
**A Study of Freedom of Information
Requests in Western Australia
2002-2007**

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Abstract

Freedom of Information Acts have become an important tool for private citizens, the free press and public commentators to ensure governments are open, transparent and accountable in modern democracies. The health of FOI and the inability of governments to exercise untoward discretion in FOI decision making for political purposes are key measures of the strength of the democratic process. It is argued that the outcomes of FOI requests, which can be the subject of considerable discretion, are an appropriate proxy for overall government openness, transparency and accountability. The study analyses data reported to the Western Australia State Parliament during 2002-2007 by the Office of Information Commissioner that shows that an increasing percentage of FOI requests were either refused or individual applicants only permitted partial access to documents held by the Government of Western Australia.

This study lends support to the proposition that the Gallop and Carpenter Labor Governments oversaw a period of decreased government openness and decreased government transparency in Western Australian history.

Introduction

Freedom of Information Acts have become an important tool for private citizens, the free press and public commentators to ensure governments are open, transparent and accountable in modern democracies, suggests (Puddington 2007).

Much public comment has been addressed in recent years to the actual, apparent, or lack of, government openness, transparency and accountability in Western Australia. Events could be said to culminate in the WA Police raid on *The Sunday Times* newspaper offices on 30 April 2008 (Buckley-Carr, 2008), and the ongoing public stoush between *The West Australian* newspaper and Hon. Jim McGinty MLA, who was Attorney-General and Health Minister at the time (Gosch, 2008). While other studies (Himmelboim 2008) have shown that the concern journalists express about their freedom is not necessarily related to the actual level of freedom of the press prevailing in their respective countries, no quantitative analysis of the openness or transparency of government in Western Australia has been conducted recently to the knowledge of the author.

This study attempts to fill that gap by conducting a quantitative analysis of the data on FOI requests and their ultimate outcome over the last five years, with a view to confirm or dispel the anecdotal reports of excessive government secrecy in Western Australia.

The *Freedom of Information Act 1992* (WA) and the access procedures it creates are dealt with in Chapter 1. The methodology of this study and data sources are discussed in Chapter 2. The results and analysis of the data and any trends are presented in Chapter 3. Chapter 4 presents a summary of conclusions of this study. Finally References and an Appendix containing the data can be found after the conclusions in Chapter 4.

1. ***Freedom of Information Act 1992 (WA) Regime***

In Western Australia the State Parliament enacted the *Freedom of Information Act 1992* to create and govern the Freedom of Information process. Further rules are contained within the accompanying State legislation entitled *Freedom of Information Regulations 1993*.¹

Foremost, this Act establishes in section 10(1) a person's right to be given access to the documents of a State government agency – being a Minister, or public body or office – that is not an exempted agency, subject to and in accordance with the Act itself.

Furthermore the Act specifies an important protection in section 10(2) that a person's right to be given access is not affected by (a) any reason the person gives for wishing to obtain access; or (b) the agency's belief as to what are the person's reasons for wishing to obtain access.

To oversee the FOI process across all of government the Office of Information Commissioner ("OIC") was created under the *Freedom of Information Act 1992* to educate the public of its FOI rights, advise government departments of the administrative steps to comply with their FOI obligations and deal with complaints about internal review decision made by government agencies in respect of access applications.

The Freedom of Information Guidelines document published by the OIC describes the steps in a FOI application's lifecycle.²

¹ Both pieces of legislation can be accessed online at <http://www.slp.wa.gov.au>

² http://www.foi.wa.gov.au/Materials/Guidelines_Brochure.pdf

Application

Persons have the right to apply for access to documents held by Western Australian state public sector agencies, including ministers, government departments, statutory and local authorities.

An application must be lodged in writing and give enough information to enable the requested documents to be identified, give an Australian address to which notices may be sent, and be lodged at the office of the agency which is reasonable expected to hold the documents along with any application fee payable as per section 12(1)(a)-(e).

Procedure for dealing with access applications

Once a FOI application is received by a government agency the agency has to deal with the access application as soon as is practicable by considering the application and deciding (a) whether to give or refuse access to the requested documents, and (b) any charge payable (if any) for dealing with the application per section 13(1). The applicant must be given notice of the decision in the form required by the Act.

