

STANDING COMMITTEE ON PUBLIC ADMINISTRATION

INQUIRY INTO STATUTORY OFFICE HOLDERS



**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 14 MAY 2018**

SESSION ONE

Members

**Hon Adele Farina (Chair)
Hon Jacqui Boydell (Deputy Chair)
Hon Ken Baston
Hon Kyle McGinn
Hon Darren West**

Hearing commenced at 10.17 am

Ms CATHERINE COOMBS

Acting Principal Legal Officer, Office of the Information Commissioner, sworn and examined:

Ms ALISON McCUBBIN

Coordinator, Education and Communications, Office of the Information Commissioner, sworn and examined:

Mr TONY PRUYN

Complaints Coordinator, Office of the Information Commissioner, sworn and examined:

Ms MICHELLE FITZGERALD

Executive Officer, Office of the Information Commissioner, sworn and examined:

The CHAIR: On behalf of the committee, I welcome you to this morning's hearing. Before we begin, I ask you to take either the oath or affirmation.

[Witnesses took the oath or affirmation.]

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood the document?

The WITNESSES: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, would you please quote the full title of any document you refer to during the course of the hearing and also ensure that you talk into the microphones and do not cover the microphones with any paper while we are having the hearing. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Also, please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of an uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would one of you like to make an opening statement to the committee or are you happy to go straight into questions?

Ms COOMBS: Happy to take questions. I understand that the committee has been informed that the Acting Information Commissioner is unwell and is unable to attend today.

The CHAIR: Yes, we have. Thank you for putting that on the record. Give her our best wishes for a speedy recovery.

Ms COOMBS: Thank you.

The CHAIR: We are going to focus mainly on the last annual report from the Information Commissioner's office. The executive summary makes reference to all the changes that are happening in relation to the machinery of government and the service priority review. I was just wondering whether you would be able to provide the committee with some details around the

significant impacts that the public sector renewal programs are having on the administration of the FOI act?

Ms COOMBS: Perhaps if I can refer simply in terms of numbers of staff, during the period—perhaps Michelle, if you could speak to this, as to the diminution in staff numbers over that period.

Ms FITZGERALD: You referred to the administration of the FOI act in the sector or with our office?

The CHAIR: With your office—both. You could cover both with your office and then in relation to the administration of the FOI act right across all the government agencies with all the changes that are happening.

Ms FITZGERALD: In relation to the sector as a whole, we have had meetings with the FOI agency reference group and talked to them about how the service priority review has affected machinery of government and that kind of thing. Because of the magnitude of the changes that have to occur in that regard—so we are working with them in respect of the collection of statistics for the end of this year. The commissioner has been talking to the corporate executives of the combined agencies on how to deal with the FOI process, so I do not know that I could honestly say that anything has come specifically to us in relation to it, but Alison may have more information about it as she coordinates the agency.

Ms McCUBBIN: I can advise that at the end of last year the commissioner wrote to the agencies that were amalgamating and offered a briefing just to consider the things about amalgamation. Some agencies have taken that up. One of the things that was put to those agencies is particularly the idea that, as they amalgamate, to think that FOI is still a thing that they have to keep at front of mind; as they are dealing with many things, they still have to keep that together. It is a challenge for some agencies as they amalgamate who have had separate FOI officers then to bring—one of the things we do is collect statistics for an agency as a whole. They are learning, it appears, how they can find those—not for it to be silos, but FOI to be across those amalgamated agencies. For some agencies that is harder than others as they deal with the kinds of systems even where they record it. Some agencies will have systems of recording that are hard for them to find a way that they speak to the others. As I understand it, they are working on dealing with those kinds of issues.

The CHAIR: Where a number of agencies have amalgamated into one and each had their own FOI unit, does this now mean that they are going to amalgamate the FOI units into one?

Ms McCUBBIN: I think some have. At this stage, it is anecdotal. We did write again to the amalgamated agencies and gave them—at the end of the year we collect statistical returns for all applications received and how they were dealt with. We have required one person from each agency traditionally to do that. For the amalgamated agencies, this year we have given them the option of either providing the names of their previous organisations and a contact from each or providing a single contact. Anecdotally, I think we are probably more having a single contact, so it may be that they have brought it together. We have encouraged agencies, because of that issue of being across several sectors, that there be at least clearly a single email contact for members of the public not to get lost and a single phone number if they give a phone number, so that it does not get lost in the midst of a larger agency.

The CHAIR: Have you had any follow-up to ensure that has happened?

Ms McCUBBIN: At this stage, I think we are waiting to hear what happens with the returns that we receive, but the follow-up, I suppose incidentally, is if we get a member of the public who is trying to find where to go, one of the roles is to find that contact and where they can go.

