Information Commissioner
NORTHERN TERRITORY

2019-20
ANNUAL REPORT

Contents

Message from the Commissioner

The demands on the Office of the Information Commissioner (the OIC) and its small contingent of staff continue to grow apace. Freedom of Information (FOI) and Privacy complaints received during the year increased by over 80% compared with numbers from just three years ago. In addition to the 47 new complaints received, the Office had to deal with 27 complaints carried over from the previous year.

On top of this, the OIC was required to respond to 11 new applications — some relating to referral to the NT Civil and Administrative Tribunal (NTCAT) and associated proceedings (a new and resource intensive role), and others for various decisions by the Commissioner under the *Information Act 2002* (the Act).

This increased workload should come as no surprise. The number of FOI applications to public sector organisations has grown markedly. There has been a rise of almost 50% in the last three years and the current year figure is well over 2½ times as high as the level in 2012/13. Privacy concerns and the need to contribute to local and national discussions about privacy protection in the digital age are also a rapid growth area.

Ensuring that we manage core business in a timely manner while responding to this additional workload is no easy task with the limited resources available.

Complicating matters during 2019/20 has been coronavirus. Although the NT is one of the fortunate jurisdictions in Australia, the impact of the global pandemic on the work of the OIC and the organisations we oversee has been significant.

In March 2020, we made preparations to respond to an environment of unprecedented events related to COVID-19. We reviewed office procedures and stakeholder communication and made plans to cover staff absences and staff working remotely. We continued to make every effort to provide services to the NT community in a modified form by encouraging communication by phone or email and by providing sensible alternatives for agencies and complainants if they were unable to comply with statutory timeframes.

We also spent a considerable amount of time in discussion with both NT agencies and interstate privacy Commissioners and Ombudsmen to ensure that legislative reform, new initiatives and policies responding to the pandemic were reasonable, proportionate and effective from a privacy perspective.

We considered legislative changes such as amendments to the Act to assist information-sharing during COVID-19. The new legislation makes it clear that the collection, use and disclosure of personal information for 'permitted purposes' is not in breach of the IPPs for the duration of a 'public health emergency'. The 'permitted purposes' include coordinating operations for the response, management of recovery, identifying individuals affected by the emergency and assisting with law enforcement in relation to the emergency.

We also provided comment on proposed privacy protections for users of the COVIDSAFE app contained in the *Privacy Amendment (Public Health Contact Information) Bill 2020* amending the *Privacy Act 1988* (Cth) and various policies and guidelines to assist with implementation of the legislation.

In these extraordinarily challenging times, I have been impressed by and grateful for the understanding and patience of stakeholders and the resilience and dedication of our staff and as best we can, business almost as usual has continued.

A significant impact on the way the OIC works has been the NTCAT decision in *Re Various Applications Under the Information Act 2002* [2019] NTCAT 27. The decision discussed the interpretation of the test of whether there is 'sufficient prima facie evidence to substantiate the matter complained of' when making a decision in relation to a complaint.

In that case, after considering the use of the term 'prima facie' in other contexts, the President of the NTCAT essentially determined that the role of the Commissioner involves making an assessment of whether, on its face, a claim in a complaint appears arguable.

Previously, our Office had implemented a more robust interpretation of the term, setting a higher bar for a finding in favour of a complainant. The NTCAT decision means that we will now find in favour of a complainant if there is an arguable case in support of their complaint.

This has required a major shift in our approach to case management. We will continue to investigate matters and to express preliminary views about likely outcomes. However, even if we entertain doubts about the strength of a case and the likely ultimate outcome, we will find sufficient evidence if there is an arguable case. This may mean that even if an opposing party has a strong case to refute a complaint, we may make a finding that there is sufficient prima facie evidence. It will be important for us to take care to explain this more limited role to the parties. While we will continue to conduct mediations and do everything we can to attempt to resolve matters, it appears likely that more complaints will progress to NTCAT. For further discussion of the NTCAT case, see pages 15-17.

In closing, I note with interest that the *Information Act 2002* is currently the 'most accessed' NT legislation in the online free access to legal information resource, *AUSTLII*. Perhaps this reflects the growing importance of privacy protection and FOI to the wider community. I thank the staff of the Office who have continued to handle a growing workload with professionalism and diligence.

Peter Shoyer
Information Commissioner

Introduction

The *Information Act 2002* ('the Act') is the legislation governing freedom of information, privacy protection, and public sector records management in the NT. The Act provides for reasonable public access to government information, the responsible collection, correction and handling of personal information and the requirement for appropriate records and archives management.

The Act is intended to strike a balance between competing interests of openness and transparency and the legitimate protection of some government information, including personal information about individuals.

The Act establishes an Information Commissioner to oversight information access and privacy protection provisions. The Information Commissioner's functions include:

- dealing with complaints about Freedom of Information (FOI) decisions and privacy issues through an investigation and mediation process;
- referring, at the request of a party, unresolved complaints to the NT Civil and Administrative Tribunal for hearing;
- commenting on the privacy implications of new legislation and new government initiatives;
- conducting privacy audits of records held by public sector organisations;
- considering applications for grants of authorisation made by public sector organisations to collect, use or disclose personal information in a manner that would otherwise contravene the Information Privacy Principles; and
- educating the public and public officers about FOI and privacy protection.

The Act has been in force since 2003 and there have been several legislative changes over the years to deal with specific issues. In recent years, changes have been made to transfer the hearing power from the Commissioner to the NT Civil and Administrative Tribunal (NTCAT) and to amend Information Privacy Principle 2(d)(i) to enable public sector organisations to more easily share personal information if there is a serious or imminent threat to a person's life, health or safety. During this reporting period, amendments to the Act were made to assist reasonable information-sharing during the COVID-19 situation. These new provisions are discussed in more detail at page 21.

The Office of the Information Commissioner (OIC) transferred to the Office of the Ombudsman in August 2018.

The OIC itself is very small. The Commissioner and Deputy have dual roles and so are able to contribute only part of their time to OIC functions. Apart from this, the OIC comprised one full-time Senior Policy and Investigation Officer, a part-time (0.6) Information Officer and a temporary Policy and Investigation Officer (for the last six months of the period). Necessary corporate support was provided by the Business Services Unit of the Ombudsman Office.

These limited resources have obvious implications for the work that we can do and the timeliness of output. We have reviewed our processes to promote early resolution whenever possible to prevent the inevitable delay when complaints don't settle and require a prima facie decision and potentially a final hearing before the Tribunal. As noted, the coronavirus also placed limitations on our ability to progress a range of matters during the period.

