COMMUNITY DEVELOPMENT AND JUSTICE STANDING COMMITTEE

AGENCY REVIEW HEARING — OFFICE OF THE INFORMATION COMMISSIONER

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 26 NOVEMBER 2014

Members

Ms M.M. Quirk (Chair)
Mr M.P. Murray
Dr A.D. Buti

Hearing commenced at 10.09 am

Mr SVEN BLUEMMEL
Information Commissioner, Office of the Information Commissioner, examined:

Ms SU LLOYD
Principal Legal Officer, Office of the Information Commissioner, examined:

The CHAIR: On behalf of the Community Development and Justice Committee, I would like to thank you for your interest and your appearance before us today. One of the functions of the committee is to review the departments within its portfolio responsibilities and from time to time the committee will conduct agency review hearings. The purpose of today's hearing is to discuss issues related to freedom of information and your office. At this stage, I would like to introduce my colleagues. I am the Chair, Margaret Quirk. On my right is the Deputy Chair, Dr Tony Buti, and on my left is Mr Mick Murray, the member for Collie–Preston. The committee is a committee of the Legislative Assembly of the Parliament of Western Australia and this hearing is a formal procedure of Parliament and therefore commands the same respect given to the proceedings in the house itself. Even though the committee is not asking witnesses to provide evidence on oath or affirmation, it is important that you understand that any deliberate misleading of the committee may be regarded as a contempt of Parliament. This is a public hearing and Hansard will be making a transcript of the proceedings for the public record. If you refer to any document or documents during the evidence, it would be of assistance to Hansard if you could provide a full title for the record.

Before we proceed to the questions we have for you today, I need to ask you a series of questions. Have you completed the "Details of Witness" form?

The Witnesses: Yes.

The CHAIR: Do you understand the notes at the bottom of the form about giving evidence to a parliamentary committee?

The Witnesses: Yes.

The CHAIR: Did you both receive and read the information for witnesses briefing sheet provided with the "Details of Witness" form today?

The Witnesses: Yes.

The CHAIR: Do you have any questions in relation to being a witness at today's hearing?

The Witnesses: No.

The CHAIR: We have a series of questions to ask you today. Before we do that, do you wish to make an opening statement?

Mr Bluemmel: Thank you, Madam Chair, if I may very briefly. Firstly, as always, we certainly welcome the opportunity to interact with Parliament and parliamentary committees. We obviously do that through a range of committees and today with your committee.

By way of clarification, given that it is the agency review part of the committee's role, I note that we are obviously listed as part of the Attorney General's portfolio responsibilities, which, certainly from a budgetary perspective, is entirely accurate but, just for the record, I would like to make it clear that obviously I do not report to the Attorney operationally as Information Commissioner. I am an entirely independent officer of Parliament under the legislation.

The CHAIR: I should clarify that. The various committees have divvied up what they call the oversight agencies. We have portfolio responsibility for you as a separate agency, not as connected with the Attorney General's department.

Mr Bluemmel: I understand that. As I said, we certainly welcome the hearing. Just for the record, I make that clear to someone who is not as familiar with it who might be reading the transcript, so they do not misunderstand that operationally we report to the Attorney.

The CHAIR: Perhaps we can start off by asking you what you see as the main issues in terms of timely access and disclosure of information in Western Australia at the moment?

Mr Bluemmel: There are probably two levels that I would like to talk about. The first is the speediness of the process at an agency or minister level when a person actually applies to the agency or minister directly before we even get involved. We have two roles. Our primary role is to be the merits review tribunal of agency and ministerial FOI decisions. Our second role is to provide advice and awareness and education, both to the sector and the community. In the first role of the merits review tribunal, we really only see about one per cent of all agency and ministerial FOI decisions that get appealed—in the order of about 140 a year out of 17 000 a year across the sector. For 99 per cent of matters, we are not involved, which is as it should be because, hopefully, those 99 per cent of matters are dealt with appropriately, particularly with our efforts in education. Within that, there is a conception that an agency has 45 days to deal with an FOI application. I make the point very regularly when I talk to agencies that the act actually requires them to make a decision as soon as practicable but, in any event, within 45 days. For some matters, as soon as practicable may be considerably less than 45 days. I make that point wherever I can.

My annual report contains statistics on all 17 000 applications. They all have to be reported to me at the end of the financial year by agencies, and they refer to the average time taken and so on. The average time taken is within the 45 days but I am certainly aware that there are individual matters that go beyond the 45 days, even though they clearly should not. That is at the first level. The second level —

The CHAIR: Before you get on to the second level, from my personal experience, in the last six years I would have had one request back within time and it is invariably the case that we get a phone call a week before the expiration of 45 days asking for an extension. It seems to me that they are not starting to look at the request until three weeks out.

Mr Bluemmel: In some of the experience that I see when I review agency decisions, I would certainly agree that there are some cases where that does happen, which is of course very poor practice. I would not suggest that that happens in every case or in the majority of cases but I can certainly say that there are some cases where that does happen. The power of the act in that regard of course is that if no extension is granted, at the 45 days the agency is deemed to have refused it, which then gives the person the review rights. That is where we get into the second level. There is initially the internal review of the agency, which you are familiar with, and after that, there is an external review available by my office and of course I freely concede that our time frames are nowhere near as short as we would like them to be. They are trending in the right direction. Over the last couple of years, we have decreased both the average cost of an external review as well as the average time taken for an external review, but there is a long way to go.

The CHAIR: What is the average time these days for an external review?

Mr Bluemmel: We keep very detailed statistics of all these. As of 31 October this year, the average time actually taken is 155.8 days. That is calendar days. That is for all matters that we have closed this financial year so far. In the previous year, it was 256.8 days. The year before that, it was 290.6 days. The year before that, it was 300.2 days and the year before that, 326.6 days. We have brought it down so far over the last four years from 326 to 155 days.

The CHAIR: You would accept, would you not, that that delay is certainly going to act as a deterrent to people seeking a review?

