**Office of the Information Commissioner (WA)**

# FREEDOM OF INFORMATION

## Policy and Practice

**November 1996**

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## FOREWORD

As Information Commissioner, I am in the unique position of having the dual responsibility of dealing with complaints about decisions made by agencies under the *Freedom of Information Act 1992*, and of ensuring that the public and officers of State and local government agencies are aware of their respective rights and obligations under this legislation.

FOI is a new area of administrative law in Western Australia and, as such, is still developing. In this manual of policy and procedures, my office has attempted to assist with procedural matters and gaps in the legislation. The advice and suggestions in this manual are based on precedent law, where applicable; FOI experience in this State and elsewhere; and my published decisions.

The manual is not a definitive guide, but it suggests a common sense approach to some of the "grey areas" of FOI administration, bearing in mind the objects and intent of the legislation. I commend its contents to FOI practitioners and to the members of the public who use FOI to obtain information from government agencies.

Members of the public and FOI practitioners in agencies are encouraged to contact the *Advice and Awareness* sub-program of my office if assistance is necessary, either in general or if difficulties are being experienced with a particular access application or an agency.

Notwithstanding the advice and suggestions herein, in keeping with my statutory obligations, I must decide complaints that come before me, impartially and on their merits, taking into account the documents concerned and the evidence. Accordingly, my determinative role is circumscribed by the FOI Act and by the decisions of the Supreme Court of Western Australia and not by anything contained in this manual.

B. KEIGHLEY-GERARDY

INFORMATION COMMISSIONER

**For advice or assistance with any aspect of FOI procedures, or with any part of this manual or the procedures outlined, contact:**

**Office of the Information Commissioner**

**Level 21, Exchange Plaza**

**2 The Esplanade**

**Perth WA 6000**

**Tel: 9220 7888**

**Facsimile: 9325 2152**

**Email: info@foi.wa.gov.au**

**Internet Site: http://www.foi.wa.gov.au**

## ***Disclaimer***

***The content of this publication is an aid to understanding and provides guidance to applicants and agencies, but cannot be substituted for the FOI Act and regulations.***

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# 1. Introduction

**Purpose**

**1.1** These guidelines are issued by the Information Commissioner in accordance with the Commissioner's statutory obligation under s.63(2)(d), (e) and (f) of the *Freedom of Information Act 1992* ('the FOI Act'). The purpose of the guidelines is to assist agencies to understand their obligations under the FOI Act and to assist applicants to exercise their rights under that Act. The guidelines also explain the approach taken by the Information Commissioner in dealing with complaints. The contents of this publication should be read in conjunction with the material contained in the Procedures Manual issued in June 1994.

**1.2** In line with the clear intention of Parliament and the FOI Act that procedures should be informal, speedy and without undue technicality, the preferred approach of the Information Commissioner when assisting agencies and applicants is to emphasise the resolution of complaints by conciliation and negotiation where possible. However, the prime responsibility for the administration of the FOI Act rests with State and local government agencies and it is incumbent upon officers of those agencies to make the legislation work effectively.

**Assisting applicants**

**1.3** The FOI Act places certain statutory obligations upon agencies to assist applicants to exercise their rights under the FOI Act. Some of the most important obligations are as follows:

* take reasonable steps to help an access applicant make an application in a manner that complies with the FOI Act **[s.11(2)];**
* take reasonable steps to help an access applicant to change an application so that it complies with the requirements of the FOI Act **[s.11(3)];**
* deal with an access application as soon as practicable **[s.13(1)];**
* transfer the access application to another agency (where appropriate) and without delay **[s.15];**
* take reasonable steps to help an access applicant to change an application to reduce the amount of work needed to deal with it **[s.20(1)];**
* take reasonable steps to be satisfied about the identity of an access applicant before personal information is released and ensure that only the person to whom the information relates (or an authorised agent of that person) receives personal information **[ s.29].**

**1.4** Agencies are required to give effect to the FOI Act in a way that:

(i) assists the public to obtain access to documents;

(ii) allows access to be obtained **promptly** and at the **lowest reasonable cost**; and

(iii) assists the public to ensure that personal information in documents is accurate, complete, up to date and not misleading **[s.4]**.

**1.5** The FOI Act requires agencies to deal with their responsibilities under that Act with the principles in s.4 in mind. Whenever there is any doubt about the appropriate manner of dealing

with an access application or where the provisions of the Act are unclear, the principles of administration should act as a guide for decision-making. Early contact with the *Advice and Awareness* sub-program in the office of the Information Commissioner can provide assistance in this regard.

**1.6** Although agencies have a discretion to release documents that may technically be exempt **[s.3(3)],** the Information Commissioner does not have the same discretion. However, to minimise the number of complaints and to demonstrate a commitment to openness and accountability, the Information Commissioner encourages agencies to exercise their discretion in accordance with the principles of administration. Decisions to withhold documents from release under FOI should only be made if disclosure would result in some identifiable harm or injury and only to protect the most sensitive information.

**Documents available for purchase or inspection by the public**

**1.7** The role of the FOI Act in the provision and amendment of information is to complement or supplement existing arrangements, not to restrict them. It does not overrule or restrict any obligations to give access to information or to amend records which exist under other legislation. However, it does override the confidentiality and secrecy provisions of legislation, unless that legislation expressly states that it has effect despite the FOI Act **[see s.3(3) and s.8(1)].**

**1.8** Some documents are excluded from the ambit of the FOI Act. These include:

* documents available for purchase or free distribution by agencies **[refer to agency Information Statements]**;
* documents available for inspection under an enactment whether for a fee or not;
* documents available for inspection in the State Archives;

* publicly available library or reference material in agencies; and
* documents made or acquired by museums, libraries and art galleries for public display or general reference **[s.6].**

**1.9** Agencies may refuse access under the FOI Act if documents are available to the public for purchase, inspection or free distribution **[s.6]**. If there is a statutory scheme in place under other legislation that allows an applicant, as a member of the public, to have access to his or her personal information upon payment of a fee, but which would not allow other members of the public to have access to that information, it is arguable that those documents are available outside the FOI Act. That is, any pre-existing legislative or administrative arrangements to enable people to have access to government information, whether personal or non-personal, may not be over-ridden by the FOI Act and agencies could rely upon those existing arrangements to make documents available to members of the public.

# 2. Documents of an agency

**Definition**

**2.1** The right of access under the FOI Act is a right to access **documents** rather than **information**. The words "document" and "record" are broadly defined in the FOI Act and cover almost all, if not all, forms in which information may be stored in an agency. For example, in the course of resolving a complaint, the Information Commissioner was of the view that a manufacturer's compliance plate fitted to the engine of a motor vehicle, was a "record" as defined in the Glossary in Schedule 2 to the FOI Act and hence a "document" for the purpose of providing access to it under the FOI Act.

**2.2** An agency need not create a document if one does not exist, in order to satisfy a request for access. However, some agencies have been prepared to create a document to provide information to applicants in order to comply with the spirit of openness and accountability. The Information Commissioner encourages such a proactive response by agencies and the adoption of policies and practices that facilitate access to information outside the framework of the FOI Act.

**2.3** However, such practices must supplement the rights of access under the FOI Act. Agency policies and practices must not be used to frustrate the legal rights of access and external review by the Information Commissioner.

**Using Information Statements to identify requested Documents**

**2.4** Agencies must publish, and make available for public inspection or purchase, **Information Statements** containing a description of the kinds of documents that are usually held by the agency, including documents that may be purchased from the agency or those that may be obtained free of charge **[s.94(d)].** If an applicant does not know where or how an agency stores the information to which access is required, or if an applicant is unable to describe the document requested, he or she should ask to see the agency's**Information Statement.**

**2.5** If the Information Statement does not help an applicant to describe the documents requested, the **agency must assist** that applicant to identify the document required and to submit an application for access in the form prescribed by the FOI Act. Such assistance may need to take the form of a more detailed description of the agency's record-keeping system, for example, demonstrating how a computerised data base records documents in order to isolate the subject matter or incident that is of interest to that applicant.

**Applications for documents already available**

**2.6** If an application is made for access to documents or information that is publicly available in a manner described in s.6 of the FOI Act, the access applicant should be informed promptly of the means of accessing that information outside the FOI process and that an access application is not required. Any application fee paid should be refunded or offset against the purchase price of the documents if the applicant agrees to that course of action.

**2.7** However, if it is agency policy to make only part of the information publicly available or to publicly release only an abbreviated version of the requested documents, the access applicant should also be informed of that fact in case he or she wishes to pursue his or her right under the FOI Act to access the remaining records.

**Documents not in existence at date of access application**

**2.8** An access application would normally only relate to documents in existence at the date that the decision is made by the agency, or a date shortly before that date. Although an access application does not apply to all future relevant documents, it may apply to documents of an agency which come into existence after the date of the access application but before the date of the decision. Whether or not an agency responds to an access application solely with respect to documents existing and held by the agency at the date of the request, or at the date of the decision, or some date shortly before the decision, will depend on the circumstances of the particular application. In any case, an applicant should be informed by the agency, in its notice of decision, of the basis on which the decision is made in that regard by specifying the date selected by the agency as being the relevant date for that purpose.

**2.9** Further, in accordance with the principles of administration in s.4 of the FOI Act, decision-makers are expected to take into account all documents known to be in existence or that could reasonably be expected to come into existence, either at the date of the access application or the application for internal review, or shortly thereafter. A common sense approach to this question is likely to eliminate the need for successive applications and reduce the administrative burden on the agency concerned **[refer to the decisions *in Re Simonsen and Edith Cowan University* (13 July 1994, unreported), at paragraph 16; *Re Brown and Police Force of Western Australia* (14 July 1995, unreported), at paragraph 13-18].**

**2.10** If an agency receives additional documents after an access application has been lodged, or if additional documents are created, it is reasonable to expect a cut-off date to apply shortly before a decision on access is made. In any case, the notice of decision provided to the access applicant should specify the relevant date for the purpose of decision-making. For example, a statement along the following lines may be appropriate:

*"This decision relates to all documents identified as being within the ambit of your request held by this agency as at....."* (insert relevant date).

## Applications for future documents

**2.11** The right of access under the FOI Act only applies to existing documents and not to documents that may come into existence at some time in the future. An agency may defer giving access under the provision of s.25 of the FOI Act, where appropriate. Alternatively, the access applicant may be advised to apply again at some future date.

## Documents that do not exist or cannot be found

**2.12** Applicants requesting access to documents must rely on the integrity of the searches conducted by the relevant agency to locate those documents. However, in her formal decisions dealing with "sufficiency of search" issues, the Information Commissioner does not believe that the FOI Act requires agencies to guarantee that their record-keeping systems are infallible. Documents may not readily be found for a number of reasons including misfiling, poor record keeping practices, ill-defined requests, a proliferation of different record- keeping systems within an agency, unclear policies or guidelines, inadequate training in record management or the documents may simply not exist. **[see *Re Boland and City of Melville* (11 October 1996, unreported)].**

**2.13** Section 26 of the FOI Act deals with the requirements of an agency in circumstances in which it is unable to locate documents requested by an access applicant. If an agency is unable to

locate requested documents and there is reason to believe that those documents should exist, an adequate statement of reasons may reassure an access applicant that the agency has attempted to meet its statutory obligations but is unable to do so. The minimum requirement is a brief explanation of the steps taken by the agency to satisfy the request. The explanation should include the locations searched, why those locations were chosen and a description of how the search was conducted- eg. computer search, manual search of file series or card index **[see *Re Doohan and WA Police Force* (5 August 1994, unreported), at paragraph 28-29].**

**Role and function of the Information Commissioner when documents are alleged to be missing**

**2.14** If a complaint is made to the Information Commissioner about "missing" documents to which access has been refused on the ground that those documents either cannot be found or do not exist, the Information Commissioner will obtain information from the agency and the applicant to answer the following questions:

1. *Are there reasonable grounds to believe that the requested documents exist, or should exist;* and

2. *Were the searches conducted by the agency to locate those documents reasonable in all the circumstances?*

**2.15** The Information Commissioner has taken the view that the function of an Information Commissioner is not to physically search for the documents on behalf of an applicant, nor to undertake a detailed examination of an agency's record-keeping system **[see *Re Doohan*; *Re Oset and Ministry of the Premier and Cabinet* (2 September 1994, unreported); *Re Lithgo and City of Perth* (3 January 1995, unreported); *Re Tickner and Police Force of Western Australia* (7 March 1995, unreported); *Re Nazaroff, Nazaroff and Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported); *Re Goodger and Armadale Kelmscott Memorial Hospital* (9 May 1995, unreported) unreported); *Re Oset and Health Department of Western Australia* (1 June 1995, unreported); and *Re Uren and Ministry for Planning* (12 July 1995, unreported); *Re Barrett and Police Force of Western Australia* (12 September 1995, unreported); *Re "M" and Princess Margaret Hospital for Children* (11**

**December 1995), unreported); *Re "N" and Graylands Hospital* (12 December 1995, unreported); *Re Sanfead and State Government Insurance Commission* (17 January 1996, unreported); *Re Boland and City of Melville* (11 October 1996, unreported)].** However, the Information Commissioner will request additional searches, if necessary, in order to be satisfied that the agency has acted reasonably **[*see Re Oset,* at paragraphs 9-11; *Re Goodger,* at paragraphs 6-17].**

**2.16** An applicant should be told, for example, of the searches that were made, including the locations searched, by whom the searches were made, why those areas were chosen and the results. The Information Commissioner will certainly request that information to be provided if a complaint is made and may suggest additional searches be conducted, including a search of the informal record-keeping systems of an agency such as the desks and drawers of officers, personal diaries and the like.

