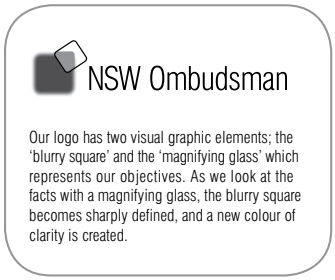
Opening up government

Review of the *Freedom of Information Act 1989*

A Special Report to Parliament under s.31 of the *Ombudsman Act 1974*

February 2009



Any correspondence relating to this special report should be sent to:

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General inquiries: 02 9286 1000
Facsimile: 02 9283 2911

Toll free (outside Sydney metro): 1800 451 524
Tel. typewriter (TTY): 02 9264 8050

Web: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au

ISBN 978-1-921132-33-9

February 2009

NSW Ombudsman

Level 24 580 George Street
Sydney NSW 2000
Phone 02 9286 1000
Fax 02 9283 2911
Tollfree 1800 451 524
TTY 02 9264 8050
Web www.ombo.nsw.gov.au

The Hon Peter Primrose MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Richard Torbay MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President and Mr Speaker,

I submit a report pursuant to s.31 of the *Ombudsman Act 1974*. In accordance with the Act, I have provided the Premier with a copy of this report.

I draw your attention to the provisions of s.31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make it public forthwith.

Yours faithfully

Bruce Barbour
Ombudsman

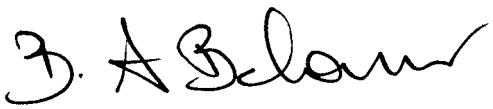
Ombudsman's foreword

Everyone should be able to access the information their government holds quickly, easily, at minimal cost and subject to few restrictions. I do not think this is happening as well as it could or should in New South Wales, which is why I have conducted a review of the *Freedom of Information Act 1989*.

There have been significant benefits to my office conducting the review. We have a long-running association with the Act, having been one of the avenues of external review since it came into force. This has given us a special understanding of many areas of difficulty for both applicants and practitioners.

Our powers under the Ombudsman Act also mean we can go beyond what is possible in most independent reviews. As well as issuing a detailed discussion paper, we have investigated the FOI practices of a cross-section of agencies. We have analysed data about the applications they deal with, audited a random sample of their files and interviewed their FOI staff. This has provided an insight into some of the practical problems with accessing information, as well as a number of encouraging examples of good practice.

This is a comprehensive report. I look forward to the government's response.



Bruce Barbour
Ombudsman

Contents

Introduction

Academics, commentators, legislative review bodies and Ombudsman have all observed that effective Freedom of Information (FOI) legislation is a cornerstone of democratic, open government. It aids citizen participation and ensures government decision-makers are held to account for their actions.

This review concludes that a truly effective system for accessing government information in NSW requires three different but complementary elements:

- a greater level of proactive disclosure of government information
- a new Act which we propose should be called the *Open Government Information Act*, containing strong legislative protections for FOI officers
- robust, independent and effective oversight by an independent Information Commissioner.

What is wrong?

There are a number of key problems with FOI in NSW. Firstly, the Act has been the subject of more than 60 amendments since it was enacted. Many of these have been in response to a particular issue or a perceived problem, and have sat dormant in the Act ever since. This has resulted in a confusing and unwieldy piece of legislation for both applicants and practitioners. Accessing government information is made even more complex by the existence of four other intersecting pieces of legislation governing access to information. These are the:

- *Local Government Act 1993*
- *Privacy and Personal Information Protection Act 1998*
- *Health Records and Information Privacy Act 2002*
- *State Records Act 1998*.

The way people get information from government needs to be simplified, with independent guidance and direction to make the various systems work effectively.

Since the FOI Unit in the Premier's Department was disbanded in 1991, the FOI Act has been without a champion.

Even with the large number of amendments, the legislation is still geared towards a paper-based system. This is no longer the way government operates and the systems around FOI need to address technological developments.

Technological advancements are not the only significant change to government operations since the Act was enacted. Government agencies are now competing on the open market and services that were formerly provided by government are being performed by private companies. The current Act does not do enough to address these changes.

Challenges for governments

Why has the FOI system in NSW been allowed to reach this stage? One of the major contributing factors has been a distinct lack of political support.

As with many other Westminster systems, the idea of freedom of information for NSW was first raised by a political party in opposition. It took almost ten years of debate and a change of government to see it enacted.

When the Bill was introduced to Parliament, the then Deputy Premier quoted President James Madison:

> *A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and people who mean to be their own governors must arm themselves with power that knowledge gives*.[1]

This sort of grand political language is not unique. It has accompanied the introduction of access to information legislation across Australia and around the world. However, most of these jurisdictions, with the possible exclusion of Sweden, have experienced a distinct cooling of political interest and support for effective FOI legislation.

One of the central reasons for this reluctance to continue to drive change and improvement in this area is that, despite public comments to the contrary, releasing information goes against the natural instincts of government. FOI legislation creates a fundamental and significant conflict of interests for government and senior public officials. On the one hand, they have a duty to implement the legislation in accordance with its terms and spirit. However, implementing the legislation will quite often have a serious and occasionally damaging impact on their personal and political interests.

While there are many examples of this, one of the best comes from the United States. When President Lyndon Johnson first introduced the Freedom of Information Act, his press release stated that:

> *This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest … I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.*[2]

In a speech in 2005, Johnson's Press Secretary at the time, Bill Moyers, told a different story:

> *… I knew that LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets and opening government files; hated them challenging the official view of reality. He dug his heels in and even threatened to pocket veto the bill after it reached the White House.*[3]

There appears to be a groundswell of political support for open and transparent government at the moment, both in NSW and across Australia. We need to ensure that these good intentions are backed up by effective legislation, clear guidance and independent oversight to make sure they outlast the next political cycle.

Those who have gone before us

In preparing this report, we have drawn on the excellent work of others both nationally and internationally. This includes independent reviews of both the Commonwealth and Queensland FOI Acts.

First cab off the rank: the Australian Law Reform Commission and Administrative Review Council

In 1994, the then Acting Attorney General Duncan Kerr referred the Commonwealth FOI Act to the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) for review. Their terms of reference dealt with both the content of the Act as well as the way it was administered and implemented.

---

1 The Hon Wallace Murray, New South Wales Parliamentary Debates (NSWPD), Legislative Assembly, 2 June 1988, page 1399.
2 Office of the White House Press Secretary, Statement of the President upon signing S. 1160, July 4 1966.
3 Bill Moyers, *In the Kingdom of the Half-Blind*, speech for the 20th anniversary of the National Security Archive, 9 December 2005, George Washington University, Washington DC.

In their final report, the two review bodies identified several key deficiencies:

- *There is no person or organisation responsible for overseeing the administration of the Act.*
- *The culture of some agencies is not as supportive of the philosophy of open government and FOI as the Review considers it should be.*
- *The conflict between the old 'secrecy regime' and the culture of openness represented by the FOI Act has not been resolved.*
- *FOI requests can develop into legalistic, adversarial contests.*
- *The cost of using the Act can be prohibitive for some.*
- *The Act can be confusing for applicants and difficult to use.*
- *The exemption provisions are unclear, open to misuse by agencies and, because of their prominence, tend to overwhelm the purpose of the Act.*
- *Records management, which is fundamental to the effectiveness of the FOI Act, is not given sufficient prominence.*
- *Current review mechanisms could be improved.*
- *There are uncertainties about the application of the Act as government agencies are corporatised.*
- *The interactions between the FOI Act and the Privacy Act, and the potential conflicts they give rise to, have not been adequately addressed.*[4]

They found that:

> *… more must be done to dismantle the culture of secrecy that still pervades some aspects of Australian public sector administration. The recommendations of this report are designed to give full effect to the Australian people's right of access to government-held information. They include:*
>
> - *retention of the FOI Act as an instrument of public sector accountability*
> - *creation of a new statutory office of FOI Commissioner to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies about how to use, interpret and administer the Act*
> - *revision of the object clause to promote a pro-disclosure interpretation of the Act and to acknowledge the important role of freedom of information.*[5]

14 years later, the report's recommendations are yet to be implemented.

On 24 September 2007, following a period of sustained media pressure and a high profile High Court case, the then Attorney General Phillip Ruddock called on the ALRC to review the FOI Act once again. The ALRC discontinued its review after the new federal government indicated they would reform FOI. Special Minister of State Senator John Faulkner has said that:

> *As early as practicable in 2009 the Government will release exposure draft legislation for public comment addressing broader reform measures aimed at promoting a pro-disclosure culture.*[6]

The Wisdom of Solomon

In September 2007, newly appointed Queensland Premier Anna Bligh appointed an independent panel to review the state's FOI Act. The Premier commented that 'I want to assess whether these laws are working effectively and what improvements can be made.'[7]

---

4 Australian Law Reform Commission and Administrative Review Council, *Open Government: A review of the Federal Freedom of Information Act 1982*, 1995 ALRC 77 page 18.

5 Australian Law Reform Commission and Administrative Review Council, *Open Government: A review of the Federal Freedom of Information Act 1982*, 1995 ALRC 77 page 5.

6 Senator John Faulkner *Abolition of conclusive certificates* media release, 28 November 2008, http://www.smos.gov.au/media/2008/mr_332008.html (last accessed 10 December 2008).

7 Premier Anna Bligh *Premier Bligh announces overhaul of FOI laws* media release, Monday 17 September 2007

The panel, chaired by journalist David Solomon, issued their final report in June 2008. In addition to suggesting large-scale changes to the FOI Act, they recommended that government change its approach to releasing information, with FOI becoming the last resort for accessing information.

The Queensland Government acted quickly, issuing a comprehensive response to the Solomon review panel's report in August 2008. Premier Bligh expressed support for all but two of the panel's recommendations, and outlined a bold timeframe for drafting and introducing a new Act. At the time of writing, the draft Right to Information Bill and Regulation have been issued for public comment, which closes on 31 March 2009. The Bill has adopted many of the excellent recommendations of the panel, and we will watch with interest the next stage in the process.

Our involvement with FOI

Our office has been involved with FOI in NSW as an avenue of external review since the Act came into force. We are able to make use of our formal powers under the Ombudsman Act to investigate a matter and report our findings to Parliament.

While it is useful to have this option, we use it sparingly. We believe it is better to try and resolve as many matters as possible quickly and informally.

Our work goes beyond handling complaints. NSW, unlike a number of other Australian jurisdictions, does not have a central collection point for FOI information. An amendment to the FOI Act in 1991 saw the requirement for the Premier to collate FOI information and report to Parliament altered to allow agencies to report individually. In an attempt to gain a more complete picture of the FOI landscape, we have been collecting publicly available statistical information from agency annual reports since 1995. While this has proved useful in identifying trends, the data collected is far from comprehensive. We are not able to access information relating to all FOI applications. Unfortunately, it has also been our experience that not all agencies are meeting their statutory reporting requirements. This means the information we collect has limited application.

This review

Our experience with the Act has made us acutely aware of some of the central problems with FOI in NSW. The Ombudsman has continually brought these problems to the attention of government, both in our annual reports and in special reports to Parliament. We have also pressed the need for an independent, comprehensive review of the Act and its supporting systems. In April 2008, after a continuing lack of interest by government, the Ombudsman announced that he would conduct a comprehensive review of the Act.

We have made use of a number of different methods of collecting information as part of our review to develop as complete a picture as possible of FOI in NSW.

Agency audits

In order to gain a better understanding of the way in which the Act is operating, we selected 18 agencies to be the subject of focused investigation. They were not selected due to a particular failing or a bad record in dealing with FOI, but rather to provide a representative cross-section of agencies dealing with FOI applications. Some are small, some are large. Some deal predominantly with applications for personal information, while others deal mostly with non-personal applications. They include a number of councils, universities and area health services.

Each agency was provided with a list of detailed questions. We tried to structure these requests in such a way that the agencies should not have had to expend a great deal of additional resources to answer them, while also ensuring that we received meaningful responses. It is important to stress that most of the information we requested should have already been collected to meet the reporting requirements under the FOI Act.

We also asked the remaining 149 local councils in NSW and the Administrative Decisions Tribunal for information. This provided us with guidance in areas such as the interaction between the Local Government Act and the FOI Act, as well as external reviews.

The best way to assess an issue such as the standard of record-keeping is to actually look at files. We visited the offices of each of the agencies and audited a random selection of their FOI files.

These visits also allowed us to speak with the agencies' FOI staff. Many of the confusing and difficult areas of the current system that are highlighted in this report were raised by these staff. We were particularly impressed with the practical solutions some of the practitioners have developed to overcome the failings of the current system.

We appreciate the assistance and cooperation of the agencies involved. It was particularly encouraging that most have also provided submissions in response to our discussion paper. We will be providing each of the agencies with detailed feedback on their own practices.

Looking elsewhere

As mentioned above, we are far from alone in considering different issues around accessing government information. To avoid reinventing the wheel, we have looked to what is happening in other jurisdictions, as well as reviewing academic discussion around best practice and future directions. This has been particularly useful in considering the role and responsibilities of an Information Commissioner.

We have also reviewed a number of other legislative approaches to accessing government information. This has provided us with some valuable guidance on the best way forward, as well as some cautionary tales.

Discussion paper

To make sure we heard from all those with an interest in this area, we prepared a public discussion paper.[8] This was released in early September 2008 and served two important purposes. Firstly, it gave applicants, agencies, practitioners, academics, commentators, journalists and special interest groups an opportunity to put forward their views. The discussion paper also gave us an opportunity to share our preliminary thoughts on certain issues.

The discussion paper was a particularly detailed document and should be read as a companion document to this report.

We enlisted the help of a panel of experts[9] to provide us with high level feedback on the issues we were planning to raise for discussion, as well as bringing additional areas to our attention. Most of the panel members have also provided us with detailed and informative submissions. We are most grateful for their contributions.

We received a total of 72 submissions from individuals, agencies and organisations. Many were very detailed and thoughtful. We would like to thank everyone who took the time to consider the issues we raised and provide us with their views.

Final report

This final report is a comprehensive, high level document which draws on all of the sources of information outlined above. The report is a companion document to the discussion paper, which contains much of the detail that has informed the final report.

We have not reached conclusions on all the issues we have considered. While we make some 88 recommendations, in some areas we have noted the need for further consideration and consultation.

---

[8] NSW Ombudsman Discussion Paper: Review of the *Freedom of Information Act 1989*, September 2008.

[9] See appendix C for the names of the expert panel.

The next stage

This report is only the first stage in the process towards a new system for accessing information held by government. As the Irish Information Commissioner observed recently:

> *While FOI may not be the most urgent matter to concern Ministers and public servants when they come to work each morning, it is in fact a vital element in how we govern ourselves. However imperfect our governmental arrangements may be, I think FOI must now be seen as an intrinsic element in the wider arrangements whereby we hand over power to elected public representatives and to non-elected public servants. In this sense, I believe FOI should be seen as one of the fundamental rights of our democracy rather than something bestowed on us by our elected representatives and for which we should be grateful.*[10]

Closer to home, former Prime Minister Bob Hawke made a similar observation:

> *Information about government operations is not, after all, some kind of 'favour' to be bestowed by a benevolent government or to be extorted from a reluctant bureaucracy. It is, quite simply, a public right.*[11]

The government now needs to demonstrate its commitment to moving towards a more open and participatory system of government for NSW.

[10] Speech by Emily O'Reilly, Irish Information Commissioner at the 10th Anniversary Conference of Freedom of Information in Ireland, *Freedom of Information: the first decade*, 15 May 2008, accessed at http://www.oic.gov.ie/en/MediaandSpeeches/Speeches/2008/Name,8400,en.htm (last accessed 11 December 2008).

[11] Quoted by Senator Andrew Murray in his second reading speech for the Freedom of Information Amendment (Open Government) Bill 2003.

Executive Summary

There is a need for significant change in the arrangements for and attitudes towards the provision of information in NSW. The Premier's public comments over recent months, as well as the support for change expressed by the Opposition, are heartening. This report presents the findings and recommendations of our review of the operation of the current FOI legislation.

The new system we are recommending has three key elements:

- a greater level of proactive disclosure of government information
- a new Open Government Information Act to replace the FOI Act
- appointment of an independent Information Commissioner.

Proactive disclosure

In the 1980s and 1990s many countries introduced legislation to provide formal mechanisms for people to apply for information from government. The *Freedom of Information Act 1989* was in keeping with its time. We are now in a different era. The internet, sophisticated search engines and email mean people can access vast amounts of information and data from wherever they are — at home, on the train or at the beach. Governments — and FOI legislation — must adapt to what are radically different expectations about access to information.

A key element in the new system we are proposing requires all government agencies to make significant amounts of information available to the public as a matter of course. And it will not be enough to simply make more information available; it must be done in a way so the information is easy to find. We put forward two practical ways of achieving this — the introduction of publication schemes and disclosure logs.

An agency's publication scheme would let the public know the types of information the agency makes publicly available, the manner in which that information is made available and whether there is any cost.

An agency's disclosure log would give access to information that has already been provided in response to an application. It is a way of sharing information that has been released to one individual more broadly. Not all released information will be included in a log — the agency is expected to identify information which may be of interest to the broader community.

To assist agencies and to make sure publication schemes and disclosure logs are as comprehensive as possible, they should be approved and regularly reviewed by the Information Commissioner.

A new Act

The current FOI Act is too complex. NSW also has a number of different and overlapping Acts dealing with public records. Accessing information should not be so complicated.

We recommend simplification of the current legislative regimes, with access and amendments rights to all personal information being dealt with under the Privacy and Personal Information Protection Act, and the repeal of the Health Records and Information Privacy Act.

In our view the most effective way to bring about a new start for access to government information is to replace the FOI Act with a new Act. This should result in new legislation which is written in plain English in a modern drafting style, which focuses on policy and principle for discretionary matters and absolutes where there is no discretion.

We propose that the new Act is called the Open Government Information Act with an objects provision that makes it clear it is to enable people to participate in the policy and decision-making process of government, to open government activities to scrutiny and to increase accountability of government.

Government increasingly contracts out the provision of services to non-government entities. To ensure access to information about those services is not lost due to the contracting out process, records held by non-government and private sector bodies which relate directly to contracted out services performed on behalf of the public sector should be covered by the new Act.

It is essential the new Act contains robust measures to ensure the independence of decision-makers under the legislation, including offence provisions to clarify and give support to their independence.

The Act should contain clear and straightforward procedures which set out in unambiguous terms the process to be followed to access government information. We have made recommendations about how the 'machinery provisions' could be improved in the new Act, including a slight increase in the timeframes for dealing with initial determinations and internal reviews as well as specific consequences for failing to meet those timeframes.

The term 'exemptions' should become a thing of the past, with the new Act instead containing 'reasons for refusal', with access only being refused if it can be demonstrated that releasing the information could reasonably be expected to cause some form of detriment or harm.

An Information Commissioner

External leadership, independent of government, will be an essential element in providing oversight and accountability for the new system. We therefore recommend the creation of an Information Commissioner. As well as being an avenue of external review, the Information Commissioner would be the public proponent for the objects and intentions of the new system and an essential element in changing culture and providing support for those working in agencies to bring about change.

Among other things, the Information Commissioner would be responsible for scrutinising agencies' systems for the proactive disclosure of information and those for handling applications, for auditing determinations of applications by agencies, publishing guidelines for practitioners, providing and/or certifying training, collecting and reporting on statistics and conducting regular reviews of the new Act.

We recommend that the ADT continue to be the determinative avenue of external review. This will enable the Information Commissioner to be an alternative avenue of non-determinative external review, with the ability to use a variety of conflict resolution techniques to resolve complaints as well as provide advice and guidance to agencies. This would retain the significant benefits of a dual system of external review and avoid the inherent risks and difficulties of having one entity for both determinative and advisory functions.

We recommend the role of Information Commissioner is created in the Office of the NSW Ombudsman. While we are aware of the particular sensitivities of making this recommendation ourselves, we believe it is a common sense solution which capitalises on our existing expertise, avoids duplication of responsibilities and provides robust leadership for the new system without the risks associated with further proliferation of oversight agencies.

Other issues

There are two other major issues which we believe will be essential in bringing about change in NSW.

Improved records management by agencies

The most extensive open disclosure legislation and policies will be of little use if agencies cannot identify and locate what information they hold and recover it in a timely way. There is considerable room for improvement across the NSW government sector in the standard of record-keeping, both paper-based and electronic. Good record-keeping and records management is essential for many reasons, not least accountability and openness of government.

Culture and leadership

There will need to be a significant cultural shift across NSW government agencies to give practical meaning to the objects and intentions of the new Act. Such a change is an immense challenge. There will need to be support from the Premier, all Ministers, the Department of Premier and Cabinet and chief executive officers (CEOs). They will need to make clear and unambiguous statements of support, be committed to them and will need to keep making them. Change will not come overnight. Shifting entrenched attitudes and concerns about proactively releasing information and responding to applications will take time and sustained effort.

We have made 88 recommendations which are detailed throughout the report and summarised in the following section.

Recommendations

Proactive disclosure and release of information

1. The government should continue to actively encourage and require greater proactive disclosure of information by agencies.
2. The new Act should require agencies to produce and maintain some form of publications scheme or reading room, similar to those operating in the United Kingdom and the United States.
3. The new Act should require agencies to produce and maintain disclosure logs, similar to those in the United Kingdom.
4. The new Act should require all publications schemes and disclosure logs to be approved and regularly reviewed by the Information Commissioner.
5. Agencies should no longer be required to produce either Statements or Summaries of Affairs. The new Act should require that the information formerly included in these documents forms part of an agency's publication scheme.
6. The new Act should include state-owned corporations and local authorities in the definition of 'agencies' that are required to disclose contracts they have entered into.

Access Schemes

7. Access and amendment rights for personal information should be moved from the FOI Act to the Privacy and Personal Information Protection Act.
8. The Health Records and Information Privacy Act should be repealed and either:
   a. the Privacy and Personal Information Protection Act is amended to cover the issues dealt with in the Health Records and Information Privacy Act

      or

   b. the Privacy and Personal Information Protection Act is amended to provide the Privacy Act (Commonwealth) applies to health records in NSW or the NSW health records jurisdiction is vested in the Commonwealth.

Access Schemes cont'd

9. The new Act should focus on access rights to non-personal information.

10. The term 'personal information' should be used in both the new Act and Privacy and Personal Information Protection Act and should have the same definition. This definition should reflect the decision in *Commissioner of Police v District Court of NSW and Perrin*.[12]

11. Section 12(1) of the Local Government Act should be retained and section 12(6) repealed.

12. A limitation should be placed on the right to add a notation to information to the effect that an agency does not have to accept a notation if it considers it defamatory or unreasonably voluminous.

How do we make it work: objects and intentions of the Act

13. The FOI Act 1989 should be replaced by a new Act called the Open Government Information Act.

14. The new Act should be drafted in plain English.

15. The objects of the new Act should be:

    a. to provide the right of access to information held by the NSW Government unless, on balance, it is contrary to the public interest to disclose that information

    b. to enable people to participate in the policy and decision-making processes of government, to open government activities to scrutiny and to increase the accountability of government.

16. In the new Act discretionary matters should be drafted in terms of principle and policy rather than prescriptive detail.

17. The new Act should emphasise that the implementation of the legislation and ensuring proper transparency must be considered by the government of the day and all agencies as a core function of government.

18. The new Act should place an onus on agencies to proactively release information about their operations.

19. The new Act should state there is a presumption that agencies will release documents on application unless a reason for refusal, read narrowly, clearly applies.

20. The new Act should place an onus on agencies to demonstrate to any external reviewer that all reasons for refusal clearly apply.

21. The CEO of each agency should designate one or more positions as Information Officers with delegated authority to determine applications.

[12] (1993) 31 NSWLR 606.

22. The new Act should state that Information Officers must perform their functions impartially and independently.

23. Information officers should be required to attend training on their appointment which is provided or certified by the Information Commissioner.

24. The following offence provisions should be included in the new Act:

    a. for any person to place undue pressure on decision-makers to influence a determination

    b. for decision-makers to wilfully fail to comply with the requirements of the Act.

25. To ensure the independence of staff, consideration should be given to where they are located both in the organisational structure of an agency and their physical work location.

26. The Premier should issue a memorandum to all Ministers:

    a. making clear that determinations are to be made by agencies on their merits, based solely on the criteria set out in the new Act and independent of any political influence or considerations

    b. requiring them to ensure CEOs within their portfolio are aware of the obligation to implement the letter and spirit of the new Act.

Scope of the new Act

27. The new Act should give a right of access:

    a. to any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means

    b. provided, where the records are in electronic form, they can be produced using the computer hardware and software and technical expertise usually available to the agency, and producing them would not interfere unreasonably with the operations of the agency.

28. The new Act should extend to records held by non-government and private sector bodies which relate directly to contracted out services performed on behalf of a public sector agency.

29. The Legislative Council and Legislative Assembly should be included in the ambit of the new Act.

30. The judicial, but not administrative, functions of courts and tribunals should be excluded from the scope of the new Act.

31. We recommend the Information Commissioner, State Records and, where appropriate, the Chief Information Officer consider what further assistance and support is necessary to improve agency management of paper and electronic documents and information across the NSW public sector.

32. Consideration should be given to a more robust audit process to ensure agencies are complying with the State Records Act and associated standards.

Scope of the new Act cont'd

33. The Information Commissioner and State Records should have ongoing dialogue about issues associated with record-keeping and the management of records, particularly electronic document management systems.

34. The Information Commissioner should produce guidance for practitioners about searching electronic records including those which are 'held' by an agency for the purposes of the new Act but, appropriately, not stored in official records systems.

35. A provision should be included in the new Act or in guidance from the Information Commissioner that where an agency has culled records in accordance with an appropriate document disposal schedule it is not required to go to its backup systems to recover the culled documents in response to an application.

36. A provision should be included in the new Act that it is an offence to destroy or conceal records.

Reasons for refusing access

37. The new Act should contain a clear statement that the public interest is a central consideration in determining any application.

38. The new Act should refer to 'reasons for refusal' not 'exemptions'.

39. The Information Commissioner should develop a list of factors to assist agencies when they are assessing the public interest.

40. Reasons for refusing access in the new Act should be based on a recognisable detriment or harm which could reasonably be expected to be caused if particular information is released.

41. Reasons for refusing access should be included in the body of the new Act, not a separate schedule.

42. Cabinet documents:

    a. The Premier should identify Cabinet material which can be proactively released on a regular basis.

    b. The definition of Cabinet documents in the new Act should be narrowed to documents brought into existence for the purpose of consideration by the Cabinet.

    c. The reason for refusing access to Cabinet, and Executive Council, documents should be based on the nature of the detriment or harm which could be caused by release and should focus on detrimental impact on the collective ministerial responsibility of Cabinet.

43. Law enforcement, public safety and counterterrorism:

    a. These reasons for refusal should be included in the new Act and be clearly drafted, focusing on the public purpose and impacts of release.

b. Consideration should be given to including as a reason for refusal of release the reasonable expectation that a person could be subjected to a serious act of harassment or intimidation.

44. The reason for refusing access to documents concerning business affairs should be based on the reasonable expectation release would have a substantial adverse impact on an agency's commercial business interests.

45. Secrecy provisions:

    a. The new Act should provide that an agency may refuse access to information if the disclosure of that information is prohibited under certain prescribed legislation.

    b. The government should review the various secrecy provisions in NSW legislation for the purpose of listing them in a schedule in the new Act.

    c. Such a schedule's use should be reviewed in the first review of the new Act.

46. The views of those directly affected by the 'Olympic' and other miscellaneous exemptions clauses should be sought and considered before deciding if provision should be made in the new Act for any of the detriments or harms they contemplate.

47. Each agency with functions listed in Schedule 2 of the current Act should be required to provide reasons for those functions to remain in a similar schedule in the new Act. These reasons should be made public.

48. The new Act should provide review and appeal rights in relation to whether the documents applied for relate to a function which is listed in Schedule 2. Agencies should be required to provide applicants for such documents with a written decision on their request, which sets out their rights of internal and external review.

49. The new Act should provide that an agency can neither confirm nor deny the existence of documents in certain situations.

50. There should be no provision in the new Act for the issue of ministerial certificates.

51. The Information Commissioner should be consulted about future amendments to the new Act and amending instruments should include the name of the new Act.

Machinery provisions

52. In the new Act, the time period for dealing with initial applications should be 20 working days and 15 working days for internal reviews.

53. The new Act should contain a provision that the time period for dealing with an initial application can be extended by agreement between the agency and the applicant.

54. The new Act should include a requirement that agencies acknowledge receipt of all applications within five working days of receipt and this should be accompanied by information about deemed refusal timeframes and rights of review.

Machinery provisions cont'd

55. The new Act should provide that if the timeframe for determining an initial determination is extended by agreement, the agency must confirm the new timeframe in writing within five working days of the agreement, along with advice about new dates for deemed refusal timeframes and rights of review.

56. The new Act should provide that a deemed refusal occurs if the agency fails to determine an initial application within 20 working days or the longer agreed timeframe and an internal review within 15 working days.

57. The new Act should give the ADT discretion to accept an external review application out of time.

58. The new Act should provide that where an agency fails to comply with the required timeframes for dealing with an initial application, the fee for the initial application must be refunded and there should be no fee for an internal review.

59. The new Act should provide that where an agency fails to comply with the required timeframes for dealing with an internal review application, the fee for the internal review must be refunded.

60. The new Act should make clear that consultation is only required where the release of information contained in a document, whether or not the document is proposed to be released in full or with identifying information removed, could reasonably be expected to be of substantial concern to a third party.

61. The new Act should provide an agency with discretion in circumstances where it has properly determined to refuse to release a document to provide access to view the document.

62. Concurrent use of FOI and subpoena should be managed as follows:

    a. the earlier disclosure of documents in response to a subpoena should be grounds for declining to accept an application for identical documentation on the basis that the information has already been made available by other means

    b. where an applicant has already obtained documentation in response to an application that is subsequently requested under a subpoena, the return of subpoena can rely on the fact that the documentation has already been produced under FOI

    c. where a subpoena and FOI application are received simultaneously for the same documents, an agency may decline to accept the FOI application on the basis it is handling the request by way of the subpoena.

Resources

63. Fees and charges for initial applications and internal reviews should remain the same.

64. There should continue to be a reduction in fees and charges of up to 50% for demonstrated financial hardship and public interest applications.

65. The new Act should include a provision that an agency can accept an application without an application fee.

66. The new Act should include a provision for an applicant to seek an internal or external review of a request for an advance deposit without the need to wait for the period specified in the request for the deposit to expire and for the agency to decide to refuse to continue dealing with the application.

67. Agencies should only be able to charge up to 50% of the estimated total cost as an advance deposit.

68. The Information Commissioner should produce guidelines on the information an agency is required to provide to an applicant to explain how an advance deposit has been calculated.

69. The new Act should specify the minimum time an applicant can be given to pay an advance deposit, that a longer period can be given and that the period can be extended by agreement between the parties.

70. The new Act should provide that an advance deposit should be refunded if the agency fails to determine the application and provide access to the documents identified for release within the statutory or agreed timeframe.

71. Where an agency includes information in its disclosure log at the same time as releasing that information to an applicant, any fees and charges paid by the applicant should be refunded.

72. Guidance should be provided in the new Act or in guidelines produced by the Information Commissioner:

    a. as to the circumstances in which disclosure of information is in the public interest

    b. that in assessing whether it is in the public interest to release information the relevant test is the likely outcome of release, not the possible motives of the applicant.

73. The factors set out by the ADT to guide an agency in assessing whether an application might constitute an unreasonable diversion of resources should be included in guidelines produced by the Information Commissioner. Such guidelines should also include details of other measures an agency should consider when dealing with applications for voluminous documents such as providing a list of documents within the scope of the application to the applicant or arranging for an applicant to view the documents.

