NSW Ombudsman

Discussion Paper:

Review of the *Freedom of Information Act 1989*

September 2008

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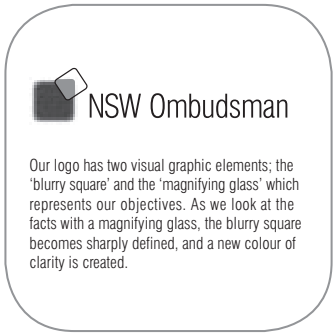

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Review of the *Freedom of Information Act 1989*

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Ombudsman's foreword

On 22 April 2008, I announced that my office would be conducting a comprehensive review of the New South Wales *Freedom of Information Act 1989* (the FOI Act).

The FOI Act is not operating effectively. It is a complex, confusing and often frustrating piece of legislation. For almost fifteen years, this office has been consistently calling on government to institute an independent and wide-ranging review. There has been no response to these calls, and as a result I have decided to conduct my own investigation.

Since the FOI Act first came into force, we have worked closely with applicants and agency staff to try to resolve matters as informally, swiftly and satisfactorily as possible. There have been occasions when we have not been successful, and have had to conduct investigations using the powers provided by the *Ombudsman Act 1974*.

Our experience has made us keenly aware of the need for the FOI Act to be clearer and simpler to understand, and for an effective balance to be found between the public interest in accessing information held by government and the need to withhold information in certain circumstances.

This discussion paper forms part of a broader investigation by my office into the processes and procedures surrounding freedom of information in New South Wales. This investigation will also involve reviewing documents and auditing randomly-selected files from 18 different government agencies, as well as interviewing agency staff who deal with FOI applications.

This is an important issue, and I would encourage anyone with an interest in FOI to make a submission.

Bruce Barbour
Ombudsman

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Introduction

Background

Effective freedom of information legislation is central to our system of government. It helps to ensure that government decision making is open and transparent, and that decision makers can be held accountable for their decisions and actions. When the NSW *Freedom of Information Act 1989* (the FOI Act) was first introduced, the then-Deputy Premier stated:

> *The freedom of information legislation now before this House will mean that voters will have the opportunity to scrutinize the actions of the government and the bureaucracy. Giving the people access to the information used by the decision makers will restore a meaningful level of accountability and induce a much higher level of public participation, awareness and interest in policy-making and government itself. This freedom of information legislation will strengthen democracy by helping to provide the people with a basis on which government policies and actions can be discussed and debated, as well as allowing the performance of the government to be judged fairly at election time. It will permit a more informed electorate to make rational judgements.*[1]

While this is a commendable statement of principle, a number of problems have developed with the way the FOI Act works. Many of these are due to changes over the last 19 years both to the Act and to the way government operates.

The FOI Act has been amended more than 60 times. This has made it unwieldy and difficult to navigate, confusing and frustrating for both applicants and practitioners.

The FOI Act is no longer the only piece of legislation governing access to government-held information. There is also:

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

This has led to confusion, with differing definitions of important terms and uncertainty among applicants and agency staff around the most appropriate legislation to apply.

The way in which government information is stored has changed dramatically. Where much of the information held by government was paper-based when the Act was drafted, many records are now stored and accessed electronically.

The public-private divide has become blurred. A large number of government agencies are either entering into business contracts with private corporations, or competing with them on the open market. While the introduction of the *Freedom of Information Amendment (Open Government — Disclosure of Contracts) Act 2006* saw information regarding certain government contracts brought within the scope of the FOI Act, there are still a number of areas where the right to access is unclear.

A review of the Act is long overdue given these circumstances.

The NSW Ombudsman is well placed to conduct a review of FOI in NSW, as we have a long association with both the FOI Act and those who regularly make use of it.

Under section 52 of the FOI Act:

> *(1) The conduct of any person or body in relation to a determination made by an agency under this Act may be the subject of a complaint, and may (subject to this section) be investigated by the Ombudsman, under the Ombudsman Act 1974.*

At the completion of an investigation:

> *(6) In a report under section 26 of the Ombudsman Act 1974 of an investigation of a determination made by an agency under this Act, the Ombudsman may recommend:*
>
> > *(a) that the public release of the document concerned would, on balance, be in the public interest even though access has been duly refused because it is an exempt document, or*
> >
> > *(b) that any general procedure of the agency in relation to dealing with applications made under this Act be changed to conform more closely to the objects and requirements of this Act.*

[1] Mr W Murray MP, Freedom of Information Bill 1989, Second Reading New South Wales Parliamentary Debates, 2 June 1988, p.1397.

Since the FOI Act first came into force, we have conducted a significant number of investigations aimed at identifying improvements in the way agencies deal with FOI applications. These investigations have provided us with a sound understanding of the FOI processes of various agencies, including the approach they adopt to particular types of applications.

Although we are able to conduct formal investigations and make recommendations, we often choose to pursue a more informal approach. This can help to overcome misunderstandings and resolve sticking points between agencies and applicants, leading to swift and satisfactory outcomes.

This informal approach has meant that our office has had regular contact with both members of the public requesting information and agency staff tasked with handling FOI requests. These interactions have given us a unique insight into the FOI processes operating in NSW, including some of the difficulties faced by both applicants and agencies when attempting to use the Act.

We have also collected a large amount of statistical information relating to FOI in NSW. For over ten years, the NSW Ombudsman has collected publicly available FOI data relating to a large number of government agencies. This information, which is drawn largely from agency annual reports, is used to prepare the NSW Ombudsman's FOI report which is released every year.[2] Unfortunately while these reports are in some ways similar to those prepared by the Commonwealth Attorney General's Department and the Victorian Justice Department, they are nowhere near as comprehensive because the reporting obligations on NSW agencies are not as extensive and the reports that are made are often deficient in their compliance with existing reporting obligations.