## The lawful destruction of documents

**2.17** Sub-sections 30(2) and (3) of the *Library Board of Western Australia Act 1951* provides as follows:

> *"(2) The officer in charge of a public office may destroy or dispose of any public record or class or public records in the custody or under the control of that public office -*
>
> *(a) if the destruction or disposal is in accordance with a Retention and Disposal Schedule with the terms of which an authorised officer of the Board has concurred; or*
>
> *(b) if the Board has informed that officer in writing that it does not require that public record or that class of public records to be transferred to the Board for inclusion among the State archives, but not otherwise.*
>
> *(3) Before any public records are destroyed or disposed of, the officer in charge of the public office in the custody or under the control of which the public records are shall*

*notify the Board of the intention to destroy or dispose of those public records and in that notification shall specify the nature of the public records concerned."*

**2.18** Copies of current Retention and Disposal Schedules are stored at the Library Information Service of Western Australia (LISWA). Agencies should provide applicants with a copy of their current authority to dispose of records, in circumstances where it is relevant, or obtain a copy from LISWA. Access applicants should ask for a copy of that authority if it is not provided by the agency in the first instance.

**Documents of Exempt Agencies**

**2.19** The general right in s.10(1) of the FOI Act to access a document of an agency does not include a right to access a document of an exempt agency. Ordinarily, that limitation means that applications under the FOI Act directed to any of the exempt agencies listed in Schedule 2 to the FOI Act must fail. However the FOI Act recognises that, from time to time, documents originating in exempt agencies may be held by other agencies and thus may be accessible under the FOI Act, the test being whether the agency receiving the access application has possession or control of the documents in question, although they may be exempt for other reasons, eg. under clause 5(2).

**2.20** Section 15(8) of the FOI Act requires an agency holding requested documents that originated with or received from an exempt agency, to notify the exempt agency that an access application has been made for those documents. The purpose of this notification is to obtain the benefit of consultation with the exempt agency as to the status of the requested documents. For example, routine documents of an exempt agency or documents dealing with administrative matters of an exempt agency, will not necessarily be sensitive and could be released if requested **[see comments in *Re Clements and Health Department of Western Australia* ( 16 March 1994, unreported), at paragraphs 10-15].**

**2.21** For example, a letter may have been written by an officer of an exempt agency to an officer of a non-exempt agency. If the original letter is located on a file in the non-exempt agency and a copy is also kept on a file in the exempt agency, then the original letter will be a document of the non-exempt agency while the copy will be a document of the exempt agency. Whilst the latter will not be accessible under the FOI Act, the former - subject to the various exemption clauses - will be potentially accessible **[see *Re Burnett and Police Force of Western Australia* (23 June 1995, unreported), at paragraphs 10 and 11].**

**2.22** The exempt agencies named in clause 6 of Schedule 2 to the FOI Act are unique amongst the agencies listed as exempt agencies in Schedule 2 in that they are branches or units of agencies and are not, other than for the purposes of the FOI Act, separate agencies in their own rights. For the purposes of the FOI Act, they are deemed to be separate agencies in order that documents of those units or branches are protected from disclosure under the FOI Act **[clause 2(2) and (3) of Schedule 2].**

**2.23** The effect of clause 6 in Schedule 2 to the FOI Act is that a document of any of the units mentioned is not to be regarded as a document of the main agency merely by virtue of it being a document of one of those units or branches which, other than for the purposes of the FOI Act, form part of the main agency. However, if a document of an exempt agency leaves that agency and enters the possession of a non-exempt agency, then that document is a document of the non-exempt agency and must be dealt with accordingly if an application is made for access to that document **[*see Re Waghorn and Christmass and Police Force of Western Australia* (22 May 1995, unreported), at paragraphs 34-35*; Re Burnett,* at paragraphs 10-13].**

## Documents of Local Authorities

**2.24** Local authorities should note that, in accordance with the definitions and clause 4 of Schedule 2 to the FOI Act, information generated by, or in the possession of or under the control of the

mayor or other councillors, in their capacities as mayor or councillors and which concerns their civic or council duties under any Act, may be subject to the FOI Act, although that point has not yet been subject to a determination by the Information Commissioner.

# 3. Dealing with an access application

**The permitted period**

**3.1** Agencies are required to deal with an access application as soon as is practicable and before the end of the "permitted period" **[s.13(1)].** The permitted period is 45 days after the access application is received **[s.13(3)].** The words **"as soon as practicable"** in s.13(1) mean that agencies have a maximum of 45 days but must allow access to be obtained **promptly** where it is practicable to do so.

**3.2** If an applicant does not receive a written notice of the decision in the form prescribed by s.30 of the FOI Act within the permitted period the agency is taken to have refused access (a deemed refusal) **[s.13(2)].** In such a case, the applicant may apply for internal review, or may apply to the Information Commissioner to allow the agency an extension of time to comply with its obligations **[s.13(7)].** The Information Commissioner has a discretion to grant such an extension and may attach conditions to such a grant including, but not limited to, reduction or waiver of charges.

**Extension/Reduction of permitted period**

**3.3** An access applicant may apply to the Information Commissioner for a reduction of the

permitted period **[s.13(4)].** Likewise, an agency may apply to the Information Commissioner for an extension of the permitted period **[s.13(5)].** It is the policy of the Information Commissioner that such applications will not be considered unless it is shown that genuine efforts have been made by the applicant and the agency in the first instance, to reach agreement on an acceptable date for decision-making. In the case of an application for a reduction of the permitted period, it is the policy of the Information Commissioner that the applicant must show good reasons why the Information Commissioner's discretion should be exercised. If the parties are unable to reach agreement, in the case of an application for an extension of time, the agency must satisfy the Information Commissioner that it has attempted to comply but that it is impracticable to do so in the circumstances **[s.13(5].**

**3.4** 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 reduce the permitted period, reasons are both necessary and desirable. This means the applicant may need to explain the importance of receiving a decision by the specified date, the reasons for believing that the agency is able to adequately deal with the application by that date, the adverse consequences (if any) of not receiving a decision by that date and any other relevant factors. The Information Commissioner has considered that a pending action in court (criminal or civil) is a sufficient reason to justify a reduction of the permitted period.

**3.5** The Information Commissioner will only intervene in the first instance between the applicant and the agency without these preliminary steps being followed, when there are compelling reasons to do so and it is not practicable for the applicant to negotiate directly with the agency concerned.

**3.6** In the case of an application by an agency for an extension of the permitted period, the agency must satisfy the Information Commissioner that

it has attempted to comply with its obligations but that it is impracticable to do so. The Information Commissioner expects the agency to be able to demonstrate that it has taken action to comply with its obligations (the agency's file records should contain sufficient evidence in this regard), and to establish real and substantial grounds for claiming that it is unable to comply with the statutory time-frame.

## Calculation of days for the "permitted period"

**3.7** An access application is assumed to have been lodged with an agency on the date that it is received by the agency, whether it arrives by post, facsimile or by hand. If it is stamped upon receipt, the date of the "received" stamp would normally evidence the date it is lodged. For the purpose of calculating the "permitted period", **day one** commences on the day after the access application was lodged and concludes at the end of day 45 **[s. 61(a) and (g),** ***Interpretation Act 1984*****].**

### *Starting and stopping the clock*

**3.8** There will be times when it is necessary for an agency to "stop the clock", such as when an access applicant has been provided with an estimate of charges and the agency is awaiting advice on whether to proceed to deal with the access application. The clock stops on the day on which the notice is given and it restarts on the day on which the agency is notified that the applicant intends to proceed **[s.19(1)].** The clock does not stop during the transfer of an access application from one agency to another. Therefore, any transfers that are necessary or desirable under the FOI Act must be effected as soon as possible.

## Third Party Consultation

**3.9** Consultation with third parties may be required when access is sought to a document containing personal information about an individual other than the applicant (a third party) **[s.32]**, or commercial, business, professional or business information, including trade secrets, about a third party **[s.33]**. The purpose of consultation is to protect the privacy of individuals and to protect the commercial interests of individuals or organisations that do business with the government **[see, *inter alia*, *Re Veale and Town of Bassendean* (25 March 1994, unreported), at paragraph 34; *Re Kobelke and Minister for Planning and others* (27 April 1994, unreported) at paragraph 68; *Re A and Heathcote Hospital* (9 June 1994, unreported), at paragraph 23; *Re Hayes and The State Housing Commission of Western Australia (Homeswest)* (17 June 1994, unreported), at paragraph 20; *Re Gray and University of Western Australia* (23 June 1994, unreported), at paragraph 14; *Re Manly and Ministry of the Premier and Cabinet* (16 September 1994, unreported), at paragraph 46; *Re "C" and Department for Community Development* (12 October 1994, unreported), at paragraph 22; *Re Smith and State Government Insurance Commission* (5 December 1994, unreported), at paragraph 13; *Re Edwards and Ministry of Justice* (12 December 1994, unreported), at paragraph 15].**

**3.10** Some agencies make unnecessary work for themselves by consulting with third parties when they need not do so. **It is not a requirement under the FOI Act to consult with third parties merely because a document contains personal or commercial or business information.** The **duty** to consult **only arises** when an agency decides to give access to a document that contains personal information or commercial or business information because the document is not exempt (having decided that the public interest, on balance, favours disclosure) **or**, though a document is technically exempt, the agency has decided not to claim an exemption for it. Contact with the access applicant may obviate the need for consultation if he or she does not seek access to third party information.

**3.11** If a document contains personal information or commercial or business information about a third party and an agency decides that it is exempt and claims an exemption under clause 3 or clause 4, consultation with the third party is not necessary. An agency may consult but it is not under a duty to do so. Consultation may provide a factual basis for the exemption claimed, ie. it may inform the agency about the "commercial value" of the information and the likely effects of disclosure.

**3.12** The agency may decide to release the document with the relevant personal information or commercial or business information deleted from the document under the provision of s.24 of the FOI Act, so that it is no longer an exempt document. In those circumstances, there is no duty to consult.

**Duty to take steps that are reasonably practicable to consult**

**3.13** When the need to consult arises, the agency need only take such steps as are reasonably practicable for that purpose. In some circumstances it may be more appropriate to apply to the Information Commissioner for approval not to consult **[s.35]**. The Information Commissioner will need to be satisfied about two matters before approval not to consult is given:

(i) it would be unreasonable to require consultation having regard to the number of third parties involved; **and**

(ii) the document does not contain exempt personal information or exempt commercial or business information.

**Procedure following consultation**

**3.14** If the agency obtains the views of a third party and those views are that the document contains exempt matter under clause 3 or 4, and the agency decides, nonetheless, to give access, the agency must give the third party a written notice of the decision and defer giving access until the time for the third party to complain to the Information Commissioner has expired and there

is no such complaint **[s.34].** If there is such a complaint, access is deferred until that complaint has been dealt with and the time for appeal to the Supreme Court has expired or, if there is an appeal, until the appeal has been dealt with **[s.34].**

**Notice of Decision**

**3.15** The FOI Act provides that in proceedings arising out of a decision the onus is on the agency to justify any decisions that are adverse to the rights of access given to an applicant by the FOI Act **[s.102(1)].** The agency is required to:

(i) identify and describe each document within the ambit of the access application;

(ii) explain why those documents or parts of documents are exempt;

(iii) specify which clause or clauses in Schedule 1 are claimed to exempt those documents or parts of documents; and

(iv) provide reasons, including material findings of fact, to show why the clause or clauses apply to exempt the documents in question.

**3.16** A notice of decision is an important piece of communication between an applicant and the agency (and the Information Commissioner if the matter proceeds to external review). The notice required under s.13(1) of the FOI Act should be the result of a documented process of consideration and decision-making by an agency. An applicant receiving such a notice must be able to understand the documents identified by the agency as being within the ambit of the access application (number and type) and, where access is refused, all of the steps of the reasoning process involved in the agency establishing that the documents are exempt.

**3.17** When dealing with a request for access to a number of documents, each discrete document must be identified and a decision made in respect of each of those documents. Each page

of a multi-page document (eg. a report) must be considered as well as any attachments or appendices to a document.

**3.18** The use of a schedule to list and describe the documents identified by the agency as being within the ambit of the access application, is strongly recommended where more than a few documents are involved. If this is not done from the outset, the Information Commissioner will require it to be done on external review. However, if it is done at the outset, it will assist decision-makers to properly discharge their duties under the FOI Act and assist applicants to understand the reasons for decision-making.