The proposition that governments should be as open and transparent to their citizens as possible, and that governments should naturally expect less privacy than citizens as a policy setting (as suggested by Farr 1998) is deeply rooted in the objects of the legislation. However, it is acknowledged by the Act in section 23 that there are circumstances on which an application may be refused on the basis that the document itself is an exempt document, the document is the subject of an exemption certificate, the agency as a whole is exempt, the document is not a document of the agency or giving access to the document would contravene a limitation referred to in section 7 of the Act.

One of the most powerful grounds for exemption to access is a Part 2 Division 4 Exemption Certificate signed by the Premier, which establishes, without the

need for further proof, that the document mentioned in the certificate contains matter that is exempt matter under the provision mentioned in the certificate, or would, if it existed, contain matter that would be exempt matter under the provision so mentioned, per section 37(1). Such a certificate operates for two years, with an unlimited option for renewals. Review of such Exemption Certificates is only possible through an appeal to the OIC or Supreme Court of Western Australia.

Within this gambit of exemption to public access to documents exists significant discretion on the behalf of ministers or public sector employees to decide whether a document will be made public. Furthermore, there are potential conflicts of interest when this process (which thus far is internal to the agency which holds the document) and Internal Review is being carried out by the same party that may have an interest in non-disclosure or the 'spin' on communications (Roberts 2005). As will be seen below, there are avenues for External Review of access decision by the independent Office of Information Commissioner, however it will be argued its powers to overturn Internal Review decisions in minimal.

Anecdotally, there have been increasing concerns within the press and public commentators that the Government of Western Australia had become increasingly secretive over the period of this study (2002-2007), in part because of an increase in the refusals of Freedom of Information Requests.

Review of Freedom of Information decisions

Once an applicant has received the decision of the government agency in relation to the application, an aggrieved applicant can request the agency review the decision, per section 39(1). This is termed an Internal Review, as it is conducted by the same agency – albeit now to be considered by a person who did not deal with the original decision or is subordinate to that person. On an application for review the agency may decide to confirm, vary or reverse

the decision under review; and there is no fee or other charge payable for an Internal Review.

Subsequent to the completed Internal Review, an external review can be initiated upon complaint to the OIC in the form required by section 66 of the Act. These proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Commissioner permit per section 70(2). Furthermore, the Commissioner is not bound by the rules of evidence. The Commissioner is given wide powers to determine the procedure for investigating and dealing with complaints and may give any necessary directions as to the conduct of the proceedings, which would include dealing with the complaint without holding formal proceedings or hearings, direct that all submissions are to be in writing or require parties to attend compulsory conferences, per section 70.

Disclosure or access to documents

Should the government agency not object to the FOI application access to the document will be given to the applicant. As stated above some documents that are deemed to protect public interests may be exempted. Personal information about other people or the commercial or business affairs of others are examples provided by the OIC Guidelines.

Partial disclosure may also be granted where the document contains some information considered to be exempted.

2. Methodology

As specified above, the Office of the Information Commissioner was created under the *Freedom of Information Act 1992* to primarily deal with complaints about internal review decision made by government agencies in respect of access applications and applications for amendment of personal information.

As the Office of the Information Commissioner (OIC) is an external reviewer of FOI applications received by all government agencies it is uniquely placed to collect data on the operation, efficiency and ultimate result of each application made to the broader WA government and public sector agencies.

In carrying out these functions the OIC prepares and presents to Parliament each financial year an Annual Report outlining *inter alia* a report on operations, performance indicators, financial statement and statistical tables. These Annual Reports are publicly available in both hardcopy and electronic copy from the Office of Information Commissioner's website.³ For this study these Annual Reports were relied upon to acquire the statistical data on FOI requests received by agencies and the decision made in relation to the person's application. The Annual Reports have adopted a consistent format and reporting method for the duration of the study, and on this basis comparisons and quantitative analysis across the five year period are valid.

