

Freedom of Information

ASPG Conference
WA Parliament
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Presentation by Ms Catherine Fletcher
WA Information Commissioner
Chair of WA State Records Commission



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Information Commissioner**

Freedom of information for Western Australia

The development of freedom of information laws

One strand in the evolution of FOI might be traced back to the concept of the *Censorate* in Imperial China



**Emperor T'ai-tsung
(Tai Zhong)**
Reign: 626 - 649

18th century Swedish legislation linked notions of freedom of information, freedom of speech and transparency of government together with the principle of a free press



**Anders Chydenius
(1729 – 1803)**
The first father of freedom of information

“The present trend toward government secrecy could end in a dictatorship. The more information that is made available, the greater will be the nation’s security.”
Senator John Moss, 1956



**US Congressman
Sen. John Moss
(1915 – 1997)**
Champion of
20th century
FOI laws



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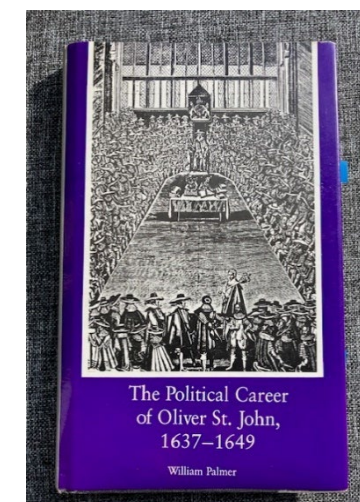
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The establishment of British Parliamentary supremacy

- The Glorious Revolution of 1688 permanently established Parliament as the ruling power of England and sowed the seeds for English democracy.
- It was brought about, in large part, by the clash between Charles I (1625-49) and a Parliament that reacted violently against a number of the King's fiscal and religious policies. The Parliament eventually stripped the monarchy of several of its principal powers.
- **Sir Oliver St John** (1598— 1673) was an eminent lawyer in 17th century England who later became Solicitor-General and then also Lord Chief Justice. As counsel, he argued the famous 'Ship Money' case in 1637 defending John Hampden for non-payment of taxes (ship money) to the King.
- He was also an MP in the House of Commons from 1640 who supported the Parliamentary cause in the English Civil War, and became one of the main leaders of Parliamentary opposition to Charles 1.
- After the Restoration, he published a defence of his past conduct. His only punishment for that past conduct was exclusion from holding any future public office. He left England in 1672 and died in 1673.



Above : Oliver St John portrait (on pamphlet)



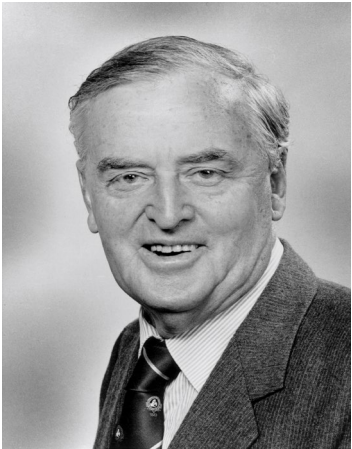
Below: Palmer's biography of St John which shows on cover the dissolving of Parliament in August 1629 by Charles 1



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Critical open government reforms across Australia in 1980s and 1990s in response to various political and financial scandals.



Queensland Premier
Joh Bjelke-Petersen
(1968 –1987)

Corruption exposed during the 1987–1989 *Fitzgerald inquiry* which recommended enactment of FOI laws.

Secrecy and propaganda are major impediments to accountability..... Information is the lynchpin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.

Chairman **Tony Fitzgerald**,
Fitzgerald Inquiry
Brisbane, 1989



Dr Carmen Lawrence MLA made history by becoming Australia's first woman premier (1990 – 1993). She promised to tackle the corruption that had seen hundreds of millions of taxpayers' dollars misused by the State Government.

In 1990, after significant public and media pressure, Dr Lawrence established the 'WA Inc' Royal Commission which reported in 1992.



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The 1992 report of the WA Royal Commission into the Commercial Activities of Government and other matters (the 'WA Inc.' Report)

Three goals can be identified as necessary to safeguard the credibility of our democracy and to provide an acceptable foundation for public trust and confidence in our system of government.

These goals are:

- (a) government must be conducted openly;
- (b) public officials and agencies must be made accountable for their actions; and
- (c) there must be integrity both in the processes of government and in the conduct to be expected of public officials.

Recommended the following open government reforms to improve transparency and accountability:

- priority for enactment of FOI laws
- a review of secrecy laws
- the introduction of public records and archives legislation
- the establishment of an Administrative Appeals Tribunal (now State Admin Tribunal)
- several wide-ranging recommendations for enhanced powers and structures concerning the office of the Auditor General.
- the establishment of an independent archives authority (now the State Records Commission).