74. The new Act should contain provision for the ADT to make orders along the lines of civil restraint orders in the UK Civil Procedure Rules concerning applications which are totally without merit or would result in an unreasonable diversion of resources.

Reviews of decisions

75. The right to an internal review should be retained in the new Act but it should be optional.

76. External reviews should be carried out by both the Information Commissioner and ADT.

77. The Information Commissioner should have the power to:

    a. conduct reviews looking at merit issues

    b. refer a matter back to an agency for an internal review

    c. investigate complaints about any conduct of an agency or its staff in relation to an application, including sufficiency of search issues

    d. make recommendations and suggestions in relation to these matters, including suggesting an agency redetermine an application.

78. The ADT should continue with its current role and responsibilities conducting determinative external reviews.

79. The ADT should be able to refer an administrative issue which it considers may have systemic implications to the Information Commissioner.

80. The Information Commissioner should be able to refer a matter to the ADT.

81. The Information Commissioner should have the right to appear and be heard in any proceedings in the ADT in relation to an external review of an application.

82. The new Act should give the Information Commissioner appropriate investigation, search and scrutiny powers.

Oversight and accountability

83. A statutory position of Information Commissioner should be created in NSW.

84. The Information Commissioner should be established in the Office of the Ombudsman.

85. The Information Commissioner's statutory functions should include but not be limited to:

    a. investigating:

        i. complaints from applicants about determinations

        ii. alleged breaches of the Act by agencies

        iii. alleged attempts to improperly pressure decision-makers in relation to the performance of their functions under the Act

        iv. alleged detrimental action taken against decision-makers arising out of the performance of their duties under the Act

b. approving and regularly reviewing agencies' publication schemes and disclosure logs

c. keeping under scrutiny agencies' systems for disclosure of information, including both systems for the proactive release of information and in response to applications

d. developing/approving templates for agencies' publication schemes

e. auditing records of agencies that relate to applications for information

f. auditing determinations of applications by agencies

g. publishing guidelines for the implementation of the Act

h. publishing a regular digest of developments in the area

i. providing training in the system and/or certifying training

j. collecting and reporting on statistics from agencies relating to the implementation of the Act

k. supporting practitioners including through the FOI and Privacy Practitioners' Network

l. seeking court orders requiring agencies to rectify breaches of the Act or requiring compliance with provisions of the Act

m. conducting regular reviews of the Act (say five yearly) to determine whether it continues to achieve its objectives

n. reporting to Parliament on:

   i. implementation of the Act (annually)

   ii. the operations of the Information Commissioner (annually)

   iii. special issues (from time to time as appropriate)

   iv. reviews of the Act (five yearly)

o. promoting community awareness of how to access government information that is proactively released and how to request information.

86. Consideration should be given to making the Information Commissioner responsible for the oversight of privacy as well as FOI.

87. The Information Commissioner should be subject to oversight by a Parliamentary Committee.

88. Arrangements should be made to involve the Information Commissioner in the process of transition to the new system from the start.

Chapter 1.
Proactive disclosure and release of information

In the last 20 years, the way in which information is created, shared, used and stored has changed dramatically. Now, the click of a button can provide instant access to many thousands of pages of information, records and data. Greater accessibility has fuelled an increased desire to access all types of information about government activities.

Members of the public have always been able to ask government agencies for information, documents and answers to questions. What they haven't always been able to do is compel the government to provide what they asked for.

Before FOI, agencies could decide for themselves how to handle requests for information. There was little stopping them from ignoring or stonewalling requests for information they did not want to release.

Legislation in the 1980s and 1990s put in place a formal process that people could choose to use to obtain documents from government agencies.

These systems were only ever intended to add to, not replace, agencies' ability to communicate with the public.

In our 1997 report entitled *Implementing the FOI Act — a snap-shot*, we suggested a five pronged approach to the release of information:

- *proactive disclosure (voluntary publication of useful information)*
- *informal disclosure (automatic release on request)*
- *formal disclosure (with a presumption for release on application)*
- *FOI reporting (i.e. summaries of affairs, statements of affairs and annual reporting under the FOI Act), and*
- *amendment of records (amendment of personal records).*[13]

Proactive disclosure has become increasingly more important as governments attempt to quench the thirst for information that can be easily downloaded to computers, mobile phones and other portable devices. But the challenge for government is to provide that information in a meaningful way — in a way that tells people about their work honestly, frankly and holistically. People have a right to know how taxpayers' money is being used 'in their name.' As one US commentator has observed:

> *Democracy only thrives with open, transparent government. Usually this concept is framed in terms of access to information. But in an age of information overload, simple access isn't enough. Increasingly, for open government to work, there needs to be effective communication of vital information so citizens can actually appreciate and understand not only the challenges government faces, but also the choices being made to meet those challenges. And this would seem to suggest that a new style of spin-free public sector public relations is desperately needed to provide a real communications bridge between government and citizens.*
>
> *In other words, open government does not just imply that information is available some place where a researcher with enough savvy and diligence can dig it up. Information actually has to be pushed out through the information noise to connect. And this information has to be what citizens need to know — the good and the bad, the successes and failures, and the realistic options for the future.*[14]

---

[13] NSW Ombudsman, *Implementing the FOI Act: a snap-shot*, July 1997, page i.

[14] Blake Harris, *Counter-spin for Open Government*, article posted on 15 February 2005 at www.govtech.com/gt/articles/93066 (last accessed 20 November 2008).

Many government agencies have recognised this need, and now make a large amount of information available on their websites. For example, the Roads and Traffic Authority provides access to statistics on traffic volume, accidents, licensing and registration. While this is encouraging, all agencies need to be more proactive. As the NSW Council for Civil Liberties observed in its submission to this review:

> *FOI provisions can never be successful if they are the main route by which the public gains access to all but the most mundane and bland of government information. The burden on all end users is too great. More importantly, such positioning of FOI perpetuates the assumption it is meant to challenge: that secrecy is the norm and extraction of information is the exception.*
>
> *… Ministers and administrators must be encouraged, and required, to adopt radically more open mind sets. Routine disclosure and active dissemination of relevant government information must become the norm.*[15]

It is not enough to just make more information available. It needs to be easy to search for and find, as well as readily accessible. This will help to prevent those looking for information getting lost in the 'data smog.'[16]

1.1. A change in the air?

Since we began this review, there has been a noticeable shift in the political approach to transparency and accountability in NSW.

On 23 October 2008, the Premier expressed a commitment to greater proactive disclosure of information in Parliament:

> *Transparency and accountability are the cornerstones of good government. The people of New South Wales should be given as much information as possible about the activities of the Government.*
>
> *…*
>
> *Many people I have spoken to in recent weeks about this matter said that it is as much about culture as it is about black letter law. In advance of a new Act I also committed to making changes promoting a pro-disclosure culture and practice in the public sector that go beyond the Freedom of Information Act. I firmly believe that the routine disclosure of information outside of freedom of information fosters transparency and makes the government more accountable for its actions. It also cuts the taxpayer-funded cost of dealing with reams of freedom of information requests.*[17]

The Premier has also issued Ministerial Memorandum M 2008–19, *Proactive release of information by government agencies*. It states that:

> *As part of my ongoing commitment to improving access to information regarding the activities of the NSW Government, I ask Ministers to work with their agencies to identify and release, as soon as practicable, information which can be made available to the public at minimal cost and without compromising the public interest. In particular, agencies should consider routinely releasing information that is sought regularly under the FOI Act.*

In a submission to our review, the Liberal/Nationals Coalition outlined their proposed policy direction in this area:

> *By significantly increasing the overall quality and quantity of Government information that is readily available to the public, the Liberal/Nationals Coalition will reduce citizens current need to rely on FOI.*
>
> *Citizens should not need to be forced into the position of having to demand information from Government — it should be freely available.*

---

15 NSW Council for Civil Liberties submission to FOI review, pages 15–16.

16 David Shenk (1997) *Data Smog,* Harper Collins, New York, p.31. Cited in Alasdair Roberts (2006) *Blacked Out: Government Secrecy in the Information Age* Cambridge University Press, New York, page 18.

17 The Hon Nathan Rees, NSWPD, Legislative Assembly, 23 October 2008, pages 10529–10530.

…

Fundamentally, the NSW Liberal/Nationals Coalition's approach is about creating a culture and systems in Government that presume that sharing information is the norm — rather than being selective in its release or holding onto it and waiting for FOI requests.[18]

These are extremely encouraging statements of commitment from both sides of government.

Much of this change in approach has resulted from the final report of the Solomon review panel in Queensland. The panel's clear statements in favour of greater proactive disclosure, drawing on academic Moira Patterson's concept of 'push' and 'pull' models, are important and have been considered carefully as part of this review. In response to the Solomon review recommendations, the Queensland government has recognised that:

It is fundamental to an open and participatory government that information is provided as a matter of course unless there are good reasons for not doing so. The policy framework will be based on guiding information policy principles, strategies and standards that position legislative access as the 'last resort' in accessing government information.

These information policy principles, strategies and standards will embed a right to information in the administrative practices and organisational culture of the public service, so that providing information to Queenslanders is recognised as a legitimate and core aspect of every public servant's day-to-day work.[19]

1.2. What agencies are required to disclose now

The FOI Act contains a number of minimal requirements for releasing information about the operation of agencies. Under Part 2, agencies are required to produce both Statements and Summaries of Affairs, as well as report publicly on certain government contracts. Outside of FOI, the other major proactive publication requirement relates to local government.

1.2.1. Statements and Summaries of Affairs

A common theme through many of the agency submissions was a lack of support for the continued publication of Summaries and Statements of Affairs in the Government Gazette. Sutherland Shire Council commented that it:

… believes that the NSW FOI Act should be amended to remove the requirement for agencies to publish a Statement of Affairs on an annual basis. This statement is not required as more information is available on Council's website. … One suggestion could be that Council publish these details annually on its web site rather than paying $500–$1000, a year to publish in the Government Gazette which nobody reads.[20]

State Super commented that neither document served a public purpose and that 'if we must have the Statement of Affairs and Summary of Affairs they could easily be published on the web. Policy documents affecting people's rights could also be published on the web'.[21]

We agree that, while the information contained in both documents should be publicly available, there is no public benefit to the current system of publishing hard copies once or twice a year.

1.2.2. Contractual information

Section 15A of the FOI Act outlines a number of disclosure requirements relating to government contracts. While agencies comply with this requirement, it can be very difficult to find and access the relevant information. The new Act should require that this information form part of a broader release of information.

---

18 NSW Liberal/Nationals Coalition submission to FOI review.

19 Queensland Government, *The Right to information: a response to the review of Queensland's Freedom of Information Act*, issued 20 August 2008.

20 Sutherland Shire Council submission to FOI review page 8.

21 State Super submission to FOI review, issue 88.

As we noted in the discussion paper, when section 15A was first added in 2006, independent MP Clover Moore commented that:

> *For me, the only major sticking point with the amendments is the exclusion of State-owned corporations from disclosure requirements, which reflects the Government's position … I am concerned that this omission may provide an avenue for evading public disclosure requirements.*[22]

Local authorities were also exempted from the requirement. We can see no public policy justification for these exemptions, and believe that the definition of 'agency' in section 15A should be amended to include state-owned corporations and local authorities. Both of these groups are making use of public funds on behalf of the community, and we should be able to find out how those funds are being spent.

1.2.3. The approach in Local Government

As noted in the discussion paper, section 12(1) of the Local Government Act provides a simple list of information that all local councils must make publicly available, as well as the limited circumstances in which that information can be withheld. This is a practical and effective way of ensuring more information is made publicly available, and we believe it should be considered when planning future proactive release beyond local government. Local Government Act provisions are discussed further in Chapter 2.

1.3. Need to get more out there

The discussion paper included examples of legislative requirements for greater proactive disclosure from the United States, Canada and the United Kingdom. We believe that the publication schemes, disclosure logs and e-reading rooms operating in these countries are excellent developments, and similar systems should be implemented in NSW.

The United Kingdom's *Freedom of Information Act 2000* requires agencies to establish and maintain a publication scheme. Publication schemes provide information to the public about the types of information the agency makes publicly available, the manner in which that information will be made available, and whether it will be necessary to pay to access the information. One of the key components of this system is the requirement that all publications schemes must be approved by the Information Commissioner.

In order to provide agencies with guidance, the United Kingdom Information Commissioner's Office has produced a Model Publication Scheme, which is available from its website. It begins by stating that a publication scheme 'commits an authority to make information available to the public as part of its normal business activities.' It then outlines some suggested classes of information for inclusion:

> ***Who we are and what we do.***
>
> *Organisational information, locations and contacts, constitutional and legal governance.*
>
> ***What we spend and how we spend it.***
>
> *Financial information relating to projected and actual income and expenditure, tendering, procurement and contracts.*
>
> ***What our priorities are and how we are doing.***
>
> *Strategy and performance information, plans, assessments, inspections and reviews.*
>
> ***How we make decisions.***
>
> *Policy proposals and decisions. Decision-making processes, internal criteria and procedures, consultations.*

[22] Clover Moore, MP, NSWPD, 26 October 2006, page 3597.

Our policies and procedures.

Current written protocols for delivering our functions and responsibilities.

Lists and registers.

Information held in registers required by law and other lists and registers relating to the functions of the authority.

The services we offer.

Advice and guidance, booklets and leaflets, transactions and media releases. A description of the services offered.

A similar model scheme should be adopted in NSW to assist government agencies in establishing and maintaining publication schemes.

Another important development to come out of the United Kingdom is disclosure logs. These allow access to information that has already been provided in response to FOI applications. While these will not contain all documents released under FOI, the agency will be expected to select those it believes may be of more general interest to people. Disclosure logs are not a legislative requirement in the United Kingdom, but are considered best practice, and government departments are strongly encouraged to maintain them. We believe that consideration should be given to requiring their creation in the new Act.

The discussion paper also highlighted recent developments in the United States. Since 1996, government agencies have been required to make certain information available on their websites.

More recently, the Sunlight Foundation, a group which advocates greater government transparency and accountability in the United States, went further. They have drafted the *Transparency in Government Act 2008*. Under the heading *Strengthening FOIA*, it provides that:

> *a. Each agency is required to make available all materials contained in the agency's completed response to a FOIA request in a structured database; searchable, sortable, downloadable database; or in a format searchable by text as appropriate.*
>
> > *1. All information is presumed to be available in an electronic format as described above unless the agency demonstrates that excessive cost would place an undue burden on the agency.*
>
> *b. All information provided under subparagraph (a) above shall be made available to the public electronically, free of charge through each agency's Web site.*[23]

It is vital that robust independent oversight and support is provided to agencies on what to release, as well as ensuring information is being made available and is easily accessible. A survey of 149 federal agencies in the United States conducted by the National Security Archive of the George Washington University found that only one in five agencies post all required records and that a great many agency FOI websites were poorly organised and difficult to use.[24]

1.4. Protecting agencies when they disclose information outside of FOI

In the discussion paper we asked if the bona fide release of documents should attract the same protections as release under the FOI Act. Almost all of the submissions that dealt with the issue of proactive release expressed strong support for some form of protection. This included those that were not overly supportive of greater release. We believe such a protection is needed, as it will act as an incentive to releasing a greater amount of information outside of the FOI process.

---

[23] The Bill has been made available for public comment at http://www.publicmarkup.org/bill/transparency-government-act-2008-revised/(last accessed 12 December 2008).

[24] The Knight Open Government Survey 2007, *File not found: 10 years after E-FOIA, most Federal agencies are delinquent.*

1.5. A benefit, not a burden

Many of the agency submissions we received suggested that requiring greater proactive disclosure would be an unnecessary diversion of resources. During our interviews with staff, a number complained that FOI applications from journalists and opposition Members of Parliament caused them a great amount of difficulty and accounted for much of their search time.

Case study

A waste of time

During our audit of agencies, one FOI unit told of their frustrations with a particular opposition MP's office. They had developed a reputation for putting in extremely broad and poorly worded applications for information. The FOI staff would then attempt to assess the work involved in answering the request. When they then requested an advance deposit from the parliamentarian's office, they received no response. This meant they had expended time and effort in defining the scope of the application, only to receive no response from the applicant.

In its submission, the Department of Health commented that:

> *The majority of the applications received by the Department are from either Members of Parliament or the media seeking access to non-personal information. In recent years, these applications have become broader and more complex in the information being sought, which has consequently placed more demands on the FOI Unit to not only determine applications within the statutory timeframes, but also meet the other requirements under the FOI Act such as identifying the documents captured by the scope of the request, reviewing the documents, consultation with third parties and consideration of the comments received.*[25]

Agency staff, both during this review and as part of our ongoing work with the Act, have told us they feel that opposition MPs and journalists have made unfair and imbalanced use of information to either score political points or to create a sensational story.

These complaints, as well as those of journalists about the time taken to process applications, are indicative of a wider problem. The media feel that they are being fed spin, and the agencies feel that their work is unfairly and unevenly represented in order to sell newspapers and grab audiences. This is not a problem that can be solved by improving the FOI system alone. Both sides need to recognise the important role they are meant to perform for the community.

Agencies need to appreciate that releasing a greater amount of information outside FOI will make it more difficult to either craft a damaging story out of partial information or misrepresent the information entirely. When such stories are run, the agency will be able to point to the relevant information — which will be in the public domain — and show that it has been misrepresented. It will allow agencies to hold journalists to account for the standard of their reporting. More importantly, releasing a greater amount of information without the perception it has been 'dragged' out of government, may raise the level of public debate in NSW and lead to a higher level of community consultation and input.

We are aware through our complaint-handling work of situations where journalists have applied for information, paid the relevant fees and charges, only to have the agency release the information they sought to other media outlets at the eleventh hour, denying them the story. It would seem that this is the situation the Solomon review panel was attempting to overcome by recommending information should only be placed in a disclosure log 24 hours after its release to the applicant. We do not believe this time lag is necessary. An agency should be entitled to place information in its disclosure log at any time after its release, no matter who is requesting the information. If this occurs simultaneously with release to the applicant, the fees and charges an individual applicant has paid should of course be refunded.

[25] NSW Department of Health submission to the FOI review, page 1.

1.6. What can be done straight away

While many of the improvements suggested in this report are reliant on legislative change, greater proactive release needs only political will and support to begin now. There have been a number of encouraging developments in recent months. At the Premier's direction, agencies now provide a link on their homepage to the relevant Minister's press releases. This is a very small step, and as Peter Timmins, a regular public commentator on FOI, noted in a radio interview, 'this is New South Wales entering 1995.'[26] The recent publication of the final reports relating to both child protection and the health system on the website of the Department of Premier and Cabinet is a promising development, but there is much more that could be done.

In his submission, Peter Timmins outlined a number of 'Immediate Policy and Management Changes' that we consider to be worthy of consideration by government:

> *Guidance on proactive publication of information on agency websites. Some examples would include the cost of ministerial trips and the cost-benefit analysis of major government spending commitments, the register of interests of members of parliament and government grants made to organisations to carry out functions on behalf of the government. Government agencies should be instructed to ask members of the public, interest groups and others with whom they have frequent dealings, to indicate the type of information that they would find useful if published as a matter of routine.*
>
> *Instruct ministers, for example Education and Health, to examine best practice approaches to the publication of information about performance, such as in schools and health systems.*
>
> *Issue a policy directive that information/documents should be released unless there is clear harm to government, individual or business interests. Documents should not be claimed exempt merely because they technically satisfy an exemption. Those parts of the joint Department of Premier and Cabinet/Ombudsman FOI Procedures Manual that suggest highly technical, narrow legal interpretation of exemption provisions to justify refusal of access, should be withdrawn.*
>
> *Require reporting from all agencies on a set of specified performance measures regarding access to information. Responsibility for performance in provision of information as a service to the public should be assigned to a senior officer in every agency.*
>
> *Ascertain what has happened since former Premier Iemma acknowledged (in answer to question on notice 3347) shortcomings in the disclosure of government contracts on the web, as has been required by law since January 2007, and require prompt action to get an easily searchable website for contract disclosure up and running. The best practice standard is the US Financial Transparency and Accountability Act. Instructions should be issued for the making of a regulation for a similar contract disclosure requirement for local councils.*
>
> *Instruct agencies to re-examine current FOI matters the subject of review by the Ombudsman and the NSW Administrative Decisions Tribunal, or before the Supreme Court or the Court of Appeal with a view to settling or discontinuing any matter which appears to be inconsistent with the Premier's views about the public right to access Government information. In addition any agency that has not responded positively to Ombudsman recommendations in the last 12 months regarding disclosure of information or changes to agency policy and procedures on access to information, should be instructed to re-examine its position.*[27]

The Department of Planning also commented on some areas where it believes there are opportunities to provide a greater amount of information outside of FOI:

- *To individuals, information about themselves, and most information used to make decisions which affect them (subject to life and safety considerations)*
- *All working papers on a policy's development once the policy is published*

---

[26] ABC Radio National, 29 November 2008, *Interview with Peter Timmins and Kelvin Bissett*.
[27] Peter Timmins submission to FOI review, pages 2–3.

- *All working papers behind a decision once the decision is made (subject to life and safety considerations)*
- *All submissions made to government, subject to life and safety considerations, on the assumption privacy considerations have been generally dealt with prior to submissions being received — timing may depend on the decision about which the submission is made.*[28]

In our view these are all practical suggestions that could be explored immediately without waiting for a new Act to be drafted.

NSW has the opportunity to be part of a global move towards more open government. Providing informative, easily accessible information to the public is an important component of this change.

Recommendations

1. The government should continue to actively encourage and require greater proactive disclosure of information by agencies.
2. The new Act should require agencies to produce and maintain some form of publications scheme or reading room, similar to those operating in the United Kingdom and the United States.
3. The new Act should require agencies to produce and maintain disclosure logs, similar to those in the United Kingdom.
4. The new Act should require all publications schemes and disclosure logs to be approved and regularly reviewed by the Information Commissioner.
5. Agencies should no longer be required to produce either Statements or Summaries of Affairs. The new Act should require that the information formerly included in these documents forms part of an agency's publication scheme.
6. The new Act should include state-owned corporations and local authorities in the definition of 'agencies' that are required to disclose contracts they have entered into.

[28] Department of Planning submission to the FOI review, page 3.

Chapter 2.
Access schemes

2.1. How do I get a copy of that?

The answer to this straightforward question is currently very complicated in NSW. There are five different pieces of legislation which specifically address access to public records in NSW:

- *the FOI Act 1989*
- *Local Government Act 1993*
- *Privacy and Personal Information Protection Act 1998* ('Privacy Act')
- *Health Records and Information Privacy Act 2002* ('Health Privacy Act')
- *State Records Act 1998*

Three of these Acts also contain the right to ask that an agency amend its records relating to a person's 'personal information', 'health information' or 'personal affairs'.

Each Act contains a different procedure for obtaining access to information and each Act is the responsibility of a different Minister.

The issue has been under active consideration in a number of forums during 2008 alone. The Australian Law Reform Commission[29] and the NSW Law Reform Commission[30] have both raised issues about how best to address the situation. The Queensland Government has adopted the recommendation of the Solomon review panel to move access and amendment rights for personal information from the FOI Act to a newly created Privacy Act.[31]

In NSW, local councils, but not state government agencies, must also comply with the Local Government Act. Their experiences are therefore inherently different when it comes to navigating the overlapping schemes for accessing information.

2.2. The experience of local councils

Three of the agencies we audited for this review were local councils. We also asked each of the other 149 councils in NSW about the number of requests for information they had dealt with under the Local Government Act, the FOI Act, the Privacy Act and the Health Privacy Act in the last five years. We wanted to know if their staff experienced any difficulties handling such requests.

All three of the councils we audited said they experienced difficulties with the interaction of the various pieces of legislation but spoke particularly about section 12 of the Local Government Act. Subsection (1) of that section lists 29 categories of documents that must be made available for inspection free of charge. Subsection (6) provides that a 'council must allow inspection of its other documents free of charge unless, in the case of a particular document, it is satisfied that allowing inspection of the document would, on balance, be contrary to the public interest'. One council officer we interviewed commented that section 12(6) 'is a FOI Act in one line', with no guidance in the Act or supplementary to the Act to guide staff. Some FOI staff also expressed concern section 12 of the Local Government Act does not afford the same protections as the FOI Act to those releasing information.

---

[29] *For your information: Australian Privacy Law and Practice Report,* Australian Law Reform Commission, May 2008.
[30] *Privacy legislation in NSW* Consultation Paper 3, June 2008.
[31] Queensland Government, *The Right to information: a response to the review of Queensland's Freedom of Information Act*, issued 20 August 2008.

Overall the data we received from all NSW councils shows that:

- requests received under all Acts except the FOI Act have increased from 2002 to date
- the number of FOI requests have decreased over this period
- the largest increase is in the number of requests under the Local Government Act, with the number of requests recorded almost doubling in that time
- the Local Government Act accounts for more than three quarters of all requests received by councils. The true figure is likely to be higher as a number of councils reported they only began keeping records of requests part way through the period we asked about and others said they do not keep records of verbal requests acted on.

Case study

An anomaly with development applications

FOI staff at a council pointed out that you could get copies of development applications from a council for free but had to lodge an application under FOI to see any development application handled by the Department of Planning. This is because section 12(1), which required development applications be made available for free, only applies to councils. The staff pointed out that section 12 seems to show a legislative intent that these kinds of documents should be available free of charge.

A number of councils expressed concern that building consultants and lawyers are using section 12 to view documents at no charge, or obtaining copies of documents for the cost of photocopying, while charging their client a considerable fee, leaving councils to bear the cost of locating the documents.

The suggestion was made by a number of council FOI officers that section 12(6) be removed from the Local Government Act on the basis any applications not covered under section 12(1) can be made under the FOI Act, or alternatively the Local Government Act should be amended to limit or at least provide guidance about the application of section 12(6).

About 80% of councils which recorded data for requests under the Privacy Act reported zero requests. Of the other 20%, most received less than 50 requests, with only a handful receiving more than 50.

The majority of councils also received no requests under the Health Privacy Act. One council received a number, primarily concerning health records and information it held for its employees.

Where councils recorded more than 50 requests under the Local Government Act, the FOI Act or the Privacy Act, they were more likely to experience difficulties with managing the interaction of the various pieces of legislation. Of those which had difficulties, approximately half indicated that it was the way the Local Government Act, FOI Act and Privacy Act interacted that was most problematic. Some of the issues included:

- knowing which Act should take precedence over others
- knowing which Act applies and when
- making decisions that satisfy the conditions of one Act, but may contradict another
- the inconsistencies between the Acts' procedures, exemptions and provisions for timeframes, fees charged, appeals processes and reporting requirements.

One council said the Acts are 'incompatible, complex and confusing'. Another spoke about the different intent of the Acts. While they saw the Privacy Act as existing to protect information that might be considered sensitive, the Local Government Act and FOI Act 'are primarily focused, with certain limitations, on facilitating access to documents'.

A number of councils suggested the current access to information regime contributed to a poor image of councils or lack of confidence in councils due to the inter-relationship between the various Acts.

Case study

Why is it taking so long?

Confusion between the Acts means council officers often seek opinions from colleagues in deciding which Act a request should be processed under while the customer waits at the counter. A council officer told us: 'This all takes time and can create the impression of council incompetence and/or reluctance to cooperate in the mind of the customer.'

Another council officer said: 'Members of the public have difficulty in dealing with the different resources, processing times, costs and access determinations between the different local government areas. These inconsistencies make it difficult to manage the public expectations when seeking access to information'. This impacts on service delivery and customer satisfaction.

2.3. The experience of agencies

Just under a third of the agencies we audited told us they experienced difficulties managing the inter-relationships between the Acts. These included the different access costs applicable under each Act, staff needing support and training to interpret the Acts, and public and staff confusion over which Act applies.

The majority of the agencies have not received requests for personal information under the Privacy Act or Health Privacy Act.

Some agencies said difficulties with the inter-relationships between the Acts is not an issue either because of the way requests are handled at their agency or because not all Acts apply to them. For example, the Department of Premier and Cabinet said it has not experienced difficulties, attributing this to the fact its legal branch deals with all applications and understands the different access rights. NSW Police indicated that, in accordance with its Privacy Code of Practice and Privacy Management Plan, applications under section 14 of the Privacy Act and clause 7 of Schedule 1 of the Health Privacy Act are dealt with as FOI requests so requests are channelled into the FOI process. Sydney Ferries indicated that, as a state owned corporation, they do not fit the definition of a public agency under the Privacy Act or Health Privacy Act and therefore do not receive requests under these Acts.

The two area health services we looked at said members of the public and staff find the distinctions between the various access regimes confusing. They both deal with requests for personal medical records under the Health Privacy Act unless the records contain information of a personal nature about another individual or where there is a risk of harm in releasing the records. These latter requests, along with requests for any other types of documents, are dealt with under the FOI Act.

2.4. FOI and privacy

The FOI Act covers both applications for access to documents held by government about someone's personal affairs as well as documents containing information about non-personal affairs.

Overall the data from our audits showed:

- a steady increase in the number of non-personal affairs applications between 2002 and 2007
- there are still considerably more personal affairs than non-personal affairs applications
- an increase in the number of internal reviews for both personal and non-personal affairs applications
- most applications are for either one or the other, with few being for a mixture of personal affairs and non-personal affairs.

For example, in 2006–2007 just under two-thirds of FOI applications received by the 18 agencies were solely personal affairs and just over a third were solely non-personal affairs. Very few applications received were mixed. Our review of the FOI statistics reported in the 2006–2007 annual reports of over 100 NSW agencies found that almost 70% of applications were for documents relating to personal affairs.

In the discussion paper we observed that in Australian FOI jurisdictions applications for access to personal information are largely successful and if they are refused it is generally for good reason.[32] Our detailed audits confirmed this view. Many have separate systems for dealing with personal and non-personal affairs applications. In some agencies more junior staff handle personal affairs applications in recognition of the more routine, process driven approach taken to such requests. One FOI officer referred to personal affairs applications as being more 'administrative'. Documents requested in personal affairs applications are generally easier to locate and less contentious than much of the information requested in non-personal affairs applications about government policies and decision-making.

The Privacy Commissioner said in his submission to the discussion paper:

> *I suggest that the protection of an individual's personal information is best dealt with by a 'cradle to the grave' approach to regulation which should reflect its life cycle within an agency. Multiplicity of information laws and governance structures relating to access and amendment of personal information potentially compromises the protection of personal and health information in its life-cycle. One of my aims in the oversight of the Privacy and Personal Information Protection Act 1998 (NSW) and the Health Records and Information Privacy Act 2002 (NSW) has been to harmonise dealings with personal and health information across the public sector. I therefore support the continued inclusion of the access and amendment provisions for personal information within the PPIP Act. I also support the proposal that the FOI Act be amended to make clear that first party access to and amendment of personal information should be sought through the PPIP Act.*[33]

It is clear that while both types of applications are important, it could be argued there are no compelling reasons for them both to be dealt with under the FOI Act.

