To release or not to release that is the question: A phenomenological study of Western Australian government freedom of information coordinators

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"TO RELEASE OR NOT TO RELEASE THAT IS THE QUESTION"
A PHENOMENOLOGICAL STUDY OF WESTERN AUSTRALIAN GOVERNMENT FREEDOM OF INFORMATION COORDINATORS

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AUGUST 2001
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ACKNOWLEDGEMENTS

When first discussing a thesis topic with my supervisor, Charles Edwards, he advised wisely that my chosen subject should be one that would hold my interest. He counseled that I would be living intimately with the topic for a prolonged period. No truer words have been spoken.

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>COVER PAGE</td>
<td>1</td>
</tr>
<tr>
<td>COPYRIGHT AND ACCESS DECLARATION</td>
<td>2</td>
</tr>
<tr>
<td>PLAGIARISM DECLARATION</td>
<td>3</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>4</td>
</tr>
<tr>
<td>TABLE OF CONTENTS</td>
<td>5</td>
</tr>
<tr>
<td>LIST OF FIGURES &amp; TABLES</td>
<td>7</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>8</td>
</tr>
<tr>
<td>CHAPTER ONE - THE STUDY</td>
<td>9</td>
</tr>
<tr>
<td>1.1 INTRODUCTION</td>
<td>10</td>
</tr>
<tr>
<td>CHAPTER TWO - LITERATURE REVIEW</td>
<td>13</td>
</tr>
<tr>
<td>2.1 LITERATURE REVIEW</td>
<td>14</td>
</tr>
<tr>
<td>2.1.1 Development of FOI in Australia</td>
<td></td>
</tr>
<tr>
<td>2.1.2 Pre and Post Implementation of FOI</td>
<td></td>
</tr>
</tbody>
</table>
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>CHAPTER THREE - THE RESEARCH</td>
<td></td>
</tr>
<tr>
<td>3.1</td>
<td>3.1 CONCEPTUAL FRAMEWORK</td>
<td>32</td>
</tr>
<tr>
<td>3.2</td>
<td>3.2 RESEARCH APPROACH</td>
<td>34</td>
</tr>
<tr>
<td>3.3</td>
<td>3.3 RESEARCH METHODOLOGY</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>3.3.1 Research Stages</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3.3.2 Agency / Participant Selection</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3.3.3 Research Integrity</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3.3.4 Research Limitations</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3.3.5 Reflections of Approach, Methodology and Processes</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>CHAPTER FOUR - THE NARRATIVES</td>
<td></td>
</tr>
<tr>
<td>4.1</td>
<td>4.1 NARRATIVE APPROACH</td>
<td>45</td>
</tr>
<tr>
<td>4.2</td>
<td>4.2 NARRATIVES</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>4.2.1 The FOI Act 1992</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4.2.2 Integration of FOI into the Public Sector</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4.2.3 Document Release Outside the FOI Process</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4.2.4 FOI Process</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4.2.5 Resourcing of FOI Coordinators</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>CHAPTER FIVE - THE ANALYSIS</td>
<td>106</td>
</tr>
<tr>
<td>5.1</td>
<td>5.1 ANALYSIS</td>
<td>107</td>
</tr>
<tr>
<td>6</td>
<td>CHAPTER SIX - THE SUMMARY</td>
<td>139</td>
</tr>
<tr>
<td>6.1</td>
<td>6.1 SUMMARY OF FINDINGS</td>
<td>140</td>
</tr>
<tr>
<td>7</td>
<td>CHAPTER SEVEN - THE CONCLUSION</td>
<td>159</td>
</tr>
<tr>
<td>7.1</td>
<td>7.1 CONCLUSION</td>
<td>160</td>
</tr>
<tr>
<td></td>
<td>REFERENCES</td>
<td>164</td>
</tr>
<tr>
<td></td>
<td>APPENDICES</td>
<td>177</td>
</tr>
</tbody>
</table>
LIST OF FIGURES

FIGURE ONE - SCHEMATIC REPRESENTATION OF FOI COORDINATORS' WORLD-VIEW 33

LIST OF TABLES

TABLE 1 – APPLICATION NUMBERS 90

TABLE 2 – COMPLAINTS DEALT WITH BY THE INFORMATION COMMISSIONER 90

TABLE 3 – FORMAL APPEAL DECISION OUTCOMES 90
ABSTRACT

This study explores the issues that impact on Western Australian State Government Freedom of Information Coordinators who, within the framework of the Freedom of Information Act (1992), manage requests from the public to access agency held documents.

A literature review identified two bodies of material. One extolling FOI, the other arguing that some agency personnel have not accepted, and are actively resisting, the concept of FOI. Using a phenomenological approach, eight Coordinators narrated the issues that impact on their roles and decision-making processes. Themes were identified, analysed and reported in the context of the broader FOI environment.

This research found that Coordinators face significant challenges, including the adequacy of the Act; Public Sector and agency culture; relationships with applicants, consultants and third parties; FOI and records management legislation and practices; and the roles and training of agency FOI practitioners, that is, both Coordinators and agency Internal Review Officers.

In conclusion, the study asserts that many of the possible solutions to the identified issues are within the Coordinators' and their agency's control, such as implementing general document release policies that will reduce workloads and make public accessibility to documents easier. However, the resolution of other problems will require the willingness of, and a commitment by, the Western Australian Government, Parliament and senior bureaucrats.
CHAPTER ONE

THE STUDY
1.1 INTRODUCTION

In managing public requests to access government documents under FOI legislation, Freedom of Information Coordinators (FOI Coordinators) are required to balance the sometimes conflicting roles of being a gateway to, and the guardian of, government held documents. Despite their pivotal role in the operation of the legislation, minimal research has been conducted into the relationship between Coordinators and their internal and external environments.

As discussed in the literature review (Chapter Two), material relating to FOI is essentially limited to two main streams. The first originates from government sources and reports on the benefits associated with the FOI concept and details the operation of the legislation. The second stream emanates from academics, legal practitioners and users of the legislation, and identifies a culture of secrecy in the Public Sector and a resistance by some agency personnel to accept the FOI concept.

The purpose of this study is to gain a better understanding of the weltanschauung of FOI Coordinators. This research is significant in that it provides an insight into the little reported world of Coordinators generally, and Western Australian State Government Coordinators specifically. In doing this, the research confirms and advances contemporary literature relating to FOI and records management legislation and administrative practices, and Public Sector secrecy.
Unlike much of the existing research into FOI that has used quantitative methodologies to focus on legalistic and case law aspects of FOI, this study used a qualitative approach to explore the social science aspects of FOI. As discussed in Chapter Three, Symbolic Interaction formed the conceptual framework upon which this research was grounded, while a phenomenological approach was used to acquire from eight FOI Coordinators their beliefs about the issues that impact on their roles, functions and decision-making processes.

Using Colaizzi's (1978) coding process, common themes and trends were identified from the participating Coordinator's narratives. Chapters Four and Five discuss and analyse the themes and trends. Key findings of the study include:

- Although the FOI Act (1992) has been in operation for almost ten years, the Act continues to operate in isolation to other legislation. The Act also exists within a government framework that contains administrative instructions and practices that conflict with the concept of FOI.

- Various provisions of the FOI Act (1992) are inadequate. These range from unclear definitions, such as 'personal information' and 'public interest', a lack of clarity as to the ownership of documents created by consultants, to uncertainty when applying exemptions used to withhold documents from being released into the public arena.
• Despite recommendations to amend the FOI Act (1992) from a statutory review, findings from a Royal Commission and ongoing requests from the Information Commissioner, practitioners and users of the Act, successive governments have not placed a high legislative priority on effecting substantial amendments.

• Agency personnel and consultants, although being aware of the FOI legislation, continue to be reluctant to release documents to the public. This situation is never so precarious than when senior managers do not cooperate with FOI Coordinators.

• Although communication between FOI Coordinators, applicants, third parties and personnel is sometimes difficult and strained, the greatest challenge for many agencies in processing an application is identifying and locating documents.

• Despite the increasing number and complexity of FOI applications being processed, some agencies do not regularly review the duties, workloads and performance of their FOI practitioners. This situation is exacerbated by a lack of succession planning and the absence of a comprehensive and structured training program.

• Some Ministers of the Crown require agencies under their control to provide them with details of FOI applications received, including the identity of applicants and the documents being sought.
CHAPTER TWO

LITERATURE REVIEW
2.1 LITERATURE REVIEW

To identify relevant research, provide a general background of the study topic and assist in understanding issues that may be raised by the research participants, a literature review was undertaken (Burns, 1995; Minichiello, Aroni, Timewell & Alexander, 1991). The review consists of two parts. Firstly, an overview of the development of FOI in Australia. It was found that the principal drivers for Australian FOI legislation were public concerns about the government's increasing involvement in individuals' affairs, the need for greater government accountability and the absence of either a statutory or common law right to access government information. Secondly, an analysis of the pre and post implementation of FOI legislation. The review found that much material extolling the benefits of FOI exists, however, another body of literature alludes to a culture of secrecy in the Public Sector and a negative attitude by some Public Sector personnel toward the FOI concept.

2.1.1 DEVELOPMENT OF FOI IN AUSTRALIA

Australia – Gilbert, Lane & Fitzgerald (1994) assert that the 1966 enactment of Federal FOI legislation in the United States of America prompted international interest in FOI legislation. Similar to the situation in pre-FOI America (Bathory & McWilliams, 1977; Legal, Constitutional & Administrative Review Committee, 1999; Miller, 1971; Terrill, 2000), the impetus in 1982 for the introduction of Australian Federal FOI legislation was public concern about the government's increasing involvement in the affairs of individuals, the absence of statutory or common law rights to access government held information and the need for greater accountability in relation to the activities
and operations of the government (Gilbert et al. 1994; Kirby, 1983; Terrill, 2000; Tomasic & Fleming, 1991).

In Australia, during the 1960s and 1970s, there were many political and social events that were of great public interest and for which there was limited government information available, including defence issues, such as the decision to conscript Australia's youth into the defence forces and later the deployment of troops to Vietnam, the collision between HMAS Voyager and HMAS Melbourne and the activities of American defence stations in Australia; and social welfare issues, such as the general expansion of the social welfare system and the need by individuals and groups for information regarding entitlements, policies and procedures (Terrill, 2000). The lack of openness in Australian government is confirmed in comments by the former Australian Prime Minister (Edward) Gough Whitlam, who prior to becoming the leader of the Australian Labor Party (ALP) in 1967, is quoted by Terrill (2000, p.12) as stating that 'too much information was being withheld from the public and parliament'.

Early evidence of the intent to enact FOi legislation in Australia is found in a 1972 ALP policy speech. Terrill (2000, p.19) cites E.G. Whitlam, who in that year became Prime Minister of Australia, as saying 'The Australian Labor Party will build into the administration of the affairs of this nation machinery that will prevent any government, Labor or Liberal, from ever again cloaking your affairs under excessive and needless secrecy'. However, it was not until 1982 that the Federal and Victorian Governments first enacted FOi
legislation in Australia, with the Federal Government (led by Prime Minister Malcolm Fraser's Liberal and National Party Coalition Government) being the first Westminster Parliamentary based government to enact this type of legislation (Snell & Tyson, 2000). This was followed by the enactment of FOI legislation by the Australian Capital Territory and New South Wales Governments in 1989, South Australian and Tasmanian Governments in 1991, and the Queensland and Western Australian Governments in 1992 (Kerr, 1995).

The models underpinning the FOI legislation, and the actual legislative provisions, vary between the Australian jurisdictions. For example, some statutes provide a review mechanism either by an Ombudsman, administrative tribunal or an Information Commissioner. Despite these differences, Snell (2000, p.3) observes that from a historical perspective there are commonalties with respect to the development and introduction of FOI at the jurisdictional level, including:

- The development of FOI was driven externally to government agencies. With reform institutions, such as law reform groups and movements, ‘agents of influence’, such as individuals advancing legal rights, and opposition politicians attempting to access government held information, driving the FOI agenda (Snell, 2000, p.4).
• The progression of the legislation had sufficient but limited political support. With few Ministers demonstrating a strong commitment to the concept, most support being 'tokenistic public pledges' during the passage of the legislation through the various parliaments (Snell, 2000, p.4).

• The Public Sector attitude to the implementation of the legislation ranged from 'lukewarm to hostile' (Snell, 2000, p.3). In Western Australia, the Information Commissioner found initially that government agencies had displayed an 'unanticipated level of resentment and hostility toward the Freedom of Information laws' (O'Malley, 1995).

• If not subject to ongoing legislative and administrative 'refinement' the original objectives of the legislation would not be achieved fully. This assertion is a principal finding of this research and repeatedly features in the literature (Roberts, 1999; Roberts, 2000; Snell, 1996; Snell, 2000; Terrill, 2000).

As discussed in Chapter Four (The Narratives) and Chapter Five (The Analysis) these observations are most applicable to the development, implementation and operation of FOI in Western Australia.

Western Australia – In 1990, the Western Australian Labor Government gave a commitment to introduce FOI legislation. It was not, however, until December 1992 that the subsequent Liberal and National Party Coalition
Government caused the FOI Act (1992) to be assented to, with the Act coming into full operation in November 1993 (Commission on Government, 1995; Harrison & Cossins, 1993). An overview of the Act and how it is administered is provided in Appendix One.

Western Australia's Information Commissioner, Bronwyn Keighley-Gerardy (1999b, p.3), who is responsible for administering the FOI Act (1992), asserts that the Act 'emerged from a public crisis in confidence concerning the actions of government and certain government agencies in the 1980's'. This is supported by Pryer (2000) who asserts that the former State Premier, Richard Court (who until February 2001 led a Liberal and National Party Coalition Government) was 'swept to power in 1993 on the open government and accountability bandwagon'. To understand these comments one must examine the period prior to the enactment of the Act.

In the 1980's the then Labor Government developed close commercial ties with the private sector, with this period being commonly referred to as the WA Inc era. Generally, it is acknowledged this association between government and the business sector resulted in the diminution of government accountability and substantial misuse of public funds (Commission on Government, 1996). In January 1991, the Government, that had been under extreme public pressure to reveal its commercial business activities, established the 'Royal Commission into Commercial Activities of Government and Other Matters'. Essentially, the Royal Commission's terms of reference were to determine whether any person or corporation had engaged in
corrupt, illegal or improper practices with respect to numerous specific business activities (Royal Commission, 1992a). On the issue of government secrecy, the Royal Commission (1992b) asserted that while secrecy had a legitimate place in some activities of government, it should be the exception not the norm. In recognising the degree to which secrecy was institutionalised within the Public Sector, and the associated dangers to government accountability and openness, the Royal Commission (1992b) found that there was a need to review secrecy in the Sector. As a consequence, in 1994 the 'Commission on Government' was established to review, among other things, secrecy pertaining to parliamentary and electoral matters, statutory officials and public administration in Western Australia (Commission on Government, 1995).

The Commission on Government (1995, p.40) stated that non-essential secrecy weakens government accountability, openness and responsibility. The Commission found that in Western Australia there were in excess of 100 statutes and regulations, not including many administrative instructions, that restrict the public disclosure of government information. In finding the extent to which statute law prevented the disclosure of government information, the Commission asserted that the provisions ‘encourage . . . “information paternalism” . . . [and are] . . . quite opposed to any reasonable concept of open government’. Further, the Commission asserted that in the absence of openness it is difficult to ‘assess whether public officials have engaged in corrupt, illegal or improper conduct’ (Commission on Government, 1995, p.41). In making its recommendations, the Commission on Government
(1996, p.230) stated that in order to 'enhance public scrutiny of the
government system and to prevent corrupt, illegal or improper conduct' there
should be greater accessibility to information concerning government
activities. Among its many findings, the Commission recommended several
amendments to the FOI Act (1992).

Notwithstanding the enactment of the FOI Act (1992), the Commission on
Government found that concerns still existed about a lack of government
openness and accountability, and the need for the public to have greater
access to government information. Despite these findings, and the ensuing
passage of time, there remains many government administrative instructions,
and a substantial body of legislation, that operate contrary to the FOi
concept, including section 81 of the Criminal Code (1913) that deems it an
offence for Public Sector personnel to disclose government information or
documents which it is their 'duty to keep secret'.

The operation of FOI in a legislative and administrative environment that
does not reflect the concept perpetuates in both the minds of Public Sector
personnel and members of the public an aura of secrecy over government
held information. As will be seen in the following section, the enactment of
FOI legislation alone does not necessarily lead to greater public accessibility
to government information – a key theme to emerge from the participants of
this research.
2.1.2 PRE AND POST IMPLEMENTATION OF FOI

There exists a body of literature that portrays the benefits of FOI which is generally associated with the government implementation and review of FOI legislation. There is, however, another body of literature that alludes to the existence of a culture of secrecy in the Public Sector, and that some agency personnel are actively using FOI laws against the spirit of the legislation to justify the non-release of documents – Hence the common phrase *Freedom from Information*. Discussion of these issues follows under the three headings of *Benefits of FOI, Culture of Secrecy* and *Negative Attitude Toward FOI*.

**Benefits of FOI** - Politicians, legislators, Public Sector administrators, academics, legal practitioners, media reporters, industry and trade groups, and individuals have all been most commendatory as to the benefits of FOI legislation. A myriad of positive outcomes have been associated with the release of government held documentation through FOI laws including: better understanding of history; greater public participation in the government decision-making process; increased government accountability; improved administrative efficiency of government; increased public awareness of agency roles and operations; increased agency openness about operations and procedures; improved communications and understanding between agencies and the public; improved government records management practices; public reassurance of the existence of the democratic process; protection for individuals against arbitrary decisions of government; empowerment of individuals to access personal information held by the
government; and strengthening of court appeal processes through the release of information that would not previously have been disclosed (Binkowski, 1984; Commission on Government 1995; Harrison & Cossins, 1993; Hawker, 1981; Keighley-Gerardy, 1994; Kirby, 1983; Legal & Constitutional Committee, 1981; Legal, Constitutional & Administrative Review Committee, 1999; Roberts, 1998; Rowat, 1979; Senate Standing Committee on Legal & Constitutional Affairs, 1987; Snell, 2000; Terrill, 2000).

While the accolades associated with FOi are many and diverse, measuring the benefits resulting from the legislation and substantiating the claims is not an easy task. For example, Snell (1993) suggests that although FOi is associated with improving government records management, he asserts that there is little empirical research to support this. Harrison and Cossins (1993) and Keighley-Gerardy (1994) state there are no suitable empirical methods of measuring the extent to which the objectives of FOi legislation are being met. Keighley-Gerardy (1999b) further states that determining whether FOI objectives are being achieved is difficult to assess due to the benefits being largely intangible, and neither susceptible to measurement nor quantifiable in monetary terms. However, she states that various indicators can measure performance, including: quantitative data, such as increases in the number of applications; decreases in the time taken to deal with applications; decreases in the number of applications refused; and decreases in the amounts of fees and charges collected; and qualitative data, such as questionnaires, surveys and scanning media reports.
It is the politicians who, given their high public profiles and need to demonstrate their personal and party's commitment to accountable, open and fair government, are the most overt in their public praise of FOI. In Australia, the former Hawke Federal Labor Government claimed that its fundamental objective was to develop a fair, prosperous and just society. The Government asserted that individuals whose interests are affected by government decisions should have the right to have those decisions reviewed by an independent party, and supported the access to government information through FOI legislation (Towards a fairer Australia, 1988). The subsequent Keating Federal Labor Government extended the promotion of FOI from the social justice platform to support the principles of human rights. The Government asserted that government accountability is ensured by the democratic electoral processes, scrutiny of parliamentary committees, administrative processes and decisions via public access to government information (National Action Plan, 1994).

In the lead up to the February 2001 Western Australian State Government election, former Premier Richard Court (who at that time led a Liberal and National Party Coalition Government) is cited by Pryer (2000) as stating that his Government's accountability achievements included enacting FOI laws. While the former Opposition Labor leader, and now Premier, Geoff Gallop is cited by Pryer (2000) as committing his Government to 'carrying out a range of accountability reforms if elected to office', including reviewing the Commission on Government's recommendations, several of which relate to enhancing the FOI Act (1992).
As can be seen, in addition to providing access to government documents, the FOI concept is also associated with a diverse range of social programs that have benefits to the community. This is a point not missed by politicians who have used FOI to demonstrate both their own and their party's commitment to social justice and government accountability. However, as observed by Snell (2000, p.5) frequently once the legislation had been enacted, and the 'electoral dividend and entry of noble speeches into Hansard had been achieved', political interest in the FOI concept appears to diminish quickly, that is until the next election.

**Culture of Secrecy** – In contrast to the commendatory rhetoric associated with FOI, is the alternative view that alludes to a culture of secrecy in the Public Sector. Lyall (1972) states there is often an air of 'what the butler saw' in articles written about the activities of the government bureaucracy, and that it is not uncommon for editorial expositions to refer to a 'bureaucratic penchant for secrecy'. Despite the age of this reference, and the subsequent enactment of FOI legislation in Australia, Snell (1996) cites Allan Rose, then President of the Australian Law Reform Commission, as asserting that a culture of secrecy pervades much of the Australian Public Sector and stating, 'if our government is to become truly transparent and accountable' this culture must be 'dismantled'. In providing possible explanations for the secrecy phenomenon, Rowat (1979, p.22) states that governments only tell the public what the bureaucracy wants it know, with 'a paper curtain of
secrecy' preventing the release of other information that may neither further
the aims and interests of government, nor the Public Sector.

Several authors (Cain, 1995; Harrison, 1984; Roberts, 1998; Snell, 2001;
Snell & Tyson, 2000; Wiltshire, 1974) suggest a noble cause theory as the
reason for the secrecy; that is, an individual acting in a manner that may be
contrary to legislation and policies for a perceived greater good. Cain (1995)
asserts that bureaucrats perceive FOI legislation as being capable of
undermining the authority and integrity of 'their' system, and that government
information is confidential - only to be used by them to 'advance the
(government's) cause'. Similarly, Snell (2001) suggests that FOI is an
unpredictable variable in a government system that seeks predictability. He
states 'Every single request has an unknown potential to cause unexpected
disruption to a policy process or cause an unplanned roadblock for a
particular policy direction'. In citing specific examples of noble cause theory,
Roberts (1998, p.9) refers to a 1986 survey of Canadian Federal FOI
Coordinators in which was identified a protective attitude by agency
management to releasing information, with the expectation of 'loyalty to the
institution' being given as the reason.

Accordingly, bureaucrats and Public Service personnel may deliberately
contravene FOI legislation in the belief that the community is better served by
protecting the long-term interests of government and agencies over the short-
term interests of an individual. However, Harrison (1984), Hawker (1981)
and Wiltshire (1974) raise the possibility of a self-serving theory, that is,
bureaucrats may actively avoid public scrutiny of their work to prevent it being challenged or requiring them to justify their actions and decisions.

In looking at the factors that influence the decision of agency personnel to release documents, the issues of the unknown result of releasing a document, uncertainty as to the legalities of releasing a document and the known attitudes to FOI by agency management and personnel may significantly affect the final decision. Roberts (1998, p.14) cites Sharp (1986), a former Canadian Cabinet Minister, as stating 'Civil servants are bound to be cautious in their approach, if only because it is safer to refuse access than it is to take chances by revealing documents about which there is doubt as to their accessibility'. While Mann (1986) states that the Public Servants who formulate FOI responses 'often feel an intense pressure from colleagues and superiors to withhold information'.

Both noble cause and self-serving interests are powerful drivers of behaviour. However, when combined with the unknown ramifications of releasing a document and peer pressure not to release documents, there is a strong probability that a negative culture toward FOI will develop, especially in the absence of a supportive management and sound administrative practices.

Negative Attitude Toward FOI – Non-acceptance by Public Sector personnel of FOI legislation, and the subsequent non-release of documents, can manifest itself overtly and covertly. Roberts (1998) and Snell (n.d. & 2001) measure the degree of non-acceptance in terms of Administrative Non-
compliance and Malicious Non-compliance. Examples of Administrative Non-compliance include: communicating possible contentious information verbally rather than in writing (a situation highlighted by the Western Australian Information Commissioner who identified a trend whereby agency personnel and Ministers of the Crown communicate verbally with the result that there are no documents to access under FOI [Keighley-Gerardy, 2000; MacDonald, 2000b]); recording information in pencil and writing information on stickers enabling it to be easily removed; recording less information on documents; inadequately resourcing the management of FOI; maintaining deficient records management practices and systems; misconstruing of document descriptions so as to limit the effectiveness of document searches; adopting broad interpretations of exemptions and using several exemptions to withhold material with the expectation that applicants will not proceed with the request.