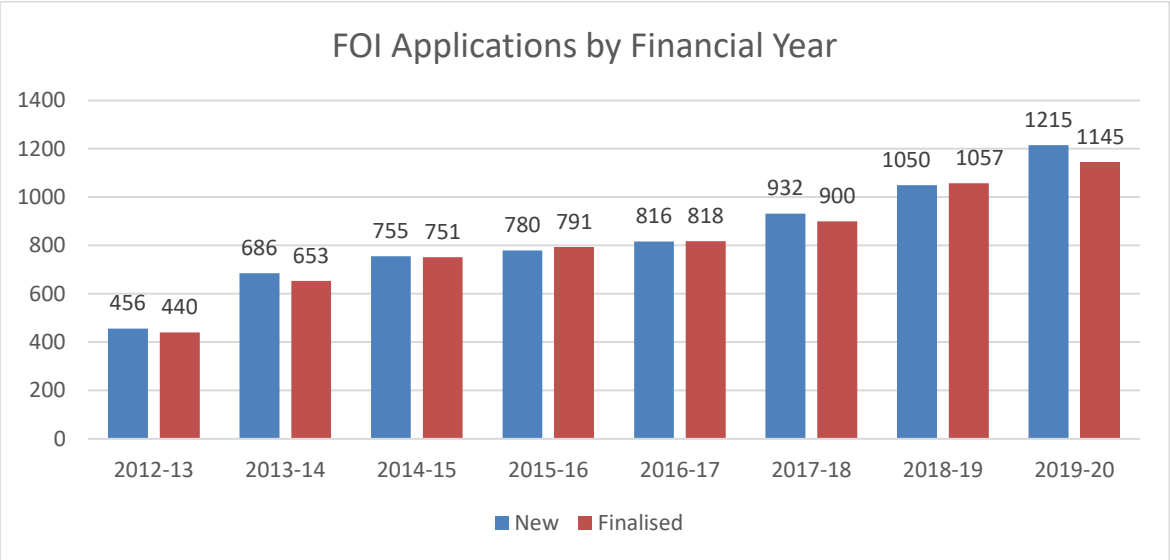
Freedom of Information

The *Information Act 2002* creates a scheme which allows people to apply to individual public sector organisations for access to government information, including personal information about themselves (sometimes referred to as 'Freedom of Information' or FOI).

Our Office is required by the Act to collect and report on certain information about FOI applications made to and dealt with by each public sector organisation[1]. This section will discuss that general information before moving on to consider the involvement of our Office. More detailed information is also available in the tables at Appendix 2.

FOI applications in 2019/20

Since the inception of the Act, the number of FOI applications made to public sector organisations has been increasing and last year was no exception.

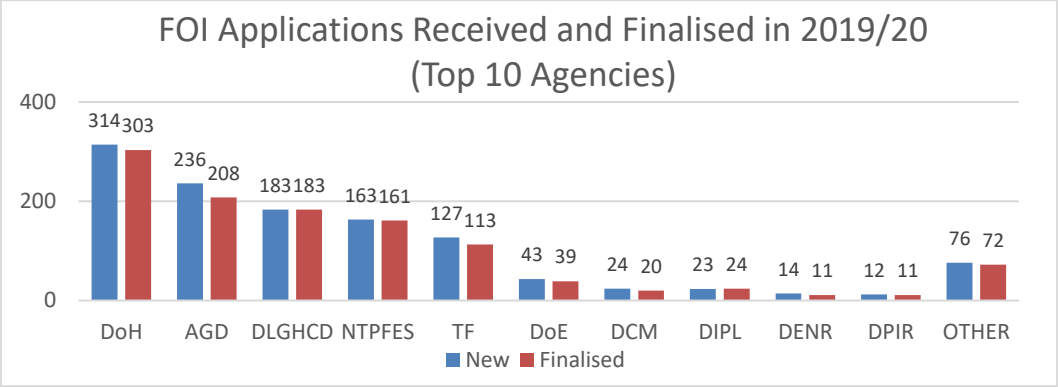


The above table shows that the number of FOI applications received each year has increased over 2½ times in the past eight years. This is a significant increase for organisations to manage within their already tightly constrained resources.

Most organisations have experienced an increase in access applications but by far the most FOI applications continue to be received by large Government organisations.

[1] To assist our Office in complying with s98 of the Act, each public sector organisation prepares a statistical return providing detailed information on FOI applications received and dealt with by them during the reporting period. Although our Office attempts to verify any discrepancies in the statistics, occasional small inconsistencies may occur in the data.

The Department of Health continues to receive many more applications than any other public sector organisation (314 applications), followed by the Department of the Attorney-General and Justice which includes NT Correctional Services (236 applications), the Department of Local Government, Housing and Community Development (183 applications), NT Police, Fire and Emergency Services (163 applications) and Territory Families (127 applications).



Many agencies are struggling to cope with the increase in application numbers. Many applications are complex or large and there are few shortcuts that can be taken in these circumstances. Further, increased turnover of staff in some FOI Units and delays in processing applications are a reality for many.

As in earlier years, smaller departments, councils and independent statutory offices that receive few applications can experience difficulties in maintaining corporate knowledge regarding FOI processing. Our Office assists agencies by providing advice on the operation of the Act and by promoting regular FOI training opportunities through an experienced trainer.

FOI matters by stage

The FOI process is designed to ensure that organisations provide information to the public without the need to involve the OIC. If an FOI applicant is not satisfied with the response they receive from an organisation, they must first seek an internal review to allow the organisation the opportunity to reconsider its initial decision.

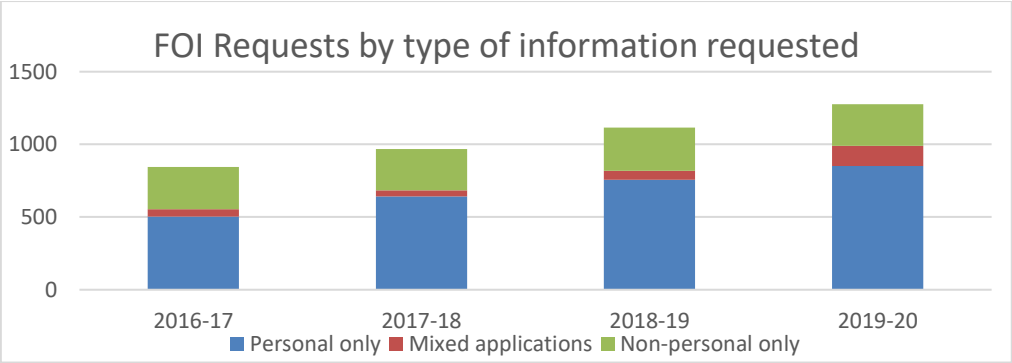
Rather than make an internal review decision, organisations are able to refer an application for internal review directly to the OIC to handle as a complaint (section 39A referrals). An organisation does not have to give a reason for referral but some have chosen to use section 39A when they have no one able to conduct an internal review or when they do not consider that the complainant will accept their decision. Most organisations however, rightly prefer to take advantage of the opportunity to reconsider their initial decision.

During 2019/20, there were six complaints referred to our Office under s39A without internal review and 29 complaints received after an internal review decision had been made.

	2018/19	2019/20
Total FOI applications received	**1050**	**1215**
Internal review applications	52	48
FOI Complaints received by OIC	**27**	**35**
Referred to OIC without internal review (s39A)	4	6
Complaints received after internal review	23	29

Personal v Non Personal

Over 77% of FOI applications dealt with during the reporting period were seeking purely personal information or a mix of personal and non-personal information. It is interesting to note that despite the increase in FOI application numbers, the number of requests for solely non-personal information has remained relatively static over the past four years. The growth has been in requests for personal or a mix of personal and non-personal information.



The reported proportion and number of FOI applications received from applicants with a political, media, activist or lobby-group background decreased from 12% (128 applications) in 2018/19 to 6% (80 applications) in 2019/20.