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Overview of FOI laws in Australia

- **'First generation' or 'pull' FOI laws** exists in jurisdictions where the requests for information have to be made to 'pull' information out of the government by making an FOI request.
- **'Second generation' or 'push' FOI laws** have a pro-active information disclosure focus to push out government information with the goal of making formal requests a last resort.
- Commonwealth (Cth) information access laws enacted 1982 - substantial reforms in 2009. A federal parliamentary inquiry currently underway to examine many aspects of Cth FOI laws.
- NSW access laws first enacted 1989 - new push model law enacted in 2009.
- QLD access laws first enacted 1992 - new push model laws enacted in 2009.
- ACT access laws enacted 2016 – new push model law operative in 2018.
- WA FOI Act enacted 1993 (enacted as hybrid of push/pull models) - no substantive reform since enactment. Only one statutory review conducted in 1996.
- Commissioners make recommendations for legislative change in annual and other reports.
- Current major inquiries into Cth FOI law and Victorian FOI law – calls for reviews in Tasmania, South Australia and Western Australia.

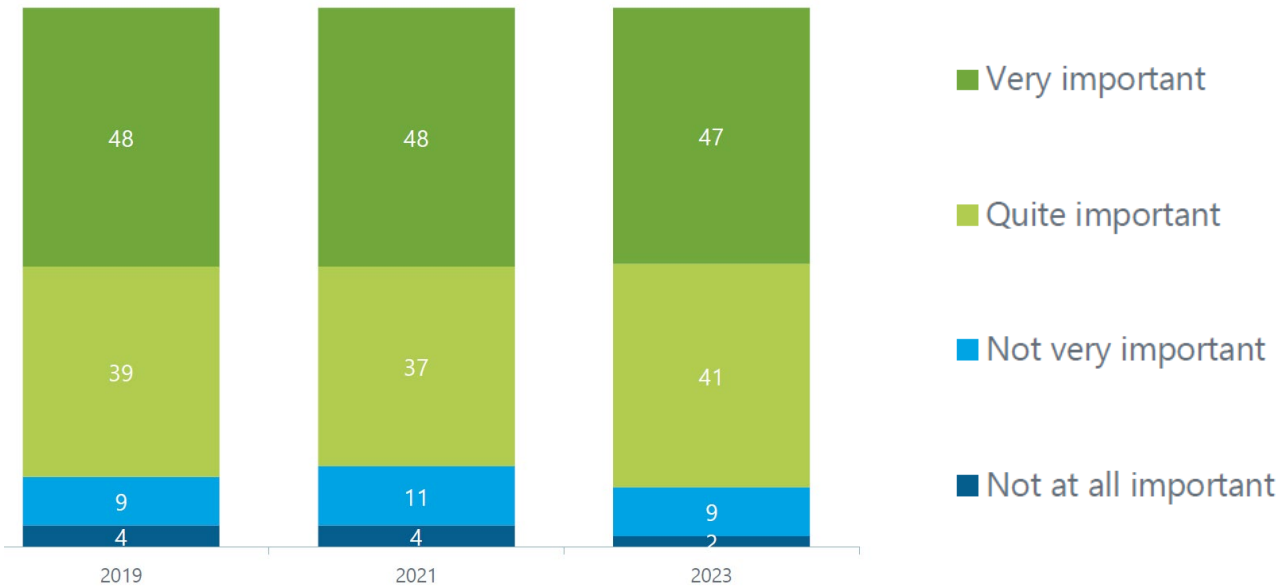


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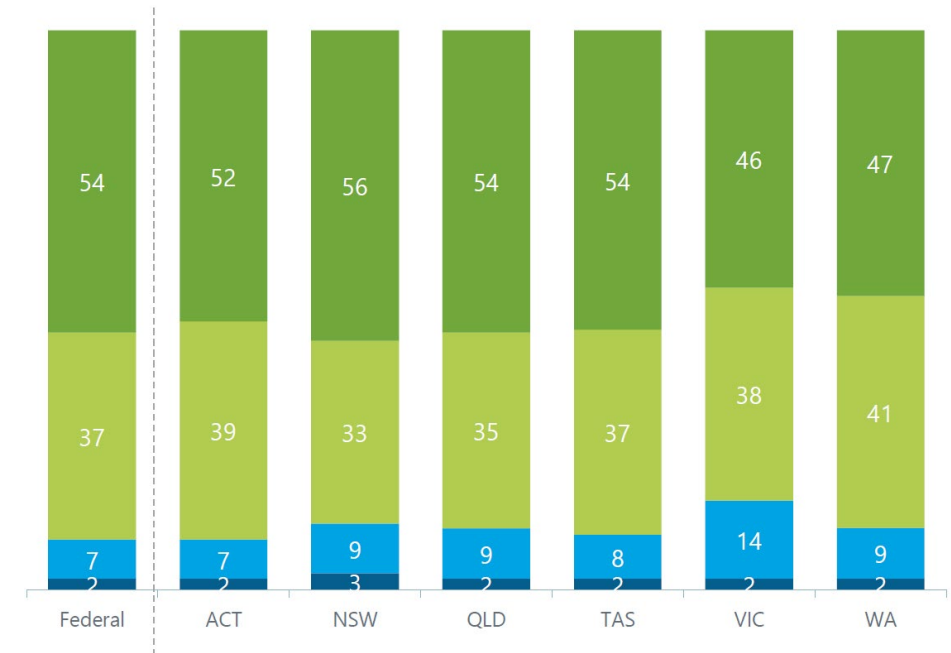
Importance of having the right to access government information across jurisdictions