**3.19** The schedule should list the documents sequentially by number eg. 1-10; 1-200 as the case may be. The schedule should contain the following information:

* the date of each document;
* the author of the document and the person or persons to whom it is addressed (or the title of the document if it is a report or a submission of some kind);
* a brief but sufficient description of the document or its contents to show a *prima facie* claim for exemption (ie. a letter seeking legal advice which may be, *prima facie*, exempt under clause 7. Therefore, it should be described in such a way as to establish the grounds for claiming the exemption under clause 7);
* the exemption/s claimed for each document;
* where the claim for exemption relates to parts of a document, a clear indication of the part or parts involved (eg. paragraph 5, or line 3 in paragraph 5 on page 3, or folios 27-30). **A sample schedule is included as an appendix to these guidelines.**

**Reasons for Decision**

**3.20** The ability to give a rational explanation for a decision is central to good decision-making in all areas of administrative law. Section 13 of the FOI Act requires that a notice be given in the form prescribed by s.30, which amongst other things requires the reasons for each decision and the findings on material questions of fact underlying the reasons referring to the material on which those findings are based. It is not sufficient compliance with s.13 and s.30 of the FOI Act if the reasons given for refusing access merely paraphrase the words of a particular exemption clause or, worse, merely quote the clause or clauses in full.

**3.21** When access is refused a decision-maker must advise the applicant of the following points, dependent upon the particular requirements of each exemption :

* what documents are in issue, describing them as fully as possible without revealing exempt matter;
* why they are sensitive;
* what exemptions are claimed for which documents or parts of documents;
* why those exemptions apply to specific documents;
* what the factual consequences of the release may be and the reasons why those consequences can reasonably be expected to result from disclosure;
* why the expected consequences of disclosure are so important as to warrant a refusal of access; and
* what aspects of the public interest favour the non-disclosure of the documents and how the agency balanced those aspects against the aspects in favour of release (where applicable).

**3.22** The notice of decision must contain the **real** reasons for not disclosing documents. Embarrassment is not a reason to deny access.

## Problems with Applicants

**3.23** From time to time, agencies will be required to deal with difficult applicants who sometimes make unreasonable demands. Whilst the FOI Act places agencies under a duty to assist applicants, there must be a corresponding obligation upon applicants and an element of reasonableness must be implied in the process if the legislation is to work satisfactorily.

### *Repeated Requests*

**3.24** There is nothing in the FOI Act that prohibits an unsuccessful access applicant from making another access application to an agency for the same documents which were the subject of a previous access application to that agency, and to which access has previously been refused, particularly in circumstances in which an applicant may have reason to believe that the law or the policy or the agency's position in respect of certain types of document may have changed **[*Re Rehman and Medical Board of Western Australia* (1 August 1995, unreported)].** Further, the FOI legislation of other jurisdictions, including the Commonwealth, Queensland, Victoria and New South Wales, do not contain provisions which prohibit an unsuccessful access applicant from making a second access application for the same documents.

**3.25** There may be a point at which repeated requests for the same documents could be viewed as vexatious. Whilst no firm policy can be established that is appropriate on all occasions, early contact with the office of the Information Commissioner (*Advice and Awareness* sub-program) can provide guidance and advice on options available.

### *"Fishing expeditions"*

**3.26** There is a requirement that an access applicant describe the documents sought with particularity sufficient to enable the agency to locate those documents and deal with them under the FOI Act. Some applicants lodge access applications which are drafted in extremely broad terms.

Typically, such requests are in the form *"All documents held on me"*, or *"All files relating to..."*. If an agency receives a request of that nature it should assist an applicant to formulate his or her request in more precise terms, for example, by explaining, subject to any exemptions, the nature and type of documents held, or by allowing an applicant to have access to a record data base if that would assist to identify the precise document required.

**3.27** If an applicant persists in presenting an ill-defined application, despite repeated offers of assistance from an agency, the agency could discuss the matter with the office of the Information Commissioner *(Advice and Awareness* sub-program) before refusing to deal with an application under s.20. In this way the interests of both the agency and the applicant can be safeguarded while also attempting to resolve the matter informally.

**Documents required for civil litigation**

**3.28** Section 10(2) of the FOI Act provides that a person's reasons for wishing to obtain access are not relevant to the question of whether access should be given. The likelihood of an applicant using documents obtained under FOI for civil litigation is not a reason to deny access. The Information Commissioner has considered that there is a public interest favouring the disclosure of information to assist people to determine whether they have any legal rights which should be pursued through the courts **[*Re Read and Public Service Commission* (16 February 1994, unreported), at paragraph 85; *Re Veale*, at paragraphs 37-53].**

**The relationship between the FOI Act and the Rules of the Courts governing discovery**

**3.29** Section 3(3) of the FOI Act states that the Act is not intended to inhibit access being given by other legal means available. The Act creates an **additional** means of gaining access to documents which is a legally enforceable right. The exercise of another right to discover documents does not extinguish the right of access under the FOI Act except where an

express provision applies in particular circumstances. **[see *Re Veale*, at paragraph 37-52].**

## Refusal to deal with an access application

**3.30** When a valid access application is made to an agency (other than an exempt agency), the agency must deal with that application in the manner described in s.13 of the FOI Act, except where the agency invokes s.20. If s.20 is relied upon, the agency has a duty to attempt to reduce the amount of work need to deal with the application.

**3.31** The agency is required to take reasonable steps to help the applicant identify the documents required and change the application so that it complies with s.12 of the FOI Act. Reasonable steps include making arrangements to assist the applicant, and explaining the record-keeping system and the methods of storage and retrieval. However, the agency is not required to show a file or files to an applicant, nor is it required to provide unrestricted access to files to enable the applicant to decide what he or she wants.

**3.32** If a complaint is made to the Information Commissioner about an agency's decision to refuse to deal with an access application, the agency must persuade the Commissioner that the work involved in dealing with the application in the form in which it is made, would substantially and unreasonably divert the resources of the agency away from its other operations. Relevant factors include:

* 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 (ie. microfiche records);
* the number of people competent to identify the documents and the normal duties of those people; and
* the assistance provided by the agency to the applicant to change the application.

## Prior Access (Previous inspection of exempt matter)

**3.33** Prior access to a document, whether to an FOI applicant or to another person, and whether by inadvertence or design on the part of the agency, might be a relevant factor in any public interest balancing test, depending on the terms of the particular exemption. If the access applicant has been given previous access in the form of inspection that fact should be considered by an agency as a factor warranting the exercise of discretion under s.3(3) of the FOI Act.

## Applications from one agency to another

**3.34** There is nothing in the FOI Act that prevents one agency from applying to another agency for access to documents, although one would expect the usual protocols governing the sharing of information to occur. However, if one agency will not provide access to identifiable documents, an access application may be lodged by another agency. Although the FOI Act gives every person a right of access, in circumstances where one agency seeks access to the documents of another agency, it may advisable for the access application to be signed by the Chief Executive Officer of the agency seeking access, or some other senior manager if necessary.

## Hints for Agencies

**3.35** Many of the problems experienced by agencies in dealing with FOI requests stem from a culture of secrecy. Many of the solutions to those problems can be found within the agencies themselves using administrative ingenuity. Some options include:

* Reserving the FOI process for only the most sensitive type of information.
* Routinely releasing documents or making them available outside the formal FOI process, whether for payment of a fee or otherwise.
* Developing new policies to deal with access to information, especially personal information.

* Using discretion to release documents that may be technically exempt and only refusing to disclose documents when there is good reason.
* Disclosing the "hidden law" (ie. the administrative rules, guidelines and procedures that are applied within an agency) of the agency in the Information Statement, or elsewhere, so that the public is informed of the policies and practices that affect their rights as customers of the agency.
* Linking existing and proposed initiatives, including Customer Service Charters to the principles of FOI as part of the overall accountability responsibilities of public administration.
* Improving record-keeping practices.
* Maintaining awareness of the formal decisions of the Information Commissioner and learning from the mistakes and successes of other agencies.
* Decentralising FOI decision-making for routine matters that can be handled by application of existing policies and reserving the experience and judgement of senior officers for a consideration of the effects of releasing the most sensitive documents.

# 4. Fees and charges

## Principles

**4.1** Applicants are entitled to have access to documents at the *lowest reasonable cost* [s.4(b)]. Although it is often necessary for a great deal of time and effort to be incurred by agencies in dealing with FOI requests, Parliament did not intend that a "user-pays" system should apply to the FOI Act. Accordingly, the Information Commissioner takes the view that any charges for access must be reasonable and that estimates of charges should not be made as a deterrent to access.

## Discretion to impose charges

**4.2** Agencies have a discretion to impose charges. In many instances, charges have been substantially reduced by agencies or not imposed at all. Such practices demonstrate a commitment to the principles of the FOI Act and the Information Commissioner acknowledges and encourages appropriate decision-making in this regard.

## The application fee

**4.3** The *Freedom of Information Regulations 1993* include a schedule of fees and charges payable under the FOI Act for access to documents containing non-personal information. Pursuant to s.12 of the FOI Act and those regulations, an application fee of $30 is payable for making a valid access application. However, no fees or charges are payable for access to personal information **[see comments in Part 6]**. A decision has been made by the Information Commissioner which sets out the interpretation of when charges are payable and what can be charged for. **[see *Re Hesse and Shire of Mundaring* (17 May 1994, unreported)].**

**4.4** There is no provision for reduction or waiver of the application fee under regulation 4. Section 16(1) of the FOI Act prescribes the principles by which *"[a]ny charge that is, in accordance with the regulations, required to be paid by an applicant before access to a document is given, must be calculated..."*. Considering the wording of that section and, in particular, s.16(2) which provides that (subject to the provision relating to payment of advanced deposits) *"...payment of a charge will not be required before the time at which the agency has notified the applicant of the decision to grant access to a document"*, the Information Commissioner is of the view that s.16 refers to charges other than the application fee which is required under s.12(1)(e) to be paid at the time of lodging the access application. In other words, under the legislation there is no discretion to waive the requirement that an application fee must be lodged with an access application for non-personal information.

## Waiver/reduction of charges

**4.5** Section 16(1)(g) provides that a charge must be waived or reduced if the applicant is impecunious. Regulation 3 to the Act provides for a reduction of 25% in the case of an applicant who is impecunious or who holds a valid pensioner card, or other pensioner concession card as described. It is important to note that the entitlement to a reduction in charges arises **either** because an applicant is

impecunious, in the opinion of the agency, **or** because he or she holds a valid pensioner concession card.

**4.6** "Impecunious" is not defined in the FOI Act. It means "having little or no money" [Concise Oxford Dictionary]. Whether or not an applicant may be properly described as impecunious requires the application of common sense by agencies and the exercise of a discretionary judgement. It is unlikely that an agency would be criticised for waiving or reducing charges and providing access in accordance with the principles in s.4.

**4.7** The purpose of regulation 3 is to seek to avoid hardship to a person seeking access to documents and who has insufficient money to pay the associated charges. **[see *Re Larson and Office of Corrections* (AAT of Victoria, Howie PM, 19 June 1990, unreported)].**

## Estimates of charges

**4.8** An applicant may request an estimate of charges when making an access application **[s.17(1)].** Realistically, unless an applicant is an experienced FOI user, he or she is unlikely to do this. However, an agency must make an estimate if charges are likely to be more than $25, and the agency must notify the applicant of its estimate and the basis on which its estimate is made before dealing with the application.

**4.9** Charges may be reduced by changing the scope of an access application, or by an applicant waiving the "permitted period" and allowing the agency a much longer time-frame within which to deal with the application. Clearly, there is scope within s.18(2) for the agency and the applicant to negotiate over the manner in which it will deal with an access application so that charges for access are reduced, if not eliminated. The Information Commissioner considers that agencies should make more use of these provisions in order to minimise the cost of access to applicants and to reduce the administrative burden of FOI on agencies.

**Non-payment of charges**

**4.10** Except where advance deposits are required by the agency, the payment of charges under the FOI Act is not required before the time at which the agency has notified the applicant of the decision to grant access **[s.16(2)].** To minimise the inconvenience of documents being copied but not collected by an access applicant and the payment of outstanding charges, it is suggested that agencies do not actually copy the documents until such time as the charges are paid. In some instances, it may be appropriate for an access applicant to wait while the photocopying is undertaken.

# 5. Exemptions

**Optional not Mandatory**

**5.1** The exemptions in Schedule 1 are designed to protect essential public and private interests. However, in accordance with the general right of access provided by the FOI Act, it follows that exemptions should not be claimed unless there are good reasons to deny access to the requested documents. Clause 3, Personal Information, is covered in chapter 6 as it is the most frequently claimed exemption and is the aspect of FOI which protects the privacy of individuals.

**5.2** Each exemption in Schedule 1 deals with the protection of certain types of information. The type of information protected by the exemption clause is an indication of the policy or essential public interest which is at issue. For example, Clause 1 provides protection for certain Cabinet documents and documents of an Executive body for a specified period. Those documents belong to a "class" which the Parliament has decided ought to be protected, whether or not it would be harmful to disclose the contents of any particular document, because it is in the public interest that the government at its highest level is able to function effectively by ensuring that certain information can be withheld without further justification if necessary.