Mr PRUYN: We are waiting a little bit to see what level of difficulty we have in collating statistics. It is May now. So, come July or August, we would be much better informed as to what degree of

difficulties arise in relation to producing the relevant statistics for us so that we can report on them and then report to Parliament. So, it is a bit of a wait and see for us at the moment. We are not quite certain as to how it is going to play out.

The CHAIR: Has the Office of the Information Commissioner been provided with any additional FTEs while we go through this machinery-of-government change to handle whatever pressures may arise if you are not able to get the statistics that you need?

Ms COOMBS: No, we have not.

The CHAIR: Have there been any reductions in FTEs?

Ms FITZGERALD: At the moment there has. We did have a redundancy with the voluntary redundancies that went through. We were part of that requirement. There was one. We were only a small office to begin with. There are only 12 people. The FTE left, but there was a reshuffle and another FTE was created as a different one. But with the resignation of the previous Information Commissioner in September last year, and then you have had people move up in acting arrangements, we are short an FTE at this stage. We have to refill that.

Ms COOMBS: We are short a complaints and/or legal officer.

The CHAIR: How is that impacting on your ability to manage the workload, given that actually getting a decision on most complaints takes at least 12 months to two years?

Ms COOMBS: There is a requirement to do more with fewer resources. Yes, it is having an impact. Obviously, it is not ideal that there is that delay, but there has been a reduction in time of late in relation to the average age of complaints. If I could ask our complaints coordinator to speak to that.

[10.30 am]

Mr PRUYN: Chair, you mentioned just then 12 to 24 months, but there is a great range in age of matters that get finalised. A small portion unfortunately blow out and there are various reasons for that degree of difficulty, together with resources and also the number of matters that we have. But I could not pinpoint exactly. It depends on the case by case. We do keep records of the average age of matters on hand on a monthly basis. We have been slowly chipping away at that over the last 12 months, so it has gone down from, say, at the end of June 2017, when the average calendar days of matters on hand there were 225 days. That was a significant high for us. We have reduced that almost by half as at April 2018 to 114 days, on average. In the last 12 months or so, a significant focus had been put on ensuring that older matters did not get older and a push was a priority inside the organisation so that that did not become even worse than it was at that point. We are quite pleased with the outcome to get where we are today with the resources we have.

The CHAIR: The annual report indicates that there were 25 decisions published in 2016–17. How many decisions were published the previous year?

Ms COOMBS: If we can take that on notice please.

The CHAIR: I note that the conciliation rate is 69 per cent for the 2016–17 financial year and I am interested to know what it was the previous year. We might take all of that as question on notice 1.

Mr PRUYN: I can provide that material if you want.

The CHAIR: All right.

Mr PRUYN: If you are looking at 2015–16, is that what you are saying?

The CHAIR: Yes.

Mr PRUYN: For 2015–16, it is 70.3, so 70 per cent, and in 2016–17, it was 69 per cent. I can provide the year to date to the end of April, if that is useful.

The CHAIR: Yes, that would be great.

Mr PRUYN: We are around about 77 per cent, so we have increased it. Again, anecdotally, if that material, together with—sorry, not anecdotally—the number of published decisions is on our website and we publish and keep that up to date. All our decisions are there throughout the year, together with all our back annual reports. Our conciliation rate is one of our performance indicators and that is reported on annually as well as part of the performance indicator component inside each annual report. Part of the reason you may find that decisions will be going down is that that becomes a smaller percentage of outcome type if we increase and maintain a high level of conciliation. That means fewer matters require the information to go to a formal determination.

The CHAIR: Page 12 of the report states that applications under the FOI act for access to CCTV footage continue to raise complex issues. Can you just detail for the committee some of the issues that have been confronted in relation to access to CCTV footage?

Ms COOMBS: Quite fortuitously, there has now been a Supreme Court decision published in relation to CCTV footage. That was a decision in relation to the Public Transport Authority. The threshold question is: what constitutes personal information, particularly in relation to CCTV, and if the person in that footage is able to identify themselves, that is sufficient for it to constitute personal information or whether it is a broader more objective test. That was dealt with in the Supreme Court, which found that the Information Commissioner had erred in his initial interpretation of personal information in that he took into account a number of factors as to whether it could reasonably be said that an individual could be identified. Whereas, on appeal, it was read very narrowly and Her Honour Acting Justice Smith found that it was sufficient if an individual could identify themselves in the footage that that constituted personal information.

The CHAIR: What ramifications does that have for the whole value of the CCTV footage, given that we are investing a huge amount of money in installing CCTV cameras right across the state?

Ms COOMBS: It has very significant ramifications in that, effectively, any footage whereby an individual could identify themselves will be personal information. The onus then shifts to the applicant to show that there is a public interest in them having access to that information.

