pay a deposit on account of the charges for dealing with an application (section 18).

An application is regarded as withdrawn if the agency does not receive notification of an intention to proceed with an application and/or payment of the required deposit within 30 days (or such further time as the agency allows) after the day which notice is given (section 19).

The charges and deposit payable under the FOI Act are set by Schedule 1 to the *Freedom of Information Regulations 1993* (**the FOI Regulations).**

The following is an extract of Schedule 1 to the FOI Regulations:

2.	Type of Charge	$
(a)	Charge for time taken by staff dealing with the application (per hour, or *pro rata* for a part of an hour).....	30
(b)	Charge for access time supervised by staff (per hour, or *pro rata* for a part of an hour).....	30
	plus the actual additional cost to the agency of any special arrangements (eg. hire of facilities or equipment).	
(c)	Charges for photocopying —	
	(i) per hour, or *pro rata* for a part of an hour of staff time;.....	30
	And	
	(ii) per copy	0.20
(d)	Charge for time taken by staff transcribing information from a tape or other device (per hour, or *pro rata* for a part of an hour)	30

(e)	Charge for duplicating a tape, film or computer information.....	Actual Cost
(f)	Charge for delivery, packaging and postage.....	Actual Cost

3. Advance Deposits

(a)	Advance deposit which may be required by an agency under section 18(1) of the Act, expressed as a percentage of the estimated charges which will be payable in excess of the application fee.....	25%
(b)	Further advance deposit which may be required by an agency under section 18(4) of the Act, expressed as a percentage of the estimated charges which will be payable in excess of the application fee.....	75%

The period commencing from the date of the applicant's receipt of the agency's notice of estimate of charges and ending on the day on which the agency is notified of the applicant's intention to proceed with the application or the deposit is paid is to be disregarded for the purpose of calculating the 'permitted period' for dealing with an access application (section 19).

If an agency has required an applicant to pay a deposit on account of the charges, the agency has to, at the request of the applicant, discuss with the applicant practicable alternatives for changing the application or reducing the anticipated charges, including reduction of the charges if the applicant waives, either conditionally or unconditionally, the need for the agency to deal with the application within the permitted period (section 18).

APPENDIX 4:
SAMPLE TIME RECORDING SHEET

NOTE:

This example is intended as a guide and reference. The content should be tailored according to the particular application being dealt with by the agency.

The Office of the Information Commissioner produced the samples as part of the Advice and Awareness function to assist agencies in applying the provisions of the FOI Act. They cannot be interpreted as standard, or substituted for the obligations placed on decision-makers in agencies, which require the exercise of judgment in each case.

- This action sheet may be stapled to the inside cover of each FOI file, or maintained as an electronic record.
- It is necessary to accurately record the time taken for each FOI action, if charges are to be imposed.
- All officers should record the time they have spent on each action.
- Use additional sheets if necessary.

Applicant's Name:	File number:

ACTION – record time in minutes for each action taken in the appropriate column.						TIME
(a) INITIAL PROCESSING:*						
• Applicant consultation						
• Making up FOI file						
• Identify and locate documents						
• Produce hard copies from fiche/film						
Note: Charges cannot be imposed for part (a)					Total	
(b) CONSULTATION WITH:						
• Applicant						
• Other officers						
• Other Government agencies						
• Third parties						
• Others						
Note: Consultation with third parties is only necessary *when an agency proposes to give access to third party information* **Note:** may not be able to charge for all of this.					Sub-Total	
(c) DECISION:						
• Examination of documents						
• Editing						
• Drafting decision						
					Sub-Total	
(d) ACCESS:						
• Document preparation						
• Photocopying						
• Supervising inspection by applicant						
					Sub-Total	
TOTAL TIME SPENT:						

Prepared by:_____

APPENDIX 5:
CHECKLIST FOR AGENCIES

NOTE:

This checklist is intended as a guide and reference. The content should be tailored according to the particular application being dealt with by the agency.

The Office of the Information Commissioner produced the samples as part of the Advice and Awareness function to assist agencies in applying the provisions of the FOI Act. They cannot be interpreted as standard, or substituted for the obligations placed on decision-makers in agencies, which require the exercise of judgment in each case.