This review

In April 2008, this office commenced a review into the processing of applications under the FOI Act and related legislation. The investigation is being conducted under section 13 of the *Ombudsman Act 1974*.

Our review is aimed at finding the right balance between the public interest in accessing information and the need to exempt documents from release where there is likely to be a detrimental impact, providing clarity and simplicity in the legislative framework and fairness in its application.

Eighteen government agencies are the subject of particular investigation. Those agencies are:

- NSW Health
- Police Force
- Department of Education and Training
- Roads and Traffic Authority
- RailCorp
- Department of Premier and Cabinet
- Pillar Administration
- Department of Corrective Services
- Department of Planning
- Department of Commerce
- Sydney Ferries
- Macquarie University
- Southern Cross University
- Sutherland Shire Council
- Liverpool City Council
- City of Sydney Council
- South Eastern Sydney/Illawarra Area Health Service, and
- Hunter/New England Area Health Service.

These agencies were selected on the basis of their varying levels of experience and approaches to the receiving and handling of FOI applications. They were not selected due to a particular failing or a poor record in dealing with FOI applications.

[2] Available at http://www.ombo.nsw.gov.au/publication/annualreports.asp.

As part of our investigation, each agency has been asked to provide certain relevant documents and information, and we are also conducting audits of a random sample of their FOI files. We have already received responses to our requests for documents and information, and the file audits are ongoing. We will be interviewing FOI staff from the selected agencies, and we may be conducting formal hearings at a later stage.

In addition to investigating the FOI practices and procedures of these selected agencies, we have also requested relevant information from the Administrative Decisions Tribunal and all NSW local councils.

Invitation for public submissions

While the process described above will provide us with a large amount of information, we want to ensure all interested parties have an opportunity to put forward their views in relation to FOI in NSW. This discussion paper is aimed at providing that opportunity.

The discussion paper draws on the NSW Ombudsman's experience in dealing with applicants and agencies, as well as differing approaches to access to information in other jurisdictions.

In order to limit the size of the discussion paper, it has been largely structured around the relevant sections of the FOI Act. Regrettably, this may mean that to some the paper has a legal or technical feel.

At the end of the discussion paper, there is a list of the issues we have raised for more detailed consideration. While submissions should not be constrained to these particular issues, so we can make the best possible use of the information provided, submissions should be structured under the same or similar topic headings.

It is important that anyone planning to make a submission is aware that we will be placing submissions on our website.

Our investigation and the submissions we receive will inform our final report to Parliament.

Please forward your submission to:

foireview@ombo.nsw.gov.au

or

FOI Review
NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

By 31 October 2008

Chapter 1. The objects and presumptions of the FOI Act

Section 5(1) of the NSW FOI Act gives the public a right to obtain access to information held by government and to ensure that Government records concerning the personal affairs of a member of the public are accurate. It provides this will occur in three ways:

- information about the operation of Government is to be made available to the public
- each member of the public has a legally enforceable right to be given access to documents held by the Government, subject only to such restrictions as are reasonably necessary for the proper administration of the Government, and
- each member of the public can apply for the amendment of such of the Government's records concerning his or her personal affairs as are incomplete, incorrect, out of date or misleading.

The FOI Act is the only NSW legislation that contains an express statement in its objects provision as to how Parliament wants the Act interpreted. Section 5(3) of the Act states:

> *(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 confirmed 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.*[3]

The Commonwealth, Victorian, Queensland and Tasmanian FOI Acts contain similar provisions.

Given the objects clause confers a right on the public, which is to be extended 'as far as possible', and the Parliament's express intention is that there is an obligation on Government to interpret and apply the Act so as to further its object, it appears that the legislation strongly favours disclosure and transparency.

However, there is a question as to exactly what restrictions are 'reasonably necessary for the proper administration of the Government', and whether the Act can be read so as to impose a presumption that documents will be released, and exemption clauses only read very narrowly. In *Commissioner of Police v District Court of NSW*[4] the Court of Appeal held that section 5 should be approached 'with a general attitude favourable to the provision of the access claimed' and without being unduly 'influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of this Act.' However, this has not been read by the ADT to infer a presumption of release.[5]

Some commentators prefer objects clauses that make no references to exceptions or exemptions, such as that provided in section 3 of the *Freedom of Information Act 1992* (WA), as the objects are less liable to be diluted. Moira Patterson has suggested that a more pro-disclosure approach could be achieved by 'supplement[ing] the existing clauses with a principle of availability which establishes the principle that information should be made available unless there is good reason for withholding it.'[6]

Issues

1. Should the objects provision in the Act be amended to 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?
2. Should the objects provision in the Act call on agencies to regularly review their information holdings and take steps to publicly release (for example on their website) as much information as possible about their operations and what could be of interest to the public?

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[3] While there is an 'intention of Parliament' type provision in several other NSW Acts, these generally relate to the extra territorial operation of the legislation.

[4] (1993) 31 NSWLR 606 at 627.

[5] *Tuncheon v Commissioner of Police, New South Wales Police Service* [2000] NSW ADT 73 at [18].

[6] Moira Patterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State*, Lexis Nexis Butterworths, Australia 2005, p42.

3. Should the objects provision provide explicitly that there is a presumption for the release of documents, which can only be overridden where an exemption clause, read narrowly, clearly applies?
4. Should the external review functions of the Act be amended to place an onus on agencies to demonstrate to both the Ombudsman and the ADT that exemptions claimed clearly apply and that the agency has clearly given consideration to whether the release of the documents is in the public interest?

Chapter 2. Title of the Act and drafting style

2.1. Title of Act

As a title for an Act concerned with access to government information, 'Freedom of Information' could be said to be somewhat misleading. For example, the Act does not grant people an absolute freedom to access government information — there are numerous exemption clauses or exempt functions that may apply, the Act gives rights of access to documents not 'information' as such and there is a fee for each FOI application and internal review application, and other access costs may well apply.