Access Granted

Much information sought from public sector organisations is freely given and many organisations have administrative access schemes to provide simple processes for obtaining information from them. The Act is a safety net and is normally used when the request for recorded information (e.g. documents, copy emails, electronic records or video footage) is more complex or extensive and a more formal process is required.

Organisations often need to take a number of steps. They may need to clarify or refine the scope of the request and then identify and collect the information sought. They may need to consult with third parties who may be affected by the release of information about them or their business before the organisation decides what information should be released and what should be refused.

The Act is intended to require organisations to give access to their recorded information upon receipt of a request from any individual unless there is good reason for them to refuse.

The following table sets out the extent of access given in applications finalised in 2019/20 where the applicant made a valid application and paid required fees.[2] Access was either granted in full, in part or refused in full on the basis of one or more exemptions.

Did applicants receive what they asked for?		
Received all	313	38%
Received part	476	58%
Received none (exemption)	37	4%

[2] It excludes applications that have been withdrawn, transferred or refused on another basis (see below). Additional information is available in Table 1 of Appendix 2.

Reasons why access may be refused

Refused by application of exemptions

The Act recognises that some information may have to be withheld to protect public or private interests. These are recognised in various exemption provisions in Part 4 of the Act.

During 2019/20, details supplied by organisations reveal that access to information was refused in full on 37 occasions on the basis that it was exempt from disclosure under Part 4 of the Act. On many other occasions, access was refused in part on the basis of exemptions.

The most widely used exemptions in this reporting period were those aimed at protecting:

- the privacy of individuals (section 56) – relied on by 15 organisations;
- commercial in confidence information (section 57) – relied on by 10 organisations;
- the effective operations of the organisation (section 53) and preservation of the system of justice (section 49) – each relied on by 7 organisations;
- confidentially obtained information (section 55) and deliberative processes (section 52) – each relied on by 6 organisations; and
- security and law enforcement (section 46) and investigative bodies (section 49A – 49D) – each relied on by 5 organisations.

Applications rejected or refused for other reasons

There are other reasons why an application may be rejected or refused, for example, if a person has failed to comply with the Act in making the application, failed to provide sufficient clarification to enable an application to be processed, failed to pay a required fee or the information is not covered by the Act in the first place.

Agencies report that a large number of applications are deficient in some way or require clarification or better definition to meet the requirements of the Act. Where there is the potential to remedy a defect, agencies must always attempt to consult with the applicant to resolve the issue. However, even in such cases, there may come a time when the agency decides to reject an application.

Grounds for rejecting or refusing an application (other than under an exemption) include:

- Section 18: Requirements for Application to access government information not met;
- Section 27: The information could not be identified or found or does not exist;
- Fees: Requirement to pay application or processing fee not met;
- Jurisdiction: Information does not fall within or is excluded from Act; and
- Section 25: Unreasonable interference with agency operations.

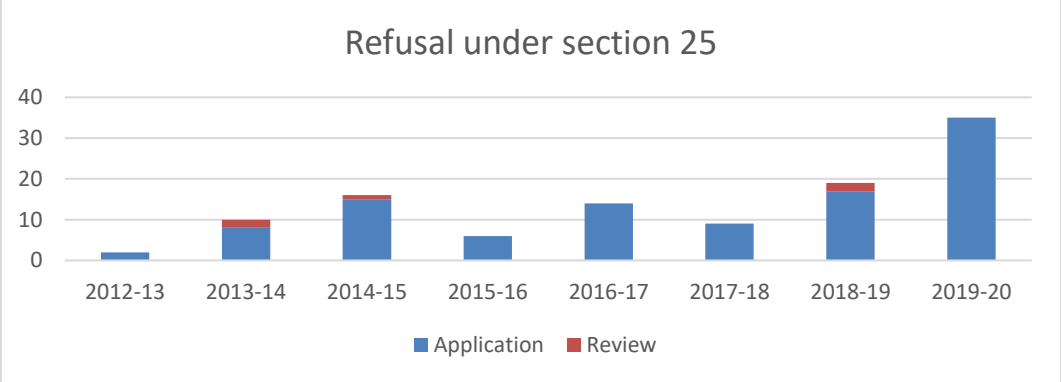
As in previous years, a large number of applications were rejected or refused on these grounds. Our Office is undertaking a project to review the situation in cooperation with agencies, to establish what strategies can be implemented to reduce these numbers. Progress has been delayed due to coronavirus however will continue in 2020/21.

Unreasonable Interference with operations

Section 25 of the Act allows public sector organisations to refuse to provide access to information if providing access would unreasonably interfere with the operations of the organisation. Access can only be refused after the organisation has unsuccessfully consulted with the applicant in a genuine attempt to narrow the scope of the search.

The number of applications refused under section 25 during the last 8 years are set out in the table below. This shows that refusals under section 25 have risen considerably when compared to historic averages. A similar trend has been seen in other jurisdictions in Australia, as internal resource pressures faced by organisations have led to a more careful evaluation of the time they spend on some FOI applications.

During 2019/20, the Department of the Attorney General and Justice refused to provide access to information on this ground on 26 occasions. Enquiries with the Department established that, in all cases, the Information Officer requested that the scope of the application be narrowed as it was too broad, however no response was received from the applicant.



National Dashboard

Since 2017, Australian Information Access Commissioners and Ombudsmen have released a dashboard of metrics on the public use of FOI access rights. This enables the community to examine the performance of local FOI laws and to advocate accordingly, as well as improving community understanding of how FOI laws work and how to access them.

The metrics reflect the currently available data that is reasonably comparable across jurisdictions and the priorities agreed in Australia's first Open Government National Action Plan 2016-2018, to develop uniform metrics on public use of FOI access rights, to promote the importance of better measuring and improving our understanding of the public's use of rights under FOI laws. They are available at https://www.ipc.nsw.gov.au/information-access/open-government-open-data/dashboard

Application and processing fees

The Act provides for the charging of application fees and processing fees. Similar to other jurisdictions, the maximum fees chargeable are set in legislation at a level well below that required for organisations to recover the costs of administering a freedom of information scheme.

Rather, the fees are intended to act as a safeguard against frivolous and vexatious applications, as they require an applicant to demonstrate their interest in obtaining the information by assisting with those administration costs.

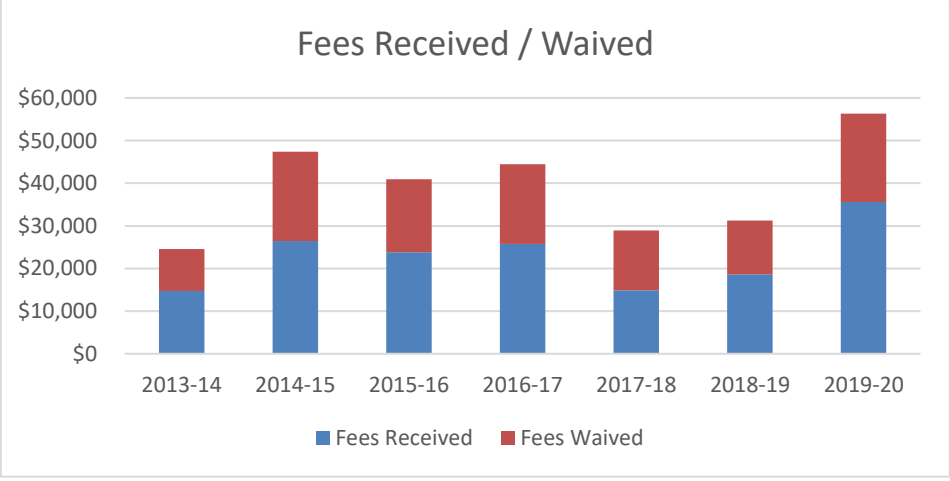
No application fees are chargeable for requests for purely personal information and organisations seem to rarely charge processing fees for such requests. Processing fees are also seldom charged if the request is small and straightforward. The resources required to collect fees in a large number of small matters would be uneconomic.