Western Australia 2019, 2021 and 2023



- Similar to 2019 and 2021 results, most respondents (88%) indicated that having a right to access government information was either very important or quite important.
- Respondents who had tried to access information held by a government agency in the last three years were much more likely to feel it was very important (58%).

2023 National results



Majority of Australians (91%) indicated it is important to have the right to access government information. This is consistent across each of the jurisdictions.



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The WA FOI Act 1992 intent and objects

Freedom of information legislation

According to s.3 FOI Act, the objects of the Act are to:

- enable the public to participate more effectively in governing the state, and
- make the persons and bodies that are responsible for state and local government more accountable to the public.

These objects “form the essential bedrock of open, democratic government. Their policy importance ... cannot be overstated.”

Martin J in [Water Corp. v McKay \[2010\] WASC 210](#) at [38].

“represents a fundamental reform of the relationship between state and local governments and the communities they serve. It enshrines in legislation rights which are at the heart of the democratic processes...FOI strengthens democracy, promotes open discussion of public affairs, ensures the community is kept informed of the operations of government and opens government performance to informed rational debate.”

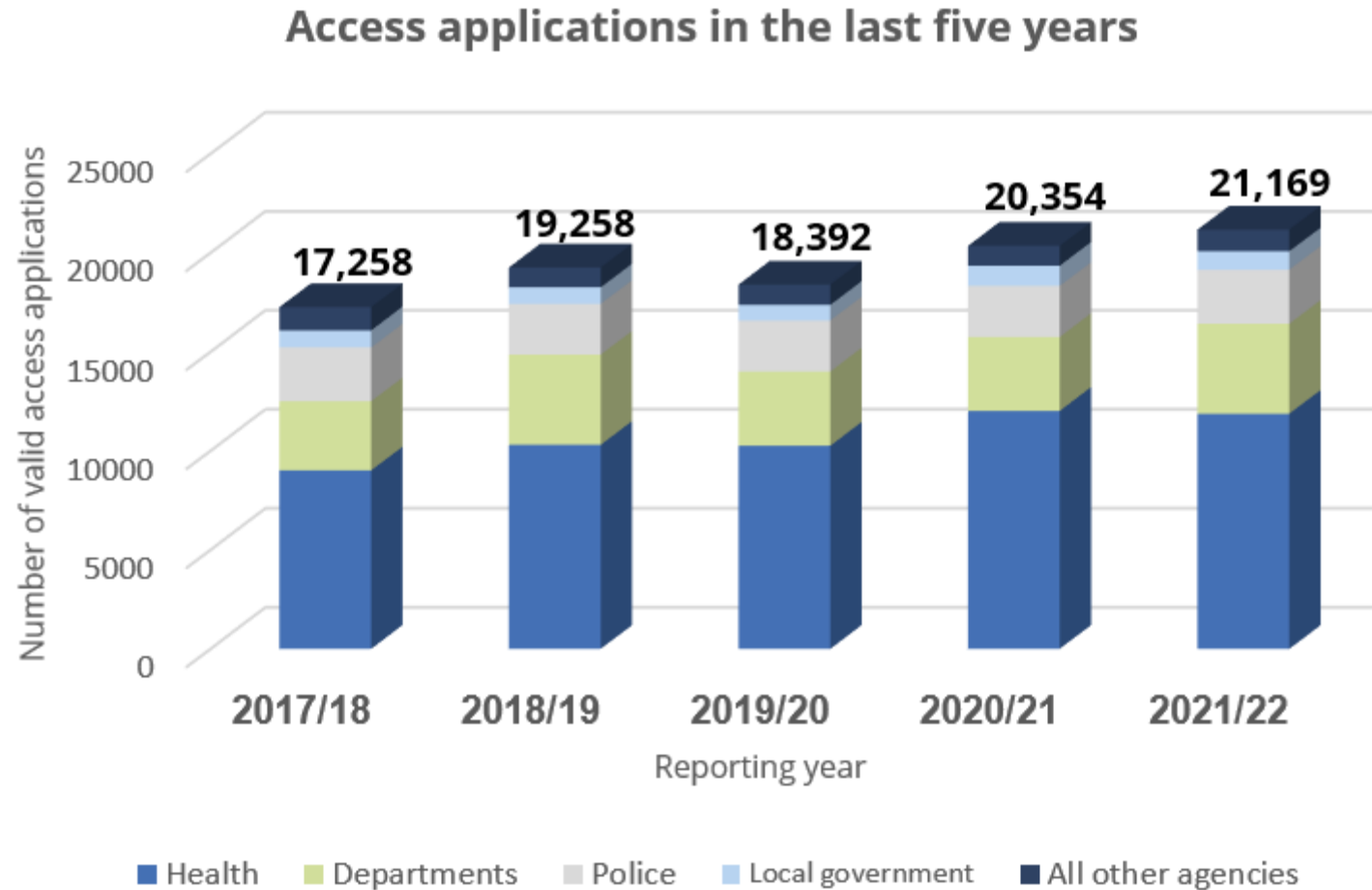
The Hon Mr David Smith MLA – Second Reading speech on FOI Bill, 28/11/1991