The data was as reported in the Office of Information Commissioner's Annual Reports covering the period of time 2003-2007. This data source included figures on:

- The total number of Freedom of Information requests received, broken down by the agency the application was lodge at;

³ <http://www.foi.wa.gov.au/publications.htm>

- The raw number and percentage of access decisions resulting in (a) access in full, (b) edited or partial access, (c) access deferred, (d) access s.28, and (e) access refused.
- The number of times exemption clauses were used by an agency or minister.
- Key performance indicators (such as satisfaction of parties with external review process, satisfaction of agencies with advice and guidance provided)

The data available was divided into the whole-of-government records, and a subset of ministerial and Department of Premier & Cabinet records for comparative analysis.

The period of time encompassing the Annual Reports of 2002-2007 was chosen primarily because it constituted the information available at the time of this study over the preceding five years. As a convenient secondary benefit, this period of time also correlated as best as possible to the terms of two State Government administrations, being the centre-left Gallop and Carpenter Labor Governments. The Gallop Labor Government was sworn into office on 16 February 2001. Dr Geoff Gallop stood down as Premier on 25 January 2006, making way for fellow party member Alan Carpenter to be sworn in as Premier immediately. The Carpenter Labor Government was defeated at the general elections on 6 September 2008.

Data from the performance indicators and statistical tables of the Annual Reports was of most interest. Where necessary to produce the subset of FOI applications made to Ministers and the Department of Premier & Cabinet this was created by comparing the record of Cabinet Ministers available from Parliament House to the OIC dataset imported into the Microsoft Excel software program.

The spreadsheet package allowed quantitative analysis of the dataset, and better graphical visualisation of trends than the purely tabular presentation in the OIC Annual Reports.

3. Results and Analysis

The data was as reported in the Office of Information Commissioner's Annual Reports covering the period of time 2003-2007. This data source included figures on:

- The total number of Freedom of Information requests received, broken down by the agency the application was lodge at;
- The raw number and percentage of access decisions resulting in (a) access in full, (b) edited or partial access, (c) access deferred, (d) access s.28, and (e) access refused).
- The number of times exemption clauses were used by an agency or minister.
- Key performance indicators (such as satisfaction of parties with external review process, satisfaction of agencies with advice and guidance provided)

The data available was divided into the whole-of-government records, and a subset of ministerial and Department of Premier & Cabinet records for comparative analysis.

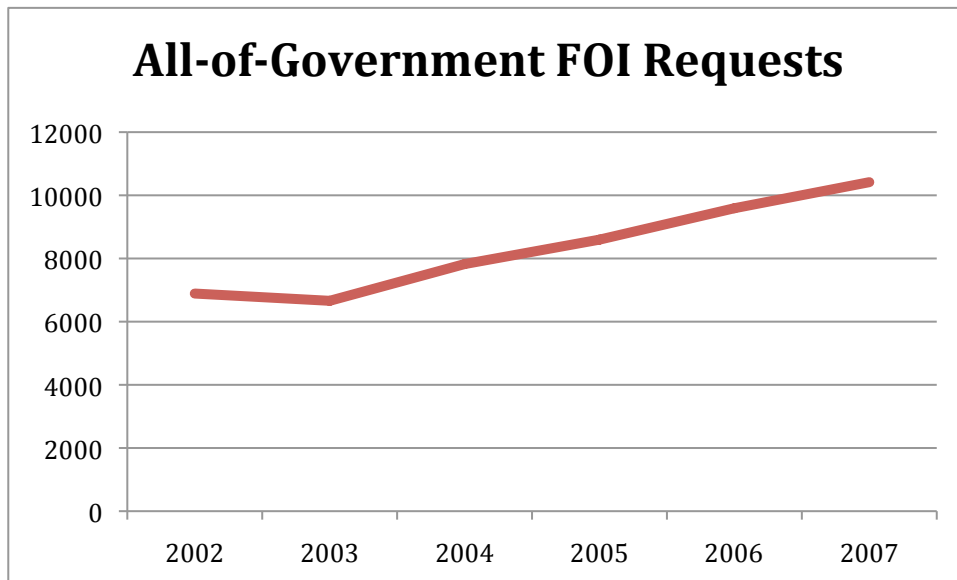


Figure 1 – Source OIC Annual Reports 2002-2007

The number of Freedom of Information requests over the time period has risen from 6,890 in 2002 to 10,416 as seen in Figure 1. This is unsurprising, as the overall Western Australian population has increased, and arguable so too has the public awareness of the FOI process and individuals' rights to access.