While all Australian jurisdictions, the USA and the UK use 'Freedom of Information' in the titles to their Acts, there are a range of titles for such legislation that might be considered to better reflect their purpose and operation. These alternative titles include:

- Official Information Act (New Zealand)
- Access to Information Act (Canada)
- Information Act (Northern Territory), and
- Right to Information Act (India).

Issues

5. Should the title of the Act be retained?
6. If not, what title would better reflect its purpose and operation?

2.2. Drafting style

FOI legislation around Australia (particularly the exemption clauses in such legislation) is drafted in detailed, technical and legalistic terms opening up opportunities for disputes about the meaning of the provisions. As Justice French noted recently, '[t]he more detailed the linguistic formulae which are used, the more scope there is for argument about their boundaries.'[7]

By contrast, the New Zealand legislation is based more on statements of principle, which are less amenable to legal dispute.

Section 5 of New Zealand's *Official Information Act 1982* provides an excellent example:

> ***Principle of availability***
>
> *The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is a good reason for withholding it.*

The Act then provides the 'good reasons' that will apply in sections 6, 7 and 9. These are the equivalent of the exemption clauses found in Schedule 1 of the NSW FOI Act.

Closer to home, Part 2 of the NSW Local Government Act, which deals with public access to council information, is worded in clear, approachable, unambiguous language. The FOI Act may benefit from a similar approach.

Issue

7. Should the FOI Act be re-drafted to focus more on principles and less on detailed and legalistic technical provisions?

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[7] Taken from a speech by Justice Robert French entitled *Judicial Activists — Mythical Monsters?* delivered at the 2008 Constitutional Law Conference, 8 February 2008.

Chapter 3. Scope — documents/information

FOI legislation in all Australian jurisdictions, Canada, the USA and the UK focuses on 'documents', namely some form of physical or electronic record. The New Zealand Official Information Act goes further, covering information in the minds of public officials that may not have been recorded.

The New Zealand Ombudsman has argued that:

> *In the ordinary course of the day-to-day work of government, there will often be no need for decision makers to record all detailed background information about advice, recommendations or decisions that is already known to them. In many cases, it is only when such information is requested by another party that there is any practical need to reduce such information to writing. However, the fact that information has not yet been reduced to writing does not mean that it does not exist and is not 'held' for the purposes of requests under the official information legislation.*
>
> *In these circumstances, if the official information were to apply only to information held in documentary form, the purposes of the legislation could easily be frustrated.*[8]

Although applicants are often seeking information, in many circumstances what they are searching for is an official record of some fact or decision, a paper trail that demonstrates certain knowledge, or that certain actions have or have not been taken. They want to find documents that they can rely on to prove a fact, or show that something happened. This can include seeking their criminal records, their hospital records, information about them in other agency records, contracts entered into by government or public officials, records of what took place at meetings, records of deliberations, and much more.

People seeking such information may prefer an official record, believing that documents are more reliable than information held in the minds of public officials. A difficulty providing non-documentary information is that the applicant is unlikely to be able to tell if they had been given the full truth, an opinion rather than a clear recollection, or whether what they are told has been influenced by later events or circumstances.

To ensure that an access scheme based on documented information works effectively, public officials must:

- comply with the State Records Act, and
- ensure their administrative practices are sound.

This should mean that decisions, actions and processes are clearly and properly recorded.

To re-enforce the importance of record keeping, section 110 of 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.*
>
> *Penalty: $6,000.*

Issues

8. Should the scope of the FOI Act be broadened to include information not in documentary form?
9. Should the FOI Act contain a provision making it an offence to destroy or conceal records?

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[8] Office of the New Zealand Ombudsmen, '*Application of Official Information legislation to non-documentary information*' (1998) 4(3) *Ombudsman Quarterly Review* at 1. Quoted in Rick Snell, '*The Kiwi paradox — a comparison of Freedom of Information in Australia and New Zealand*' (2000) 28 *Federal Law Review* 575-616 at 587.

Chapter 4. Role of FOI decision-makers

Section 18 of the FOI Act provides:

> *(1) An application shall be dealt with on behalf of an agency:*
>
> *(a) by the principal officer of the agency, or*
>
> *(b) by such other officer of the agency as the principal officer of the agency may direct for that purpose, either generally or in a particular case.*
>
> *(2) Notwithstanding subsection (1), an application for access to a local authority's document shall be dealt with on behalf of the authority:*
>
> *(a) by the principal officer of the agency, or*
>
> *(b) by such other officer of the authority as the authority may, by resolution, direct for that purpose, either generally or in a particular case.*

The FOI Act also provides that internal review applications are not to be dealt with by the person who dealt with the original application, or by a person who is a subordinate of that person (s.34(5)).

While the FOI Act specifies what decision-makers are to consider in the assessment and handling of an FOI application, it does not specify what decision-makers are precluded from considering in the performance of their role. For example, the Act does not expressly state they are required to act independently when performing their role.

The concept that those exercising delegated powers must do so independently is central to administrative law. However, the relevant provisions of the FOI Act specifically state that officers of an agency are 'directed' to deal with FOI applications 'on behalf of' the agency. In such circumstances it could be argued that FOI decision-makers are not exercising delegated powers, but acting in accordance with a direction.

For the Act to work as intended, it is important that FOI decision-makers make up their own minds based on the content of the documents requested and the applicable provisions of the Act. It is not appropriate that decisions on FOI applications are made as directed by other persons from within an agency or from some other agency or Minister's office, who are not the relevant decision-makers and have not carried out the necessary assessment. For the Act to work as intended the statutory function being fulfilled by FOI decision-makers must be exercised without being influenced by any political considerations.