For these reasons, it is often difficult to comment with any confidence on the reasons for annual fluctuations in fees charged or waived beyond saying that the total fees received and waived are small in comparison to the actual costs of dealing with over 1,200 applications. It is notable, however, that in 2019/20, more fees were levied than in earlier reporting periods and the fees waived were higher in total than in the past but slightly lower in percentage terms.

Comparative table: Fees received and waived

	Total fees received	Total fees waived	Percentage waived #
2013-14	$14,761	$9,770	40%
2014-15	$26,469	$20,891	44%
2015-16	$23,788	$17,179	42%
2016-17	$25,799	$18,702	42%
2017-18	$14,899	$14,041	49%
2018-19	$18,666	$12,587	40%
2019-20	$35,628	$20,670	37%

This figure represents a percentage of the total of fees that could be charged *not* a percentage of the fees received.



FOI Correction applications

Historically, the scheme in the Act which allows people to apply to correct their own personal information (Part 3, Division 3) is seldom utilised. Anecdotal information suggests that the correction of an error in personal information held by an organisation about an individual is often resolved without the need for a formal application.

No doubt difficult matters where organisations are reluctant to amend the record are the ones that result in a formal correction application being made. The refusal to correct may be because the organisation does not consider that there is an error on the file or they may consider that the error/wrong information is historical only. With many correction applications, there is an option for a notation to be placed on the file to record the applicant's concerns.

In 2019/20, 8 applications to correct personal information were received by organisations, with none carried over from the previous year**.**

Three applications resulted in corrections being made by the organisation as requested. On another, the organisation has advised that the application was settled in some 'other form' being a statement expressing the applicant's view associated with the record. On 2 occasions, the organisation refused to correct the record. Two matters are pending completion.

More details on correction applications are included at Appendix 2, Table 2.

Timeliness measure for agencies

At the end of the reporting period, organisations were requested to provide statistical data regarding their compliance with legislative timelines when finalising FOI applications within the 30 day statutory timeframe or any valid extension period.

The extension period makes allowance for reasonable delays in processing large applications or in consulting third parties if their personal or confidential information is intended to be released.

Data on this measure is collected annually as it provides a good indicator of how public bodies are managing an increasing workload and how the FOI scheme is working in terms of timeliness.

Public sector organisations reported the following timeliness for handling FOI applications that were finalised within the initial statutory timeframe or within a valid extension period.

Time taken	Access	Correction	Internal Review
Finalised within 30 days of receipt of application	895	4	39
Finalised within 31 to 90 days of receipt of application	153	2	12
Finalised after 90 days of receipt of application	24	1	1

The figures show that the great majority of applications are finalised within 30 days. We continue to work with agencies in relation to a number of applications that have not been identified as within these timeframes.

Challenging behaviour by some applicants

No applications have been received this year for a declaration that a person is a vexatious applicant under section 42 of the Act Even so, organisations continue to contact the OIC seeking advice on appropriate methods for managing individuals whose conduct or demands appear to them to be unreasonable.

These types of situation need to be well managed as they can place considerable strain on everyone involved and can result in delays in reaching resolution.

Managing challenging complainant conduct requires a reasonable, carefully implemented and staged approach. Our Office will continue to assist FOI officers and complainants with advice on maintaining a productive and workable relationship wherever possible.

Public resources to assist with management of challenging complainant conduct, include:

Ombudsman NT website: http://www.ombudsman.nt.gov.au/node/99/unreasonable-complainant-conduct , with links to NSW Ombudsman documents.

Victorian Ombudsman website: particularly the *Good Practice Guide to Dealing with Challenging Behaviour*, https://www.ombudsman.vic.gov.au/learn-from-us/practice-guides/

Queensland Ombudsman website**,** *Identifying and managing unreasonable complainant conduct*, https://www.ombudsman.qld.gov.au/improve-public-administration/public-administration-resources/managing-unreasonable-complainant-conduct/identifying-and-managing-unreasonable-complainant-conduct.

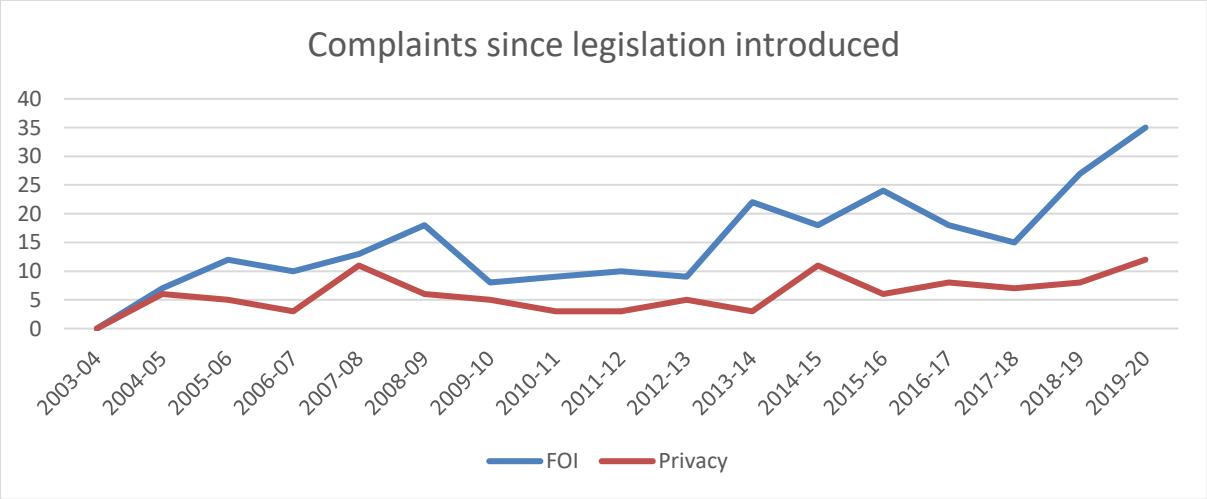
Complaints to the Information Commissioner

This year, the Office received 35 new FOI complaints, with 21 matters carried over from the previous year. Of the 29 matters that were completed in the reporting period, 3 were referred to NTCAT at the request of either the complainant or a third party. The table below lists FOI complaints handled, by agency, in this reporting period.

FOI Complaints				
PSO*	New Complaint	Carried Over	Finalised	Open at EOY
AGDJ	4	2	3	**3**
CoD	1	-	1	**0**
CoP	1	1	1	**1**
DCM	2	1	2	**1**
DENR	1	-	-	**1**
DLA	-	1	1	**0**
DoE	9	1	3	**7**
DoH	10	5	7	**8**
DPIR	1	3	1	**3**
NTPFES	4	2	4	**2**
TF	2	3	4	**1**
TRB	-	2	2	**0**
TOTAL	**35**	**21**	**29**	**27**

* Refer to Appendix 2 for details of acronyms for organisations.