The effect of this growth was negated by comparing the percentage figures of each possible decision in relation to FOI requests, allowing us to 'see through' to the underlying trends in the openness and transparency of government in Western Australia.

As seen in Figure 2 the occurrences of access refusal across the whole-of-government has risen markedly during the study period, from 4.8% of FOI applications in 2002 to 10.9% in 2007. When examining the subset of ministerial and Department of Premier & Cabinet FOI requests, where it is posited exists the greatest political incentive for secrecy, the increase in access refusals is greater as seen in Figure 3.

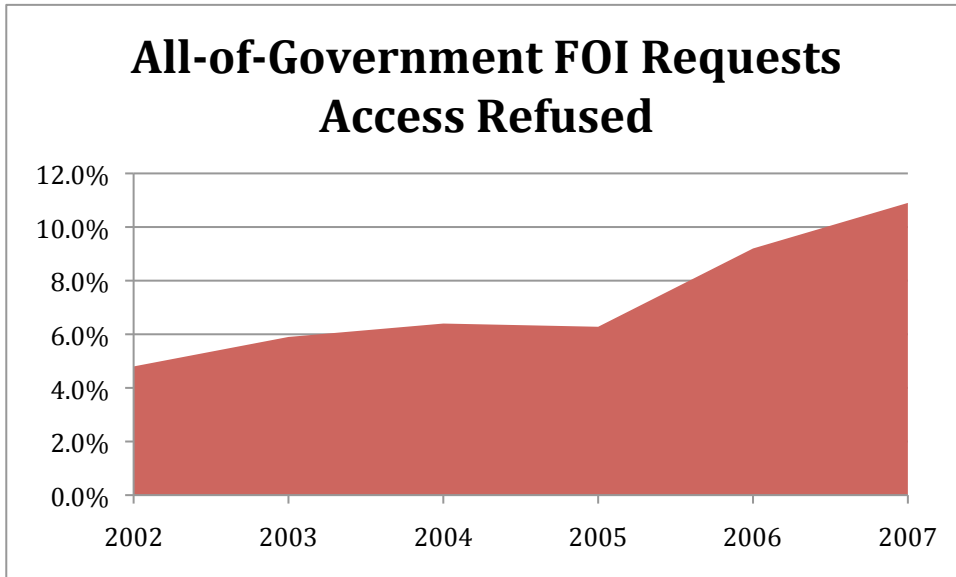


Figure 2 - Source OIC Annual Reports 2002-2007

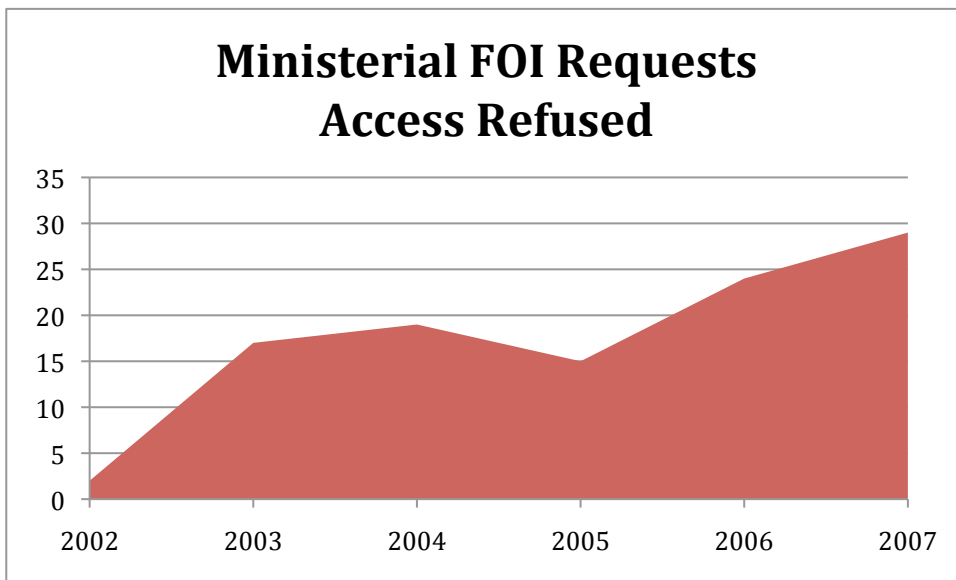


Figure 3 - Source OIC Annual Reports 2002-2007

While outright refusal to access documents could be considered the headline proxy measurement for government secrecy, the prevalence of incomplete disclosure – that is anything less than full disclosure, e.g. edited access and/or