**5.3** The following interpretations are based primarily on decisions of the Information Commissioner and, where applicable, decisions of the WA Supreme Court or other relevant precedents. Most exemptions frequently considered are covered. For guidance on the applicability of other exemptions, consult the *FOI Decision Support System* available through this office or the *FOI Procedures Manual.*

## Clause 2 - Inter-governmental relations

**5.4** Clause 2(1) of Schedule 1 provides:

> *(1) Matter is exempt matter if its disclosure -*
>
> *(a) could reasonably be expected to damage relations between the government and any other government;*
>
> *(b) would reveal information of a confidential nature communicated in confidence to the Government (whether directly or indirectly) by any other government."*

**5.5** The purpose of the exemption in clause 2 is to protect the sensitivity of documents passing in confidence between the Government of Western Australia and governments of either the Commonwealth, another State or Territory, or a foreign country or state. There are two separate sub-clauses under which a document may be exempt.

### *Damage to Inter-governmental relations*

**5.6** It is not sufficient to establish an exemption under clause 2(1)(a) to merely claim that disclosure could reasonably be expected to damage relations between governments. There must be some probative material to establish a reasonable basis for such a claim. Relevant matters for consideration may include:

- the age of the documents. If the subject matter deals with events long past that have no present relevance it may be unlikely that disclosure could reasonably be expected to cause damage to government relations;

- whether the parties to the correspondence indicate that it was a high level inter-governmental communication;
- whether the subject matter deals with routine matters or matters involving sensitive issues of State.

***Reveal confidential information communicated in confidence***

**5.7** The second possible basis for an exemption under clause 2 is where a document contains confidential information communicated in confidence to the Government by another. The information must be confidential in nature and it must be given and received in confidence for clause 2(1)(b) to apply. The mere fact that a document records the substance of discussions at a meeting of a Ministerial Council does not mean that all information discussed and recorded at such a meeting is necessarily confidential in nature **[see *Re Cyclists' Rights Action Group and Department of Transport* (20 June 1995, unreported)].** Regard must be had to the contents of the document and whether the particular matter is in the public domain through media statements and the like. Further, if it can be established that disclosure would, on balance, be in the public interest, then the exemption will not apply.

**Clause 4 - Commercial or business information**

**5.8** The exemptions in clause 4 more or less mirror those in clause 10. If a requested document contains sensitive commercial information about government agencies, clause 10 is the more appropriate exemption. If the requested document contains sensitive commercial information about other persons, including companies and associations whether incorporated or unincorporated **[see definition of "person" in *the Interpretation Act 1984*]**, other than government agencies, clause 4 is the appropriate exemption. Because the wording of clauses 4 and 10 are similar, the comments in this part are also applicable to clause 10.

**5.9** Clause 4 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."*

**5.10** The wording of the clause makes it clear (as a matter of statutory construction) that each subclause applies to a different kind of information and that the same information cannot be exempt under more than one of those subclauses. However, an agency may argue that certain information is exempt under one or more subclauses and put arguments in the alternative as to which is applicable. The alternative bases on which matter may be exempt from disclosure under clause 4 may be summarised as follows:

(i) if it would reveal trade secrets; **OR**

(ii) if it would reveal information that has a commercial value **AND** the disclosure could reasonably be expected to destroy or diminish that commercial value; **OR**

(iii) it would reveal information about the business, professional, commercial or financial affairs of a person **AND** disclosure could reasonably be expected to have an adverse effect on those affairs,

**OR** prejudice the future supply of information of that kind to the Government or to an agency.

### *Trade secrets*

**5.11** For information to be a trade secret it must be secret information that is, or would be, of use in the particular trade if it were to be disclosed. For guidance on the kind of information that constitutes a "trade secret" agencies should consult the FOI Implementation Manual at page 41 and refer to the factors identified in ***Re Organon (Australia) Pty Ltd and Department of Community Services and Health*** **(1987) 13 ALD 588** esp at 593, as a starting point only. The meaning and scope of the exemption in Western Australia has not yet been the subject of determination by the Information Commissioner.

### *Information that has a commercial value*

**5.12** There are few reported decisions in which a precise meaning of the phrase *"commercial value"* has been considered. The Information Commissioner has taken the view that the intended meaning is that information has commercial value if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged **[see *Re Slater and State Housing Commission of Western Australia* (22 February 1996, unreported), at paragraph 10-13; *Re Hassell and Health Department of Western Australia* (13 December 1994, unreported), at paragraph 37].**

**5.13** It is only by reference to the context in which the information is used, or exists, that the question of whether information is correctly characterised as matter that has a "commercial value" may be determined. In ***Re Hassell***, the Information Commissioner rejected an argument that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition. The Information

Commissioner expressed the view that, at best, the fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value for the purposes of the exemption **[see *Re Hassell*, at paragraphs 38-40].**

### *Information about business, professional, commercial or financial affairs*

**5.14** Although the precise meaning and scope of the phrase "business, professional, commercial or financial affairs" has not been the subject of a determination by the Information Commissioner, the Queensland Information Commissioner considers that the four adjectives in the phrase "business, professional, commercial or financial affairs" were not intended, because of the substantial overlap between them, to establish distinct and exclusive categories, but rather that the phrase was intended to cover, in a compendious way, all forms of private sector commercial activity, and thereby to also cover commercial activities carried on by government agencies **[*Re Pope and Queensland Health (Hammond and Robbins, Third Parties)* (1994) 2 QAR 37, at paragraph 29].**

**5.15** However, the Information Commissioner concurs with the Queensland Information Commissioner who expressed the view in his decision in ***Re Pope*** that the words "professional affairs" is intended to cover the work activities of persons who are admitted to a recognised profession, and who ordinarily offer their professional services to the community at large for a fee, ie. to the running of a professional practice for the purpose of generating income **[*see Re Lawless and Medical Board of Western Australia* (5 July 1995, unreported), at paragraphs 71-75].**

**5.16** There are various decisions of the Information Commissioner in which claims for exemption under clause 4(3) have been considered by the Information Commissioner. The following decisions indicate some types of information that has been found to be information about "business, professional,

commercial or financial affairs" of a person **[see *Re Kobelke*, at paragraph 89; *Re Kolo and Department of Land Administration* (6 February 1995, unreported), at paragraph 22; *Re Strelley Pastoral Pty Ltd and Others and Department of Land Administration* (27 March 1995, unreported), at paragraphs 33 and 34; *Re Maddock, Lonie and Chisholm (a firm) and Department of State Services* (2 June 1995, unreported), at paragraph 39].**

**5.17** A decision-maker must make findings of fact in order to establish that the requested document contains matter of the type described. It is possible to do this by accurately describing the contents of the documents, so far as is possible without disclosing matter claimed to be exempt. A company is "a person" within the scope of clause 4(3)(a), by virtue of the definition of "person" in s.4 of the *Interpretation Act 1984* which provides as follows:

***"person"*** *or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or incorporate;".*

In addition, having satisfied the requirements of 4(3)(a), an agency must then provide evidence that it is reasonable to expect an adverse effect to follow from disclosure of the documents **or** a prejudice to the future supply of information of that kind to government. **[4(3)(b)]**

## Clause 5 - Law enforcement, public safety and property security

**5.18** Clause 5(1)(a) provides:

> *"(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> > *(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;"*

**5.19** Subclause 5(1)(a) is capable of applying to any law which imposes an enforceable legal duty to do or refrain from doing some thing, and not merely to a contravention of the criminal law **[see *Re Egan and Medical Board of Western Australia* (28 September 1995, unreported), at paragraphs 10-**

**15].** The Information Commissioner has expressed the view that the subclause is directed at investigative methods or procedures and is concerned with protecting the means employed by agencies to investigate, detect, prevent and deal with contraventions or possible contraventions of the law **[see *Re Manly*, at paragraphs 28-32].**

**5.20** Further, whilst the Information Commissioner considers that the exemption is more likely to apply to covert rather than overt methods of enforcement so that a unique or unusual investigative method or procedure may be impaired merely by disclosing the fact of its existence, the agency must, nonetheless, be able to identify with some particularity, the "law" to which the investigative procedure or method relates, and those methods or procedures must be lawful for the exemption to apply **[see comments in *Re Foy and Medical Board of Western Australia* (18 October 1995, unreported), at paragraph 21].**

**5.21** The Information Commissioner has indicated agreement with the view of the Queensland Information Commissioner that the disclosure of methods and procedures adopted by law enforcement agencies which are obvious and well known to the community (eg. interviewing and taking statements from witnesses to a crime) may not be likely to impair the effectiveness of those methods. For example, if a law enforcement method or procedure has been so widely reported as to become a matter of public notoriety, there may be a real question as to whether its disclosure under the FOI Act could be capable of impairing its effectiveness **[see comments *in Re Egan*, at paragraph 13; *Re Foy*, at paragraph 12; *Re Sanfead and Medical Board of Western Australia* (15 November 1995, unreported), at paragraph 11].**

**5.22** The Information Commissioner has expressed the view that there may be cases where the disclosure of particular matter will so obviously impair the effectiveness of law enforcement methods or procedures that the case for exemption is self-evident but, ordinarily in proceedings before her under Part 4 of the FOI Act, it will be incumbent on an agency to

explain the precise nature of the impairment to the effectiveness of a law enforcement method or procedure that it expects to be occasioned by disclosure, and to satisfy the Information Commissioner that that expectation is reasonably based **[see *Re Egan*, at paragraph 18; *Re Foy*, at paragraph 18].**

**5.23** Clause 5(1)(b) provides:

*"(1) Matter is exempt matter if its disclosure could reasonably be expected to -*

*...*

*(b) reveal the investigation of any contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;"*

**5.24** The scope of the exemption and the meaning of the words "reveal the investigation" in clause 5(1)(b) of Schedule 1 to the FOI Act initially arose for consideration by the Supreme Court of Western Australia in ***Manly v Ministry of Premier and Cabinet*** **(15 June 1995, unreported)**). Owen J said, at p.25 of the judgment:

*"I think the clause is aimed at the specifics of the investigation, and not at the mere fact that there is or has been an investigation...A document is not exempt from disclosure simply because it would reveal the fact of an investigation. It must reveal something about the content of the investigation.*

*I also think that it would be wrong to test the coverage of the clause by looking at the document in isolation. It must be considered in the light of the surrounding circumstances and in view of what else is known to the parties and the public...The exemption applies if disclosure of that document would reveal the investigation. There must be something in the document which, when looked at in the light of the surrounding circumstances, would tend to show something about the content of the investigation. If that material is already in the public arena then it could not properly be said that the disclosure of the document would reveal the investigation."*

**5.25** In ***Police Force of Western Australia v Kelly and Smith*** **(Supreme Court of Western Australia, 30 April 1996, unreported),** the Court also considered the meaning of the words "reveal the investigation" in clause 5(1)(b). His Honour Judge Anderson said, at page 9:

*"In my opinion the phrase "...if its disclosure could reasonably be expected to...reveal the investigation of any contravention of the law in a particular case..." is apt to include the revelation of the fact of a particular investigation by police of a particular incident involving people. I think there is very good reason to accept that Parliament intended that such matter be exempt from access under the Act. It is not difficult to imagine cases in which it would be highly detrimental to good government and inimical to the administration of law enforcement to disclose that a particular criminal investigation is contemplated, has been started or has been completed. It is notorious that many investigations, particularly of large scale criminality, are multi-faceted, lengthy and sensitive and involve considerable personal risk to the officers engaged in them. No doubt it would be highly prejudicial to the practical success of many such investigations to allow or require the fact of them to be disclosed.*

*Even after an investigation has been completed there may be very good operational reasons why there should be no disclosure of it. For example, it may be part of a wider and perhaps incomplete investigation. Of course there may be no need for any secrecy whatever in a particular case and there may be good public interest reasons to give public access to the documents or to give the applicant access to the documents. However, whilst that may be a relevant consideration for the agency in exercising its discretion under s.23(1) whether to allow access to the documents to the public or to a particular individual, it cannot help to determine whether the documents are in fact exempt under cl 5(1)(b)."* (Emphasis added).