Mr PRUYN: Could I give it context though; it is in relation to a matter where CCTV is the subject of an FOI application, as distinct from how it is otherwise used, independently of it coming through the formal legislative process to our office, versus agencies cooperating, law enforcement organisations and otherwise dealing with them under memorandums of understanding, through consent or what have you. Ours is a small component of contentious CCTV insofar as somebody has sought access under the FOI act and then there is a dispute. I am not sure that we can comment on the complete ramifications of the use of CCTV across government. Ours is a very small view in relation to that.

The CHAIR: Yes, but it does have pretty wide ramifications. I will talk about one of my personal experiences. I had a constituent whose business was broken into over a long weekend. The glass front to the premises was broken. It was the third time it had happened in the space of a number of months. We have CCTV cameras on the street. He wanted access to the CCTV footage to see if they could identify the perpetrator. The police said, “It’s a long weekend; we’re not looking at the CCTV footage for a period of 72 hours, and we’re not inclined to make the demand on the City of Bunbury for the CCTV footage.” The request was made to the City of Bunbury. The City of Bunbury likewise said, “We’re not inclined to spend time looking at 72 hours of CCTV footage. If you can tell us in a smaller period of time when it was likely to have happened, then we’re prepared to look at the CCTV footage for the exact period of time.” It happened over a long weekend and he had no knowledge

of exactly when it happened. It required some pretty strong advocacy by me to get the City of Bunbury to finally allocate the time to have that CCTV footage reviewed. For an ordinary member of the public, the other option they would have would be an FOI application and you are telling us now that that would fail.

Ms COOMBS: In all likelihood, yes.

Ms McCUBBIN: There is the public interest issue, so it is not absolute but that is a difficult threshold. There is also the issue of editing. The first issue would be: does it contain personal information; if it does, then can it be edited? But part of the problem in this situation, I suppose, the very personal information that would be taken out. But that may depend on who is asking. It is difficult.

The CHAIR: It is a significant problem.

Mr PRUYN: We have to comply with precedent law.

Ms COOMBS: We are bound by the findings of the Supreme Court.

The CHAIR: We are not going to challenge those findings? There is a public interest in having the CCTV footage, and that debate has been had and won and that is that people believe that if you are in a public place, there is every likelihood there will be a CCTV camera on you observing your conduct and you should behave accordingly, but if you do not, you are likely to get covered by the CCTV camera and it may be used against you.

Ms COOMBS: The Information Commissioner does not have standing to appeal the decision; it is only the parties to the decision that have standing to appeal the decision. In this particular case, the access applicant chose not to take part in the proceedings.

[10.40 am]

The CHAIR: Possibly because of cost?

Ms COOMBS: I cannot speak to that. I can disclose that it was a media organisation, so that would not necessarily be the case.

The CHAIR: That is quite startling.

Can I just go back to the issue of the high conciliation rate? My experience through the FOI process has been that there are a number of agencies that decline to give access to documents on the basis that they do not want that information in the public domain for a period of time, so if they deny access, they can string out the process of actually providing the documents and that once you get to the conciliation phase, they then acknowledge that they had no grounds on which to deny access to the documents and the documents are provided. But usually that is so far down the track that either there has been a ministerial statement that has revealed that information in the meantime, or the information is so old that it is of no value anymore. I wonder whether there has been any review of the conciliation process and the extent to which that actually serves to frustrate the provisions of the legislation, which are intended to provide people with timely access to information.

Ms COOMBS: There has not been a formal review of the conciliation process as such. We do have that as one of the facilities available to us by way of conciliation but the concentration is on conciliating a matter before it gets to that stage. Once a matter is allocated to an officer, the role of that officer is to contact the parties without convening a formal conciliation conference and to assist the parties to come to an agreement to resolve the matter. I think that is reflected more in our fairly high conciliation rate as opposed to formal conciliation conferences.

The CHAIR: Could I just say again that through my own personal experience, I tried to access information about a new town planning scheme of the City of Bunbury. I was denied access and a long way down the track, once the town planning scheme had been finalised, the City of Bunbury was happy to release all the documentation. So, it was nothing more than a delaying tactic, which was facilitated by the Office of the Information Commissioner.

Ms COOMBS: I cannot speak to that particular case because I do not know of it. In any event, there are privacy restrictions under our act that preclude me from speaking to that particular case. But, generally speaking, certainly the emphasis is on officers contacting the parties as soon as possible. Where the officer forms a view that a matter is not exempt, the agency will be required to produce submissions to justify or assist the Information Commissioner to better understand what the basis of the claim for exemption is.

The CHAIR: May I just make a suggestion that perhaps a formal review of that process needs to be undertaken to ensure that the conciliation process is not being used by government agencies to actually frustrate the object of the act, which is to give people access to information in a timely manner. I think a review of that process is long overdue.