refusal – further shows the increase in government secrecy. Incomplete disclosure has risen from 30.6% in 2002 to 46.4% in 2007 across the whole-of-government, Figure 4.

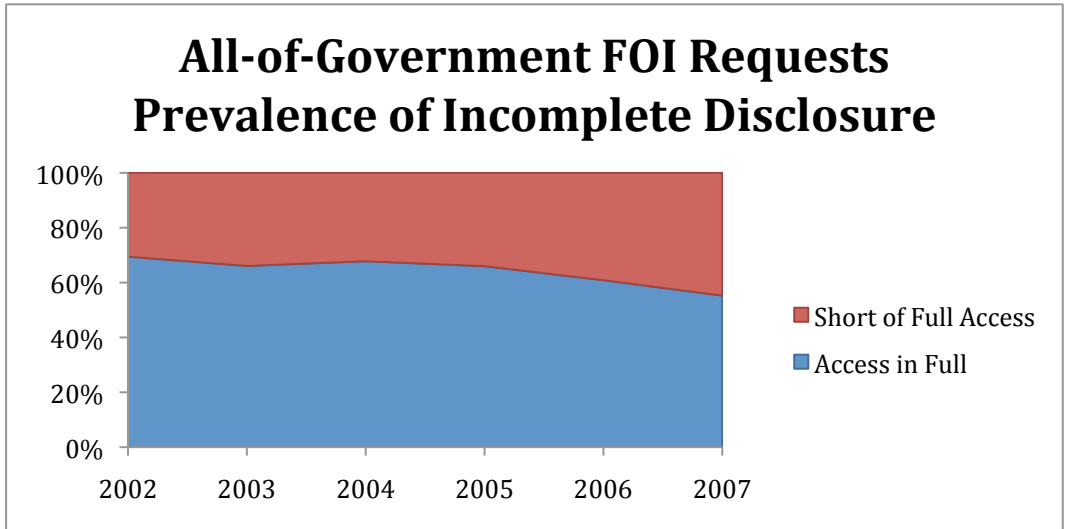


Figure 4 - Source OIC Annual Reports 2002-2007

A similar trend towards incomplete disclosure can be seen in FOI requests directed to ministers, in Figure 5. While the counter argument may be presented that incomplete ministerial disclosure fell in 2007, this should be viewed in the light that overall FOI requests to ministers in fact fell in 2007. This appears a curious result, as whole of government FOI requests continued to rise in 2007, why should ministerial FOI requests have fallen? It could be explained in light of ministerial offices referring requests to their respective department towards end of the study period. This is deserving of further research. Regardless, there remains a marked increase in the inability for private individuals to gain access to documents during the terms of the Gallop and Carpenter Labor Governments in Western Australia.