Mr Bluemmel: It may well do and if it does, of course, that would be an undesirable outcome. That is exactly why we are working so hard to keep reducing it further.

Dr A.D. BUTI: What measures are being put in place to try to reduce that?

Mr Bluemmel: They probably fall into two broad categories. The act fortunately gives me a lot of flexibility in how I run an external review. However, we are also very consciously aware that my review is the last merits review available. My decisions can only be appealed to the Supreme Court and then only on a point of law, not fact or merit, more broadly speaking. I am pleased to say in my time, we have had four appeals in total. They have all upheld my decision. The reason I point that out is because we are the last point of merits review, if we get the merits wrong, then we have got an injustice that really cannot be undone. That is why we are obviously very careful of making sure people have their rights.

The two categories of things that we have done to bring that time frame down is, first, a much greater focus on what we are calling informal resolution. All of my external review team are now formally trained in alternative dispute resolution and conciliation. What we now do as a matter of course in most external reviews, almost all, in fact, is that we actually have at an early stage a conciliation conference between the parties. That was quite interesting because initially there was a bit of fear and reluctance about that—about how that would operate because it was a significant change to our process—but the feedback we have had both from agencies and applicants, subsequently, has been overwhelmingly positive. It has also increased the complaint closure rate. So, that is the first series of things we are doing.

[10.20 am]

The second series is that we are just getting a little bit more—how do I put this?—direct and less patient with things that can cause delay. In the past our standard process was that we would get written submissions from all the parties, we would then write what we call a preliminary view, which was basically a draft decision—in many cases quite a detailed thing that took a lot of time. After that, we would invite the parties to either reconsider their decision or give us more relevant submissions. We found that some parties would not accept our preliminary view and would basically demand that we issue a formal decision, but would not give us any further submissions. We have now taken a much stricter view of that and have said, "This is my view: I believe the complaint in this case either does not have substance or the agency's refusal is unjustified. If you can't provide me with more information to support your case, I am, essentially, going to dismiss the matter on the basis that either there is nothing left in dispute or", more likely, "I have given you my view and you haven't given me anything further to change that." That has saved a lot of time. Obviously, we have to be very careful in how we do that, to make sure that all the parties are still provided procedural fairness. We have been just a little bit less flexible in granting extensions and so on; we need a higher threshold now, if you will, before someone is granted some sort of indulgence from my office in terms of getting extra time.

The CHAIR: Can we go back to that issue about where you are negotiating? So, you have a party that, say, has refused access, and the applicant then comes to you and says, "Well, I believe that that decision is not correct." You then go back to the person who has the documents and ask for additional material or submissions as to why access should not be granted. In the course of procedural fairness, do those extra submissions then need to be disclosed to the applicant?

Mr Bluemmel: Well, certainly they may do, and certainly what we do need to do is ensure that, in the example you have given, the applicant is able to meaningfully answer those submissions or rebut them. We are sometimes under a little bit of constraint in doing that, because the Freedom of Information Act actually provides that I must not do anything to disclose material that is claimed to

be exempt. A classic example might be if a document in question is claimed to be exempt under cabinet confidentiality, which is an exemption under the schedule to the act. I will ask the minister or the agency for information about why this matter was prepared for cabinet rather than just to brief a minister on day-to-day operations. In that case I might have one of my investigators inspect the relevant cabinet submissions that were made that relate to the issue, so that I can actually see the matter did go before cabinet rather than "the matter may, one day in the future, go before cabinet", because that would generally not be enough to found an exemption. Clearly, if I disclose to the applicant what the cabinet minute says that proves that the document in question is exempt, then clearly the process has, effectively, been circumvented. While I might not always be able to ensure that the applicant is given everything the agency has told me in that form, I do need to ensure that they are at least able to be given the substance of it so that they can rebut it. There is actually a line of Supreme Court authority on this issue, and this came up in, I think, a matter about four or five years ago involving an access application to a state agreement. That state agreement contained a confidentiality clause that was legally enforceable, rendering it exempt under the FOI act. In that case the applicant, quite understandably, said, "Well, how can I make arguments on whether the confidentiality clause is valid if I can't see the confidentiality clause?" But of course the confidentiality clause itself is part of the document claimed to be exempt. In that matter I was able to refer back to some Supreme Court authority in Western Australia that recognises that this puts the applicant in a difficult position. But what the court held was that because the FOI act sets up a regime with an independent commissioner who is politically independent and does not report to government, that is as good as we can get in those limited circumstances. But I do what I can to make sure that the substance of the submissions is given to the applicant, yes.

The CHAIR: I was a bit disturbed to read in your last annual report that you still have agencies coming to you and saying, "On what basis can we get this exempt?" I have to say that that is certainly my experience, too. I am concerned about your educative function if bureaucrats are still proceeding on the basis of "what can we do to make sure access is not given to these documents?"

Mr Bluemmel: Yes, look, I am concerned about that, too. I do need to put it into context: I made that reference in my annual report because the particular example was—well, it stuck in my mind by how clearly it demonstrated for that one particular agency a default position of "we must refuse access, and then find a good reason for it". That is clearly unacceptable under the act. But putting it into context, that is one out of the thousands of inquiries my office gets every year, and there are, in many agencies, improvements in that regard. But we are certainly a long way from being in the situation where every agency is, shall we say, enlightened enough to say, "Well, let's not —

The CHAIR: It is not a question of being enlightened; it is a question of observing the law.

Mr Bluemmel: Quite right; that is exactly right. What I tell agencies frequently as well is, "Don't forget, even if something is technically exempt under FOI, the agency still has a discretion to give it out." I do not; my act makes it very clear that I cannot order the disclosure of exempt information, but an agency can. I tell agencies to really weigh that up, because quite often it will be in the public interest to disclose something that is technically exempt, and they should use that.