As Peter Timmins put it: 'Two statutes, one dealing with personal information of an individual, the other dealing with other information, would provide a better framework than the current system'.[34]

However, Megan Carter, an experienced FOI consultant and trainer, sounded a note of caution:

> *This is a perennial dilemma with FOI and Privacy legislation. The recent Queensland proposals to split requests for personal and non-personal requests will face difficulties with any 'mixed' requests, similarly in the UK which made a similar split between their FOI and Data Protection Acts. The interface between the two Acts in the UK is extremely complex (UK FOI Act s40) and confuses even FOI practitioners. It is not possible to have them mutually exclusive, because even a request for personal information involving oneself and family members is not clearly a 'personal' request. The Privacy Act would still need the same sort of exemptions to protect third party information as there are in FOI. Therefore I would favour a single statute for personal and non-personal requests. This would not take away from other*

[32] Discussion paper 9.2.
[33] NSW Privacy Commissioner submission to the FOI review.
[34] Peter Timmins submission to the FOI review, page 10.

statutory or administrative rights of access to personal and non-personal information.[35]

The current system needs rationalising. No one solution addresses all of the challenges. On balance, having considered the various possibilities, we agree with the NSW Council for Civil Liberties which said in its submission:

> *CCL appreciates there are well argued differing positions on this issue but on balance is swayed by the basic point that 'FOI and privacy are not necessarily consistent values'.*[36] *The Solomon Report is the latest major review to recommend the transfer of personal information matters to separate privacy legislation arguing that this will bring benefits to both users and administrators. This separation of personal information issues from the FOI should be done in conjunction with an overall rationalisation, and where appropriate, consolidation, of legislation relating to both privacy and FOI issues.*[37]

We agree there would need to be an appropriate interface between the two statutes and that this should be as straightforward and practical as possible. The UK difficulties referred to by Megan Carter appear to be due in large part to the complex structure of section 40 of the UK FOI Act and its references to concepts and principles in the Data Protection Act. In contrast, the definition of a mixed application in the Queensland draft Right to Information Bill is simple and the Bill places an onus on the agency to 'make appropriate administrative arrangements to process mixed applications'.[38] Care should be taken not to replicate the UK problems in NSW but we are confident the challenges are not insurmountable and that, on balance, there are significant benefits to be gained.

Subjecting applications for personal information to the same process as applications for government information puts in place unnecessary barriers. Some agencies have already begun to demonstrate, within the confines of the current system, that personal information requests could be dealt with in a different, more streamlined way.

However, it is essential that if applications for personal information are moved, it is to a system which is complementary to FOI with the same principle of accessibility and the same stages of review, albeit potentially to different bodies.

Definitions should also be the same. In particular the term 'personal affairs' is used in the current FOI Act while the Privacy Act refers to 'personal information'. The same term with the same definition should be used in both Acts and should reflect the decision in the *Commissioner of Police v District Court of NSW and Perrin*.[39]

In relation to the Health Privacy Act, NSW Health advised the Ombudsman in 2004 that the primary reason the government proceeded with the legislation was the need to ensure health information could be shared when treating patients, addressing public health risks and so on. The department told us that Privacy NSW only offered public interest directions on a temporary basis which provided no long term certainty for health services staff.[40] While acknowledging it was important to address the impact of the Privacy Act on health service provision, we would question if introducing an additional Act was the best way to proceed rather than addressing the concerns by amending existing legislation. Certainly the introduction of a further piece of legislation to this area added to the complexity of trying to access information.

This review has not considered privacy directly. If our recommendation to move applications for personal information from FOI to privacy legislation is adopted, the government should review the privacy regime to ensure the two systems are similar in structure.

2.5. Amendment of records

The agencies we audited reported receiving few amendment applications. Our review of the FOI statistics from the 2006–2007 annual reports of over 100 NSW agencies found that only

---

35 Megan Carter submission to the FOI review, page 27.
36 NSW Parliamentary Library Research Service: Freedom of Information — Issues and Recent Developments No 6/07.
37 NSW Council on Civil Liberties Inc submission to the FOI review, page 18.
38 Section 8 public consultation draft Queensland Right to Information Bill 2009.
39 (1993) 31 NSWLR 606.
40 Letter dated 11 May 2004 from NSW Health to the NSW Ombudsman.

37 amendment applications were reported in the context of 12,500 FOI applications to these agencies. A number of FOI staff commented they thought it was important there is a right to amend incorrect personal information but the amendment provision in Part 4 of the FOI Act is largely used to add a notation. This occurs where an agency has refused to amend its records — because it does not agree with the applicant that the record is 'incomplete, incorrect, out of date or misleading'[41] — but permits a notation setting out the respects in which the applicant claims the record is deficient as well as the information the applicant believes is necessary to complete the record or bring it up to date.

There is currently no limitation on the contents of a notation. Both the Western Australia and Commonwealth FOI Acts provide that an agency does not have to accept a notation if it considers it defamatory or unnecessarily voluminous. In our view, based on our experience in dealing with complaints, such a limitation could usefully be included in NSW legislation.

2.6. Simplification of access schemes

We therefore recommend significant simplification of the legislative regime. Rather than the current overlapping legislative system, two main Acts should deal with access to information. Access and amendment rights for personal information should be dealt with under the Privacy Act and for non-personal information under the FOI Act.

Section 12(1) of the Local Government Act should be retained as it works well and is in effect an open disclosure system for local government. However, section 12(6) should be repealed. Having two separate regimes to request council information, which operate in different ways, has led to unnecessary confusion and complexity. Requests for council information should be dealt with under the new Act.

Recommendations

7. Access and amendment rights for personal information should be moved from the FOI Act to the Privacy and Personal Information Protection Act.
8. The Health Records and Information Privacy Act should be repealed and either:
   a. the Privacy and Personal Information Protection Act is amended to cover the issues dealt with in the Health Records and Information Privacy Act

      or

   b. the Privacy and Personal Information Protection Act is amended to provide the Privacy Act (Commonwealth) applies to health records in NSW or the NSW health records jurisdiction is vested in the Commonwealth.
9. The new Act should focus on access rights to non-personal information.
10. The term 'personal information' should be used in both the new Act and Privacy and Personal Information Protection Act and should have the same definition. This definition should reflect the decision in *Commissioner of Police v District Court of NSW and Perrin*.[42]
11. Section 12(1) of the Local Government Act should be retained and section 12(6) repealed.
12. A limitation should be placed on the right to add a notation to information to the effect that an agency does not have to accept a notation if it considers it defamatory or unreasonably voluminous.

[41] Section 46 FOI Act 1989.
[42] (1993) 31 NSWLR 606.

Chapter 3.
How do we make it work: objects and intentions of the new Act

3.1. A new start

Under the new model we are proposing, applying for access to information will be the avenue of last resort for members of the public to obtain government documents containing non-personal information. It will no longer be the first port of call as proactive disclosure should negate the need to make formal applications for many documents.

We believe the most effective way of achieving a new start is to adopt a new Act. New objects and intentions will therefore need to be drafted and, critically, there has to be a cultural shift across government in favour of the provision of information.

3.2. What we have now — *Freedom of Information Act 1989*

The objects of the current FOI Act read well:

> *1) The objects of this Act are to extend, as far as possible, the rights of the public:*
>
> *(a) to obtain access to information held by the Government, and*
>
> *(b) to ensure that records held by the Government concerning the personal affairs of members of the public are not incomplete, incorrect, out of date or misleading.*

Section 5(3) contains an express statement about how Parliament wants the Act interpreted:

> *(3) It is the intention of Parliament:*
>
> *(a) that this Act shall be interpreted and applied so as to further the objects of this Act, and*
>
> *(b) that the discretions conferred by this Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.*

All fine sentiments. However, 20 years after this provision was passed into law, Premier Nathan Rees acknowledged on 23 October 2008 that there was still a need to 'turn the Freedom of Information system on its head to end a culture of secrecy within the Government and bureaucracy'.[43]

The discussion paper asked a number of questions about what the objects of an amended Act should contain to achieve the pro-disclosure approach promised in the current Act but clearly not being realised in NSW.

3.3. New objects?

A new objects clause should be a clear statement of the core principles of the legislation; a clear articulation of its essential purpose. We agree with the Solomon review panel when it summarised the object of FOI legislation as being 'to provide the right of access to information held by [the Government] unless, on balance, it is contrary to the public interest to disclose that information'.[44]

---

[43] Premier of NSW *Rees acts to end Government 'secrecy'*, media release, 23 October 2008.

[44] FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 76.

Rick Snell, a university academic with a particular interest in FOI, was emphatic about the change necessary in NSW:

> *The objects provisions must be amended to emphasise transparency as a core function and mandated government policy program of government. The section should emphasise that access to information is a core democratic right of all citizens and that governments need to respect and implement this right.*[45]

Peter Timmins pointed out in his submission:

> *In Australia the requirement to consider access because of the potential for government information to contribute to community advancement is not reflected in the objects of freedom of information legislation. NSW has an opportunity to provide leadership in a new aspect of the access to information debate.*[46]

The Commonwealth Freedom of Information Amendment (Open Government) Bill 2003[47] addressed this issue with a proposed objects clause which said in part:

> *(1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth:*
>
> *(a) to enable people to participate in the policy, accountability and decision-making processes of government; and*
>
> *(b) to open the Government's activities to scrutiny, discussion, comment and review; and*
>
> *(c) to increase the accountability of the executive branch of government.*

We recommend the objects of the new Act should be:

- to provide the right of access to information held by the NSW Government unless, on balance, it is contrary to the public interest to disclose that information
- to enable people to participate in the policy and decision-making processes of government, to open government activities to scrutiny and to increase the accountability of government.

While the new Act should also state explicitly that there is a presumption for release of information in response to applications, as well as an onus on agencies to automatically release information about their operations without it being asked for, these statements should be made elsewhere in the Act. These are not 'objects' of the legislation but are important statements to include.

To reinforce the fact the new Act promotes the right to information, the Act should also place the onus on agencies to demonstrate to any external reviewer that all exemptions claimed clearly apply, similar to the onus in the existing section 61 of the FOI Act.

3.4. Title of the Act

'Freedom of Information' could be said to be a misleading title, not least because the Act does not give people freedom to access all government information and access is not free of charge. If there is to be a fresh approach to FOI, a new name could also be a symbol of this new start. The discussion paper asked if the title should be kept and, if not, what title would better reflect the purpose and operation of the legislation.

Some submissions, such as that from the City of Sydney Council, supported keeping the title FOI Act saying 'the title of the FOI Act is relevant to the contents of the document and should be retained'.[48]

---

45 Rick Snell submission to the FOI review, issue 1.
46 Peter Timmins submission to the FOI review, page 5.
47 Introduced by Senator Andrew Murray Bill number 03123.
48 City of Sydney Council submission to the FOI review, chapter 2.

Megan Carter said:

> *While 'Freedom of Information' is not the most accurate title, it has a great deal of recognition from the public and within the public service. It is also the most widely used title in Australia and internationally. None of the alternative titles are strictly any more accurate than 'FOI': 'Right to Information' — it is not an absolute right; 'Access to Information' is also not an absolute, and in all cases, it is more accurately about access to 'documents' more than 'information'.*[49]

However, many who commented on this issue supported a new title for new legislation often on the grounds the current title was 'confusing and misleading'[50] or similar.

One submission suggested the 'Official Information Disclosure Act'[51] and another 'Access to Documents Act.'[52] Peter Timmins thought:

> *NSW should follow the lead of Queensland by renaming the legislation the Right to Information Act.*[53]

Sutherland Shire Council suggested:

> *… there is merit in the suggestion of renaming the FOI Act to something that more realistically reflects the ability of individuals to obtain information from government agencies. As the Act contains provisions relating to accessing information held by government agencies, the most suitable title of any reviewed Act would be the Access to Information Act.*[54]

A change in name can be a powerful symbol, a line being drawn in the sand and the start of a new approach to providing information to citizens in NSW. We have carefully considered the various suggestions put forward. This report is about opening up government in NSW. Agencies will be required to proactively release information without it being asked for and the system for requesting information will be streamlined. A new title should reflect this framework.

We therefore recommend the new Act be called the Open Government Information Act. Practitioners could be called Information Officers and they would handle Information applications. The new system would be overseen by an independent Information Commissioner.

3.5. Drafting style

Modern business writing, at least in principle, strives to be clear, concise and unambiguous. Many agencies send their staff to plain English courses and put considerable effort into producing easily read and unambiguous publications. The legislation governing our lives should also be written in clear, easily understood language. The current Act, drafted some 20 years ago, is certainly not written in plain English.

Government should ensure the new Act does not replicate the problems in the current legislation, where the way it is written encourages disputes about its provisions.

NSW Police Force said:

> *The FOI Act would benefit from clear, approachable and unambiguous language that relies on statements of principle. However, NSWPF submits that particular detail is still required in depicting various exemptions to prevent ambiguity.*[55]

In addition to using clear language, significant improvements may be achieved by drafting the legislation focusing on policy and principle for discretionary matters or absolutes where there is no discretion. The New Zealand Act is an example of a policy level Act which has produced little litigation.

---

49 Megan Carter submission to the FOI review, page 1.
50 Phillip Youngman submission to the FOI review, issue 5.
51 Denis Fitzpatrick submission to the FOI review, issue 6.
52 City of Canterbury Council submission to the FOI review, page 2.
53 Peter Timmins submission to the FOI review, page 6.
54 Sutherland Shire Council submission to the FOI review, page 4.
55 NSW Police Force submission to the FOI review, chapter 2.

The Department of Planning saw there being further efficiencies:

> *We believe any carefully considered steps that create a more understandable and accessible Act would be welcome by the majority of agencies and the public. They would lead to greater use of the Act and through quicker, more straightforward training [of] more officers within agencies able to competently deal with FOI applications.*[56]

3.6. Culture and leadership

A significant cultural shift is needed across NSW government agencies to give practical meaning to the objects and intentions of a new or amended Act. Much criticism is levelled at public servants for not releasing information. While some criticism is undoubtedly warranted, the government as a whole, as well as individual Ministers and heads of agencies, are responsible for setting the tone and cultural expectations which support the release of information. We heard frequent comment from agency staff in the course of this review that proactive disclosure of information was clearly sensible but their Minister and/or CEO would not countenance this.

We interviewed FOI officers in some agencies conscientiously applying the objects of the current Act who spoke of having to educate senior colleagues about their obligations to release information.

So how can the necessary cultural change be achieved? Such change is an immense challenge, but having considered the broad range of submissions, our interviews with 70 FOI practitioners, our 20 years of experience in reviewing the implementation of the Act and a review of academic and other commentaries, we believe there are a number of key elements which are discussed below.

3.6.1. New stronger objects clause

A strong objects clause in the Act as discussed above will be an important part of setting a new tone. As Rick Snell said:

> *The aim should be to create a pro-disclosure system where the FOI Act is only resorted to when deciding difficult access issues or when governments or agencies drift too far towards secrecy or non-compliance with the objectives and the requirements of the legislation.*[57]

3.6.2. Support from the top

A genuine shift to open and accountable government must be led from the top. The Premier, all Ministers, the Department of Premier and Cabinet and CEOs will need to make clear and unambiguous statements supporting the objects and intentions of the FOI Act. And these will have to be repeated regularly. Change will not come overnight. Rather, entrenched attitudes and concerns about proactively releasing information and responding to FOI requests will take time and concerted attention to shift.

Leading by example will be crucial. The new obligation on agencies to proactively identify documents for release will provide an ideal opportunity for heads of agencies and senior managers to demonstrate their personal commitment to the new approach. By actively earmarking documents for release as they are produced, CEOs can send a strong message that this is how business is to be done from now on.

---

[56] Department of Planning submission to the FOI review, page 1.
[57] Rick Snell submission to the FOI review, page 1.

3.6.3. An Information Commissioner: guardian of the new system

The new system will need a guardian, a proponent of the objects and spirit of the legislation. The need for an Information Commissioner is discussed in detail later in this report. External leadership, independent of government, will be an essential element in changing culture and providing a robust support mechanism for those working in agencies to bring about change. One of the statutory responsibilities of the Information Commissioner should be the production of guidelines giving clear direction about what is expected.

3.6.4. Protections for Information Officers

It is essential that the new Act contains robust measures to ensure the independence of those responsible for implementing the system. The Act should clearly state that Information Officers must perform their functions impartially and independently, free from pressure from within the agency or Minister's office. It is clear from our experience dealing with complaints, as well as talking to FOI officers for the purpose of this review, that it can be a difficult job on occasion. Officers can be isolated and exposed to pressure. There need to be proper protections in place to ensure Information Officers are free from interference and are protected carrying out their work.

Currently the Act refers to an officer being 'directed' to deal with a FOI application 'on behalf of an agency'.[58] It is a well established administrative law principle that when exercising delegated powers you must do so independently. The term 'directed' is less clear and could lead to an argument FOI officers are not exercising delegated powers but are rather acting in accordance with a direction. This should be addressed in the new Act.

Under the new regime, each agency should have one or more positions formally designated as Information Officers with delegated authority from the CEO to determine applications. In accordance with long standing administrative law principles the CEO should not dictate how the delegation is exercised in any particular case, but would still retain the discretion to make a determination themselves. This is not encouraged as it removes the applicant's right to an internal review as there is no more senior officer to conduct the review. However, if a CEO feels strongly about how an application should be determined, the CEO should make the determination themselves and sign the letter of determination. They should not try to direct the Information Officer as to the determination they are to make.

We suggest the Information Commissioner should have the following responsibilities in relation to Information Officers:

- provide, or certify, mandatory training
- support practitioners including through the FOI and Privacy Practitioners' Network
- provide comprehensive guidelines on the operation and implementation of the new Act
- investigate allegations of:
  - improper pressure being applied to officers performing duties under the new Act
  - alleged detrimental action taken against officers arising from the performance of those duties
  - alleged breaches of the new Act by agencies or officers.

Offence provisions in relation to improper attempts to pressure Information Officers should be included in the new Act to clarify and give support to the independent role of decision-makers. As the Department of Planning said in its submission:

> [offence provisions] *would provide FOI practitioners with a valuable tool at present lacking in explaining to their agencies the independent nature of FOI decisions expected by the Act.*[59]

[58] Section 18 FOI Act 1989.
[59] Department of Planning submission to the FOI review, page 2.

3.6.5. 'Management' of applications

It became clear during our review that all agencies carefully manage what are generally referred to as 'contentious' FOI applications. Staff in many agencies struggled to define contentious applications but basically told us 'you know one when you see one'. Contentious applications generally seem to include all applications from opposition MPs and journalists, plus individual applications from special interest groups that are identified on an ad hoc basis. The common characteristic is the possibility of bad press and embarrassment for the agency, Minister or government of the day.

When we asked what, if any, central reporting arrangements are in place, the Department of Premier and Cabinet told us:

> *It is the long standing practice of each Minister's Office to provide DPC with a fortnightly report about the status of its portfolio agencies' FOI applications. These returns are compiled into a single document and provided for information only, in a report form, to the Senior Executive DPC and the Premier's Office. Although the exact origins of this practice are unclear, it appears that reporting FOI applications on a fortnightly basis to the Premier's Office has been in place since 1989.*[60]

The Department of Premier and Cabinet subsequently provided us with a copy of a memorandum to all chiefs of staff dated 18 September 2008 reminding them of this reporting obligation.

Our further research located a copy of an email from the then Premier's Department to ministerial offices in 2001. The email is reminding ministerial offices to report each fortnight on 'all new and current contentious FOI applications… These applications will often be from the Opposition or the media. Contentious FOI issues being brought before the Ombudsman, Administrative Decisions Tribunal or other superior courts should be included'. Clearly the practice had been established some time earlier and is based on ministerial offices being notified of all 'contentious' applications being handled by their respective departments.

It is not unreasonable for a government or Minister to want to be made aware of applications that could result in it having to deal with a controversial issue when the documents are released. The danger is in the detail, or lack thereof, of the process used and the failure to make absolutely clear that the communication flow should be in one direction only — from the agency up the reporting chain.

While some agencies have a clearly documented and well understood process of both how and why applications are notified on receipt and copies of finalised determinations are sent to their Minister's office, others are much less clear. Alarmingly we came across a number of agencies where copies of determinations are not sent to applicants until the agency has heard back from the Minister's office. FOI staff were often unclear what they are waiting for and delays could run into weeks. This is not appropriate and raises questions about the role Ministers' offices are playing in the FOI process. Of even more serious concern is the practice of sending draft determinations to a Minister's office. We have recently had cause to make such conduct the subject of a formal investigation under the Ombudsman Act and have made a series of recommendations about the inappropriateness of such a practice including that it should cease immediately.

At the moment one of the key safeguards in some agencies appears to be a robust and confident attitude by FOI staff, or their managers, who expressed a willingness to contact ministerial staff if necessary about the obligations of the FOI Act. They were very clear they were notifying receipt of applications and copies of finalised determinations for information purposes only. Other FOI staff were far less certain how they would handle conflict with their Minister's office. A number of agencies lamented the lack of understanding of FOI by ministerial staff.

---

[60] Response dated 11 July 2008 to notice under s.18 of the *Ombudsman Act 1989.*

In some agencies media staff prepare press briefings to accompany determinations when they are notified to the head of agency and Minister's office. This is generally acceptable provided this is kept separate from the decision-making process. We noted during our review that the location of FOI units in agencies varies, with units in the agencies we audited being differently located in corporate governance, executive support, legal or records sections. Kelvin Bissett, Investigations Editor with *The Daily Telegraph*, identified the location of FOI units as an important issue:

> *The physical integration of the FOI function with the media relations function in various agencies* [is an issue of concern]. *It is not uncommon for these two functions to be nearby in the one open plan office area. It is not unusual for media relations officers to answer phone calls seeking FOI officer… FOI applications should be handled under the Act, not viewed as part of a wider issues management strategy.*[61]

We agree. As well as it being essential for there to be no media staff involvement in the assessment and determination of applications, if a new culture of proactive release of information is to thrive, agencies must resist the temptation to 'media manage' everything which is released. We appreciate all governments have an interest in presenting information in the most favourable light and there is a public benefit in clarifying a message or managing fall out. But proactive disclosure of documents is about government accountability, not media presentation. The release of information and media management should remain two distinct roles.

Similarly it is not appropriate for FOI staff to be placed in ministerial liaison units.

Recommendations

13. The FOI Act 1989 should be replaced by a new Act called the Open Government Information Act.
14. The new Act should be drafted in plain English.
15. The objects of the new Act should be:
    a. to provide the right of access to information held by the NSW Government unless, on balance, it is contrary to the public interest to disclose that information
    b. to enable people to participate in the policy and decision-making processes of government, to open government activities to scrutiny and to increase the accountability of government.
16. In the new Act discretionary matters should be drafted in terms of principle and policy rather than prescriptive detail.
17. The new Act should emphasise that the implementation of the legislation and ensuring proper transparency must be considered by the government of the day, Treasury and all agencies as a core function of government.
18. The new Act should place an onus on agencies to proactively release information about their operations.
19. The new Act should state there is a presumption that agencies will release documents on application unless a reason for refusal, read narrowly, clearly applies.
20. The new Act should place an onus on agencies to demonstrate to any external reviewer that all reasons for refusal clearly apply.

[61] Letter to the Ombudsman 11 August 2008.

21. The CEO of each agency should designate one or more positions as Information Officers with delegated authority to determine applications.

22. The new Act should state that Information Officers must perform their functions impartially and independently.

23. Information Officers should be required to attend training on their appointment which is provided or certified by the Information Commissioner.

24. The following offence provisions should be included in the new Act:

    a. for any person to place undue pressure on decision-makers to influence a determination

    b. for decision-makers to wilfully fail to comply with the requirements of the Act.

25. To ensure the independence of staff, consideration should be given to where they are located both in the organisational structure of an agency and their physical work location.

26. The Premier should issue a memorandum to all Ministers:

    a. making clear that determinations are to be made by agencies on their merits, based solely on the criteria set out in the new Act and independent of any political influence or considerations

    b. requiring them to ensure CEOs within their portfolio are aware of the obligation to implement the letter and spirit of the new Act.

Chapter 4.
Scope of the new Act

4.1. What can I ask for?

This chapter deals with what should be covered by the new Act and how to make sure it can be found by agencies and provided to applicants in a useful format. It also considers some of the challenges, as well as the benefits, of the electronic age.

4.2. What should be covered

4.2.1. Information in the mind of officials?

Access schemes in all Australian jurisdictions, Canada, the USA and UK are about documents — some form of paper or electronic record. In contrast the New Zealand Official Information Act goes further and covers information in the minds of public officials that may not have been recorded.

We asked in the discussion paper if the scope of the current Act should be broadened to include information not in documentary form. Most saw the New Zealand model of including what is in the mind of officials as too broad a change, but many saw the need to update the FOI Act to reflect the increasing use of electronic rather than paper-based record management systems.

In relation to the New Zealand model of including 'information' in its broadest form, City of Canterbury Council had a straightforward answer:

> *Such information is seen as an opinion or expert advice from the agency and we are of the view that this type of request is better dealt with as a request for advice from the relevant agency officer qualified to deal with such enquiries.*[62]

Megan Carter concurred:

> *In effect, applicants could simply ask a series of questions of agencies, requiring creation or compiling of responses. Much of this would have to be done by people with detailed knowledge of the subject matter, rather than by centrally located FOI Officers with knowledge of FOI rather than specific topic area. FOI Officers could still coordinate but they could not easily complete such responses.*[63]

The Department of Primary Industries said succinctly:

> *Compliance would be difficult to demonstrate and unlikely to satisfy an aggrieved applicant.*
>
> *Information held 'in the mind' of a public official is essentially a personal opinion and has no Departmental impact or status until it is applied, documented or actioned.*[64]

We agree. There is clearly a place for people to ask questions and seek clarification of the reasons for decisions and actions of government, but this should be kept separate to FOI. Information is forgotten over time and memories can become inaccurate. If the information is at all contentious rationalisation is likely and the risk of selective recall is real. If the information is not contentious and the person has an interest in it, it is our experience agencies are likely to provide such information without a formal request being made.

It is important for agencies to create and maintain full and accurate records of all important discussions and decisions, reducing the need to rely on memories.

---

62 City of Canterbury Council submission to the FOI review, page 3.
63 Megan Carter submission to the FOI review, page 2.
64 Department of Primary Industries submission to the FOI review, issue 8.

4.2.2. Bringing the legislation up to date

Bringing the Act up to date to reflect the electronic age is a complex and challenging task and there are varied opinions about how best to do this.

'Documents' are defined broadly in the current Act to include 'any paper or other material on which there is writing or in or on which there are marks, symbols or perforations having a meaning' and 'any disc, tape or other article from which sounds, images or messages are capable of being reproduced'.[65] A separate section then deals with 'Information stored in computer systems etc' providing if:

> *(a) it appears to an agency that an application relates to information of a kind that is not contained in a written document held by the agency, and*
>
> *(b) the agency could create a written document containing information of that kind by the use of equipment that is usually available to it for retrieving or collating stored information,*
>
> *the agency shall deal with the application as if it were an application for a written document so created and shall be taken to hold such a document.*[66]

The discussion paper asked if this definition is still appropriate.

Peter Timmins said:

> *An access regime based on documents is not consistent with the use of digital technology for information management within the public sector. The Act should stipulate that the response to a request should be based on information held in systems, not primarily written documents, as is currently the case.*[67]

State Records said:

> *Consideration should be given to broadening the scope to encompass recorded information in any format or material form to avoid any potential limitations that might be imposed by use of definitions reliant on reference to documents or documentary form.*[68]

A 'record' in the State Records Act is defined as 'any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means'.[69]

We agree with the sentiments of both these submissions. We recommend that the new Act contain a definition that reflects the range of formats used to record information other than just paper and should be consistent with the definition of 'record' in the State Records Act.

While a definition based on paper files and documents is too narrow, many agencies pointed out in their submissions that just because information is held electronically does not necessarily mean it is possible to produce unlimited combinations of that information. Expecting an agency to write new computer programs to satisfy an individual's request may not be reasonable.

NSW Police Force is of the view there should be limits to how far an agency is required to manipulate its databases to produce requested information:

> *Any amendment* [to the Act] *must address that manipulation of databases to create documents is not required ……. For example, NSWPF receives a number of applications of a non-personal nature that request statistical information. While this information is readily made available where possible, the operations of the agency must be taken into account in determining what is a reasonable response to such an application and what, if any, manipulation of databases is required in order to produce a document that responds to the requests under the FOI application.*[70]

---

65 Section 6(1) FOI Act 1989.
66 Section 23 FOI Act 1989.
67 Peter Timmins submission to the FOI review, page 6.
68 State Records submission to the FOI review, page 2.
69 Section 3 *State Records Act 1998*.
70 NSW Police Force submission to the FOI review, page 11.

The Department of Premier and Cabinet said:

> *Many of the applications received by the Department relate to information held in databases. It is not simply a matter of retrieving and printing the data in hardcopy, particularly in circumstances where the applicant seeks a limited subset of data contained in the database. Retrieving the information will often require a special report to be prepared, and the creation of software to retrieve the information. While a strict application of* [the current provisions of the FOI Act] *would prevent this occurring, the Department takes a practical approach and seeks to accommodate such requests. The Department would not object to this being reflected in the legislation, subject to appropriate conditions so that it does not result in unreasonable demands being placed on agencies.*[71]

There was acknowledgement in submissions that this is a growing area of concern. Megan Carter summed up the practical difficulties:

> *Programmer time is scarce and expensive for agencies, and they frequently have backlogs in dealing with their own internal requests for information. I do not think that* [allowing an applicant to view the information at the office of the agency] *is really the answer to most situations — it is more that the applicant is asking for answers from a database/system which it is not designed to produce (correlating elements within fields, extracting for period of time or subsets of data). It is not so much a matter of producing in writing, as of producing at all, even on screen.*[72]

We recommend the definition of what can be accessed under the new legislation should be similar to the provision in the Newfoundland and Labrador Access to Information and Protection of Privacy Act where an agency must produce records of information held in electronic form where:

> *(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and*
>
> *(b) producing it would not interfere unreasonably with the operations of the public body.*[73]

4.3. NGOs and private organisations

The discussion paper asked if the new Act should be extended to non-government and private sector bodies that carry out public functions on behalf of a public sector agency or receive significant public funding.

There were varied opinions about this issue, including amongst those with considerable experience of 'contracting out' services.

The Public Interest Advocacy Centre said:

> *In light of the NSW Government's recent move to increase privatisation of services such as superannuation administration and electricity, PIAC considers that the extension of the FOI Act proposed in issue 32* [of the discussion paper] *would be warranted in most cases, but recognises that this is a complex issue.*
>
> *For example, many organisations that are recipients of government funds are independent, not for profit charitable organisations that rely on volunteers to carry out their objectives. One of the main reasons that they have sought — and been granted — government funding is that they are carrying out community service obligations or achieving community objectives, the pursuit of which are generally unprofitable.*[74]

---

71 Department of Premier and Cabinet submission to the FOI review, pages 7–8.
72 Megan Carter submission to the FOI review, page 14.
73 From section 10 Newfoundland and Labrador Access to Information and Protection of Privacy Act.
74 Public Interest Advocacy Centre Ltd submission to the FOI review, page 19.

Housing NSW said:

> *Housing NSW engages a number of contractors to carry out functions on their behalf. This proposal could mean serious resource and cost implications for those contractors which would be passed on to Housing NSW. This proposal has unintended and possibly large economic consequences on agencies.*[75]

The Department of Ageing, Disability and Home Care said:

> *DADHC considers that publicly funded NGOs and other private sector bodies should not be burdened by a requirement to comply with the FOI Act. Such a requirement could be a barrier of entry to a sector where the government needs increased capacity. It would also divert resources away from direct service provision. The NGO sector also lacks resources, skills and appropriate personnel to properly implement an FOI program or function.*[76]

The Department of Juvenile Justice said:

> *We provide funding for non-government organisations to provide care for young offenders on Community Service Orders. This involves these organisations in Departmental policy, operations and the 'personal information' of young offenders within the jurisdiction of this Department. We consider such organisations should be subject to the FOI Act insofar as their operations are contracted by and/or funded by any NSW government agency.*[77]

In its report *The Contracting Out of Government Services*, the Administrative Review Council looked at various options to ensure that access to information relating to government services is not lost or diminished as a result of the contracting out process. Its preferred option was to deem documents in the possession of the contractor that relate directly to the performance of their contractual obligations to be in the possession of the government agency.[78]

There are two issues here. One is whether non-government and private organisations performing services on behalf of government should be subject to the same openness obligations in relation to information about those services as a government agency would be. Our concluded view is that they should. Government should not be able to avoid the usual accountability processes by contracting out services. Contracting out is becoming increasingly common and considerable public money now goes to non-government agencies to do what public sector agencies have traditionally done.

The second issue is then whether all those who provide contracted out services have the capacity to deal with applications to access information. We would argue that many do, but acknowledge some smaller NGOs in particular would have neither the capacity nor the infrastructure to handle such requests.