Going back to the CCTV footage, how many of the applications you receive are against local government authorities? CCTV cameras are monitored by local government authorities in the main. Obviously, there are some exceptions within office buildings, police stations and the like but, generally, out in the public, they are mainly monitored by local government.

Ms COOMBS: We do not have a breakdown of that particular figure, but Mr Pruyn may be able to speak to local government applications generally.

Mr PRUYN: We do not identify matters that come to us by necessarily the issue in dispute, but we do keep records of the agency type and sort of broad complaint type. For example, if it is agency it might be a department versus an authority versus a university, say, and local government, and so there are categories that we keep. So we have records of the proportion of matters that come to us on external review by agency type. I have not got those figures to hand, but I can supply them to the committee if you wish.

The CHAIR: Can we take that as question on notice 2, because given the decision that was made in the Supreme Court I think we need to understand the implications for people out there trying to access the CCTV footage.

Mr PRUYN: The figures that I provide would not necessarily answer that question about CCTV. It would purely state that, for example, if we have 100 complaints—external reviews—come to the Information Commissioner on that year, 25 per cent related to decisions of local government, and 75 for other kinds of government agencies.

The CHAIR: So you will not be able to provide us with a breakdown as to how many of the local government ones related to access to the CCTV?

Mr PRUYN: That would be very difficult. It would require an extensive assessment of every single complaint that we went through, examining those files retrospectively, and that would be a research project I think. But we would not have those figures to hand.

The CHAIR: Okay. We will cancel question on notice 2. I will not require you to do that at this point in time.

Mr PRUYN: Okay.

The CHAIR: At page 22 of the report you cover the issue of training and briefings for individuals agencies, and the information provided in the report indicates that nine FOI coordinator workshops

were run for agency staff, five decision-writing workshops were run for agency staff, and 34 general FOI briefings and trainings to agencies on site were conducted in that financial period. Can you give us an indication of how many individuals are in each of those training sessions?

Ms COOMBS: Ms McCubbin is our advice awareness officer.

Ms McCUBBIN: Yes. The FOI coordinator workshops, the maximum number that we take will be 25. It usually, though, does not fully come up to that so we range in those workshops between about 12 and 20 that actually attend. Decision-writing workshops are smaller because we try to do a little bit more discussion and to get them to engage more, I suppose, individually, and we have usually between 10 and 15 attending those. The specific numbers attending we do report on each year, and that is at the back of the annual report.

The CHAIR: Okay. All right.

Ms FITZGERALD: It is on page 94.

The CHAIR: Thank you very much. We will check that. In relation to the FOI coordinators and decision-writing workshops you indicate that there is a level of material that is provided at the workshops, and then there is some material that is made available to the FOI coordinators outside the training workshops. Could you just run through what sort of material is provided in the workshops, and what material is available outside the workshops?

Ms McCUBBIN: Prior to attending either of the workshops the participants are required to do an online sort of introduction to FOI. It is at a very basic level, and before they attend they are required to do that. That tends to try to least get everyone up to a basic understanding when they get to the training. For the FOI coordinators workshop they also use our “FOI Coordinators Manual”, which is available online, and then within the program we work to a PowerPoint so they have the PowerPoint as well and we do some exercises in it. For the decision-writing workshop they are again required to do the minimum online if they have not done it prior to that, and there is an assessment that they are required to do to show that they have done it as well. They are just required to bring the FOI act with them, and we discuss writing decisions and considering some of the key exemptions. Those participating there will get materials to take away—in a sense, the summary of how we have approached particular kinds of decision-writing. As well, both sessions are shown our website, which now has pretty well all our materials available on it. The “FOI Coordinators Manual” is available on the website, and we have publications that are more aimed at members of the public in being one-page sort of short summaries. There are fairly short summaries for agencies as well, and then more detailed investigations of some of the exemptions. They are all available on the website. We show them where those are available. We also teach them a little bit about searching the Information Commissioner’s decisions. All formal decisions of the commissioner are on the website and searchable in a variety of ways.

[10.50 am]

The CHAIR: At page 28 of the report you indicate that there is a difference in the way the contracts are written for Corrective Services and also some privately run hospitals, and that they have a different sort of contract. There is a question about the FOI act needing to be amended to close that gap to make sure that you are able to capture contractors and subcontractors, regardless of which agency they have been contracted to or which minister they have been contracted to. Has a request been made to your minister or to cabinet for drafting approval to draft the amendments that have been suggested to the act?

Ms COOMBS: Not that I am aware of.

The CHAIR: Is there a reason why that has not happened?

Ms COOMBS: I will take that question on notice.