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FOI applications in WA : 2017/18 to 2021/22



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FOI laws and Open Government in Australia

- The multilateral ***Open Government Partnership (OGP)*** is an initiative aimed at securing commitments from governments to promote transparency, empower citizens, fight corruption, and harness technologies to strengthen governance.
- OGP members (currently 75 countries and 104 local jurisdictions) are required to produce a national action plan that sets out commitments that the government will deliver within a 2 or 4 year timeframe.
- The OGP agenda extends to a variety of issues. These include:
 - digital transformation
 - the use of artificial intelligence
 - promoting disclosure of interests and conflicts
 - freedom of information
 - public ethics
 - anti-corruption
 - service delivery
 - budgetary efficiency
 - public safety
 - corporate accountability.
- Australia has been a member of the OGP since 2015 and has released 2 [National Action Plans](#) to date.
- Australia's third NAP is under development by the Australian Government working with civil society.

(Source: website of the Commonwealth Attorney-General at <https://www.ag.gov.au/rights-and-protections/australias-open-government-partnership>)



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Challenges for FOI laws – now and into the future

- The boundaries between the public and private sectors are increasingly being blurred – increased contracting out of government services. FOI does not typically extend to public services performed by private operators.
- Information increasingly held in non-traditional formats: CCTV footage, tweets, blog posts, SMS, facial recognition etc.
- Proliferation of digital records is an issue of increasing significance – but can also be a tool for enhanced transparency.
- Accompanying digital transformation is a growing demand for transparency around technology and management of data whilst privacy concerns are also high.
- Interaction between FOI and privacy laws – tension and complementarity.
- Use of AI and machine-assisted decision making – importance of transparency for equity and reviewability.
- Government as a reliable source of information to counter misinformation and disinformation.
- Increasing compliance burden for agencies who are reactive to information disclosure requests (rather than proactive)
- Threats to independence of Information Commissioner bodies – one risk comes from persistent and long term under resourcing by Executive Government. Should Parliament have more control over funding of integrity agencies?
- Open and transparent government involves proactively pushing out useful, non-sensitive data which is both interactive and searchable.
- FOI should become a last resort for seeking access to the most sensitive documents available to challenge unwarranted censorship of government information wherever it might occur.



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The continuing importance of Freedom of Information

Access to relevant, timely government information correlates strongly with trust in government.

Trust in Government is essential for democracy to function effectively.

In a world of secrecy and opaque government, serious wrongs can occur which may never come to light. FOI legislation is at once a means of casting the light of scrutiny into dark corners of government and a contribution to a new culture of openness in public administration.

Hon Justice Michael Kirby AC CMG

17 December 1997, London

Access to information is the foundation of democratic decision-making and democratic governance and we have to prize access to information if we are to counter power asymmetries and eliminate undue information based digital domination.

Professor Beth Simone Noveck 2021 Solomon Lecture, Brisbane

We are committed to open justice...we have open Parliament...

“How much more obvious, then, is the need to require our elected representatives and especially their executive delegates the Ministry and Cabinet, to allow us sufficient information to check them, test them, and remind them of their representative capacity?.....this irreducible need for information about government is not to be seen through an individual prism: it is not a personal right, but rather an imperative of a representative, parliamentary, democracy”

Bret Walker SC “The Information that Democracy Needs”

Whitlam Oration, Sydney

June 2018



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