**5.26** Making reference to the passage from the judgment in ***Manly's*** case referred to above, His Honour said, at page 8:

*"I think documents which reveal that there is an investigation, the identity of the people being investigated and generally the subject matter of the investigation probably would satisfy the requirement stipulated by Owen J that the document "must reveal something about the content of the investigation."*

**5.27** Further, at page 11, His Honour considered the scope of the exemption in clause 5(1)(b) and added:

*"...cl 5(1)(b) is not limited to new revelations but covers all matter that of itself reveals the things referred to, without regard for what other material might also reveal those things, or when that other material became known, and without regard for the actual state of knowledge that the applicant may have on the subject or the stage that the investigation has reached."*

**5.28** Clause 5(1)(c) provides:

*"(1) Matter is exempt matter if its disclosure could reasonably be expected to -*

*...*

*(c) enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered;"*

**5.29** The exemption in clause 5(1)(c) refers to a "confidential source of information" and not to a source of confidential information. It is designed to protect the identity of the informer and has no application where the identity is known or could easily be ascertained independently of the document in question **[see *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441 at 459].**

**5.30** Not all information given to an agency is confidential, or given in confidence, nor does it come from a confidential source. A source is confidential if the person has supplied information on an understanding, express or implied, that his or her identity will remain confidential (for example, the *"Crime Stoppers"* initiative). The exemption protects the true "informer" and has no application where that identity is known or can easily be ascertained independently of the document in question. It appears that if the identity of a witness who provided an investigator with information is either well known or could easily be ascertained independently of a document, it is unlikely that the witness would be considered to be a confidential source of information within the meaning of clause 5(1)(c) **[see comments in *Re Croom*, at page 459].**

**5.31** The information supplied from a confidential source need not be confidential (although it may be), but it must relate to the enforcement or administration of the law and the "law" should be identified. Hence, the elements of the exemption that must be established by material findings of fact are:

(i) that there exists a confidential source of information;

(ii) the information supplied from the source is related to the enforcement or administration of the law; and

(iii) disclosure could reasonably be expected to **either** enable the existence of the confidential source to be ascertained, **or**, enable the identity of the confidential source to be ascertained **[see *Re "C"*, at paragraph 43; *Re Hunter and Fisheries Department of Western Australia* (20 November 1995, unreported), at paragraph 25]; *Re Styles and City of Gosnells* (11 October 1996, unreported), at paragraphs 14-16].**

**5.32** Clause 5(1)(d) provides:

*"(1) Matter is exempt matter if its disclosure could reasonably be expected to -*

...

*(d) prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings;"*

**5.33** So far as is possible in the particular circumstances, in proceedings before the Information Commissioner there needs to be some information provided as to the broad outline of the investigations, including the nature of the contravention of the law since the courts will not lightly infer the reasonable expectation of prejudice to a fair trial, even when there is widespread publicity. Relevant matters include:

(i) whether any charge is pending to which the material is relevant;

(ii) the degree of relevance of the material to the charge;

(iii) the lapse of time between disclosure of the material and the trial in question;

(iv) whether the material was known to the public;

(v) the likely impact of the material on the mind of the public; and

(vi) the ability of an appropriate direction at trial to negate any prejudicial effect of the material.

**[See comments in *Manly v Ministry of Premier and Cabinet*].**

## Clause 6 - Deliberative processes

**5.34** Clause 6(1) provides:

*(1) Matter is exempt matter if its disclosure -*

*(a) would reveal -*

*(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*

*(ii) any consultation or deliberation that has taken place,*

*in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;*

*and*

*(b) would, on balance, be contrary to the public interest."*

**5.35** In a number of formal decisions, the Information Commissioner has accepted and applied the following passage in ***Re Waterford and Department of Treasury*** **(No 2) (1984) 5 ALD 588**, as a correct statement of the scope and meaning of the exemption in clause 6 (the equivalent to s.36(1) in the Commonwealth FOI Act):

*"As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing on one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...*

*It by no means follows, therefore, that every document on a departmental file will fall into this category. Furthermore, however imprecise the dividing line may appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...*

*It is documents containing opinion, advice, recommendations etc. relating to internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."*

**[See *Re Read*, at paragraph 26; *Re Kobelke*, at paragraph 40; *Re Veale*, at paragraph 13; *Re Taylor and Ministry of the Premier and Cabinet* (23 December 1994, unreported), at paragraph 23; *Re Jones and Shire of Swan* (9 May 1994, unreported), at paragraph 16; *Re Jeanes and Kalgoorlie Regional Hospital and Others* (7 February 1995, unreported), at paragraph 13; *Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited* (28 September 1995, unreported), at paragraphs 22-37; *Re Mineralogy Pty Ltd and Department of Resources Development* (5 January 1996, unreported), at paragraphs 42-43].**

**5.36** The scope of the exemption in clause 6(1) is very broad and clearly includes deliberations for decision making and deliberations for policy making. However, it does not include documents dealing with the purely procedural or administrative functions of an agency **[*see Re Read*, at paragraphs 24 and 25].** If the particular decision that must be made can be isolated and identified then the nature and character of that decision may provide an indication of whether the documents in question are deliberative in the sense described in ***Re Waterford***, or are administrative in nature.

**5.37** If exemption under clause 6 is to be claimed, the agency must establish not only that the matter in question is of the kind described in clause 6(1)(a), but also that its disclosure would, on balance, be contrary to the public interest, as required by part (b) of clause 6(1). **[for a discussion of the public interest see Part 7].**

### *Candour and frankness*

**5.38** Agencies frequently decide that disclosure of a document is contrary to the public interest because of a perceived need for full and frank disclosure to occur in certain decision-making between officers of an agency or between the agency and the Minister. Courts and Tribunals in other jurisdictions have rejected the validity of the "candour and frankness" argument and so too has the Information Commissioner **[*Re Jeanes*, at paragraph 30].** The "candour and frankness" argument for non-disclosure should be disregarded unless there is a factual basis for the claim and that factual

basis is established by clear and unequivocal evidence.

## Clause 7 - Legal professional privilege

**5.39** Clause 7 provides:

*"(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege."*

**5.40** To determine whether a document attracts legal professional privilege consideration must be given to the circumstances of its creation. It is necessary to look at the reason why it was brought into existence. The purpose of its existence is a question of fact.

**5.41** To attract legal professional privilege the document must be brought into existence for the sole purpose of submission to legal advisers for advice or for use in anticipated or pending proceedings **[see *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500, *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, and *Waterford v Commonwealth of Australia* (1987) 163 CLR 54].**

**5.42** Legal professional privilege will also attach to certain confidential professional communications between salaried legal officers and government agencies. It must be a professional relationship of a sufficiently independent nature to secure to the advice an independent character. A claim for privilege is not limited in the case of such communications, to communications which have been made for the purpose of existing or contemplated litigation **[*Trade Practices Commission v Sterling* (1979) 36 FLR 244].**

**5.43** In a number of formal decisions the Information Commissioner has confirmed the exempt status of documents consisting of confidential communications between the Crown Solicitor's Office and agencies containing legal advice **[for general comments see the earlier decisions *in Re Guyt and Health Department of Western Australia* (16 March 1994, unreported), at paragraphs 12-26; *Re Nazaroff*, at paragraphs 16-24;**

**and more recently, *Re Coastal Waters* and *Re Hunter*. For a discussion concerning the application of the exemption to advice from the Director of Public Prosecutions, see *Re Waghorn and Christmass*, at paragraphs 20-31].**

### *Waiver of privilege*

**5.44** Legal professional privilege may be waived by the client. Waiver occurs when the client performs an act which is inconsistent with the confidence preserved by the privilege. The consequences of waiver is that the client becomes subject to the normal requirements of disclosure of the communication.

**5.45** The privilege may be lost when documents are disclosed to another party **[*Webster v James Chapman and Co. (a firm) and Others* [1989] 3 All ER 939].** The privilege may also be lost by the act of an officer of an agency reading from a privileged document **[*see Re Weeks and Shire of Swan* (24 February 1995, unreported), at paragraphs 28-34]**. However, the privilege is not lost if the disclosure was unintentional or a result of inadvertence.

## Clause 8 - Confidential communications

**5.46** Clause 8 provides:

> *(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*
>
> *(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information of a confidential nature obtained in confidence; and*
>
> *(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency."*

### *Clause 8(1) - Breach of Confidence*

**5.47** The scope and meaning of the exemption in clause 8(1) has not yet been

determined by the Information Commissioner. However, the Queensland Information Commissioner discussed the meaning of a similar (but not identical) provision in the Queensland FOI Act in his decision ***Re "B" and Brisbane North Regional Health Authority* (1994) 1 QAR 279**. In *Re "B"*, the Queensland Information Commissioner discussed the requirements to establish an equitable action for breach of confidence and stated that the criteria are as follows:

> (i) it must be possible to specifically identify the information in issue in order to establish that it is secret, rather than generally available information;
>
> (ii) the information in issue must possess "the necessary quality of confidence", ie. it must not be trivial or useless information, and it must possess a degree of secrecy sufficient for it to be the subject of an obligation of confidence, arising from the circumstances in or through which the information was communicated or obtained;
>
> (iii) the information in issue must have been communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it;
>
> (iv) it must be established that disclosure to the applicant for access under the FOI Act would constitute a misuse, or unauthorised use, of the confidential information in issue; and
>
> (v) it must be established that detriment is likely to be occasioned to the original confider of the confidential information if that information were to be disclosed.

**5.48** The Information Commissioner has expressed the view that is unlikely that the disclosure of information to a government agency pursuant to the exercise of statutory powers to compel the disclosure of such

information could give rise to any obligation of confidence under the general law **[see *Re Pastoralists' and Graziers' Association and Department of Land Administration* (25 August 1995, unreported), at paragraphs 11-18].** For the exemption to apply it would be necessary to find some statutory restriction upon the use by the agency of the information in the documents and to consider that restriction in light of the exemption in clause 8(1) **[see the comments of Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 74 ALR 428, at 437].**

### *Clause 8(2) - Prejudice to the supply of confidential information*

**5.49** When considering the application of the exemption in clause 8(2) to a document in dispute, the decision-maker should ask the following questions:

(i) does the document contain information of a confidential nature obtained in confidence;

(ii) are there real and substantial grounds to expect that disclosure could prejudice the ability of the agency in the future to obtain information of the kind under consideration; and

(iii) are there any competing interests to be weighed against that risk and any other public interests in maintaining that confidentiality such that disclosure of the document would, on balance, be in the public interest?

### *Confidential information obtained in confidence*

**5.50** Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or a limited class of persons. However, merely marking a document "Confidential" is not sufficient to establish that the information in that document is confidential in nature and that it was both given and received in confidence. A "confidential" stamp or mark is an indicator only. However, there must be some other material that establishes as a matter of fact, that the information was obtained in confidence.

### *Prejudice to the future supply of that kind of information*

**5.51** The Information Commissioner has considered that it may not be reasonable to expect that information provided to an agency in order to gain some benefit or to obtain some advantage would not be provided in the future to the Government or to an agency **[see *Re Maddock, Lonie and Chisholm*].** The argument that it is reasonable to expect that information required to be supplied pursuant to a statutory requirement would not be supplied in the future has also been rejected by the Information Commissioner **[see *Re Pastoralists' and Graziers' Association*].**

**5.52** Further, previous conventions of confidentiality given or understood to exist pre-FOI are insufficient to invoke a claim for non-disclosure under clause 8(2) **[see *Re Kobelke*, at paragraphs 77 and 78 and *Re Pastoralists' and Graziers' Association*, at paragraphs 25-27 where the Information Commissioner referred to the decision of the Full Federal Court in *Searle Aust Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, at 180].**

**5.53** However, if an organisation or individual voluntarily provides more information than is necessary to an agency, whether by way of background material or otherwise, and the additional information is useful but not essential for an agency's purposes, the fact that that information is volunteered may constitute a reasonable basis for expecting that the ability of the agency in the future to obtain useful information of that kind, could be prejudiced by disclosure **[see *Re Lawless; Re Sanfead and Medical***

***Board of Western Australia*** **(15 November 1995, unreported)].**

## Clause 11 - Effective operation of agencies

**5.54** Clause 11 provides:

*(1) Matter is exempt matter if its disclosure could reasonably be expected to -*

*(a) impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;*

*(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;*

*(c) have a substantial adverse effect on an agency's management or assessment of its personnel; or*

*(d) have a substantial adverse effect on an agency's conduct of industrial relations.*

***Limit on exemptions***

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

### *Impair the effectiveness of a method or procedure for the conduct of tests, examinations or audits*

**5.55** The Information Commissioner first considered the application of clause 11 in ***Re Simonsen and Edith Cowan University***. The Information Commissioner held that examination questions for certain units in a Bachelor of Nursing course were exempt under clause 11(1)(a). The Information Commissioner noted that the requirements of clause 11(1)(a) are substantially the same as the corresponding provision in the Commonwealth FOI Act, s.40(1)(a). To establish the exemption an agency must show that disclosure of the document or part of the document could pose more than a possibility or risk of damage to the effectiveness of some particular method or procedure for conducting tests, examinations or audits **[see *Re Simonsen*, paragraph 24].** Another

decision, ***Re H and Graylands Hospital,*** covers the overlap between 11(1)(a) and 11(1)(b).

### *Prevent the objects of any test, examination or audit from being attained*

**5.56** Although the term "audit" is defined in the Concise Oxford Dictionary as *"an official examination of accounts"*, the Information Commissioner accepts that, at least within the Public Service, the term is commonly understood to embrace examinations of matters other than accounts. For example, public sector agencies' performance indicators are "audited" by the Auditor General, and the term is also used in respect of examinations of, for example, information technology systems **[see *Re Hassell,* at paragraph 19].**

### *Substantial adverse effect*

**5.57** The words "substantial adverse effect" indicate the degree of gravity of the claimed effect required in order to establish the exemptions provided by clauses 11(1)(c) and 11(1)(d) **[*Harris v Australian Broadcasting Corporation* (1983) 78 FCR 236 at 249: see also comments in *Re Rindos and the University of Western Australia* (10 July 1995, unreported].** It is not sufficient to merely quote the words of the exemption, nor is it sufficient to quote the words of the heading to the exemption and claim that disclosure would affect the effective operations of agencies. An assessment by the agency which describes the adverse effects expected and how that conclusion was derived, based on opinions backed with evidence, is necessary.