The CHAIR: You can contest this if you like, but I am of the view that the interpretation that we take of cabinet-in-confidence is a lot broader than is taken at commonwealth level. I wanted to ask you why that is. I have the commonwealth guidelines in front of me and they say that cabinet-in-confidence will be exempt if it is submitted to cabinet or is a document that a minister proposed to take to cabinet—this is the important bit—and the document was brought into existence for the dominant purpose of consideration by cabinet. I have certainly known of instances, personally, when a stray email talking about a general policy issue that has the potential, sometime in the future, and may go to cabinet has sought to be exempted under this. I am also aware of one government agency that has a rubber stamp that puts "cabinet in confidence" all over documents. That is a pretty unfortunate state of affairs, is it not?

Mr Bluemmel: Yes, it is. On the first part of the question about the breadth of the commonwealth provision compared with the state provision, the state provision in that regard is actually quite similar in the sense that the broad rule is fairly generous; however, it does provide, under schedule 1, clause 1(5) that —

> Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body.

So that is actually, in that sense, quite a similar rule. But the broader part of your question, yes, I agree with; in other words —

The CHAIR: But it is not applied. That is not applied at state level, I can tell you that.

Mr Bluemmel: It varies. I have had plenty of matters that have come before me where I have required an agency or a minister to disclose information that is marked "cabinet-in-confidence". I make it very clear that the sheer fact that there is a header or a footer or a watermark that says "cabinet-in-confidence", there is no legal magic in that. It is an expression of a view—or perhaps, being unkind, a wish—that this document should not be disclosed in the same way that "commercial-in-confidence" on a document has no magic meaning. I have ordered the disclosure of plenty of documents that say "commercial-in-confidence" plastered all over them. It is a point that I make very clearly when talking to agencies and ministers. I think at the ministerial level, for about the last three years, the situation, at least for matters that come before me, has improved somewhat, or actually significantly, I must say, since ministers' FOI applications are now managed by the FOI unit at DPC. The minister is still responsible for their decision, but the FOI unit is able to assist with searches, interpretations and so on. That came out of my report to Parliament in 2010 where I noted that that was an issue. I must say that since that time, I do not recall seeing any matters that come before me from a minister where the claim for cabinet confidentiality was that tenuous as it was perhaps before. However, I appreciate, of course, that the cabinet claim can also be made by agencies rather than ministers.

[10.30 am]

The CHAIR: This is the very issue that I am getting at. So, you have got a 45-day plus application where, frankly, the claim has been made what I will call promiscuously, and then the only prospect of getting that effectively reduced is to then—I mean, there is an internal review, but that tends to stick with whatever the party line is. So, then you have got the disincentive of having to wait another six months, say, before you get a determination from you that might comply with the law. So you are looking at over six months, when that decision should be made properly in the first place. This is what I have somewhat of an issue with.

Mr Bluemmel: I certainly agree; the decision should be made properly in the first place. One of the presentations I regularly give to agencies, particularly at senior levels, contains a slide that says "FOI myths", and one of those myths is listed as cabinet-in-confidence. Now, of course, I then talk to the slide and make it clear that, yes, there is a cabinet exemption in the FOI act, but it is not as broad as is often thought, and it is certainly not magically made out by having the words "cabinet-in-confidence" written on a document. A document's exempt status will depend on the nature of the document and its circumstances of creation, not on whether somebody put a header, footer or watermark on it.

The CHAIR: If everyone pursued that, your resources would not be able to cope if every time there was a claim made that was felt to be spurious and we had to then get you to review it. So, what I am asking about is how do we improve the system fundamentally so that we do not get this multiplicity of claims that are just illegitimate?

Mr Bluemmel: The way I think we improve the system for better quality decisions is twofold. One, my educative function—again, if I stand there in front of senior agency staff and make it clear

that when a matter comes to me on an external review when a claim is not solidly made out, I will not uphold it, hopefully, there is some motivation there for people to listen and improve their practices and comply with the act in the first instance. It may well be that in some cases—in fact, I am quite confident in some cases that the claiming of the cabinet exemption at an agency level is not done maliciously or deliberately. It is done because of this sort of general understanding that anything that might one day have something to do with cabinet has to be confidential. The act does not make the exemption as broad as that. Therefore, in some cases it is a misunderstanding rather than a deliberate hiding, I would suggest—although, again, I do not see all the matters, of course. But, again, the first part is I keep talking to agencies and keep reminding them of their obligations and relevant cases that I have decided and that the Supreme Court may have looked at.

The second thing is: on the matters that do come before me, the process that we have with our conciliation hearings has a tremendous educative effect as well, because where they are in a room, we have the —

The CHAIR: That is the specific agency; right?

Mr Bluemmel: Correct, yes.

The CHAIR: If I was researching a matter that I thought was not cabinet-in-confidence, and I went onto your website, there would be the formal decisions there. There might be some policy directives or something else, but there would not be anything to tell me that in eight out of the 10 cases that you conciliated, you knocked backed a claim of cabinet-in-confidence, and on exactly the same terms as the matter that I am trying to pursue. I have a bit of an issue with that, that there is no formal record of your conciliations in terms of decisions like, "Well, a cabinet confidence claim was knocked back here." How is that going to have an educative effect if we do not actually know what the outcome was?

Mr Bluemmel: Perhaps in a couple of ways. One is that where I do see something as being systemic, I will report it to Parliament, obviously, in my annual report, as I did with the matter that you mentioned earlier. The second is I would suggest that there is a pretty strong effect of, at least among large or central agencies, people talking to each other. If someone has been to one of my conciliations and has had a somewhat sobering experience about a cabinet-in-confidence claim that was attempted but perhaps should not have been attempted in the first place, then I think that will get around to others at senior levels in those circles. Yes, we have over 100 agencies all up, including local government, so it will not get to everyone, but to those who regularly deal with those sorts of contentious matters, I think that word spreads pretty quickly.

The CHAIR: If they are in the FOI club and they are aware of some other agency being knocked back, they know that, but the person that is contesting the matter does not know that. That is the problem. What I am saying is that in traditional legal areas there are authorities, there are precedents; you can look up the cases. How am I, Joe Public, who is pursuing an FOI request, is extremely sceptical about a claim, say, of cabinet-in-confidence—how am I to know that they are being routinely being knocked back by you?