Although this independence is important, the practical pressures faced by many FOI decision makers also need to be considered. This is particularly relevant to larger agencies where FOI Units are highly specialised and often only deal with records management rather than operational issues. In these circumstances, FOI decision makers may occasionally rely heavily on advice from others within the agency as to the nature of the information requested and its potential impact. This does not necessarily hinder the independence of their decisions, but it should be borne in mind when considering the decision-making process.

Advice about the operational impact or importance of certain information is very different from consideration of the political expedience of withholding information. Consideration of political implications is contrary to the intent of Parliament and the objects of the Act.

Some advice as to Ministerial involvement in decision-making is set out in the NSW FOI Manual:

> *In some circumstances it may be appropriate for the Minister responsible for the agency to be consulted before a request is determined (eg when access is sought to Ministerial correspondence or Cabinet documents).*
>
> *The Ombudsman has advised that, if directed to do so by its Minister, it is not unreasonable for an agency to notify its Minister, or the Minister's office, of the receipt and determination of an FOI application.*
>
> *It is essential, however, that determinations of FOI applications are made by agencies on their merits, based solely on the criteria set out in the FOI Act and independent of any political influence or considerations. For example, the identity and motives of an FOI applicant are generally irrelevant considerations in the determination of the application (although in some cases these may be relevant). Allegations that agencies took into account irrelevant considerations are matters within the jurisdiction of the Ombudsman. Agencies should ensure that their Ministers, and the staff in their Ministers' offices, are aware of this.*[9]

[9] See 4.1.8-4.1.10.

While the CEO of an agency can determine FOI applications, as stated in the NSW FOI Manual 'the general rule should be that an appropriate officer other than the principal officer should make the initial determination, in order to keep open the right to internal review.'[10]

Issues

10. Should provisions be introduced into the Act to emphasise the responsibility of FOI decision-makers to independently and responsibly implement the letter and spirit of the law?
11. To clarify and give support to the independent role of FOI decision-makers, would it be appropriate to make it an offence:
    a. For any person to place undue pressure on FOI decision-makers to influence a determination?
    b. For FOI decision-makers to wilfully fail to comply with the requirements of the FOI Act?

[10] See 4.1.6.

Chapter 5. Exemptions

5.1. Exemption clauses generally

Data collected by the NSW Ombudsman over the past ten years has shown there has been a marked increase in the percentage of total refusals where agencies reported that their decision to refuse access was based on an exemption clause. In 1995–96, only 10% of total refusals were based on an exemption clause. In 2005–06, it had reached 42%.[11]

5.1.1. Public interest or significant detriment tests

In 1995, the Australian Law Reform Commission commented that:

> *What most distinguishes the approach to disclosure of information in the FOI Act from approaches taken prior to its enactment is its focus on the public interest.*[12]

Having reviewed a number of different FOI Acts, there appear to be two major approaches to the public interest.

The first incorporates a public interest test into each exemption clause. While this approach would require very little change to the FOI Act in NSW, it would maintain the technical, legalistic tone of the current exemption clauses.

The second approach involves the application of an over-arching public interest test to all information, which is accompanied by a list of factors for and against disclosure. The independent review panel in Queensland has recommended the following wording for such a public interest test:

> *Access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest.*[13]

This type of broad, principle-based approach to disclosure is also reflected in New Zealand's Official Information Act.

In Ontario, section 23 of the *Freedom of Information and Protection of Privacy Act 1990* provides that:

> *An exemption from disclosure of a record under section 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.*

In NSW, of the 39 different grounds for exempting documents from release set out in the 26 exemption clauses in Schedule 1 to 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 'category of documents' type clauses).

'Class of documents' or 'category of documents' type clauses exempt documents from release because they are of a particular class or category, whether or not their disclosure will be likely to have any adverse effect on any public or private interest. In relation to these types of exemptions, both the NSW Government and the NSW Ombudsman agree that 'agencies should not refuse access to material only because there are technical grounds of exemption available under the FOI Act. If a document does not contain sensitive information, it may be appropriate to disclose it, even if it falls within an exemption.'[14] Similar advice has been given to Commonwealth agencies by the Commonwealth Attorney General.

Section 59A of the FOI Act provides that:

> *For the purpose of determining under this Act whether the disclosure of a document would be contrary to the public interest it is irrelevant that the disclosure may:*

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[11] See http://www.ombo.nsw.gov.au/publication/annualreports.asp.

[12] Australian Law Reform Commission, *Open Government: a review of the federal Freedom of Information Act 1982*, ALRC Report No 77, December 1995, p.95. Quoted in FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, June 2008, p. 1.

[13] As above, p. 149.

[14] See *the NSW FOI Manual* at 10.5.2.

(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.

The provisions of s.59A(b) have been interpreted by some agencies as only applying to the actual applicant alone, and that the provision does not apply where the public generally could misinterpret or misunderstand the information.

Issues

12. Should public interest or significant detriment tests be incorporated into all exemption clauses?
13. Should these tests be the same in all cases?
14. Would it be preferable to adopt an over arching public interest test to all information, with a list of factors for and against disclosure provided in the legislation?
15. Are there circumstances where the public interest test should be that disclosure is 'in' the public interest rather than disclosure being 'contrary' to the public interest?
16. Should s.59A(b) be re-drafted to clarify that it applies to the public generally, as well as to the particular applicant?

5.1.2. Scope and number of exemptions

There are currently approximately 39 different grounds on which an agency can refuse access to documents, set out in 26 clauses in Schedule 1 to the FOI Act.[15] While no detailed figures are available, it is the experience of the NSW Ombudsman that a number of these exemption provisions are seldom if ever used.

The number of exemptions in the FOI Act is constantly growing (the Act originally contained only 21 exemption clauses), often by inclusion in schedules to other legislation with little or no debate on the FOI issue involved.