# 6. Personal Information

**Definition**

**6.1** The FOI Act allows a person to have access to personal information about himself or herself, subject to some limitations. However, it protects the personal and professional privacy of other individuals by providing an exemption for personal information about a third party other than the access applicant and imposing a duty upon the agency to consult any such third party if the agency is considering disclosing personal information about him or her.

**6.2** The exemption in clause 3(1) is most frequently cited as the reason for denying access. Clause 3(1) provides:

*"(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead)."*

**6.3** In the Glossary in Schedule 2 to the FOI Act, "**personal information**" is defined as meaning "*...information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead-*

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

*(b) who can be identified by reference to an identification number or*

*other identifying particular such as a fingerprint, retina print or body sample."*

**Titles, names, addresses and telephone numbers**

**6.4** The purpose of the exemption in clause 3(1) is to protect the privacy of individuals. It can be seen from the definition that it is the identification of a person from the information itself that gives it the character of "personal information" which is, *prima facie*, exempt matter under the FOI Act. Further, whilst the information may not specifically name a person, it may be 'personal information" if it is the kind of information that could readily be understood as referring to a particular individual. For example, a person could readily be identified from information that refers to a title or position such as the *Archbishop of Canterbury*, the *Prime Minister*, the *Chief Executive Officer [of an agency]*; or the *Officer in Charge of [a particular] Police Station* at a particular time. If a document contains facts or opinions, whether true or false, about the CEO of an agency, at a particular time, without naming that person, then that information is capable of being "personal information" under the FOI Act because the identity of the person to whom it refers could readily be ascertained from the information itself. It is not necessarily exempt - see 6.7 and 6.8.

**6.5** Although, in some instances, the mere mention of a person's name may reveal "personal information" about that individual (such as disclosing the identity of an informer), more is normally required in order to establish this exemption. Parts (a) and (b) of the definition of personal information suggest that disclosure of the document ordinarily must reveal something more about an individual than his or her name to attract the exemption **[see comments in *Re Veale,* at paragraphs 34 and 35].** The Information Commissioner has commented that the mere routine recording of a person's name in a government document in circumstances where it would be reasonable to expect such information to appear, may not be sufficient to attract the exemption **[see Re *"F" and Police Force of Western***

***Australia*** **(14 September 1995, unreported, at paragraphs 14-16}.**

**6.6** A document with no heading and in no context containing a list of names and nothing more would be unlikely to be exempt under clause 3. However, a document containing a list of names that also discloses something personal and private about the people mentioned on that list, because of the context in which the names appear, may be exempt. It is usually the combination of information, for example, a name, address, telephone number, that gives the whole of the information the character of "personal information".

**Officers of agencies and contractors for services**

**6.7** In relation to a person who is, or has been, an officer of an agency, the following "personal information" is not exempt matter under clause 3:

(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 **[see clause 3(3) and regulation 9 of *the Freedom of Information Regulations 1993* as amended].**

**6.8** In relation to a person who performs, or has performed, services for an agency under a contract for services, "personal information" of the following kind is not exempt under clause 3:

(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; or

(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 **[see clause 3(3) and regulation 9 of *the Freedom of Information Regulations 1993* as amended].**

**Applications for access to personal information concerning children**

**6.9** Access applications may be made on behalf of a child by the child's guardian or the person who has custody or care and control of the child **[s.98(a)].**

**6.10** However, if a document contains personal information and either the access applicant, or the person to whom the information relates, is a child who has not turned 16, the agency may refuse access if it is satisfied that access would not be in the best interests of the child and that the child does not have the capacity to appreciate the circumstances and make a mature judgment as to what might be in his or her best interests **[s.23(4)].**

**6.11** Section 23(4) does not provide an exemption in itself. However, its effect is that, if the child is the access applicant - or is not the access applicant but consents to the disclosure of personal information about himself or herself - the agency may still refuse access in the

circumstances described in s.23(4). Otherwise clauses 3(3) and 3(4) would operate to limit the exemption provided by clause 3(1) and the agency could not claim that exemption **[see *Re "K" and Department for Family and Children's Services* (9 April 1996, unreported), at paragraphs 31 and 32].**

**6.12** If an agency is considering giving access to a document containing personal information about a child under the age of 16 years, and the agency is of the view that the child does not have the capacity to appreciate the circumstances and make a mature judgment as to the nature and significance of the document, then the agency may consult the child's guardian or the person who has custody or care of the child, rather than the child. **[s.32(3)]** Where the child is a ward of the State, the child's guardian is the Director General of the Department for Family and Children's Services. In that circumstance, the Department should generally be consulted before giving any person access to documents containing personal information about the child.

**6.13** Further, in circumstances where a child is a ward of the State, the rights of the parents to have access to personal information about the child are no more nor less than the rights of any other person to have access under the FOI Act to personal information about the child. That is, personal information about the child is not necessarily personal information about the parents of that child. Consequently, an application fee of $30 is payable by a parent if access is sought to non-personal information of that type (ie. if the information is personal information about a third party, in this case the child) **[see *Re Geary & Others and Department of Family and Children's Services* (18 January 1996, unreported)].**

## Applications for access to personal information concerning intellectually handicapped persons

**6.14** Access applications may be made on behalf of an intellectually handicapped person by the person's closest relative or guardian **[s.98(b)].** If a document contains personal information and the applicant, or the person to whom the information relates, is an intellectually

handicapped person, the agency may refuse access to the document if it is satisfied that access would not be in the best interests of that person **[s.23(5)].**

**6.15** The operation of s.23(5) is similar to that of s.23(4) in respect of children **[see paragraphs 6.9-6.13 above].** That is, the right of access to personal information may be restricted if the access applicant is intellectually handicapped. In those circumstances, s.32(4) provides that the views of the handicapped person's closest relative or guardian may be obtained for the purpose of deciding whether the information is exempt under clause 3. Where the guardian is the Public Advocate it will generally be necessary to consult the Public Advocate before giving access to personal information. In those circumstances, the parents of the intellectually handicapped person may have no greater right to have access to that person's personal information than any other access applicant **[*see Re "Q" and Public Guardian* (16 May 1996, unreported)].**

## Deletion of third party personal information

**6.16** If an agency decides that a document contains personal information about a third party and that document is the subject of an access application, it may provide access to that document with personal information deleted **[s.24].** If the third party's identity can be ascertained from the personal information about him or her contained in the document, an agency may delete so much of the personal information that may enable the identity of that person to whom that information relates to be ascertained. Sometimes that may require deletion of all the information about that person which is contained in the document, including the relevant name of the person to whom the information relates if such a name appears. Depending on the type of document concerned, that option may be unsatisfactory from an applicant's viewpoint if all that is disclosed is a blank piece of paper.

**6.17** Alternatively, if the identity of the person to whom the information relates is not able to be

ascertained from that information itself, an agency may delete the name only and provide access to the document and the remaining information. If the identity of the person cannot be ascertained from the information that remains, then it is no longer personal information as defined in the FOI Act. The test is not whether personal information about a third party would be revealed to a particular access applicant (who may believe that he or she knows that information), but whether disclosure would reveal it to the world at large. Providing access to a document with only the name deleted, wherever that option is possible, is in accordance with the objects and intent of the FOI Act.

### Personal information about applicant interwoven with other personal information

**6.18** Practical difficulties may arise if personal information about an access applicant is interwoven with personal information about a third party. In those circumstances, the access applicant's right to have access to personal information about him or her competes with the right of the other person to have his or her privacy respected. The decision on access will then generally involve a weighing of the competing public interests and the making of a decision as to where the balance lies. **[see *Re Morton and City of Stirling* (5 October 1994, unreported)].**

### Disclosure of the identity of a complainant

**6.19** From time to time agencies receive complaints from members of the public about the activities of other people. The FOI Act has been used by some people to try to gain access to complaints made about themselves, particularly to discover the identity of the person making the complaint. Several issues arise in the consideration of disclosure of that kind of information and some of those issues have been identified in decisions of the Information Commissioner.

**6.20** Where a regulatory authority proposes to take action against a person in respect of particular alleged wrong-doing, the public

interest in the fair treatment of that person might, according to the circumstances of the particular case and procedural fairness, require the disclosure of the identity of the complainant.

***Complaints to agencies making allegations about individuals***

**6.21** Typically, complaints received by many agencies, especially local authorities, concern neighbourhood disputes - noisy dogs, breaches of by-laws, health matters, fencing disputes and anti-social behaviour and the like. In some instances, the friction between neighbours is of such intensity that there may be a real risk of physical harm ensuing to the parties concerned that may be exacerbated by the disclosure of documents under the FOI Act.

**6.22** The Information Commissioner has consistently stated that there is a public interest in a person being informed of the substance of a complaint about him or her received by a local authority, and being given an opportunity to respond to the complaint if necessary, and a public interest in the complainant being informed of the action taken by that authority in respect of the complaint. Ultimately, if a matter proceeds to external review, the decision concerning access to documents relating to a complaint will depend on the particular procedures adopted by a local authority for dealing with such matters **[see the decisions in *Re Morton and City of Stirling* (5 October 1994, unreported) and *Re Lithgo and City of Perth* (3 January 1995, unreported) for examples of different approaches adopted by local authorities].**

**6.23** However, if the procedures of an agency are deficient and do not adequately address the public interest identified in paragraph 6.22, then the balance of the public interest may require that the substance of a letter of complaint be disclosed. Agencies can take steps to minimise the likelihood of this occurring by changing administrative procedures and policies for dealing with neighbourhood complaints. Options may include: writing to the alleged offending party outlining in full the matters complained about and seeking a response;

visiting the alleged offending party and confirming in writing the substance of the matters discussed and things done on that visit; or creating a document containing the substance of the complaint, if that letter of complaint is hand-written, and then providing a copy of the document prepared to the offending party.

**6.24** The Information Commissioner has withheld the names and addresses of people who have lodged complaints with State Government agencies such as the State Government Insurance Commission, the Health Department, the Department for Family and Children's Services **[see the decisions in *Re Morton; Re Lithgo; Re Brandter and City of Bayswater* (5 September 1995, unreported); *Re Ross and City of Perth* (9 October 1995, unreported); *Re Capelli and Fiedukowicz and Town of East Fremantle* (3 November 1995, unreported)].**

**6.25** However, each application of this type should be determined on its merits and according to the circumstances of the particular case. It should not be assumed that the identity of complainants nor letters of complaint will never be disclosed. In balancing the public interests, relevant factors may include, but are not limited to:

* the age of the documents;
* whether the information is already in the public domain;
* whether the person complained about has otherwise been informed by the agency of the allegations and invited to respond to them; and
* whether action is proposed to be taken against the person who is the subject of the complaint.

# 7. The Public Interest

**Application to Exemptions**

**7.1** Some exemptions incorporate a "public interest test". This means that even if an agency is able to establish that a requested document is either of a type described in the exemption clause (ie. a Cabinet document), or that its disclosure could reasonably be expected to have the effect stated in the exemption clause (eg. *prejudice* the future supply of information; *impair* the effectiveness of a test or audit), the claim for an exemption may be displaced by competing interests if it can be shown that, on balance, disclosure of the document would be in the public interest.

***What is the public interest?***

**7.2** Although the public interest is not defined in the FOI Act, it is not concerned with matters of private interest to individuals, nor is it something that is of interest to the public today because it is newsworthy. The concept is best illustrated by the following comment in ***DPP v Smith*** **[1991] 1 VR 63**, at 65:

*" 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...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."*

***Examples***

**7.3** Some examples of various "public interests" that have been recognised by the Information Commissioner and by the courts and tribunals in other jurisdictions will illustrate the point made by the Court in ***DPP v Smith***. There may be a public interest in:

* understanding the decision-making processes of Government;

* knowing the range of options available to agencies in their decision-making;

* knowing how different information is treated by agencies and what information is rejected and why it is rejected;

* understanding the way the processes of decision-making by Government are structured and who controls them, what is important and why it is important;

* an applicant being able to exercise his or her right of access under the FOI Act;

* the disclosure of comments that are gratuitous, unfairly subjective or irrelevant;

* being able to "clear the air" over a matter of controversy;

* knowing the substance of complaints made against a person and knowing how an agency deals with such complaints;

* the maintenance of personal privacy;

* State and local government agencies being able to effectively carry

out their functions and the business of government on behalf of the community;

* accountability for the use of public funds and for decision-making that affects the rights and entitlements of individuals;

* the proper functioning of a government or public instrumentality when there is concern and debate on issues contained in requested documents.

**7.4** When deciding the applicability of an exemption, the Information Commissioner will not always reach the same conclusion as the agency as to where the balance of the public interest should lie. It is to be expected that in balancing the competing interests, the Information Commissioner will, from time to time, place a different emphasis on the weight to be given to those interests.