Mr Bluemmel: Those slides that I mentioned that I present to agencies, I present those to the public as well. One of my educative functions is to ensure that the public is aware of its rights. In fact, I regularly go on regional visits, particularly with the Ombudsman and other oversight agencies. While we are there, we talk to local community groups, we have public seminars, and all of those sorts of things. Again that message that I send out about the myth of the watermark that says "cabinet-in-confidence" or "commercial-in-confidence" features very prominently in the talks I give to members of the public as well.

The CHAIR: I think that is obvious, but where I have had experience—for example, two middle-ranking public servants sending an email to one another about a general topic—that is, burglary or bushfire protection or something like that. Now, it is such a general topic that it is odds-on that at

some stage in the future there will be a cabinet document, but the nexus is very remote. It is not once, but it is on more than one occasion I have had that now. Frankly, I have not got the time or the inclination to spend six months trying to get the document out of them. This is what I am concerned about. I am concerned that there is not any proper formal guidance on these sorts of matters that you can just ring up the bureaucrats that you are negotiating with and say, "Well, this is the section of the act. This is the guidelines that the commissioner has put down. How are you saying this still should be exempt?"

Mr Bluemmel: We are actually doing something along those lines in my office. One of the things that we have undertaken recently is a strategic review of all of my office's publications, and we have actually identified some publications that need to be retired, some that need to be updated and new ones that need to be created. But we are also taking the view that everything that we provide to agencies by way of training, for example—there is no reason why that should not be made available to the public. As of about three weeks ago, our key document, which we call our FOI coordinators manual, which is a very substantial training manual that FOI coordinators get when they attend a course run by my office, is now available to the public. I see no reason why the public should not see what we are telling FOI coordinators to do. A lot of these sorts of issues are in there. Now, it will be early days for that to filter out and become more popular, but the other thing we are doing at the moment is that review of our publications—we will shortly start the process of actually implementing that. It will take at least six to nine months, I would say, but after that period of time we should have a lot more of these guidelines, and they should be clear and, as far as I am concerned, there should be no limitation on what is available. If we are telling agencies something, the public should see that.

[10.40 am]

The CHAIR: Is the manual online currently?

Mr Bluemmel: It is online. It is not the most easily navigable website at the moment, but as part of our publication's review, we are looking at all of that as well to make sure things are reachable, findable; but it is there, yes.

The CHAIR: I am sure my colleagues have got some other questions, but I also wanted to raise the issue about charging for access. There seems to be a lack of consistency; there seems to be a bit of an attitude of trying to deter people from making claims and it does not necessarily seem to be related to the amount of work involved. I do not know what your views are on charging, but I had a situation recently where I wanted five sets of minutes, which should just be a question of finding them on the system and printing them off, and I think they were going to charge me something like $400 for it. I just do not see any link between what I was seeking and any workload; but I could see that they were a bit annoyed with me and so that was a deterrent or penalty that was being imposed.

Mr Bluemmel: Charging is, I have got to be honest, a very, very difficult issue under the FOI act. While the FOI act does provide that you can only charge for certain things and that certain fees are set by regulation, within that there is a huge amount of interpretation, extrapolation and so on that has to be made. In fact, there was a recent decision that I made in Kelly v Department of Fisheries, which was decision 19 of 2014, where Dave Kelly applied for certain information from Fisheries about the shark strategy, and a large estimate of charges was made there, and on appeal to me that was reduced to about a quarter of the original. Now, of course that is just estimates. Ultimately once the matter is dealt with, if the matter goes ahead, then the actual charges will be applied. But what that case highlights to me is the difficulty of charging, because so much of what you are doing when you are giving someone an estimate of charges is, well, not hypothetical but extrapolated, and until you actually get in there and look at the documents in quite an amount of detail, it is going to be difficult. A lot of the work involved in dealing with it that an agency that may charge for is not the mechanics of it, the copying and so on or even the editing —

The CHAIR: It is consulting third parties and what have you.

Mr Bluemmel: Precisely, and this is why another one of the key messages I send to agencies is wherever possible, unless there is a really good reason not to do so, consider disclosing things outside the FOI act, because then you have flexibility. Once you are under the FOI act, it is very rigid. It is rigid in terms of third party consultation and all sorts of other things. If you do it outside the FOI act, you can make a judgement, such as, yes, this contains third party information, but the third party information is not particularly personal, it is more professional about a public servant, and surely there would be no harm in disclosing it. I am not saying that would be the case everywhere; it still has to be a case-by-case basis. But for things like minutes of meetings and so on, other than particularly sensitive bodies, why not put it on your website? You get around the whole issue of charging; you get outside of the straightjacket of the FOI process, and then leave the FOI process for the really difficult ones, where there are really valid third party interests, where there is genuine public interest in some confidentiality. But everything else, do it outside the act. I think there is probably a long way to go in that regard, but I am going to keep sending that message wherever I can.

Dr A.D. BUTI: Just following on in regards to the cabinet-in-confidence material, there is also the issue about if something has been prepared for a minister to be used in Parliament. That seems to be exempt, too, under the act, or a decision is made—I know it is under the act. Ms Lloyd would understand me. I came to look at a mediation in regards to an education department matter. They were refusing to release, because they said it was prepared for the minister to utilise in Parliament, and it appeared whether he did or did not utilise it was a problem for the advocate. That, again, is open for abuse, and I am just wondering what your views are on that.

Mr Bluemmel: That exemption would be under what is in the act as clause 12(c) of schedule 1, which provides that the matter is exempt if public disclosure would infringe the privileges of Parliament. Now, that is actually a clause that was not used all that frequently at all; and, in fact, I think there had not really been a decision by me or my predecessors until about three or four years ago, and then we were faced with that, where the information in question was of that type of contentious issues—briefing notes, those sorts of things, for use in, usually, question time. We actually had to go back a long way, indeed all the way to the Bill of Rights in England, to find out what the privileges of Parliament were, because they had been imported by reference to the House of Commons and all of those things under our own laws. Ultimately, the view that I took in that line of cases is that one of the privileges of Parliament is Parliament's ability to control the dissemination of its own proceedings. Yes, I took quite a broad view of that. I am sure there will come a time when a matter comes before me where that nexus between the document and the proceedings in Parliament is too tenuous and the exemption simply will not be made out, but we have had a small number of cases where it has come to me on that regard and I have had to find it exempt in that case.