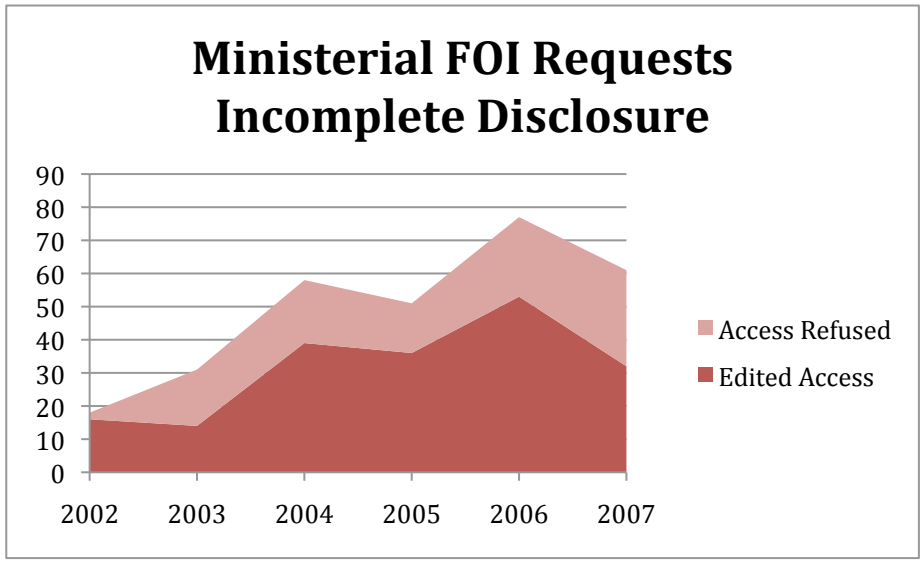


Figure 5 - Source OIC Annual Reports 2002-2007

The Key Performance Indicators of the OIC show quantitative support for the anecdotal view that FOI system users became increasingly frustrated and dissatisfied with the secrecy of WA Government during 2002-2007.

The Office of Information Commissioner asks persons seeking external review to complete a survey at the conclusion of their appeal. The OIC sets itself a target each year in relation to the measure “Satisfaction of parties with the OIC external review process”, see Figure 6. During 2002-2005 the OIC consistently failed to meet its own KPI target, and ultimately in 2006-2007 began to reduce its KPI target, to be a better measure of its relative performance year to year. Satisfaction with the external review process by applicants fell so much in the last years of the study that the OIC even failed to meet its (already reduced) satisfaction target in every remaining year.