There are some circumstances and some topics where information should not be, or is unlikely ever to be, released. Where documents are never likely to be released it can be argued that not making this explicit is misleading and results in public expectations that are unlikely to be met. In such circumstances it may be preferable to explicitly state that those types of documents are exempt from the Act, subject of course to rights of external review to the Ombudsman and the ADT. Schedule 2 of the FOI Act already sets out a range of functions which sit outside the FOI scheme. If this approach to placing certain functions of agencies, or certain types of documents, outside the scope of the FOI Act as adopted, as a safeguard it may be necessary to place a five year sunset clause on Schedule 2 or at least on any new inclusions into that schedule. This would allow their inclusion to be properly reviewed as part of a regular review of the Act as a whole.

It may also be possible to look at the provision of automatic public access to certain types of documents that achieves at least some of the public policy objectives of the Act. For example, in NSW the Cabinet document exemption clause ceases to operate after 10 years. Another possibility could be a regular audit of information that is exempt by way of class or category by an independent body to ensure that inappropriate conduct is not taking place.

Issues

17. Should the number of exemption clauses in the FOI Act be reduced?
18. What types of information should be required to be automatically made available to the public?
19. Should certain classes of documents or functions of agencies' be exempt from the operation of the Act?
20. Should the exemption of classes of document or agencies functions from the operation of the Act be subject to time specific review or sunset provision?

[15] A further two exemption clauses are not yet in force — See s.7 of the *Education Legislation Amendment Act 2006* and s.5 of the *Child Protection (Offenders Registration) Amendment Act 2007* and certain exemptions/exceptions applying to specific agencies are set out in other legislation.

5.1.3. Exemptions established in Acts other than the FOI Act

Not all exemption provisions are set out in Schedule 1 of the FOI Act.[16] This can make the FOI landscape even more difficult to navigate, as certain exemptions are located in different Acts. This could be corrected by requiring that all exemptions be included within a single, comprehensive list in the FOI Act.

Issue

21. Should all exemption provisions be required to be in Schedule 1 or Schedule 2 to the FOI Act?

5.1.4. Circumstances where agencies can refuse to confirm or deny that documents exist

Section 28(3) of the FOI Act provides that:

> *An agency is not required to include in a notice any matter that is of such a nature that its inclusion in the notice would cause the notice to be an exempt document.*

In certain circumstances an acknowledgement that certain documents exist in a notice of determination refusing access could cause the same detriment that the exemption clause is designed to prevent. This may particularly be the case in relation to clause 4 (documents affecting law enforcement and public safety) and clause 20(d) (a matter relating to a protected disclosure).

Examples might include:

- a person applying to the NSW Police Force for documents relating to any investigation being conducted that concerns them
- a person applying to the NSW Police Force or Department of Corrective Services for any documents arising out of any surveillance (including any listening device or telecommunications interception) concerning them
- a person requesting documents relating to any complaint or protected disclosure that might concern them, particularly where the acknowledgement that such a complaint or disclosure had been made could effectively lead to the identification of the person who made it in circumstances where there is good reason to keep the identity of the complainant or reporter confidential, and
- a person requesting documents relating to any investigation being conducted by an agency that may concern them, where acknowledgement that such documents exist would prematurely alert the applicant that such an investigation was underway.

This issue has been addressed in other jurisdictions through the incorporation in the legislation of a clause authorising agencies to refuse to confirm or deny that certain documents exist.

The Victorian *Freedom of Information Act 1982* provides that in a notice of determination an agency or Minister:

> *(a) is not required to include any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document;*
>
> *(b) if the decision relates to a request for access to a document that is an exempt document under section 28* [cabinet documents], *29A* [documents affecting national security, defence or international relations]*, or 31* [law enforcement documents] *or that, if it existed, would be an exempt document under section 28, 29A or 31, may state the decision in terms which neither confirm nor deny the existence of any document.*

Section 25 of the *Commonwealth Freedom of Information Act 1982* provides, more legalistically:

> *(1) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be an exempt document by virtue of section 33* [document affecting national security, defence or international relations] *or 33A* [document affecting relations with states] *or subsection 37(1)* [document affecting enforcement of law and protection of public safety].

[16] For example the exemption created by s.29(5) of the *Children and Young Persons (Care and Protection) Act 1998*.

(2) Where a request relates to a document that is, or if it existed would be, of a kind referred to in subsection (1), the agency or Minister dealing with the request may give notice in writing to the applicant that the agency or Minister, as the case may be, neither confirms nor denies the existence, as a document of the agency or an official document of the Minister, of such a document but that, assuming the existence of such a document, it would be an exempt document under section 33 or 33A or subsection 37(1) and, where such a notice is given:

(a) section 26 [reasons and other particulars of decisions to be given] *applies as if the decision to give such a notice were a decision referred to in that section; and*

(b) the decision shall, for the purposes of Part VI, be deemed to be a decision refusing to grant access to the document in accordance with the request for the reason that the document would, if it existed, be an exempt document under section 33 or 33A or subsection 37(1), as the case may be.

Section 10 of the New Zealand Official Information Act provides that:

Where a request under this Act relates to information to which section 6 [conclusive reasons for withholding official information] *or section 7* [special reasons for withholding official information related to the …] *of this Act applies, would, if it existed, apply, the Departments or Minister of the Crown or organisations dealing with the request may, if it or he is satisfied that the interest protected by section 6 or section 7 of this Act would be likely to be prejudiced by the disclosure of the existence or non-existence of such information, give notice in writing to the applicant that it or he neither confirms nor denies the existence or non-existence of that information.*

Issues

22. Should the Act contain a provision which authorises agencies and Ministers to refuse to confirm or deny the existence of certain documents?
23. If such a provision is to be included in the Act, which exemption clauses should it apply to?

5.2. Specific exception clauses

The following discussion concerns those exemption clauses which the NSW Ombudsman has identified as particularly contentious in their interpretation and operation.