The number of FOI complaints received by the OIC has increased substantially since the inception of the Office, and particularly over the last two years. This increase and substantial commitments involved in referrals to the NTCAT have added significantly to the workload of the Office.



Encouraging an Informal Approach

The OIC continues to focus on resolving complaints on an informal basis where possible. Noticeable benefits to approaching complaints in this manner include:

- improved timeliness in resolving some disputes thus reducing the pressure placed on the parties and the Office by the investigation process; and
- in an environment of constrained resources, creating more time to spend on complex complaints.

FOI Complaint Case Studies

Negotiated outcome

The complainant applied through FOI for information disclosing the names of all officers of the organisation who had had dealings with him on a specific matter. He was dissatisfied with the organisation's response and considered that the names of some officers had been overlooked. When he made a complaint to our Office, it became apparent that there was confusion between the parties about the scope of the FOI request. After consultation with the parties, the organisation agreed to conduct a further search provided the complainant agreed to refine the scope of his application.

This occurred and the information was provided to the complainant but he remained dissatisfied as some of the public officers had signed their names on the documents provided and he still did not know their identity. The organisation initially refused to provide further information to the complainant because they are not legally obliged to comment on or interpret documents provided under FOI. After consultation however and in the hope that their actions may resolve the matter, the organisation agreed to provide the names of the relevant public officers on the understanding that the complainant would then withdraw his complaint. As a result the complaint was withdrawn.

A matter of trust

The complainant approached our office because he was concerned that he had not received through FOI all relevant documentation on his file relating to a grievance procedure involving him. In fact, many of the documents sought had been refused or the information partially redacted by application of the exemptions relating to privacy (s56) and protecting the effective operations of the organisation (s53). The complainant's concern was that information held on his personnel file might impact on his advancement in the organisation in the future. Our Office accepted the complaint and asked the parties to provide all relevant information.

We noted that the information and the schedule of documents that had earlier been provided to the complainant was confusing and incomplete and added to his concern that he was not being fairly dealt with. During the investigation, the organisation provided our Office with an amended Schedule of Documents and a copy of both the redacted documents provided to the complainant and the original unedited documents. After further investigation and discussion, we were able to negotiate the release of additional information to the complainant. As a result, the complainant withdrew his complaint and the file was closed.

Sufficiency of search

The complainant sought, among other things, access to surveillance camera footage that he believed the organisation had filmed at his residence over a number of years. The organisation conducted a search and advised the complainant that they had no such footage. At his request, they reviewed and confirmed their decision that no such information existed. The complainant was not satisfied with the organisation's response and complained to our Office.

In a 'sufficiency of search' case, when deciding whether the steps the organisation took to locate documents were sufficient, the decision-maker must consider:

- whether there are reasonable grounds to believe that the requested documents exist and are documents of the organisation; and if so
- whether the search efforts made by the agency to locate such documents were reasonable in all the circumstances of the particular case.

Particularly where the circumstances do not, on their face, point to the likely existence of documents, it is important for a complainant to provide any information or explanation they have to show that documents of the type sought exist or should existed.

In this matter, the organisation provided details of the reasonable steps they had taken to search, albeit unsuccessfully, for the requested footage and the complainant was unable to provide any information to support his view that video footage existed.

In these circumstances, the delegate of the Commissioner decided that there was insufficient prima facie evidence to substantiate the complaint and dismissed the complaint.

Northern Territory Civil and Administrative Tribunal

Following a decision finalising an Information Commissioner complaint, an applicant or respondent who is aggrieved by a decision can apply to the Commissioner to refer the decision to the NTCAT. In such cases, the OIC prepares a referral and a report to the NTCAT and may also participate in tribunal proceedings depending on the circumstances.

During 2019/20, a number of hearings were finalised and decisions were published by NTCAT. The decisions referred to below have been published by the NTCAT and are available in full on the Australasian Legal Information Institute (AustLII) website: http://www.austlii.edu.au/

Re Various Applications Under the Information Act 2002 [2019] NTCAT 27

This decision was fundamental in guiding the OIC regarding its formal role in dealing with complaints. It has led to a substantial change in the way the OIC approaches decision-making when it considers whether there is 'sufficient prima facie evidence to substantiate the matter complained of' under section 110(3) of the Act.

The OIC had previously set a relatively higher bar for success when assessing 'sufficient prima facie evidence'. Operating in line with the NTCAT decision, our Office now approaches our role as an assessment of whether, on its face, a claim in a complaint appears arguable.

In the case, the President of the NTCAT considered a number of separate matters in which the Commissioner or delegate had dismissed the complaint on the basis that there was not sufficient prima facie evidence. After considering the use of the term 'prima facie' in other contexts, the President made the following comments:

62. *The prescription of the prima facie standard means that the matters put forward by an applicant in support of 'the matter complained of' must be taken at face value. Similarly, anything that comes to light in the context of the investigation mandated by section 110 that tends to substantiate 'the matter complained of' is to be evaluated the same way.*

63. *The determination whether the 'matter complained of' is substantiated by sufficient prima facie evidence should not involve findings on contentious factual matters. Not only would the making of such findings be inconsistent with a prima facie evaluation of 'the matter complained of', there would be clear natural justice implications if such findings could be taken into account.*

64. *Necessarily, the decision required under section 110 will involve the Information Commissioner considering legal issues. The 'matter complained of' will always be a matter that arises (if at all) by virtue of the operation of at least one – and usually several – provisions of the* Information Act 2002*. It will be the operation of such provisions against which the available material is to be assessed in determining whether a complaint is prima facie substantiated. If the operation of a relevant provision is clear (whether on its face or because it has received definitive attention in court or tribunal proceedings), then it should be given that operation in the context of the prima facie evaluation.*

65. *If, on the other hand, the fate of an applicant's complaint depends on legal questions that are unsettled, such questions should not be determined in the context of the prima facie evaluation. The question whether the matter complained of is prima facie substantiated should be approached on the basis that legal propositions that are at least arguable may ultimately be resolved in the applicant's favour.*

66. *Similarly, if 'the matter complained of' is a decision involving an exercise of discretion on the part of a* [public sector organisation]*, then it is not the Information Commissioner s role, in making the prima facie assessment required by section 110, to reach a view as to how the discretion might be exercised by NTCAT on a full merits review.*

The President noted the comments of McHugh J in the *North Ganalanja* case, that "*the notion of a prima facie case is well understood as precluding the determination of disputed questions of fact; it requires an assessment of whether, on its face, a claim appears arguable*" (paragraph 58).

The decision meant that a number of prior decisions by the Commissioner or delegate were not made in accordance with the test set out by NTCAT and, consequently, a number of complaints decided prior to the decision were referred back to the OIC for reconsideration or alternative action.

The NTCAT additionally provided guidance regarding: the nature of the review it conducts into complaints dismissed for want of sufficient prima facie evidence; the question to be answered when contemplating an exemption in the public interest; the nature of the Commissioner's investigation into complaints; and that the 'matter complained of' in relation to redacted information under section 50 of the Act should be focused on the grounds that disclosure of that information was not in the public interest.

Re Various Applications Under the Information Act 2002 [No. 2] [2020] NTCAT 2

This case is of particular relevance for third party objections. NTCAT determined that third party objectors to disclosure can only pursue an exemption-related objection to disclosure on the basis of an exemption with respect to which they were entitled to be consulted under section 30 of the Act.