This responsibility must be seen as one of the costs of doing business with government — there are clearly many benefits as well. Many large organisations have contracts with government and would have the necessary internal structures and resources to handle this responsibility. We are persuaded by Megan Carter's practical solution:

> *…if government functions have been outsourced or are being dealt with on a contract for services basis, the records so generated should be subject to FOI exactly as they would have been in the hands of the government agency itself. This should be stated explicitly in the contract with the service provider. In terms of the work, there is the option that they themselves could provide the FOI access, or they could transfer the relevant documents back to the outsourcing government agency to process under FOI.*[79]

We therefore recommend that the new Act is extended to records held by non-government and private sector bodies which relate directly to contracted out services performed on behalf of a public sector agency. This would include documents which pre-date the contract, provided to the contractor by the agency to enable them to perform the contracted services.

---

75 Housing NSW submission to the FOI review, issue 32.
76 Department of Ageing Disability and Home Care submission to the FOI review, page 2.
77 Department of Juvenile Justice submission to the FOI review, page 3.
78 Administrative Review Council, *The Contracting Out of Government Services Report* No. 42 August 1998 at 5.21.
79 Megan Carter submission to the FOI review, page 8.

The Act should contain a provision permitting either the contractor or government agency to handle an application for such information. Where government contracts with an agency to provide services on behalf of the government, those contracts should specify the arrangements for access to information, i.e. whether the contractor will handle all applications or if they will be transferred immediately to the contracting agency which will be deemed to 'hold' all relevant documents and have the right to require their production by the contractor.

Personal information contained in documents relating to the performance of such contracted services should also be available under the Privacy Act. This issue should be looked at as part of the government's broader consideration of the privacy regime.

4.4. Parliament

The discussion paper raised the issue of whether the Houses of Parliament should be included in the ambit of the new Act. Other jurisdictions including India, South Africa, Ireland and the United Kingdom have brought Parliament into their legislative schemes governing access to information. Currently the Legislative Council and Legislative Assembly are specifically excluded from the definition of public authorities and therefore from the scope of the NSW FOI Act.[80]

Few submissions commented on this issue. Where comment was made it was largely supportive of Parliament being included. For example, PIAC said:

> *In general, PIAC considers that all aspects of government should be covered by the FOI Act, subject to limited exemptions aimed at balancing the rights of the public to access government held information against the need to protect legitimate government and public interests in certain documents remaining confidential.*[81]

We agree the Legislative Council and Legislative Assembly should be included in the ambit of the new Act.

Some submissions also raised coverage being extended to documents held by MPs. Such comment was limited to a small number of submissions and this review has not looked at the issue in any detail. We therefore make no recommendation in this regard but the possibility of including MPs in the scope of the Act should be actively considered in the first full review of the new Act to allow proper consideration of what is a complex issue.

4.5. Courts and tribunals

The judicial, but not administrative, functions of courts and tribunals are excluded from the current Act. The discussion paper asked if this should continue.[82]

Compelling arguments were made in a number of submissions about why judicial functions should continue to be excluded. The Attorney General's Department said:

> *The accountability of the Executive Government is a fundamental feature of a democratic society. The FOI Act is one of the mechanisms by which the public can hold the Executive Government to account. However, of equal importance in securing a free and democratic society is the independence of the Courts from the Executive Branch of Government. Section 10 of the Act quite properly recognises the basic principle of the separation of powers by excluding from the scope of the Act the judiciary in respect of its judicial functions.*[83]

---

80 Section 7(1) FOI Act 1989.
81 Public Interest Advocacy Centre Ltd submission to the FOI review, page 21.
82 Section 10 FOI Act 1989.
83 Attorney General's Department submission to the FOI review, page 3.

The Workers Compensation Commission in agreeing with this said:

> *The operation of section 10 does not undermine the objects of the FOI Act. The Commission has a legislative mandate to be open and transparent. Arbitration hearings are open to members of the public, decisions are required to be issued in writing, supported by reasons, and decisions are required to be published. A party may also access a file in which they are a party or apply to inspect the Commission's record of any other proceeding. Non-parties have access to Commission records…Subject to confidentiality and privacy issues.*[84]

The Guardianship Tribunal added:

> *It appears to the Tribunal that the objects of the FOI Act are to promote greater disclosure to the public and transparency in government administrative decision-making.*
>
> *However, the Guardianship Tribunal, like many other tribunals and courts, is not an administrative decision-maker but a judicial decision-maker. Parties involved in Tribunal proceedings have the usual remedies available to them with respect to decisions of the Tribunal and can appeal decisions to the Supreme Court or the Administrative Decisions Tribunal.*[85]

We are persuaded by these submissions. We recommend that the judicial functions of courts and tribunals are excluded from the scope of the new Act, but that the new legislation is drafted to make clear administrative functions are within the scope. Tensions have arisen in the past about this issue, despite the apparent clarity of the current clause.

4.6. Importance of good records management systems

The most extensive open disclosure legislation and policies will be of little use if agencies cannot identify and locate what they hold and recover the relevant records in a timely way. This applies to paper-based and electronic records management systems. Good information management systems are essential, irrespective of the format in which information is held.

The State Records Act establishes certain standards for records management and permits State Records to approve standards and codes of best practice for records management. State Records produces a range of such standards including a standard on managing a records management program, physical storage, full and accurate record-keeping and digital record-keeping. State Records said in its submission:

> *Many of the requirements from the Standard* [on digital record-keeping] *support the aims of FOI legislation by requiring public offices to keep the records with certain minimum metadata and so they are retrievable and useable throughout their existence — regardless of whether they are kept in an EDRM style system or business system with record-keeping functionality, such as a case management system or web content management system.*
>
> *State Records has a strategy — called Future Proof - that deals with various issues that arise for the increase of electronic communications and business processes and the consequent increase in the use and creation of digital records. Information about this is available from our web-site.*[86]

Our observations from our general complaint-handling work across the NSW government sector, as well as our specific experience of FOI, suggest there is significant room for improvement in compliance with some of the areas addressed in the standards, in relation to both paper and digital record-keeping.

---

[84] Workers Compensation Commission submission to FOI review, page 4.
[85] Guardianship Tribunal submission to the FOI review, page 2.
[86] State Records submission to the FOI review, pages 1–2.

By way of illustration, with the exception of one agency which had a paperless office, the majority of the agencies we audited were operating with an often uneasy mix of paper and electronic records. Many have partially implemented electronic document management systems. While this may be an inevitable part of a transition process, we saw situations where this was causing significant problems. We saw instances where only one section of an entire agency had its records on the system, others where the existence of a document could be seen in the system but not the document's content and still others where only some categories of staff had access to the document management system despite a broader range of staff needing to access the documents.

Some agencies have multiple databases with varying degrees of functionality. One agency we audited told us it has 160 databases and no centralised document management system. Its key database was designed in the 1980s, is now very slow and if an error is made in searching, the process must be repeated. Lack of central policies about information management have exacerbated the situation with staff recording different quantities, and quality, of information in these numerous databases.

Some agencies which have been the subject of mergers and substantial reorganisations over the years spoke to us about one of the downsides of such reorganisations — the difficulties of inherited document management systems, databases and paper records about which current agency staff have little knowledge.

For officers trying to identify what an agency holds, the challenges are obvious.

There is clearly much room for improvement in some agencies in the quality and functionality of their current paper and electronic document management systems and databases. We recommend the Information Commissioner, State Records and, where appropriate, the Government Chief Information Office[87] in the Department of Commerce work together to consider what further assistance and support is necessary to improve agency management of paper and electronic documents and information across the NSW public sector.

Consideration should also be given to a more robust audit process to ensure agencies are complying with the State Records Act and associated standards.

4.7. Electronic records

4.7.1. The issues

The discussion paper raised a series of issues about electronic documents and FOI including:

- the adequacy of current provisions to ensure information in superseded document management systems can still be accessed
- information system design requirements for searching, reporting and printing capabilities
- configuration of messaging systems to search electronically on attachments
- the powers and abilities of officers to conduct searches of electronic document management systems
- advice to staff that members of the public could apply for access to official and personal emails sent on agency equipment
- paper or electronic options for means of release.[88]

[87] The Chief Information Office was created in November 2004 to provide the New South Wales Government with leadership and advice on information and communication technology procurement, e-government and other initiatives.

[88] Discussion paper, chapter 6.

4.7.2. Standards and guidelines

There was general agreement in submissions that guidelines and standards issued by State Records are the most appropriate way to provide guidance about the requirements of electronic document management systems and their functionality, including on issues such as those raised in the first three dot points above.

Phillip Youngman, chair of the FOI and Privacy Practitioners' Network between 1991 and 2008, added that while he thought the State Records Act and associated standards provided adequate guidance on many issues:

> *… agencies have to be held more accountable for their failure to comply with the standards set out under the State Records Act.*[89]

The Information Commissioner and State Records should have ongoing dialogue about issues associated with record-keeping and the management of records, particularly electronic document management systems. This will help ensure that standards and guidance issued address matters identified in the course of the Information Commissioner's work and also provide information to State Records about the types of problems being encountered.

Audits of applications and determinations conducted by the Information Commissioner, whose proposed functions are discussed in more detail in Chapter 9 will also provide valuable information about the standard of record-keeping and records management systems in agencies.

4.7.3. Searches of electronic document management systems

There were varied views about how practical it is for FOI officers to conduct searches of electronic document management systems themselves, with many seeing it as dependent on the size and nature of the agency. While there was general agreement that FOI officers should have the means and authorisation to access agency IT databases and electronic document management systems, many submissions pointed out there are practical issues which mean officers may have to rely on staff in relevant sections of an agency to assist them. Megan Carter summarised the views of many when she said:

> *FOI officers need the authority and support from their own agencies to be able to conduct proper searches of all relevant records and systems and that should come from their designation by the CEO of their role as FOI officers. They should be able to invoke this authority whenever needed. If they are denied access, they cannot do their job properly, and if this cannot be resolved, the FOI legislation should empower the Information Commissioner to investigate the actions of officers in that agency blocking the access.*
>
> *In a practical sense, FOI officers have to rely on staff in line areas to do a lot of the searching, as those staff are familiar with the plethora of records in their own areas, especially those not captured in formal records management systems such as file indexes. There may be security clearance issues for certain areas, in which case either the FOI officer requires clearance, or a suitably cleared officer undertakes the search as requested and signs a statement for the FOI officer as to their findings. FOI officers may benefit from additional training in records management systems and techniques, but I think they will always have to rely on their in-house experts for much of this. They cannot be masters of all trades.*[90]

These issues are not confined to electronic records systems. Many of the practitioners we interviewed spoke about having to send out search requests to various areas of their agency. Some had developed useful pro formas which they addressed to a senior manager. The more comprehensive pro formas summarised the provisions of the FOI Act, set out a timeframe by which a response was required and made clear the named manager was required to take personal responsibility for certifying that a thorough search had been conducted for documents within the scope of the application. They also talked about having to rely on the technical expertise of colleagues in specialist areas to explain the content of some documents in order to decide if they were what was being asked for.

---

89 Philip Youngman submission to the FOI review, issue 43.

90 Megan Carter submission to the FOI review, page 15.

Giving the public access to information has never been, and should not be seen as, the exclusive responsibility of designated officers. Part of the cultural shift needed to move to genuinely open government is an acceptance by public servants generally that the information they use to do their work can be accessed by members of the public whom they ultimately serve.

The shift from paper to electronic records raises thorny questions of what is required to conduct an appropriately detailed search. Some submissions commented for example on the fraught issue of applications for 'a document and all its drafts'. With current word processing software, people can create new drafts with relative ease. The final version of a document may have been through numerous drafts. Guidance on such issues should be provided by the Information Commissioner to establish best practice and to clarify what is expected of practitioners.

4.7.4. Emails

In general agencies seem to be warning staff that emails are part of the agency's records and State Records confirmed it already advises agencies 'along these lines'.[91] This is clearly good practice and agencies should make all staff aware that members of the public can seek access to personal and work emails sent or received on work equipment.

An issue which was not raised in the discussion paper but was raised by a number of practitioners is the extent of searches required for emails and other documents that were not required to be kept as part of an agency's official records.

The State Records Act requires agencies to have appropriate record-keeping systems for 'state records',[92] but the FOI Act covers all documents 'held' by an agency,[93] a broader range of documents. This means agencies have to search for documents that were, appropriately, not stored in official records systems, for example personal emails.

In a paper delivered to the Fifth International Conference of Information Commissioners in 2007 such emails were described as 'transitory records and include for example, an email to confirm the time of a meeting, non-business related communications and duplicate copies of documents circulated for reference purposes only'.[94] If they have been retained by an agency and fall within the scope of an application, the agency is under an obligation to be able to search for and retrieve them.

This is a challenging issue to manage for many agencies not least because according to the above paper, Canada's Chief Information Officer estimated in 2002 that government employees were exchanging six million emails every day.[95]

This is an issue the Information Commissioner should turn their mind to in consultation with State Records and the Chief Information Office where appropriate.

4.7.5. Paper or electronic?

We asked in the discussion paper if the new Act should provide that applicants could be given the option of having electronic access or paper copies of documents, and also whether an agency should be able to only provide electronic access for a large volume of documents. Submissions pointed out while these should be options, there should be no categorical provisions along either of these lines.

While offering an applicant the option of having electronic or paper access would generally be a positive move, agencies may not always be able to provide electronic access or at least not in a cost effective way. For agencies still using paper, it could result in increased work to scan documents, and documents may need to be released in PDF format so they could not be

---

91 State Records submission to the FOI review, page 5.
92 Section 3 *State Records Act 1998.*
93 Section 6(1) *FOI Act 1989.*
94 *Electronic Records and Access to Information — Have we revolutionised the process or are we simply killing more trees?* Sandy B Hounsell, Assistant Information and Privacy Commissioner Newfoundland and Labrador, page 8.
95 Ibid, page 7.

altered. Conversely, only offering electronic access would be inappropriate if the applicant did not have the means to read the documents electronically. A number of submissions said it would be preferable to offer electronic access as a free or reduced cost option reflecting the time saving involved for the agency.

4.7.6. Information in backup systems

The status of material on backup systems was not covered in the discussion paper but was raised in submissions. Megan Carter said:

> *Copies of material, often deleted from the agency's main records systems, often survives on the back up tapes of servers, for disaster recovery purposes. It has been raised in several jurisdictions as a question whether such records are 'documents' for the purposes of the FOI Act. I would argue they are not; however, a legislative amendment would make the issue clear.*[96]

We agree. Where an agency has culled records in accordance with an appropriate document disposal schedule it should be under no obligation to go to its backup systems to search for and, if found, recover the culled documents in response to an application. A provision to this effect should be included in the Act itself or in guidance from the Information Commissioner.

4.8. Offence provisions

To reinforce the importance of good record-keeping, the Western Australian Freedom of Information Act makes it an offence to destroy or conceal records:

> *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.*[97]

We asked in the discussion paper if such a provision should be included in a new NSW Act.

Some submissions took the view that such a provision would be better in the State Records Act. However, State Records said in its submission:

> *While the State Records Act 1998 has provisions for illegal destruction (generally non-authorised destruction in terms of the State Records Act) State Records would have no objections to this provision in the FOI Act.*[98]

We recommend such an offence provision is included in the new Act to reinforce this vital obligation.

---

[96] Megan Carter submission to the FOI review, page 2.
[97] Section 110 *Western Australian FOI Act 1992.*
[98] State Records submission to the FOI review, page 2.

Recommendations

27. The new Act should give a right of access:

    a. to any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means

    b. provided, where the records are in electronic form, they can be produced using the computer hardware and software and technical expertise usually available to the agency, and producing them would not interfere unreasonably with the operations of the agency.

28. The new Act should extend to records held by non-government and private sector bodies which relate directly to contracted out services performed on behalf of a public sector agency.

29. The Legislative Council and Legislative Assembly should be included in the ambit of the new Act.

30. The judicial, but not administrative, functions of courts and tribunals should be excluded from the scope of the new Act.

31. We recommend the Information Commissioner, State Records and, where appropriate, the Chief Information Officer consider what further assistance and support is necessary to improve agency management of paper and electronic documents and information across the NSW public sector.

32. Consideration should be given to a more robust audit process to ensure agencies are complying with the State Records Act and associated standards.

33. The Information Commissioner and State Records should have ongoing dialogue about issues associated with record-keeping and the management of records, particularly electronic document management systems.

34. The Information Commissioner should produce guidance for practitioners about searching electronic records including those which are 'held' by an agency for the purposes of the new Act but, appropriately, not stored in official records systems.

35. A provision should be included in the new Act or in guidance from the Information Commissioner that where an agency has culled records in accordance with an appropriate document disposal schedule it is not required to go to its backup systems to recover the culled documents in response to an application.

36. A provision should be included in the new Act that it is an offence to destroy or conceal records.

Chapter 5.
Reasons for refusing access

People should be able to access as much government information as possible. However, there will be occasions when there are legitimate reasons for withholding information.

Although the provisions in the current Act for refusing to release information may have been based on this rationale, there are considerable shortcomings in the operation and application of the exemption provisions. This is a result of a number of different factors.

Firstly, the exemption provisions in the current Act are confusing and frustrating for both applicants and agencies. In its submission, the Department of Premier and Cabinet said it:

> *… acknowledges that the current structure of exemptions is technical and potentially confusing for applicants and agencies, and that exemptions based on principles might be easier for FOI practitioners and applicants to understand.*[99]

There have been a large number of additions to the exemption provisions since the Act first came into force. As Megan Carter noted, '[m]any of the 'class' exemptions are not worthy of retention, and many of the specific items covered in the clauses added since 1989 could easily be incorporated into the older exemptions.'[100] We propose that the number of exemptions be reduced and those remaining should be simply and clearly worded.

Secondly, agencies need to change the way they think about refusing access to information. Agencies should not be looking to 'fit' documents to an exemption based on their subject matter. Such an approach is encouraged by the current exemption provisions.

The data we have obtained from the audits, as well as material from submissions and interviews with practitioners has provided useful information about the operation of the current exemptions and their challenges. It supplements what we already know from our long complaint-handling experience. However, this review has been done in a short period of time with limited resources. Submissions on the current exemption provisions were not as comprehensive as we had expected with few submissions commenting in detail on all exemption clauses, most either making broad comments or confining themselves to a small number of specific exemptions of particular relevance to them. We have not therefore been able to provide detailed comment on all of the exemption clauses in the current Act. Instead, in this chapter we:

- discuss the principles that should underpin the refusal of access to information in the new Act
- explore ways of reducing and simplifying the number of reasons for refusing access
- consider if schedules are the best place for reasons for refusal in the new Act
- look at how to make the public interest a central consideration in the determination of all applications
- deal with some common myths about releasing information
- look at the application of some of the most commonly used exemptions to identify pitfalls to be avoided in the new Act.

In drafting the new Act, further consideration and consultation will be required on a range of issues but particularly about reasons for refusal. This part of the new Act will be both the most contentious and difficult to get right.

---

[99] Department of Premier and Cabinet submission to the FOI review, page 6.
[100] Megan Carter submission to the FOI review, page 5.

5.1. The test for deciding if access should be refused

At the moment, an agency can deny access to a document if it is an 'exempt' document. The categories of exempt documents are listed in Schedule 1. It is important to note that an agency is not 'prohibited' from giving access to an exempt document. Ideally, an agency should be following a two-step process:

1. Is the document an exempt document?
2. If it is, can/should access still be provided?

It is our experience that many agencies do not go beyond the first step.

We believe this process could be made far simpler if the agency merely asked the second question. This change in approach would be facilitated by changing the language used in the legislation. The exemption provisions in Schedule 1 begin with:

A document is an exempt document if …

This should be changed in the new Act to:

A public authority may refuse access to a document if …

The reasons for refusal would then outline the expected impact of release. Many agencies automatically claim an exemption clause 'because they can'. The suggested change in approach would help avoid the situation described in a submission to a review of the Commonwealth FOI Act where 'with a few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts.'[101]

Access should only be refused if it can be demonstrated that releasing the information could reasonably be expected to cause some form of detriment or harm.

At the same time as requiring decision-makers to focus on the likely impact of release, this approach should lead to a reduction in the number of grounds for refusing to release information. Some of the exemptions in the current Act cover the same or very similar ground, or have unnecessary subclauses which make them more difficult both to understand and to apply. By articulating the likely detriment or harm, duplication will be revealed and exemptions which can be consolidated more easily identified.

5.2. Out of the schedule and into the light

In our assessment, one of the reasons the current exemptions have become so unwieldy is their placement in a schedule to the Act. It is relatively easy to build to the schedule and just add another clause.

We recommend that the reasons for refusal are placed in the body of the new Act, making it more difficult to make amendments in response to a single and often transitory concern.

Another measure to reduce unnecessary amendment to the new Act would be a requirement that any amending instrument bear the name of the Act itself. Only three of the amendments made to the current Act were made by an instrument with 'Freedom of Information' in the title. Amendments, particularly to this section of the Act, should not be able to pass without proper scrutiny.

With the same aim, we also recommend there be a requirement that the Information Commissioner be consulted in relation to all proposed amendments to the new Act.

[101] Quoted by Senator Andrew Murray in his second reading speech for the Freedom of Information Amendment (Open Government) Bill 2003.

5.3. The public interest

The new Act needs to clearly state that it is to be applied with the public interest in mind. This is particularly relevant when agencies are deciding whether to refuse access to information.

As we noted in the discussion paper there are already a number of public interest tests built into the current exemption provisions:

> *In NSW, of the 39 different grounds for exempting documents from release set out in the 26 exemption clauses in Schedule 1 of the FOI Act:*
>
> - *eight contain a public interest test and 11 contain a detriment, prejudice, damage, unreasonable adverse effect or similar type test, including seven of the eight clauses that contain a public interest test (tests that focus on the consequences of release)*
> - *two contain common law tests (disclosure would found an action for breach of confidence and privilege from production in legal proceedings on the ground of legal professional privilege), and*
> - *25 contain neither type of test (they are 'class of documents' or 'type of documents' type clauses).*[102]

Some additional guidance around the application of a public interest test is provided by section 59A of the current Act:

> *For the purpose of determining under this Act whether the disclosure would be contrary to the public interest it is irrelevant that the disclosure may:*
>
> *(a) cause embarrassment to the Government or a loss of confidence in the Government, or*
>
> *(b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.*

We asked in the discussion paper if public interest or significant detriment tests should be incorporated into each exemption clause, or if there should be an overarching public interest test. We received varied responses.

Sutherland Shire Council believes that:

> *The existing Act works well in terms of exemptions. Each application should be dealt with on merit and by introducing any carte blanche clause in relation to public interest and or classes of documents you are in effect removing the scope of the FOI officer to treat each application on merit. This would not be in the spirit of the Act.*[103]

The Roads and Traffic Authority told us that:

> *Overall the RTA is satisfied with the scope and application of the current exemption provisions in the FOI Act. The RTA contends that any broad sweeping changes to the public interest test will create uncertainty on the application of the test and increase the likelihood of inconsistency of decisions across departments and agencies. The lack of a public interest test in some clauses reflects Parliament's recognition that disclosure of matters such as: trade secrets, commercially valuable information and personal information could be detrimental and against the public interest. To apply a blanket "public interest test" to all exemptions would have a negative effect on the workings of the RTA.*[104]

Hornsby Shire Council commented that:

> *The public interest test is already unspecific and subjective. Its inclusion in all exemption clauses would add detrimental complexity and would considerably increase the time required to process applications.*[105]

---

[102] Discussion paper, section 5.1.1.
[103] Sutherland Shire Council submission to the FOI review, page 4.
[104] Roads and Traffic Authority submission to the FOI review, page 7.
[105] Hornsby Shire Council submission to the FOI review, page 3.

Not all of the submissions we received on this topic were opposed to a change in focus. In its submission, the New South Wales Police Force stated that it:

> *… strongly supports the incorporation of a public interest or significant detriment test into all exemption clauses. To do so by way of the application of an over-arching principle would be more in line with the object of the FOI Act and allow greater flexibility in interpretation. Obviously, this has the converse effect of potentially creating greater ambiguity. However, in the application of a principle such as "public interest" such ambiguity, combined with the clear objects of the FOI Act, allow for greater ease of application which must be done on a case-by-case basis.*[106]

The Solomon review panel recommended including a clear legislative statement that:

> *Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.*[107]

The new Act should contain a similar statement. This will help ensure that, before looking to the reasons for refusal, those determining applications will have the public interest at the front of their minds.

The Solomon review panel also recommended that this broad statement should be accompanied by a list of 'for and against' considerations to assist in assessing the public interest. The Queensland draft Right to Information Bill has the broad statement in its preamble, and a list of factors in a schedule.

A number of submissions commented on this approach. NSW Police Force said that:

> *Providing a list of factors for and against disclosure in determining the way in which the public interest test would apply should be set out in the legislation. However such a list should not be conclusive. The list should provide examples of considerations to be taken into account, whilst providing the decision-maker with the final discretion to determine the public interest applicable to each application on the merits of the circumstances at hand. A list of this nature should be supplemented by external commentary such as the Ombudsman's Manual.*[108]

This comment touches on one of our main concerns around including a list in the Act. As Megan Carter notes:

> *The Queensland approach has merit, although it is still untested in practice. The concept is sound, although my fear about any lists of factors, is that they automatically limit the decision-maker in terms of what can be taken into account in the particular case. Judges have always refused to be definitive about the "public interest", allowing it to grow and develop over the years. Public interest arguments come out of the specifics of the documents and the circumstances, even the identity and needs of the applicant. A risk with being too prescriptive with the lists is that an unfair or unbalanced assessment may be made, but still be legally correct.*[109]

The Public Interest Advocacy Centre felt including a list in the Act may:

> *… limit the flexibility of decision-makers to consider public interest considerations on a case-by-case basis. It may also 'freeze' the factors to which a decision-maker will have regard, even if the legislation expressly states that the list is not intended to be exhaustive. Finally, the introduction of a list may lead to a situation where decision-makers simply add up the number of reasons for or against disclosure rather than considering what the different interests at play are in a particular case, whose interests are being affected, and the relative rights of the different interests.*[110]

---

106 New South Wales Police Force submission to the FOI review, page 6.
107 FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 149.
108 New South Wales Police Force submission to the FOI review, page 6.
109 Megan Carter submission to the FOI review, page 5.
110 Public Interest Advocacy Centre submission to the FOI review, page 11.

While we have similar reservations around the inclusion of a list in the Act, we are strongly in favour of an Information Commissioner preparing lists of factors to guide agency decision-makers. The advantage to this, rather than including a list in the Act, is that it can be easily changed. It also allows the Information Commissioner to provide targeted guidance in particular areas. Because such guidelines can be easily altered, it is essential that they are prepared by an independent, impartial body. Guidelines are dealt with in more detail in Chapter 9.

5.4. Busting the myths

Some of the problems we see do not stem from the wording of the current Act, but from its application. The following are two common misconceptions.

5.4.1. 'FOI prevents us from being frank and candid in our discussions'

Contrary to this claim, knowing that what they say may be made public should improve the standard of advice. It ought to cause staff to check information and structure their work in a professional manner. These are surely good developments. Difficult and controversial decisions will always have to be made, and these decisions will be more defensible if they are supported by honest, professional and clear advice.

5.4.2. 'We have to claim legal professional privilege when it applies'

Legal professional privilege is an important legal principle, but it is not an inalienable right. Many of those who have made submissions to this review reacted very strongly to the suggestion that a public interest component be included when an agency is considering refusing access to documents on the grounds of legal professional privilege. They suggested privilege is claimed as a matter of course, seemingly without consideration of its appropriateness. Only one submission recognised that an agency can choose to waive privilege, even where the documents legitimately attract the protection.[111] We have published guidance around some of the situations where it may be appropriate for an agency to waive privilege. This could include documents that:

- *contain information likely to contribute to positive and informed debate about issues of serious public interest, or reveal significant reasoning behind decisions made by the agency that affect or will affect a significant number of people*
- *set out only factual or technical matters*
- *show how agency policy affecting the rights or interests of members of the public, was created*
- *are reports of finalised investigations or inquiries, or inspections carried out by public officials arising out of events or circumstances that have resulted in damage or injury to the member of the public seeking access to the report*
- *show how an agency has dealt with a complaint made by the person seeking access*
- *contain the best or only evidence of matters that affect the rights or interests of the person seeking access*
- *will assist or allow proper inquiry into possible deficiencies in the conduct of the agency or its staff (for example, by exposing or removing suspicion of significant impropriety) or will otherwise significantly contribute towards the public accountability of the agency or its staff.*[112]

[111] Legal Aid submission to the FOI review.
[112] NSW Ombudsman, *Public sector agencies fact sheet no. 12: legal advice.*

We would hope that agencies would take an approach similar to that put forward by the Office of the Director of Public Prosecutions in its submission, namely that:

> *… in all matters even though not specifically stated when considering exemption clauses the issue of public interest must play a role. To provide for a specific public interest test in this clause would not overly complicate matters and could assist the decision-maker.*[113]

Ideally it should not be necessary to state explicitly that the public interest is to be considered but our experience suggests otherwise.

These are only two of the common misconceptions about the current exemptions. For any new legislation to work effectively, such misconceptions will need to be overcome.

5.5. Lessons from current practice

While we have not been able to evaluate all of the current exemptions within the time and resources available to us to do this review, we believe there are valuable lessons to be learned from considering the operation of a small number of the current exemptions. Our complaint-handling work suggests the following exemptions are some of the most commonly used and/or contentious. The data which agencies provided during the audits largely confirmed this. While we have made specific recommendations about how some of these issues should be better addressed in the new Act, there are also general lessons to be learned, particularly about pitfalls to avoid in the future. These include the avoidance of the ad hoc addition of clauses and subsections and the need for the legislation to be as clear as possible about the detriment or harm which is to be avoided.

5.5.1. Cabinet and the Executive Council

The exemption for Cabinet documents is one of the more contentious in the current Act, as it is often used in relation to documents at the heart of government decisions. The Department of Premier and Cabinet believes that:

> *… it is essential for the proper operation of the Westminster system of government in New South Wales that documents that concern a deliberation of Cabinet remain confidential.*
>
> *A large proportion of the exemptions claimed by the Department are in respect of Cabinet documents, or documents the release of which would disclose information concerning the deliberations or decisions of Cabinet. As the release of these documents would undermine the collective Ministerial responsibility of Cabinet, access to them is refused.*[114]

While we do not question the importance of maintaining a level of confidentiality around Cabinet deliberations, in our view this exemption needs to be reworded. The Council for Civil Liberties commented that:

> *While not the least liberal (i.e. most secretive) in Australia … the ambit of the words 'information concerning any deliberation or decision', has been shown to be open to varying, as well as very broad interpretation.*[115]

The Department of Premier and Cabinet touched on the central concept in their submission. Documents should only be withheld if their release would have an adverse impact on the continuing effectiveness of the Cabinet. As the Solomon review panel commented, 'it should be about protecting the collective ministerial responsibility of ministers in Cabinet and no more.'[116]

As noted in the discussion paper, there are a number of different approaches to Cabinet documents in other jurisdictions. We believe that both the Victorian and Commonwealth Acts manage to strike an appropriate balance. The Commonwealth Cabinet exemption states that:

---

[113] Office of the Director of Public Prosecutions submission to the FOI review, page 6.
[114] Department of Premier and Cabinet submission to the FOI review, page 7.
[115] NSW Council for Civil Liberties submission to the FOI review, page 11.
[116] FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 3.

(1) A document is an exempt document if it is:

(a) a document that has been submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submission for consideration by the Cabinet;

(b) an official record of the Cabinet;

(c) a document that is a copy of, or of a part of, or contains an extract from, a document referred to in paragraph (a) or (b); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

The important aspect of this provision is the requirement that the document must have been bought into existence for the purpose of consideration by the Cabinet.