Acts of Malicious Non-compliance include: failing to assist applicants with their applications (including not transferring applications to appropriate agencies); failing to conduct thorough searches for documents; providing access to only part of a document without notifying the applicant of the existence of other parts; exaggerating estimates of fees and charges; prolonging the processing of applications; deliberately destroying documents, such as shredding; separating related documents and relabelling files in order to make future location more difficult (Harrison & Cossins, 1993; Roberts, 1998; Roberts, 1999; Snell, 2001; Tickner, 1997a; Wiltshire, 1974). In illustrating this type of non-acceptance, Roberts (1998) cites two
examples: first, a case involving the Canadian Blood Committee - a subsequent inquiry by FOI administrators concluded that records had been deliberately destroyed to thwart a FOI request; second, a case involving the Canadian Department of National Defence – the Commission of Inquiry into the Deployment of Canadian Forces to Somalia found that officials had deliberately destroyed documents, removed information from documents, hidden documents by renaming them and quoted high access fees for records that were readily available.

Australian examples of possible inappropriate destruction of government documents include events during the 1999 Victorian Government elections. At a time when it appeared that a majority government was unlikely, it was reported in The Western Australian newspaper (By-election set, 1999) that the then caretaker Coalition Government had begun removing truckloads of documents from government offices and was shredding them. Steve Bracks, then opposition Labor leader, is cited in the article as stating that, if it was subsequently found that any files had been disposed of contrary to the Victorian public records laws, the matter would be referred to the police. In response, Jeff Kennett, then caretaker Premier of Victoria, is cited as claiming that the documents being shredded were working papers and correspondence from Ministers' offices. In Western Australia, Meertens (1995) cites Maria Harries, then President of the Western Australia Council of Social Service, as stating that government agencies destroy documents to prevent public access.
With respect to the implementation and operation of FOi legislation, there have been few published studies. Research into FOi has principally been conducted by members of the legal profession, who in the main have confined their endeavors to interpreting case law, and academics who have focussed on quantitative data, such as the number of applications that resulted in access to documents and the types of exemptions claimed by agencies to refuse applications. Notable exceptions are the studies by Turner (1993) and Roberts (1998).

Turner (1993) compared the attitudes of several Tasmanian Government FOi officers with FOi statistics in several other Australian jurisdictions. The study concluded that although the attitudes of the FOi officers indicated an acceptance of the legislation, there was evidence that some agencies perceived FOi as a threat, with statistics suggesting that the Tasmanian access rate to documents was lower than in the other jurisdictions. Roberts (1998) conducted a review of FOi legislation operating in the Canadian Federal Government and nine provincial governments. The study determined the extent to which the intent of the statutes had been limited by the legislative provisions (including definitions, exemptions and review processes), implementation of the statutes (including administrative resourcing and willingness of Public Servants to comply with the laws) and the effect of changing government practices (including out-sourcing and focus on cost recovery). Roberts (1998) found that although many persons participating in the study stated that officials had complied with the intent of the FOi laws, others told of frequent abuses of the legislation by Ministers.
and Public Servants. He concluded that many factors threatened the objectives of the Canadian FOI laws and that Canadian Governments were ambivalent about these laws, with a tendency for officials to manipulate the legislation to protect departmental or governmental interests. These studies suggest that although the provisions of the FOI legislation are being implemented, in some instances the application of the legislation may not be in the spirit of the laws with the result that the statutes are actually being used to withhold information.

The two streams within the literature indicate that there is a conflict between the benefits associated with FOI and the negative perceptions of FOI reportedly held by some Public Sector employees. The literature review also identified methods that agency personnel may use to confound FOI legislation, and examples of when personnel have usurped the legislation. The nexus between the two streams is that legislation of this type by itself, no matter how comprehensive and prescriptive, will not necessarily result in greater accessibility to government information. For FOI legislation to be successful it must operate in a legislative and administrative framework that is not at odds with the concept and be administered by a Public Sector in which there are strong and ongoing supports to ensure acceptance of the legislation. As will be seen in Chapters Four and Five that relate to the research participant's narratives, the operation of FOI legislation in Western Australia did not, and to a lesser extent does not to this day, exist in a supportive parliamentary, government and public sector environment.
CHAPTER THREE

THE RESEARCH
3.1 CONCEPTUAL FRAMEWORK

To assist in determining research parameters, and to gain a better understanding of the relationships between FOI Coordinators and their environment, Symbolic Interaction was chosen as a conceptual framework upon which to ground the research. Symbolic Interaction argues that an individual's perception of self and reality emanates from that person's life experiences and social interactions. Accordingly, in establishing the various components of an individual's world, it is possible to form a discrete system from which relationships, co-relationships and inter-relationships can be identified (Blumer, 1972; Bronfenbrenner, 1979).

Using the information acquired from the literature review, and my own practical knowledge of FOI matters, discrete components of the FOI Coordinators' world were identified and a schematic chart developed (see Figure One over page). An analysis of the chart suggests that the role of a FOI Coordinator requires Coordinators to navigate through their own personal belief systems, legal and organisational systems, professional and workplace cultures, and interpersonal relationships with agency personnel and members of the public. Throughout the research, the chart assisted in my understanding of the relationships existing in the Coordinators' world and also to verify aspects of the participants' narratives. Given the limitations of the chart, such as it neither establishes that the components affect every Coordinator, nor indicates the extent of importance to which Coordinators placed on the components, an opportunity exists to research various aspects of the chart.
FIGURE ONE

SCHEMATIC REPRESENTATION OF FOI COORDINATORS' WORLD-VIEW
3.2 RESEARCH APPROACH

As established in the literature review, much of the existing and limited research into FOI relates to the examination of quantitative performance indicators, such as the number of applications approved or refused, and legal case decisions, for example the exemptions applied by agencies to refuse access to documents. Given that the objectives of this study are to explore the roles of FOI Coordinators and the issues that impact on their functions, I considered that a dynamic, flexible and humanistic research approach was required. Bryman (1988, p.52) warns that 'any attempt to understand social reality must be grounded in people's experience' and not to do so may result in the portrayal of a fictional world. Similarly, Morris (1977, p.48) asserts that to understand social settings or situations, the researcher must see it from the perspective of those being studied, that is, 'reality as it appears to them'. W.I. Thomas, a Symbolic Interactionist, is cited by Psathas (1973, p.6) as stating 'if men define situations as real, they are real in their consequences'.

The phenomenological approach, which was chosen to underpin this research, contributes to the knowledge of the phenomena being studied, in this case the world of FOI Coordinators, by understanding the nature or meaning of the research participant's lived experiences (Guba & Lincoln, 1982; Sorrell & Redmond, 1995; Van Manen, 1990). Polit and Hungler (1995) state that the approach focuses on people's experiences and how they interpret those experiences, with Patton (1990) asserting that this is achieved by identifying the experiences of different people, analysing and comparing those experiences. The phenomenological approach rather than
requiring adherence to a ‘narrow theoretical framework’ (Psathas, 1973, p.16) requires the researcher to obtain and assume the participant's philosophical viewpoint and the structures giving rise to that viewpoint. In so doing, the researcher is required to appreciate the existence of multiple subjective realities and perceive ‘reality’ as being problematic (Guba, 1981; Morris, 1977).

3.3 RESEARCH METHODOLOGY

3.3.1 RESEARCH STAGES

In applying the phenomenological approach to this study, the research was performed in two stages: participants narrating their perceptions and experiences, and the researcher identifying, codifying, interpreting and reporting the themes.

(1) Participants narrating their perceptions and experiences

This stage involves individual research participants being asked a non-directional question to prompt narration of their perceptions and experiences (Wilson & Hutchinson, 1991). In describing the attributes of a good question, Ackroyd and Hughes (1992) assert that it should be unambiguous, precise and express a single idea.

For the purpose of this study, I set participants the following task:

*In your role as a FOI Coordinator*

tell me about the issues that impact on your functions.
The researcher's role during the narrative process is to facilitate the sessions by providing non-directive prompts. Benner (1994, p.110) asserts that researchers should only interrupt a participant when 'they can no longer follow the story' and probe only to clarify details. In describing the researcher's own attitude to what is being narrated, Sorrell and Redmond (1995) state that the researcher must be accepting of the participant's view of the world, while McCracken (1988, p.38) believes that the attributes of a good interviewer include being 'benign, accepting, curious (but not inquisitive)'. It was with these ideals that I facilitated the narrative sessions.

McCracken (1988) warns against researchers taking notes themselves as the practice is disruptive and distracting. This practice may also result in the researcher selectively recording what is said and may indirectly suggest to the participant areas that the researcher considers important or interesting. An alternate method of recording narratives is suggested by Hall and Hall (1996), who state that tape recording interviews is less intrusive than note taking, is more accurate, records the participant's actual tones and inflections, and makes for easier, quicker and more secure transcription. For the purpose of this study, narratives were recorded on audiotape and later transcribed.
(2) **Researcher identifying, codifying, interpreting and reporting the themes**

This stage involves the researcher analysing the narratives in order to identify themes and relationships. Benner (1994) asserts that the intent of the phenomenological approach is to 'uncover commonalities and differences, not private idiosyncratic events or understandings'. For the purpose of this study, I used the coding process developed by Colaizzi (1978) to analyse the narratives. This process required me to familiarise myself with the transcriptions by reading and re-reading them; extracting significant words, phrases and statements; formulating meanings from the statements and clustering the meanings to themes (see Appendix Two for a summary of the coding).

In reporting the themes and relationships emanating from the narratives, Van Manen (1990) states that if done well the descriptions should be compelling and insightful. He further states that when successfully done, participants and readers familiar with the research topic may experience the 'Shock of Recognition' or display the 'Phenomenological Nod', that is, associating and agreeing with the interpretation of the narratives and findings. For the purposes of this study, I have described the themes and relationships quoting, where possible, the participant's actual perceptions and experiences (Denzin & Lincoln, 1994; Sorrell & Redmond, 1995). To enable readers to consider the themes in context of the broader environment, mention has been made to relevant contemporary FOI literature.
3.3.2 AGENCY / PARTICIPANT SELECTION

To determine an appropriate strategy for selecting agencies to participate in the study, reference was made to the Information Commissioner’s 1997-1998 Annual Report to Parliament (Keighley-Gerardy, 1998). The Report lists 137 State Government agencies in the Perth Metropolitan area that were subject to the FOI Act (1992). The number of FOI applications received by the agencies ranged from none to 798. To ensure that the FOI Coordinators participating in the study had sufficient knowledge of and experience with FOI issues, only those agencies that had dealt with 35 applications or more during 1997-1998 were deemed suitable. Using this criterion, 19 agencies were eligible to participate in the study. It was considered that eight Coordinators from different agencies would provide the desired depth, rather than breadth, of understanding of the phenomena being studied (Patton, 1990).

Communicating with FOI Coordinators, and obtaining their beliefs and perceptions about government and agency activities, presented two ethical issues. First, by participating in the study participants may breach statutory confidentiality or secrecy provisions, such as section 81 of the Criminal Code (1913), and government requirements that restrict Public Sector employees from disclosing information acquired during the course of their employment. Second, participants in their responses may reveal that either their agencies or themselves have breached statutory or government requirements relating to FOI or records management. To overcome these difficulties, I sent a letter to each of the 19 agency Chief Executive Officers (CEOs) advising them of
the purpose and details of the study, and seeking consent for their Coordinators to participate. The CEOs were also informed that every possible measure would be taken to preserve the anonymity of participating agencies and the participants. The CEOs were advised that to protect the identity of the participating Coordinators, and also to encourage their forthrightness, participants would be selected from a pool of eligible Coordinators, with their individual identities only being known to myself (see Appendices Four and Five).

Of the 19 invitations sent to the CEOs 15 consents were given, with nine being personally signed by the CEOs. Of the four remaining agencies one advised that the FOI role had been devolved to various senior officers throughout the organisation (each of whom individually only dealt with a small number of applications), one agency requested the submission of a comprehensive research application, and two agencies did not respond. The 15 consenting agencies formed the pool, from which the eight full time FOI Coordinators were selected. The selection was based on capturing the broadest range of service areas that comprise the Public Sector. Using similar correspondence to that seeking the consent from the CEOs, I sent invitation letters to the eight Coordinators. The Coordinators were informed that, should they consent to participate in the study, their acceptance would be conditional upon them being advised of all considerations that may lead to their refusal to participate. Assurances were also given with respect to the resulting information not being directly attributed to them or their agency, that the resulting data would be protected and secured, and that participants were
free to withdraw from the study at any time without criticism or sanction (Hyde, 1988; Seaman, 1987). All eight Coordinators consented to participate in the study (see Appendices Six and Seven).

3.3.3 RESEARCH INTEGRITY

Credibility is an essential aspect to all academic research. Benner (1994 p.xvii) states that the phenomenological approach has a 'stringent set of disciplines' designed to ensure that the subsequent interpretation of the narratives accurately articulates the participant's perceptions, offers increased understanding, is guided by an ethic of understanding and responsiveness, and is auditable. To add rigour to this study, I employed the following six processes: Bracketing, Peer Review, Member Checks, Structural Corroboration, Triangulation and Auditability.

Blaikie (1995) and Field and Morse (1990) assert that all phenomenological studies should be undertaken without preconceptions or presuppositions. Given that I had previously held the position of a FOI Coordinator for a Western Australian State Government agency, and recognising that I had my own beliefs and experiences, I used the process of Bracketing to minimise any bias. Bracketing requires the researcher to initially declare their attitudes, beliefs and values, and continually reflect on them during all stages of the study in order that they may identify and put aside personal bias (Blaikie 1995; Bryman 1988; Guba 1981; Morris 1977; Patton 1990; Van Manen 1990). In accordance with the Bracketing process, a journal was created in which I noted my personal attitudes and beliefs relating to FOI.
Throughout the various stages of the study, I referred to the journal and
consciously challenged my activities, analysis and interpretations.

To ensure reliable and valid research results, I used the Peer Review
process. This process entailed having my peers, such as faculty associates
and work colleagues not involved in the research regularly challenge all
aspects of the research, including the methodology, analysis and
interpretation of the narratives (Guba, 1981). Member Checks, that is,
participants confirming the accuracy of the transcriptions of their narratives,
and my subsequent analysis and interpretation, were also undertaken (Guba,
1981). To further corroborate the narratives, and challenge my
understanding of the resulting information, I also used the processes of
Structural Corroboration, that is, comparing the first and second session
narratives of each participant, and comparing different participants' narratives
with each other, with the aim of identifying consistencies and inconsistencies;
and Triangulation, the aim of which is again to corroborate the information
derived from the narratives, this time by comparing the participant's
narratives with other information sources, such as the knowledge gained
through the literature review (Guba, 1981). Finally, to provide auditability, I
retained preparatory notes, my bracketing journal, field notes and analytical
documents (Morse, 1994).
3.3.4 RESEARCH LIMITATIONS

State Government agencies located in Non-metropolitan areas and municipal government authorities were omitted from the study. Municipal authorities were excluded due to the small number of FOI applications dealt with by individual authorities (Keighley-Gerardy, 1998), and the differences between State and municipal administration, cultures and funding. Non-metropolitan State Government agencies were excluded from the study for practical and logistical reasons associated with travelling between the Perth Metropolitan and country areas. Therefore an opportunity exists to complement this research by obtaining the perceptions of country and municipal government authority Coordinators to determine whether their world-views vary significantly from those identified in this study.

3.3.5 REFLECTIONS OF APPROACH, METHODOLOGY AND PROCESSES

For most participants, commencing their first narration was a little awkward, although as the session progressed they became more focussed and comfortable with having a very much one-sided conversation. Fortunately, the worst case scenario, that is, a deathly silence from a participant after switching on the tape-recorder, did not occur. In total, the narratives amounted to in excess of 50,000 words. This substantial amount of material required transcribing from tape to hardcopy, transcripts from both sessions were returned to the respective participants for validation, and finally the material contained in the transcripts was coded and themes identified.
In this instance, the use of phenomenology was successful with respect to all participants. However, it is possible that with different personalities, such as having participants who require a more formal interview approach, and under different circumstances, such as the participants not being forthright, the approach may not yield such good data. The approach was time consuming and work intensive. Despite these limitations, the use of phenomenology proved to be a dynamic approach that did yield good data.
4.1 NARRATIVE APPROACH

The narrative sessions were conducted in mid 1999. These were held at mutually agreed times with all participants choosing to conduct the sessions at their workplaces. Initially, it was intended that the participants narrate their stories in two separate sessions of about 30 minutes duration. However, in practice the first sessions well exceeded this period, that is, the shortest session was about 50 minutes and the longest about two and a half hours. Later, having had the opportunity to read their first transcriptions, six of the eight participants chose to participate in a second session to clarify and add to their first narrative: these later sessions were generally of about 45 minutes duration (Benner, 1994; Morse, 1994). The two participants who did not participate in a second session considered that they had no further comments or issues to raise. Draft transcriptions from both sessions were distributed to the respective participants, with all feedback being received by late 1999.

During the narration process I gave close attention to ensuring that this stage only concluded when information ‘saturation’ occurred, that is, no new significant issues arose, and that variations in information were accounted for and understood (Morse, 1994). Accordingly, it was neither necessary to increase the number nor duration of sessions, or to increase the number of participants. While giving their narratives all participants appeared confident and open in relating their perceptions, opinions and experiences. Participants were pleased with the opportunity to ‘tell their story’, making such comments as, ‘I've been doing this job since the Act commenced. This
is the first time that anyone has asked me for my opinion', 'I feel much better after that, it was like a therapy session' and 'We have heard from the FOI Commissioner, the judiciary and the so called FOI advocates and experts, I feel as if we've been given the chance to have our say'.

In reporting the narratives great care was taken to protect the identity of participants and their agencies. All references that identified an individual or an agency were deleted or exchanged with generic words, the later being contained within parentheses. To provide further anonymity, the male gender has been used with respect to both male and female participants.

4.2 NARRATIVES

When transcribed, the participants' narratives amounted to in excess of 50,000 words. Using Colaizzi's (1978) coding process the following four themes were identified. In this Chapter, the themes are first summarised and then discussed, with a comprehensive analysis following in Chapter 5 (The Analysis).

(1) Inadequacies of the FOI Act (1992)

The principal theme to emerge from this part is the need for various provisions of the Act to be amended to either correct anomalies or enhance the provisions. Over time calls to amend the Act have progressed from seeking relatively minor changes to a total rethink of the Act's design principles. Although the need for legislative change has been well documented, including recommendations from a statutory
review and two Royal Commissions, successive Governments have not
given amending the Act a high legislative priority.

(2) Challenges with introducing the FOI concept into agencies

To emerge from this part is the theme that many Public Sector
personnel continue to be reluctant to release government documents.
This research supports existing literature that the reluctance is
associated with noble cause and self serving reasons, however, adds to
the body of knowledge by identifying different factors between the
seniority levels of personnel and the strategies used by FOI
Coordinators to overcome the reluctance.

(3) Difficulties associated with agency FOI processes

Many of the concerns expressed by FOI Coordinators relate to the
various stages of processing a FOI application. Accordingly, this part
consists of a substantial body of material. The participants' concerns
broadly follow the application process, that is, from the challenges in
identifying and acquiring the documents, the difficulties in assessing the
documents and formulating a Notice of Decision, through to the
inadequacies of the appeal processes. While this research supports
much of the existing literature, it also challenges several common
assumptions and explores areas for which little other research exists.
(4) Managing agency FOI performance

Themes to emerge in this part include the inadequacy of some agencies’ staffing of FOI positions, the absence of timely performance feedback to Coordinators, a lack of suitable FOI training opportunities for Coordinators, and poor succession planning for the Coordinator positions. Again apart from this research these areas have been subject to little investigation.

The narratives follow under the headings of The FOI Act 1992 (4.2.1), Integration of FOI into the Public Sector (4.2.2), Document release outside the FOI process (4.2.3), FOI process (4.2.4) and Resourcing of FOI Coordinators (4.2.5).

4.2.1 THE FOI ACT 1992

Most participants voiced dissatisfaction with various provisions of the FOI Act (1992). Representative of this dissatisfaction was the statement by one participant that, although it was common knowledge that the Act required amending, on a daily basis FOI Coordinators were required to apply provisions that had been causing legal and practical problems since the Act commenced. In support of the participants’ assertions, various amendments to the Act have been recommended by the Commission on Government (1995), the Information Commissioner, and reviewers of the Act, such as Richards (1997).
In his statutory review of the effectiveness and efficiency of the Act, Richards (1997) found that the objectives of the Act were generally being achieved. However, he identified numerous anomalies with, and made many recommendations to amend, various provisions of the Act, some of which will be discussed later in this paper. In November 1997, soon after the review was tabled in Parliament, former Attorney General Peter Foss reiterated in a ministerial statement the comments by Richards (1997). He confirmed the then Government's continuing commitment to FOI and stated that amendments to the Act giving effect to a number of recommendations made by Richards (1997) would be implemented (Foss, 1997).

For some time the Information Commissioner in her Annual Reports to Parliament (Keighley-Gerardy, 1994; Keighley-Gerardy, 1995; Keighley-Gerardy, 1996a; Keighley-Gerardy 1997a; Keighley-Gerardy, 1998; Keighley-Gerardy, 1999a), in media and press statements (Butler, 2000; McNamara, 2000; Pryer, 1999; Tickner, 1997a; Tickner, 1997b), and in public fora (Keighley-Gerardy, 1999b) has also recommended substantial amendments to the FOI Act (1992). The Commissioner has been quoted as stating that the Act 'was designed by bureaucrats for bureaucrats to effectively maintain the status quo' (McNamara, 2000). By far the most significant of the Commissioner's recommendations is that a major rethink of the Act's design principles is required if the legislation is to meet the needs of 'contemporary public administration' (Keighley-Gerardy, 1999a, p.18). In recent times, the Commissioner has stated that FOI legislation should focus on accessing all types of information rather than only documents, and that there is a need to
replace individual exemption clauses with a single Public Interest Test [see page 100 for explanation of this term and discussion] (Butler, 2000; Keighley-Gerardy, 1999b).

Participants stated that amendments to the FOI Act (1992) had not received high Government priority and that the Information Commissioner's beliefs and recommendations did not appear to carry much weight in the political arena. Pryer (1999) cites the Commissioner as stating that since the commencement of the Act, the Government had chosen only to increase exemptions used to prevent access to documents, while important amendments that would make the Government more open and accountable have not been effected. In direct response to this assertion, Pryer (1999) quotes a spokesperson for former Attorney General Foss as saying that proposed legislation in line with the Richards (1997) review was completed and awaiting introduction into Parliament. Recently, the Information Commissioner was again quoted as publicly criticising the previous Liberal and National Party Coalition Government (that lost government to Labor in February 2001) for failing to introduce amendments to the Act (Pryer, 2000). In June 2000, former Attorney General Foss is reported as stating to the Legislative Council Budget Estimates Committee that several 'fairly technical' amendments were being drafted to the Act (Butler, 2000). It is not known whether the amendments are different to those previously stated by Mr. Foss in 1999 as having been completed and awaiting introduction into Parliament.
A similar situation to that occurring in Western Australia, that is, the Government not effecting timely amendments to FOI legislation, is reported by other authors, including Snell (2000) with respect to other Australian jurisdictions and Roberts (1998) who reviewed the Canadian FOI laws. Roberts concluded that the Canadian Federal Government and provincial governments were ambivalent to the ideals of FOI, with this being demonstrated by an unwillingness of the various governments to effect necessary changes to the laws even though weaknesses in the legislation had previously been identified in numerous reports, reviews and judicial findings.