# 8. External Review

**Notification of Complaint**

**8.1** When the Information Commissioner receives a complaint about a decision of an agency, the Commissioner will notify the principal officer of that agency, in writing, that a complaint has been made **[s.68(1)].** At the same time the Commissioner may serve upon the agency a notice to produce the disputed documents and the agency's FOI file to the Information Commissioner **[s.75(1) and s.72(1)(b)].** If the agency's notice of decision does not meet the requirements of s.30 of the FOI Act, a requirement may also be made to provide reasons for denying access, including material findings of fact and a reference to the material on which those findings are based. Copies of the letter to the principal officer and the notices are usually sent by facsimile to the agency's FOI Co-ordinator to ensure there are no delays in the commencement of external review.

**8.2** The FOI Act requires the Information Commissioner to make a decision on a complaint within 30 days, unless the Information Commissioner considers that it is not practicable to do so. As the process of external review is designed to be quick and informal, the Information Commissioner will usually place tight time-frames on requests for documents or information. If the access application has been properly dealt with, the documents and/or information required should be easily located

and produced by the agency. Those time frames are expected to be adhered to unless there are good reasons why an agency (or a complainant) is unable to comply. In such a case a request for a reasonable extension may be granted.

## Notifying parties of external review

**8.3** It is the responsibility of the agency to notify any third parties, or an access applicant where a complaint is made by a third party, in writing of any applications for external review by the Information Commissioner. This responsibility arises where the exemption claimed involves clause 3 (personal information) or clause 4 (commercial or business information) **[s.68(2)].** Notifications should be made by the agency immediately advice is received from the Information Commissioner that a complaint has been made. In doing so, agencies must be cautious about revealing the identity of a complainant to a third party, and vice versa.

**8.4** Third parties and access applicants should be advised to contact the Information Commissioner if they wish to be joined as parties to the proceedings and/or if they wish to make submissions about the exempt status or otherwise of matter in the requested documents. Once the external review process has commenced the Information Commissioner has jurisdiction to decide all matters that could have been decided by the agency in the first instance **[s.76(1)(b)].** Therefore, any further contact or negotiations between the access applicant, third parties and the agency will occur via the Information Commissioner, unless the Commissioner directs otherwise.

## Procedures on Review

**8.5** Complaints received by the Information Commissioner are assigned to either an Investigations Officer or a Legal Officer. Contact will be made by that person and attempts will usually be made to conciliate the complaint, if possible. If conciliation fails or is not an option, the officer handling the complaint will, after investigating the complaint, provide a

report to the Information Commissioner and recommend an appropriate course of action.

**8.6** The Information Commissioner is empowered to give directions as to procedure for investigating and dealing with a complaint and may require, for example, that all submissions are to be in writing or may require oral submissions. Each party will usually have access to the submissions of the other, although the submissions of an agency may be edited or summarised by the Information Commissioner in order to avoid the disclosure of exempt matter. All material and submissions obtained in the course of the investigation of the complaint are considered by the Information Commissioner in the course of deciding a complaint.

**Onus of Proof**

**8.7** In proceedings before the Information Commissioner, the agency claiming an exemption bears the onus of establishing that its decision to deny access to a document is justified **[s.102(1)].** Where the requested document exists, has been found and is a document of an agency, the agency must establish that a particular document or part of a document contains exempt matter as described in Schedule 1. The decision-maker does this by making findings of fact that establish either that the document is of a type described in the exemption clause claimed or, depending on the particular exemption claimed, that it is a document of a type described and one of the effects described in the exemption clause could reasonably be expected to follow if it were to be disclosed.

**8.8** Some exemptions have limitations attached. The limitations have the effect of making documents which may have otherwise been exempt, not exempt. In circumstances where the exemption is limited by a public interest test, the onus shifts to the access applicant, but this only happens after the agency has established a *prima facie* claim for exemption. If the agency does not establish the

exemption, there is no onus on the access applicant and the question of whether disclosure would, on balance, be in the public interest does not arise.

**8.9** Even if a document is technically exempt, the agency does not have to deny access to that document. Section 3(3) of the FOI Act gives the agency a discretion to release such documents. Before claiming exemption the agency should carefully consider exercising that discretion in accordance with the objects and intent of the legislation.

**8.10** Where the exemption is limited by a public interest test, in considering whether the exemption should be claimed, the decision-maker should turn his or her mind to what the relevant competing public interest factors might be and where the balance might lie. That consideration should be conveyed to the access applicant. In particular, those public interest factors that were considered to be so important as to persuade the decision-maker that the document should not be disclosed should be identified for the benefit of the access applicant. Only when the agency explains to an access applicant what public interest factors weighed against disclosure is that applicant able to identify other factors that might tilt the balance in favour of disclosure in order that the access applicant satisfy the onus he or she bears under s.102(3) of the FOI Act.

**8.11** It is the experience of the Information Commissioner that insufficient weight is sometimes given by decision-makers to an applicant's right of access under the FOI Act, and that exemptions are frequently claimed by agencies when the essential public and private interests that are sought to be protected are not apparent.

**Standard of Proof**

**8.12** In proceedings before the Information Commissioner, there must be some basis for a claim that disclosure could reasonably be expected to have certain effects. The comments of Owen J in a decision of the Supreme Court of Western Australia, ***Manly v Ministry of Premier and Cabinet*** **(15 June 1995, unreported**) indicate the standard of proof that is required. In the context of considering the application of the exemption in clause 8(2) of Schedule 1 to the FOI Act, Owen J, referred to the judgment of Sheppard J in ***Attorney General's Department v Cockcroft*** **(1986) 10 FCR 180** *and said, at page 44:*

*"How can the [Information] Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasoned decision-maker."*

**Procedure following receipt of preliminary view**

**8.13** The parties will normally be provided with the Information Commissioner's preliminary view and an opportunity to respond to that preliminary view, before the Information Commissioner proceeds to determine the matter by a formal decision, if necessary.

**8.14** The Information Commissioner's preliminary view is to give the parties an

indication of the Commissioner's view, on the basis of the evidence then before the Commissioner, about the matters in dispute, whether those matters are claims concerning the exempt status of documents or parts of documents, allegations about missing documents, documents within the ambit of the access application, charges and refusals to deal with access applications, and so forth as the case may be. Informing the parties of the Commissioner's preliminary view notifies them of any possible adverse findings being considered and of the basis of such findings, and affords an opportunity to provide further evidence and submissions in support of their claim to access, or claims for exemption, as the case may be.

**8.15** Any additional evidence or material provided to the Information Commissioner by the parties following the preliminary view may change that view. However, if no new material is provided by the parties, the Information Commissioner's preliminary view and the reasons are an indication of how the complaint is likely to be finally determined.

**8.16** When an agency withdraws its claims for exemption for documents or parts of documents which, in the Commissioner's preliminary view are not exempt, the agency should provide the complainant with access to those documents forthwith, and inform the Information Commissioner accordingly.

### Changing the basis of a claim for exemption

**8.17** It is not uncommon for agencies to claim new exemptions after receiving the Information Commissioner's preliminary view that the documents are not exempt as originally claimed. A "shifting of the goal posts" may operate unfairly for the complainant. It also prolongs the external review process because the Information Commissioner is obliged to put any new claims for exemption to the complainant and to give him or her an opportunity to respond to those new claims.

**8.18** However, it is also the case that, in the course of dealing with a complaint and considering the original reasons for claiming an exemption, the Information Commissioner will consider whether the disputed documents are exempt for any reason not claimed by the agency. If the Information Commissioner considers that there is material which may establish that another exemption may be applicable, the agency will be informed accordingly and may be required to provide further material for the purpose of determining whether there is any factual basis for a reliance upon a new exemption clause, either in addition to or in substitution for the exemptions claimed in the first instance. **[see *Re Styles and City of Gosnells* (11 October 1996, unreported)].**

## The Information Commissioner's decision

**8.19** The decision of the Information Commissioner upon a complaint determines the exempt status or otherwise of documents in dispute between the parties. The decision is to be regarded as the decision of the agency and has effect accordingly **[s.76(7)].** If the complaint is against a decision to refuse access to a document and the Information Commissioner decides that documents are not exempt and an agency does not intend to appeal against that decision, and there are no other parties to the complaint, the documents must be released to the complainant forthwith in accordance with the Information Commissioner's decision.

## Status of complaints decided by the Information Commissioner

**8.20** When a complaint has been dealt with in this manner, the Information Commissioner has discharged the Commissioner's statutory duty under the FOI Act and no longer has any role to play in the dispute, if any, between the parties. Consequently, further correspondence between the complainant and the Information Commissioner, in respect of that matter, is unnecessary. A decision of the Information Commissioner is final unless an appeal to the Supreme Court on any question of law arising out of that decision is lodged **[s.85(1)].**

**8.21** However, there is no appeal against a decision of the Information Commissioner as to whether or not to deal with a complaint, nor in relation to any other decision of the Information Commissioner, including a decision about charges for dealing with an access application.

**Feedback on review procedures**

**8.22** The Information Commissioner will seek feed-back from agencies and complainants on the processes of review (not the merits of the decision). Agencies and complainants are encouraged to provide candid and frank comments to the *Advice and Awareness* sub-program and to identify any areas where changes could be made to improve the quality or timeliness of the review process. The procedures adopted by the Information Commissioner must provide for procedural fairness between the parties, but flexibility, informality and speed must also be accommodated so far as is possible in accordance with the statutory requirements, the intention of the FOI Act and the will of Parliament.

# 9. APPENDICES

**FORMAT FOR DOCUMENT SCHEDULE**

THIS IS AVAILABLE ON DISK FROM THE OFFICE OF THE INFORMATION COMMISSIONER

**Document Schedule: _____ Freedom of Information Application No. _____ File No._____**

**Applicant: _____ Decision Maker: _____**

| Doc. No. | Source / Location | Description | Decision | Exemption | Reasons for decision |
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EXAMPLE ONLY OF A COMPLETED SCHEDULE

**Document Schedule:** _____ **Freedom of Information Application No.** _____ **File No.**_____
**Applicant:** _____ **Decision Maker:** _____

| Doc. No. | Source / Location | Description | Decision | Exemption | Reasons for decision |
|---|---|---|---|---|---|
| 1. | FILE 4/84<br>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<br>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<br>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<br>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. |

**CASES**


*Attorney General's Department v Cockcroft (1986) 10 FCR 180* 88
*Attorney-General (NT) v Kearney* **(1985) 158 CLR 500** 60
*Attorney-General (NT) v Maurice* **(1986) 161 CLR 475** 60
*Baker v Campbell* **(1983) 153 CLR 52** 60
*Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* **(1987) 74 ALR 428** 63
*DPP v Smith* **[1991] 1 VR 63** 80
*Grant v Downs* **(1976) 135 CLR 674** 60
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*Re "A" and Heathcote Hospital* **(9 June 1994, unreported)** 28
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*Re Barrett and Police Force of Western Australia* **(12 September 1995, unreported***)* 18
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*Re Capelli and Fiedukowicz and Town of East Fremantle* **(3 November 1995, unreported)** 77
*Re Clements and Health Department of Western Australia* **( 16 March 1994, unreported)** 20
*Re Coastal Waters Alliance of Western Australia Incorporated and Department of Environmental Protection and Cockburn Cement Limited* **(28 September 1995, unreported)** 59, 61
*Re Croom and Accident Compensation Commission* **(1989) 3 VAR 441** 55, 56
*Re Cyclists' Rights Action Group and Department of Transport* **(20 June 1995, unreported)** 46
*Re Doohan and WA Police Force* **(5 August 1994, unreported)** 17
*Re Edwards and Ministry of Justice* **(12 December 1994, unreported)** 28
*Re Egan and Medical Board of Western Australia* **(28 September 1995, unreported)** 51, 52
*Re Foy and Medical Board of Western Australia* **(18 October 1995, unreported)** 51, 52
*Re Geary & Others and Department of Family and Children's Services* **(18 January 1996, unreported)** 73
*Re Goodger and Armadale Kelmscott Memorial Hospital* **(9 May 1995, unreported)** 18
*Re Gray and University of Western Australia* **(23 June 1994, unreported)** 28
*Re Guyt and Health Department of Western Australia* **(16 March 1994, unreported)** 61
*Re H and Graylands Hospital* **(6 September 1996, unreported)** 67
*Re Hassell and Health Department of Western Australia* **(13 December 1994, unreported)** 48, 67
*Re Hayes and The State Housing Commission of Western Australia (Homeswest)* **(17 June 1994, unreported)** 28
*Re Hesse and Shire of Mundaring* **(17 May 1994, unreported)** 41
*Re Hunter and Fisheries Department of Western Australia* **(20 November 1995, unreported)** 56, 61
*Re Jeanes and Kalgoorlie Regional Hospital and Others* **(7 February 1995, unreported)** 58, 60
*Re Jones and Shire of Swan* **(9 May 1994, unreported)** 58
*Re Kobelke and Minister for Planning and others* **(27 April 1994, unreported)** 28, 50, 58, 65
*Re Kolo and Department of Land Administration* **(6 February 1995, unreported)** 50
*Re Larson and Office of Corrections* **(AAT of Victoria, Howie PM, 19 June 1990, unreported)** 42
*Re Lawless and Medical Board of Western Australia* **(5 July 1995, unreported)** 50, 66
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*Re Maddock, Lonie and Chisholm (a firm) and Department of State Services* **(2 June 1995, unreported)** 50, 65
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*Re Mineralogy Pty Ltd and Department of Resources Development* **(5 January 1996, unreported)** 59
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***Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588** 48
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***Re Ross and City of Perth* (9 October 1995, unreported)** 77
***Re Sanfead and State Government Insurance Commission* (17 January 1996, unreported)** 18, 52, 66
***Re Simonsen and Edith Cowan University* (13 July 1994, unreported)** 14, 66, 67
***Re Slater and State Housing Commission of Western Australia* (22 February 1996, unreported)** 48
***Re Smith and State Government Insurance Commission* (5 December 1994, unreported)** 28
***Re Strelley Pastoral Pty Ltd and Others and Department of Land Administration* (27 March 1995, unreported)** 50
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***Re Taylor and Ministry of the Premier and Cabinet* (23 December 1994, unreported)** 58
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***Re Waterford and Department of Treasury* (No 2) (1984) 5 ALD 588** 57, 59
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***Searle Aust Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163** 65
***Trade Practices Commission v Sterling* (1979) 36 FLR 244** 61
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***Webster v James Chapman and Co. (a firm) and Others* [1989] 3 All ER 939** 61

## CHECKLIST FOR APPLICANTS UNDER FOI

***You want to exercise your right of access to government documents. Have you:***

### Applied in writing to the right State or local government agency? ☑

- if you do not know which agency holds the document you want, contact the one you think should hold the document and ask to speak to the FOI Co-ordinator. Agencies are obliged to assist you to make an application that conforms with the legislative requirements.
- no special form is required.