We believe there are two possible approaches to refusing access to Cabinet documents. The first involves narrowing the scope by adopting language similar to the Commonwealth Act. The second focuses more on the detriment or harm caused, providing that documents should not be released if there would be a detrimental impact on the collective ministerial responsibility of Cabinet. Such a decision would need to be accompanied by detailed reasons to support such a refusal.

The Solomon review panel also recommended that the Premier make more information regarding the deliberations of Cabinet publicly available. We note the Queensland Government has acted quickly in response to this recommendation by establishing an internet portal to allow members of the public to search selected Cabinet information. We would recommend that a similar approach is considered for NSW.

While we received a number of submissions that stressed the importance of a continuing exclusion for cabinet documents, none commented on the exemption for Executive Council documents.

In their final report, the Australian Law Reform Commission and Administrative Review Council suggested that the Executive Council exemption in the Commonwealth Act should be repealed. They believed that 'requests for draft Executive Council documents would be rare and that, even if one was made, genuinely sensitive material would be protected by one of the other specific exemptions.'[117]

The Solomon review panel did not agree, as they considered it would be 'inconsistent with the approach the Panel has proposed for Cabinet material for the Executive Council exemption to be treated any differently.'[118] They also noted that the Queensland Constitution requires Executive Council members to take an oath or affirmation, which includes a secrecy requirement.

The oath or affirmation required to be taken by members of the NSW Executive Council is very similar[119], and we do not see any reason to treat Executive Council documents differently to Cabinet documents. As the Solomon review panel noted, they are often one and the same.[120]

5.5.2. Law enforcement, public safety and counterterrorism[121]

We acknowledge the importance of the harms these exemption provisions are designed to address. However, in our view, as currently drafted they are unnecessarily complicated.

---

[117] Australian Law Reform Commission and Administrative Review Council, *Open Government: A review of the Federal Freedom of Information Act 1982*, 1995 ALRC 77 page 113.

[118] FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 123.

[119] *Constitution Act 1902* section 35CA.

[120] FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 123.

[121] Clauses 4 and 4A FOI Act 1989.

The first and second parts of clause 4 illustrate the approach we believe should be taken in the new Act. The first part lists all the reasons for refusal, they clearly serve a public purpose and concentrate on the impacts of release. They include matters such as the prejudice of an investigation or endangering the security of a building.

The second part of the clause (subclause (2)) ensures the exemption is not over-extended by listing certain qualifications.

However, the clause then goes on to list various operational units and provides that if documents have been created by any of these units, they are exempt. If release of documents created by these specified units would have an adverse impact on law enforcement or public safety, we would expect them to fall within the harms already listed. This further provision appears superfluous.

Similarly it is difficult to see why the introduction of a specific clause (4A) about documents affecting counterterrorism measures was necessary. The existing provisions would appear to provide very adequate reasons for refusing access to such documents.

Interestingly, when this amendment went before the Parliament, Parliamentary Secretary Henry Tsang said:

> *The fact is that Government agencies now hold significantly more documents containing sensitive counterterrorism information than when our freedom of information law was enacted in 1989. We cannot allow the Freedom of Information Act to become an unwitting tool in terrorists' designs … The exemption proposed in the Bill may reduce the chance of accidental or inadvertent release of sensitive documents.*[122]

Any concern about 'accidental or inadvertent release' would have been better addressed through training and good practice, rather than amendment to the legislation.

In her submission, Megan Carter suggests including an additional ground for refusal of access in relation to law enforcement. She recommends adding a subclause similar to that in the Queensland FOI Act:

> *A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:*
>
> *(d) to result in a person being subjected to a serious act of harassment or intimidation.*[123]

This suggestion has merit. However, if agencies were provided with the option of refusing access on such a ground, the Information Commissioner would need to provide clear guidance on its application to ensure agencies conduct an objective assessment rather than relying wholly on the belief of an individual.

5.5.3. Personal affairs

Megan Carter's suggestion about a reasonable expectation of a serious act of harassment or intimidation being a reason to refuse access is relevant here as well. A number of the complaint matters we deal with involve agencies attempting to protect third parties who are concerned that the release of information would put them at risk. These situations are most commonly neighbour and other personal disputes.

When people communicate with government agencies, they often assume their letters and documents will be kept confidential.

The decision-maker has to balance the reasonable expectation that information provided to government is provided in confidence with the right of the community to access information in order to hold the government accountable. It has been our experience that agencies often err on the side of caution and refuse to release information that may identify individuals.

---

[122] The Hon Henry Tsang, New South Wales Parliamentary Debates (NSWPD), Legislative Council, 5 May 2004 page 8329.
[123] Megan Carter submission to the FOI review, page 11.

Case study

It's the neighbours

The personal affairs exemption was identified by staff at one of the councils we audited as a major concern. Their customer service policy said the confidentiality of complaints, including the identity of the customer, would be maintained 'in accordance with appropriate legislation and policies.' The FOI staff relied on this policy to delete names and personal details from documents which they released, usually without consultation. They told us this approach had been successful in managing neighbour disputes. They would like to see compulsory mediation before an application proceeds in cases where staff believe an applicant is 'sticky-beaking' into a neighbour's affairs.

This issue, particularly in relation to complaints, requires a greater level of consideration before a final conclusion can be reached.

As discussed in Chapter 2, the term 'personal affairs' should be replaced by 'personal information' with the same definition being used in both the new Act and the Privacy and Personal Information Protection Act. As with many sections of the current Act, there is a body of case law about the term 'personal affairs'. The new definition should reflect this case law and particularly the decision in the Perrin[124] case that information regarding an individual acting in their professional capacity should not be considered 'personal' for the purposes of this Act.

5.5.4. Business affairs

This reason for refusal needs to be clarified in the new Act. In our experience this provision is currently applied far too often without any thought as to the actual impact of release. In our view such an exemption should apply only to information that, if released, would have a detrimental impact on competitive business dealings, not merely information 'about' business affairs.

We are aware of cases where agencies, particularly those that are also operating in the private sector, claim that a document should not be released merely because it relates to their business affairs. This should not be enough. Those claiming release would damage their business interests must provide evidence to support their claim, and this should then be the subject of an objective assessment by the agency. The request should only be refused if the agency is satisfied release would indeed have a detrimental impact on commercial business interests.

5.5.5. Internal working documents

This provision effectively runs counter to one of the original aims of FOI legislation which is to enable members of the public to take part in a meaningful way in debate about policy development.

In the discussion paper, we asked if the provision should be amended so it does not apply in circumstances where:

- a final position has been reached that will be the basis for a recommendation to government, or
- a decision has been made on the issue in question, or
- the information in the requested documents is no longer directly relevant to any on-going consideration.

[124] *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606.

NSW Police Force was supportive of these three options but said:

> *… there is no value in removing coverage of consultations and deliberations (or similar) from the exemption pertaining to working documents. Depending on the progression of the documents and any policy formulation, removal of such deliberations may undermine the entire exemption. Government agencies need to be able to deliberate and consult frankly and openly and without being subject to interference during a 'working up' phase. Ultimately it is the final decision that should be subject to public scrutiny as this is the intended outcome which affects the public.*[125]

As discussed earlier in this chapter, we do not believe the possibility of disclosure should prevent frankness and candour.

We accept there are occasions when it is appropriate not to release documents concerning the 'thinking' phase of a particular process, but take the view there is rarely any justification for refusing to release such documents after a decision has been made.

In the new Act this reason for refusal should be drafted narrowly to make clear it does not apply after a final recommendation has been reached, a decision made or the information requested is no longer relevant to any further consideration.

There is also a broader issue here. There is a public interest in having a greater level of consultation and community participation to ensure the public is informed about government decision-making. This would in turn reduce the need for people to make formal applications for information.

5.5.6. Secrecy provisions

Under the current Act, a document is exempt if it contains matter the disclosure of which would constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exceptions.[126] While it has been our experience that this exemption is rarely used, it has the potential to be broadly applied, and we believe that it should be subject to clear limitations.

When the FOI Bill was first introduced into the NSW Parliament, former MP Tim Moore said that as part of a comprehensive review of the FOI Act two years after its commencement:

> *Special attention will be paid to the secrecy provision … and, where necessary, the secrecy provisions in individual legislation will be examined.*[127]

This review never took place.

Megan Carter provided a possible approach to this issue in her submission:

> *In the Commonwealth, Queensland and other jurisdictions, the equivalent provision does not apply to all secrecy provisions in other legislation. Following a review process, only certain provisions were identified as being significant enough to override FOI, and where the usual FOI exemptions may both be sufficient to protect the information. I would recommend such a process occur in NSW, and the resulting (small) number of secrecy provisions then be listed in a Schedule to the Act for easy reference.*[128]

The Australian Law Reform Commission and the Administrative Review Council went further in their final report stating that:

> *The Review considers that repealing s.38* [the equivalent secrecy provision in the Commonwealth FOI Act] *will promote a more pro-disclosure culture in agencies … If s.38 is not repealed, it should at least be amended so that Schedule 3* [which lists the relevant secrecy provisions] *becomes a definitive list of all secrecy provisions to which the FOI Act is subject.*[129]

---

125 NSW Police Force submission to the FOI review, page 9.
126 Schedule 1 clause 12(1) FOI Act 1989.
127 Quoted in NSW Ombudsman, *Freedom of Information: the way ahead*, December 1994 page 20.
128 Megan Carter submission to the FOI review, page 11.
129 Australian Law Reform Commission and Administrative Review Council, *Open Government: A review of the Federal Freedom of Information Act 1982*, 1995 ALRC 77 pages 146–7.

The Queensland Government has taken a similar approach to the Commonwealth Act in its draft Right to Information Bill. The Bill provides that information is exempt information if its disclosure is prohibited under certain legislation. This is followed by a list of Acts. It also provides that information will not be exempt if it is the personal information of the applicant.

The government should review the various secrecy provisions operating in NSW and prepare a similar list. Our only concern with placing such a list in a schedule to the new Act is the ease with which it can be amended. As the Australian Law Reform Commission has noted in a recent discussion paper on Commonwealth secrecy laws:

> *Schedule 3 has been amended several times since its introduction. The provisions in 11 Acts have been removed entirely from the list, provisions in nine new Acts added to the list, and a number of provisions in remaining Acts amended. In addition, since 1991, a number of provisions in other Acts have expressly applied s.38 of the FOI Act with respect to certain information. Some of these provisions are also listed in Schedule 3, others are not.*[130]

If this approach is taken, the schedule's use should be carefully scrutinised as part of each review of the new Act.

5.5.7. Confidentiality

This provision does not, on first reading, appear unreasonable. Our experience has been that difficulties arise when it is applied in practice.

We have dealt with complaints where agencies have tried to rely on this exemption on the basis of a confidentiality clause in a contract. In our view, the inclusion of a clause in a contract is not, of itself, enough to warrant such a claim. It would mean agencies could 'contract out' of FOI by expressly creating a contractual obligation of confidentiality regarding the contents of a document.

We believe these problems are largely caused by the first part of the exemption clause which provides that a document is exempt 'if it contains matter the disclosure of which would found a breach of confidence.'[131] Removing this from the provision would encourage a more appropriate application of the clause.

5.6. The 'Olympic' type exemptions

Since 1989, there have been a number of additions to Schedule 1 of the FOI Act. Many appear to have been added to exempt information about either a specific function or a one-off event. Where possible, these exemptions should not be included in the new Act.

Clause 22 is a good example of this. It exempts documents 'containing information confidential to Olympic Committees'. Even at the time of the Sydney Olympic Games, it is not clear why any detriment or harm in releasing particular documents would not have been covered by the confidentiality protections in clause 13. Almost nine years on, the exemption still sits in the Act.

Unless there are good arguments for their retention, consideration should be given to not including the following clauses in the new Act:

- clause 20: Miscellaneous documents
- clause 22: Documents containing information confidential to Olympic Committees
- clause 22A: Documents containing information confidential to International Masters Games Association
- clause 23: Documents containing information relating to threatened species, Aboriginal objects and Aboriginal places
- clause 24: Documents relating to threatened species conservation

---

[130] Australian Law Reform Commission, *Issues Paper 34: Review of Secrecy Laws*, December 2008 page 217.
[131] Schedule 1 clause 13(a) of the FOI Act 1989.

- clause 25: Plans of management containing information relating to places or items of Aboriginal significance
- clause 26: Documents relating to complaints under health legislation

Clause 20 lists a number of 'miscellaneous documents' exempted under the Act. Over the years, it appears to have acted as an exemption 'dumping ground'. When the Act first came into force, it exempted only two of the seven types of document now included. Of most concern is the inclusion of clauses dealing with several particularly sensitive topics, namely the release of information relating to adoptions and protected disclosures.

Many of the above reasons for refusal were not considered in submissions. There may be important reasons for their inclusion of which we are not aware. We recommend seeking the views of those directly affected by their removal. If compelling reasons for their continued inclusion are unable to be provided, they should be removed. The reasons cited should be made public. If any of these exemptions are to remain within the Act, they should be redrafted to expressly state the detriment or harm that may result from release.

5.7. What about Schedule 2?

Schedule 2 of the Act currently provides that certain functions are outside the scope of the FOI Act. We received submissions in favour of the current structure of Schedule 2, some suggesting that its coverage should be expanded, and others advocating its removal from the Act.

Peter Timmins suggested:

> *The need for Schedule 2 should be reconsidered, as blanket exemptions constitute a large gap in the transparency and accountability framework.*[132]

Philip Youngman went further:

> *I feel there are no classes of documents nor are there any agencies that should be automatically exempt under the FOI Act. All agencies should be removed from Schedule 2 of the FOI Act. There is more than enough protection in the Schedule 1 exemption clauses for any documents requested under FOI if the agency believes the documents should not be released.*[133]

The NSW Treasury Corporation outlined its role as 'engaging in activities in highly competitive financial markets, whether executing the state's financing strategy or competing with private sector entities for NSW Government business' and suggested that:

> *Were TCorp's Schedule 2 exemption removed, it would be placed at a significant commercial disadvantage, as parties sought to take advantage of the Freedom of Information Act in order to obtain information which could be used to TCorp's detriment in the execution of its financial management tasks. These disadvantages include TCorp incurring loses due to financial market participants using internal information to gain from TCorp's ongoing debt issuance management programme.*[134]

TCorp agreed that:

> *… there should be some form of internal/external review rights in respect of agency determinations that documents relate to functions covered by Schedule 2 and that formal notices of determinations be issued in relation to such applications. The current position of the Act is a curious deficiency. In respect of FOI applications concerning Schedule 2 documents, as a matter of course we currently provide notification and reasons to the applicants regarding such determinations.*[135]

---

[132] Peter Timmins submission to the FOI review, page 9.
[133] Philip Youngman submission to the FOI review, page 7.
[134] New South Wales Treasury Corporation submission to the FOI review, page 2.
[135] Ibid.

Workcover expressed similar views in relation to the role of the Nominal Insurer, whose functions are included in Schedule 2:

> *The exemption facilitates the responsible investment of the Insurance Fund. Any erosion of that exemption would compromise the Nominal Insurer's capacity to effectively invest Insurance Fund monies and could affect its ability to discharge its legal obligations holding Insurance Fund assets for the benefit of workers and employers.*
>
> *It is submitted that the existing Schedule 2 exemption for the Nominal Insurer should be extended to include its commercial arrangements with Scheme agents entered into under section 154G of the Workers Compensation Act 1987, and any data and reports generated as a result of those arrangements, in order to clearly protect the commercial and confidential arrangements existing between the Nominal Insurer and scheme agents.*[136]

Workcover, along with the RTA, suggested that the protection provided to the Director of Public Prosecutions' prosecutorial function should be extended to other organisations 'that undertake criminal investigations and prosecutions.'[137]

We pointed out in the discussion paper that there is no publicly available decision-making rationale about what functions should be listed or excluded from Schedule 2.[138] Many of the bodies with functions listed in the schedule, including our own office, are complaint-handling or investigative organisations. We suggested the following criteria could be used to guide decisions about the inclusion, or exclusion, of such bodies:

- For inclusion:
  - the relevant statutes comprehensively set out the circumstances in which the agencies are able or required to report on the outcome of their performance of the function
  - the agencies are required to give detailed reasons to support any findings adverse to any person or body, either publicly or directly to the person or body concerned
  - information generated by the function has greater value as intelligence to guide or inform future action if the fact or nature of the information is kept secret
  - an agency is very unlikely to exercise a discretion under the FOI Act to release relevant documents in any circumstances
  - findings arising from the performance of the function are generally based on the civil standard of proof
  - the rights of affected individuals are usually protected by statutory procedural fairness provisions.
- For exclusion:
  - the function can lead to decisions that affect the legal rights of individuals, for example in employment, arrest/bail/prosecution, insurance coverage
  - the function can result in findings adverse to an individual in circumstances where the agency performing the function is not required to provide procedural fairness
  - the records arising from the function will or can influence ongoing interactions, for example with employers, law enforcement officers, health service providers, welfare agencies.

Appropriate criteria would also need to be developed for other types of entities.

Unfortunately, we did not receive submissions from many of the agencies with functions listed in Schedule 2. In order to ensure they are provided with an opportunity to comment, we believe that Schedule 2 should continue to be included in the new Act in its current form, but that each

---

136 WorkCover NSW submission to the FOI review, page 9.
137 Ibid. and RTA submission to the FOI review, page 13.
138 Discussion paper 5.3.

agency with functions listed should be required to provide a detailed submission making the case for its inclusion during the drafting process. Submissions should address certain criteria similar to that suggested above and be made public.

We also recommend that applicants should have review and appeal rights in relation to whether documents applied for relate to a function which is listed in Schedule 2. Agencies should be required to provide applicants for such documents with a written decision on their request, which sets out their rights of internal and external review.

5.8. Neither confirm nor deny

In some situations, refusing access to information can cause almost as much harm as releasing the information, as the applicant now knows that such a document exists. Agencies should be able to respond to these applications by neither confirming nor denying the existence of the requested documents. Similar provisions are already in place in other Australian jurisdictions. A large number of submissions supported the inclusion of a similar provision in NSW. There were differing views as to when it would apply.

The Office of the Director of Public Prosecutions suggested:

> *Consideration should be given to applying the provision to any exemption clause whereby prejudice to an agency or agency function would result due to disclosure. This would probably mean the provision would apply to information that relates to law enforcement, public safety, counterterrorism measures, legal professional privilege, judicial functions, confidential material and perhaps others.*[139]

Megan Carter suggested that it should apply to:

> *Any of them, as required. The UK Act allows the application of this provision across the board. While the Commonwealth and Queensland examples limit it to a few provisions (mainly Cabinet and law enforcement), in practice, it is needed for many others … I would argue that it is also necessary for the personal affairs exemption, for example, to deal with a request such as for psychiatric or sexually transmitted diseases records about another person.*[140]

We believe that including a similar provision in the new Act would provide a greater level of certainty, particularly in areas such as law enforcement. For example, in response to an application for a record obtained through a listening device or telecommunications interception, an agency should be able to neither confirm or deny the existence of the requested document.

If the provision is correctly applied, there is no reason why it could not be used in relation to all of the reasons for refusal in the new Act.

5.9. Ministerial certificates

As noted in the discussion paper, we are aware of only one ministerial certificate being issued in NSW since the introduction of the Act, and it was issued 19 years ago.[141] We do not see any benefit to their retention.

Other jurisdictions are moving towards removing conclusive or ministerial certificates from their FOI Acts. The Solomon review panel believed that:

> *… there seems to be no justification now for the retention in the law of what amounts to a ministerial blank cheque — even if only the Attorney General can provide the necessary signature. The proposition that a Minister should have the power to ignore or override a decision by the independent arbiter cannot be justified.*[142]

---

[139] Office of the Director of Public Prosecutions submission to the FOI review, page 6.
[140] Megan Carter submission to the FOI review, page 6.
[141] Discussion paper, chapter 10, 10.3.
[142] FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 9.

The Queensland Government indicated its support for this recommendation in its response to the panel's final report, and the draft Right to Information Bill contains no mention of conclusive certificates.

A number of other jurisdictions have indicated that they will be following a similar path in relation to ministerial, or conclusive, certificates:

- On 26 November 2008, the Federal Government introduced the Freedom of Information (Removal of Conclusive Certificate and Other Measures) Bill 2008. The Bill amends the Commonwealth FOI Act to remove any mention of conclusive certificates. The Bill has been sent to the Senate Finance and other Public Administration Committee for inquiry and report by 10 March 2009.
- On 9 December 2008, the Attorney General for the Australian Capital Territory, Simon Corbell, announced that the use of conclusive certificates will be narrowed to issues relating to national security. At the time of writing, the legislation was yet to be put before Parliament.[143]

Recommendations

37. The new Act should contain a clear statement that the public interest is a central consideration in determining any application.

38. The new Act should refer to 'reasons for refusal' not 'exemptions'.

39. The Information Commissioner should develop a list of factors to assist agencies when they are assessing the public interest.

40. Reasons for refusing access in the new Act should be based on a recognisable detriment or harm which could reasonably be expected to be caused if particular information is released.

41. Reasons for refusing access should be included in the body of the new Act, not a separate schedule.

42. Cabinet documents:

    a. The Premier should identify Cabinet material which can be proactively released on a regular basis.

    b. The definition of Cabinet documents in the new Act should be narrowed to documents brought into existence for the purpose of consideration by the Cabinet.

    c. The reason for refusing access to Cabinet, and Executive Council, documents should be based on the nature of the detriment or harm which could be caused by release and should focus on detrimental impact on the collective ministerial responsibility of Cabinet.

43. Law enforcement, public safety and counter-terrorism:

    a. These reasons for refusal should be included in the new Act and be clearly drafted, focusing on the public purpose and impacts of release.

    b. Consideration should be given to including as a reason for refusal of release the reasonable expectation that a person could be subjected to a serious act of harassment or intimidation.

[143] Simon Corbell MLA, *Labor moves to reform Freedom of Information* media release, 9 December 2008 http://www.chiefminister.act.gov.au/media.php?v=7636 (last accessed 10 December 2008).

44. The reason for refusing access to documents concerning business affairs should be based on the reasonable expectation release would have a substantial adverse impact on an agency's commercial business interests.

45. Secrecy provisions:

    a. The new Act should provide that an agency may refuse access to information if the disclosure of that information is prohibited under certain prescribed legislation.

    b. The government should review the various secrecy provisions in NSW legislation for the purpose of listing them in a schedule in the new Act.

    c. Such a schedule's use should be reviewed in the first review of the new Act.

46. The views of those directly affected by the 'Olympic' and other miscellaneous exemptions clauses should be sought and considered before deciding if provision should be made in the new Act for any of the detriments or harms they contemplate.

47. Each agency with functions listed in Schedule 2 of the current Act should be required to provide reasons for those functions to remain in a similar schedule in the new Act. These reasons should be made public.

48. The new Act should provide review and appeal rights in relation to whether the documents applied for relate to a function which is listed in Schedule 2. Agencies should be required to provide applicants for such documents with a written decision on their request, which sets out their rights of internal and external review.

49. The new Act should provide that an agency can neither confirm nor deny the existence of documents in certain situations.

50. There should be no provision in the new Act for the issue of ministerial certificates.

51. The Information Commissioner should be consulted about future amendments to the new Act and amending instruments should include the name of the new Act.

Chapter 6.
Machinery provisions

6.1. Keep it simple

The new Act should contain clear and straightforward procedures setting out in unambiguous terms the process to be followed to access non-personal government information.

There is nothing intrinsically complex about requesting and obtaining government documents. Much of the frustration and confusion caused by the current Act arises from a failure to ensure the legislation has kept pace with changes in how government operates and how information is stored. There has been no overall review of the legislation since its enactment and it has instead been amended piecemeal on over 60 occasions. It is hardly surprising it is unwieldy and difficult to navigate for both applicants and practitioners. A new Act is an opportunity to fix this.

6.2. Time periods

The time periods specified in the current Act are:

- an agency has 21 days to determine applications
- an agency can extend the 21 day period by a further 14 days in certain circumstances
- an agency must deal with an application transferred from another agency either within 31 days of its receipt by the first agency or within 21 days of its receipt by the second agency — i.e. effectively an extension of the 21 day period by 10 days
- an applicant has 28 days from the date of a notice of determination (or 49 days after the application was received by the agency if no notice of determination is given) to lodge an internal review application
- an agency has 14 days to determine an internal review application
- a review application to the ADT is to be made within 60 days after the notice of determination was given, or if a complaint is made to the Ombudsman within that 60 day period, within a further 60 days after the Ombudsman either informs the applicant that the complaint has been declined or discontinued, or about the results of any investigation
- a notice served under the Act on a person by letter is taken to have been given to the person at the end of the fifth day after the letter was posted.

There was general agreement among the 70 FOI practitioners we interviewed that 21 days to determine anything other than the most straightforward application is not sufficient. They said:

- it takes time to identify where documents are held, to send out a search request to those areas and for the documents to be provided to the FOI practitioner
- agencies may have multiple sites and/or be in geographically dispersed areas in NSW with documents being held at more than one of those locations. This means requests may have to be sent to a number of locations asking about the existence of relevant documents, a far more time-consuming process than dealing with one location
- a practitioner may need assistance from staff who work in a particular area to interpret a request for technical or other specialist information
- it takes time to collate and assess applications for voluminous amounts of documents
- the timeframe does not take into account weekends or public holidays.

Some practitioners have developed strategies to try and manage the challenges posed by the current time frame.

Case study

Let's work out what you want first

When an application is very broad or in unclear terms, one agency has a practice of not 'accepting' the application until the scope has been agreed. The practitioner telephones applicants immediately on receipt of their request and works with them to identify what they are seeking. Only when there is agreement about the scope does the agency cash their cheque and starts the clock running on the 21 days. As the agency does not charge for this work, it appears to work to the advantage of all parties.

Others have pro forma directions they send with search requests to various parts of the organisation. The pro formas set out the requirements of the FOI Act particularly in regard to time-frames and the importance of locating all documents in the scope of an application and emphasise the importance of a prompt response.

Twenty working days was the most commonly made suggestion by practitioners for a more realistic timeframe for initial determinations. This recognises weekends and public holidays but still requires a reasonably prompt response. This would bring NSW into line with the UK and New Zealand and still mean applications were required to be dealt with more quickly than in other Australian jurisdictions.

Some practitioners said in their experience many applicants are happy to negotiate a longer timeframe provided they are told why that length of time is necessary. They suggested the new Act could contain a provision that the time could be extended by agreement with the applicant. The idea of a negotiated extension of time found support in some submissions to the discussion paper:

> *This might be a good idea. There are times where, for a range of reasons, it is difficult to meet deadlines, particularly where the matter involves a harassment claim and is still being investigated.*
>
> *Many times the agency can resolve the delay by advising the applicant of the circumstances. If the applicant is agreeable s/he will not pursue the matter once the time period is up. However, according to the statistical report the application still exceeds the timeframe. If the applicant agrees to a delay the agency should be able to extend the deadline to the new timeframe and report on that once the application is completed.*[144]

This would be one way of reflecting the varying degrees of complexity and amount of work involved in applications. A small number of agencies spoke about the difficulties of dealing with applications during Christmas holidays and school holidays and would like to be able to extend the time period at those times. This would provide a mechanism to do this by consent.

PIAC was concerned there should be safeguards in any provision where an agency can ask an applicant to agree to an extension of time as:

> *… sometimes applicants have a multi-faceted relationship with agencies, for example NSW Police Force or the Department of Community Services and so may feel that if they don't agree to the agency's request for an extension of time, this may adversely affect other aspects of their dealings with the agency. PIAC submits that an agency should be required to seek an extension in writing from the applicant and there should be an option for the applicant (advised to them in that letter) to ask the Information Commissioner to determine whether or not the request is reasonable.*[145]

[144] Phillip Youngman submission to the FOI review, issue 73.
[145] Public Interest Advocacy Centre Ltd submission to the FOI review, page 30.

While we would not want to add another formal review step in the process, there is merit in requiring agencies to advise applicants that they can contact the Information Commissioner if they have any complaints about how their application is being dealt with. This could be done both when the application is acknowledged (see below) and when an agency asks for an extension of time. This would be in addition to advice about formal review and appeal rights.

A number of practitioners also thought 14 days was not enough time to conduct a thorough internal review. They suggested the timeframe should be the same as for an initial determination to allow searches to be done again, documents considered with fresh eyes and a genuinely new consideration made of the matter. This view was supported in a number of submissions to the discussion paper. As users of FOI on behalf of their clients, the Combined Community Legal Centres' Group said:

> *We recommend that if there is an increase in the time limit applied to initial applications, then there should be a commensurate increase in the time limit applied to the time in which an agency should determine an internal review application.*[146]

Based on our experience of the current Act we do not think a further 20 working days is necessary, as there are usually some time savings in dealing with an internal review application compared to an initial application. However, we agree an appropriately thorough internal review may require longer than the current 14 calendar days and the same problems with weekends and public holidays apply.

Of course, regardless of the statutory timeframes, agencies should endeavour to determine initial applications and internal review requests as promptly as possible.

6.3. Acknowledgements

Unlike the Commonwealth, ACT and Queensland FOI legislation the current NSW FOI Act does not require agencies to acknowledge receipt of applications. The discussion paper pointed out the potential problems this can cause, particularly in preserving an applicant's appeal and review rights.

When an agency fails to determine an application within the applicable time limits the application is 'deemed' to have been refused and the applicant has a right to apply for an internal or external review, as applicable. However, the current Act's deemed refusal provision provides that the time in which a review application can be made to the ADT starts to run from the date of receipt of the application by the agency. The ADT has held that the 60 day time frame to appeal to the ADT flows from the date the applicant's internal review request was deemed to have been refused by the agency, not the date the applicant actually received the notice of internal review determination.[147] The ADT has more recently held that it has discretion under section 57 of the Administrative Decisions Tribunal Act to extend the time period for lodgement of an appeal but indicated the discretion would be used with some circumspection as the period to lodge a FOI appeal is more generous than in other areas of the Tribunal.[148]

Of the agencies we audited, 16 told us they have a policy of acknowledging receipt of FOI applications. Fourteen aim to send an acknowledgement within three days or less.

It is therefore essential that agencies acknowledge all applications and provide information to applicants of the following dates:

- the date on which their application or internal review request was received
- when they must lodge an internal review application with the agency
- when they must lodge an external review application if their request is deemed refused or otherwise delayed by the agency.

---

[146] Combined Community Legal Centres' Group (NSW) Inc submission to the FOI review, page 11.
[147] *Sawires v Commissioner of Police, NSW Police* [2008] NSWADT 91.
[148] *LZ v Office of the Protective Commissioner (GD)* [2008] NSWADTAP 50.

If the time period is extended by agreement, as set out above, the agency will need to confirm the agreed extension in writing and provide information about the amended dates on which the applicant must lodge internal and external review applications.

In addition to the above information, the Combined Community Legal Centres' Group suggested the acknowledgement should also give the reference number of the FOI application and the contact details of someone in the agency.[149] We agree, although we see these as matters of good administrative practice rather than matters to be included in the legislation.

6.4. Outcome of delays

There was general agreement in submissions that the deemed refusal provisions of the current Act should be retained and that agencies should not be able to collect fees for delayed applications. There was little support for other sanctions such as deemed approvals of delayed applications or the inability to claim certain exemption clauses. There was a view that despite the delay, if there are legitimate reasons not to release documents these should not be overridden.

Some also suggested the lodgement fee at the ADT should be waived for an external review where there has been a deemed refusal of an internal review. This latter view is not supported as the ADT has not played any part in the delay.