The grounds for objection in section 30 are limited to the release of information where disclosure might be an interference of privacy, prejudice inter-governmental relations, disclose information regarding Aboriginal sacred sites or traditions, or disclose information from a business that would expose that business to disadvantage.

So, for example, a business consulted under section 30 about release of its commercial information could, in a complaint or NTCAT proceeding, only object to disclosure under the section 57(1) exemption. It could not rely on another potential grounds of exemption like the 'deliberative process' exemption.

DE v Information Commissioner & a Public Sector Organisation [2019] NTCAT 34 (22 November 2019)

An access applicant sought an order that the Information Commissioner pay his costs of an application to NTCAT. The applicant complained about delay by the Commissioner in making a decision beyond the expiry of the 60 day time limit established under s 42 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (the NTCAT Act).

The NTCAT found that the application was misconceived as the Commissioner's decision was not one to which section 42 of the NTCAT Act applied. The NTCAT stated that NTCAT's jurisdiction is only enlivened when the *Information Act 2002* invokes it and the NTCAT Act does not provide a separate basis for its jurisdiction. The NTCAT ultimately dismissed the application with the agreement of the parties but indicated that the application would have been dismissed had it proceeded.

DT v A Government Department and the Information Commissioner [2020] NTCAT 9 (27 February 2020)

NTCAT considered an application for information access where the organisation had invoked an exemption for the benefit of third parties. The Commissioner had dismissed the applicant's complaint. The views of the third parties had not been sought by either the organisation or the Commissioner.

Where a complaint has been dismissed, the NTCAT must first decide whether or not to confirm the Information Commissioner's dismissal. The applicant argued that the NTCAT should make orders that the organisation seek the views of the third parties, prior to NTCAT considering whether to confirm dismissal of the complaint. The NTCAT concluded that it had the power to order third party consultations at that stage and did so.

Privacy protection

The OIC is the 'privacy watchdog' for the NT public sector. The Office investigates and mediates privacy complaints made by individuals against public sector organisations in circumstances where the organisation has been unable to resolve the complaint.

A person is first required to approach the organisation and give it a reasonable chance to resolve or rectify the matter complained of before coming to our Office.

If complaints don't resolve through a complaint to our Office, a person can seek referral to the NTCAT for a decision as to whether or not a privacy breach has occurred and whether orders should be made to rectify the breach or compensate the complainant.

The Office also allocates significant resources to educating public officers about their privacy obligations and to providing advice and public comment on proposed legislative change or new initiatives that may impact on privacy rights. In addition, the OIC provides education and advice to the public on their privacy rights under the Act.

Legislative reporting requirements for public sector organisations in relation to privacy complaints are not as structured as for FOI complaints. In an attempt to gain insight into the management of privacy complaints by organisations, our Office seeks additional information from organisations on an annual basis.

Further, even in the absence of a requirement to report, many organisations will advise us of potential breaches and seek our advice in relation to them.

Overview of privacy complaints in 2019/20

The Office received 12 new complaints alleging privacy breaches during the reporting period, one of which was ultimately referred for hearing to the NTCAT. The following table lists privacy complaints handled, by agency, in this period.[3]

Privacy complaints				
PSO	**New complaints**	**Carried over**	**Finalised**	**Open at EOY**
AGD	2	-	1	**1**
CDU	**-**	1	1	**0**
DoE	1	-	-	**1**
DoH	4	3	-	**7**
NTPFES	1	1	-	**2**
TIO	1	-	1	**0**
TF	3	1	2	**2**
TOTAL	**12**	**6**	**5**	**13**

[3] Refer to Appendix 2 for details of acronyms for organisations. Reclassification of one DoH matter has resulted in a variance in the number of DoH complaints carried over from 2018/19.

We also regularly deal with concerns raised by members of the public that are not accepted as formal complaints because the person has not yet requested the organisation to resolve or rectify the matter in the first instance (see section 104(2)(a) of the Act). In these situations, our Office liaises with the individual and the organisation with a view to resolving or progressing matters informally and to the satisfaction of both parties.

In addition to formal complaints, the OIC received over 150 enquiries during the reporting period from organisations and members of the public, seeking information or advice with regard to potential privacy breaches or privacy issues.

Examples of privacy matters considered by the OIC this year include:

- Providing advice to organisations on the appropriate redaction of CCTV footage prior to release to protect the privacy of an individual.
- Comment on privacy considerations around the introduction of a body worn video trial for selected staff within an organisation.
- Advice to a public housing tenant and department regarding the installation of CCTV footage in a common area.
- Advising an organisation on potential privacy issues with regard to information-sharing about vulnerable youth within the youth justice and youth diversion system and supporting the use of a model that is based on consent of the young person to the sharing of their information.
- Regular requests for privacy advice about information-sharing between departments and on-sharing with outside organisations, and advice to individuals concerned about liberal sharing of personal information about them between organisations.
- In an age of technology and data matching, comment on privacy considerations that should be taken into account when an organisation lawfully intends to publish identifying information that may impact on the reputation of individuals.
- Assistance to a person to remove distressing historical information about them from a government website.
- Privacy advice sought before the public release of de-identified information regarding small communities to ensure that any future risk of re-identification of individuals was minimised.
- Advice and comment on national issues and initiatives that have a privacy element including:
    - The use of biometrics by government agencies for security, fraud detection or other purposes;
    - Privacy risks involving the use of digital identities;
    - Consultation regarding the legislation behind the COVIDSAFE app and related policies and processes;
    - Comment on legislative amendments to enable reasonable information sharing;
    - Comment on personal information about Territorians being held interstate; and
    - Privacy advice to inform the preparatory work for the next Australian Census.

Voluntary data breach notification

There is no legislative requirement on public sector organisations or public officers to advise the Commissioner when there has been a privacy (data) breach but it is common for organisations to do so and their actions are to be commended. In the past year, there have been nine reports of a privacy breach to the Commissioner by an organisation or public officer and numerous related enquiries.

The breaches are of varying levels of seriousness and occurred in both large and small organisations and in various parts of the Territory. In this reporting period, two privacy breaches were caused by technical faults in software applications but most were caused by human error e.g. emailing personal information to the wrong person, a delivery of personal records gone missing and personal information inadvertently included on a website or in correspondence sent to many recipients.

When notified of a privacy breach by an organisation, this Office provides advice about options for action and possible steps to minimise the risk of harm to the individuals affected. It is most important that affected individuals are made aware of any serious breach and that they know their right to make a privacy complaint should they wish to do so. We also work with organisations to minimise their future risk and to improve their privacy protection and staff training.

Several notifications and related enquiries disclosed poor processes or inadequate staff training to minimise the risk of a data breach within an organisation. The concern is that because there is no scheme for mandatory reporting, the true number of data breaches is significantly higher than the reported number. Consistent with federal law in Australia, the introduction of a robust mandatory data breach notification system would be a significant step in protecting the privacy of Territorians.