The CHAIR: Okay. We will take that as question on notice 2. I would be interested to know. You have identified a legitimate issue here, and I think that there is no reason why the two contracts should be so different that you are actually exempted from being able to actually apply the FOI act in some instances. So it would be interesting to know what action the office has actually taken to seek those legislative amendments to the legislation and what has been the response to date. That will be question on notice 2.

In relation to page 28, we understand that an Association of Information Access Commissioners was established in 2010, and that meetings were held in Sydney in November 2016 and in Melbourne in March 2017. Can you provide the committee with any specific outcomes from those meetings?

Ms COOMBS: I would need to take that question on notice.

The CHAIR: Okay. We will take that as question on notice 3. Do you know where the 2018 meeting is being held?

Ms COOMBS: Yes. There was a meeting within six days of the Acting Information Commissioner being appointed. That took place in Adelaide, and she attended certain sessions by telephone.

The CHAIR: Again, could you just add that. We would be interested to know what specific outcomes came out of that meeting as well.

Pages 29 to 30 deal with “Strengthening Information Sharing Arrangements”—a discussion paper—and you indicate that the FOI act expressly provides that nothing in that act is intended to prevent or discourage the giving of access to documents otherwise than under the FOI act if that can properly be done, and state and local government agencies are consistently encouraged by the Office of the Information Commissioner to deal with requests for information outside the FOI process unless there is good reason not to do so. Can I tell you from my experience in opposition for nine years this very rarely happens; we are always told you have to lodge an FOI application to access any information. To what extent are agencies dealing with requests for information outside of the FOI process, and do you have any ability to gauge what that might be?

Ms COOMBS: It is difficult to gauge the extent to which local government agencies are dealing with those requests outside of the FOI process; however, I am aware that Ms McCubbin receives quite a considerable number of telephone calls from local government agencies, and perhaps Alison is in a better position to speak to that.

Ms McCUBBIN: It is a struggle with some agencies more than others, and it is a little bit about dealing with the concept of risk and people understanding that risk is also just about the resources to take to deal with FOIs. So sometimes, particularly in local governments, people will talk to a particular part—so they might talk to a ranger or to someone who is concerned very much with the information that they are trying to protect. The kind of message I give back when I get members of the public calling is get them to talk to the FOI coordinators. That is not in all situations, but the FOI coordinators tend to have a bit better of an understanding of the need to deal with issues beyond dealing with it specifically under the FOI act. There are some things that agencies do hold onto and local government agencies generally will be more prone to hold onto, but I think there is an understanding at least in some areas of the worth of giving access outside of the FOI act. Specifically actually the former commissioner, Sven Bluemmel, and I were in the Kimberley and talking with a local government, and they actually talked about the fact that they realised sometimes an FOI was the first time they heard about a problem, and that they were looking at their website about how they can try to get people to engage before they do the FOI to actually deal with the problem and work with it that way. We have had experience actually also with local governments who have

seemed to go only FOI and rely on it and that has resulted in considerable external review applications, and we have worked with that local government on a change of attitude from the top, where there was much more engagement with the people—getting them to come in and trying to answer the question. We had a significant drop in a particular local government I can think of where it was night and day, both in the attitude and understanding that it is a worthwhile process to engage, but also then the heat from the people who are trying to get information when they felt particularly sometimes it is about being heard and understood and that it is not always a block.

The CHAIR: At page 32 the report deals with the internal review process and says that sometimes agencies are left to have the principal officer of the agency to make the initial decision in relation to an access application, and the effect of this is that the internal review is not available and the only option for a dissatisfied applicant is to apply directly to the commissioner for external review. How prevalent is this practice amongst the agencies?

Ms FITZGERALD: I do not think we have any statistics on how prevalent it is. In working with agencies we had realised, or been told by that agency, that to avoid a troublesome complainant they go straight to the CEO making the decision so that they do not have to deal with them as much. That attitude was something that we were trying to discourage, or the commissioner was trying to discourage. So it is not something that we can gather from statistics. We do get statistics. It may be something that we would see if there were a lot of decisions made but no internal review decisions in their stats at the end of the year, but if we know that we have received a lot of external review applications then perhaps that would be an issue that we would see from the statistics provided. But it is not something that we actually asked agencies to let us know about. That was just something that had been flagged.

The CHAIR: From my own personal experience, the frustrating thing with that has been that not only do they get the senior officer—the agency head—to actually sign off on the decision, but they then include the notice paper which says you have 30 days within which to lodge an internal review if you are not happy with it, which just confuses people because they think they have the right to an internal review if they go through that and lodge the process, only to then find out they did not have one ever because of the way the initial decision was made. Perhaps in the training that message could be made clear to agencies, that if you are going to use this practice—using your senior officer to sign off on the decision—that you certainly should not be including the notice which says you have a right to an internal review because you do not.