Several participants stated that as a result of the Government not effecting timely amendments to the FOI Act (1992) they believed that the Information Commissioner, through her determinations and discussions with agencies, has arbitrarily imposed her own views on how the Act should operate, without it being established whether those views were reflective of the original intent of Parliament. The principal example given by participants was the perceived diminution of some exemption clauses, such as the Commissioner advocating that agencies should release documents that could 'reveal the investigation of any contravention . . . of the law', when no harm is likely to result, even though clause 5 (1) (b) of Schedule 1 to the Act deems such documents to be exempt (see Appendix Three). To support the participants' general assertions, the Information Commissioner has, on numerous occasions, stated that some agencies refuse access to documents, including those that 'reveal an investigation', even though there is no likelihood of harm
resulting from the release of the information (Butler, 2000; Keighley-Gerardy, 1997b; Tickner, 2000a). In 1996, in a watershed case whereby the Commissioner overturned one agency's decision to refuse access to documents on the grounds that it would 'reveal an investigation', the agency appealed the decision in the Supreme Court. The Court subsequently found that, although the investigation was publicly known and that to refuse access to the documents may deny the applicant natural justice, the agency's decision to refuse access to the documents was correct and was upheld (Tickner, 1996).

4.2.2 INTEGRATION OF FOI INTO THE PUBLIC SECTOR

Most participants generally accepted that a Public Sector culture of secrecy did exist and, to varying extents, that culture continues to have an adverse impact on their functions. One participant stated, 'The Public Service had a secret culture prior to the FOI Act coming into effect. Another participant said, 'being an older Public Servant, when you came in (to the Public Sector) you're informed that anything you learnt through the course of your duties is confidential... FOI goes contrary to all that'. Participants portrayed varying degrees of acceptance of FOI by agency personnel. From a positive perspective one participant stated, 'I think a lot of the doomsday predictions have fallen away. The big concerns that the traditional government bureaucrats had would have probably evaporated'. Conversely, another participant stated, 'there's still that veil of secrecy that people have in their mind, the "don't give out anything we'll cop it" rather than "lets be open and an accountable government". That old attitude prevails. I don't think it (FOI)
is a popular thing’. In describing the gradual change in attitude to FOI in the Public Sector another participant stated, ‘It's slowly changing . . . but the culture will need to be changed and people made aware that whatever they do, whatever they decide on, anything they record is a public document and subject to the FOI Act’.

The participants' assertions that a culture of secrecy did exist, and to varying degrees continues to exist, in some areas of the Public Sector was supported by both the Royal Commission (1992b) and the Commission on Government (1995). Negativity by some Public Sector personnel toward the ideals of FOI continues to be reported. For example, O'Malley (1995) quotes the Information Commissioner as stating that government agencies had displayed an ‘unanticipated level of resentment and hostility toward the Freedom of Information laws'. In the newspaper editorial 'New spirit is needed' (1997) it is asserted that some bureaucrats and politicians are still coming to terms with the concept that the public has a right to know about government activities. Further, Keighley-Gerardy (1997a) and others (Court should show foi leadership, 2000; Foi reprimand fully deserved, 2001) observe that some agencies still perceive government held information as being private property, rather than a public asset. Tickner (1997a) quotes Mr. John Kobelke, a former Labor Opposition FOI spokesperson, as stating that the time for believing that agencies had a ‘genuine misunderstanding as to the operation of the Act' were over, and that shortcomings should now be viewed 'as an unacceptable failure to meet an agency's legal requirements'. In criticising the handling of an application by one agency, Meertens (1998)
cites the Information Commissioner as stating that the agency concerned had 'acted contrary to the spirit of the Freedom of Information Act, public sector standards and public service code of ethics'. Assertions that Public Sector personnel are failing to act in the spirit of the FOI legislation, that the Public Sector is resisting the FOI Act (1992) and that a culture of secrecy exists in the Public Sector, also continue to be reported (Butler, 2000; Court should show foi leadership, 2000; Foi reprimand fully deserved, 2001; MacDonald, 2000b; Tickner, 2000b). What is striking about the references is the continuing theme of resistance to the FOI concept since the Act was enacted to the current day.

The majority of participants identified as an issue reluctance, in some cases even fear, by many agency managers and personnel to release documents into the public arena. This reluctance was perceived to be more prevalent with senior and middle management. One participant stated that when it came to FOI requests senior management displayed 'a lot of anxiety'. Another participant asserted, 'our hierarchy has... this inbuilt fear that "why should we release this" to the point that even stats (statistics) they are very nervous about (releasing)'. According to a third participant when requests from the media are received, such as an application seeking agency budget information, his executive management expected him to know for what purpose the information will be used. Although the purpose is usually unknown, and applicants are under no obligation to disclose such details, the participant conducts a 'quick ring around' of other agencies to determine
whether the request solely applies to his agency or is a government agency-wide request.

Participants perceived anxiety by senior management as resulting from the possibility of adverse media attention, political backlash, strained relationships with other agencies and industry partners, and adverse impact on agency morale. 'It's going to cost us money once this goes out, you realise that, don't you', was cited by one participant as an example of 'noble cause' anxiety expressed by his management. Participants stated that middle management was the level of agency personnel with whom they most routinely interacted. Participants perceived anxiety by managers as resulting from an uncertainty as to whether senior management would object to the release of the information and their own questioning of the applicant's need to have the information. As stated by one participant, 'Sometimes they (middle managers) get a little bit annoyed because they think that they are responsible or liable for any decision that went bad'. Another participant said that personnel had 'a fear of doing the wrong thing' and the possibility of being subject to official or unofficial internal disciplinary action. Although some of the above factors were identified by the Commission on Government (1995) as drivers for maintaining secrecy, other drivers such as the potential to jeopardise relationships with other agencies and industry partners, and adverse impact on agency morale were not.

The importance of agency management, especially senior management, being seen to support the concept of FOI has been generally acknowledged
(Keighley-Gerardy, 2000; Legal, Constitutional & Administrative Review Committee, 1999; Snell & Tyson, 2000). For example, the Queensland Information Commissioner is cited as stating that negative attitudes to FOI by agency management can have an adverse impact on, and seriously hinder, the success of FOI (Legal, Constitutional & Administrative Review Committee, 1999). In Western Australia, the Information Commissioner has acknowledged that 'there is less enthusiasm for FOI in the senior levels of some agencies. However . . . support from management is vital if the public's right of access to information is to be meaningful' (Keighley-Gerardy, 2000, p.2).

To minimise anxiety, a common strategy used by participants with senior management is to ensure that managers are informed of the intended release of possible contentious documents in order that they may formulate a risk management strategy, including preparing media statements. When dealing with middle management, participants reported that they explained agency FOI processes, and apprised managers of ongoing consultations and negotiations. One participant stated that a general strategy used to encourage cooperation from colleagues, such as when requesting assistance to locate documents, involved discussing the application with the officers from whom he is seeking assistance and attempting to get them to empathise and understand the applicant's position and access rights.

Participants identified that one cause of anxiety common to all personnel was the possible release of documents that may contain inaccurate or
Inappropriate comments. As stated by one participant, 'There's been some cases where individuals have made inappropriate comments on documents and they have been released to the public under FOI'. Another participant said that when explaining FOI to personnel he regularly cautions staff not to write gratuitous remarks about people and advises them, 'I'm not going to save you embarrassment'. A third participant, while discussing writing styles of agency personnel, stated, 'I don't think they've changed a great deal on how they write reports. On the whole most staff recognise the fact that there could quite easily be an FOI application in the future. Certainly, the regular report writers are quite aware of that'. However, according to this participant, on occasion individuals, especially those new to the Public Sector and contract employees, do get caught out, that is, documents upon which they have written disparaging or unfounded comments are released through FOI into the public arena.

Of the eight participants, seven stated that they were proactive in educating agency personnel with respect to FOI. Participants reported that they had formulated instruction manuals, conducted in-house training courses and discussed FOI while attending locations throughout their agencies. For example, one participant stated, 'I've tried to impress when I've gone to regional meetings about FOI because I think as managers . . . they need to know what the public are asking, why they are asking it and why it's important for them to have good records management practices'. Other educational strategies included discussing FOI obligations and processes with new personnel, for example one participant while describing how he
conducts FOI awareness sessions to new agency personnel stated, 'at least they know who I am . . . and that any enquiry you get regarding the (agency) come and see me, and that works pretty well. However, participants believed taking FOI to the masses was sometimes problematic due to a constantly changing workforce, personnel being geographically dispersed throughout the State and the limited exposure by most personnel to FOI applications.

Anxiety associated with FOI was not confined to Public Sector personnel. Several participants raised as an issue the practice of Ministers of the Crown requiring their agency CEOs to provide regular status reports of FOI applications received. For example, one participant stated that his CEO, at the insistence of the Minister, provided fortnightly reports identifying applicants and the information being sought. In explaining the situation in his agency another participant stated, 'I think he (the Minister) wants to look at any potential contentious issues coming up, especially from the media or other Members of Parliament . . . They like to keep tabs on what's going on'. Although participants reported that there did not appear to be any ministerial interference in the FOI process, they believed that these ministerial briefings were not in the spirit of the FOI Act (1992). The Information Commissioner has previously expressed concern about the practice. She stated that while it could be argued that Ministers have the right to be advised of the number and nature of applications dealt with by their agencies, 'Ministers should be kept informed of such matters in a way that does not breach the privacy of access applicants' (Keighley-Gerardy, 1996a). Mr. John Kobelke, who in
1997 was this State's Opposition spokesperson on FOI and who is now a Minister in the 2001 Gallop Labor Government, is cited by Tickner (1997a) as stating that he had 'grave concerns' about the practice, as it breached an applicant's privacy and could result in the perception that 'Ministers are interfering in the FOI process'. More recently, Coulthart (1999) raised the issue of agencies routinely providing Ministers and ministerial staff with the details of FOI requests from other politicians. He states that FOI 'needs to be entirely at arms length from the Minister's office, with a specific ban on automatic notification'.

4.2.3 DOCUMENT RELEASE OUTSIDE THE FOI PROCESS

Before considering issues raised by participants relating to agency FOI practices and processes, it is relevant to first consider that, pursuant to section 6 of the FOI Act (1992), the Act does not apply to documents that are generally accessible to the public whether on payment or not, such as documents accessible on the Internet or available at libraries (see Appendix Three). In his review, Richards (1997) concluded that the impact of the Act on most agencies had been minimal, although he accepted that some agencies had experienced problems with implementing and administering the Act. Further, he acknowledges statements by the Information Commissioner that agency FOI workloads would reduce if more documents were made available outside the FOI process. Participants stated that the Commissioner actively promotes, even 'pressures', agencies to make more documents generally available to the public. The Legal, Constitutional and Administrative Review Committee (1999) supports this position and suggests
that agencies could increase accessibility to a wide range of documents, including providing access to documents via the Internet.

Four participants stated that they were proactive in encouraging their agencies to make documents available outside the FOI process. One participant stated that he regularly receives enquiries from the public on how to lodge a FOI application. His initial response to these enquiries is to say 'please don't put one in yet, I'll see if I can deal with it outside of FOI'. Another participant said, 'My comment to a lot of people in (this agency) is let's try and release as much outside of FOI, in particular to aggrieved applicants . . . without having to put them through FOI'. A third participant stated, 'I believe that there's a lot of material still sitting within our (agency) that could be released without coming through FOI. It only needs someone with the balls and the guts to release it . . . they've (agency personnel) just got to follow a simple pattern in saying, "well, what is the ramification if I release this"'. However, as explained by one participant the size and diversity of functions of some agencies made this approach problematic. He stated in his agency with respect to the same information, it was possible for the public to access the information contained in one administrative form after paying a fee in excess of $10.00, the same information contained in a different administrative form was considered confidential and not for general release, yet another administrative form containing the same information would be released under the FOI Act (1992) after the payment of the $30.00 'non-personal information' application fee.
There were three participants, however, who disagreed with the general document release approach. These participants perceived the approach to be a diminution of their legal protection provided by sections 105 and 106 of the FOI Act (1992), that relate to releasing information in 'good faith' (see Appendix Three). One participant stated, 'I certainty wouldn't want to be held liable for something that I've done in good faith, but I'm not covered because I didn't do it under FOI'. Similarly, another participant commented, 'I have a problem with it (the general document release approach) in that FOI Coordinators lose the protection of the FOI Act when they release documents outside of that FOI process'.

4.2.4 FOI PROCESS

It has been asserted that the principal factors that determine the effectiveness of FOI are agency culture, that has previously been discussed in this paper, and agency administrative practices (Legal, Constitutional & Administrative Review Committee, 1999). This assertion very much reflects the issues identified by the participants who, with respect to the FOI process itself, raised concerns with various stages of the application process.

Essentially, the FOI process can be separated into the following six stages: Identifying the documents; Locating and acquiring the documents; Applying fees and charges; Assessing the sensitivity of the documents; Formulating a Notice of Decision; and the Appeal processes. To assist readers, an overview of these stages precedes the participants' comments.
(1) Identifying the documents

This stage requires the FOI Coordinator to determine from the application, and on occasion the applicant, what documents are being requested. Participants agreed that many applications are so vaguely worded that it is not possible to identify the actual documents being sought. Perhaps it was because the legislators anticipated that the public would have limited knowledge of both the legislation and the associated administrative processes that agencies are required, pursuant to section 4 (a) of the FOI Act (1992), to assist applicants with their applications (see Appendix Three). In explaining his approach to clarifying an application, one participant stated, ‘I always ring up the applicant and say “I’ve just received your application, what do you mean by this, what are you after”’. Another participant said, ‘we ring the person up and say “we need more information” . . . and when we establish the scope we just write to them and say we will be dealing with your application’. Participants stated, however, that contacting applicants is sometimes problematic, for example, writing to an applicant is time consuming and it is sometimes difficult to explain the problem and suggest alternatives. Telephoning applicants also has its drawbacks, as explained by one participant, 'It can sometimes take you three or four days to get on to people . . . I've got one (FOI applicant) at the moment . . . I rang yesterday. He starts work at 7.30 in the morning and doesn't get home until 5.30 . . . When am I going to catch this bloke?'.

The majority of participants identified dealing with the broad ambit of many applications as a significant challenge. Again perhaps the legislators foresaw
this given the requirement, pursuant to section 20 (1) of the FOI Act (1992), for agencies to assist applicants in reducing the ambit of large applications (see Appendix Three). The Information Commissioner, too, has recognised the difficulties experienced by agencies in dealing with broad ambit applications, and has reiterated the need for agencies to assist applicants to refine the ambit of their applications (Keighley-Gerardy, 1995; Keighley-Gerardy, 1997a; Keighley-Gerardy, 2000). Participants, however, stated that requesting applicants to refine the ambit of their applications is problematic. One participant said, *We make sure to narrow it (the application ambit) down to the lowest scope. But that itself causes problems, sometimes people . . . say "well I don't know what's in my file, how am I supposed to tell you what I want?"*.

Participants have generally adopted two practical strategies to assist applicants reduce the ambits of their application. First, they provide applicants with a schedule of relevant files - one participant advised that he had received an application that related to 108 separate files which, due to the volume, he considered to be an unreasonable request. He stated that in such cases, the applicant is sent a schedule and letter advising *'here's the types of files that we've got . . . and these are the titles, you tell me what you want, and what you're after and I'll try to get them to narrow it down*. Second, they allow applicants to peruse the relevant documents and identify those of interest. A participant stated, *'I find it easier to bring people in and say "this is what you're getting . . . go through it" . . . you'd be surprised how many people will only take four or five pages of 500, when they've (originally)*
asked for the whole file'. Another participant stated, 'If it's a really big one (application ambit), I'm inclined to get the applicant in . . . and I'll go through the files . . . I did have one . . . it took us six days just to leaf through the files for him to say "yes I want that and that" while I'm taking note of it . . . Because otherwise I was just going to refuse to deal with it'. However, not all applicants are amenable to reducing the ambit of their application and on occasion agencies exercise the refusal provision contained in section 20 (2) of the Act (see Appendix Three). Commenting on this provision one participant stated, 'We've used that provision twice . . . Just the sheer volume of the stuff . . . we said, "we're not doing any of that unless you reduce the scope" and he (the applicant) said "no, I want it all . . . It's all or nothing", so he got nothing'.

Participants stated that knowledge of the applicant's reason for seeking access to documents would assist them in identifying the documents and reducing the ambit of large applications. According to one participant, 'We could save a lot of time, energy and money if we knew at the very beginning why somebody wants something because you could narrow 400 pages down to four or five'. The participant suggested that the solution is to incorporate a question into agency FOI application forms whereby applicants could voluntarily disclose the reason for seeking access to the documents. Protection against agencies misusing the information would continue to be provided by section 10 (2) of the FOI Act (1992) which states that access to documents shall not be affected by any reasons given by an applicant or an
agency's belief as to an applicant's reasons for seeking access (see Appendix Three).

Although participants generally empathise with applicants from the general public, all but one expressed frustration with professional applicants, such as members of the legal profession, the insurance industry and the media. One participant stated, 'when we get contacted by lawyers it is common place for an across the board request . . . "we want everything . . . all documentation, all yellow stickies, all memo's, all files, all records" . . . they're getting this for $30.00 and charging their clients six times that per hour'. The participant further stated, 'We correlate the requirements, put it on schedules, interrogate the files, separate those bits that we perceive to be of interest, document it all and date it. I mean we are just like their clerks'. Another participant in explaining the high number of invalid applications, and applications that required further information, received from legal practitioners said, 'It's their lack of understanding'. This assumption is supported by Rawson (1998) and Lye (1999), a solicitor from New South Wales, who makes the observation that 'Most lawyers are relatively unfamiliar with FOI legislation, case law and processes'. She further states that this 'hinders their ability to negotiate successfully with agencies'. Not directly raised by the participants, another possibility why some applications from members of the legal profession may be broad is the notion that they engage in 'fishing expedition(s) for litigation purposes', with members of the legal profession perceiving FOI laws as a cheaper, quicker and less resource intensive alternative to the civil court processes of accessing documents.
(2) Locating and acquiring the documents

This stage requires the FOI Coordinator to ascertain if the documents sought exist in their agency, locating and acquiring the documents. Most of the participants stated that establishing the existence and determining the location of documents poses an ongoing challenge. Numerous factors were identified by participants as exacerbating this stage of the process, including: the amalgamation of agencies, changing organisational structures, multifaceted and changing agency functions, large numbers of personnel, business areas located throughout this State and the retrospective nature of the FOI Act (1992), that is, the Act applies to all documents in the possession and under the control of agencies not merely those documents created after the commencement of the Act.

Central to the above factors is the effectiveness of an agency's past and current records management practices and systems. For example, the Royal Commission (1992b) stated that sound records management is a 'prerequisite to effective accountability' and without it the aims and objectives of FOI will be 'thwarted'. Similarly, the Legal, Constitutional and Administrative Review Committee (1999, p.3) asserted that the effectiveness of FOI legislation is dependent upon agencies having 'good record keeping practices and an obligation to preserve records', with the Queensland Information Commissioner suggesting that agencies require specific
education on archive legislation (Legal, Constitutional & Administrative Review Committee, 1999).

The issues identified by the participants relating to locating and acquiring documents fell into the following three areas: *Effectiveness of the document recording practices and systems*, *Integrity of the searches* and *Acquiring the documents*.

**Effectiveness of the document recording practices and systems** – FOI Coordinators are not only required to be conversant with their agency’s current records management practices and systems, but also those used in the past. All participants stated that their agencies had established document recording procedures and used some type of computer records management system to record and track corporate documents, with most agencies having more than one system in operation. The effectiveness and coverage of procedures and systems varied on an inter and intra agency level. One participant, for example, in describing the adherence by agency personnel to corporate document recording procedures stated that generally field staff recorded documents and filed them in accordance with procedures. However, administrative personnel, such as those working in the finance area, favoured their own unofficial filing systems. Another participant in describing records management in one part of his agency stated, ‘they don’t seem to have good record keeping practices and there’s not a proper computer system in place . . . to find where files are . . . we have to do a lot of ringing around. I often get conflicting stories and sometimes it can be days
before we find out'. In explaining records management practices at his agency, a third participant said that personnel gave file management a very low priority and he stated that a common attitude was to throw documents and records into a room and hope that they would never be required in the future.

Participants stated that even when personnel did record and place documents on a file, locating the documents was not always easy due to the possibility of the files being kept at various locations throughout the agency, and related documents being titled differently and/or placed on different files. Participants attributed the above scenarios to a poor understanding of records management practices, rather than a deliberate action to confound the intent of the FOI Act (1992). Therefore an application requesting access to all documents relating to an individual can present significant difficulties for Coordinators when one considers the above factors. According to one participant, whose agency has many centralised and district offices, ‘...ifs (the documentation) not just sitting in a filing cabinet of you... records are not kept centrally and they’re all out in the (business areas)’. This situation appears to be common not only in Western Australia, but also elsewhere (Rawson, 1998). In attempting to overcome shortfalls in records management practices and systems, participants identified the establishment of an informal intra agency network with key, not necessarily senior, personnel as being an important means of determining the existence and location of documents.
The management of electronic documentation, such as email and to a lesser extent facsimile documents, also presented problems to FOI Coordinators. Participants stated that personnel generally did not perceive electronic documents as being 'real' documents, and as a result they usually were neither retained nor filed. One participant said, 'When FOI first came in, I think there was a real thrust within the agency that we would all become accountable and be very careful and operate with good records management practices. Now it has gone a little bit on the slide, particularly in electronic documents they (agency personnel) just seem to think "I can ping off anything" and it won't get recorded'.

The issue of FOI legislation being outdated by technological advances in the areas of document creation, communication and retention has previously been identified as an issue in Western Australia. The Information Commission has stated that the FOI Act (1992) was essentially designed to deal with hardcopy records, and that agencies were increasingly going from paper to electronic documents (Keighley-Gerardy, 1998; Keighley-Gerardy, 2001). The Commissioner further states that traditional filing cabinets are being replaced by electronic databases, with the responsibility for records management increasingly being transferred from professional records managers to the senders and receivers of electronic documents (Keighley-Gerardy, 2001). In examining this issue, the Legal, Constitutional and Administrative Review Committee (1999) posed several solutions, including better defining the term 'document' and changing the focus of FOI legislation from access to documentation to 'information'. However, the latter alternative
was considered problematic in that agencies would have the additional administrative and resource burden associated with creating new documents to fulfil information requests (Constitutional & Administrative Review Committee, 1999).

Maertens (1996) cites the Western Australian Auditor General, Mr. Des Pearson, as stating that 'effective records management formed the cornerstone of open and accountable government'. The Auditor General is further cited as saying that despite recommendations relating to the need to improve record keeping in Western Australia from various sources, including a Royal Commission, the management of public records is 'still in disarray'. In November 2000, the former Liberal and National Party Coalition Government introduced the State Records Act (2000). This Act replaced the archive provisions in the Library Board of Western Australia Act (1951), a statute generally considered to be out of date especially with respect to modern forms of electronic communication. The Minister responsible for introducing the State Records Act (2000), Mike Board, former Minister for Employment, Training, Youth and the Arts, stated that the Act made Western Australia the 'most accountable in the nation' and 'enshrined in law record-keeping practices designed to ensure accountability and transparency in local and State Government agencies' (Board, 2000).

Established under the State Records Act (2000) is the State Records Commission that is comprised of the Auditor General, the Information Commissioner, the Parliamentary Commissioner (Ombudsman) and a person
experienced in record keeping appointed by the Governor. The functions of the Commission, which is supported by the State Records Office, are establishing principles and standards relating to record keeping by State Government agencies, monitoring agencies' compliance with record keeping plans, monitoring the operation of and compliance with the Act and inquiring into breaches or possible breaches of the Act (State Records Act, 2000, ss. 59 & 60). The Commission has broad investigative powers and the ability to apply penalty provisions for offences under the Act (State Records Act, 2000, ss. 60, 67-69). While still at the Bill stage, the Information Commissioner stated that the Act would be 'a vital tool of accountability' and that it could address some of the problems being experienced with the management of public documents (Keighley-Gerardy, 2000, p.4). Although the Act received Royal Assent in November 2000, the majority of provisions have yet to be proclaimed. Accordingly, it is too early to assess what effect the Act, the State Records Commission and the State Records Office has had on records management in Western Australia.