Sharing and protecting personal information in a pandemic

Amendments to *Information Act 2002*

Amendments to the *Information Act 2002* to facilitate information-sharing during the COVID-19 pandemic came into effect on 26 March 2020. The amendments added to an existing provision in the Act that allows public sector organisations to depart from the *Information Privacy Principles* (IPPs) in an 'emergency situation' (e.g. a cyclone) declared under the *Emergency Management Act 2013 (NT)* (section 81A(1)). The amendments now extend to a 'public health emergency' under the *Public and Environmental Health Act 2011 (NT)*, such as is currently in force in the NT.

The new legislation makes it clear that collection, use and disclosure of personal information for 'permitted purposes' is not in breach of the IPPs for the duration of a public health emergency. The 'permitted purposes' include coordinating operations for the response, management of recovery, identifying individuals affected by the emergency and assisting with law enforcement in relation to the emergency.

Further, section 81A(2) gives discretion to the Information Commissioner to authorise more liberal information-sharing during the aftermath of an 'emergency situation' or a 'public health emergency'.

Comment on *Privacy Amendment (Public Health Contact Information) Bill 2020*

In May 2020, our Office consulted with interstate colleagues and provided comment on proposed privacy protections for users of the COVIDSAFE app contained in the Australian Government's COVIDSAFE bill (the *Privacy Amendment (Public Health Contact Information) Bill 2020*.)

The Commissioner has also participated in discussion on various guidelines prepared by the Australian Information Commissioner regarding privacy issues and information sharing during the pandemic.

Public Comment on COVID-19 related issues

The Commissioner has published joint statements with Australian and New Zealand Information Access Commissioners and others including:

- *COVID-19: Message to Stakeholders* - published 24 March 2020
- *COVID and personal privacy* - published 30 March 2020.
- *Transparency and access to information in the context of a global pandemic* - published 16 April 2020
- *COVID-19: The duty to document does not cease in a crisis, it becomes more essential* - published 7 May 2020

Reporting on Grant of Authorisation – NTPFES and SupportLink

In January 2016, NTPFES sought a s.81 Authorisation from the Information Commissioner to permit the disclosure of personal information to SupportLink Australia, in a manner that would otherwise contravene or be inconsistent with the IPPs. The primary purpose of the Authorisation was to utilise SupportLink, a web-based referral system, to significantly improve the accessibility and speed of police officers in referring mandatory reports to the CEO of Territory Families, in accordance with the provisions of the *Care and Protection of Children Act 2007*.

The Authorisation was granted for a term of 5 years. Its terms included a requirement on the NTPFES to provide reports to the Commissioner over the life of the Grant. On 11 April 2019, in a report to the Commissioner detailing the effectiveness and impact of the Authorisation, the NTPFES advised the following:

> *During the reporting period (01/04/2017 to 31/03/2019) NTPFES referred 10,116 cases via SupportLink to Territory Families. There were nil breaches during the reporting period.*
>
> *For your information, the child abuse report form was recently updated to include additional prompting questions. This update was done in consultation with both NTPFES and Territory Families. Feedback received from Territory Families (via the Regional Advisory Group) confirmed that the quality of the intake being compiled improved thanks to this new template.*

The Grant of Authorisation remains in place until 25 February 2021 with the final report for the period 24 February 2016 to 31 December 2020 to be provided to the Information Commissioner by 31 January 2021.

OIC operations

Timeliness – resolving complaints within 12 months

In 2019/20, a total of 29 FOI complaints were finalised with 20 (69%) completed within 12 months. Five privacy complaints were finalised, with 3 (60%) completed within 12 months.

In some cases, delay in resolution may be unavoidable, for example, due to the personal circumstances or health of a complainant. In 2019/20, the impact of COVID-19 on some agencies meant that their ability to respond to matters was significantly delayed. On other occasions, timeliness was affected by the realities of being a very small office with a large workload. As the number of complaints is small, delays in a small number of matters can impact on the overall timeliness result.

Even so, with the change in functions of the Office, following the advent of NTCAT, we do not consider that a finalisation timeline of up to 12 months for a large number of complaints accords with community expectations.

We can only work within the resources available to us but we are regularly reviewing our processes in an effort to identify ways to substantially improve timeliness of complaint finalisation. Early resolution must be achieved in as many matters as possible to ensure that our resources are available for the more complex complaints.

General Enquiries

The OIC receives general enquiries via telephone and email from public officers, community members and non-government organisations. During 2019/20, we received 591 general enquiries, in addition to formal complaints and applications.

As a benefit of combining with the Ombudsman's Office, staff can now more easily take enquiries and complaints from incarcerated applicants, leading to further improved service to these individuals.

Advice and Public Comment

One of the key roles of the Office is to provide expertise with regard to FOI and privacy matters at an early stage, ensuring that new initiatives are designed in a way that treats personal information with care.

Although staff in the Office are not able to provide legal advice, they regularly provide professional guidance and support to agencies during the development and review of practices, policy and legislation.

Advice is largely provided on an 'on-request' basis, so the hours recorded fluctuate depending on the types of initiatives being developed by organisations and the extent to which the Office is approached for assistance.

During 2019/20, our ability to provide advice was impacted upon by the COVID-19 pandemic and we also received fewer requests for advice. COVID-19 may well have delayed new government initiatives and legislative reform projects with resources diverted elsewhere.

This year, in addition to policy advice hours recorded above, staff from our Office provided advice and guidance on FOI and Privacy matters to various local and national working groups and committees, including:

- Face Matching Services (FMS) Coordination Group – a cross agency working group considering proposed national initiatives involving facial identification and facial matching services.
- Privacy Awareness Authorities (PAA) Policy Group – Formed by representatives of all Australian and New Zealand Privacy Commissioners for the purpose of providing a formal avenue through which officers can work together to enhance policy capacity within jurisdictions.
- PAA Complaints and Enforcement Group – A subgroup of the PAA network formed by representatives of each Australian Privacy Commissioner to encourage informal cooperation between privacy investigators nationally.

Awareness, education and training

During 2019/20, we were unable to continue our focus on providing FOI and privacy training to agencies due to the COVID-19 pandemic. A second round of FOI training for information officers, organised for April 2020 had to be delayed and initiatives aimed at promoting the role of the OIC publicly similarly had to be postponed. The Office was however able to organise five education and training sessions, for a total of 97 participants during the year.

Quantity – training, education and awareness

Comparative Performance		16-17	17-18	18-19	19-20
Quantity	Awareness and training presentations				
	- Number of presentations	10	18	36	5
	- Number of participants	321	347	775	97

Participants and public sector organisations provide feedback following training sessions and public education events, ranking the quality of presentations on a five point scale. These results are then averaged and converted into a percentage.

Comparative Performance		16-17	17-18	18-19	19-20
Quality	Stakeholder satisfaction with performance	82%	83%	84%	89%

Our annual Privacy Awareness Week (PAW) celebrations were also curtailed by COVID-19, like all other member jurisdictions of the Asia Pacific Privacy Authorities (APPA). PAW messages, including a colourful poster for the week of 4 to 10 May 2020, were delivered via electronic media. The theme for PAW 2020 was *Privacy - Protect Yours, Respect Others*, relevant to government agencies, businesses and Territorians generally.

For Territorians, the message was "Think about what you share online and protect your personal details from being misused by others". For agencies and business, the message emphasised collecting only the information needed; using it for the agreed purpose; keeping it safe; and deleting it lawfully when it is no longer required.

Appendix 1 – OIC Financial Performance

Detailed financial information regarding OIC operations now appears in the Ombudsman's Annual Report (in particular see the 'Comprehensive operating statement by output group' at note 3 to the Financial Statements).