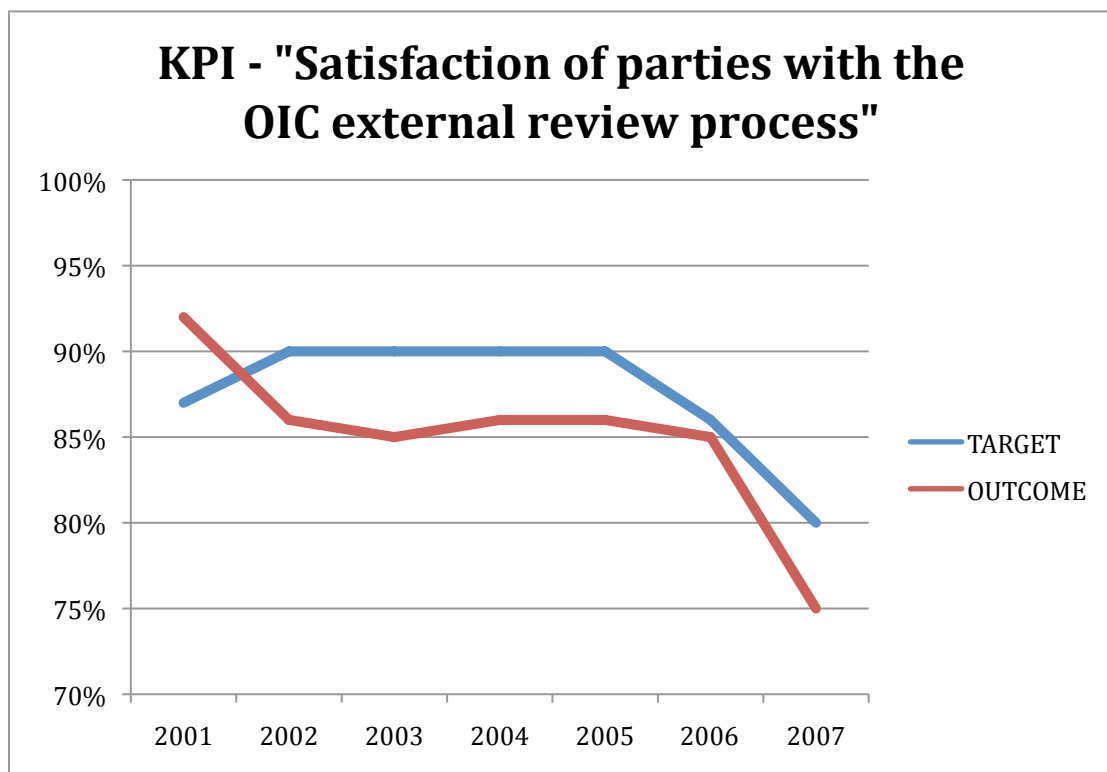


Figure 6 - Source OIC Annual Reports 2001-2007

4. Conclusions

This report presents the first known quantitative analysis of Freedom of Information performance in Western Australia over the period 2002-2007. Analysis of data reported to State Parliament during this period by the Office of Information Commissioner shows that an increasing percentage of FOI requests were either refused or persons only permitted partial access to documents held by the Government of Western Australia. It is argued that the outcomes of FOI requests, which are the subject of considerable discretion, are an appropriate proxy for overall government openness, transparency and accountability.

This study lends support to the proposition that the Gallop and Carpenter Labor Governments oversaw a period of decreased government openness and decreased government transparency in Western Australian history.

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Office of Information Commissioner

Summary Statistics - Annual Reports 2001-2007
<http://www.foi.wa.gov.au/Publications.htm>

Effectiveness (of OIC)							
Satisfaction of parties with the external review process							
	2000	2001	2002	2003	2004	2005	2006
TARGET OUTCOME	88%	87%	90%	90%	90%	90%	86%
ACTUAL OUTCOME	86%	92%	86%	85%	86%	86%	85%
Satisfaction of agencies with advice and guidance							
TARGET OUTCOME	98.0%	98.0%	98.0%	98.0%	98.0%	98.0%	98.0%
ACTUAL OUTCOME	98.0%	98.0%	98.5%	100.0%	100.0%	98.0%	97.0%

Efficiency (of OIC)							
Average cost of external reviews finalised							
	2000	2001	2002	2003	2004	2005	2006
BUDGET	\$5,044	\$3,552	\$4,779	\$4,642	\$4,325	\$5,413	\$4,166
ACTUAL	\$5,380	\$5,321	\$4,206	\$4,645	\$4,812	\$5,413	\$5,270
Aggregate FOI requests							
TOTAL	6509	6890	6660	7823	8597	9591	10416

All of Government FOI Requests							
Decisions made regarding these FOI requests							
	2001	2002	2003	2004	2005	2006	2007
Access in Full	68.5%	69.6%	66.0%	67.8%	66.0%	60.8%	57.3%
Edited Access	25.2%	25.1%	27.4%	25.4%	27.3%	29.7%	31.5%
Access Deferred	0.4%	0.4%	0.3%	0.2%	0.3%	0.1%	2.0%
Access s.28	0.3%	0.3%	0.3%	0.2%	0.2%	0.1%	2.0%
Access Refused	5.6%	4.8%	5.9%	6.4%	6.3%	9.2%	10.9%
Short of Full Access	31.5%	30.6%	33.9%	32.2%	34.0%	39.1%	46.4%

Ministerial FOI Request							
All Ministers of the Crown, and Department of Premier & Cabinet.							
Note this does NOT include the respective Department of each Minister							
	2001	2002	2003	2004	2005	2006	2007
TOTAL	49	29	58	79	60	113	86
Access in Full	21	11	27	21	8	36	25
Edited Access	9	16	14	39	36	53	32
Access Deferred	0	0	0	0	1	0	0
Access s.28	0	0	0	0	0	0	0
Access Refused	19	2	17	19	15	24	29
Short of Full Access	31.5%	30.6%	33.9%	32.2%	34.0%	39.1%	46.4%

Appendix – OIC Annual Report Data