**Integrity of the searches** — Crucial to the FOI process is the requirement for agencies to establish the existence of and locate documents subject to an application. Therefore applicants must 'rely on the completeness of the searches' conducted by agencies (Sufficiency of search, 1999). Generally, participants did not conduct physical searches for documents themselves, with agency protocols being established requiring local personnel to search for and locate documents falling within the ambit of an application. Commonly, the protocols require personnel to complete a written declaration
stating that a thorough search had been conducted and, where documents are located, to forward them to their FOI Coordinator for processing. One participant in explaining the problems of having to rely on local personnel stated, 'A lot of the records you need to obtain are out in the field . . . which invariably are short staffed . . . they're (field personnel) becoming less and less keen on running around searching for records . . . quite often searching for records that are two or three years old or more becomes a major task and they're not willing to do so'. The participant further stated, 'Quite often it can drag out to a month or more trying to get someone to conduct a search . . . we're becoming a little bit suspicious when they (field personnel) say "documents can't be found" as to whether they can't be bothered looking'.

In support of the participants' assertions relating to poor agency records management practices and systems, and inadequate searching for documents by some personnel, the Information Commissioner recently confirmed that there had been an increase in the number of complaints lodged with her Office pertaining to agency claims that documents could not be identified or were missing. She stated, 'In some cases, the records simply do not exist. In others, it is clear that the required records should exist . . . but, for various reasons, the records cannot be found'. One example cited by the Commissioner concerned an agency that had important documents missing from its corporate records filing system. The Commissioner acknowledged that although it was possible that the documents had been misfiled, she stated, the 'frequency with which this issue arises in the Department suggests that the record keeping system may be at fault'. The
Commissioner further stated that CEOs, pursuant to the Public Sector Management Act (1994), have an obligation 'to ensure that proper records are maintained in their agencies' and that she considered not enough attention is being given to these responsibilities (Keighley-Gerardy, 2000, p.4; MacDonald, 2000a).

**Acquiring the documents** - Participants reported that ordinarily they had full access to agency documents. One participant stated, 'There's a very clear understanding from the whole department that there's nothing you can refuse me'. Participants, however, were able to relate examples of when personnel refused to deliver specific documents in the belief that they were their personal property. One such case was related by a participant who stated that a manager when requested to forward a document said, 'You can't have that, that's my personal property, that was for my personal record'. The participant advised that his usual response was to say 'To create a record in the course of your duty . . . is a record of the department'. However, the more junior the FOi Coordinator and more senior the person in possession of the document, the more problematic gaining access became. A participant who was of a lower level stated, 'you need the clout when you go to one of the managers who says, "why should I release this information", I mean you're a level four and they're a level six . . . so sometimes you get railroaded. If they say, "no you can't have it" . . . what can you do? . . . we really want to say, "you have to release it". . . . You haven't got the status to do that'.
A specific problem common to all participants was that of accessing the diaries of middle and senior managers. One participant stated a frequent response from managers is ‘You can’t have my diary that’s personal’, to which the participant’s standard response was ‘your diary is personal, but the information in it is a departmental record’. Another participant commenting on his attempts to gain access to the diary of his CEO stated, ‘Openly... he has said we’re open and accountable. But he’s the most autocratic pedantic person I’ve ever had to deal with. He will stand you up and say “I will not give you the document, you’re not having it”, even though I have pointed out the ramifications of the (FOI) Act... His diaries, anything like that he says they’re off limits and that’s it’.

(3) Applying fees and charges
This stage requires the FOI Coordinator to determine if any of the charges, as provided in section 16 of the FOI Act (1992) and prescribed in the FOI Regulations (1993), apply prior to giving access to documents (see Appendix Three). Several participants identified as an issue the charging of the application fee with respect to documents containing non-personal information. The provision makes a distinction between applications that seek personal information (for which no application fee is charged) and those seeking non-personal information (for which a $30.00 application fee applies). Crucial to deciding the applicability of the fee is the need for Coordinators from the outset to determine which type of information, that is personal or non-personal, is being sought. Despite the term ‘personal information’ being defined in the Glossary to the Act (see Appendix Three),
and in material contained on the Information Commissioner's Internet site (Personal information, 1999), participants interpreted this term very differently. Although participants generally provided clear examples of what they considered to be non-personal information, their definitions of 'personal information' varied greatly. For example, some participants viewed a document that contained any reference to the applicant as being 'personal information', whereas other participants viewed only those details relating to the applicant themselves, such as the individual's address, age, date of birth, motor driver's licence, as being 'personal information'. Accordingly, applicants may be charged by some agencies to access documents that other agencies provide free.

Participants identified as an issue the requirement, pursuant to section 17 of the FOI Act (1992), to provide applicants seeking non-personal information with an estimate of charges where costs may exceed $25.00 (see Appendix Three). Section 16 of the Act specifies the types of activities for which agencies can charge, including conducting routine searches for documents, supervising inspections of material by applicants and supplying copies of documents. Participants stated that it was common to deal with large applications, and the hourly rates for personnel and ever increasing costs of consumables made the $25.00 maximum unrealistic. In explaining this one participant stated, 'if it's over $25.00 you've got to do an estimate of the cost and advise the applicant and then they've got to come back to you and say "yes we want to proceed" . . . . I don't think I've ever had one (applicant) that says "no I'm not going to proceed". But it does mean virtually every single
application that we deal with is non-personal information and you've got to do an estimate. It's ridiculous the low cost. It should be about $100.00'.

The charging of fees associated with providing access to documents under FOI legislation has been perceived by some observers of FOI as being a means to offset administrative expenses, increase government revenue and, on a more sinister line, circumvent FOI laws by dissuading individuals from making applications (Commission on Government, 1995; Legal, Constitutional & Administrative Review Committee, 1999; Roberts, 2000). When researching Canadian FOI legislation, Roberts (1998) concluded that Canadian Governments perceive government information as a source of revenue, rather than a public resource, and are attempting to recover costs associated with FOI by increasing fees and charges. He states it is generally accepted that the costs of administering FOI substantially exceed the revenue collected and believes that increases in revenue through fees and charges are negligible, with the only savings being associated with deterring large numbers of potential applicants from exercising their right to access government documents (Roberts 1998; Roberts, 2000).

One of the principles of the FOI Act (1992), as provided in section 4 (b), is prompt access to documents at the 'lowest reasonable cost' (see Appendix Three). Generally, participants reported that although the Act provides for the charging of costs, in practice they deliberately undercharge. In explaining the difficulties with accurately costing the time taken to process applications one participant stated, 'if we were serious about charging for all the time we'd
attributed to an application, it'd be like Monopoly money'. In addition to under-charging, participants stated that on occasion they arbitrarily reduce or waive charges to compensate applicants for excessive delays in the processing of applications or for other difficulties that applicants may have experienced with the application process. In explaining the decision to waive charges one participant stated, ‘I've got one (application) at the moment where I've got to write and say “sorry but I need more time”. Because I need more time I'll waive all costs and they could be fairly considerable'.

Although public submissions were made to both the Commission on Government (1995) and the Richards (1997) statutory review of the FOi Act (1992) claiming that fees and charges were too high, they have remained unaltered since the commencement of the Act. The Commission on Government (1995, p.78) found that the schedule of fees and charges struck a balance between the 'competing interests of open access to information and minimising the additional costs to taxpayers' in having the legislation. Similarly, Richards (1997) concluded that the prescribed fees and charges were reasonable and did not support changing them. Despite the above findings, some individuals maintain that the fees and charges are too high. Brogan (1998) asserts that in Western Australia the cost to applicants in accessing government information through FOI is high. He states that the costs have 'all but buried FOI as an instrument of redress for ordinary people'. It is unclear from the literature whether individuals claiming that costs associated with accessing documents under FOI are excessive are
referring to the actual fees and charges or the manner in which agencies calculate and apply the charges.

Participants believed that the Information Commissioner has consistently taken a tough stance against agencies charging costs, especially those relating to conducting searches for documents. In recent times, there have been several public examples of the Commissioner challenging agencies over the charging of costs. The first example involved an applicant seeking from the Crown Solicitor's Office access to documents relating to a government review. Upon appeal, the Commissioner found that the agency's proposed $30,000 charge for 1000 hours processing time was excessive, with other costs deemed to be inappropriate. The Commissioner subsequently reduced the costs to $240.00 (Tickner, 2000b). The second example involved an applicant who sought from Agriculture WA documents that related to the sale of poisons to unauthorised persons. Upon appeal, the Commissioner found that the agency's proposed $1,380 charge (including a $345 deposit) was unreasonable. The Commissioner reduced the costs to $257.80 and the deposit to $64.50 (Foi reprimand fully deserved, 2001).

Official statistics for both the 1998-1999 and 1999-2000 financial years show that while there was a 13.8% (666) increase in the number of FOI applications dealt with (see Table 1 on page 90), and in the number of applications that resulted in access to documents, the costs imposed by agencies have stabilised. In 2000 the average charge imposed for non-personal information, excluding the $30.00 application fee for non-personal
information, was about $14.00 (Keighley-Gerardy, 1999a; Keighley-Gerardy, 2000). Given the Legislative Council Budget Estimates Committee June 2000 decision not to increased the prescribed fees and charges (Butler, 2000), it appears that the former Liberal and Nation Party Coalition Government acknowledged that increases in fees and charges would act as a deterrent to potential applicants. It remains to be seen how the 2001 Gallop Labor Government will balance the costs associated with providing FOI against the provision of cheap FOI to applicants.

(4) Assessing the sensitivity of the documents

This stage requires the FOI Coordinator to determine whether it is necessary to refuse access to a document on the grounds that it contains exempt material as defined in Schedule I to the FOI Act (1992). The exemption clauses claimed by agencies are as diverse as the different agency businesses. The more common exemptions discussed by participants came under the general headings of commercial or business information, deliberative process, legal professional privilege, personal information of third parties and revealing an investigation. Participants indicated that they commenced their deliberations on the principle of what documents can be released as opposed to what cannot be released. In explaining this principle one participant stated, 'there's too much concentration on what you can't give out rather than what you can . . . let's look at what we can give out . . . I find that very useful to get (agency personnel) . . . on track and get their thinking changed otherwise they can't have this, they can't have that, soon everything is exempt'. Another participant stated, 'As I've pointed out to some of our
senior officers, just because something falls within one of the exemption clauses it doesn’t say you may not release it. I've got to be convinced why something shouldn't be released.

It is not only agency personnel that FOI Coordinators experience difficulties with when determining the appropriateness of documents for release. On occasion Coordinators also need to consult third parties mentioned in a document, for example any person other than the applicant whose identity is revealed, such as a complainant, consultant, vendor or witness. Participants reported that frequently third parties, when considering if they object to their details being released, request, sometimes demand, to know the applicant’s identity. The situation was exacerbated when third parties had no prior knowledge of their details being contained in a government document. To assist third parties in their deliberations, it was common for Coordinators to advise third parties of the document’s contents or forward them a copy of the document for perusal. In explaining the latter strategy one participant stated, ‘There’s a lot of consultation with third parties and the only way to do that effectively is to send them copies of what the applicant wants. Sometimes it means you’ve actually got to edit names before it goes out to the third party’. However, participants stated that despite editing out names, sometimes it is possible for the third party to determine the identity of the applicant by the nature of the document itself.

Participants considered that the Information Commissioner’s stance on this issue is not to reveal the identity of applicants on the grounds of their right to
privacy. Material on the Commissioner's Internet site supports this belief, it states, 'There should be no need to reveal the identity of an applicant to a third party . . . during the consultation process, although the question will almost inevitably be asked' (Privacy of applicant and third party, 1999). It is further stated, 'Therefore, personal information about any individual (other than [sic] access applicant) whose identity can be ascertained is *prima facie* exempt' (Privacy of third parties protected, 1999). Despite the Commissioner's stance, this research found that on occasion some participants do either directly or indirectly disclosed the applicant's identity to a third party in order to progress the application.

Four participants identified as an issue dealing with applications that seek documents created by external parties, such as consultants and contractors engaged by their agencies. One participant stated, 'the people who are most surprised or resentful about FOI are some of the professional staff . . . often they are on a contract basis and can be very upset when they find out their professional reports are about to be released'. It was found that contractors frequently considered their documents to contain commercial information. In explaining this one participant said, 'Buried in that report there could be information which need not necessarily be specific to that report, for example . . . how much they (the consultant) charge, their methods and strategies and how they went about collating the information . . . there's no way we can release that because it's commercial information'.
Participants raised the issue of ownership of documents created by consultants. One example described by a participant involved a contractor who claimed ownership of staff selection documents. The participant explained, 'I had an external person on the (selection) panel refuse to give me their panel notes, which the applicant actually asked for . . . it was very difficult when the two (panel members) within the agency are quite happy to give their notes'. Similarly, another participant provided an example of where a contractor was engaged to conduct attitudinal testing of prospective employees. Unbeknown to the agency, the contractor had required interviewees to sign a waiver releasing the company from supplying assessment feedback. The contractor later refused to provide individuals with feedback, which resulted in the applicants lodging FOI requests with the agency. The participant stated that although he himself would not release documents describing the testing method or questions, pursuant to clause 11 of Schedule 1 to the FOI Act (1992) that relates to jeopardising testing processes, he would release summaries that provided individuals with information on how they had been assessed.

All participants were of the opinion that documents created by consultants were the property of the agency. In justifying this conclusion, one participant asserted, 'if we commission that report we own it'. Another participant stated, 'We as an agency own their (the consultant’s) time . . . so we own their intellectual effort'. However, participants said that it was sometimes extremely difficult and time consuming to convince consultants and contractors that the documents created by them on behalf of the agency
were owned by the agency, and to actually get the contractors to deliver the documents. One participant described a case where his agency had to obtain legal assistance to recover documents from a consultant. The Information Commissioner has also identified the problem of accessing documents created by and under the control of contractors. She states, ‘there is a need for any out-sourcing arrangements to contain explicit reference to access rights under FOI and to address the issue of ownership’ (Keighley-Gerardy, 1996a).

The issue of commercial confidentiality, and difficulties associated with agencies accessing documents created by contractors, have been identified as a potential threat to the ideals of FOI by the Legal, Constitutional and Administrative Review Committee (1999). In Western Australia, the Royal Commission (1992b) found that although on occasion it was appropriate to claim commercial confidentiality, such claims should be subject to public interest considerations. The Commission on Government (1995) asserts that difficulties in this area are increasing due to the government trend in outsourcing activities and functions. Previously, the Information Commissioner has stated that companies using public money should not tender for government contracts if they are not prepared for the resulting information to be publicly disclosed (McNamara, 2000) and that the FOI Act (1992) is ‘allowing the Government to shade itself under a veil of commercial confidentiality’ (MacDonald, 2000b). To date, no Australian jurisdiction has enacted legislation to address this specific issue as it applies to FOI (Legal, Constitutional & Administrative Review Committee, 1999).
In his review of the FOI Act (1992), Richards (1997) found that generally the exemptions contained in Schedule 1 to the Act are appropriate. However, he identified anomalies with, and recommended various enhancements to, the exemption clauses. For some time, the Information Commissioner also has suggested changes to the exemption clauses (Pryer, 1999). The Commissioner has over time progressed from suggesting minor enhancements to the exemptions, to the present day when she recommends that the current 15 exemption clauses and 51 sub-clauses be replaced by a single test based on information only being withheld if it was likely that release would cause substantial harm to the public interest (Butler, 2000; Keighley-Gerardy, 1999b; McNamara, 2000; Pryer, 1999).

(5) Formulating a Notice of Decision

This stage requires the FOI Coordinator to formulate a Notice of Decision to the applicant advising whether the agency intends to provide access to the documents sought. All participants stated that it was their role to consider the issues raised by agency personnel and third parties as to the appropriateness of providing access to a document, to apply any relevant exemption clauses, to research the applicability of judicial or quasi-judicial decisions, and to formulate a Notice of Decision. Participants stated that when access is refused the Notice must specify the reasons, including factors both for and against releasing the document, provide an explanation of the exemption clause claimed and make reference to any relevant case law precedents and other applicable determinations, such as those made by the Information Commissioner. The person signing the Notice of Decision on
behalf of the agency is called the Decision-maker, who may not necessarily be the Coordinator. In the case of the research participants, five of the eight Coordinators were also Decision-makers.

Two of the three participants who were not Decision-makers, but who formulated the Notices of Decision, stated that their respective Decision-makers did not possess the level of knowledge of the FOI Act (1992) required to perform the role effectively, and as a result they relied on the Coordinators to conduct the research and formulate the Notices. As explained by one participant, 'it's fair to say that I've done all the work and I make the recommendations as to which exemptions we're going to claim'. Another participant stated, 'I've established my credibility, they (the Decision-makers) rely on my judgement . . . and they just rubber-stamp . . . I can say “this is what I’m going to release”, they won't bother to read the Act, they're taking me on trust'. Participants reported that in most instances where the Coordinator is not the Decision-maker, rarely does the Decision-maker alter the Coordinator's original decision.

Most participants believed that the Information Commissioner requires agencies to produce Notices of Decision that are too formal and legalistic in nature. Participants expressed the belief that although this style of communicating decisions may be suitable for applicants who have a legal background, the style was inappropriate for members of the general public. One participant stated, 'I think in a lot of ways we've changed our style in the way we do our determination letters . . . three quarters . . . reads like
gobbledy-gook to the layman . . . this unfortunately is what has been agreed to not only by our area but other government agencies'. Another participant said, 'instead of citing previous cases and examples which the FOI Commissioner loves you doing . . . I give a simple reason . . . as to why I'm withholding documents . . . It certainly wouldn't be more than a paragraph'.

In his review of the FOI Act (1992), Richards (1997) refers to statements made by the Commissioner that at times agencies do not provide adequate justification of their decisions.

Agencies are required, pursuant to section 13 (1) of the FOI Act (1992), to make a decision whether to give access to a document and provide a Notice of Decision to the applicant 'as soon as is practical' and within 45 days from receipt of the application. Under subsection (2), failure to do so is a ground for appeal to the Information Commissioner (see Appendix Three). Participants reported that many factors impact on their ability to complete a Notice of Decision within the prescribed period. These factors can be divided into either Process or Extraneous factors.

- **Process factors** – these include the size and complexity of the application, time associated with determining the existence and location of the document, acquiring the document from agency custodians, perusing the document and creating a schedule, consulting and negotiating with intra and inter agency personnel and third parties, researching relevant judicial and quasi-judicial decisions, formulating the Notice of Decision and, for those FOI Coordinators who are not
Decision-makers, obtaining the approval of the Decision-maker (which for some agencies requires the paperwork to be forwarded to and returned from a regional or district office).

- **Extraneous factors** – these include the number of existing applications being processed, work loads associated with other roles performed by the Coordinator and the loss of time resulting from public holidays.

It is perhaps the recognition of the myriad of factors that could delay the completion of a Notice of Decision that resulted in the legislators making provision, pursuant to section 13 (5) of the FOI Act (1992), for agencies to apply to the Commissioner for an extension to the 45 day period (see Appendix Three).

Several participants reported that they frequently received requests from applicants requiring their applications be completed in much shorter periods, some even the same or the following day. Participants explained that some applicants believe that they can just attend the agency, pay a fee and receive the document over the counter. One participant stated, 'I get a bit tired sometimes of people contacting me . . . as I do almost every day, saying "I really need these documents tomorrow" . . . We will always do our best'. Another participant said, 'I don’t think there is one agency that really would hold back on not getting information to the applicant very quickly. Probably because of the customer focus that is coming into government agencies, no one really wants to hang onto them (applications) for the 45 day limit.'
Participants stated that requests to expedite the process are treated on a case-by-case basis, and although some applicants perceived a delay as a deliberate attempt by agencies to withhold the documents or confound the FOI legislation, Coordinators could only attempt to manage the applicant's expectations by explaining the reason for the delay or inability to expedite the application.

These process and extraneous factors place previous comments made by the Information Commissioner with respect to agency delays in processing applications into a broader perspective. The Commission on Government (1995) cites the Commissioner as stating that some agencies took excessive time to complete applications. The Commission also received several public submissions asserting that some agencies were obstructive by unnecessarily delaying decisions. Although the Commission's recommendation to reduce the 45 day period to 14 days was not supported by Richards (1997), the participants' assertions that FOI Coordinators are not deliberately delaying the completion of applications is corroborated by official statistics that show in 1998/1999 and 1999/2000 financial years the average time taken to finalise an application reduced from 21 to 18 days respectively (Keighley-Gerardy, 1999a; Keighley-Gerardy, 2000).

(6) Appeal Processes

The FOI Act (1992) provides applicants and third parties with an appeal process against agency decisions and actions. Generally, an aggrieved party may appeal, pursuant to the provisions contained in Division 5 of Part 4
of the Act, to have an agency's decision or process reviewed under the following two-tiered appeal process. First, an aggrieved party may seek an Internal Review, that is, a review conducted by an officer of the agency who is independent of, and equal to or greater in seniority than, the agency's Decision-maker. Second, if dissatisfied with the findings of the Internal Review, the aggrieved party may request the Information Commissioner, pursuant to provisions contained in Division 3 of Part 4 of the Act, to conduct an independent External Review. Both appeal processes are free of charge to the aggrieved party. The outcome of either appeal process may result in the agency's original decision being upheld, varied or substituted. Due to the length of the mentioned Divisions of the Act, they have not been incorporated into Appendix Three of this paper.

Participants stated that although a large number of FOi applications were dealt with annually, appeals against agency decisions were infrequent, and in many cases the Information Commissioner upheld the agency's original decision. These assertions are supported by the official statistics over page that show in the 1999-2000 financial year there were 5,501 FOi applications processed. Of the 246 (4.5%) complaints dealt with by the Commissioner, 28 (11.4%) were deemed to be misconceived or lacking in substance. Of the 66 complaints that were referred to formal decision (most complaints having been successfully resolved through conciliation), 56.1% (37) were found in favour of the agency's original decision, 24.2% (16) decisions were varied and 19.7% (13) were substituted.
### Table 1
**FOI – Application numbers**

<table>
<thead>
<tr>
<th></th>
<th>1998-99</th>
<th>1999-00</th>
<th>Difference</th>
<th>Complaints dealt with as % of 1999-00 applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>FOI applications dealt with by agencies</td>
<td>4,835</td>
<td>5,501</td>
<td>666</td>
<td>13.8</td>
</tr>
</tbody>
</table>

(Keighley-Gerardy, 1999a; Keighley-Gerardy, 2000)

### Table 2
**FOI – Complaints dealt with by the Information Commissioner**

<table>
<thead>
<tr>
<th></th>
<th>1998-99</th>
<th>1999-00</th>
<th>Difference</th>
<th>% of 1999-00 complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaints dealt with by the Information Commissioner</td>
<td>161</td>
<td>246</td>
<td>85</td>
<td>52.8</td>
</tr>
<tr>
<td>Complaints not progressed due to being misconceived or lacking in substance</td>
<td>19</td>
<td>28</td>
<td>9</td>
<td>47.4</td>
</tr>
</tbody>
</table>

(Keighley-Gerardy, 1999a; Keighley-Gerardy, 2000)

### Table 3
**FOI – Formal appeal decision outcomes**

<table>
<thead>
<tr>
<th></th>
<th>1998-99</th>
<th>1999-00</th>
<th>Difference</th>
<th>% of complaints to formal decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complaints proceeded to formal decision</td>
<td>26</td>
<td>66</td>
<td>40</td>
<td>153.8</td>
</tr>
<tr>
<td>Decisions held in favour of agency</td>
<td>20</td>
<td>37</td>
<td>17</td>
<td>85.0</td>
</tr>
<tr>
<td>Decisions to vary agency decision</td>
<td>2</td>
<td>16</td>
<td>14</td>
<td>700.0</td>
</tr>
<tr>
<td>Decisions to substitute agency decision</td>
<td>4</td>
<td>13</td>
<td>9</td>
<td>225.0</td>
</tr>
</tbody>
</table>

(Keighley-Gerardy, 1999a; Keighley-Gerardy, 2000)
Although generally satisfied with the two-tier appeal process, participants expressed the following concerns with the effectiveness of several processes associated with both the internal Reviews and External Reviews.