### Identified the document required? ☑

- you should try to describe the particular document or documents you seek, otherwise the agency may refuse to deal with your request if it is too broad. Ask to see the agency's Information Statement which contains a list of the type of documents held by that agency. The FOI Co-ordinator can also assist you.

### Paid the application fee of $30 if the document contains non-personal information? ☑

- no application fee is payable for access to personal information about you.
- if the agency wants you to pay an application fee and you disagree, ask for an internal review of that decision. If you still disagree with the decision after internal review, you can seek external review by the Information Commissioner.

### Asked for an estimate of charges ? ☑

- you may ask for an estimate of charges when you make your access application.
- the agency must tell you if the charges might exceed $25.

### Paid any deposit required by the agency? ☑

- if the agency requires you to pay a deposit, you should discuss with the agency how the application may be changed to reduce the charges payable.
- you should also consider allowing the agency more time to deal with your request on condition that charges are waived or reduced.
- if the agency gives you a notice requiring a deposit to be paid and you do not notify the agency of your intention to proceed, the agency will consider your application to be withdrawn. If that occurs, any advance deposits paid by you will be refunded.
- if you disagree with the charges imposed, ask for an internal review of that decision. If you still disagree with the decision after internal review, you can seek external review by the Information Commissioner.

### Negotiated any reduction or extension of the "permitted period" with the agency? ☑

- if you require the documents by a certain date for some specific purpose, you can ask the agency to provide you with a decision on access within a shorter period than 45 days allowed by the FOI Act. You should negotiate an agreed date with the agency.
- if you and the agency are unable to agree on a shorter period and you need the documents, you can ask the Information Commissioner to reduce the time allowed to the agency to comply with the FOI Act.

***The agency should notify you when your application has been received. The agency must deal with your application and decide whether to give or refuse access within 45 days after the application is received. If you do not***

***receive a decision from the agency within 45 days, or within such other period as is agreed between the agency and you, the agency is taken to have refused access. Your options are:***

**If the decision was made by an officer of the agency other than the principal officer, apply to the agency immediately for internal review of the "deemed refusal"** ☑

- internal review is not available if the decision-maker is the principal officer of the agency, or if you applied for documents of a Minister.

**If the decision was made by the principal officer of the agency or a Minister, apply immediately for external review by the Information Commissioner** ☑

- the Information Commissioner is unlikely to allow a complaint to be made if internal review is available and you have not applied for internal review. The Information Commissioner may allow a complaint to be made if you show cause why internal review should not be applied for or should not be completed.

**Apply to the Information Commissioner to allow the agency an extension of time on such conditions as the Commissioner thinks fit.** ☑

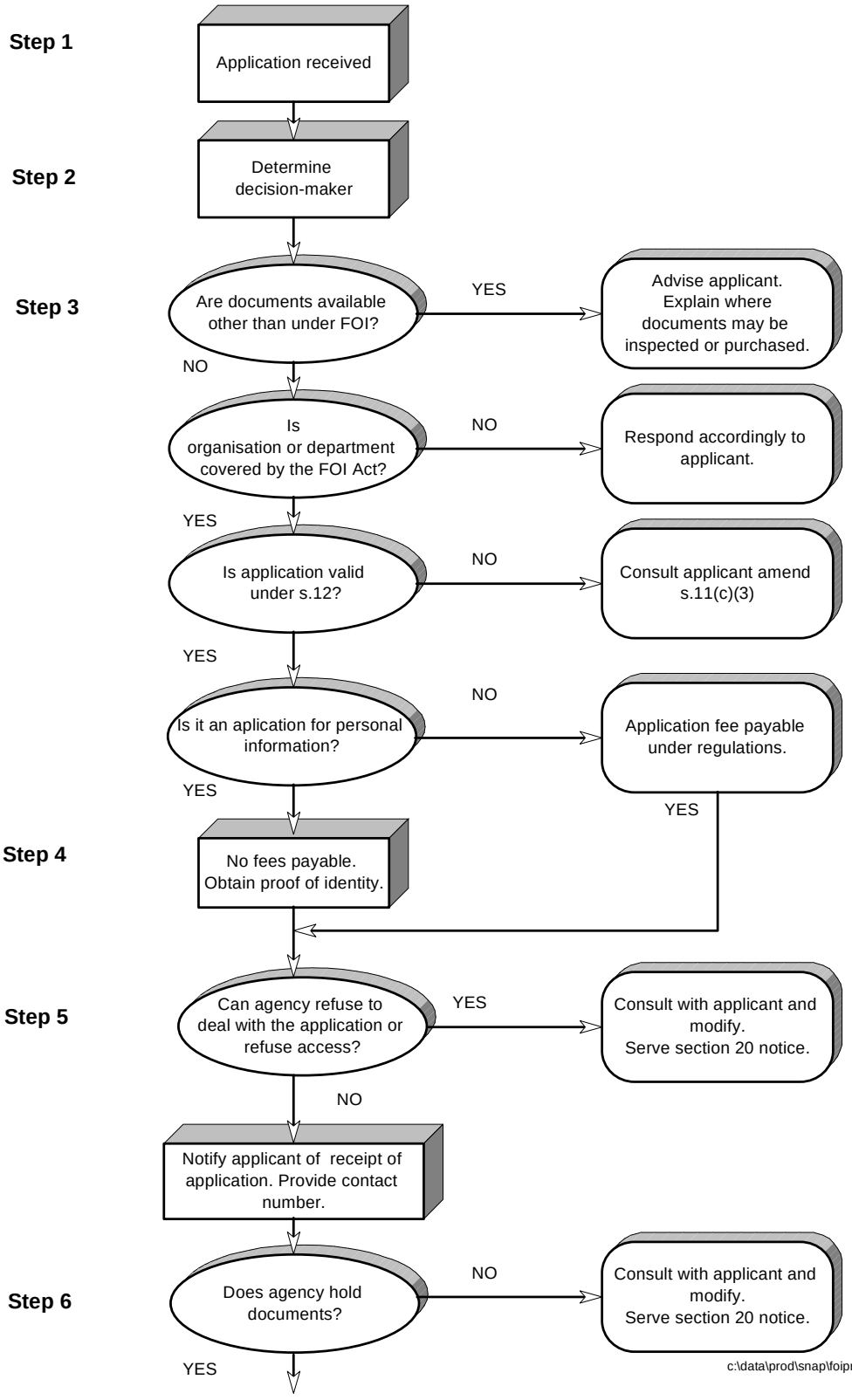
- you can ask the Information Commissioner to reduce or waive the charges payable if the agency is given an extension of time to deal with your access application and decide whether to give access.

**If you have applied for internal review (where appropriate) and you are still dissatisfied with the decision of the agency, you may:**

**Apply to the Information Commissioner for external review of the agency's decision.** ☑

- you must apply to the Information Commissioner within 60 days after receiving written notice of the agency's decision upon internal review.

## FLOW CHART - PROCESSING AN FOI APPLICATION

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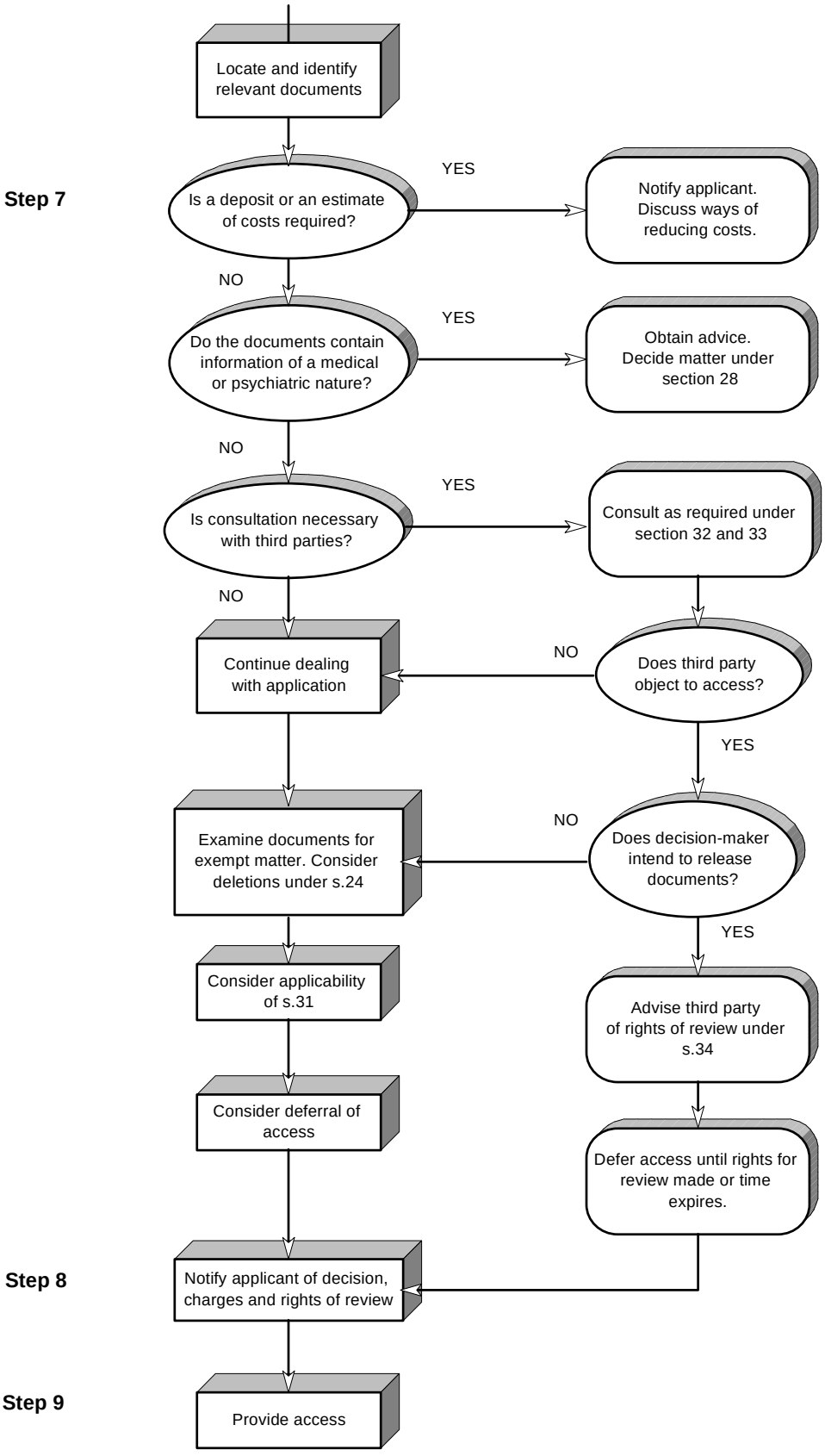
Step 7
Locate and identify relevant documents
Is a deposit or an estimate of costs required?
YES
Notify applicant. Discuss ways of reducing costs.
NO
Do the documents contain information of a medical or psychiatric nature?
YES
Obtain advice. Decide matter under section 28
NO
Is consultation necessary with third parties?
YES
Consult as required under section 32 and 33
NO
Continue dealing with application
NO
Does third party object to access?
YES
Examine documents for exempt matter. Consider deletions under s.24
NO
Does decision-maker intend to release documents?
YES
Consider applicability of s.31
Advise third party of rights of review under s.34
Consider deferral of access
Defer access until rights for review made or time expires.
Step 8
Notify applicant of decision, charges and rights of review
Step 9
Provide access