6.5. Urgent applications

The discussion paper asked if the new Act should include provision for urgent applications. The Office of the Director of Public Prosecutions thought it appropriate to include such a provision but said:

> *… the test for urgent applications should be stringent and the cost of the application should also be much higher. The requirement to deal with the application as urgent should be discretionary as despite a proven need for urgency there may be valid reasons why the agency cannot process it in a shortened timeframe. The agency should be required to provide reasons for failing to do so.*[150]

Megan Carter said she was not sure of the advantages and disadvantages of accepting urgent applications but thought:

> *… there would have to be a combination of a fee and meeting certain criteria or it would simply become Fast FOI for the Wealthy.*
>
> *There should be criteria, similar to those used in the USA and the others suggested in the review. This is an area which would need a lot of more policy development work with input from practitioners. The criteria would need to be somewhat strict or all FOI applicants will claim the need for urgency (many of them do now, some validly, some from impatience).*[151]

NSW Housing agreed there should be provision in the FOI Act for urgent applications but that their acceptance should be discretionary, with time limits and fees also being at the discretion of the agency. NSW Housing went on to suggest:

> *The requirements could be:*
>
> *a. if a document is required urgently for the purpose of a court proceeding;*
>
> *b. in the event of a mortality and the document is required by the applicant to gain financial assistance;*
>
> *c. if the document is required as a matter of urgency to lodge with another government agency by the applicant; and*

[149] Combined Community Legal Centres' Group (NSW) Inc submission to the FOI review, page 10.
[150] Office of the Director of Public Prosecutions submission to the FOI review, 6.5.
[151] Megan Carter submission to the FOI review, pages 21–22.

d. in the event there is a terminal illness with limited time to that applicant's life and where the information is required for an urgent compensation matter. Housing NSW will often be approached by Legal firms seeking urgent access to documentation where they are representing clients with 'mesothelioma' (an asbestos related terminal illness), in this event Housing NSW currently gives that application priority.[152]

As users of the FOI process, the Environmental Defender's Office NSW saw benefits in being able to make expedited applications, agreeing with the observation in the Solomon review panel report that for some applicants 'access delayed, is access refused':

A good example in our experience is gathering information in relation to a development application under the Environmental Planning and Assessment Act 1979 within the 28 day limitations period for merits appeal to the Land and Environment Court. In such circumstances the quick availability of information is crucial.[153]

We do not have a decided view on this issue. We would expect agencies as part of their general administrative processes to have the capacity to handle requests as quickly as possible when they have been made aware of a compelling need, but placing such a requirement in legislation may be unduly complicated.

If such a provision was to be included, further consideration should be given to the criteria for an application to be treated as urgent. It may be appropriate for there to be no additional fee, to make sure the only reason for receiving an expedited service is genuine need, not ability to pay.

6.6. Consultation with third parties

Our review has confirmed that the application of the consultation provisions of the current Act is problematic. Agencies are unclear about the purpose of third party consultation, with practices differing across agencies. Some of the agencies we audited conduct all consultations in writing; others are more informal and phone or email third parties. Some agencies see consultation as a courtesy, where they let the third party know documents have been requested that in some way may relate to them or their business. This was particularly the case where documents related to other government agencies. This can lead to significant delays in determining applications.

The current Act requires agencies to consult with affected third parties before releasing documents which contain matter 'concerning':

- personal affairs
- business affairs
- conduct of research
- intergovernmental affairs.

The general practice adopted by most NSW agencies is to interpret the provisions as only applying where the release of the documents would 'affect' (i.e. detrimentally impact) affairs or interests. This is in line with the use of the word 'affecting' in the relevant section and exemption clause headings. This means agencies would generally not consult where the information requested, or the information released after negotiation with the applicant about scope, was sufficiently de-identified or aggregated so as to prevent any detrimental impact on a third party's interests.

However, the sections and exemptions themselves currently refer to 'concerning' the affairs or interests which means the provisions can be interpreted more broadly to require consultation even where the identity of the third party cannot be readily identified. Some agencies are using this very broad definition to consult third parties apparently with little clarity around the purpose of the consultation.

[152] Housing NSW submission to the FOI review, issues 77 and 78.
[153] Environmental Defender's Office NSW submission to the FOI review, page 15.

Case study

Why consult?

Vague wording in letters sent with third party consultations is indicative of a lack of certainty about the purpose of the consultation. A consultation letter on a file we reviewed said: 'The FOI Act provides that before access is given to these documents you have the right to state whether or not the document is an exempt document by virtue of Schedule 1 of the FOI Act.' This is inaccurate. Each of the clauses requiring consultation requires the agency to 'obtain the views of the person concerned as to whether or not the document is an exempt document by virtue of clause [5 or 6 or 7 or 8]'. The consultation process is not a general request to a third party to make out any exemption clause they think applies; rather it is an opportunity for them to give their views on one of the specified provisions in the FOI Act — personal or business affairs, the conduct of research or intergovernmental affairs.

While most practitioners we interviewed were clear that they are the final decision-maker, there were concerning indications that some practitioners may be reluctant to release documents if third parties have made objections, even if those objections are not well-founded and even in circumstances where they do not relate to the consultation clauses. We have seen this a lot in our complaint-handling work.

During the audits we saw a number of files where third parties had raised other exemption clauses they thought applied to the documents without making an adequate, or sometimes any, case about the applicability of the clause that had led to the consultation. Due to what some practitioners thought was a lack of guidance in the current Act about what to do in those circumstances, they would grant the third party appeal rights even though the third party had sought to rely on a clause that was different from the clause that had triggered the requirement to consult.

There was support for making explicit the general practice. For example the Sydney Opera House Trust said:

> [Sydney Opera House Trust] *submits that for the benefit of, inter alia, expediency and resourcing, it would be beneficial if the FOI Act formalised what is effectively the general practice of the NSW public sector that consultation is not required where the information to be disclosed sufficiently de-identifies to the extent that the third party cannot be readily identified. Consultation in these circumstances should then only be required if disclosure may be expected to be of substantial concern to the third party.*[154]

Concern was expressed in some submissions that such a change would leave it up to the practitioner to determine what would be of substantial concern to a third party. However, it seems evident that practitioners must exercise some judgment over the issue of consultation and a more explicit legislative provision would assist.

Our recommendation, discussed in Chapter 5, that reasons for exemption should be drafted in the new Act to make it clear that access to information can only be refused if release could reasonably be expected to cause some form of detriment or harm, should also assist.

6.7. Viewing only?

The discussion paper asked whether a new Act should provide agencies with the discretion to allow an applicant to view, but not be provided with a copy of, a document where disclosure of the document to the world at large would be inappropriate.[155]

[154] Sydney Opera House Trust submission to the FOI review, page 84.
[155] Discussion paper, issue 54, page 28.

There were diverse opinions. The Department of Primary Industries did not support the idea:

> *It is an unsatisfactory compromise which abrogates the responsibility for rigorously applying the available exemptions. At present the presumption is release to the 'world at large' with no limitations or conditions placed on the release of documents and applicants not being required to provide any reasons for their request. Exemptions should therefore be considered as either being applicable or not applicable to particular documents without qualification.*
>
> *Allowing documents to be sighted but not copied does not necessarily prevent the applicant taking notes, and possibly photographs, nor from articulating the details later on. In these circumstances it is arguable what benefit is achieved by withholding the document but not the information.*[156]

The Department of Education and Training submitted:

> *The FOI Act ought to provide capacity to allow an agency to provide a document subject to an agreement that it will not be published where there are reasonable grounds to believe that publishing would be harmful.*[157]

It is difficult to see how an agreement such as this could be enforced.

Both the Public Interest Advocacy Centre and the Combined Community Legal Centres' Group were concerned such a provision could be used by agencies to decrease the number of documents they released and would not satisfy the desire of many applicants to use the information sought for a purpose, such as to use with their advisors to inform a decision about whether or not to bring litigation.[158]

Others saw benefits in such an arrangement. For example, Megan Carter said 'this maximises the principle of access, while minimising the possible harmful consequences of disclosure'.[159] Rick Snell thought it 'a very feasible suggestion'.[160]

Clearly any such provision should not form a basis for agencies to withhold copies of documents they should otherwise release. However, arising from our complaint-handling work, we see a limited but important application for a provision permitting viewing of a document which it has been properly determined should not be released to 'the world'. That is, the provision extends access to an applicant who is not otherwise going to see the document. An example of such a situation would be when something goes wrong in a hospital.

Case study

The individual not the world

When an adverse incident occurs in a hospital, a root cause analysis is carried out to find out what happened and action taken to address systemic and other issues. However, in addition to this response, there is a clear public interest in showing the affected individual and/or their family the details of such an investigation but staff involved may have legitimate objections to the release of the documents to the world at large. If a proper consideration of the documents results in a determination they should not be released, viewing of the document could then be arranged for the individual and/or family. The public interest is served in making the information available to those directly affected, without making the documents available to the world at large.

A further example is where NSW Police Force has properly refused to release CCTV footage but would be willing for the footage to be viewed at a police station by an applicant who has an appropriate interest in the material. Another use for this provision would be for individuals to be

---

156 Department of Primary Industries submission to the FOI review, issue 54.
157 Department of Education and Training submission to the FOI review, page 8.
158 PIAC submission to the FOI review page 26; Combined Community Legal Centres' Group submission to the FOI review, page 3.
159 Megan Carter submission to the FOI review, page 17.
160 Rick Snell submission to the FOI review, issue 54.

shown what particular documents **do not** contain, where their concern is that the documents do contain certain information.

In each of these types of situation, where a determination is properly made that such documents should not be released, a viewing provision may be the only way to put the individual's mind at rest.

6.8. Use of FOI and subpoenas

Information obtained via subpoena can only be used in the particular proceedings for which it was obtained. There is no restriction on how documents obtained under the FOI Act can be used. People can, and often do, apply for the same information using both the FOI Act and a subpoena. As set out in the discussion paper, this has resource implications for those agencies which have to deal with both requests and has implications for applicants.

NSW Police Force said:

> *This is a significant drain on NSWPF resources to address both requests for the identical documentation. NSWPF submits that this is certainly a problem that must be addressed. Potentially it needs to be stated in the FOI Act and on application forms that the FOI process is not a substitute for or supplement to obtaining documents by subpoena. Given the nature of court proceedings and in the interests of procedural fairness, applicants should be informed that subpoena is the primary method for obtaining such documentation. In the event that an applicant has submitted a subpoena, they should be excluded from submitting an FOI application for identical documentation on the basis that the information has already been made available by other means. In the event that an applicant has already submitted an FOI application for documentation that is now requested under a subpoena, the return of subpoena should be able to rely on the fact that the documentation has already been produced under FOI.*[161]

Some saw it as a fact of life:

> *Although there are resource implications there should not be a bar to seeking information by subpoena and FOI. They are usually utilised for different purposes.*[162]

Others saw some positives in having both systems:

> *The problem with a subpoena is that it is necessary to be very prescriptive when requesting information. If the FOI application is of a general nature, the applicant is given the opportunity to conduct a fishing expedition, whilst this may be frustrating to the agency, it does provide it with the opportunity to demonstrate to an applicant that it may not be wise to continue with a legal case.*
>
> *… pending applicants should be advised if they are in a position to subpoena, they should do so; it is cheaper, quicker and surer.*[163]

State Super suggested:

> *A fair and reasonable way to approach the concurrent FOI and subpoena problem would be to prohibit subpoenas being made if the material is available under FOI. This would prevent double handling. Viewing material to update it before getting a further FOI request would also be helpful.*[164]

We see no obvious benefit in directing that one method of requesting information is preferred over the other. However, we are satisfied that for some agencies at least, the concurrent use of subpoenas and FOI is a significant problem that needs to be managed. We suggest this is done by allowing production of the documents under one system to be a basis for not providing them a second time under the alternative system.

---

161 NSW Police Force submission to the FOI review, page 13.
162 Office of the Director of Public Prosecutions, issues 85 and 86.
163 Phillip Youngman submission to the FOI review, issues 85 and 86.
164 State Super submission to the FOI review, issue 85.

Recommendations

52. In the new Act, the time period for dealing with initial applications should be 20 working days and 15 working days for internal reviews.

53. The new Act should contain a provision that the time period for dealing with an initial application can be extended by agreement between the agency and the applicant.

54. The new Act should include a requirement that agencies acknowledge receipt of all applications within five working days of receipt and this should be accompanied by information about deemed refusal timeframes and rights of review.

55. The new Act should provide that if the timeframe for determining an initial determination is extended by agreement, the agency must confirm the new timeframe in writing within five working days of the agreement, along with advice about new dates for deemed refusal timeframes and rights of review.

56. The new Act should provide that a deemed refusal occurs if the agency fails to determine an initial application within 20 working days or the longer agreed timeframe and an internal review within 15 working days.

57. The new Act should give the ADT discretion to accept an external review application out of time.

58. The new Act should provide that where an agency fails to comply with the required timeframes for dealing with an initial application, the fee for the initial application must be refunded and there should be no fee for an internal review.

59. The new Act should provide that where an agency fails to comply with the required timeframes for dealing with an internal review application, the fee for the internal review must be refunded.

60. The new Act should make clear that consultation is only required where the release of information contained in a document, whether or not the document is proposed to be released in full or with identifying information removed, could reasonably be expected to be of substantial concern to a third party.

61. The new Act should provide an agency with discretion in circumstances where it has properly determined to refuse to release a document to provide access to view the document.

62. Concurrent use of FOI and subpoena should be managed as follows:

    a. the earlier disclosure of documents in response to a subpoena should be grounds for declining to accept an application for identical documentation on the basis that the information has already been made available by other means

    b. where an applicant has already obtained documentation in response to an application that is subsequently requested under a subpoena, the return of subpoena can rely on the fact that the documentation has already been produced under FOI

    c. where a subpoena and FOI application are received simultaneously for the same documents, an agency may decline to accept the FOI application on the basis it is handling the request by way of the subpoena.

Chapter 7.
Resources

7.1. A sustainable system

To work effectively the new system must be properly resourced. This covers a range of issues including fees and charges, the provision of adequate resources to practitioners by their agencies to deal with the number of applications received, obligations on regular users to use the system efficiently and how best to manage voluminous requests and repeat applicants.

7.2. Fees and charges

The current costs to applicants can be summarised as follows:

- fee of $30 for an initial request and $40 for an internal review
- processing charge of $30 per hour for non-personal applications
- 20 hours of free processing for personal affairs applications, then $30 per extra hour
- 50% reduction in fees and charges on proof of low income
- 50% reduction in fees and charges where it is in the public interest to make the information applied for available
- internal review fee to be refunded if the internal review determination is significantly different from the initial determination.[165]

These costs have not changed since 1989 when the legislation was introduced.

We provided the following a table in the discussion paper comparing applications fees in a range of FOI jurisdictions.

Table 1. Comparison of application fees for FOI requests
(not including additional charges for processing and copying)

Jurisdiction	Initial request	Internal review
ACT	no	no
Commonwealth	$30	$40
NSW	$30	$40
NT	$30 (for applications for information)	no
Queensland	$36.50 (for applications for personal affairs information)	no
SA	$23.80	$23.80
Tasmania	no	no
Victoria	$22	no
WA	$30	no
Canada	$25	N/A
UK	no	N/A
USA	no	no

[165] From the Freedom of Information (Fees and Charges) Order 1989.

As explored in the discussion paper, providing access to government information can be argued to be:

- a cost of democracy that should be borne by governments in the same way as the courts, police and the electoral system, or
- a service provided by government for which users should pay in the same way users pay for essential services such as water, electricity and gas.

Most jurisdictions around the world have adopted an approach that fees and charges are not intended to cover all costs involved.

Our audits established that approaches to processing charges vary widely. According to the figures for 2006–2007 provided by the agencies, RailCorp had the lowest average charge at $15, while the Department of Commerce had the highest average charge at $567. The average charge in half of the agencies was under $50 while four agencies had an average charge of over $200.

Few agencies were able to provide accurate figures as to the costs incurred by them in handling applications. Those that could produced figures clearly calculating their costs in different ways, so comparisons could not be made with any certainty. However, it was clear the cost of processing applications outweighs considerably the money received. Staff costs are the most significant item. Most of the agencies reported having five or fewer effective full-time staff involved in processing, assessing and determining applications. One-third of the agencies have only two, and three agencies had 12 or more. Not surprisingly, these three agencies were among those with the highest number of applications in 2006–2007.

Some practitioners spoke about regularly charging an hourly processing fee and had recording systems to work out how much time was spent. Others told us they think it costs more to collect a processing charge than the charge itself and it is rare for them to charge anything other than the application fee. Rather than process numerous individual cheques, a number of agencies bulk-billed solicitors and professional associations who regularly make applications. Simple, yet effective, and more efficient for all concerned.

There were many varied views on fees and charges, from suggestions to abolish fees completely to making significant increases in both fees and charges.

For example, Sutherland Shire Council said in its submission:

> *Council believes the fees that agencies are permitted to charge in relation to FOI applications are extremely inadequate. In 2006/07 Council incurred costs of $122,264 yet Council only received a total of $3,200 from FOI application and processing fees. Council believes that all fees under the FOI Act should be indexed to the cost of living increases (CPI). This additional cost is borne by the Council's other rate payers who are paying in most cases for other neighbourhood disputes.*
>
> *Complying with the FOI Act is both time-consuming and a drain on limited Council resources and as indicated above, recovered costs amount to less than 11% of the total cost to Council in complying with the Act. Council believes that in addition to increasing all fees under the FOI Act annually in line with the CPI, that the processing fee under the Act should be increased to $60 per hour to better reflect the costs that agencies incur when processing applications. This fee increase would still only allow Council to recoup about 25–30% of its costs.*[166]

A practitioner put it more succinctly, saying 'It's amazing what you get for 30 bucks these days'.

The Department of Education and Training said:

> *It is estimated that the Department recovers only about one percent of costs by fees collected.*
>
> *It is difficult to determine how costs might be fairly assessed and imposed. For example, costs based on time might create an incentive for agencies to oversupply information that is not relevant.*[167]

[166] Sutherland Shire Council submission to the FOI review, pages 6–7.
[167] Department of Education and Training submission to the FOI review, page 8.

The RTA said a 'user pays' principal should apply and suggested significant increases in hourly charges and the introduction of a separate photocopying charge.[168] NSW Police Force submitted that 'at a minimum there should be an increase of 100% for an initial application and 130% increase for an internal review'.[169]

City of Sydney Council said there should be no change to the fee structure,[170] while the NSW Liberal/Nationals Coalition's policy announced in October 2008 is that FOI application fees should be abolished.[171] The Right to Know Coalition said in its submission 'the cost of providing information about government to inform the public should be borne by the government, particularly as media organisations invest significant funds in training and employing journalists using FOI. Media organisations often receive little benefit from the investigations that produce no results'.[172]

The Environmental Defender's Office NSW also submitted that fees should be removed, saying:

> *In addition to making the FOI system accessible to all, the removal of the fee would also be important symbolically. It would signify to both agencies and the public that access to public information is a fundamental democratic right …*[173]

The Public Interest Advocacy Centre also wanted fees removed from the FOI Act.[174]

The Solomon review panel recommended a new charging regime in Queensland based on the number of pages provided. This recommendation was not supported by the Queensland Government.[175] Instead the draft Bill and Regulation provide for an application fee of $38 plus a processing charge and an access charge. The processing charge is to cover the cost of searching and retrieving the documents and making the decision in relation to the application. The access charge is to cover the cost of giving access to the documents.[176]

We asked in the discussion paper whether charges in NSW should be based on the time taken to process a request or be directly related to the amount of information released. The general view was summarised by Phillip Youngman:

> *It should be based on the time taken to process the application. The number of pages does not always represent the effort in processing an application. It can go either way, you may get a large number of documents that are routine and do not require much time to consult or determine, alternatively you may get a few pages of documents that require significant consultation and determination time.*[177]

However, the Environmental Defender's Office NSW made the practical point that in any event:

> *In order to greatly reduce the number of unnecessary documents printed or photocopied, the EDO submits that when an agency has discovered that an excessively large number of documents are applicable to an applicant's request, the agency provide the applicant with a schedule of documents. From that schedule the applicant is given the opportunity to select only those documents required, which should in turn minimise the costs to both the agency and the applicant.*[178]

In the face of such a marked lack of consensus, we have taken a fairly pragmatic view. We do not agree that the system should operate on a cost recovery basis but neither do we think there should be no application fee. Both extremes give the wrong message. A user pays system ignores the vital role the system plays in keeping government accountable; a totally free service

---

168 RTA submission to the FOI review, page 17.
169 NSW Police Force submission to the FOI review, page 12.
170 City of Sydney Council submission to the FOI review, 6.3.
171 NSW Liberal/National Coalition *Restoring Your Right to Know: Improving freedom of information in NSW* October 2008.
172 Right to Know Coalition submission to the FOI review, 10.3.
173 Environmental Defenders Office NSW submission to the FOI review, page 17.
174 Public Interest Advocacy Centre Ltd submission to the FOI review, page 27.
175 Queensland Government, *The Right to information: a response to the review of Queensland's Freedom of Information Act*, issued 20 August 2008, page 9.
176 Right to Information Regulation 2009, part 3, public consultation draft.
177 Phillip Youngman submission to the FOI review, issue 58.
178 Environmental Defender's Office NSW submission to the FOI review, page 18.

ignores the significant public resources that are committed to administering the system and could potentially lead to abuse of the system. The current fees in NSW are within the normal range for Australian jurisdictions and in our view there is no compelling reason for them to be increased. If the government was minded to change the current fees for applications or internal reviews, we would support only a minimum increase.

There was more agreement in submissions about the need to continue to have a reduction in fees and charges for demonstrated financial hardship and for public interest applications. Many submissions saw this as an issue of fairness and equity but with requests for more guidance about public interest applications. We agree. In addition, the new Act should make clear an agency can exercise its discretion to accept an application without a fee being paid.

7.3. Advance deposits

Currently an agency can require an advance deposit where it believes the cost of dealing with the application is likely to be more than the application fee. When requesting the advance deposit the agency must set out the basis on which the amount has been calculated. If payment is not made within the time specified, the agency can refuse to continue dealing with the application and must inform the applicant of this in writing. The applicant then has a right to an internal review. An agency can 'stop the clock' while waiting for an applicant to pay an advance deposit.

Kelvin Bissett, Investigations Editor at *The Daily Telegraph*, said in his experience as a frequent user of FOI he has often had to wait a considerable time for documents after paying an advance deposit. He gave an example where he said he had paid the sum of $390 requested in April 2008 but was still waiting for the documents from the agency at the time of writing to us, which was in August 2008. In his view, in such circumstances 'it is reasonable for us to conclude that bureaucrats are withholding documents until such time as they have fixed the problem'.

Amongst other things, Mr Bissett stated that:

- inconsistent charging regimes between agencies, and refusal to refund after rejecting access, possibly to deter future access; and
- time periods for determinations after processing fees are paid

were two key issues of concern with the operation of the current Act.[179]

There was general agreement in submissions that the advance deposit system should be simplified. Having considered the submissions and our experience over a considerable period of how advance deposits are handled, we consider the following measures would improve the process.

Applicants should be allowed to seek an internal or external review of a request for an advance deposit without waiting for a determination from the agency that it refuses to continue dealing with the request because the advance deposit has not been paid. As Hornsby Shire Council succinctly put it:

> *If an applicant wishes to dispute the costs involved there seems no point in waiting [x] days to do so.*[180]

As discussed in more detail in the chapter on reviews, we have concluded internal reviews should be optional. The Act should therefore contain a provision that an applicant can request an external review of a request for an advance deposit, or a refusal to continue dealing with a request because an advance deposit has not been paid, without the need for a prior internal review.

[179] Letter to the Ombudsman 11 August 2008.
[180] Hornsby Shire Council submission to the FOI review, issue 62.

While some submissions thought there was no benefit to restricting advance deposits to a percentage of the estimated cost on the basis *'the balance will need to be paid before the information can be released to the applicant',*[181] we are more persuaded by the view that 'deposit' suggests only a part, not the full amount is required — a kind of 'good faith' payment to confirm the applicant wants to proceed.

Megan Carter suggested:

> *Based on other jurisdictions' practices, it would seem fair to charge at least 25% up to a certain limit and 50% beyond that limit.*[182]

If a deposit is required, we have concluded limiting it to no more than 50% is simple and in keeping with the notion of a 'deposit'.

It is clearly important that an agency explains how it has arrived at whatever sum it is requesting and provides details of how the advance deposit has been calculated. We would not hand over sums of money in other areas of our lives without an explanation of what we are paying for. We are persuaded by comments in a number of submissions that guidance to agencies about the information they should provide would best be contained in guidance produced by the Information Commissioner rather than in the legislation itself.

While the Act should specify the minimum time which an applicant should be given to pay an advance deposit, the provision should provide for a longer period to be given and also permit an extension of the period to be agreed between the parties. An advance deposit should be refunded if the agency subsequently fails to determine the application and provide access to the documents identified for release within the statutory or agreed timeframe.

If an agency decides to include information in its disclosure log at the same time as releasing the same information to the applicant, any fees and charges paid by the applicant should be refunded. In our experience this is most likely to occur where journalists have applied for information and the agency decides to release the information more broadly.

7.4. Public interest discounts

The NSW Freedom of information (Fees and Charges) Order 1989 provides for a reduction of fees and charges of up to 50% for applications for information 'that it is in the public interest to make available'.[183]

As the underlying philosophy of the current Act, as set out in section 5, is that it is in the public interest to release information held by government it could be argued the release of non-personal information held by the government is generally in the public interest.

The Combined Community Legal Centres Group developed this point:

> *We do not recommend a separate costs category for 'public interest' discounts because the term itself is so loosely defined. It is our view that all applications under the Freedom of Information Act are inherently in the public interest.*
>
> *It is in the public interest to have a legal system that operates fairly and equitably. It is in the interests of justice (which is ultimately the interest of the public, or the community as a whole) that people are able to have access to information held about them by government agencies.*
>
> *It is particularly in the interests of justice to release documents where an applicant needs the information held by an agency in order to properly exercise other legal rights and entitlements (for example, to commence civil proceedings).*
>
> *Accordingly, we submit that all applications under freedom of information legislation should be presumed to be in the public interest, and dealt with as such.*[184]

---

[181] Department of Primary Industries submission to the FOI review, issue 64.
[182] Megan Carter submission to the FOI review, page 19.
[183] Clause 6(e).
[184] Combined Community Legal Centres Group (NSW) Inc submission to the FOI review, page 6.

Out of the 4,270 reported non-personal affairs applications included in our informal review of FOI statistics in 2005–2006, only 48 public interest discounts were given. The Public Interest Advocacy Centre referred to this issue in its submission:

> *… in PIAC's experience while agencies are generally prepared to reduce fees and charges when its clients can demonstrate financial hardship, for example by providing a pensioner card, they are extremely reluctant to reduce fees on the basis of public interest. PIAC suggest that consideration should be given to ways to encourage agencies to use this discretion more often, for example through the provision of training or targeted guidance on this issue.*[185]

We agree. The information Commissioner would be well placed to ensure training and further guidance is provided.

The Department of Premier and Cabinet cautioned that while the number of instances of public interest fee discounts may be low (giving its recent determinations as an example), fees may in fact have been waived in full. In relation to its own applications it said it had waived application fees in 25 of 68 completed applications.[186]

There was support for more guidance as to the circumstances where disclosure of information is in the public interest and that the circumstances should be read broadly. Views differed about whether this would be best placed in the Act itself or in policy guidance provided by the Information Commissioner. Similarly a clear statement that in assessing whether it is in the public interest to release information the relevant test is the likely outcome of release, not the possible motives of the applicant, could either be in the Act or in separate guidance.

In our view, the circumstances in which disclosure of information should be treated as being in the public interest should include where the documents requested primarily concern issues such as:

- the integrity of public officials, government agencies or the government of the day
- the accountability of public officials, government agencies, or the government of the day as well as other people or organisations performing public official functions
- the performance of public functions by public officials, government agencies, or the government of the day as well as other people or organisations contracted or working as agents of the government
- the expenditure or allocation of public money
- any arrangements including tenders and contracts for the expenditure of public money or performance of public official functions.

7.5. Voluminous requests

The current Act does not currently provide for an extension of time when dealing with requests for large amounts of information. It only deals with an agency's right to refuse to deal with an application that is a substantial and unreasonable diversion of resources (see below) and an agency is able to charge an advance deposit.

As raised in the discussion paper, the FOI Acts in Canada, the United States, Northern Territory, South Australia and Western Australia all allow for an extension of processing time where an applicant is requesting a large amount of information. Most provide for extensions of a reasonable time having regard to the particular circumstances.

We saw examples of good practice in managing requests for large amounts of information in some of the agencies we audited. Each of the practices relied on contact and discussion between the agency and applicants.

---

[185] Public Interest Advocacy Centre Ltd submission to the FOI review, page 28.
[186] Department of Premier and Cabinet submission to the FOI review, page 9.

Case study

Capitalising on technology

An agency's FOI practitioners recognised that the majority of requests were from legal or other professional representatives for documents relating to their clients. Rather than photocopying voluminous files, they arranged with regular users to provide copies of the documents on password protected CDs. Each regular user was allocated a unique password and CDs were mailed separately to ensure security. If further applications were received for the same client, the agency had a scanned copy of the previously released documents and simply added new documents from the file. Staff had made maximum use of the agency's electronic document management system and paperless office environment to save postage costs and make what could be voluminous applications manageable.

Case study

Look before copying

Extensive use of a viewing room meant a council only provided copies of documents an applicant actually wanted rather than needlessly copying an entire file. FOI staff told us applicants often requested all documents on a given file because they did not know which were relevant. By inviting applicants to view the file, they decide which documents they actually wanted. This significantly reduced the number of documents copied, reducing postage costs and use of staff time. The viewing room could only be used during council working hours. However, the FOI staff had on occasion arranged for documents to be viewed in the public library with more extensive opening times.

In its submission to the review, State Super suggested arranging for applicants who make multiple requests to view documents:

> *If they want to see if anything has happened since their last request, they could view the list of documents and just get copies of the latest ones that they need or they may not be interested in all of them.*[187]

Those who commented on voluminous applications generally thought it would be a good idea if agencies could extend the time for dealing with an application and that this should be based on an estimate of the time it would take to complete the application. Views about what period of time was significant varied, with mention being made of 10 through to 40 hours.

We are keen to ensure the new Act fosters a more straightforward and constructive approach than under the current Act. Rather than recommending a provision for time to be extended based on an arbitrary amount of processing time, we suggest the new Act places the onus on both agencies and applicants to discuss which documents the applicant really wants. It was clear from our audits that where practitioners contacted applicants to discuss their applications, there was a much greater chance of dealing efficiently with applications, even those which were for large amounts of information. Good communication also minimises conflict. Often the discussion leads an applicant to refine the scope of their application. Sometimes it gives both parties a better understanding of what is involved in identifying and collating the documents requested. Agencies should also consider more creative responses such as those outlined in the case studies.

Our recommendation that there is a provision in the new Act to extend the time for dealing with an application by agreement, will in our view provide an adequate mechanism for agencies

[187] State Super submission to the FOI review , issue 54.

when dealing with applications for large amounts of information. The fact that any extension has to be by agreement means agencies will have to contact applicants to explain what is involved in their current request, explain the likely time it will take to process and the reasons for this. Applicants will have sufficient information to make an informed decision about the agency's request. If no agreement can be reached, the substantial and unreasonable diversion of resources provision may apply, subject to a right to seek an internal or external review.

7.6. Substantial and unreasonable diversion of resources

There was general agreement in submissions that the factors set out by the ADT are appropriate to guide an agency in assessing whether an application might constitute an unreasonable diversion of resources. The current Act provides that an agency can refuse access to a document:

> *if the work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions.*[188]

The ADT has set out a number of factors which it considers to be relevant when an agency is making this assessment.