**Internal Reviews** - Participants stated that in most instances the role of reviewer was only a small part of that officer's total duties. Due to the requirements of the role, many of the reviewers were members of senior management, were frequently transferred about the agency and had other high work priorities. Doubt as to the effectiveness of the Internal Review process has previously been raised. Tickner (1997b) while recognising the process as a 'quality control' measure, stated that 'It was not possible to determine whether agencies were merely "rubber stamping"; their initial decision'.

One participant said that as the result of the transience of the reviewers, and their general lack of knowledge of the FOI legislation, he, as FOI Coordinator, conducted reviews of his own decisions, prepared responses to the appellants and submitted the response to the reviewer for signature. Other participants, although confirming the independence of their agencies' reviewers, questioned the ability and preparedness of these senior managers to review some types of complaints, such as searching systems and files to verify the non-existence of documents. In support of the participants' assertions, the Legal, Constitutional and Administrative Review Committee (1999) also identified as issues the ability of some Internal Review Officers to effectively perform reviews due to their limited knowledge of FOI legislation,
agency FOI processes and records management systems, and their perceived lack of impartiality. However, despite these negative aspects, the Committee found that Internal Reviews do enable agencies to review decisions informally, quickly and cheaply, and allows agency management to monitor the quality of decisions. Official statistics show that in the 1999/2000 financial year, of the 224 Internal Reviews conducted 148 (66%) confirmed the agency's original decision, 61 (27%) decisions were varied and 9 (4%) substituted (Keighley-Gerardy, 2000). It is presumed the remaining 6 (3%) reviews were uncompleted when the statistics were published.

External Reviews – Few participants had experienced any of their decisions being formally reviewed by the Information Commissioner. However, based on their reading of the Commissioner's formal decisions, participants believed that the decisions were too legalistic and complex. In explaining this one participant described the decisions as 'pages and pages of these legal terms'. The participant further stated, 'a lot of our clients are actually on the lower socio-economic ladder, for them to get a decision like that is just way above them and I think it's inappropriate for the Commissioner's Office to give out something like that to Joe Blow'. When commenting on the format and content of her review findings, the Commissioner has previously stated that a balance was necessary between the informality required by many applicants and meeting 'statutory requirements, principles of administrative law and acceptable standards of merit reviews' (Keighley-Gerardy, 1999b, p.4), a point also made by the Legal, Constitutional and Administrative Review Committee (1999).
Five participants stated that there was a lack of proactive feedback from both agency management and the Information Commissioner with respect to their processes and decisions. Participants believed that if there was regular feedback earlier in the application process there may be fewer aggrieved parties and therefore less complaints. The lack of feedback from agency management was perceived by participants as resulting from management's general lack of understanding of the FOI Act (1992) and associated agency processes. Participants believed that their senior managers only became interested in their agency's handling of FOI when either a controversial document was about to be released or an agency decision was subject to an External Review.

Several participants expressed the belief that the Information Commissioner should proactively review agency decisions and processes outside of the appeal process. One participant stated, 'One thing that surprises me with the whole FOI process and how it's handled is the fact that the FOI Commissioner doesn't seem to conduct any audits on how FOI is going in government agencies'. Participants suggested that staff from the Commissioner's Office should randomly inspect agency FOI files and also verify the outcomes by contacting applicants. In the absence of any external audits, one participant reported that he regularly arranges for an independent officer from his agency to conduct audits of his decisions and practices. The participant said, We just picked three months at random and went through the requests . . . and how quickly I got my acknowledgement letters out. My
own guidelines say that I either get my acknowledgement letters out . . . or a 
Letter (Notice) of Decision within 72 hours'.

Although, the FOI Act (1992) limits the Information Commissioner's powers to 
audit agencies to the External Review process, in 1999 the Commissioner 
implemented a 'report-card' approach to assessing the performance of 
agencies, that is, evaluating agency performance against specific criteria. 
The Commissioner visited five agencies and evaluated their performance 
against the following standards and measures, that were developed in 
conjunction with FOi Coordinators: timeliness and costs, records systems 
and searches, decision-making and reasons, responsiveness and openness, 
administrative framework, complaint trends and agency information 
statements (Foi standards and performance measures, 1998). The results of 
the evaluations were published in the Commissioner's Annual Report to 
Parliament (Keighley-Gerardy, 1999a). The Commissioner has continued 
this initiative, with a further four evaluations of different agencies being 
similarly conducted and published in the 2000 Annual Report to Parliament 
(Keighley-Gerardy, 2000).

4.2.5 RESOURCING OF FOI COORDINATORS

The manner in which individual agencies resource FOi, and the level of 
training and experience of agency FOI practitioners, directly impact on the 
practitioners' ability to manage the FOI Act (1992). Participants identified the 
following four areas as issues: Staffing; Succession planning; Training and
knowledge; and the Recognition of responsibility and appropriateness of seniority of FOI Coordinators.

**Staffing** - Participants believed that agency management initially underestimated the impact that the FOI Act (1992) would have on their agencies, with some managers perceiving the legislation to be just another administrative process that would need to be absorbed by agencies. One participant stated that the attitude of management in his agency to FOI was simply one of who within the agency was going to take responsibility for this additional administrative process. Without additional funding or resources to administer the Act, implementation of the Act was likened by another participant as 'having a full glass of water and pouring more in'.

Participants reported that in some instances agencies assigned responsibility for FOI to existing areas, such as records areas, other agencies created specific units, while others devolved responsibility to business area and local office managers. In determining the location of FOI areas with agencies, Snell (2001) states that the 'internal dynamics, operations and culture of each agency' should be taken into consideration. One participant in explaining his agency's decision to later change approaches stated, 'like a lot of agencies it (FOI) got left to records (management area) to deal with . . . it became a major problem. It was taking up the record manager's time, almost exclusively . . . After struggling for about two years, eventually the FOI Unit was formed'.
Four participants identified under-resourcing as a significant issue. Participants believed that despite increases in recent times of the total number of FOi applications received by agencies (Keighley-Gerardy, 1999a; Keighley-Gerardy, 2000), the number of agency personnel assigned to deal with FOi matters had rarely increased. One participant described the attitude of management to providing additional resources as being a dichotomy, that is, although management espoused that FOI is an agency-wide responsibility, management expected FOI Coordinators to process increasing numbers of applications with little or no additional resources. As a result participants, who were generally middle to upper middle management, cited daily examples of where, due to insufficient clerical support, they performed basic administrative duties. Several participants claimed that a single clerical officer would increase their ability to produce timely and quality decisions, for example, according to one participant, 'It would be very useful if I could get someone just to draw up the schedule of documents, and then I can just go through and make the decisions'.

In an attempt to resolve resource shortfalls, one participant reported that although he was unable to obtain internal clerical support, he was permitted to contract temporary external clerical assistants. This, however, had proved to be unsatisfactory due to the assistants neither being committed to their assigned tasks, nor had sufficient knowledge of the FOI Act (1992), agency processes and systems. The participant further added that it was difficult to provide the external assistants with training as there was no certainty whether future funding would be available, whether a previous assistant who
had acquired some knowledge would be reassigned to the agency and whether the employment agency would be able to provide appropriate personnel at short notice.

Participants reported that in an attempt to manage workloads and to comply with the prescribed timelines in which to complete a FOI application, it was sometimes necessary to take short cuts in processing applications. Explaining the need to balance completing workloads within the prescribed timeframes and operating with insufficient resources one participant stated, 'if this agency was to comply to the letter with the (legislative) requirements, we'd be shot. We couldn't do it unless we had more staff, which is a nonsense in this day and age. You try asking for more staff and people (management) just laugh'. Another participant said that given the statutory responsibilities placed on agencies by the FOI Act (1992), the issue of adequate resourcing should be pursued by external regulators, such as the Information Commissioner and the Commissioner for Public Sector Standards. 'If we've really got an Act and we seriously believe in Freedom of Information, I see it needs some enforcement of standards on departments, that is, you have got appropriate resources', one participant stated.

Succession planning - Six participants identified as an issue the lack of agency succession planning for the FOI practitioner positions. One participant stated that he could not get another person within the agency to even fill the FOI Coordinator position temporarily. The taking of annual leave by FOI practitioners presented a dilemma for several agencies. As explained
by a participant, ‘I don’t have in this job an actual person to ... act while I go on leave. Last time I went on leave ... we put out expressions of interest well in advance ... No one applied so it (the expression) had to go out again and there was a bit of cajoling’. The participant further stated, ‘Certainly when it comes to people doing my job ... we’ve managed to get everyone on a (FOi training) course, but so far no one has wanted to do my job more than once’. Another participant said he could only take annual leave in two-week periods, during which time the application process was merely maintained by a clerical assistant from elsewhere in the agency forwarding a generic acknowledgement letter to new applicants. According to a third participant, ‘there is no one else trained ... I keep on saying “if I drop dead tomorrow who’s going to do it (his FOi functions), someone’s going to have to” ... You shouldn’t be the only body in the (agency) who can do it ... Like they wouldn’t know how to write the letters (Notices) of Decision, there is no basic understanding (of the FOi process) and I would say that even of the hierarchy’. A fourth participant also reported difficulty in finding temporary replacements. He stated, ‘there aren’t people out there who’ve been trained, so we don’t have a regular relief that we can draw on ... I’ve taken (holidays) a week or two at a time and just had to leave ... the applications or decisions until I get back. I haven’t got to the stage of taking an extended period of leave. Something might happen’.

The principal reasons given by the participants for the lack of desire by other agency personnel to relieve temporarily in the FOi positions included: personnel on Workplace Agreements not being entitled to higher duties
allowance; closer working relationship with senior and executive management, high workloads and little clerical support.

**Training and knowledge of FOI** – All eight participants identified knowledge of the FOI Act (1992) as being essential to their ability to apply the Act. Although all participants had received external FOI training, such as completing one day or two half-day courses, they believed that training is limited in scope, infrequent and does not cater for different knowledge levels. These beliefs are supported by the fact that in 2001, personnel from the Australian Government Solicitor's Office, Canberra, will only conduct three FOI training seminars in Perth. The seminars, that were held in June, cost $1390 for the three days and pertained to the provisions of the Commonwealth FOI Act (1982) relating to 'Commercial-in-Confidence', 'Personal Information' and 'Law Enforcement & Secrecy Provisions', and 'Introduction to Privacy' (FOI & Administrative Law Seminar Calendar, 2001). Commenting on the professional development of FOI practitioners in Australia, Snell (2001) states that training has become 'ad-hoc, optional and a low priority consideration'.

Participants advised that on occasion they were uncertain how to interpret the provisions of the FOI Act (1992) or the correct procedure to follow. Generally these situations occurred when they were required to apply an unfamiliar provision of the Act or had their interpretations or practices challenged by an applicant, third party, agency personnel or the Information
Commissioner. One area of the Act identified by participants as requiring training was the application of the Public Interest Test.

The Legal, Constitutional and Administrative Review Committee (1999, p.18) defined the Public Interest Test as 'weighing up the public interest in an individual's right of access to documents against the public interest in preserving the confidentiality of government and third parties and ensuring the proper working of government'. In Western Australia, FOI Coordinators must apply the Test when claiming several specific exemption clauses contained in the FOI Act (1992). Mere reference to the Test in a Notice of Decision is not sufficient, as the actual weighing up of the individual's and community's interests in providing access to the document must be stated.

As the Test forms part of the Notice of Decision, any comments made or factors omitted can be a ground for appeal by an applicant or third party. A recent example of the complexity of applying the Test was the refusal by the Western Power Corporation (Western Australia's principal supplier of electricity) to release documents relating to its joint venture with Integrated Power Service (a United States mining and energy conglomerate). Upon review, although the Information Commissioner upheld the agency's decision to refuse access on the grounds that the documents were commercially sensitive, she found that the agency had 'failed to recognise public interest in its accountability as a government agency for its commercial activities' (Southwell, 2000).
The majority of participants reported that the Public Interest Test was difficult to apply, especially when many applicants are legally qualified and were perceived by the participants as being knowledgeable in this area. One participant stated, 'We're up against lawyers that have legal degrees, went to university, studied the way the law works and here we are basically clerks, admin' officers, that try and apply the Act and give a reason or interpretation to people who've got that qualification'. The participant further stated, 'I personally feel very behind the eight-ball and very intimidated because they've (solicitors) obviously got the right vocabulary to actually give you a reason why they should get certain things and they could quite easily sway you into actually making a decision which, to your interpretation, might not be right'.

In support of the participants' assertions, the difficulty of applying the Public Interest Test has also been identified by the Legal, Constitutional and Administrative Review Committee (1999) and the Commission on Government (1995), with the Commission recommending that the FOI Act (1992) be amended to provide that the Test apply to all exemptions (excluding Cabinet documents) and empower the Information Commissioner to formulate guidelines, including a non-exhaustive list of factors, to be considered by agencies when applying the Test. A similar conclusion about the Test was reached by the Australian Law Reform Commission and the Administrative Review Council (cited in Legal, Constitutional & Administrative Review Committee, 1999). The Information Commissioner has incorporated a section relating to the concept of Public Interest in her policy and practice
guidelines (Keighley-Gerardy, 1996b). The guidelines, that are publicly available, are intended to assist agency personnel understand their obligations under the Act. In explaining the Public Interest concept, the guidelines make reference to case law and include a list of 'public interests', such as 'being able to "clear the air" over a matter of controversy' and 'the disclosure of comments that are gratuitous, unfairly subjective or irrelevant' (Keighley-Gerardy, 1996b, p.74).

Participants identified informal and formal networks as important means of extending their knowledge of FOI matters. One participant stated, 'I ring up another department and say "look, how do you deal with this"'. Other participants stated that they also contacted individuals from the Office of the Information Commissioner whom they previously had found to be helpful. The principal peer group was the FOI Coordinators' Network, however, although some participants perceived the Network to be useful, others believed it to be ineffective as a support body. Participants perceived the negative aspects of the Network to be that it was unrepresentative of Coordinators generally and, due to time constraints and distance, it was difficult to attend the Shenton Park venue. The positive aspects of the Network were identified as it having the potential to promote information exchange between Coordinators and provided Coordinators with a representative voice.

Commenting on the Network as being a knowledge base, one participant stated that when it came to obtaining information on FOI issues there was no
better way to learn than from the practical experiences of other FOI Coordinators, as opposed to asking the Information Commissioner who he said 'will just tell you straight down the line what the Act says, what you should do and what she wants'. To address some of the negative aspects of the Network, one participant suggested the creation of an Internet site accessible to all FOI practitioners, including Coordinators located in country areas and municipal government authorities. The participant stated that a diverse range of information could be posted on the site, such as agency FOI practitioner contact details and Frequently Asked Questions. A further suggestion was the development of a chat page where practitioners could post questions and view responses from other practitioners. As stated by one participant, a chat page would enable all Coordinators to raise issues and allow others to be aware of and help resolve the problem without leaving their desks.

Although not directly related to FOI, several participants reported that because of their abilities to interpret and apply the FOI legislation, agency management and other personnel often assumed that they had knowledge of general legal matters. Participants stated that they were often seen as being conversant with a range of legal problems, including interpreting of other statutes, providing advice on privacy issues, dealing with the execution of search warrants by the police, attending to the 'Discovery' process that is associated with the production of documents in civil proceedings, and responding to subpoenas and summonses requiring the production of documents in court. One participant cited an example where he, with no
previous experience or training, was required to produce documents before a court, give evidence and be subjected to cross-examination.

**Recognition of responsibility and appropriateness of seniority of FOI Coordinators** - Generally, agencies have classified FOI Coordinators between Public Sector levels four and six, a situation that appears common in other jurisdictions (Snell, 2001). Several participants stated that although they were at the lower end of this seniority scale, in practice they formulated the Notices of Decision, including consulting and negotiating with internal and external parties, analysing and applying statutory provisions and other relevant material. Once the draft Notice had been formulated it was forwarded to the Decision-maker for consideration of signature. Although the Decision-maker was generally one or two levels higher in seniority, several participants claimed that these officers had a limited understanding of the FOI Act (1992). However, the more senior participants stated that their levels reflected the responsibilities associated with being a manager, including being responsible for staffing and budgetary matters, being accountable for their agency meeting the various obligations under the Act, and in some instances performing other functions.

Participants, especially those who were more senior, claimed that in comparison with other agency personnel of similar seniority levels, their responsibilities and stress levels were far greater, including the sometimes unavoidable adversarial nature of their role with applicants, third parties, general agency personnel and management; the potential for released
documents to cause embarrassment to, or result in legal action against, past and present employees, the agency and the government; the potential for released documents (although released in good faith and in accordance with the Act) to result in financial harm to a company, or financial, mental or physical harm to a person. In explaining this situation one participant stated, "you are sitting on a time bomb... when it starts going into the political arena and the media... you know it's going to hit the headlines whichever way it goes. I think you need danger money... I don't think the JDF (Job Description Form) reflects the responsibility or the intricacies of the job'.

An analysis of the research participants' narratives is contained in the following Chapter.
CHAPTER FIVE

THE ANALYSIS
5.1 ANALYSIS

To the casual observer, the FOI Act (1992) may appear to be operating satisfactorily, especially given that no significant amendments have been effected to the Act since it came into operation. However, this study has found that for some time the Government has known of various deficient provisions in the legislation. These inadequacies have been communicated to the Government, among other ways, through the recommendations of the Commission on Government (1995) and the statutory review by Richards (1997) into the effectiveness and efficiency of the Act. The Information Commissioner has also repeatedly called for amendments to the Act. These calls commenced shortly after the Act came into operation, and over the ensuing years have progressed from suggestions for relatively minor enhancements to the present day, when the Commissioner seeks a complete rewrite of the Act's design principles (Butler, 2000; Keighley-Gerardy, 1994; Keighley-Gerardy, 1995; Keighley-Gerardy, 1996a; Keighley-Gerardy, 1997a; Keighley-Gerardy, 1998; Keighley-Gerardy, 1999a; Keighley-Gerardy, 1999b; Keighley-Gerardy, 2000; McNamara, 2000; Tickner, 1997a; Tickner, 1997b).

Apart from any inefficiency, ineffectiveness and inconvenience resulting from operating with defective legislation, this research suggests that in the absence of timely legislative changes to the Act, the Information Commissioner is imposing her own interpretation of the statute, resulting in disquiet by FOI Coordinators some of whom believe the Commissioner's views do not reflect the original intent of the Parliament.
Although the deficiencies of the FOI Act (1992) have the potential to confound the objectives of the Act, which are to create both a general right of access to government held documents and to provide a mechanism to ensure the correctness of individuals' personal information, to date redressing the deficiencies has not had a high priority on the Government legislative agenda. This is despite the former Liberal and National Party Coalition Government publicly stating on numerous occasions that amendments to the Act had been drafted and were awaiting introduction into the Parliament (Butler, 2000; Foss, 1997; Pryer, 1999; Pryer 2000).

Similar delays in effecting needed amendments to FOI legislation have occurred elsewhere in Australia and overseas. For example, although the Commonwealth FOI Act (1982) was formally reviewed by the Australian Law Reform Commission and Administrative Review Council (1995) and numerous recommendations were made to increase access to documents, Terrill (2000) states that most of the subsequent amendments to the Act have further restricted access to documents. Whereas, Snell (2000, p.1 & 7) asserts that most legislative changes to Australian FOI legislation have 'returned the system closer to its original state' or were 'designed to make FOI more comfortable and less threatening device'. In concluding his research into the operation of Canadian FOI legislation, Roberts (1998) asserted that the unwillingness of the Canadian Federal and provincial Governments to address identified deficiencies in that country's FOI legislation demonstrated government ambivalence to the ideals of FOI.
On the issue of possible political manipulation of FOI legislation, Roberts (1999) states, 'It is easier for governments to demonstrate adherence to openness principles by maintaining FOI laws and to loosen the constraint imposed by those laws through less visible administrative actions'. Although not expressly stated by Roberts, governments enacting FOI legislation and then not effecting timely amendments to rectify serious anomalies can be considered a form of Administrative Non-compliance at the executive level.

In Western Australia, it is unclear whether the delay in effecting amendments to the FOI Act (1992) is the result of deliberate Government inaction or greater legislative priority being assigned to other areas, such as economic, electoral and industrial reform. The current Labor Premier of Western Australia Dr Geoff Gallop, who was elected in February 2001, is cited by Pryer (2000) as stating while still in opposition that if the Labor Party was elected the Act would be reviewed and improved. It remains to be seen whether; and how quickly, this election promise will be honoured.

The FOI Act (1992) was introduced into a legislative and government framework that had established confidentiality of government activities and information as a foundation. With in excess of 100 statutes and regulations, and many administrative instructions, restricting the public disclosure of government information and documents, it is little wonder that a Public Sector culture of secrecy developed and that to some extent endures to this day (Commission on Government, 1995; Keighley-Gerardy, 1996a; Royal Commission, 1992b). This research shows that although Public Sector personnel now have a general awareness of the Act and its objectives, there
remains reluctance by many agency personnel to release documents into the public arena. This assertion is supported by the research participants, the Information Commissioner and local media articles (Butler, 2000; Court should show foi leadership, 2000; Foi reprimand fully deserved, 2001; Keighley-Gerardy, 1997a; MacDonald, 2000b; Meertens, 1998; New spirit is needed, 1997; O'Malley, 1995; Tickner, 1997b; Tickner, 2000a).

Reasons for the reluctance by some Public Sector personnel to release documents to the public were found to vary according to their different level of appointment. A generic reason is fear that the documents to be released may contain inaccurate or inappropriate comments. Middle managers seem to make value judgements about an applicant's need for the information, and are concerned that a decision (even if it is in accordance with the FOI Act [1992]) may adversely affect their standing with senior management. Snell (2000, p.6) states that the 'level and type of wariness towards FOI by senior bureaucrats ... remains largely undocumented'. This research, however, found that senior managers are concerned about corporate ramifications resulting from the release of a document, such as potential harm to the government and the agency through negative media exposure, jeopardising business relationships with partners and stakeholders, and adversely affecting staff morale. Despite the reluctance by some agency personnel to release documents, the research found that the level of Malicious Non-compliance is low, with any confounding of the Act more likely to be reflected in acts of Administrative Non-compliance, such as inadequate resourcing of FOI and inadequate records management systems and practices.
Anxiety about FOI is not confined to agency personnel, but extends to Ministers of the Crown. It was found that some Ministers require agencies under their control to provide regular reports on FOI applications received and details of applicants. Although the Ministers may not be directly contravening any law, and while no examples of direct political interference were identified, this practice is perceived by FOI Coordinators and other observers to be against the spirit of FOI legislation (Coulthart, 1999; Keighley-Gerardy, 1996a; Tickner, 1997a). The practice also has the potential for Ministers and their staff to use the information for self or political purposes, thereby compromising their and their agency's integrity, and may also be perceived by applicants to be a violation of their right to privacy. Based on the research, I believe that an opportunity exists for the Information Commissioner and the Commissioner for Public Sector Standards to review current Ministerial activities in this area and formulate a whole-of-government policy on this practice.

Reluctance by Public Sector personnel to release documents into the public arena is generally associated with noble cause and self-interest justifications. These justifications are powerful drivers of behaviour. The literature and this research also show that the acceptance of FOI by personnel requires greater understanding of the FOI concept, with overt support from senior management being essential (Legal, Constitutional & Administrative Review Committee, 1999; Keighley-Gerardy, 2000). However, some executives and senior managers are less than supportive of FOI, especially when requests...
are made for documents they themselves have created or maintain, such as personal diaries.

For FOI to be accepted in the Public Sector negative and conflicting drivers need to be minimised, for example, non essential legislation that conflicts with the FOI concept should be repealed (a recommendation made by the Commission on Government, [1996]); the benefits of FOI should be marketed with parliamentarians, agency executives and senior managers (the aim being to create White Knights a concept that Snell [2000, p.5] attributes to Kirby [1997]); and agency policies and practices should be changed to reflect the ideas of FOI. At the agency level, FOI Coordinators are the common link between the legislation, the operations of the agency and personnel, and as such are best positioned to drive many of the required changes. Based on the research, I believe that an opportunity exists for Coordinators, with the overt support of agency management, to be proactive and innovative in increasing the knowledge of personnel relating to FOI and the associated agency processes through ongoing awareness and education strategies.