Dr A.D. BUTI: I know you cannot talk about specific cases; anyhow, I am going to use this as a hypothetical. The issue was there was an applicant trying to obtain attendance records in a public education institution. The education department was refusing that, by saying this material is being prepared, or was prepared for, the minister who may or may not have disclosed it in Parliament. That is absurd. Those records can actually be done in the annual reports. I must say Ms Lloyd handled the issue incredibly well in that particular hearing. This brings in the issue about Education. I am sure that, like all agencies, you are under the pump with resources, but the person that represented the education department in that mediation was deplorable. So whether you are seeking to obtain more resources, because I think the education that you need to deal with the public service is phenomenal, if that person was representative of the education department and other agencies or departments.

Mr Bluemmel: There are probably two things on that. As you obviously recognise, I cannot really speak about specific matters, but more broadly speaking, firstly, I would agree that the amount of education that my office has to do is enormous, for a couple of reasons: one, we have over 100 000

people in the sector that could potentially be making or assisting FOI decisions, or influencing them. We have turnover—we have lots of turnover. Usually, FOI in some agencies is a job with very high staff turnover, so my office constantly has to restart the effort of training and awareness raising of individual FOI coordinators and decision-makers, and we try and keep up with that. But, second, also—I would just be a little bit, again, putting things into context—while the matters that tend to come before me are usually the ones where there is a lot at stake or things are quite sensitive, or things have been handled badly, and again I am not speaking about any particular matters, there are also lots of things that I do see where things have gone quite well, where people in agencies are being constructive, are being aware of the FOI act in all of its detail, and in some cases, indeed, are being proactively open with information. Clearly, the sort of hypothetical matter that you mentioned may not have been like that. But in other matters, I think we just need to be careful of not tarring everyone with the same brush.

Dr A.D. BUTI: Hypothetically speaking, an issue that comes up, which I am wondering if your office has addressed in mediation, is that the person who represents the department should be a person who is confident enough to make a decision and is of a rank that they can make a decision. That was the problem in our situation.

Ms Lloyd: I will add something to that, if I may. The conciliation process that we piloted at the beginning of the year has now become an embedded part of our process. It is a specific requirement of our office that the agency provide in attendance not only the FOI coordinator or decision-maker, but a senior officer capable of making a decision that binds the agency. We also impress upon agencies that that should be the principal officer who is responsible for the FOI decision, not, with respect, often a fairly junior member of the staff working in the records or corporate information section. So while I would not want to overstate the benefits of conciliation, it certainly has a very powerful effect when a very senior officer from an agency has to front up to a conciliation conference and listen to a discussion with a complainant who may well have been dealt with by the agency over a period of 12 months or more purely by email and correspondence and never actually had met face to face. So it is often quite a salutary and educative experience for the agency's senior staff to gain a closer understanding of the FOI process that that agency has gone through, and to hear, often in private session, what we might call reality testing in the dispute resolution process, where the conciliator can sit with the agency staff privately and have a candid, confidential discussion about either the agency's handling of the matter, or what it might have done differently or how it is necessary to adjust its approach to make sure it complies with the legislation, and then likewise you can do a similar reality testing exercise with the complainant, and you can also use that as an educative process. Certainly in my own conciliations, I have often taken the complainant aside and gone through, perhaps, some of the exemption clauses in the act that they may not be aware of and talked to them about the conciliation process and the requirements of the act.

[10.50 am]

It takes a little time. I think that an-hour-and-a-half conciliation is probably time well spent in the sense that if we have large agencies that are what we call repeat players, and we have those experiences early on, we certainly have noticed a trend to slightly better quality of decision making within agencies, when matters are coming to us now on external review, as they are becoming more aware of their obligations under the act. As long as the parties were not speaking to each other, it was rather easy to engage in the tick-tack of email correspondence back and forth. It has been quite surprising and heartening to see how both parties respond when they are actually in a room together. So, just recapping, it is now a requirement that the agency send along to the conference preferably a member of their senior executive—a leadership role—so that it is someone who can actually make a decision for the agency and by the agency, rather than simply send perhaps, with respect, a more junior member of staff who may not be in a position to negotiate on behalf of that department.

The CHAIR: That brings me to another issue, and that is, for example, in the course of earlier discussions about narrowing the scope of an application, that quite often descends into wanting some indication of motive or reason for applying for the documents, which in my regard is completely irrelevant. That tends to be an issue there. Again, is that something that is addressed in the training?

Mr Bluemmel: We certainly do cover that in training, and, yes, I agree with you—certainly a person's motive is completely irrelevant in making a decision on access. A person's motive may be helpful in narrowing the issues down. One example that we give during training is that if a person presents to numerous public hospitals over many years and is a frequent patient, and then may apply to the hospitals or the health department for access to their entire medical record, which may be several cartons of highly detailed documents, if the agency then were to engage in some meaningful dialogue with the person, saying, "Why are you after this information?", then the person might say, "Well, ever since you did that operation on my back last year, I have been crook." Okay. Then you might be able to say how about we deal with everything around that time period. That would be quite useful. Of course if the person says, "Once I find out, I am going to sue you; that is my real motive", that is fine; that must not play a role in the agency's decision on access. But it may be a helpful determinant to meaningfully narrow the scope.

The CHAIR: I have just gone into something—it looks like a 155-page training session. Is this the manual that you are talking about?

Mr Bluemmel: It would be, yes.