> *Factors which the ADT considered relevant to an assessment of whether the application might constitute an unreasonable diversion of resources included the following:*
>
> *(a) the terms of the request, especially whether it is of a global kind or generally expressed request; and in that regard whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort;*
>
> *(b) the demonstrable importance of the document or documents to the applicant may be a factor in determining what in the particular case is a reasonable time and a reasonable effort;*
>
> *(c) more generally whether the request is a reasonably manageable one giving due, but not conclusive, regard to the size of the agency and the extent of its resources available for dealing with FOI applications;*
>
> *(d) the agency's estimate as to the number of documents affected by the request, and by extension the number of pages and the amount of officer-time, and the salary cost;*
>
> *(e) the timelines binding the agency;*
>
> *(f) the degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed, and in that regard importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and*
>
> *(g) possibly, the extent to which the applicant is a repeat applicant to the agency in respect of applications of the same kind, or a repeat applicant across government in respect of applications of the same kind, and the extent to which the present application may have been adequately met by those previous applications.*
>
> *The ADT indicated that these factors are not an exhaustive list of possible considerations.*[189]

There were some differences in opinion about whether the factors should be included in the new Act or merely reinforced to agencies via a Premier's Memorandum or other form of reminder. Memoranda from the Premier do not apply to all agencies that implement the FOI Act, such as universities and local councils. We therefore recommend that any guidance about assessing when an application would constitute an unreasonable diversion of resources come from the Information Commissioner.

---

[188] Section 25(1)(a1) *FOI Act 1989*.
[189] NSW FOI Manual 2007, at 4.5.10.

7.7. Repeat FOI applications

Members of the public can apply under the FOI Act for documents as many times as they want. We know a number of agencies have difficulties with individuals who make unreasonable and repeat applications and as a consequence become a significant drain on public resources.

The FOI Act is intended to provide transparency in government and agencies need to be appropriately resourced to fulfil this objective. As raised in the discussion paper, there are several groups of people such as journalists and MPs who use the Act frequently as a tool to legitimately obtain information to help them with their work.

However, there is no public interest served in agencies using considerable resources to deal with a small number of persistent individuals repeatedly seeking access to the same or related documents, some of which are legitimately exempt.

As part of a joint Australian Ombudsman project about unreasonable complainant conduct, strategies to deal with repeat applications have been analysed. The experience from a range of jurisdictions shows that a small number of people exercise their statutory rights to make FOI and privacy applications in ways that unreasonably impact on the resources of agencies, create significant equity considerations in relation to the ability of other applicants to exercise their rights and sometimes adversely impact on the health and welfare of agency staff. While the number of these kind of applicants is small, their conduct or activities can have significant cost implications for agencies and external review bodies. For example, just two applicants are the subject of approximately 30% of the ADT's FOI related decisions since 2004.

This is not just an issue related to FOI applications. The *Vexatious Proceedings Act 2008* received assent on 5 November 2008. For the purposes of that Act a vexatious litigant is a person who frequently and persistently seeks to commence legal action without reasonable grounds or for improper purposes. The Act expands the power of the Supreme Court to make orders restricting proceedings in courts and tribunals by vexatious litigants.

While welcome, we do not consider that the Vexatious Proceedings Act will enable agencies or the ADT to properly manage repeat applicants. It is based on the motive and intentions of an applicant, their conduct not the content of their applications. The main consideration when dealing with repeat FOI applicants is whether the number of applications made to an agency about the same or similar issues has an unreasonable impact on agency resources, delaying processing of other applications. The basis for the test should be where one person exercises their rights in ways that detrimentally impacts on the ability of other people to exercise theirs. This is a more practical, and perhaps a less subjective, test than questioning whether an applicant is 'vexatious', which requires an assessment of the applicant's intention or motive. Its also ensures the impact of numerous applications can be taken into account.

Submissions to the discussion paper gave general support for agencies to have the ability to refuse applications (subject to rights of external complaint or review) based on excessive numbers of applications for documents about the same or similar issues over a 12 month period where dealing with them would unreasonably divert resources away from the agency in the exercise of its functions.

For instance the Office of the Director of Public Prosecutions said:

> *It may be prudent to ensure agencies are not subject to repeat FOI applications and to place restrictions within the legislation is therefore appropriate.*[190]

While some agencies thought three or four applications a year, other than from MPs and journalists, was potentially unreasonable, others thought the issue more complicated. Phillip Youngman said in his submission:

> *It is not practical to make a number that you can use to say that once this number is reached the applicant should be treated as vexatious. An applicant could always place a smaller number of applications requesting thousands of pages of documents for each request.*

[190] Office of the Director of Public Prosecutions submission to the FOI review, issue 103.

It is more to the point that repeat applications from the same person (or group of people) dealing with essentially the same issue can seriously impact on the efficiency of the agency's FOI area….

The agency needs to be able to demonstrate, and it should be able to do so through its FOI files, that the applicant has made persistent applications for the same material over a reasonably short period of time. In addition, the agency should be able to prove the impact it is having on the human and financial resources of the FOI area. …

… the agency has to prove that the number of applications and/or the amount of work generated by particular vexatious applicants is impacting on the area's ability to be able to process its work and meet the demands of the other applicants.[191]

Hunter New England Area Health Service said:

[agencies should be able to seek orders from the ADT] *that the Tribunal's consent is required for any further applications, imposing conditions on further applications that costs are met and imposing an upper limit on the number of separate applications by an individual.*[192]

The Legal Aid Commission expressed concern that:

Consideration of the personality and motives of an applicant, except in limited circumstances related to specific exemptions, are not a part of the usual process by which agencies assess FOI applications at present. To introduce these considerations for a particular class of applicant involves new and complex issues for consideration.[193]

This is not what was suggested in the discussion paper. We are not concerned with an applicant's motive, and certainly not their personality. Rather the issue is one of equity; the unreasonable impact on the resources of agencies caused by a limited number of people applying repeatedly for documents about the same or closely related issues. Repeat applications from a small number of individuals can take up a disproportionate amount of agencies' finite resources with a corresponding impact on other work, including dealing with other applications.

We suggest the new Act contains a provision giving the ADT the power to make orders along the lines of civil restraint orders in the UK Civil Procedure Rules.[194] The supplementary *Practice Direction — Civil Restraint Orders* sets out the circumstances in which orders can be made without reference to the prejudicial term 'vexatious'. Rather the practice direction refers to 'applications which are totally without merit'. Such orders stop someone from making any further applications without first obtaining the permission of a judge identified in the order.

7.8. Obligations of regular users of FOI

As mentioned above, there are several groups of people such as journalists and MPs who use the current Act as a tool to obtain information to help them with their work. They make frequent applications to a variety of government agencies. In the case of MPs, applications are often prepared and submitted by their staff.

This is an important part of a functioning, participatory democracy. However, it can be argued that with such regular use comes obligations. In the course of our audits we have come across numerous examples of poorly drafted applications lodged by experienced users of FOI. While appreciating applicants often do not know what documents exist and therefore have to make broad applications, some applications we have seen look more akin to questions on notice in Parliament than FOI applications.

---

191 Phillip Youngman submission to the FOI review, issues 103–105.
192 Hunter New England Area Health Service submission to the FOI review, issue 103.
193 Legal Aid NSW submission to the FOI review, page 8.
194 3.11 UK Civil Procedure Rules.

Poorly articulated applications that ask questions rather than seek documents make it unnecessarily difficult for agencies to comply with their statutory obligations. We also note that opposition MPs have other avenues through which to seek answers to questions, including questions on notice and the call for papers process.[195] It is ironic that many of these applications are designed to obtain information about an alleged waste of public funds to embarrass the government, but on occasion the applications themselves are so poorly articulated as to cause unnecessary expenditure of public money.

Regular users of the system share the responsibility for making this legislation work effectively. There will never be unlimited resources for FOI and we urge regular users to avail themselves of training in the system to make sure they, and their staff, use public resources as efficiently and effectively as possible while exercising their right to access information.

Recommendations

63. Fees and charges for initial applications and internal reviews should remain the same.

64. There should continue to be a reduction in fees and charges of up to 50% for demonstrated financial hardship and public interest applications.

65. The new Act should include a provision that an agency can accept an application without an application fee.

66. The new Act should include a provision for an applicant to seek an internal or external review of a request for an advance deposit without the need to wait for the period specified in the request for the deposit to expire and for the agency to decide to refuse to continue dealing with the application.

67. Agencies should only be able to charge up to 50% of the estimated total cost as an advance deposit.

68. The Information Commissioner should produce guidelines on the information an agency is required to provide to an applicant to explain how an advance deposit has been calculated.

69. The new Act should specify the minimum time an applicant can be given to pay an advance deposit, that a longer period can be given and that the period can be extended by agreement between the parties.

70. The new Act should provide that an advance deposit should be refunded if the agency fails to determine the application and provide access to the documents identified for release within the statutory or agreed timeframe.

71. Where an agency includes information in its disclosure log at the same time as releasing that information to an applicant, any fees and charges paid by the applicant should be refunded.

72. Guidance should be provided in the new Act or in guidelines produced by the Information Commissioner:

    a. as to the circumstances in which disclosure of information is in the public interest

    b. that in assessing whether it is in the public interest to release information the relevant test is the likely outcome of release, not the possible motives of the applicant.

[195] NSW Parliament, Sanding Order 269 Papers and documents.

73. The factors set out by the ADT to guide an agency in assessing whether an application might constitute an unreasonable diversion of resources should be included in guidelines produced by the Information Commissioner. Such guidelines should also include details of other measures an agency should consider when dealing with applications for voluminous documents such as providing a list of documents within the scope of the application to the applicant or arranging for an applicant to view the documents.

74. The new Act should contain provision for the ADT to make orders along the lines of civil restraint orders in the UK Civil Procedure Rules concerning applications which are totally without merit or would result in an unreasonable diversion of resources.

Chapter 8.
Reviews of decisions

8.1. I disagree with the decision

It is well established in FOI jurisdictions throughout Australia and overseas that an applicant who disagrees with a decision of an agency has certain rights of appeal and review. The detail of how these rights are exercised varies but generally applicants, and those known as 'third parties' who have been consulted about an application, have internal and external avenues of appeal.

The discussion paper set out in some detail how these rights operate currently in NSW.[196] As with other areas of the current Act, the review provisions have been amended on an ad hoc basis over the years with the creation of the ADT, changes to the Ombudsman Act to give the Ombudsman power to conduct preliminary inquiries and changes to the FOI Act so an agency can review a determination at the Ombudsman's suggestion.

This incremental change has resulted in arrangements which are far from straightforward. A new Act presents an opportunity to draft new review and appeal provisions that are logical, written in clear language and offer choices at key stages.

8.2. Internal reviews

Under the current system an applicant cannot seek an external review until they have given the agency an opportunity to reconsider the application by way of an internal review.

There was general support in submissions from both agencies and users of FOI that internal reviews should be maintained. The Combined Community Centres Legal Group said:

> *The Discussion Paper notes that in its annual review of agencies' FOI statistics, the original decision made by the agency was upheld in 68% of cases. This figure indicates that in 32% of cases (that is, one third of all internal reviews) a different decision is reached by an agency upon internal review. This significant figure demonstrates the importance of retaining a system of internal review.*
>
> *… It is our recommendation that an internal review system should not be an optional mechanism. We are in favour of the retention of internal review (as set out above). We are also in favour of a single clear and transparent system for applicants to follow when making applications or challenging decisions. We are concerned that options and discretion might lead to further confusion and could be open to abuse.*
>
> *The review process should be kept as simple and easy to understand as possible particularly for those applicants who are unrepresented, in keeping with the social policy considerations of the Act.*[197]

While some agencies thought there was duplication of work involved in an internal review, this was generally seen to be outweighed by the benefits. NSW Police Force observed:

> *The internal review provisions provide applicants with a right of review that often avoids the applicant having to engage the powers of the Ombudsman or the ADT. Removing this process in its entirety could ultimately result in a significant increase in matters dealt with by the Ombudsman or ADT, which ultimately incurs greater expense for agencies. The right to internal review is an important function in the administrative law process and it is important that the internal review process remain mandatory before the Ombudsman or ADT is involved to ensure that there is no unnecessary review of decisions in a more costly forum. However,*

[196] Discussion paper, chapter 11 Reviews.
[197] Combined Community Legal Centres Group (NSW) Inc submission to the FOI review, page 11.

in practice there is often much duplication of the functions of the agencies in performing initial determinations and subsequently internal reviews on the same issues.[198]

While not disagreeing that some benefits flow from the internal review process, some submissions thought making it mandatory was problematic. The Environmental Defender's Office said this 'places an unfair burden on the applicant'. The EDO went on to give a case study of an application it had made where it said 'the possibility of the original decision being overturned was extremely unlikely':

This is an example where undergoing the process for an internal review, in order to obtain an external review by the ADT, is a frivolous procedure that costs the applicant both unnecessary time and money.

The EDO therefore believes that whilst there still should remain an option for an applicant to pursue an internal review by the agency that originally denied the information requested, it should not be a prerequisite to obtaining an external review. That is, internal reviews should be optional, not mandatory.[199]

Australia's Right to Know Coalition said:

Applicants should have the option of bypassing internal review and proceeding directly to external review. Agencies need to place more emphasis on getting the decision right in the first instance.[200]

The Solomon review panel reached a similar conclusion:

The Panel believes that internal review should be optional. It seems desirable there should be some flexibility in the system to take account of the particular circumstances of the applicant or the application. There will be some cases, for example where sufficiency of search is in issue, where internal review would be highly desirable. There are others, for example if there is a legal issue in dispute, where there may be little to be gained from internal review.[201]

This is also our experience. An internal review is sometimes a useful and productive opportunity for agencies to fix mistakes while genuinely reconsidering a matter. However, on occasion it is clear there is little prospect of a different outcome yet an applicant has to pay $40, the fee for an internal review, and wait for two weeks before getting confirmation of the same advice. The right to an internal review should be preserved but it should not be compulsory.

We have made recommendations in Chapter 6 of this report to address some of the other anomalies and challenges of the current system including increasing the timeframe to complete an internal review to 15 working days, reflecting that when an internal review is conducted, it should consist of a genuine consideration of the application, and requiring agencies to provide details of essential timeframes when acknowledging an application to ensure applicants are aware of their external appeal rights and are thereby empowered to exercise them.

8.3. External reviews

8.3.1. Current arrangements

Currently applicants or third parties can:

- make a complaint to the NSW Ombudsman in relation to the merits of a decision to refuse access or advice that no documents exist, or any conduct of the agency or its staff in relation to an application

[198] NSW Police Force submission to the FOI review, chapter 11.
[199] Environmental Defenders Office (NSW) submission to the FOI review, pages 19–20.
[200] Australia's Right to Know Coalition submission to the FOI review, 12.3.
[201] FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 238.

- make a review application to the ADT in relation primarily to merit issues
- both of the above but not at the same time.

An application to the ADT must be made within a specified time, accompanied by a lodgement fee of $55 which can be waived by the registrar in cases of financial hardship. There is no charge or time limit for making a complaint to the Ombudsman.

The ADT has determinative powers. The Ombudsman has a variety of informal tools we use to resolve matters, including suggesting that an agency redetermine a matter, a power we have due to section 52A of the current Act.

The discussion paper asked whether a new Act should provide a single avenue of external review, such as an Information Commissioner with determinative powers, or dual avenues of external review such as the current system.

8.3.2. Submissions

Opinions in submissions were wide-ranging. As we discuss further in Chapter 9, there was widespread support for a statutory position of Information Commissioner but with varying suggestions about such an entity's role in external reviews.

Peter Timmins said:

> *Judicial issues have occurred so frequently in the ADT to suggest serious problems with the review mechanism. A broad based right to seek review of a determination by an information commissioner with determinative powers is a much better option.*[202]

Megan Carter said:

> *I would prefer an Information Commissioner with determinative powers, whose decisions can be appealed on points of laws. In this model, the specialist review body is able to develop deep expertise in FOI; traditionally it always has a more consistent approach in its decision-making. (All jurisdictions with the Tribunal model have problems with internal consistency in their approach to FOI exemptions — ADT, AAT, VCAT). The Commissioner model offers the advantages for applicants of accessible, affordable justice; they do not need legal representation, there are few if any of the formalities of Tribunals. Commissioners, like Ombudsman, have a wide range of flexible methods to achieve a result, including investigation, mediation, negotiation and shuttle-diplomacy.*[203]

The Environmental Defender's Office was not impressed by the current external role played by the Ombudsman:

> *We submit that the current role of the Ombudsman in this external review process is ineffectual and has not led to real cultural changes within agencies. As a result… the EDO suggests that all the powers of the Ombudsman relating to the administration of FOI regime, including the external review power, be transferred to a newly appointed Information Commissioner. However, the Commissioner would not only have the current powers of review afforded to the Ombudsman, but would also have authority to make determinations. … The EDO submits that the introduction of an Information Commissioner would not take away from the important role provided by the Administrative Decisions Tribunal, which would remain as a higher source of appeal for both applicants and agencies.*[204]

NSW Police Force said:

> *NSWPF supports the contention of a dual avenue review structure where the Ombudsman retains its powers to review the functions of agencies and the way in which decisions are made, while a body such as an Information Commissioner can examine the merits of decisions. Furthermore, the role of an Information Commissioner may aid in ensuring that matters addressed in the ADT only concern questions of law and that this avenue of appeal is*

[202] Peter Timmins submission to the FOI review, page 10.
[203] Megan Carter submission to the FOI review, page 34.
[204] Environmental Defender's Office(NSW) submission to the FOI review ,pages 20–21.

not unnecessarily utilised. For example, a workable suggestion may be that all disputes over applications must be dealt with by the Information Commissioner before proceeding to the ADT and the Information Commissioner has the responsibility to deter unreasonable or repeat applications, or applications with little prospect of success, from appealing to the ADT.[205]

Still other submissions, such as that from the Local Government and Shires Associations, thought the current external review processes are adequate and need not change.[206]

8.3.3. The way forward

While there was some limited support for the status quo, the bulk of submissions thought change is required. We agree.

We appreciate that a 'one stop shop' for external reviews has some attractions. It holds out the possibility of a more streamlined system, with certainty about when the sole avenue of external review has been exhausted. However, our practical experience as an administrative watchdog dealing with, amongst other things, complaints about FOI process and merits issues, leads us to conclude such an arrangement would not only fail to provide an optimal system but runs the risk of being ineffective.

In our view there are significant benefits to a dual system of review. At the heart of our concern are the inherent risks and difficulties of having one entity with both determinative and advisory functions.

There is a need to have an independent body which can deal with agencies on a range of FOI matters. This includes giving advice and guidance both directly to individual practitioners and by way of detailed guidelines, and taking practical steps to ensure agencies' systems for providing access to information are robust. Significant concerns could arise about the objectivity and independence of such a body if it also had determinative powers.

For example, if an Information Commissioner advised an agency that it had a legitimate reason to refuse access to information and the applicant subsequently complained about that decision, there may be a perception the Information Commissioner had already formed a view about the matter. The impact of vital advisory and systems improvement work could be at risk of being diminished or compromised, as well as binding determinations being brought into question.

Importantly, a non-determinative avenue of external review also offers significant opportunities for resolving matters with minimal cost and formality. While many submissions supported an Information Commissioner with determinative powers, there was also a desire to ensure the right to legal representation during an external review. For example, the Environmental Defender's Office said:

In relation to external reviews, whether in front of the ADT or the Information Commissioner (if adopted), the EDO strongly submits that there should be no restriction to rights to legal representation. FOI applicants often have limited resources and very limited experience with hearings, whether in front of tribunals or courts. In contrast, agencies would often have significant resources and advocacy experience. The opportunity for applicants to obtain legal representation goes some way towards levelling the playing field.[207]

Phillip Youngman also did not think the right to legal representation before the ADT should be limited in any way, saying:

… in most cases, with the onus of proof on the agency, most need for legal representation is with the agency. If the appellant wants to have his/her own legal advisor/s s/he is free to do so.

As an FOI Officer I have appeared before the ADT without legal representation and whilst it is possible in cases where the issues are straightforward, I feel the rules of evidence and other matters that tend to be brought up during proceedings make it better in most cases for the agency to be legally represented.[208]

---

[205] NSW Police Force submission to the FOI review, page 18.
[206] Local Government and Shires Associations submission to the FOI review, chapter 11.
[207] Environmental Defender's Office (NSW) submission to the FOI review, page 21.
[208] Phillip Youngman submission to the FOI review, issue 115.

The ADT has a less formal approach than a court, with the first stage often being a pre-hearing planning meeting where agencies have an opportunity to reconsider their original decision. However, it is clear both from comments in some submissions and from our audits that many agencies see an external review as a combative, legal process. In a number of the agencies we audited, external review applications to the ADT are handled by the agency's legal section rather than the FOI unit and some agencies brief the Crown Solicitor or external law firms. In contrast, in their dealings with the Ombudsman, agencies seldom use legal representation other than when a formal investigation is undertaken.

This strongly suggests that if the only avenue/s of external review were determinative, whether to an Information Commissioner or the ADT or both, the process risks becoming very legalistic and formal. Agencies would want to be legally represented, lessening the scope for informal negotiations and agreement and immediately leading to a power imbalance as applicants are much less likely to be able to be legally represented. It also adds considerably to the cost.

In contrast, having a non-determinative avenue of external review offers a real opportunity for resolution. In 2007–2008 the Ombudsman finalised over 190 FOI complaints and achieved 171 positive outcomes in these matters.[209] Many of them were resolved by the agency agreeing to re-determine the application and release the documents, as well as positive improvements by way of changes to policy and procedure, refunds of fees and apologies being made to applicants. We also resolved a number of matters where the agency had been unable to locate the documents at the time of the original determination but subsequently located and released them to the applicant at our suggestion.

In the agencies we audited, external reviews to the Ombudsman are largely dealt with by FOI staff or a senior manager for the area in which FOI sits, rather than legal officers. In our experience this often results in a more flexible, pragmatic approach to resolving disputes. Unlike a tribunal, as a non-determinative body, we are able to use a variety of methods to persuade the parties to come to some resolution.

8.3.4. New external review system

We therefore recommend the new Act provides for a dual avenue of external review, with both the Information Commissioner and ADT being able to carry out external reviews.

The Information Commissioner should have the power to:

- conduct reviews looking at merit issues
- refer a matter back to an agency for an internal review
- investigate complaints about any conduct of an agency or its staff in relation to an application including sufficiency of search issues
- make recommendations and suggestions in relation to these matters including suggesting an agency redetermine an application.

The ADT should continue with its current role and responsibilities as the determinative external review avenue.

The current interaction between the two avenues of external review is unnecessarily cumbersome. We suggest the new external review procedure is linear — the Information Commissioner being the first available step and then, if the applicant is still dissatisfied, an application can be made to the ADT. Lodgement of a complaint with the Information Commissioner would be optional, but if an applicant decides to go directly to the ADT they will not be able to complain to the Information Commissioner after the ADT has dealt with it.

Each should have the ability to refer matters to the other and the Information Commissioner should have the right to appear in proceedings in the ADT in relation to an external review of a FOI application.[210] The Information Commissioner should be able to refer complaints about matters of general maladministration to the Ombudsman.

[209] *NSW Ombudsman Annual Report 2007–08,* page 147.

[210] Similar to the provision in Section 55(7) of the *Privacy and Personal Information Protection Act 1998* in relation to the Privacy Commissioner.

Time limits for external reviews should largely remain as they are now.[211] The only difference should be that the time to go to the ADT will run either from when the initial determination **or** internal review determination was given to the applicant, depending on whether they decide to apply for an internal review or go immediately to external review. There should be no time limit for complaints being made to the Information Commissioner. However, if a complaint is made outside the prescribed timeframes the applicant will have no further right of review to the ADT. We have also recommended that the new Act give the ADT discretion to accept an external review application out of time — see Chapter 6.

8.4. Powers of investigation, search and scrutiny

To conduct reviews effectively, an independent external review body needs appropriate powers to obtain information. The new Act should give the Information Commissioner appropriate investigation, search and scrutiny powers including the ability to make inquiries and conduct investigations, to enter premises, to conduct searches for documents and to take or make copies of relevant documents. It is important the provisions reflect the modern electronic office to address issues such as electronic security systems, key card door access, passwords, and encryption and centralised electronic record-keeping systems.

Recommendations

75. The right to an internal review should be retained in the new Act but it should be optional.

76. External reviews should be carried out by both the Information Commissioner and ADT.

77. The Information Commissioner should have the power to:

    a. conduct reviews looking at merit issues

    b. refer a matter back to an agency for an internal review

    c. investigate complaints about any conduct of an agency or its staff in relation to an application, including sufficiency of search issues

    d. make recommendations and suggestions in relation to these matters, including suggesting an agency redetermine an application.

78. The ADT should continue with its current role and responsibilities conducting determinative external reviews.

79. The ADT should be able to refer an administrative issue which it considers may have systemic implications to the Information Commissioner.

80. The Information Commissioner should be able to refer a matter to the ADT.

81. The Information Commissioner should have the right to appear and be heard in any proceedings in the ADT in relation to an external review of an application.

82. The new Act should give the Information Commissioner appropriate investigation, search and scrutiny powers.

[211] Section 54 of the FOI Act 1989: a review application must be made to the ADT within 60 days after the notice of determination was given to the applicant, or if a complaint is made to the Information Commissioner within that 60 day period, within a further 60 days after the Information Commissioner informs the applicant of the outcome of its consideration.

Chapter 9.
Oversight and accountability

9.1. A guardian for the new system

As well as being an avenue of external review as discussed in Chapter 8, the Information Commissioner should also provide independent oversight and accountability for the new Act and be its guardian, the public proponent for the objects and intentions of the new system.

When recommending the creation of a Commissioner to monitor and improve the administration of FOI, the 1995 joint Australian Law Reform Commission and Administrative Review Council said in their *Open Government* report:

> [T]*he appointment of an independent person to monitor and promote the FOI Act and its philosophy is the most effective means of improving the administration of the Act. The existence of such a person would lift the profile of FOI, both within agencies and in the community and would assist applicants use the Act. It would give agencies the incentive to accord FOI the higher priority required to ensure its effective and efficient administration.*[212]

In this chapter we consider where the Information Commissioner should sit and what its role and functions should be, over and above conducting external reviews.

While there was widespread support for a statutory position of Information Commissioner, there were a variety of views about where to establish the position and what its role and functions should be.

Australia's Right to Know Coalition said:

> *It is vital that NSW appoint an Information Commissioner to deal with FOI applications. Whilst acknowledging the invaluable current FOI role of the NSW Ombudsman, we strongly believe a well resourced, dedicated Commissioner with comprehensive powers, is necessary for FOI to work effectively.*[213]

Peter Timmins said the Information Commissioner should be in the Ombudsman's Office 'with responsibility for information access and privacy issues along the lines of the UK model'.[214]

Megan Carter preferred the model of a separate Information Commissioner but said the role being in the Ombudsman's Office 'has been quite successful in other jurisdictions… [this option] is often pursued due to resource constraints and it saves the administrative expenses of setting up a separate Office'. She thought the:

> *… ideal model, and one followed in many places, is that there is an FOI Policy Unit within government, and an external review body with a level of independence from government. This happens in the Commonwealth, Queensland, South Australia, United Kingdom and Ireland amongst others. Most jurisdictions begin with such a model, and over time the centre unit is disbanded, and problems set in.*[215]

The Office of the Director of Public Prosecutions thought 'there is merit in creating an Information Commissioner under the responsibility of the Ombudsman with both FOI and privacy roles'.[216]

---

[212] ALRC/ARC *Open Government* report, para 6.4.
[213] Australia's Right to Know Coalition submission to the FOI review, page 1.
[214] Peter Timmins submission to the FOI review, page 11.
[215] Megan Carter submission to the FOI review, page 35.
[216] Office of the Director of Public Prosecutions submission to the FOI review, issues 123–128.

The City of Sydney Council said:

> *I consider that the duties of the NSW Ombudsman should include the position of Information Ombudsman. This position should retain the responsibility of investigating complaints relating to how FOI applications have been handled and should have a determinative role.*[217]

The Department of Premier and Cabinet commented:

> *In a climate where the Government needs to exercise fiscal restraint, any proposal to support the establishment of a separate office [of the Information Commissioner] would need to be carefully scrutinised to ensure maximum efficiency.*[218]

9.2. The way forward

Having carefully considered the many relevant factors, including models used in other Australian jurisdictions as well as overseas, we recommend the role of Information Commissioner be created in the Office of the NSW Ombudsman.

While we are aware of the particular sensitivities of making such a recommendation ourselves, we believe this is a common sense solution which capitalises on our existing expertise, avoids duplication of responsibilities and provides robust leadership for the new system without resulting in the risks associated with further proliferation of oversight agencies.

For sometime now the role of Ombudsman in many jurisdictions has been much more than the investigation of complaints. Our own experience has been no different. We have steadily taken on new oversight responsibilities, resulting in a significant expansion in our general role in improving public administration.

Our existing expertise in the area, gained over nearly 20 years, would form the basis for the expanded function of Information Commissioner, but we would also bring our broader knowledge of issues across government gained from the breadth of the Ombudsman's work. Our experience has shown there are often multiple factors involved in a poorly handled application. These can include poor record-keeping, inadequate customer service, a failure to give adequate reasons and even maladministration revealed by the content of the documents, as well as problems with the determination itself. The Ombudsman's broad responsibility for improving administrative practice across NSW government agencies including local councils means we can look at all of these matters as well as the substantive issues.

We also have credibility and standing in NSW amongst both agencies and applicants, as well as established systems for liaison and information sharing with key government agencies and other watchdogs. A newly created entity would need to devote time and considerable resources to establishing its reputation and business systems.

The Commonwealth Ombudsman, Professor John McMillan, has spoken about the advantages of placing an Information Commissioner in an Ombudsman's office:

> *A distinct benefit that an Ombudsman can bring to any new function is that the office has a tradition, credibility and respect to draw upon. In Australia, Ombudsman officers have been operating successfully for over thirty years. In that time, they have developed a successful model and philosophy for safeguarding the public and dealing with problems in government.*
>
> *The importance of this stability and strength should never be understated. There are many other complaint, oversight and monitoring bodies that have had a shorter or more turbulent life.*[219]

---

[217] City of Sydney Council submission to the FOI review, chapter 12.
[218] Department of Premier and Cabinet submission to the FOI review, page 14.
[219] Professor John McMillan *Designing an effective FOI oversight body — Ombudsman or independent Commissioner?* paper to the 5th International Conference of Information Commissioners Wellington New Zealand, 27 November 2007.

In contrast, some see drawbacks in doing this. The Australian Law Reform Commission and Administrative Review Council in their *Open Government* report referred to earlier considered the role of FOI Commissioner would not sit well with the Ombudsman's primary role of complaint resolution and that:

> *… this aspect of the Ombudsman's work could reduce the effectiveness of the proposed advice and assistance role because of a perceived conflict of interests. In addition, the Ombudsman's role makes it important that he or she not become involved in policy development. The Ombudsman should be independent of the policy making process and able to criticise defective policy. The Ombudsman, like the Auditor-General, has broad systemic responsibility for maintaining the integrity of government. This requires arms length scrutiny which would be compromised significantly if the Ombudsman had responsibility for administering particular legislation other than his or her own.*[220]

An argument that a stand alone oversight arrangement is preferable for each area or function of government does not take into account the practical realities of modern government where there is competition for limited resources. An Ombudsman has existing back-office infrastructure — human resources, information technology and other corporate services — that would support an Information Commissioner. We also have existing powers of inquiry and investigation with well established systems for their operation and use.

We have demonstrated in finding the resources needed to do this review[221] that resources can be moved around within a larger organisation where essential large scale projects need to be carried out. A smaller organisation does not have the flexibility to do this.

Professor McMillan has also spoken about this:

> *The greater size of an Ombudsman's office gives it a practical advantage in recruiting staff, training staff, providing career variation and opportunities for staff, and retaining good staff. By contrast, small offices with a specialist oversight function can face greater difficulty in staff recruitment than larger offices with a broader jurisdiction and range of work.*
>
> *It is probable also that an Ombudsman's office requires less staff to discharge an FOI function, because it already has corporate, human relations and IT staff for other Ombudsman functions. Another advantage of this greater staffing capacity is the ability to deal more easily with peaks and troughs in complaint work, in shifting staff from one area of the office to another.*[222]

Establishing a separate Commissioner also runs the risk of a single issue watchdog losing sight of the broader perspective, something which an entity embedded in an organisation with a broader jurisdiction is less prone to do.