5.2.1. Cabinet documents

Clause 1 of Schedule 1 to the FOI Act provides:

(1) A document is an exempt document:

(a) if it is a document that has been prepared for submission to Cabinet (whether or not it has been so submitted), or

(b) if it is a preliminary draft of a document referred to in paragraph (a), or

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

(d) if it is an official record of Cabinet, or

(e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.

This is a 'class of documents' clause that has been interpreted narrowly by the ADT in some cases (see *National Parks Association of NSW Inc v Department of Lands*[17] and *Cianfrano v Director General, Department of Commerce and anor*[18]) and more broadly in others (see *McGuirk v Director General, The Cabinet Office*[19]). The government appears to support the broader interpretation.[20]

[17] [2005] NSW ADT 124.
[18] [2005] NSWADT 282.
[19] [2007] NSWADT 9.
[20] NSW FOI Manual at 11.2.27.

Clause 1 of Schedule 1 to the FOI Act cannot be relied on as a basis to exempt documents from release:

- if the document 'merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet, or
- if 10 years have passed since the end of the calendar year in which the document came into existence (clause 1(2)).

Further, there is a 30 year rule for release of Cabinet documents under the State Records Act. While documents are classed as 'open access' after 30 years, the agency responsible for the record can make a 'closed for public access direction'.

The issue in relation to disclosure of Cabinet documents is therefore not about an absolute prohibition on the release of Cabinet documents — it is about the timing of such release.

In *National Parks Association New South Wales Inc v Department of Lands et al*, the ADT stated:

> *In my view the mere fact a part of the documents come or went before Cabinet or were considered by Cabinet when deliberating or reaching a decision, does not make the information in that document, information 'concerning' any deliberation or decision of Cabinet. I agree with the comment of Alpietz T in Reed Hudson and Department of the Premier, Economic and Trade Development. [1993] 1 QAR 123 AT 141, when the Commissioner said 'only documents created contemporaneously with, or subsequent to, the discussion and debate within Cabinet…are capable of disclosing Cabinet deliberations. A broader interpretation is not consistent with the ordinary meaning of the words and will allow agencies to beat the exemption by attaching documents to Cabinet submissions in an effort to avoid disclosure under the FOI Act.*[21]

The NSW Crown Solicitor has adopted a broader view and has advised that it is not essential that a document has been created during or after Cabinet's consideration in order to attract a 'deliberation or decision' claim. This interpretation was supported by the ADT in *McGuirk v Director-General, The Cabinet Office*.[22]

New Zealand adopted a very different approach to Cabinet confidentiality in its Official Information Act. Section 9(2)(f) states that there will be good reason for withholding information where this is necessary to:

> *(f) Maintain the constitutional conventions for the time being which protect —*
>
> *(i) The confidentiality of communications by or with the Sovereign or her representative;*
>
> *(ii) Collective and individual Ministerial responsibility;*
>
> *(iii) The political neutrality of officials;*
>
> *(iv) The confidentiality of advice tendered by Ministers of the Crown and officials.*

However, section 9 of the New Zealand Act clarifies this and other exemptions by stating that:

> *… in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.*

In the *Practice Guidelines — Official Information*, issued by the New Zealand Ombudsman, it is noted that 'in the experience of the Ombudsmen, this withholding ground has arisen very rarely.'[23] The Guidelines go on to give the following advice:

> *When making this assessment, an agency should consider the following issues:*
>
> *(1) What is the convention being relied upon?*
>
> *(a) 'Collective Ministerial responsibility' is the constitutional convention which protects the ability of Cabinet to present a united front once a Cabinet decision has been made, regardless of the personal views of individual Ministers. This convention allows Ministers to debate issues freely and frankly within Cabinet without fear that their differences will be aired in public.*
>
> *The Cabinet Manual 2001 describes collective responsibility in the following manner:*
>
> *Acceptance of Ministerial office requires acceptance of collective responsibility. Issues are often debated vigorously and within the confidential setting of Cabinet meetings, although consensus is usually reached*

[21] [2005] NSW ADT 124.
[22] [2007] NSW ADT 9, at [35-37].
[23] Part B, Chapter 4.5.

and votes are rarely taken. Once Cabinet makes a decision, then …Ministers must support it, regardless of their personal views and whether or not they were at the meeting concerned.

And later:

(iii) Is it necessary to withhold the requested information in order to maintain the conventions?

(a) When considering whether it is necessary to withhold the requested information in order to maintain the convention which protects 'collective Ministerial responsibility', an agency should consider the following factors:

- *If a decision has been made by Cabinet, would disclosure of the requested information reveal diverging views of individual Ministers?*
- *In order for release of the information to breach collective responsibility, the information must reveal the personal views of individual Ministers, which diverge from the Cabinet decision.*
- *The disclosure of views expressed by agencies in the course of providing advice to the relevant Ministers is not a breach of collective responsibility.*

A similar provision in the Victorian FOI Act was considered by the Supreme Court of Victoria in *The Secretary, Department of Infrastructure v Asher.*[24] The provision considered by the Supreme Court is narrower than the equivalent provision in the NSW FOI Act, as it only applies to documents where disclosure would involve 'disclosure of any deliberation or decision of the Cabinet.' The NSW FOI Act deals with documents which would 'disclose information concerning any deliberation or decision of Cabinet'. Buchanan JA looked to the purpose intended to be achieved by such a provision:

…I can readily understand that it is necessary for the protection of an essential public interest to prevent the disclosure of documents revealing the views expressed by members of Cabinet as to a matter and the manner in which Cabinet treats and uses information placed before it. I am unable to see, however, that the disclosure of a document placed before Cabinet, without any indication that Cabinet even read the document, let alone how Cabinet dealt with the document, could jeopardise any public interest.