[11.00 am]

Ms COOMBS: That is a message that is certainly given at the training; furthermore, if a matter comes on external review, it will invariably be picked up by our office and we will generally write to the principal officer indicating our concern at the misleading advice, effectively, that has been given to the access applicant.

Mr PRUYN: Could I give the committee a bit of context in relation some of the responses we are providing? We are only informed to the best of our knowledge on matters that come to us on external review. Just for your information, if I use, for example, say, 2016–17, across agencies 17 160 access applications were made to all agencies across government, and 124 matters came to us. So 0.72 of a ratio—not even one per cent—of matters that start life as an access application inside a government agency is brought to our attention down through the review processes. There is a middle period of the internal review. We can comment as best we can on matters that are brought to our attention. We are not very well-informed at all about the 99 per cent-plus of matters that have been dealt with, and we take it in the main very well by agencies; notwithstanding, your

personal experience. When matters come to us, we act as firmly and as quickly as we can on what we know. A lot of it is outside our knowledge base, so it is difficult to comment otherwise.

The CHAIR: At pages 44 to 45, it indicates the “Effectiveness performance indicators”. It states —

A PRQ —

Post-effectiveness review questionnaire —

was sent to 245 parties who participated in an external review process following finalisation of the review process. 181 participants returned a completed PRQ. 129 participants returned a completed PRQ. 79 response were received from agencies and 50 were received from complainants.

Could you clarify whether it was 181 or 129 participants who returned the responses, because in the same paragraph two different figures are stated? That is at page 45, just under dot point 4, the paragraph immediately underneath it.

Mr PRUYN: I would have to take it on notice, but I suggest, without confirming, that the 181 was incorrect and it should have been 129, but I will take it on notice.

The CHAIR: That is question on notice 4 for clarification

Mr PRUYN: Yes, and we could correct the record.

The CHAIR: At page 82, table 1, applications received and dealt with by the Information Commissioner, it states that 40 complaints received were invalid or informal. Can you explain to the committee what makes a complaint invalid or informal?

Mr PRUYN: It normally relates to the jurisdiction of the commissioner to deal with it as a valid complaint under the relevant section of the FOI act. We use that term “informal invalid” as a generic term, whereby somebody has, by their language, has sought the intervention of the Information Commissioner but has not necessarily satisfied all the relevant criteria to turn it into a formal complaint. It might be there it could have been an error in them following the process, which then did not make it valid, or it may be they had not been through FOI at all but, for some reason, came to the Information Commissioner and thought that the commissioner had a role in dealing with their issue. So if they sought the intervention but did not satisfy the formal jurisdiction issue, then we would give it that categorisation.

The CHAIR: Is any information provided back to the complainant about the reasons that complaint was considered informal or invalid and the process explained to them?

Mr PRUYN: Yes. There is invariably a detailed written response, either pointing out why we were not dealing with it formally and what our limited role may be; but, we also like to provide some assistance and usually there will be a reference to, if we know, another body or office who might have the relevant jurisdiction. We may direct them, for example, to the Ombudsman office or, maybe, say that they take it up with the agency directly or, alike, we will try to insert, as well as telling them why we will not be dealing with it further, as to who might be best able to assist them. That is usually part of the response.

The CHAIR: What monitoring is undertaken of agencies requests to narrow the scope? As an applicant it is really frustrating when you continually get asked by agencies to narrow the scope no matter how narrow the scope was to begin with. I see that some agencies use that process again just to string out the process and to frustrate the applicant. I am wondering what level of monitoring is undertaken by the office to determine that these processes that are specified in the act, or provided for under the act, are not actually being abused by agencies?

Ms COOMBS: Again, to put the matter into context, we only see less than one per cent of matters on formal review. My observation is that we do not have significant numbers whereby it could be said that the agency has refused to deal with an application on a frivolous basis.

The CHAIR: That goes on to my next question; and, that is, what monitoring is undertaken of the use of section 20 by agencies to refuse to deal with applications to ensure that those agencies are not abusing that power? Fundamentally, agencies just simply say, “It’s going to require us to divert too much of our resources to undertake this FOI request, so we’re not doing it”?

Ms COOMBS: Again, within the constraints of the legislation, we can only look at matters that come to us on external review. Once the matters come to us on external review, we look at them in light of section 20 of the FOI act, which sets out the criteria that an agency must justify before its decision will be found to have been correctly made. Once a matter comes to us in relation to a section-20 decision, we look at, very closely, the attempts that have been made by the parties to agree a scope. It is not necessarily the case that simply because the agency has asked an applicant to narrow a scope that they are seeking to delay. In fact, in our experience it is quite often the case that the scope is very large and the applicant either has a misunderstanding about the role of the agency in narrowing the application—by the same token there are the odd cases where the agency has not taken appropriate steps to assist the applicant to narrow the access application. But in terms of monitoring within the constraints of the legislation, we do not have a role above and beyond how we deal with external review applications.