The CHAIR: I have just come onto the page that deals with cabinet-in-confidence, which is page 73. There are two decisions there that are cited from. One is Watson and Minister for Forestry, discussing cabinet-in-confidence, and it refers to other cases and says —

> … the meaning of 'deliberations' includes not only active discussion and debate but also information that discloses that an Executive body has considered, gathered information on, analysed or looked at strategies in relation to a particular issue.

That is a lot broader than what I quoted from the commonwealth FOI guidelines. If I was a bureaucrat who did not have a lot of experience, that to me would be a green light to claim an exemption on a range of issues. Frankly, that to me is somewhat ambiguous. If this is what you are saying is the guidance on the website, I am still somewhat concerned.

Mr Bluemmel: In that case, obviously what we would have been limited to is what remained in dispute before the commissioner on that particular matter. What we often find is —

The CHAIR: No. What I am saying is in the FOI guidelines of the commonwealth, there is the clear statement of what constitutes cabinet-in-confidence and puts in the issue about it being a dominant purpose. None of the stuff here, which is ostensibly for the assistance of people who have to make these initial decisions, has an unambiguous statement like that, and that is what I am saying. I would find that very—well, I would err on the side of caution if I read that —

> … the meaning of 'deliberations' includes not only active discussion and debate but also information that discloses that an Executive body has considered, gathered information on, analysed or looked at strategies in relation to a particular issue.

Mr Bluemmel: But that still has to be the executive body that is doing that, not the agency. So even from the wording of that, it makes it clear that the term "deliberation" —

The CHAIR: Makes it clear to you and I, but it does not necessarily make it clear, compared with what I am saying is the unambiguous statement in the commonwealth guidelines. If this is what is put on the system to give people guidance as to how officers make decisions, frankly, it is not enough.

Mr Bluemmel: But just on that, again, yes, it might be clear to you and me that what we are talking about here is the deliberations or decisions of the executive body. Some of the examples—the hypotheticals—that we were talking about earlier, where it might be an email between two staffers, or, indeed, between a staffer and a director general, would not pass that test in Watson, I would say, because that would not reveal the deliberations unless the email itself said —

The CHAIR: A minister has asked for statistics on burglary in the southern suburbs; they are looking at what strategies can be used. So "they" could be interpreted as cabinet, or "they" could be interpreted as the minister's office. But that is the kind of thing that there are claims of exemption on at the moment.

Mr Bluemmel: But under the exemption, again, it would have to be—under the act itself, it would be up to the agency or the minister to make out the exemption claim. They have the oversight of the act.

The CHAIR: All right—after two months, plus another six months. This is what I am saying. The whole system is breaking down because those unambiguous directions and those unambiguous decisions are not being made in the first place. We have to rely on your expertise six months down the track; and, frankly, why there cannot be something like the commonwealth FOI guidelines, which are clear and unambiguous, I do not understand.

Mr Bluemmel: I would say that even with the commonwealth guidelines, I mean, on the whole topic of dominant purpose, of course, there are lines of authority in the context of legal professional privilege that show that applying a dominant purpose test is not an easy thing. So I would say that the commonwealth guidelines perhaps are not entirely unambiguous either. The other thing, of course, is I do not think I could professionally make an unambiguous statement, because with the email between the two staffers, it depends entirely on the subject matter. If one staffer writes to other staffer saying, "In cabinet today, the minister was concerned about issue X and Y and would like us to develop a proposal for cabinet for two weeks hence", then, yes, it is only an email between two staffers, but that would almost certainly be exempt under clause 1, because it would reveal the deliberations of cabinet. So there is a danger in compartmentalising it.

The CHAIR: It reveals deliberations of a member of cabinet but not necessarily in the context of a matter being submitted to cabinet. There is a subtle difference.

Mr Bluemmel: There is a difference but the example I just gave was if the email between the two staffers said, "Cabinet today discussed X, Y and Z."

The CHAIR: No, of course. That goes without saying.

Mr Bluemmel: In that case, I cannot make an unambiguous direction in the training material saying that this category is always exempt and this category is never exempt, because it will turn very much on the content.

The CHAIR: But I read the statement to you; it is not rocket science. I do not understand why this is the extent of the guidance you are giving people who have to make the initial decision. It is not really good enough, I do not think.

[11.00 am]

Dr A.D. BUTI: The whole philosophy is to be able to release information to the public or to the applicant. That is why we have freedom of information. Surely, the training material is seeking to ensure that happens as much as possible. With what the Chair has just read, this is so broad that the chances of this being able to be compatible with the general philosophy is reduced because this is opening up so many reasons for the public servant to say, "No; I am not going to allow it." Of course, when it gets to you, you have the expertise to be able to narrow that down but what the Chair is saying is that we do not want to have to worry about it getting to you; we do not want it to

have to get to you. We want the public servant to release the information if at all possible. If the training is emphasising all these possibilities, then it gives them more room to refuse something.

The CHAIR: Exactly.

Mr Bluemmel: Then I would also note that the entire training manual needs to be read in the context of the very first part of it, which is my foreword to agencies, which provides exactly as you have said: the philosophy behind FOI is everything is to be disclosed unless it is exempt. The agencies have the onus and it is important to engage in a meaningful decision-making process. That is at the very start of the manual and is the message I always open with when I welcome participants to our training.

The CHAIR: Except that if you have a specific issue, you go to it to look up the issue, so you do what I have done and just scroll to page 79 or whatever it is. "What's the orthodoxy on this?" Anyway, I make the point; I am not going to push it. Is it a question of resources that you are not able to produce something a little more user-friendly?

Mr Bluemmel: Like any agency, of course, we struggle with our resources. If we had more resources, we could do more, naturally, but I understand that there are obviously competing calls on the public purse. What we are doing within our resources at the moment is, as I have said, we are doing that review of all of our publications to identify gaps and to make sure we have got consistent messages. The sort of discussion I think we have just had now is exactly the sort of thing that gets taken into consideration in doing that.

The CHAIR: I go back to the workings of Parliament exemption. It seems to me that other jurisdictions would have dealt with this, so I am intrigued that you said you had to delve through history. Why is that? Is that exemption less frequently used in other places and, if that is the case, should that not ring a bell?