Vincent JA agreed, stating that:

I agree with Buchanan JA that when one has regard to the meaning of the term 'deliberation' and the object of the Act as contained in s.3, one cannot accept the appellant's submission that it is sufficient to attract the exemption that the document discloses the subject matter upon which Cabinet may have deliberated. The deliberative process involves the weighing up or evaluating of the competing arguments or considerations that may have a bearing upon Cabinet's course of action — its thinking processes — with a view to the making of a decision. It encompasses more than mere receipt of information in the Cabinet room for digestion by Cabinet ministers then or later.

Neither the agenda for a Cabinet meeting nor a document which merely contains information on a subject which may have been before Cabinet enables the conclusion that there was any Cabinet deliberation as to that matter or if there was, what the deliberations were with respect to such matter.

Redlich JA took the view 'that primary emphasis must be placed upon the content of the document in determining the consequences of its disclosure.'

Maree Shroff, the New Zealand Privacy Commissioner, who also served as Cabinet Secretary for sixteen years, recently commented that:

Even at the hardest end of FOI — access to Cabinet documents — the benefits are clear. If I, as a civil servant, write a Cabinet paper which I expect to be sought for pubic release I am going to be extraordinarily careful to get my facts right, to avoid trespassing into politics, to give comprehensive reasons for and against a proposal, and to think very carefully about my recommendations. My advice will therefore be balanced, accurate and comprehensive. Sometimes I will put in more detail than might formally have been the case: I might quote from sources rather than summarising them, especially when unpalatable advice might be needed; and I might clearly identify legal advice and separate it from policy advice to allow for possible legal protection under legal professional privilege. I will record carefully the reasons for my particular recommendations — although this will largely be to ensure that my reputation as a public servant will be enhanced if the advice is released. I will avoid the temptation to make cute remarks. I will often have robust face-to-face discussions with my Minister on the way towards a final piece of advice or a Cabinet paper.[25]

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[24] [2007] VSCA 272.

[25] Marie Shroff, *The Official Information Act and Privacy: New Zealand's Story*, Presented at the FOI Live 2005 Conference, London, 16 June 2005. http://www.privacy.org.nz/assets/Files/67725421.pdf. Last accessed 30 May 2008.

What needs to be considered is whether it is essential for the proper operation of the Westminster system of government in NSW that documents that might in some way concern a deliberation or decision of the Cabinet remain confidential, as opposed to documents that would disclose the actual deliberation or decisions.

The independent review panel in Queensland has recommended that:

> *Cabinet decisions, Cabinet submissions and Cabinet Briefing Notes, whether final or in draft form, and all other matter that would, if made public, compromise the collective ministerial responsibility of Cabinet under the Constitution, should be exempt documents. Those exempt Cabinet documents would include minutes or notes of Cabinet decisions and discussions, briefs for Ministers attending Cabinet meetings, the Cabinet agenda and pre-Cabinet consultations between officials and Ministers and among Ministers. This exception applies only to documents brought into existence for the purpose of submission to Cabinet. Cabinet includes Cabinet committees.*[26]

The panel has also recommended that incoming ministerial briefing books, parliamentary estimates briefs to allow Ministers to provide Parliament with information regarding expenditure, and parliamentary question time briefs should be exempt from disclosure.[27]

Issues

24. In relation to the Cabinet documents exemption clause:
    a. should its scope be clarified and narrowed? (Similar to the Victorian and Commonwealth approach)
    b. should a public interest or significant detriment test be added? (Similar to the New Zealand approach)
25. Given that in practice NSW Cabinet documents are refused as a matter of principle, would it be more appropriate and less misleading to the public if the Cabinet documents exemption provision was moved from Schedule 1 to Schedule 2 of the Act?
26. If such an exemption was included in Schedule 2, should it be subject to a five year sunset clause?

5.2.2. Working documents

Clause 9 of Schedule 1 to the FOI Act provides:

> *(1) A document is an exempt document if it contains matter the disclosure of which:*
>
> *(a) would disclose:*
>
> *(i) any opinion, advice or recommendation that has been obtained, prepared or recorded, or*
>
> *(ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency, and*
>
> *(b) would, on balance, be contrary to the public interest.*
>
> *(2) A document is not an exempt document by virtue of this clause if it merely consists of:*
>
> *(a) matter that appear in an agency's policy document, or*
>
> *(b) factual or statistical material.*

As Lord Simon of Glaisdale observed in *Attorney General v Times Newspapers*:

> *People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.*[28]

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[26] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, June 2008, p.121.
[27] As above, p.128.
[28] [1974] AC 273, at 315.

A similar sentiment was expressed by the Queensland Information Commissioner in a decision that is regularly referenced when this issue is being discussed:

> *Citizens in a representative democracy have the right to seek to participate in and influence the processes of government decision-making and policy formulation on any issue of concern to them. The importance of FOI legislation is that it provides the means for a person to have access to the knowledge and information that will assist a more meaningful and effective exercise of that right.*[29]

The release of advice before decisions are made can promote public participation in the policy formulation and decision-making process. However, in some circumstances the release of such advice may have a significant detrimental impact, for example where the issue in question is complex and highly emotive. In such circumstances, the release of advice before such deliberations have been completed may lead to a less than optimal reaction to the views expressed by sections of the media or particularly vociferous special interest groups.

In situations such as this, as long as there is no need for an urgent decision, the release of a discussion paper addressing all relevant issues may be a preferable approach to the release of incomplete, partial or preliminary advice.

It is also worth considering whether the exemption should have any application to documents after the decision to which they applied has already been made. It has been argued that the public interest against disclosure is less likely to apply once a decision has been made, with the ongoing relevance of documents to the agency's deliberations or current thinking processes falling away.