Many of the concerns expressed by FOI Coordinators relate to excessive workloads and post application process problems. The literature and this research identified that it is generally accepted that problems experienced by agencies and the public could be minimised if more documents were available outside the FOI process. The benefits associated with this practice to both agencies and applicants, include easier, cheaper and quicker access to documents, and less administrative and resource burden on agencies due
to fewer FOI applications being received (Legal, Constitutional & Administrative Review Committee, 1999; Richards, 1997). Although Coordinators are proactively encouraging agency personnel to make documents more accessible outside the FOI process, such as placing documents, guidelines and manuals into libraries, there are difficulties associated with this practice, including the volume and diversity of documents held by agencies. The general access approach, however, is not considered by all Coordinators to be appropriate. This research found that some Coordinators believe that providing access to documents outside the FOI process would result in the loss of their protection against civil action currently provided by sections 105 and 106 of the FOI Act (1992) (see Appendix Three). However, it is suggested that if more non-sensitive documents were generally available, fewer decisions and therefore less protection would be required.

One means of minimising the excessive workloads, while addressing the liability concerns, is for the Coordinators with the support of their management to review agency document holdings, formulate general release policies and make non-sensitive documents available to the public, including through the greater use of agency Internet sites. However, as alluded to by Terrill (2000, p.119) agencies should use the Internet to increase the types of information accessible and ‘not merely facilitate easier and quicker access to existing information’. A strategy that would contribute to this approach is for Coordinators to assess the types of information and documents principally
sought by applicants and, where appropriate, make the material generally available whether free or for a fee.

FOI Coordinators expend a great deal of time and effort during the initial stages of the application process. Frequently, Coordinators consult applicants to identify the actual documents being sought and negotiate with applicants to narrow the scope of their applications. Although assisting applicants with their application and reducing the ambit of excessively large applications are legitimate processes under sections 4 (a) and 20 (1) of the FOI Act (1992) respectively (see Appendix Three), and are actively encouraged by the Information Commissioner (Keighley-Gerardy, 1995; Keighley-Gerardy, 1997a; Keighley-Gerardy, 2000), this research found that the processes generally require a substantial amount of work, and on occasion applicants mistake this assistance to be an attempt by agencies to delay or confound their application, or to harass them. Based on this research, I believe that an opportunity exists for Coordinators to minimise any misunderstanding by fully explaining to applicants the reasons, and the relevant provisions of the Act, when seeking additional information about the documents being sought and when attempting to reduce the ambit of applications.

Problems with identifying and locating documents, however, are far broader than just the inadequacies associated with applications. This research found that for FOI Coordinators to operate effectively they require a comprehensive knowledge of their agency's past and present records management practices
and systems; especially given that the FOI Act (1992), although only coming into full operation in 1993, is retrospective. As will be discussed, poor past and current practices and systems present significant difficulties to Coordinators.

**Records Management Practices** – the research found that many agency personnel do not perceive the importance of complying with corporate policies and procedures relating to the creation, recording and storage of documents. There is evidence that some agency business areas do not record or file documents, and leave loose and unsorted documents in storage rooms. The poor state of records management by some agencies has previously been identified by the Information Commissioner (Keighley-Gerardy, 2000; MacDonald, 2000a) and the Auditor General, Mr. Des Pearson, who asserted that despite recommendations from various reports, including a Royal Commission, the management of public records was in 'disarray' (Meertens, 1996).

**Records Management Systems** – although most agencies have some form of electronic records management system, the research found that the effectiveness and coverage (geographically and chronologically) differ greatly. It was found that some agency business areas have established individual file management protocols and developed separate records systems, with these non-corporate systems generally being inaccessible to personnel external to the areas concerned, including FOI Coordinators.
Accordingly, these factors contribute significantly to the difficulties of Coordinators in identifying and locating documents.

The literature shows that effective records management practices and systems are essential to open and accountable government generally and the successful operation of FOI legislation specifically (Keighley-Gerardy, 2000; Legal, Constitutional & Administrative Review Committee, 1999; MacDonald, 2000a; Meertens, 1996; Royal Commission, 1992b). The State Records Act (2000), and the Commission and Office it has established, has provided a mechanism for the development and administration of contemporary standards relating to the management of government documents, including their recording, archiving, storage and destruction (Keighley-Gerardy, 2000; Mallabone, 1998). If the FOI Act (1992) and associated agency processes are to operate effectively, and the work of FOI Coordinators minimised, a strong commitment to the principles of FOI and compliance with sound records management procedures are required from all agency personnel. Based on this research, I believe that an opportunity exists for agency management to review current records management systems and practices, the aim being to establish effective systems and to foster an environment that promotes sound practices.

It is unrealistic in the short and medium terms to expect all government agencies to adopt a common records management system. This is due to a perceived reluctance by agencies to abandon existing systems and to incur the costs associated with purchasing new systems and establishing new
infrastructures. However, an opportunity exists for the relevant government bodies, such as the State Records Commission, to coordinate the development of standardised records management policies and procedures across the Public Sector. These standards should provide for the new electronic methods of recording, communicating, storing and retrieving information that increasingly are replacing the more traditional paper documents, and that appear to be ignored by some agencies' current records management policies (Keighley-Gerardy, 1998; Keighley-Gerardy, 2001).

Problems associated with locating documents are further exacerbated by the need for FOI Coordinators to rely on the assistance of field and local personnel to conduct document searches on their behalf. This is especially problematic when some personnel are known to oppose the FOI concept, have poor records management practices and are required to commit substantial resources to conduct the search. This research found that some Coordinators are becoming increasingly suspicious when agency personnel, despite signing formal acknowledgements, conclude that either a document is not known to exist or cannot be found. Snell (1994a) states that the 'integrity of FOI is compromised if applicants harbor reservations as to whether agencies have conducted adequate searches for information', with the subsequent lodging of appeals being the possible result.

Even when the existence and location of a document are established, it was found that Coordinators on occasion experience significant difficulties in acquiring documents from agency personnel. The main reasons for this
include the belief held by some personnel that documents are their personal property, for example, some executive officers and senior managers perceive their diaries to be their own private property. There is also evidence of a general protectiveness towards documents, such as some country officers are reluctant to forward documents and records to Coordinators in Perth because they perceive the issues in the documents are local matters. Generally, Coordinators manage these situations by explaining to personnel the FOI concept, legislative requirements and agency processes, and include local personnel in the consultation process.

The more senior the officer and more junior the Coordinator, the more problematic it becomes for the Coordinator to assert pressure on the officer to conduct thorough searches and forward documents. Under these circumstances it is conceivable that Coordinators of junior level will desist from attempting to acquire the documents, leaving themselves in the precarious position of having either to refer the matter to a senior manager or to manipulate the FOI Act (1992) improperly. Commenting on the plight of junior Coordinators, Snell (2001) states that sometimes they ‘find themselves torn between their clear legislative requirements and the more pressing and immediate perceived requirements of their bureaucratic and political leadership’. He concludes that the appointment of Coordinators who have ‘little status or experience and no career path is a recipe designed to foster weak compliance’: a scenario identified by some participants during this research.
It is a fundamental precept of FOI that agencies will identify, locate and use the legislative framework to consider the appropriateness of releasing documents. Based on this research, I believe that an opportunity exists for agency management to ensure that Coordinators have adequate status within the organisation, and that appropriate protocols are in place to assist Coordinators in managing occasions when personnel, especially middle and senior management, are uncooperative or obstructive.

This research found that FOI Coordinators are generally understanding of the public's lack of knowledge about both the provisions of the FOI Act (1992) and the associated agency procedures. Seemingly, the more information Coordinators have about the material being sought the greater their efforts to locate the documents. This perhaps can be attributed to the reduced amount of time and effort required by Coordinators to establish the existence and location of the documents. It was also found that on occasion Coordinators empathise with the reasons why applicants are seeking to access the documents.

Although, applicants are not required to state their reasons for seeking access to documents, with section 10 (2) of the FOI Act (1992) (see Appendix Three) providing that the reasons are not to affect access being given, such knowledge by Coordinators does sometimes appear to contribute to access being given. This phenomenon was identified by Kearney (2000), a Queensland journalist, who found that 'with a bit of patience and understanding of the work of FOI officers' and by closely liaising with them,
increased the possibility of access to documents being given. However, such knowledge by Coordinators may conversely result in them consciously or subconsciously forming the belief that for whatever reason access should be refused. While the provisions of the Act should minimise any subjectivity by Coordinators in determining whether to grant access to the documents, human nature appears to be a strong driver in the decision-making process of Coordinators.

While Coordinators are generally empathic to the information needs of the public, they are less so when it comes to dealing with professional applicants, including legal practitioners, whom they perceive as exploiting the FOI Act (1992) by using the legislation as a cheaper option to locate and access documents than other legal procedures, such as the civil law ‘Discovery’ process, and using Coordinators as a cheap form of research assistance. This research and the literature (Rawson, 1998; Lye, 1999) also found that many requests from legal practitioners provided insufficient information or, for one reason or another, were deemed by Coordinators to be invalid. Based on the research, I believe that an opportunity exists for the Information Commissioner to apply targeted educational strategies to professional applicants, for example promoting the incorporation of FOI issues into academic and training course curricula, and conducting presentations to professional applicants through their respective bodies and organisations.

A lack of knowledge about FOI is not confined to professional applicants, but extends to professional persons who undertake work on behalf of agencies,
such as contractors. This research found that, once engaged, many consultants and contractors later refuse to provide FOI Coordinators with documents created by them as they perceive they own the material and intellectual property. Some consultants and contractors also object to releasing 'their' documents on the grounds that the material is commercially confidential. It is unclear whether the identified problems are associated with a lack of awareness by consultants of the FOI legislation or an unwillingness to release information. This problem is exacerbated by uncertainty in the FOI Act (1992) and insufficient consideration of the issue being given by agencies when engaging contractors. Consultants citing commercial confidentiality as a reason to refuse access to documents created by them has been previously identified as a significant threat to the FOI concept, especially given the increasing trend for governments to outsource functions and services (Commission on Government, 1995; Keighley-Gerardy, 1996a; Legal, Constitutional & Administrative Review Committee, 1999; MacDonald, 2000a; McNamara, 2000; Roberts, 1998; Royal Commission, 1992b; Towley & Snell, 1996). Based on this research, I believe that an opportunity exists for agency management and Coordinators to review current agency contracting procedures and to clarify the issue of ownership of documents created by contractors. Opportunities also exist for both relevant stakeholders, such as the Commissioner for Public Sector Standards, and agencies, such as Contract and Management Services, to develop a generic Public Sector contract clause specifying the obligations of contractors with respect to the ownership of documents and the requirements of the Act, and
for the Information Commissioner to explore the need for an amendment to the Act.

The application of fees and charges under section 16 of the FOI Act (1992) (see Appendix Three) is an important consideration for FOI Coordinators when processing FOI applications. Coordinators must first determine whether the documents sought contain personal or non-personal information, with the latter requiring agencies to collect from applicants a $30.00 application fee. This research found that although Coordinators have a clear understanding of what constitutes non-personal information, there is diverse interpretation across agencies as to the meaning of the term 'personal information'. Accordingly, what some agencies determine to be non-personal information and subject to the application fee, other agencies consider to be 'personal information' and provide the documents free of charge. It was also identified that some agencies under different circumstances treat the same information differently, for example, an agency may release a particular type of information outside the Act either upon payment of a statutory fee or free of charge, the same information contained on a different administrative form may be deemed confidential and not for release, while the same information in yet another form may be considered either personal or non-personal information and released under the Act. This inconsistency of approach when releasing documents not only exists between agencies but also within agencies.
Given the diversity of opinion with respect to the fundamental issue of classifying types of information, and despite the term 'personal information' being defined in the Glossary to the Act (see Appendix Three), based on this research I believe that an opportunity exists for the Information Commissioner to determine the extent of the problem (possibly by requesting a sample of Coordinators to complete pre-set written scenarios), provide clear examples of the two terms and apply targeted educational strategies. A further opportunity exists for the relevant government stakeholders, such as the State Records Commission, and Coordinators to achieve a consistent approach to how agencies generally perceive information by identifying and classifying the various types of information and documents held, and developing a document release policy. To facilitate this process, an audit of the different types of information and documentation could be conducted as an extension to the existing process whereby agencies are required, pursuant to section 96 (1) of the Act (see Appendix Three), to make available an annual agency Information Statement containing details of documents held.

FOI Coordinators have concerns with respect to other fees and charges prescribed by section 16 of the FOI Act (1992). Coordinators perceived as unrealistic the prescribed $25.00 maximum limit, pursuant to section 17 (3) of the Act, used to determine when agencies must provide applicants with an estimate of charges (see Appendix Three). The provision requires agencies to supply applicants with an itemised estimate of charges and costs, and to obtain the applicant's consent before progressing the application. The
Coordinators consider that the prescribed limit does not reflect the reality of contemporary staff and material costs associated with supervising inspections and supplying copies of documents. Coordinators believe that the limit should be increased to $100.00, which they consider is reasonable to applicants and will reduce their work caused by the existing low maximum limit. Based on this research, I believe that an opportunity exists for the Information Commissioner to consider seeking an amendment to section 17 of the Act to increase the prescribed limit to $100.

The literature shows that there is public concern about the possibility of governments imposing high FOI fees and charges as a means of acquiring additional revenue, and increasing fees and charges in an attempt to make provision of FOI cost neutral. There are also concerns that agencies may inflate costs and charges to deter individuals from making or progressing applications (Brogan, 1998; Commission on Government, 1995; Legal, Constitutional & Review Committee, 1999; Roberts, 1998; Roberts, 2000). This research, however, found the Western Australian Government, although having the opportunity to do so, has to date demonstrated a commitment to the FOI concept by resisting an increase in the fees (Butler, 2000). A dichotomy exists with respect to FOI Coordinators and their attitude to the prescribed fees. On one hand, there is a general belief by Coordinators that the charges should go a significant way towards recovering the costs associated with processing an application. On the other hand, it was found that in many instances Coordinators undercharge or waive charges to compensate applicants for excessive delays or other difficulties that they may
have experienced with the agency's processing of an application. A possible explanation may be that the collection of money, issuing of receipts and complying with government banking procedures, may be perceived as being another process that impacts on Coordinators' workloads and their ability to complete a Notice of Decision within the prescribed time period.

This research, both through comments made by the Coordinators and contained in the literature, has established that the Information Commissioner has adopted a tough stance against agencies with respect to the charging of fees and costs. The Commissioner has made it no secret that she will act swiftly and publicly should she find that an agency has inflated costs, especially if the costs are associated with an agency's inability to locate documents easily and quickly. In recent times there have been several public examples of when the Commissioner has challenged agencies in relation to proposed costs, including reducing one agency's costs from $30,000 to $240.00 and another agency's costs from $1,380 to $257.80 (Foi reprimand fully deserved, 2001; Tickner, 2000b). However, despite occasional examples of apparently excessive charging by agencies, the official statistics show that the costs imposed by agencies with respect to non-personal information have stabilised with the average charge in 1999/2000 being $14.00 (Keighley-Gerardy, 2000). Based on this research, I conclude that the fears about the Government and agencies manipulating fees and charges to the detriment of the FOI concept do not reflect the situation in Western Australia. However, as stated by Roberts (2000), fees
must be watched carefully so that individuals are 'not deterred from exercising their rights' through cost increases.

Generally, FOI Coordinators when determining the appropriateness of documents for release first consider what can be released, as opposed to what exemptions can be applied to prevent documents from being released. This is an important philosophical basis from which to commence their decision-making. The processes involved in providing access to documents that identify third parties are of concern to Coordinators. Although it is possible for Coordinators to delete parts of a document that identify a third party and to release the edited document, on occasion the wording and the subject matter in the document may still indirectly identify a third party. Under these circumstances, Coordinators ascertain from the third party whether they object to the release of the document. However, this is sometimes problematic, for example, third parties frequently have no prior knowledge of having been mentioned in the government document and request to peruse it. This presents a further problem for Coordinators in that it may not always be appropriate for the third party to read the document, which may also reveal details of the applicant and other parties.

This research found that despite Coordinators perceiving that the Information Commissioner's stance is not to breach an applicant's privacy by revealing their identity to a third party, this perception being supported by material contained on the Commissioner's Internet site (Privacy of applicant and third parties, 1999; Privacy of third parties protected, 1999), some Coordinators in
an attempt to progress the application, and prevent third parties also making an application, do provide the third parties with a copy of the document and disclose the identity of the applicant. Based on this research, I believe that the Information Commissioner should further explore the difficulties associated with this area of concern and develop guidelines to assist Coordinators.

The use of exemption clauses by agencies to refuse access to documents can be a source of conflict between FOI Coordinators, applicants, third parties and the Information Commissioner. The Commissioner has thrown doubt on the effectiveness of the 15 exemption clauses and 51 sub-clauses contained in the FOI Act (1992). She has expressed the view that the existing clauses should be replaced with a single clause that would see agencies only being able to refuse access to documents when substantial harm to the public interest may result (Butler, 2000; Keighley-Gerardy, 1999b; McNamara, 2000) – a concept also supported by Roberts (2000). Several of the existing clauses require Coordinators to apply the Public Interest Test, that essentially requires Coordinators to first consider the applicant's 'right of access . . . against . . . preserving the confidentiality of government and third parties and ensuring the proper working of government' (Legal, Constitutional & Administrative Review Committee, 1999, p.18) and include this reasoning in the agency's Notice of Decision. This research found, however, that some Coordinators experience difficulties in either understanding the concept of the Test or applying it, and feel intimidated by
professional applicants, such as legal practitioners, who they believe are more versed with the concept and its application.

The difficulties of applying the Public Interest Test have been acknowledged by reviewers of FOI legislation (Legal, Constitutional & Administrative Review Committee, 1999), with the Commission on Government (1992) recommending that the Test be applied to all exemptions clauses (apart from the provisions relating to Cabinet documents). However, the Commission further recommended that the Information Commissioner formulate guidelines to assist Coordinators in understanding and applying the Test. Although the Commissioner has included a segment on Public Interest in her policy and practice guidelines (Keighley-Gerardy, 1996b), the research found that some Coordinators remain uncertain about how to apply the Test. Based on this research, I believe that an opportunity exists for the Information Commissioner to apply targeted education strategies to FOI practitioners, especially if it is intended to replace the current exemptions with a single Public Interest Test.

In advising an applicant of the outcome of their application, agencies are required as soon as is practical after receiving an application, and within 45 days, to provide applicants with a Notice of Decision (section 13, FOI Act, 1992) (see Appendix Three). This research found that a range of factors can contribute to delaying the completion of a Notice within the prescribed time period. The factors, that are not identified in the existing literature, relate to process and other considerations. Process factors are associated with the
FOI process itself, such as the time taken to: process large and complex applications; establish the existence of the documents; conduct an agency-wide search for the documents; acquire the documents from agency business areas throughout the State; number the documents and create a schedule; formulate and communicate an estimate of costs; peruse the documents for sensitive information as defined in the exemption clauses; consult and negotiate with applicants, agency personnel and third parties as to the appropriateness of releasing the documents; research, analyse and apply judicial and quasi-judicial decisions; edit third party or exempt information from the documents; formulate the Notice of Decision, including where applicable researching and applying the Public Interest Test, and if refusing access to the documents provide a reasoned argument. Also identified were various non-process factors, such as the Coordinator's existing FOI and other workload commitments, agency personnel who created the document being on leave, and loss of time due to public holidays.

Coordinators believe that the 45 day requirement in which to complete an application is sometimes difficult to comply with. This research found that Coordinators do not want to delay processing applications unnecessarily. This position conflicts with submissions received by the Commission on Government (1995) and the review of the Act's effectiveness conducted by Richards (1997), that agencies take excessive time to process applications and are obstructive by delaying decisions unnecessarily. However, official statistics indicate that the time taken by agencies to complete applications has decreased to a point where in 1999/2000 the average time was only 18
days (Keighley-Gerardy, 2000). This research suggests that despite the myriad of factors that could, and sometimes do, delay the completion of a Notice, agencies generally complete Notices well within the prescribed period.

FOI Coordinators have a diverse opinion of what constitutes a good Notice of Decision. Some believe that Notices should be comprehensive, while others take the view that they should be brief. On this point, the Information Commissioner has previously stated that some agencies fail to support their claims and decisions adequately (Richards, 1997). This has contributed to the general belief by Coordinators that the Commissioner requires a legalistic style of Notice and that agencies should support exemption claims by including references to judicial and quasi-judicial decisions. However, Coordinators believe that Notices of this type are time consuming to prepare and beyond the understanding of most applicants. While one would expect writing styles to differ between individual Coordinators, and formats to vary between agencies, this research found that there is a need for a balance between agency decisions that are too legalistic and those that are too simplistic and do not provide applicants with sufficient information and justification for refusing access to documents. Based on this research, I believe that an opportunity exists for the Information Commissioner and Coordinators to identify and communicate good examples of Notices of Decision and develop agreed minimum standards.
Creating awareness of, and providing education on, FOI is an integral role of FOI Coordinators. It forms the basis of their attempts to assist applicants with their applications and promote the assistance from personnel to comply with the FOI Act (1992) and associated agency FOI processes. As part of their information base, Coordinators require knowledge of the Act, judicial and quasi-judicial determinations. This research found that formal FOI training in Western Australia is limited, infrequent and costly (FOI & Administrative Law Seminar Calendar, 2001). In commenting on factors that contribute to ‘inherent dysfunction’ of FOI, Snell (2001) states that Coordinators operate ‘in an environment of diminishing training, resources and increasing pressure to settle for levels of non-disclosure (that are) at odds with the legislative requirements . . . or, at the very least, its ethos’. Although these comments do not relate to any particular jurisdiction, they have an uncanny resemblance to the situation in Western Australia. Based on this research, I believe that an opportunity exists for the Information Commissioner and FOI practitioners to identify the educational needs of practitioners and to explore the possibility of developing a training program, possibly conducted by the Technical And Further Education College or a local university, the completion of which ideally should contribute to an academic or professional qualification.

In addition to formal training, it was found that FOI Coordinators acquire knowledge through personal experience and information sharing with other Coordinators. At the time of the research interviews, a formal Coordinators' Network existed, although there was a general lack of commitment to it.
Some Coordinators perceived the Network as being unrepresentative of Coordinators generally, with the meetings held in an inconvenient location. Several Coordinators mooted the use of the Internet as a possible solution to the identified problems with the Network. Other benefits resulting from this initiative include enabling members to be as active or passive as they like in the Network, posting of current FOI literature and material, and extending the Network to include Non-metropolitan and municipal government authority Coordinators. Since providing their narratives, the research participants advise that the Network has all but ceased to exist due to a lack of interest by Coordinators. Based on this research, I believe that an opportunity exists for Coordinators to form a working group, with or without the involvement of the Information Commissioner, to explore the use of the Internet as an interactive means of sharing experiences and knowledge.

For several long-time Coordinators, the first indication that their decisions or processes were considered inadequate was receiving notification of an appeal being lodged. This research found that there is a general lack of feedback provided by agency management to Coordinators about the appropriateness of their decisions and agency FOI processes. The only time that some senior managers become interested in their agency's FOI performance and processes is when a controversial document is going to be released or if the Information Commissioner is to commence an External Review. While this research suggests that agency management is not generally proactive in providing timely feedback to their FOI practitioners, in 1999 the Commissioner implemented an initiative whereby she visits a small
number of different agencies each year and assesses agency performance against a number of indicators previous established with Coordinators (Foi standards and performance measures, 1998). These indicators cover a broad range of areas, including timeliness and costs, records systems and searches, decision-making, responsiveness and openness, and complaint trends, with the assessment results being reported in the Commissioner's Annual Reports to the Parliament.

This research suggests that more frequent feedback to Coordinators, especially by agency management, may enable them to address performance issues at an earlier stage, resulting in reduced dissatisfaction by applicants and third parties, and a decreased number of appeals against agency decisions and processes. I believe therefore that opportunities exist for agency management to become more proactive in assessing the appropriateness of agency FOI processes and the performance of their FOI practitioners. The Information Commissioner, too, perhaps could further contribute to the provision of timely feedback by extending the assessment role to senior members of her office and thereby increasing the annual number and frequency of agencies being assessed.