PROCESSING APPLICATION

Personal Information Y/N	Non-Personal Information Y/N

Decision Maker:_____

1	Date received:_____	Valid application (s.12)	(Y/N)
2	Required to help applicant change application	Date:_____	(Y/N)
3	45 day (maximum) deadline:	Date: _____	
4	Acknowledgement sent:	Date: _____	(Y/N)
5	Documents located:		(Y/N)
	Personal Information only	**Non-personal Information**	
6.		Estimate of charges: (Y/N) Deposit required (Y/N) Date estimate sent: Date intention to proceed received: Revised due date:	
7.		Third party consultation required: (Y/N)	
8	Editing required: (Y/N)	Editing required: (Y/N)	
9	Notice of decision sent:	Date:	
10	Internal review closes:	Date:	

INTERNAL REVIEW

	Application received:	Date:
	15 day deadline:	Date:
	Notice of decision sent:	Date:
	Internal Reviewer:	

EXTERNAL REVIEW

	Agency notified:	Date:

EXPLANATORY NOTES

PROCESSING THE APPLICATION

Determine from the outset who will be the decision-maker. (In some agencies the FOI Coordinator is the initial decision-maker, in others it may be another officer, the principal officer (usually the CEO) or the Minister. If the principal officer or the Minister makes the decision there is no internal review.)

1. Register the application, create a file and ensure the application is valid (section 12):
    - Gives enough information so the requested documents can be identified;
    - Gives an Australian address to which notices can be sent.
    - $30 application fee for non-personal information application paid.
2. If the application does not comply with the FOI Act, help applicant change application so that it complies (section 11(3)). Document any assistance given.
3. The maximum period is 45 calendar days – determine deadline date.
4. Acknowledge receipt of application and confirm agreement of scope.
5. Locate all documents that fall within the ambit of the request, e.g.: Emails; Files; Computer search; copies held by individual officers
6. Non-personal application (at agency discretion whether or not to impose charges)
    - Estimate of Charges (where charges exceed $25.00)
    - Agency and applicant agree on documents in ambit of application.
    - Notify applicant of estimate and basis for it and any deposit required – (25% of estimate of charges).
    - Advise applicant of requirement to respond within 30 days and outcome of failing to do so including rights of review.
    - 45 day time limit is suspended on day applicant notified and resumes on day intention to proceed notified and/or when deposit paid.
7. Non-personal application: Consultation process (see sections 32-34 of FOI Act). *The agency only needs to consult if it is proposing to give access*.

Discuss with applicant the following:

Does applicant seek access to third party information? (Y/N)

If answer is NO – there is no need to consult third parties

If answer is YES – number of third parties involved

Officers of the agency _____

Third parties _____

Correspondence to and from the applicant – seek agreement to exclude those documents

- Agreement to exclude – then no longer in scope (Y/N)

How to consult

- By telephone (File note of call) (Y/N)
- Face to face meeting (File note of meeting) (Y/N)
- Send letter: (Y/N)
    - Enclose copy of document (if possible) highlight likely exempt matter or clearly describe them
    - Specify date for response

Receipt of third parties views – make a decision. If third party objects to release but the agency's decision is to release:

- Issue both access applicant and the third party Notice of Decision - Third party has 30 days to apply for an internal review.

Third party does not seek review:

- Release documents to access applicant.

Third party seeks review:

- withhold documents until reviews finalised.

8. Edit documents to delete such third party information as is outside the scope or exempt from the documents.

9. The notice of decision must comply with section 30, and include the following details the date of the decision; name and designation of the decision-maker; decision on access and reasons for classifying any matter exempt; reasons for refusal, and rights of review. Even where the decision is to give full access, the agency must include the rights of review.

10. Access applicant and/or third party may lodge an application for internal review within 30 days after being given a notice of decision.

INTERNAL REVIEW

Record date the application for internal review is received by the agency.

The agency has 15 calendar days to review its decision – determine deadline.

The review has to be dealt with as if it were an access application and the notice of decision must comply with section 30 (see point 8 above). The decision must include the rights of external review and appeal.

The internal reviewer must not be subordinate to the initial decision-maker. The reviewer can decide to confirm, vary or reverse the decision under review.