Mr PRUYN: I think the monitoring will, as well as not have necessarily legislative power for the Information Commissioner to have an overall audit role of all things FOI—because there are quite precise powers and functions of the commissioner—it is also a resources issue. If the commissioner was given powers to have this global monitoring/auditing role, we would need significantly more resources to go out to agencies or conduct wider across-government reviews. It is not within our current capabilities even if we had the power.

[11.10 am]

The CHAIR: One of my other experiences with the FOI process is that you put in an application for an FOI; you receive the decision from the agency, which indicates that you have access to certain documents and other documents you have been denied access to, or you have been given part access to the documents. So the time runs on the ability to lodge an internal review application or an external review application from the time that you get the decision, but the documents are not included. The ones that you get access to are not included with the decision. They require you to make a payment before you can actually get access to the documents. A lot of the agencies do not have a mechanism for you to make the payment online or over the phone with your credit card, so you have to write a cheque and that needs to go through Australia Post, which takes over a week. They then receive that. They take time to process that and then post back to the applicant the documents to which access has been provided. By the time that process is completed, the 30 days for an internal review application are over, so the applicant has had to lodge an application for internal review without access to the documents. So in relation to the documents that you have been denied access to, it is reasonably easy enough to make the argument; but the ones where you have only been provided with part access, until you see those documents, it is very hard to lodge an argument for a ground of internal review or external review. So the applicant is being placed in an impossible position to actually comply with the requirements of the act when those sort of tactics are being used by government agencies. It seems to me that this needs to be reviewed and fixed because it is a very serious problem. I have written to the Information Commissioner in the past about this and suggested that the act needs to be reviewed. I have had no response to that letter. I

just want to put it to you: is there any intended review of the act happening any time in the foreseeable future because there are, clearly, deficiencies with the act that need to be addressed?

Ms COOMBS: All I can say in relation to that is that, unfortunately, I am not aware of your letter. Perhaps if you could give me a date?

The CHAIR: It will be a few years old now. It would have been a number of years ago now.

Ms COOMBS: Anecdotally, I am not aware of that occurring. A lot of agencies do take as far as I am aware—Alison perhaps you could assist me here—will accept credit cards.

Ms McCUBBIN: It is varied, and I think it is a challenge for some, finding out how to pay. I think that in these days it is—I have received from members of the public complaints about, “Why can’t I pay?” The response in a way is, “We don’t have a role.” I have said, “We don’t have a role in that.” Sometimes I will at least try to ensure that there is a way that they have the right person to contact so the money can be paid, but we have not been involved in requesting a review.

The CHAIR: The problem is twofold: it is also that Australia Post is now taking longer, surprisingly, to deliver mail than they have in the past.

Ms COOMBS: Yes, I am acutely aware of that.

The CHAIR: That compounds the problem, and, really, those time periods need to be reviewed because in some circumstances it is making it absolutely impossible for an applicant to actually lodge an internal or external review within the time period provided. Let me assure you that the Information Commissioner is not very forgiving if you lodge an application outside the time period; in fact, none of mine have been accepted outside of the time period. So it really is a case that that needs to be addressed, given the fact that Australia Post is now taking so long to deliver documents. In some cases, where the request is generating access to a number of documents, the agencies are also taking their time to photocopy the documents and then put them in the post. So it is an issue.

Ms COOMBS: I agree. However, if the applicant made it clear that they did not get the documents when they got the decision, then the discretion of the Information Commissioner could well be exercised differently.

The CHAIR: I have not had any experience of other than the exact time lines being enforced to the letter. That has been my experience under the FOI act.

Mr PRUYN: The other issue is whether or not to protect your interests, do you apply for an internal review in the absence of the documents, notwithstanding the process that you described as being difficult, with postage and payment, to preserve your internal review right and then administratively give the agency a hurry up in relation to producing documents and accepting payment by certain means? If you are displeased with the attitude of an agency, it is the kind of issue that our office has a broad role in relation to informing agencies of the way in which they should deal with the legislation. We can be more coercive in suggesting to agencies that they are putting an artificial impediment to the process. We have a high success rate on bringing things to agencies’ attention when we know of it.

The CHAIR: Can I just say that I have had to lodge external review applications without citing the documents in order to comply with the time frames, and that is a ridiculous position for anyone to be put in. I just say that I think that really needs to be looked at.

At page 34 of the report, the table shows a decline from 2013 to 2016 in full access decisions, with a slight increase in 2017. What do you think are the reasons for the decline in full access decisions that are indicated between 2013 and 2016?

Ms COOMBS: I am not able to isolate any trends. I do not know if my colleagues could assist there.