The two-tiered appeal system, that is, the Internal and External Review processes, established by the FOI Act (1992), was generally considered by Coordinators to be operating satisfactorily. Both types of review are free of charge to the appellant. The system enables aggrieved applicants and third parties to have an agency's decision reviewed by an officer of the agency
who is equal or senior in level to the original Decision-maker. Should the aggrieved party not be satisfied with the result of the Internal Review, they can refer the matter to the Information Commissioner for an independent review. The literature suggests that while Internal Reviews are less formal and a quicker process, aggrieved parties may not perceive the findings as being impartial (Legal, Constitutional & Administrative Review Committee, 1999).

This research found that the competence of some agency Internal Review Officers may impact on the impartiality and independence of their findings. It was found that reviewers tend to be senior managers who may have little knowledge of the FOI Act (1992), agency FOI processes and records management systems. This lack of knowledge and experience with FOI is exacerbated by other factors, including the transient nature of the senior manager positions, the lack of transference of information between incoming and outgoing reviewers and the small number of reviews each reviewer deals with. Evidence was found that some reviewers rely heavily on their Coordinators to assist in the review process and to provide advice, with at least one Coordinator stating that he reviews his own decisions, prepares a response to the applicant and has the reviewer sign the review findings - a less than satisfactory situation given the leadership and independence expected of reviewers. As stated by Tickner (1997b) the Internal Review process is a 'quality-control', however, it is unknown how many decisions merely 'rubber stamp' the original decisions of agencies. Official statistics show that many reviews do confirm the original agency decision (Keighley-
Gerardy, 2000). Based on this research, I believe that an opportunity exists for the Information Commissioner, agency management and FOI practitioners to identify gaps in knowledge and skills of Internal Review Officers, and develop a training course that meets their needs.

With respect to External Reviews conducted by the Information Commissioner, this research suggests that many appellants and other parties may not easily understand the Commissioner's written appeal determinations. The Coordinators perceive that the Commissioner's determinations are too legalistic and complex for the average person to understand. The Commissioner herself acknowledges the challenge of writing decisions that both satisfy the informal information needs of applicants while meeting the formal requirements of a decision made pursuant to statute law (Keighley-Gerardy, 1999b). Official statistics show that in comparison with the annual number of applications dealt with by agencies there are relatively few appeals (see Table 1 on page 90). This is despite the lack of performance feedback by agency management to FOI practitioners, the small number of agencies annually assessed by the Information Commissioner, and the fact that the review processes are free of charge. From the Coordinator's perspective the total annual number of appeals translates to an extremely low and infrequent incidence of appeals for individual agencies, with the statistics in Tables 2 and 3 (see page 90) showing that in many cases the original agency decision is upheld by the Information Commissioner.
Appropriate resourcing of agency FOI practitioner positions is crucial to the effective operation of the FOI Act (1992) and an agency's ability to meet its obligations under the Act. This research suggests that rarely have agencies reviewed the FOI practitioner positions against functions performed, the apparently increasing workloads (see Table 1 on page 90) and complexity of applications. It was found that some Coordinators, who in terms of Public Sector salary and seniority are classified as middle to upper middle management, frequently perform basic clerical duties, such as generating acknowledgement letters, searching records systems, numbering documents, creating document schedules and filing, as they have insufficient clerical assistance. Based on this research, I believe that an opportunity exists for agency management to review functions and workloads of their FOI practitioners, with a view to ensuring adequate resourcing. Similarly, there is a further opportunity for the Information Commissioner to provide independent comment on resourcing when conducting her annual assessment of agencies.

For some Coordinators a lack of clerical support has contributed to the longer-term problem of little or no agency succession planning in relation to the FOI practitioner positions. This research found that some Coordinators find it difficult to take extended leave, such as annual and study leave, or participate in non FOI developmental opportunities, due to there being no trained or experienced agency personnel to relieve them temporarily. Inadequate and infrequent FOI training, and the reluctance of colleagues to relieve FOI positions voluntarily, exacerbate the situation. The reasons for
the reluctance include the inability to obtain higher allowances under the
terms of workplace agreements, closer working relationships with senior
management, and high volume and complex workloads. The possibility of
conflict with personnel and the public, and additional responsibilities
associated with administering a statute, were not identified as factors.

The inability to fill a vacant FOI practitioner position temporarily with a person
who has knowledge of the FOI Act (1992), and who is familiar with the
agency’s FOI and records management processes, poses a significant risk to
an agency’s ability to meet the requirements of the Act, especially given the
statutory timeframes in which certain procedures must be completed. This
inability also prevents practitioners participating in non FOI developmental
opportunities. These situations have serious industrial relations and equal
opportunity implications for agencies. Snell (2001) states that training and
resourcing of FOI positions should be undertaken on the premise that it is
ongoing. He further states that most jurisdictions have concentrated their
efforts on a ‘cadre of motivated and enthusiastic officers with little systematic
follow-up’. This appears to be reflective of the situation in Western Australia.
Based on this research, I believe that an opportunity exists for agency
management to review their FOI practitioner positions with a view to ensuring
sufficient numbers of personnel are conversant with the FOI legislation and
associated agency processes to be able to perform in those positions at short
notice and at times of high work demand.
The FOI Coordinator's role requires Coordinators to possess comprehensive knowledge of the FOI Act (1992), judicial and quasi-judicial decisions, and agency record systems and processes. On occasion, the role results in Coordinators being in conflict with personnel, contractors, the public and the Information Commissioner. It was also found that Coordinators, sometimes without appropriate training, are required to perform non FOI functions, for example, commonly Coordinators were perceived to be conversant with general legal matters and are requested to provide legal opinions on other statutes and respond to subpoenas.

For some Coordinators, the high volume and complex workloads; meeting statutory timelines; responsibility for administering a statute; possibility of conflict with others; a sense of being judged by management against criteria that are neither based on how well they apply the FOI legislation nor established performance indicators; and the inability to take extended leave, places them under constant psychological pressure. This study found that some Coordinators believe that their knowledge, experience and responsibility are not reflected in their seniority and salary levels, especially when compared with other positions of a similar level.

Based on this research, I believe that an opportunity exists for agency management to review the roles and functions of their Coordinators with a view to identifying the appropriateness of their duties, providing suitable training with respect to any extraneous functions, and ensuring that salary and seniority levels are commensurate with the position roles and functions.
CHAPTER SIX

THE SUMMARY
6.1 SUMMARY OF FINDINGS

This study found that there is a diverse range of issues that impact on most areas of the FOI Coordinators’ world. Given the large number of issues identified in this research, and the interrelationship between the issues, a summary of the principal findings and recommendations follows.

Legislative amendments to the FOI Act (1992)

This research found that the FOI Act (1992) continues to operate in isolation to other legislation and within a government framework that contains administrative instructions and practices that conflict with the concept of FOI. Further, despite the findings of a statutory review of the Act, recommendations from several Royal Commissions and ongoing requests from the Information Commissioner (the Act’s administrator), FOI practitioners and other stakeholders, to effect significant changes to the Act, successive governments have not placed a high priority on addressing these issues.

Public Sector culture and the need for FOI awareness

The research found that FOI legislation alone will not ensure acceptance of the concept of government openness and accountability, and that the public has a general right to access government held documents. These ideals require a legislative and government framework that supports the FOI concept and associated legislation. Similarly, parliamentarians, agency personnel, especially members of executive and senior management, also need to support and see benefit in the FOI concept.
Although the FOI Act (1992) has now been in operation for some time, and agency personnel are generally aware of the intent of the Act, many personnel remain reluctant to release documents into the public forum. This research found that personnel have varying reasons for being reluctant. Generally, all personnel are concerned that the contents of documents they have created may be challenged, or that the documents may be found to contain inappropriate comments. Middle managers seem to make value judgements as to the applicant's reason for accessing the documents, and are concerned with how senior managers may perceive their decision to release the documents. Senior and executive managers are concerned that releasing the documents may damage the integrity of the government or agency through adverse media exposure, cause harm to relationships with business partners and stakeholders, and may result in a diminution of staff morale.

It is perhaps conflict between FOI Coordinators and senior managers that creates most concern to Coordinators. This research found evidence that some executive managers, while overtly promoting the concept of FOI, covertly refuse to provide Coordinators with access to documents, especially their personal diaries. This places Coordinators in the position of having to either manipulate the FOI Act (1992) improperly or attempt to resolve the issue, for example, by raising the matter with a member of senior or executive management. Both options are problematic from an internal and external organisational perspective, and may affect the credibility of the Coordinator.
Awareness by all personnel of the FOI Act (1992) through educational strategies, policies and involvement in the FOI process, are the limited options available to FOI Coordinators to normalise the concept of FOI. Accordingly, Coordinators, with the overt support of senior management, should remain proactive in promoting FOI to agency personnel. With respect to uncooperative personnel, especially members of senior and executive management, all agencies should establish clear policies and procedures to assist FOI practitioners when confronted with these circumstances.

Ministerial access to FOI applications and the need for agency policies

This research found that some Ministers of the Crown require their agencies to reveal the identity of FOI applicants and provide details of their applications. This practice is unrelated to the FOI process and can only relate to the Minister's self or political interest in knowing which external parties are attempting to access what documents. For example, such information could be used to prepare for adverse media attention relating to the performance of the minister or the government. Although the FOI Coordinators did not identify any direct political interference, and there appears to be no breach of the FOI Act (1992), the practice does contravene the spirit of the Act and compromises the integrity of all those involved. Accordingly, to avoid the perception by both agency personnel and applicants of ministerial interference, and breaches of applicants' privacy, it is recommended that the Information Commissioner and the Commissioner for Public Sector Standards develop a government policy on this practice.
Agency documents and the need for general release policies

The research found that there are many agency documents that if readily accessible to the public would reduce the number of FOI applications. There are many benefits to this approach such as individuals having cheaper and quicker access to many types of documents. Benefits to agencies include the reduction of costs and resources associated with processing fewer applications. Accordingly, FOI Coordinators with support from their management should identify and classify types of agency documents that can be released to the public outside the FOI process (whether free of charge or for a fee); develop general release policies and guidelines for the purposes of communicating to personnel the release procedures and to allay fears that they may be subject to agency or legal sanctions; and place as many documents as possible into the public arena, including in libraries or on the Internet. The initial identification and classification of material should focus on the types of information and documents commonly sought under FOI. This would result in the immediate reduction of unnecessary FOI requests.

Unambiguous applications and reasonable applicationambits

This research found that many FOI applications do not adequately identify the documents being sought, while other applications seek large volumes of documents. Sections 4 and 20 of the FOI Act (1992) require agencies to assist applicants in accessing documents and to help applicants reduce the ambit of unreasonably large applications respectively (see Appendix Three). In assisting applicants with their applications, FOI Coordinators consult and
negotiate with applicants. However, some applicants perceive this assistance to be harassment or an attempt to confound their access to documents. Accordingly, to minimise the negative perceptions of applicants and reduce the number of complaints against agencies, Coordinators should fully apprise applicants of the reasons for their actions and the relevant provisions of the Act.

**Applicants and the need for educational strategies**

The research found that FOI Coordinators generally have a good relationship with applicants and are understanding of their lack of knowledge of the FOI Act (1992) and the associated agency FOI processes. Often Coordinators through discussions with applicants become aware of their reasons to access documents and on occasion become empathic to the applicant’s needs, with this sometimes contributing to the decision to provide access to documents. While Coordinators generally have a good relationship with non-professional applicants, the same cannot usually be said of relations with professional applicants, such as members of the insurance, legal and media industries.

Generally, FOI Coordinators perceive that professional applicants view the FOI Act (1992) as a cheaper and easier method to access information than other statutory processes, and use Coordinators to conduct their research and them as a cheap source of labour. This relationship is further strained by the broad nature of many of the requests from professional applicants and the frequency of invalid applications, such as solicitors requesting personal information about their clients without attaching a letter of consent.
Accordingly, to minimise the friction between Coordinators and professional applicants, it is recommended that the Information Commissioner apply targeted education strategies, such as promoting FOI issues be incorporated into legal and quasi-legal academic courses, and presenting FOI awareness sessions to professional associations and bodies.

**Records management and the need for improved systems and practices**

This research found that some agencies continue to suffer from poor previous and present records management systems and practices. The institution of effective systems and practices is essential to establishing the existence and whereabouts of documents. The effectiveness and efficiency of systems greatly differ between agencies, with many of the larger agencies having both corporate and non-corporate systems operating in different parts of the agency. As a result of inadequate records management systems some FOI Coordinators experience significant problems in locating documents, with these problems being exacerbated by other factors, including the retrospective nature of the FOI Act (1992), varying business activities within agencies, amalgamation of agencies, decommissioning of business areas and different records management system technologies.

Similarly, records management practices also differ between and within agencies. Although agencies generally have records management policies and procedures, many personnel are ambivalent towards these and give records management a low priority. Accordingly, to minimise the difficulties
associated with the management of records, agency management should cause the effectiveness and efficiency of systems, policies and practices to be reviewed. Senior management should also proactively foster an environment whereby the importance of correctly recording, filing, archiving and legally destroying documents by all personnel is promoted. FOI Coordinators too should not be overlooked as stakeholders in this process, for they have knowledge of the limitations and gaps in agency records systems and practices. Further, the newly established State Records Commission should play a significant role in establishing and monitoring records management standards across government agencies, especially those relating to the rapidly developing world of electronic communication.

**Personal / non-personal information and the need for clear definitions**

The research found that although FOI Coordinators readily classify documents that contain non-personal information, there are varied beliefs as to what constitutes 'personal information'. The importance of correctly classifying documents at the initial stage of the FOI process is essential as a $30.00 application fee is applicable for accessing non-personal information. Despite the term 'personal information' being defined in the Glossary to the FOI Act (1992) (see Appendix Three), and reference material being contained on the Information Commissioner's Internet site (Personal information, 1999), some Coordinators consider that documents containing any information relating to an individual constitutes 'personal information', whereas other Coordinators consider that only information which identifies an individual is 'personal information'. Therefore types of information provided
free by some agencies are considered by others to be non-personal information and is subject to the application fee. Accordingly, to minimise the disparity between agencies in classifying documents, it is recommended that the Information Commissioner determine the extent of the disparity, include clear definitions in training material and apply targeted educational strategies.

**Costs and charges under the FOI Act (1992)**

Section 16 of the FOI Act (1992) (see Appendix Three) enables agencies to levy various charges associated with processing a FOI application, such as providing photocopies of non-personal documents and supervising the inspection of documents. FOI Coordinators experience difficulties in calculating some of the charges due to the ongoing nature of many applications, that is, the time spent on negotiating and consulting with various parties, and the time associated with the charging processes, that is, preparing and communicating to the applicant an estimate when charges are likely to exceed $25.00 (an amount Coordinators believe should be increased to $100). Although some people consider that governments may use these charges as an additional source of revenue, and agencies exploit the charges to deter individuals from using the Act, to date the Western Australian Government has resisted increasing the charges and it is common for Coordinators to undercharge or waive charges altogether, especially if the applicant has had difficulties with the agency's FOI processes or experienced undue time delays in having their application completed. It is generally known by Coordinators that the Information Commissioner takes a tough stance on agencies levying charges. Although there have been several
examples when the Commissioner has found excessive charging by agencies, the Commissioner's official statistics show that the average costs are only about $14.00 (Keighley-Gerardy, 2000).

Third party information and the need for a release policy

This research found that often applicants seek access to documents that identify third parties. Under these circumstances FOi Coordinators have the option of editing information that could identify the third party, and/or consult the party to determine if they object to the document being released. This process, which at first glance appears to be straightforward, is problematic in that often third parties are unaware of their details being contained in the government document. As a result third parties frequently demand to peruse the documents themselves, and be advised of the applicant's identity and their reason for accessing the documents. Coordinators generally believe that the Information Commissioner's stance on this issue is to protect the applicant's privacy and not reveal their identity. This belief is supported by reference material contained on the Commissioner's Internet site (Privacy of applicant and third parties, 1999; Privacy of third parties protected, 1999). However, despite this, some Coordinators disclose to the third party the applicant's identity in order to progress the application, and provide a copy of the document to prevent that party also applying under the FOI Act (1992) to access the document. Accordingly, it is recommended that the Information Commissioner explore the difficulties associated with this area of concern and develop suitable guidelines.
Ownership of consultants' documents and the need for a legislative amendment and a standard government contract clause

The research found that increasingly agencies are engaging consultants and contractors to perform traditional roles and functions. Many contractors automatically claim their work is commercially confidential and instruct FOI Coordinators to exempt the documents from release. Further, some contractors refuse to deliver documents the subject of an FOI application to Coordinators, claiming that the documents are their property and not the agency's. Accordingly, it is recommended that the Information Commissioner explores the issue of ownership of documents created by consultants and contractors, and if necessary pursue an amendment to the FOI Act (1992). Further, in the short-term, the Commissioner of Public Sector Management and other key stakeholders, such as the State Records Commission, and agencies, such as Contract and Management Services, should develop a standardised clause that clarifies the ownership of, and accessibility to, material created by consultants and contractors and cause the clause to be incorporated into new contracts.

Exemption clauses

The FOI Act (1992) contains 15 exemption clauses and 51 sub-clauses. Although, the clauses generally satisfy most needs and in the main are workable, there are several that require enhancing. One of the more controversial enhancements is the Information Commissioner's recommendation relating to clause 5 (1) (b) of the Act (see Appendix Three), that relates to exempting from release documents that 'reveal the
investigation of any contravention or possible contravention of the law'. The Commissioner recommends that the clause be extended to include the proviso that there must also be a likelihood of harm resulting from the release (Butler, 2000; Keighley-Gerardy, 1999b; McNamara, 2000). In this instance, the Commissioner, in the absence of a legislative change, attempted to reflect her enhancement in a review determination. Upon being challenged by one agency in the Supreme Court it was held that the Commissioner's interpretation of the Act was ultra-vires, that is, beyond the power of the statute (Tickner, 1996). This finding has given support to concerns by some FOI Coordinators that the Commissioner may, in the absence of the Government effecting timely legislative changes, be imposing her views of how the Act should operate with the possibility of these views not being in accordance with the original intent of the Parliament.

In recent times, the Information Commissioner has recommended that the existing exemption model be simplified by replacing the various clauses with a single exemption clause that would enable agencies to refuse access to documents only when 'substantial harm to the public interest' may result (Butler, 2000; Keighley-Gerardy, 1999b; McNamara, 2000). Although the single exemption model would provide greater flexibility and ensure that agency reasons for refusing to provide access to documents are contemporary (unlike many of the existing blanket exemptions), it would also require FOI Coordinators to conduct greater research into claims and not just quote a standard phrase as is the present case with respect to most exemptions. A crucial element of the single clause model is the requirement
to apply the Public Interest Test, that is, the balancing of an individual's right to access documents against the needs of the community (Legal, Constitutional & Administrative Review Committee, 1999).

This research found that it is generally accepted that applying the Public Interest Test is not an easy task (Commission on Government, 1992; Legal, Constitutional & Administrative Review Committee, 1999), with some Coordinators experiencing difficulties in understanding what is required and the extent to which they must go to establish their argument. Coordinators also believe that their knowledge in this area is inadequate, especially when dealing with legal practitioners whom they perceive as having superior theoretical knowledge and practical experience in applying and arguing this Test. Although the Information Commissioner has incorporated reference material on the concept of Public Interest in her educational material (Keighley-Gerardy, 1996b), it is recommended that the Commissioner develop education strategies to assist FOI practitioners in applying the Public Interest Test, especially if it is intended to replace the existing clauses with a single exemption.

45 day period in which agencies must make a decision

The research found that many factors may impact on a FOI Coordinator's ability to formulate and communicate an agency's decision to provide or refuse access to a document. Factors include process type issues, such as the time taken to: process large and complex applications; locate and acquire the documents; prepare a schedule of documents and estimate of costs;
peruse the documents and consult with stakeholders and third parties (who may be difficult to find or on leave); and research and formulate a Notice of Decision. Other issues, such as high FOI and non FOI related workloads, and public holidays may also delay the completion of a Notice of Decision. Although some applicants believe that agencies are obstructive by taking excessive time to make a decision, it was found that Coordinators do not usually prolong the completion of applications unnecessarily, the Information Commissioner's official statistics showing that the average time to complete an application is only about 18 days (Keighley-Gerardy, 2000).

**Notices of Decision and the need for agreed standards**

This research found that FOI Coordinators have different opinions of what constitutes a good Notice of Decision, that is, some Coordinators consider they should be brief while others prefer them to be comprehensive. Although Coordinators perceive that the Information Commissioner requires comprehensive Notices, that include references to judicial and quasi-judicial decisions, they believe that this style of notice (like the Commissioner's own review determinations) is too legalistic and beyond the comprehension of most applicants and third parties. Accordingly, to assist Coordinators in determining an appropriate standard for Notices, it is recommended that the Information Commissioner in conjunction with Coordinators identify and communicate good examples of Notices, and develop agreed minimum standards. With respect to reporting her own decisions, the Commissioner has previously identified the difficulty in balancing the informal information needs of applicants against the formal requirements of a decision made
pursuant to statute law (Keighley-Gerardy, 1999b). Nevertheless, the Commissioner should continue to strive to produce decisions that meet the requirements of the intended audience who, in the main, are members of the public.

**Coordinators' and agency performance and the need for feedback**

The research found that, in many instances, the first that a FOI Coordinator knew that somebody was dissatisfied with either their or their agency's performance with regard to FOI was upon an appeal being lodged. This sometimes occurred after a Coordinator had performed that role for several years. Generally, agency management only become interested in FOI matters and the performance of Coordinators when a controversial document is to be released or when the Information Commissioner is to commence an External Review of an agency decision. The research suggests that timely and ongoing feedback by management and the Commissioner would identify poor performance earlier in the application process and may reduce the level of dissatisfaction by applicants and third parties, and as a result decrease the number of appeals. Accordingly, agency CEOs should, possibly through their Internal Review Officers, regularly review various aspects of their agency's FOI processes and decisions. Appropriate benchmarks for measuring performance are the criteria previously developed by the Commissioner and Coordinators, and used by the Commissioner in her annual inspections of agencies (FOI standards and performance measures, 1998). The Commissioner could also possibly extend her random annual
assessment of agencies by devolving some of the functions to senior members of her Office.

Internal review process and the need for better training for review officers

In 1999/2000, 5,501 FOI applications, including a small number dealt with by municipal authorities, were processed by government agencies. However, Tables 1, 2 and 3 (see page 90) show there were relatively few appeals of which an even smaller number were upheld. Although the two-tier appeal process, that is Internal and External Reviews, appears to be operating satisfactorily, it was found that Coordinators held concerns about the capability of some Internal Review Officers to perform this role effectively. Generally, the reviewers, due to the requirement that they be either of the same or senior level to the agency's Decision-maker, are middle and senior managers. This research suggests that due to the small number of appeals dealt with by any one Internal Review Officer, and the frequency with which they are transferred intra and inter agency, some reviewers possess a poor understanding of the FOI Act (1992). This problem is exacerbated when reviewers also have a poor knowledge of agency FOI processes, records management systems and practices, for example, during the research one Coordinator raised the improbability of his Internal Review Officer having the knowledge of the Act or agency systems and practices to be able to overturn a decision. At another agency, the Coordinator actually reviews his own decisions, prepares a response and has his Internal Review Officer sign it.
The low levels of FOI knowledge and experience of some Internal Review Officers, and the lack of independence, should be a cause for concern to agency management and the Information Commissioner. Accordingly, it is recommended that the Commissioner and FOI practitioners identify the training needs of practitioners (some areas have been identified in this research) and develop appropriate educational strategies, including the possibility of the establishment of an accredited course conducted by the Technical And Further Education College or a local university.