Expenses recorded against the OIC in 2019-20 are set out below. They must be read subject to the caveat that personnel expenses are divided on the basis of a best estimate of the respective time certain officers devote to Ombudsman and OIC functions. These allocations will be refined over time.

OFFICE OF THE INFORMATION COMMISSIONER EXPENSES
For the year ended 30 June 2020

	2019/20
EXPENSES	**$000**
Employee expenses	427
Administrative expenses	42
Purchases of goods and services	*39*
Accommodation	-
Advertising	-
Communications	1
Consultants Fees	15
Consumables / General Expenses	-
Entertainment / Hospitality	-
Information Technology Charges	10
Insurance Premiums	1
Legal Expenses	1
Marketing & Promotion	-
Memberships and Subscriptions	1
Motor Vehicle Expenses	7
Office Requisites and Stationery	-
Official Duty Fares	-
Other Equipment Expenses	-
Training and Study Expenses	1
Travelling Allowances	-
Property management	*3*
TOTAL EXPENSES	**469**

Appendix 2 – Statistics by Public Sector Organisation

The following public sector organisations received or handled FOI applications during 2019/20. We appreciate their co-operation and assistance in the timely and accurate reporting of the information necessary for this report.

Abbreviations for public sector organisations

AGD	Attorney-General and Justice (Dept of the)
CDU	Charles Darwin University
CoD	City of Darwin
CoP	City of Palmerston
DCIS	Corporate and Information Services (Dept of)
DCM	Chief Minister (Dept of the)
DENR	Environment and Natural Resources (Dept of)
DIPL	Infrastructure, Planning and Logistics (Dept of)
DLA	Legislative Assembly (Dept of)
DLGHCD	Local Government, Housing and Community Development (Dept of)
DoE	Education (Dept of)
DoH	Health (Dept of)
DPIR	Primary Industry and Resources (Dept of)
DTBI	Trade, Business and Innovation (Dept of)
DTF	Treasury and Finance (Dept of)
DTSC	Tourism, Sport and Culture (Dept of)
EARC	East Arnhem Regional Council
JE	Jacana Energy
LC	Litchfield Council
NTAGO	NT Auditor-General's Office
NTLAC	NT Legal Aid Commission
NTPFES	NT Police, Fire and Emergency Services
OCPE	Office of the Commissioner for Public Employment
PWC	Power and Water Corporation
TF	Territory Families
TIO	Territory Insurance Office
TRB	Teacher Registration Board
WARC	West Arnhem Regional Council

TABLE 1 – Information access applications and outcomes 2019-20

PSO	Lodged	Info Released			App refused	Withdraw	Transfer	Finalised
		All	Part	None				
AGD	236	27	105	6	67	2	1	208
CDU	7	3	0	0	1	0	0	4
CoD	7	2	5	0	0	0	0	7
CoP	5	2	4	0	0	0	0	6
DCIS	5	2	1	0	1	0	0	4
DCM	24	0	8	0	6	4	2	20
DENR	14	3	1	0	1	0	6	11
DIPL	23	10	8	2	2	2	0	24
DLA	1	1	0	0	0	0	0	1
DLGHCD	183	17	147	10	7	2	0	183
DoE	43	7	16	1	13	2	0	39
DoH	314	194	26	0	78	5	0	303
DPIR	12	3	4	1	0	0	3	11
DTBI	6	0	2	1	3	0	1	7
DTF	4	0	1	1	1	1	0	4
DTSC	10	2	5	0	2	0	0	9
EARC	1	1	0	0	0	0	0	1
JE	1	1	0	0	0	0	0	1
LC	1	1	0	0	0	0	0	1
NTAGO	2	0	0	1	1	0	0	2
NTLAC	2	1	0	0	0	0	0	1
NTPFES	163	24	74	3	47	10	3	161
OCPE	5	0	1	3	1	0	0	5
PWC	9	2	0	7	0	0	0	9
TF	127	3	67	1	40	2	0	113
TIO	9	7	0	0	1	0	1	9
WARC	1	0	1	0	0	0	0	1
TOTAL	1215	313	476	37	272	30	17	1145

Notes.
'Info released, None' records full refusals on the basis of exemption, see page 8.
'App refused', records grounds for rejection or refusal of an application, see page 8.

TABLE 2 – Information correction applications and outcomes 2019-20

	Lodged	Pending	As Requested	Other Form	No Change	Withdrawn	Finalised	Statement
AGD	1	0	0	1	0	0	1	1
DoE	1	0	0	0	1	0	1	0
DoH	3	2	0	0	1	0	1	0
NTPFES	2	0	2	0	0	0	2	0
TF	1	0	1	0	0	0	1	0
TOTALS	**8**	**2**	**3**	**1**	**2**	**0**	**6**	**1**

TABLE 3 – Internal Review applications and outcomes 2019-20

			Outcome					
	Lodged	Pending	s103(2)	Confirmed	Varied/ Revoked	Withdrawn	s39A	Finalised
AGD	10	0	0	4	4	0	2	10
CoD	2	0	1	1	2	0	0	3
DCM	3	0	0	2	0	0	1	3
DIPL	2	0	0	2	0	0	0	2
DoE	14	0	0	11	2	0	0	13
DoH	10	4	3	5	6	0	3	14
DPIR	2	0	1	1	1	0	0	2
NTPFES	0	1	3	1	3	0	0	4
OCPE	1	0	0	1	0	0	0	1
TF	4	0	1	3	2	0	0	5
TOTALS	**48**	**5**	**9**	**31**	**20**	**0**	**6**	**57**

TABLE 4 – Application Fees 2019-20

Details as advised by PSOs.

PSO	Fees Received	Reduction
AGD	$810	$360.00
CDU	$30	0
CoD	$210.00	0
CoP	$150.00	0
DCIS	$30.00	0
DCM	$540.00	$90.00
DENR	$270.00	0
DIPL	$600.00	$90.00
DLA	$30.00	0
DLGHCD	$330.00	$60.00
DoE	$390.00	$90.00
DoH	$1500.00	$1,150.00
DPIR	$180.00	0
DTBI	$120.00	0
DTF	$60.00	$60.00
DTSC	$180.00	$60.00
NTAGO	$30.00	0
NTPFES	$3,630.00	$60.00
OCPE	$30	$30.00
TF	$120.00	0
TOTALS	**$9,240.00**	**$2,050.00**

TABLE 5 – Processing Fees 2019-20

Details as advised by PSOs.

PSO	Fees Received	Reduced/ Waived	Reduction
AGD	$539.60	33	$340.60
CDU	0	7	0*
DCM	$3,029.50	8	$1,625.00
DENR	$1,361.00	0	0
DIPL	$6,138.77	7	$20.83
DLGHCD	0	183	$8,295.10
DoE	$755.25	1	$75.00
DoH	$3,818.85	29	$2,975.17
DPIR	$3,474.69	2	$1,262.56
DTBI	$483.22	1	$298.61
DTF	0	3	$650.00
DTSC	$696.66	2	$87.50
LC	0	1	$30.00
NTPFES	$6,090.50	27	$2,760.00
OCPE	0	1	$200.00
TOTALS	**$26,388.04**	**305**	**$18,620.37**

* Reduction not specified.

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