9.3. Functions of the Information Commissioner

For the reasons set out in Chapter 8, we do not consider it appropriate for an Information Commissioner to have determinative powers. The ADT should continue to perform that function while the Information Commissioner has the broader, more wide ranging responsibilities crucial for the robust and successful operation of the new system.

References and recommendations have been made throughout this report to responsibilities an Information Commissioner could be given. Wherever established, the functions of the Information Commissioner should be created by statute and include:

---

220 ALRC/ARC *Open Government* report, para 6.29.

221 The Ombudsman decided it was important to undertake this review without relying on the government to provide specific purpose funds.

222 Professor John McMillan *Designing an effective FOI oversight body — Ombudsman or independent Commissioner?* paper to the 5th International Conference of Information Commissioners Wellington New Zealand, 27 November 2007.

- investigating:
  - — complaints from applicants about determinations
  - — alleged breaches of the Act by agencies
  - — alleged attempts to improperly pressure decision-makers in relation to the performance of their functions under the Act
  - — alleged detrimental action taken against decision-makers arising out of the performance of their duties under the Act
- approving and regularly reviewing agencies' publication schemes and disclosure logs
- keeping under scrutiny agencies' systems for disclosure of information, including both systems for the proactive release of information and in response to applications
- developing/approving templates for agencies' publication schemes
- auditing records of agencies that relate to applications for information
- auditing determinations of applications by agencies
- publishing guidelines for the implementation of the Act
- publishing a regular digest of developments in the area
- providing training in the system and/or certifying training
- collecting and reporting on statistics from agencies relating to the implementation of the Act
- supporting practitioners including through the FOI and Privacy Practitioners' Network
- seeking court orders requiring agencies to rectify breaches of the Act or requiring compliance with provisions of the Act
- conducting regular reviews of the Act (say five yearly) to determine whether it continues to achieve its objectives;
- reporting to Parliament on:
  - — implementation of the Act (annually)
  - — the operations of the Information Commissioner (annually)
  - — special issues (from time to time as appropriate)
  - — reviews of the Act (five yearly)
- promoting community awareness of how to access government information that is proactively released and how to request information.

9.4. FOI and privacy roles?

A number of submissions supported having an Information Commissioner with both FOI and privacy roles. As Megan Carter identified:

> *Because it is not possible to absolutely separate personal information requests from non-personal, there will always be an overlap even with two access regimes (as in the UK — where their Information Commissioner is also the Data Protection Commissioner). There is a great deal of merit in combining the two roles.*[223]

[223] Megan Carter submission to the FOI review, page 38.

The Privacy Commissioner said in his submission to the review:

> *Chapter 12 of the Discussion Paper on Oversight and Accountability includes the prospect of creating an Information Commissioner whose role would include oversight of the operation of both an FOI Commissioner and the NSW Privacy Commissioner. I note that the Australian Law Reform Commission has recommended the creation of an Information Commissioner at the federal level. The model adopted by the Commonwealth will have considerable influence on the choice of structure for New South Wales.*[224]

The co-location of privacy with FOI would certainly help rationalise the current arrangements for access to information. The Department of Premier and Cabinet noted in its submission that the advantages in doing this have already been acknowledged by the NSW Government:

> *The Government previously introduced legislation to provide for the functions of the Privacy Commissioner to be transferred to the Ombudsman. This reform would have provided for greater integration of FOI and privacy functions and is consistent with the positions in South Australia, Tasmania and the Northern Territory, where a single office exercises both functions. While the Department considers that there may be merit in pursuing the proposal, given the overlap of access regimes under FOI and privacy legislation, it is noted that a range of concerns were raised in relation to the Bill. These would need to be considered further if such a proposal were to be pursued.*[225]

In many agencies FOI and privacy functions are carried out by the same staff. FOI and privacy officers have a combined network — the NSW FOI and Privacy Practitioners' Network. This seems to indicate that those who implement privacy legislation share many of the same concerns and face similar challenges to FOI practitioners.

If our recommendation that personal affairs applications be dealt with under privacy legislation is adopted, we have said the government should review the privacy regime to ensure the two systems are similar in structure (see Chapter 2). The co-location of the Information Commissioner and Privacy Commissioner may well be a step in the right direction in this regard.

9.5. Parliamentary Committee oversight

There was consensus in submissions that the Information Commissioner should be subject to the oversight of a Parliamentary Committee. Such a committee should be modelled on the existing committees established under the Ombudsman Act and ICAC Act. The role of the committee would be oversight, not direct involvement or review of decisions of the Information Commissioner. If the Information Commissioner was established in the Office of the Ombudsman, our existing Joint Parliamentary Committee could of course have this role.

9.6. Practical support for decision-makers

While the recommended statutory functions of the Information Commissioner are set out above, many practitioners interviewed as part of the review made more detailed requests and suggestions for the Information Commissioner to consider. A number of ideas were about facilitating and supporting practitioners in maintaining their skill levels and sharing information. Being a FOI officer, particularly in a small agency where you may be the only practitioner, can be a lonely occupation. Some very good, practical suggestions for support were also made in submissions.

---

[224] K V Taylor Privacy Commissioner submission to the FOI review.
[225] Department of Premier and Cabinet submission to the FOI review, pages 13 and 14.

9.6.1. Online networking facility for practitioners

While the majority of practitioners told us they found the FOI and Privacy Practitioners' Network meetings useful, some were unable to attend regularly and many said they would like the opportunity to network with their fellow practitioners more regularly. Many said they would like an online facility where practitioners can share tips, ask questions and seek opinions on practice issues.

9.6.2. Guidelines

There was strong support both from practitioners and in submissions for a designated body to be responsible for issuing guidelines for the implementation of the new Act. We recommend this responsibility be given to the Information Commissioner.

The Department of Premier and Cabinet said in its submission:

> *Regardless of whether or not a legislative obligation is placed on the Department or some other body to issue guidelines, the Department intends to continue to maintain the FOI Manual as part of its role in providing leadership to the sector on the FOI Act.*

The department also indicated its intention to establish a reference group of large and small agencies with different FOI profiles to assist in its planned review of the manual and said it would welcome the Ombudsman's ongoing participation in issuing the manual. It also said 'it is the department's intention that this reference group will also play a role in implementing any changes arising from the Ombudsman's review.'[226]

If the responsibility for producing guidelines was given to an agency other than the Department of Premier and Cabinet under a wholesale reorganisation, it is our view that instead of continuing with the existing manual the department would be better placed to offer support to the new system. A number of submissions commented on the extensive delay in the production of the current manual and saw it as demonstrating why it is essential that an independent body is responsible for producing future guidelines rather than a government department.

How do we make sure guidelines are useful for those they are intended to assist — practitioners? Practitioners' comments about the current manual were mixed. Some practitioners said they used it frequently and found it extremely useful. Others said they use it as a reference tool if they are dealing with a particularly tricky issue, rather than in their day to day work. Others found it hard to use due to its size and style. Many also said that in addition to comprehensive guidance such as in the manual, they would welcome a regular digest of recent developments so they could be assured they were up to date in their practice.

Practitioners are from a range of backgrounds, have varied levels of experience and work in very different environments with differing resources. To ensure guidelines are helpful and relevant to this diverse group, Megan Carter said:

> *Working with practitioners, involving them in working parties drafting and editing the guidelines, and being receptive to ongoing feedback about them would be a good start. To remain relevant they need to be constantly under review and updated to reflect external review decisions, whether they are made by an Information Commissioner, ADT or higher courts. For such frequency of update, it is apparent that they need to be in an electronic online format, with a downloadable PDF option.*[227]

There was broad agreement guidelines should carry significant weight, but a note of caution was raised in some submissions that clearly guidelines can be 'binding' on agencies only so far as they are legally accurate, and it may not be useful to make guidelines about process and procedural issues binding. The difference in agency size and structure means 'one size fits all' is unlikely to work in relation to such practical matters. In practical terms, there will be some matters where mandatory guidance that practitioners are required to follow will be appropriate and others where more general guidance will be called for.

---

[226] Department of Premier and Cabinet submission to the FOI review, page 15.
[227] Megan Carter submission to the FOI review, page 39.

9.6.3. Training

There was broad support for the Information Commissioner to have responsibility for either delivering training or accrediting others to deliver training. While the focus should appropriately be on training for decision-makers in agencies, in the course of our review we identified that training should also be developed and provided to the following groups:

- staff of ministerial offices to ensure they are aware of the requirements of the new Act including the independence of decision-makers and onus to release information
- staff of any shadow ministers and opposition MPs who are regular users of the system
- other regular users of the system such as journalists.

There was also some support for Information Officers to have to be accredited. Phillip Youngman said:

> *Consideration should be given to require FOI and Privacy Officers to undergo training so that they can demonstrate they have a proper understanding of their responsibilities under the Acts. In South Australia FOI Officers must be accredited and this could be addressed as part of the training schemes.*[228]

Sutherland Shire Council agreed:

> *Council is of the opinion that the NSW Government should implement an accreditation scheme for FOI Officers similar to the one that is in place in South Australia. It is important that FOI Officers are given more authority and respect for the important work that they do. As part of any accreditation program a comprehensive program of study must be implemented and supported by the NSW Government to allow FOI Officers to continually improve their skills. By elevating the importance and prominence of the FOI Officer role within an organisation, via an accreditation scheme, Freedom of Information may be able to take a more prominent role in the thinking of all public officials not just those involved in processing FOI applications. This will also result in a common approach to processing and identifying information and improve the quality of determinations.*[229]

We have no firm view about the benefits of an accreditation scheme but agree the standing of FOI officers in agencies should be improved. Accreditation could be explored further by either the government or Information Commissioner in conjunction with practitioners.

As noted above, FOI and privacy responsibilities are carried out by the same officers in many agencies. Co-location of oversight for the two systems would facilitate coordination of training and other supports to agency personnel.

9.6.4. Statistics

FOI statistical reporting in NSW is in dire need of an overhaul. While NSW agencies are required to publish FOI statistics in their annual reports, there is no mechanism in place to ensure this is done, to ensure the statistics are comprehensive and accurate or to analyse the statistics on a state-wide basis. Agencies in every other Australian FOI jurisdiction are obliged to report statistics about their implementation of FOI to a central agency and this agency then publishes a comprehensive annual report on the operation of FOI.

We are aware from the informal reviews we have conducted of FOI annual reporting since 1995–1996 that many agencies do not comply with the mandatory annual reporting requirements. However, even we were surprised to discover how poor many agencies' record-keeping and statistics are around FOI. As part of this review we asked each of the agencies we audited for statistical information about the applications they handled. Many were unable to produce what we considered basic information and others had to manually collate figures.

---

[228] Phillip Youngman submission to the FOI review, issue 139.
[229] Sutherland Shire Council submission to the FOI review, chapter 13.

There was widespread frustration amongst practitioners at the lack of guidance and support given to agencies about the data they should collect. When the new FOI Manual was published many had expected a new database to be provided from central government to assist collect the data set out in appendix B. This did not occur and instead practitioners in one or two agencies eventually developed systems which have been adopted by some agencies but by no means all. While the work of these practitioners is appreciated by their colleagues, we understand the systems are not ideally suited to all agencies and some have had to 'tweak' the systems considerably. Some council FOI practitioners complained they thought the data required had more relevance to state government departments than local councils. The basis for this view is unclear — the statistics are about outcomes of applications, not the content of requests — but this was indicative of the widespread discontent about current statistical reporting requirements.

The Information Commissioner would be well positioned to review why and how data is collected and reported. As the Solomon review panel identified:

> *There are four major issues. The first is about the purpose of the exercise. The second concerns its analysis. The third concerns its reliability. The fourth is the nature of the data that is collected.*[230]

There is no point requiring data on applications to be collected for its own sake. There must be a clear purpose and a system to collect whatever information is agreed is necessary. The Information Commissioner should consult with practitioners about the type of data that should usefully be collected and the support needed for this to be done efficiently and accurately. Systems should then be put in place to record and report this data, allowing the Information Commissioner to produce accurate statistics about the operation and effectiveness of the new system.

9.7. Transition to the new system

We are confident the changes proposed in this report are achievable. However, such a large scale shift in thinking, culture and operational practice will not be without its challenges. The current arrangements to access information are contained in a number of pieces of legislation with intersecting and interrelated issues. A report such as this can only set out the major changes which need to be made. The successful implementation of the new regime will also require many smaller but significant issues to be resolved and consultation with bodies such as State Records, the Privacy Commissioner and ADT. We do not suggest the Information Commissioner should be responsible for all of these matters but we do recommend the Commissioner be involved in the change process from the start. This could be by way of a reference group or steering committee with responsibility for driving the necessary changes in a timely manner.

In summing up, we agree with Professor McMillan when he said:

> *At the end of the day, there is a need for either an Ombudsman or an Information Commissioner to play an oversight role. Simply stated, FOI will not work well across government unless there is an FOI champion.*[231]

[230] FOI Independent Review Panel *The Right to Information: reviewing Queensland's Freedom of Information Act* report June 2008, page 288.

[231] Professor John McMillan *Designing an effective FOI oversight body — Ombudsman or independent Commissioner?* paper to the 5th International Conference of Information Commissioners Wellington New Zealand, 27 November 2007.

Recommendations

83. A statutory position of Information Commissioner should be created in NSW.

84. The Information Commissioner should be established in the Office of the Ombudsman.

85. The Information Commissioner's statutory functions should include but not be limited to:

    a. investigating:

        i. complaints from applicants about determinations

        ii. alleged breaches of the Act by agencies

        iii. alleged attempts to improperly pressure decision-makers in relation to the performance of their functions under the Act

        iv. alleged detrimental action taken against decision-makers arising out of the performance of their duties under the Act

    b. approving and regularly reviewing agencies' publication schemes and disclosure logs

    c. keeping under scrutiny agencies' systems for disclosure of information, including both systems for the proactive release of information and in response to applications

    d. developing/approving templates for agencies' publication schemes

    e. auditing records of agencies that relate to applications for information

    f. auditing determinations of applications by agencies

    g. publishing guidelines for the implementation of the Act

    h. publishing a regular digest of developments in the area

    i. providing training in the system and/or certifying training

    j. collecting and reporting on statistics from agencies relating to the implementation of the Act

    k. supporting practitioners including through the FOI and Privacy Practitioners' Network

    l. seeking court orders requiring agencies to rectify breaches of the Act or requiring compliance with provisions of the Act

    m. conducting regular reviews of the Act (say five yearly) to determine whether it continues to achieve its objectives

    n. reporting to Parliament on:

        i. implementation of the Act (annually)

        ii. the operations of the Information Commissioner (annually)

        iii. special issues (from time to time as appropriate)

        iv. reviews of the Act (five yearly)

    o. promoting community awareness of how to access government information that is proactively released and how to request information.

86. Consideration should be given to making the Information Commissioner responsible for the oversight of privacy as well as FOI.

87. The Information Commissioner should be subject to oversight by a Parliamentary Committee.

88. Arrangements should be made to involve the Information Commissioner in the process of transition to the new system from the start.

Bibliography

Administrative Review Council, *The Contracting Out of Government Services*, Report No 42, 1998

Australian Law Reform Commission and Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, ALRC Report 77, 1995

Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108, 2008

Australian Law Reform Commission, *Review of Secrecy Laws*, ALRC Issues Paper 34, 2008

Australian Press Council, *Amicus curiae* brief in the High Court Appeal, *McKinnon v Secretary, Department of Treasury*, 17 April 2006

Belgrave, John, *Open and Shut Legislation? The Official Information Act*, paper delivered at LexisNexis Information Law Conference, 21 July 2006, Auckland, New Zealand

Berzins, Christopher, 'Some thoughts in administering access and privacy rights: one statute or two?' (2004) 114 *Freedom of Information Review*, 66–69

Burt, Dr Eleanor and Professor John Taylor, 'Managing Freedom of Information in Scottish Public Bodies: Administrative Imperatives and Political Settings' (2008) 4(1) *Open Government: a journal on freedom of information*, 1–24

Carter, Megan and Andrew Bouris, *Freedom of Information: Balancing the Public Interest*, University College London, May 2006

Commonwealth Ombudsman, *Department of Immigration and Citizenship: Timeliness of decision-making under the Freedom of Information Act 1982,* June 2008

Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian government agencies*, March 2006

DeMaria, William, 'FOI Unshackled? The Murray Bill' (2001) 25(4) *Alternative Law Journal*, 191–195

Donnelly, Leo, *Access to policy advice held by government agencies using FOI legislation*, paper delivered at the 5th International Conference of Information Commissioners, 26–29 November 2007, Wellington, New Zealand

Elwood, Sir Brian, *The New Zealand Model — The Official Information Act 1982*, paper delivered at FOI and the Right to Know Conference, 19–20 August 1999, Melbourne, Australia

Gandy, Bryn, *New Zealand's Official Information Act: Public Policy, Accountability and Participation*, paper delivered at the 5th International Conference of Information Commissioners, 26–29 November 2007, Wellington, New Zealand

Griffith, Gareth, *Freedom of Information — Issues and Recent Developments in NSW*, Briefing Paper No 6/07, May 2007, NSW Parliamentary Library Research Service

Holsen, Sarah et al., 'Journalists' use of the UK Freedom of Information Act' (2007) 3(1) *Open Government: a journal on Freedom of Information*, 1–16

Hounsell, Sandy, *Electronic Records and Access to Information: have we revolutionised the process or are we simply killing more trees?*, paper delivered at the 5th International Conference of Information Commissioners, 26–29 November 2007, Wellington, New Zealand

Independent Review Panel, *Enhancing open and accountable government*, Discussion Paper, 29 January 2008

Independent Review Panel, *The Right to Information: reviewing Queensland's Freedom of Information Act*, June 2008

Kirby, Michael, *Freedom of Information: the Seven Deadly Sins,* a speech to the British section of the International Commission of Jurists Fourteenth Anniversary Lecture Series, London, 17 December 1997

Lamble, Stephen, 'Computer-Assisted Reporting and FOI — a PhD research project' (2001) 91 *Freedom of Information Review*, 2–9

McMillan, John, *Designing an effective FOI oversight body — Ombudsman or Information Commissioner?,* paper delivered at the 5th International Conference of Information Commissioners, 26–29 November 2007, Wellington, New Zealand

McMillan, John, *Open Government: Reality or Rhetoric?* Talk to IPAA seminar 15 June 2006

Mendel, Toby, *Freedom of Information: a comparative survey*, second edition, UNESCO, Paris, 2008

Ministry of Justice (UK), *Freedom of Information Act 2000: Designation of additional public authorities*, CP 27/07 25 October 2007

Ministry of Justice (UK), *Government response to the Constitutional Affairs Select Committee Report Freedom of Information: Government's proposals for reform*, October 2007

Ministry of Justice, *Third Annual Report on the Operation of the FOI Act in Central Government 2007*, June 2008

Moyers, Bill, *In the Kingdom of the Half-Blind*, paper delivered to the 20th anniversary of the National Security Archive, 9 December 2005, Washington D.C, United States of America

New South Wales Law Reform Commission, *Privacy Legislation in New South Wales*, Consultation Paper 3, June 2008

New South Wales Ombudsman, *Discussion Paper: review of the Freedom of Information Act 1989*, September 2008

New South Wales Ombudsman, *Freedom of Information: the way ahead*, December 1994

New South Wales Ombudsman, *Implementing the FOI Act: a snap-shot*, July 1997

New South Wales Ombudsman, *Special Report to Parliament concerning the operation of the Freedom of Information Act 1989 and the functions of the Ombudsman*, May 1990

New South Wales Ombudsman, *Special Report to Parliament proposing amendments to the Freedom of Information Act 1989*, March 1994

New Zealand Law Commission, *Review of the Official Information Act 1982*, Wellington, New Zealand, 1997

O'Connor, Kevin, *Freedom of Information: Some thoughts,* speech to CLE Conference 30 October 2007

Office of the Irish Information Commissioner, *Freedom of Information: the first decade*, May 2008, accessed at www.oic.gov.ie (last accessed 10 December 2008)

Patterson, Moira 'Commercial in Confidence and public accountability: Achieving a new balance in the contract State' (2004) 32 *Australian Business Law Review*, 315–336

Patterson, Moira, *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, 2005

Price, Steven, 'The Official Information Act: A window on Government or the curtains drawn?'(2003) 2(1) *Open Government: a journal on freedom of information*

Queensland Government, *The right to information: a response to the review of Queensland's Freedom of Information Act*, August 2008

Rees, Ann, 'Red File alert: Public access at risk' (2004) 111 *Freedom of Information Review*, 37–40

Roberts, Alasdair, *Blacked Out: Government Secrecy in the Information Age*, Cambridge University Press, New York, 2006

Roberts, Alasdair, 'Spin control and Freedom of Information: Lessons for the United Kingdom from Canada' (2005) 83(1) *Public Administration*

Roberts, Alasdair, *Administrative discretion and the Access to Information Act: an "Internal Law" on open government?* Paper taken from www.aroberts.us (last accessed 30 November 2008)

Roberts, Alasdair, 'Dashed Expectations: Governmental Adaptation to Transparency Rules' (2006) 135 *Proceeding of the British Academy,* 107–125

Roberts, Alasdair, *Future challenges of the RTI Movement*, paper delivered at the 5th International Conference of Information Commissioners, 26–29 November 2007, Wellington, New Zealand

Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, April 2001

Schroff, Marie, *The Official Information Act and Privacy: New Zealand's Story*, speech to FOI Live 2005 Conference, 16 June 2005

Snell, Rick, 'Failing the information game' January–March 2007 *Public Administration Today*, 5–9

Snell, Rick, 'Freedom of Information: The experience of the Australian States — An Epiphany?' (2001) 29 *Federal Law Review*, 343–358

Snell, Rick, 'The Kiwi Paradox — A Comparison of Freedom of Information in Australia and New Zealand' (2000) 28 *Federal Law Review*, 575–616

Snell, Rick and Peter Sabina, 'Information Flows: The real art of Information Management and Freedom of Information' 35(1) *Archives and Manuscripts*, 55–80

Snell, Rick, 'Opening up the mindset is key to change' November 2008 *The Public Sector Informant*, 10–11

Susman, Thomas, 'Delay and the Freedom of Information Act: Senator Cornyn's legislative prescriptions' (2005) 1(2) *Open Government: a journal on Freedom of Information*

Susman, Thomas, *Access to Information in Electronic Form: The US Experience Under the Freedom of Information Act*, paper delivered at the 5th International Conference of Information Commissioners, 26–29 November 2007, Wellington, New Zealand

The National Security Archive, 'File not found: 10 years after E-FOIA, most Federal agencies are delinquent' *The Knight Open Government Survey 2007*, March 12 2007, accessed at http://www.gwu.edu/~nsarchiv/(last accessed 20 November 2008)

Thomas, Richard, *Freedom of Information and Privacy — the Regulatory Role of the Information Commissioner*, paper delivered to the Centre for Regulated Industries, 9 January 2008

Timmins, Peter, 'Freedom of information in New South Wales: 15 years on' (2004) 114 *Freedom of Information Review*, 69–71

UK Information Commissioner's Office, *Model Publication Scheme 2009*, accessed at http://www.ico.gov.uk/Home/what_we_cover/freedom_of_information/publication_schemes.aspx (last accessed 16 December 2008)

UK Information Commissioner's Office's guidance to agencies, accessed at http://www.ico.gov.uk/what_we_cover/freedom_of_information/guidance.aspx (last accessed 16 December 2008)

US Attorney General, *Attorney General's Report to the President pursuant to Executive Order 13,392, entitled "Improving agency Disclosure of information*, 30 May 2008, accessed at http://www.usdoj.gov/oip/ag-rpt08/ag-report-to-president06012008.pdf (last accessed 8 January 2009)

White, Jessica, 'Towards electronic democracy: the impact of technological change in the Official Information Act 1982.' (2003) 34 *Victoria University Wellington Law Review*, 609–629

Legislation

Freedom of Information Act 1982 (Cth)

Freedom of Information Act 1982 (Vic)

Freedom of Information Act 1989 (NSW)

Freedom of Information Act 1989 (ACT)

Freedom of Information Act 1991 (SA)

Freedom of Information Act 1991 (Tas)

Freedom of Information Act 1992 (Qld)

Freedom of Information Act 1992 (WA)

Information Act 2002 (NT)

Freedom of Information Act 5 U.S.C. § 552 (US)

Official Information Act 1982 (NZ)

Access to Information Act R.S 1985 (Can)

Freedom of Information Act 1997 (Ireland)

Freedom of Information Act 2000 (UK)

Freedom of Information (Scotland) Act 2002

Access to Information and Privacy Act 2002 (Newfoundland and Labrador)

Draft Right to Information Bill 2009 (Qld)

Freedom of Information Amendment (Open Government) Bill 2003 (Cth)

Freedom of Information Amendment Bill 2007 (Vic)

Appendix A

Submissions to the discussion paper

Anonymous

Attorney General's Department of NSW

Australia's Right to Know Coalition

Blacktown City Council

Blue Mountains City Council

Bruce Berry

Burwood Council

Camden Council

Care Leavers Australia Network

Catholic Commission for Employment Relations

City of Canterbury Council

City of Sydney Council

Colin A Saggers, Chair, Freedom of Information Association Ltd

Combined Community Legal Centres' Group (NSW) Inc

Denis R Fitzpatrick

Denys Clark

Department of Ageing, Disability and Home Care

Department of Corrective Services

Department of Education and Training

Department of Juvenile Justice

Department of Planning

Department of Premier and Cabinet

Department of Primary Industries

Department of State and Regional Development

Each and All Stronger Together

Energy Australia

Environmental Defender's Office (NSW)

Gladys Berejiklian MP

Glenda (no surname provided)

Gosford City Council

Guardianship Tribunal

Hornsby Shire Council

Housing NSW

Hunter New England Area Health Service

Law Society of NSW

Legal Aid NSW

NSW Liberal Nationals Coalition

Liverpool City Council

Local Government Governance Network Group

Local Government Association of NSW and Shires Association of NSW

Megan Carter, Director Information Consultants Pty Ltd

Naomi Newland

NSW Council for Civil Liberties

NSW Health

NSW Police Force

NSW Treasury Corporation

Office of the Board of Studies

Office of the Director of Public Prosecutions

Office of State Revenue

Peter Dixon

Peter Timmins, Managing Director, Timmins Consulting

Phil Black

Phillip Youngman, Chair of the FOI and Privacy Practitioners' Network 1991-2008

Pillar Administration

Privacy NSW

Public Interest Advocacy Centre

Ray Stedman

Rick Snell, Senior Lecturer in Law, University of Tasmania

Roads and Traffic Authority

Rozlyn de Bussey

Singleton Council

State Records

State Super

Sue Covey

Sutherland Shire Council

Sydney Opera House Trust

University of Sydney

Wilma Robb

WorkCover NSW

Workers Compensation Commission

WSN Environmental Solutions

Yau Hang Chan

Appendix B

18 agencies the subject of particular investigation and audit

City of Sydney Council

Department of Commerce

Department of Corrective Services

Department of Education and Training

Department of Planning

Department of Premier and Cabinet

Hunter/New England Area Health Service

Liverpool City Council

Macquarie University

NSW Health

NSW Police Force

Pillar Administration

RailCorp

Roads and Traffic Authority

South Eastern Sydney/Illawarra Area Health Service

Southern Cross University

Sutherland Shire Council

Sydney Ferries

Appendix C

Expert advisors

Judge Kevin O'Connor, President, Administrative Decisions Tribunal

Tim Robinson, Convenor, FOI and Privacy Practitioners' Network

Rick Snell, Senior Law Lecturer, University of Tasmania

Judge Ken Taylor, Privacy Commissioner

Peter Timmins, Managing Director, Timmins Consulting

Appendix D

NSW councils that provided information for the review

Ashfield Municipal Council
Albury City Council
Armidale Dumaresq Council
The Council of the Municipality of Ashfield
Auburn Council
Ballina Shire Council
Balranald Shire Council
Bankstown City Council
The Council of the Shire of Baulkham Hills
Bellingen Shire Council
Blacktown City Council
Bland Shire Council
Blue Mountains City Council
Boorowa Council
Bourke Shire Council
Burwood Council
Byron Shire Council
Bathurst Regional Council
Bega Valley Shire Council
Berrigan Shire Council
Blayney Shire Council
Bogan Shire Council
Bombala Council
The Council of the City of Botany Bay
Brewarrina Shire Council
Broken Hill City Council
Cabonne Shire Council
Camden Council
City of Canada Bay Council
Canterbury City Council
Carrathool Shire Council
Central Darling Shire Council
Cessnock City Council
Cobar Shire Council
Coolamon Shire Council
Cooma-Monaro Shire Council
Coonamble Shire Council
Corowa Shire Council
Cowra Shire Council
Campbelltown City Council
Clarence Valley Council
Coffs Harbour City Council
Conargo Shire Council
Cootamundra Shire Council
Deniliquin Council
Dubbo City Council
Dungog Shire Council
Eurobodalla Shire Council
Fairfield City Council
Forbes Shire Council
Goulburn Mulwaree Council
Gwydir Shire Council
Gilgandra Shire Council
Glen Innes Severn Council
Gloucester Shire Council
Gosford City Council
Greater Taree City Council
Greater Hume Shire Council
Great Lakes Council
Griffith City Council
Gundagai Shire Council
Gunnedah Shire Council
Guyra Shire Council
Harden Shire Council
Hawkesbury City Council
Holroyd City Council
The Council of the Shire of Hornsby
The Council of the Municipality of Hunters Hill
Port Macquarie-Hastings Council
Hay Shire Council
Hurstville City Council
Inverell Shire Council
Jerilderie Shire Council
Junee Shire Council

Kempsey Shire Council
The Council of the Municipality of Kiama
Kogarah Municipal Council
Ku-ring-gai Council Ashfield Municipal Council
Auburn Council
Bathurst Regional Council
Bega Valley Shire Council
Berrigan Shire Council
Blayney Shire Council
Bogan Shire Council
Bombala Council
The Council of the City of Botany Bay
Brewarrina Shire Council
Broken Hill City Council
Cabonne Shire Council
Camden Council
City of Canada Bay Council
Canterbury City Council
Carrathool Shire Council
Central Darling Shire Council
Cessnock City Council
Cobar Shire Council
Coolamon Shire Council
Cooma-Monaro Shire Council
Coonamble Shire Council
Corowa Shire Council
Cowra Shire Council
Eurobodalla Shire Council
Goulburn Mulwaree Council
Gwydir Shire Council
Harden Shire Council
Hay Shire Council
Hurstville City Council
Inverell Shire Council
Jerilderie Shire Council
Kempsey Shire Council
Kogarah Municipal Council
Ku-ring-gai Council
Kyogle Council
Lachlan Shire Council
Leeton Shire Council
Leichhardt Municipal Council
Lismore City Council
Maitland City Council
Marrickville Council
Mid-Western Regional Council
Moree Plains Shire Council
Murray Shire Council
Muswellbrook Shire Council
Newcastle City Council
Orange City Council
Parkes Shire Council
Penrith City Council
Port Macquarie-Hastings Council
Port Stephens Council
Randwick City Council
Rockdale City Council
Ryde City Council
Shellharbour City Council
Strathfield Municipal Council
Tamworth Regional Council
Temora Shire Council
Tumut Shire Council
Upper Lachlan Shire Council
Uralla Shire Council
Urana Shire Council
Walcha Council
Walgett Shire Council
Warren Shire Council
Warringah Council
Warrumbungle Shire Council
Wellington Council
Wentworth Shire Council
Wollongong City Council