**Theoretical knowledge and practical experience of FOI practitioners**

Although FOI practitioners require a comprehensive knowledge of the FOI Act (1992) and associated processes, judicial and quasi-judicial decisions, actual formal training is limited, infrequent, costly, and neither provides increasing levels of complexity nor contributes to an academic or professional qualification. The problem is exacerbated for country Coordinators who must attend Perth and whose agencies are required to pay additional accommodation and travel costs. Similar to the previous recommendation, the training needs of practitioners require to be determined and an accredited course developed.

The research also identified that informal information and experience sharing between FOI Coordinators and their peers, supplement the Coordinator's theoretical knowledge. While several Coordinators found staff from the Information Commissioner's office helpful with respect to legislative matters, they consider it more appropriate to discuss process difficulties, such as
problems with applicants and third parties, with other Coordinators and to
learn from their practical experiences. At the time of the research
participants being interviewed, a Coordinators Network Group was operating,
however, the participation rate was low. Generally, Coordinators perceived
the Network to be unrepresentative of government agencies with meetings
held at a location inconvenient to some. Coordinators themselves see the
potential benefits that a well supported Network could provide them, including
a common voice when dealing with the Information Commissioner and other
stakeholders, and as a medium for information exchange. Accordingly, given
that the identified problems associated with the Network relate to
membership being perceived as unrepresentative and difficulties in attending
meetings, Coordinators should explore creating a virtual Network on the
Internet. This initiative, that was suggested by several Coordinators, has
many benefits: formal meetings would reduce to only one or two each year;
restricted access to the site would provide confidentiality to FOI practitioners;
inclusion of Coordinators and Internal Review Officers from both Metropolitan
and Non-metropolitan government agencies and municipal authorities;
posting of current member details, frequently asked questions and other FOI
reference material. Since conducting the interviews, participants have
advised that the Network has all but ceased to exist, supporting the identified
need for a more convenient means of communication between Coordinators,
such as those identified above.
Staffing of FOI practitioner positions and the need for appropriate support and succession planning

This research suggests that despite the increasing number of FOI applications processed annually (Keighley-Gerardy, 1999a; Keighley-Gerardy, 2000) and the increasing complexity of applications perceived by FOI Coordinators, it appears that rarely have agencies increased the number of FOI practitioners. In some instances, due to a lack of clerical support, Coordinators (who would normally be classified as middle management) frequently perform basic clerical duties. Workload problems are also exacerbated by Coordinators being formally and informally assigned extraneous duties, including assuming responsibility for producing documents in court and providing advice on a range of legal topics, such as privacy laws, often without receiving training. The research also identified that for many agencies the lack of succession planning of the FOI practitioner positions is a significant issue, with the problem being so serious at some agencies that Coordinators are unable to undertake extended leave or non-FOI developmental opportunities.

Agency personnel are reluctant to act in the FOI Coordinator positions temporarily. Mostly, the reluctance is borne from a desire not to work with senior management, and the high volume and complex workloads associated with the Coordinator position. Issues, such as possible conflict with other personnel and applicants, and responsibility for administering a statute, are not significant contributing factors. Accordingly, to ensure that FOI practitioners are efficiently and effectively utilised, and for agencies to meet
their FOI, industrial relations and other human resource responsibilities, agency management should review the roles and workloads of their FOI practitioners. To enable agencies to comply with their future FOI obligations, management should also as a matter of priority implement strategies to ensure sufficient personnel have the knowledge and skills to support Coordinators in times of high workload and to occupy their positions should Coordinators be absent for prolonged periods. Additionally, where found necessary, practitioners should also have access to clerical support whether this be on a temporary or full time basis.
CHAPTER SEVEN

THE CONCLUSION
7.1 CONCLUSION

Despite the pivotal role that FOI Coordinators have in the daily operation of FOI legislation, apart from this study minimal research has been conducted into the weltanschauung of Coordinators, including how they perceive their environment and the issues that impact on their decision-making processes. This research is significant because it provides readers with a rare portal into the complex and dynamic world of Coordinators generally, and those operating in Western Australian State Government agencies specifically.

This research confirms aspects in the existing literature relating to FOI in Australia and elsewhere, and analyses many issues not previously identified. The study, among other things, makes recommendations with respect to the need for:

- a legislative and government administrative framework that supports the FOI concept;
- a high government priority to review and amend the FOI Act (1992);
- the establishment of a whole-of-government FOI policy relating to the relationship between agencies and Ministers of the Crown;
- agencies to categorise document types and implement a general release policy;
• the establishment of effective agency records management systems;

• agency personnel to adopt good records management practices;

• clarification as to the ownership of documents created by consultants;

• timely provision of performance feedback to FOI practitioners;

• the development of a comprehensive, accessible and accredited training course for FOI practitioners;

• agency management to review the appropriateness of practitioner positions with respect to duties performed, workloads, resourcing, succession planning and to ensure that agencies meet their obligations under equal opportunity and industrial relations laws.

Although this study identified both short and long term challenges facing FOI Coordinators, there also exist many opportunities to address these issues. While some of the solutions suggested in this paper can only be advanced by stakeholders, such as the Information Commissioner, and in the case of effecting legislative amendments, the Attorney General, others can be progressed by FOI practitioners with the support of agency management.

There appears to be a genuine desire by FOI Coordinators to advance the concept of FOI. However, it has been found that this is not always the case
with agency management and personnel. While Western Australia is not immune from attempts by Public Sector personnel to confound the FOI Act (1992), this research shows that Coordinators play a significant part in minimising any such activities. The research also suggests that any confounding of the Act is more likely to take the form of Administrative Non-compliance, such as inadequate resourcing of Coordinator positions and deficient records management practices, rather than acts of Malicious Non-compliance, for example failing to assist applicants with their applications and destroying documents. Nevertheless, the possibility of agencies failing to conduct thorough searches for documents appears to be an increasing concern to both Coordinators and the Information Commissioner, and an area that should be closely monitored.

The Information Commissioner has publicly stated ‘There is a contingent of dedicated, committed and informed FOI Coordinators in Public Sector agencies’. She acknowledges that without their efforts ‘FOI would surely fail to meet the requirements of a democratic government’ (Keighley-Gerardy, 2000, p.2). The Commissioner's comments are praise indeed, however, this research has identified that the effectiveness of the FOI Act (1992) and FOI practitioners is dependent upon many internal and external factors.

Snell and Tyson (2000) state that FOI legislation ‘cannot be effective without a commitment from government and its servants to openness and accountability’. The authors assert that this commitment ‘must be genuine; it must be long-term; and it must be evident not only among FOI officers . . .
but also senior bureaucrats, policy advisors and at the ministerial level'. In Western Australia although significant progress with respect to FOI has been made, there remains a considerable way to go before FOI utopia is achieved.

While the Western Australian Government and Public Sector bureaucrats fail to provide a legislative and administrative framework that fully supports the FOI concept, the public shows apathy towards exercising their statutory rights to access government documents, and the Government continues to accord a low priority to effecting needed amendments to the FOI Act (1992), it will remain the daily task of FOI Coordinators to make the Act and associated processes work. It is then reasonable that in the medium term at least, the Coordinators' daily lament will continue to be

To release or not release that is the question.
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APPENDICES
APPENDICES

APPENDIX ONE  OVERVIEW OF THE FOI ACT (1992) AND ITS ADMINISTRATION
This appendix contains an overview of the FOI Act (1992) and how it is administered.

APPENDIX TWO  SUMMARY OF NARRATIVE CODING
This appendix contains a matrix showing participants and the coding of their respective narratives.

APPENDIX THREE  EXCERPTS FROM THE FOI ACT (1992)
This appendix contains excerpts from the FOI Act (1992) referred to in the thesis.

APPENDIX FOUR  LETTER TO CHIEF EXECUTIVE OFFICERS
This appendix contains the format of the letter sent to agency Chief Executive Officers seeking consent for their agency’s FOI Coordinator to participate in the study.

APPENDIX FIVE  CHIEF EXECUTIVE OFFICERS CONSENT / REFUSAL NOTIFICATION FORM
This appendix contains the pro-forma used by Chief Executive Officers to provide consent for their agency’s FOI Coordinator to participate in the study.

APPENDIX SIX  LETTER TO FOI COORDINATORS
This appendix contains the format of the letter sent to FOI Coordinators inviting their participation in the study.

APPENDIX SEVEN  FOI COORDINATORS CONSENT / REFUSAL NOTIFICATION FORM
This appendix contains the pro-forma used by FOI Coordinators to provide consent to participate in the study.
APPENDIX ONE

OVERVIEW OF THE FOI ACT (1992)

AND ITS ADMINISTRATION

Essentially, the FOI Act (1992) provides a statutory means for the public to access documents held by Western Australian State Government and municipal authorities, that is, the Act does not relate to information generally, nor does it apply to non-government agencies and organisations.

The objectives of the FOI Act (1992) are to enable the public to participate more effectively in governing Western Australia and to make those responsible for government more accountable. Achievement of these objectives is to be accomplished by the creation under the Act of a general right of access to government held documents; provision of a mechanism that ensures that personal information held by government is accurate, complete, current and not misleading; and the requirement that certain documents are generally available (section 3 FOI Act 1992) (see Appendix Three).

The FOI Act (1992) is administered by the Information Commissioner who, pursuant to section 56 (1) of the Act, is appointed by the Governor. Since the establishment of the Office of the Information Commissioner in July 1993, Bronwyn Keighley-Gerardy has held this position. For the 1998-1999 financial year, 11 officers supported the Information Commissioner, with the total operating cost of the Office being $1,234,933 (Keighley-Gerardy, 179
During the 1999-2000 financial year, the number of officers supporting the Commissioner increased by one to 12 and the total operating costs increased to $1,376,203 (Keighley-Gerardy, 2000).

The mission of the Office of the Information Commissioner is to contribute to the ‘Public understanding and confidence in the decision-making process of government agencies through access to relevant information’ (Keighley-Gerardy, 2000, p.18). In administering the FOI Act (1992), the Commissioner has a wide range of functions, including education and review. In describing the operations of her Office, the Information Commissioner states that the following two sub-programs of Advice and Awareness, and Review and Complaint Resolution support her dual roles.

**Advice and Awareness** - This sub-program focuses on educating the public with respect to their rights and the procedures under the FOI Act (1992), and ensuring that agencies are aware of their responsibilities under the Act. Initiatives that contribute to achieving the aims of this sub-program include: conducting briefings, seminars, training courses and workshops; responding to enquiries; publishing general informative literature, such as leaflets relating to application and review processes, and technical material, such as establishing agency standards and performance measures (Keighley-Gerardy, 1999a; Keighley-Gerardy, 1999b).
Review and Complaint Resolution - This sub-program focuses on the resolution of complaints from applicants and third parties. Essentially, an applicant or third party may lodge an appeal against an agency's decision to refuse to provide access to a document, to provide access to edited rather than the complete document, to defer or refuse to deal with an application, that section 28 of the FOI Act (1992) which relates to providing access to medical and psychiatric information has been improperly applied (see Appendix Three), to impose a charge or require a deposit, or refuse to amend personal information (Keighley-Gerardy, 2000).

When a complaint is received by the Commissioner's Office, attempts are first made by officers to resolve the issues between the parties by conciliation. Where this is not possible the Commissioner, pursuant to Division 3 of the FOI Act (1992), undertakes a merit review role, that is, the Commissioner adopts a fact finding and inquisitorial role. To support this role the Commissioner has the power to obtain agency documents, compel individuals to attend before her and examine them under oath. In making the formal decision, the Commissioner assumes the role of the agency decision-maker and may confirm, vary, set aside or substitute an agency's original decision (Keighley-Gerardy, 1999a; Keighley-Gerardy, 1999b).

The Information Commissioner has other administrative and regulatory functions, including the power to extend the prescribed time period in which applications are to be dealt with and to reduce costs imposed by agencies.
# APPENDIX TWO

## SUMMARY OF NARRATIVE CODING

<table>
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## APPENDIX TWO

### SUMMARY OF NARRATIVE CODING (CONTINUED)

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### Resourcing of FOI Coordinators-

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183
APPENDIX THREE

EXCERPTS FROM THE FOI ACT (1992)

Section 3 – Objects and intent

(1) The objects of this Act are to-

(a) enable the public to participate more effectively in governing the State; and

(b) make the persons and bodies that are responsible for State and local government more accountable to the public.

(2) The objects of this Act are to be achieved by-

(a) creating a general right of access to State and local government documents;

(b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and

(c) requiring that certain documents concerning State and local government operations be made available to the public.

(3) ....

Section 4 – Principle of administration

Agencies are to give effect to this Act in a way that-

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

(b) allows access to documents to be obtained promptly and at the lowest reasonable cost; and

(c) assist the public to ensure that personal information contained in documents is accurate, complete, up to date and not misleading.
Section 6 – Access procedures do not apply to documents that are already available

Parts 2 and 4 do not apply to access to documents that are-

(a) available for purchase by the public or free distribution to the public;

(b) available for inspection (whether for a fee or charge or not) under Part 5 or another enactment;

(c) available for inspection in the State archives;

(d) publicly available library material held by agencies for reference purposes; or

(e) made or acquired by an art gallery, museum or library and preserved for public reference or exhibition purposes.

Section 10 – Right of access and applications

(1) A person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with this Act.

(2) Subject to this Act, a person’s right to be given access is not affected by-

(a) any reasons 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.
Section 13 – Decisions as to access and charges

(1) Subject to this Division, the agency has to deal with the access application as soon as is practicable (and, in any event, before the end of the permitted period) by -

(a) considering the application and deciding -

(i) whether to give or refuse access to the requested documents; and

(ii) any charge payable for dealing with the application; and

(b) giving the applicant written notice of the decision in the form required by section 30.

(2) If the applicant does not receive notice under subsection (1) (b) within the permitted period the agency is taken to have refused, at the end of that period, to give access to the documents and the applicant is taken to have received written notice of that refusal on the day on which that period ended.

(3) For the purpose of this section the “permitted period” is 45 days after the access application is received or such other period as is agreed between the agency and the applicant or allowed by the Commissioner under subsection (4) or (5).

(4) On the application of the applicant, the Commissioner may reduce the time allowed to the agency to comply with subsection (1).

(5) On the application of the agency, the Commissioner, on being satisfied that the agency has attempted to comply with subsection (1) within 45 days but that it is impracticable, in the circumstances, for it to comply within that time, may allow the agency an extension of time to comply with subsection (1) on such conditions as the Commissioner thinks fit.

(6) - (9) ....
Section 16 – Charges for access to documents

(1) Any charge that is, in accordance with the regulations, required to be paid by an applicant before access to a document is given, must be calculated by an agency in accordance with the following principles, or, where those principles require, must be waived:

(a) a charge must only cover the time that would be spent by the agency in conducting a routine search for the document to which access is requested, and must not cover additional time, if any, spent by the agency in searching for a document that was lost or misplaced;

(b) the charge in relation to time made under paragraph (a) must be fixed on an hourly rate basis;

(c) a charge may be made for the identifiable cost incurred in supervising the inspection by the applicant of the matter to which access is granted;

(d) no charge may be made for providing an applicant with access to personal information about the applicant;

(e) a charge may be made for the reasonable costs incurred by an agency in supplying copies of documents, in making arrangements for viewing documents or in providing a written transcript of the words recorded or contained in documents;

(f) a charge must not be made for producing for inspection a document referred to in sections 94 or 95;

(g) a charge must be waived or be reduced if the applicant is impecunious; and

(h) a charge must not exceed such amount as may be prescribed by regulation from time to time.

(2) - ....
Section 17 – Estimate of charges

(1) - (2) ....

(3) If the agency estimates that the charges for dealing with the access application might exceed $25, or such greater amount as is prescribed, then, whether or not a request has been made under subsection (1), the agency has to notify the applicant of its estimate, and the basis on which its estimate is made, and inquire whether the applicant wishes to proceed with the application and notify the applicant of the requirements of section 19 (1) (b).

Section 20 – Agency may refuse to deal with an application in certain cases

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

(2) - (4) ....

Section 28 – Medical and psychiatric information

If -

(a) a document to which the agency has decided to give access contains information of a medical or psychiatric nature concerning the applicant; and

(b) the principal officer of the agency is of the opinion that disclosure of the information to the applicant may have a substantial adverse effect on the physical or mental health of the applicant,

it is sufficient compliance with this Act if access to the document is given to a suitably qualified person nominated in writing by the applicant and the agency may withhold access until a person who is, in the opinion of the agency, suitably qualified is nominated.
Section 96 – Publication of information statements

(1) An agency (other than a Minister or an exempt agency) has to cause an up-to-date information statement about the agency to be published in a manner approved by the Minister administering this Act-

(a) within 12 months after the commencement of this Act; and

(b) at subsequent intervals of not more than 12 months.

(2) …

Section 105 – Protection from criminal actions

If access to a document is given under a decision under this Act, and the person who makes the decision believes, in good faith, when making the decision, that the Act permits or requires the decision to be made, neither the person who makes the decision nor any other person concerned in giving access to the document is guilty of an offence merely because of the making of the decision or the giving of access.

Section 106 – Personal liability

(1) A matter or thing done by-

(a) an agency or the principal officer of an agency; or

(b) a person acting under the direction of an agency or the principal officer of an agency,

does not subject the principal officer or any person so acting personally to any action, liability, claim or demand so long as the matter or thing was done in good faith for the purposes of giving effect to this Act.

(2) Subsection (1) applies even if, in giving access to a document, there has been a failure to comply with Division 3 of Part 2.
Section 110 – Destruction of documents

A person who conceals, destroys or disposes of a document or part of a document or is knowingly involved in such an act for the purpose (sole or otherwise) of preventing an agency being able to give access to that document or part of it, whether or not an application for access has been made, commits an offence.

Penalty: $5,000 or imprisonment for 6 months.

SCHEDULE 1 - Exemptions

5. Law enforcement, public safety and property security

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

(a) ....

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

(c) - (h) ....

GLOSSARY

'personal information' means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

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

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.
APPENDIX FOUR

LETTER TO CHIEF EXECUTIVE OFFICERS

Dear


Introduction

I am a mature age student with the Faculty of Community Services, Education and Social Sciences at the Edith Cowan University, Joondalup Campus.

I am completing the degree Master of Social Science (Human Services) by undertaking a research thesis. Recently, I received approval from the University's Higher Education and Ethics Committees to commence the data collection stage of my research.

The purpose of this letter is to seek from you, or your representative, written consent to contact your agency's Freedom of Information Coordinator with a view of inviting him or her to participate in the study.

Background

The Freedom of Information Act 1992 (the FOI Act) came into operation in 1993. Since that time little independent research has been conducted into the relationship between the FOI Act and its administrators, practitioners and users.

The purpose of my study is to gain an understanding of the issues that FOI Coordinators of State Government agencies perceive as affecting their decisions when determining an FOI application. The study will provide administrators, agency management, practitioners and consumers with a better understanding of the relationships between the FOI Act, its practitioners and the environment in which they operate.

The research methodology will involve FOI Coordinators from several government agencies, individually narrating to me their experiences and perceptions about issues that affect their decisions. The narrations will be divided into two sessions of about thirty minutes each. After the narratives are analysed, central themes will be identified and presented in a thesis paper. A copy of which will be provided to all participating agencies.
Participants will be randomly selected from a pool of eligible prospective persons. The material obtained from the narratives will be treated in the Strictest of Confidence, and every effort will be made to protect the identity of the participants and their agencies.

Participation of the FOI Coordinators in the study will occur only if approved by their Chief Executive Officers, or their representative, and of the participants' own free will. Prior to being accepted as a participant, prospective participants will be personally advised of the following:

- the nature of the research, including its purpose, methodology and reporting arrangements;
- considerations (if any) that may lead them to refuse to participate, including possible risk of harm to them;
- assurance that every effort will be made to ensure their, and their agency's, anonymity in respect to specific comments made (excluding the unlikely event that the information is subpoenaed to a court of law);
- the ability to freely decline to answer any question, and edit from the transcripts any comment, without any criticism or sanction; and
- the ability to freely withdraw from a session or the study at any time, without any criticism or sanction.

Consent

Please find attached a consent / refusal notification form. In order that I may progress the research, I would be grateful if the form could be completed and returned to me at your earliest convenience.

If you agree for your FOI Coordinator to participate in the study, and if selected from the pool, I will write to him or her advising of that fact and formally invite them to participate.

Should you require additional information or wish to discuss any aspect of the study, please do not hesitate to contact me ☎ (telephone number).

Thank you for your time.

Graham Harnwell

BA (Justice)  Post Grad Dlp (Social Science)  AIMM

Researcher: Graham Harnwell.
Faculty of Community Services, Education and Social Sciences. Edith Cowan University, Joondalup Campus.

I .......................................................... being the Chief Executive Officer (or representative) of ........................................
agree / refuse (please circle) to this agency's Freedom of Information Coordinator participating in the mentioned study.

I have read the terms and assurances associated with the study and any questions have been answered to my satisfaction.

The name and contact number of my FOI Coordinator is:

..........................................................

Signature: .................................. Dated: .........................

Please return this form to:
G Harnwell
Address
APPENDIX SIX

LETTER TO FOI COORDINATORS

Dear


Introduction

I am a mature age student with the Faculty of Community Services, Education and Social Sciences at the Edith Cowan University.

I am completing the degree Master of Social Science (Human Services) by research. Recently, I received approval from the University's Higher Education and Ethics Committees to commence my study.

The purpose of this letter is to invite you to participate in the data collection phase of the study. Like you, I am a State Government employee and am aware of the restrictions and protocols associated with discussing work related matters to persons outside our respective agencies. Accordingly, before writing this letter, I have first obtained your Chief Executive Officer's written approval to contact you and for you, subject to your agreement, to participate in the study.

Background

The Freedom of Information Act 1992 (the FOI Act) came into operation in 1993. Since that time little independent research has been conducted into the relationship between the FOI Act and its administrators, practitioners and consumers.

The purpose of my study is to gain an understanding of the issues that FOI Coordinators of State Government agencies perceive as affecting their decisions when determining an FOI application. The study will provide administrators, agency management, practitioners and consumers with a better understanding of the relationships between the FOI Act, its practitioners and the environment in which they operate.

The research methodology will involve FOI Coordinators from about eight government agencies, individually narrating to me their experiences and perceptions about issues that affect their decisions. The narrations will be divided into two sessions of about thirty minutes each. Later, I will identify central themes from the narratives and provide an analysis of the results in a thesis paper. A copy of which will be provided to all participating agencies.
To assist in maintaining anonymity, participants will be selected from a pool of prospective participants. The material obtained from the narratives will be treated in the *Strictest of Confidence*, and *every* effort will be made to protect the identity of the participants and their agencies.

Your participation in the study will occur only if approved by your Chief Executive Officer (or their representative), which as previously mentioned has been obtained, and of your own free will. Prior to being accepted as a participant, I will personally advise you of the following:

- the nature of the research, including its purpose, methodology and reporting arrangements;
- considerations (if any) that may lead you to refuse to participate, including possible risks;
- assurance that every effort will be made to ensure your, and your agency’s, anonymity in respect to specific comments made (excluding the unlikely event that the information is subpoenaed to a court of law);
- the ability to freely decline to answer any question, and edit from the transcripts any comment, without any criticism or sanction; and
- the ability to freely withdraw from a session or the study at any time, without any criticism or sanction.

**Consent**

I will contact you shortly to discuss the study and answer any questions that you may have. However, in the interim should you require additional information or wish to discuss any aspect of the study, please do not hesitate to contact me during working hours on 📞 (telephone number).

I have attached a standard consent/refusal notification form for your consideration.

Thank you for your time.

Graham Harnwell

BA (Justice)  Postgrad' Dip (Social Science)  AIMM
APPENDIX SEVEN

FOI COORDINATORS
CONSENT / REFUSAL NOTIFICATION FORM

Study Title: A Phenomenological Study of the Issues Affecting
the Decision-Making Processes of WA Government
Freedom of Information Coordinators.

Researcher: Graham Harnwell.
Faculty of Community Services, Education and Social
Sciences. Edith Cowan University, Joondalup Campus.

I ................................................................. being the Freedom of Information Coordinator for the .....................
agree / refuse (please circle) to participate in the mentioned study.

I have read the terms and assurances associated with the study and any
questions have been answered to my satisfaction.

Signature: .................................................... Dated: .........................

Please return this form to:
G Harnwell
Address