Mr Bluemmel: I would have to go back to all the research that we did the first time it came before me a few years ago, but I do recall finding myself in that situation where there was not a lot of the guidance.

The CHAIR: Why do you think that would be?

Mr Bluemmel: From memory—I do not have the matter in front of me—I recall that the wording in other jurisdictions was more restricted. I believe that other jurisdictions' exemptions were worded along the lines of material being exempt if its disclosure would be a contempt of Parliament; whereas, ours is a different wording, which provides that disclosure would infringe the privileges. I think it was that distinction of wording that caused quite a difference in interpretation.

The CHAIR: We would certainly be grateful if you could maybe correspond with the committee about that particular issue. I will give an example. When you are a minister and something comes up—in my case it used to be the escape of criminals or whatever—I needed to know, in the course of my duties, how it had occurred. But it was also contemplated that there could be a question in Parliament, but that briefing was not provided necessarily with the view that I might have a question in Parliament; just that I was doing the job. I now try FOI, for example, briefings to ministers after a bush fire incident. Again, the exemption is quite frequently claimed on the basis that there might be a question in Parliament asked. Again, if there was some dominant purpose–type issue there, that would certainly clarify that issue, but again it seems to have been deployed extremely widely.

Mr Bluemmel: As I said, we have not had too many matters come before us in the last few years—I would say probably about half a dozen or so in the last three years that have come before me. Of course, as you know, I do not see all the matters and there are decisions taken that I do not review because they are not appealed, but I certainly will be quite happy to get back to the committee in writing on that issue about perhaps the difference between our line of authority on the parliamentary issue versus other jurisdictions.

The CHAIR: Thank you. The legislation was reviewed in 2010 and I had a bit of trouble this morning getting on to my computer. That was part of the statutory review I understand it.

Mr Bluemmel: No; that was different. There is no statutory review requirement at all at the moment. Before the 2008 election, there was a commitment by the then opposition to review the operations of the act. It was not a review of the legislation but how it is operating. There was not a great deal of detail given as to who would do that or how it would be done. After the election, the Department of the Premier and Cabinet and I had some discussions and it was agreed that it would be best for the review to be done by someone who is independent of executive government; therefore, I was transferred the funding and I undertook the report, which was tabled in 2010.

The CHAIR: Independent of executive government but not of the FOI process?

Mr Bluemmel: That is correct, yes.

The CHAIR: You were right in the middle of it all?

Mr Bluemmel: Absolutely; that is exactly right. That was tabled, I think, in October 2010 but that was really about the operations; it was not a review primarily into whether the act is still suitable and whether there should be changes. Of course, in other Australian jurisdictions in the last seven or eight years, there have been some quite significant legislative reviews into freedom of information legislation, particularly Queensland, I think, led the way, and then the commonwealth and New South Wales and Victoria subsequently; whereas our act has been fairly much unchanged since it was introduced.

The CHAIR: Are there any views about changes that you would like to see in the existing legislation?

Mr Bluemmel: There are a few. I do not think there is anything particularly substantial. We mentioned earlier the obligation to consult third parties whose information appears in a document before it has been give out under FOI. I have argued for an amendment that that not apply where all that is proposed to be disclosed is work-related information about a public servant or a contractor. That is not entirely without controversy because some agencies, particularly in the health space, see that the existing consultation requirement for officers of an agency as being a bit of a safeguard so that would allow a nurse or a doctor to say, "Well this patient is violent, has made threats and therefore if they find that information about me, that will be a problem." But, of course, my argument to that would be that there are already other exemptions in the act that would allow for information like that then to be withheld in those circumstances but it is then up to agencies to make sure they have proper processes to identify some risks and not rely on the current third party consultation obligations in that regard. It is those sorts of things. There are a few procedural things. The Western Australian act, while it is very much of the first generation of Australian FOI laws, it was one of the latest of the first generation and, therefore, I think was able to learn from the experience of other jurisdictions in that regard. So while some of the others have now gone to the second generation of FOI, ours is probably one of the best of the first generation.

The CHAIR: If you look in the commonwealth context, the FOI legislation came in with the Administrative Appeals Tribunal Act legislation, the Administrative Decisions (Judicial Review) Act. We are very late in the piece in getting SAT here. In fact, there is no requirement to give reasons, so, in a way FOI act is the last bastion because we do not have the access to reasons under the state legislation. Again, people are having to go back to first principles and to look at the document, so that in a way should influence the issues concerning the presumption, and the disclosure should be first-case scenario.

Dr A.D. BUTI: The review of the agency, or how the act worked, was really an internal review conducted by yourself. I have two questions. Firstly, has there been any external review of the agency that you are aware of? Secondly, has the agency been asked by departments to provide training on how they can do things to ensure that they are exempt from releasing material?

[11.10 am]

Mr Bluemmel: I might take the second first. I have certainly never been asked to provide training that will help agencies not disclose. My training is largely proactive. It is largely my office wanting to do more training and driving it out there. Mind you, having said that, when we advertise our courses, they do fill up pretty fast, so we would like to do more of that. We have just deployed an online FOI basics training course so that those people who are not FOI coordinators can at least get the FOI basics. Certainly if I ever became aware of a situation where I thought an agency or a minister was trying to circumvent the act somehow, obviously I would have an issue with that. In fact the act allows me then, if that comes up in the course of an external review, to report that in the case of a minister, to Parliament, and if I became aware of something like that, I certainly would. As to the first issue, I take it you are asking whether there has been a review of my office. There has not been an external review of my office, other than the usual accountability of Auditor General performance audits, those sorts of things. But the 2010 review was not primarily focused on the operations of FOI in the external review function, although that was obviously a part of it; it was how FOI was working across the sector as a whole. So, we actually went out and we did have some support through external providers who provided us with surveys. We called for public submissions and all those sorts of things, and that was really about how primarily agencies were administering FOI, but then obviously we did also look at the external review function, but on the understanding of course that it is not an independent external review. A couple of the main recommendations from that report, one in particular I think, has paid great dividends, which is my recommendation that ministers be supported in making their FOI decisions by the DPC FOI unit. I think that has led to a much better consistency, a greater level of professionalism in ministerial FOI decisions, and that is very pleasing to see.