Mr PRUYN: I do not think it is appropriate for us to speculate the rationale as to why agencies are doing that. I go back to what I described earlier. That table is drawn on statistics provided to us where we get raw statistics where agencies say how much they have given access, either in full or edited or what have you. We do not have a narrative that goes with that across agencies, of the many hundreds of agencies that we have to deal with, so we do not know whether there have been changes in policies or what. I do not think we could attempt to explain it.

Ms McCUBBIN: I could perhaps add, though, again, it is about FOI applications. As an agency takes on more administrative release outside of FOI, it will mean that decisions that come under FOI are put there because there is more sensitivity. Particularly with Health, Health has taken on more of a proactive release outside of freedom of information and they are encouraged to save FOI for the harder stuff. There has been a drop—I am not sure of those years—for a while in the number of FOI applications received by the Department of Health or health-related agencies, which are a very big proportion of our applications altogether. If they are doing more outside of FOI, it saves the ones for FOI, which means there will be a high proportion, maybe edited to some extent.

The CHAIR: For each of the last five financial years, how many out of time applications were permitted to proceed? Can you take that as question on notice 5 because I do not expect you to have the answer to that now.

Ms McCUBBIN: Is that out of time for an external review?

The CHAIR: Yes.

Mr PRUYN: We will take that on notice.

The CHAIR: Also, would you have the records for external applications that were allowed to proceed out of time for internal reviews where an external review application had been made? You would not track that level of information?

Mr PRUYN: No. The two relevant provisions of the FOI Act are sections 66(4) and 66(6) where a person applies outside the 60-day period or somebody may apply without having completed an internal review. If the material before us is clear that it fits within one of those categories, we would assign that category within the database and we would have a record of the outcomes. We can provide that information if it directly relates to that category.

The CHAIR: That would be helpful. Thank you.

At page 83, I note that the Information Commissioner received a significant number of complaints that were made against WA Police. Are you able to indicate to the committee the nature of the complaints or the nature of the information that was being sought?

[11.20 am]

Mr PRUYN: Only if it went on decision. We would be limited by the confidentiality of the complaints process to describe the specific circumstances.

The CHAIR: Let me ask the question differently then. Would you be able to indicate to the committee what percentage of those complaints related to an investigation by the police internal investigation unit?

Ms COOMBS: We do not capture that statistic.

Mr PRUYN: That would require going through those individual files and assessing those files. Every complaint matter that we have—external review—is a case by case. The back story, so to speak, that varies entirely. We do not attempt to put them into a category as to whether or not it relates to somebody not getting access to the health records or whether or not they were subject to the

law enforcement matter or they have an inside agency dispute with industrial relations. We do not capture the generic nature of the underlying dispute. We do not keep that material.

The CHAIR: In 2016–17, 15 complaints were received against WA Police. Would it be too much to ask that those files be reviewed and you advise the committee how many of those related to a complaint against a decision by the police internal investigation unit? You can take that as a question on notice if you need to get some legal advice on that.

Mr PRUYN: I think we may have to—what our limitations are.

The CHAIR: We will take that as question on notice 6.

Are you able to advise the committee how many complaints the Information Commissioner received against WorkSafe in 2016–17? I did not see it listed in the agencies that were listed in the appendix and I do not know whether it would come under the department of commerce.

Mr PRUYN: Complaints by agency name, we normally would publish that. We should be able to.

The CHAIR: We will take that as question on notice 7.

For each of the five last financial years, how many complaints were received against WorkSafe? This other question is likely to give the same answer I have been given to date but I am going to ask it anyway just to put it on the record. What monitoring is undertaken of the fees charged by agencies for access to documents under the FOI process? I have to tell you that I have been stung with some pretty hefty fees.

Ms COOMBS: Again, within the confines of the act, we can only review a matter if it comes to us on external review.

The CHAIR: Fair enough. I thought I might get that answer. You will be grateful to know that that is the end of my questions and the rest of my committee members do not have any further questions. Are there any concluding comments that you would like to make to the committee?

Ms COOMBS: No, thank you, Madam Chair.

The CHAIR: I need to remind that your transcript of evidence will be forwarded to you and you will be given an opportunity to make any corrections to that transcript of evidence and return it back to the committee. In relation to the questions taken on notice, we ask that you provide the answers to those questions at the same time as you return your transcript of evidence with the corrections. However, if you require some additional time for some of those questions that are a little more complicated or going to take a bit more time, just notify the committee and I am sure that an extension of time will be granted.

Ms COOMBS: Thank you. We would appreciate that.

The CHAIR: You are also invited to provide any additional information or to elaborate on any answers that you have given once you look at the transcript or to provide supplementary evidence if you think it is appropriate at that time. Thank you very much for coming this morning; it is much appreciated.

Hearing concluded at 11.24 am