The CHAIR: You did mention that now FOI applications to ministerial offices are effectively handled centrally by DPC. It struck me the last time that I came across one of these that the individual ministers legally were not actually making independent decisions; they were effectively signing off on what DPC advised them to sign off on; whereas technically I think they are required to actually address the issues. That seems to me to be a problem legally.

Mr Bluemmel: I think there is no doubt that the minister, apart from the Premier and I will get to that in a moment—the minister himself or herself, must be the decision maker. And my recommendation in my review in 2010 made it very clear that that is not to change. As I understand the process that has been implemented through DPC is that it is not compulsory, in that a minister can do all the work in-house if they want—I am not aware of any minister that does that—but they then refer it to DPC to undertake things like searches, provide legal advice, provide opinions, but it is always made very clear, as I understand it, that ultimately the decision is the minister's and the minister will only sign off on what decision they would make. And, as I said, I think it has improved the quality no end, frankly. Sorry, I meant to get back to the Premier. There is a special arrangement under the act which provides that the Premier is actually what is called a related agency of the Department of the Premier and Cabinet, and so therefore the Premier's decisions are actually made by the Department of the Premier and Cabinet. But that has been the case since the act commenced, I understand.

The CHAIR: Again, at the moment there seems to be a number of contentious issues around disposal of property, acquisition of property, commercial development of sites and what have you. Are you concerned about whether or not there is, again, a bit of abuse of the term "commercial in confidence"?

Mr Bluemmel: I certainly made it clear, I think, in my annual reports recently that the commercial in confidence exemption—well, the first point is there is no commercial in confidence exemption; the Freedom of Information Act does not mention whether it is commercial in confidence.

The CHAIR: Yes, sorry.

Mr Bluemmel: I was not saying that to correct the record; I was actually saying that to make the important point that when I go out and talk to agencies, I remind them that there is no commercial in confidence exemption, so if I see a decision that says, "This is exempt because it is commercial in confidence", that is not valid. So, there are limited exemptions for certain types of commercial information of third parties, but they are often not as broad as is thought. And in fact in my most recent annual report, I highlighted that in the context of a tender process. I have also highlighted, primarily through a paper that I delivered at the Australian Institute of Administrative Law annual conference that there are some challenges ahead as the boundaries between the public and the private sectors blur. And in fact a couple of years ago there was a decision that I made about access to documents held by the Peel Health Campus which, while it is privately operated, has both public and private patient facilities, so a public patient can be treated there. And I actually found that because it is publicly operated, it does not meet the definition of "agency" under the FOI act, even though that was perhaps the intention when it was privatised, and that therefore there is a gap there that should perhaps be addressed. And I think that will just become more and more of an issue as more government services are delivered through non-traditional means.

The CHAIR: You mentioned the Queensland FOI review, and I think David Solomon did that.

Mr Bluemmel: That is correct.

The CHAIR: He highlighted, from recollection—it is a while since I have looked at it—the fact that technology had moved on, there are a range of issues, and I have to say that I do not think email and everything else was contemplated in 1982 when the legislation came out. So, do you accept that maybe we have got to update some procedures or legislative provisions to take into account modern technology?

Mr Bluemmel: Yes. That is a really important point. I actually think that our act was drafted just late enough that it was technology neutral enough to work. So, I actually cannot recall any matters that have come before me in the last five years where something was prevented from being accessed by virtue of the fact that it was electronic and the act was not broad enough to cover it. So, I think the definitions of "document" and "record" in our FOI act are entirely technology neutral; and in fact I would say the vast majority of documents that are now in dispute before agencies and indeed before me are electronic.

The CHAIR: All right, but conversely, for example, if someone is saying a search is onerous, you now have a position to type in a word and every document in which that word comes up, you know, is there almost instantaneously.

Mr Bluemmel: Yes.

The CHAIR: So, that is the other side of the coin there, that claims about things being onerous or oppressive or too difficult to access really do not, frankly, stand up much anymore.

Mr Bluemmel: Certainly in terms of searches, yes, we have the search capabilities, and they are getting better and more intuitive, but I have certainly seen plenty of cases where a search term was ill-conceived, where archives were not searched when they should have been—all those sorts of things—so there are certainly traps there. One of those is, say, if a particular organisation, a committee or something like that, changes its name and the person applying for it is not aware of the name change and the person or the agency only searches on the old name or indeed the wrong name. I make it very clear to agencies that they need to engage in a dialogue with the applicant there to make sure those sorts of issues are identified early.

The CHAIR: Is there anything coming out of that Solomon review that you think we could usefully adapt in WA?

Mr Bluemmel: Off the top of my head, I think the main things with the Solomon review was that they were reviewing the Queensland legislation, which was much earlier than ours and so, therefore, they had a lot more ground to cover than we would if we were to look at our own act.

There is nothing specific that would jump out where I would say, "Look, this is a hole that needs to be addressed."

The CHAIR: Maybe when you are replying to us on that other issue, you could maybe indicate if there were recommendations you think that could be usefully progressed here.

Mr Bluemmel: Certainly I would be very happy to do that.

The CHAIR: And in that context, if the act was being amended, what amendments do you think could usefully be made?

Mr Bluemmel: I am very happy to do that.

The CHAIR: Off the top of your head, have you got any ideas now?

Mr Bluemmel: Really just that one that I mentioned about changing or doing away with the obligatory consultation process for prescribed details about officers of agencies.

The CHAIR: All right, thank you very much. I have got a bit of a spiel I have got to read at the end. Thanks for your evidence before the committee today. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. And that means 10 days. We will not go any later. You might ring up and ask for an extension of time! If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information, and we have sought that, or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence. Thank you very much.

Hearing concluded at 11.20 am

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