Issues

27. Should the scope of the 'working documents' exemption clause be narrowed, for example to confine its operation to policy formulation, to remove coverage of consultations and deliberations or similar?
28. Should the Act contain a provision that where the 'working documents' exemption is replied on, agencies are required to provide a summary of the policy which is under development?
29. Should the Act be amended to clarify that the 'working documents' exemption clause cannot be relied on once:
    a. a final position has been reached that will be the basis for a recommendation to government, or
    b. a decision has been made on the issue in question, or
    c. the information in the requested documents is no longer directly relevant to any on-going consideration?

5.2.3. Business Affairs

Clause 7 of Schedule 1 to the FOI Act provides:

> *(1) A document is an exempt document:*
>
> *(a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person, or*
>
> *(a1) if it contains matter the disclosure of which would disclose the commercial-in-confidence provisions of a government contract (within the meaning of section 15A), or*
>
> *(b) if it contains matter the disclosure of which:*
>
> *(i) would disclose information (other than trade secrets) that has a commercial value to any agency or any other person, and*
>
> *(ii) could reasonably be expected to destroy or diminish the commercial value of the information, or*

[29] *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1992] QICmr 2, para 71.

(c) if it contains matter the disclosure of which:

(i) could disclose information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person, and

(ii) could reasonably be expected to have an unreasonable adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency.

(2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is being made.

As noted in the FOI Manual at 12.4.8:

The main purpose of this exemption is to avoid prematurely disclosing information provided by the business community to government and exposing businesses to commercial disadvantage.

The Ombudsman takes the view that government agencies must apply a higher threshold to consideration of the application of this clause to documents they themselves created than to documents supplied to them by the private sector.

Government departments and authorities are increasingly engaging in commercial dealings, both as purchasers and providers. Moira Patterson believes this has meant that:

In recent years, access to business information under freedom of information legislation has become increasingly restricted by claims that it is commercially confidential. The effect of such claims is that government accountability via information disclosure diminishes in exact proportion as government operations become more "commercial" and therefore has serious implications for government accountability in general.[30]

Many State-owned corporations, however, argue that being subject to FOI applications can mean they are unable to remain competitive with private organisations operating in the same field. This argument led to State-owned corporations being exempted from the *Freedom of Information Amendment (Open Government — Disclosure of Contracts) Act 2006*. While she agreed to the government amendments to her bill, Clover Moore MP noted 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.[31]

She asked the government for an explanation for the exclusion, and an undertaking that the decision to exempt State-owned corporations would be re-considered in the future. The government replied that State-owned corporations:

… often compete with the private sector, and those competitors are not required to disclose contracts. However, the Government will support the idea of encouraging State-owned corporations to comply with the bill.[32]

In his submission to the independent review of the FOI Act in Queensland, the Queensland Ombudsman commented that:

I consider that all GOCs [Government Owned Corporations] *should be subject to the FOI Act. I am strongly of the view that private entities that carry out public functions using public funds are accountable to the public for the way in which they perform those services and spend those funds, and should be subject to all the usual accountability measures, including the application of the FOI Act and scrutiny by the Crime and Misconduct Commission, the Ombudsman, and the Auditor General. The commercial interests of GOCs are adequately protected by the exemptions available to agencies which are subject to the FOI Act.*[33]

There may also be a need to consider whether applicants should be able to apply for access to documents held by non-government and private organisations relating to a public function performed by that organisation.

It is possible that some middle ground can be found on this issue. For example, the competitive dealings of State-owned corporations could be placed in Schedule 2, subject to a sunset clause requiring a review and report to Parliament.

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[30] Patterson M, *Freedom of Information and Privacy in Australia*, Lexisnexis Butterworths, Sydney, 2005, p.259.
[31] Clover Moore MP, *NSWPD*, 26 October 2006, p.3597.
[32] Diane Beamer MP, *NSWPD*, 26 October 2006, p.3597.

Issues

30. Should the scope of the business affairs exemption clause be changed?
31. Should the commercial functions of State-owned corporations be exempt from the operation of the FOI Act under Schedule 2? If such an exemption was included in the Act, should it be subject to a five-year sunset clause?
32. Should the FOI Act 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?

5.2.4. Legal professional privilege

Clause 10 of Schedule 1 to the FOI Act provides:

> *(1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.*
>
> *(2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.*

As with the Cabinet exemption provision, New Zealand adopted an approach to legal professional privilege in their Official Information Act that is quite different to NSW. While information can be withheld if it is necessary to maintain legal professional privilege, section 9(1) states that this will be overridden when 'in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.'

The New Zealand Ombudsman has noted that, in order to decide if the exemption will apply, an agency needs to take the following steps:

> *(i) Identify any considerations that may favour disclosure of the information in the public interest.*
>
> *(ii) Consider whether disclosure of the actual information requested would in fact promote these considerations.*
>
> *(iii) Finally, consider whether, in the circumstances of a particular case, the considerations favouring disclosure outweigh in the public interest, the need to withhold the information requested to maintain legal professional privilege.*[34]

The NSW Ombudsman has stated that: 'it is sometimes reasonable and appropriate to disclose legal advice, even if legal professional privilege could be claimed' and that 'there should be sound reasons for refusing to disclose legal advice, particularly where there is more to be gained by disclosure — for instance to avoid the escalation of a dispute.'[35]

It may be that legal professional privilege should only rarely apply to information which:

- might help someone understand why a decision was made
- affects the rights or interests of individuals, and
- relates to the accountability of government.

These circumstances are summarised in the NSW FOI Manual:

> ***Ombudsman's guidance — The public interest in disclosing legally privileged documents***
>
> *In the Ombudsman's opinion, in general terms (and particularly in the absence of anticipated litigation), it is unlikely to be contrary to the public interest to allow legal advice relating to an agency's affairs to be inspected if:*
>
> - *it contains information likely to contribute to positive and informed debate about issues of serious public interest,*
> - *it reveals significant reasoning behind an agency's decisions that affect or will affect a significant number of people,*

[33] Queensland Ombudsman, *Response of the Queensland Ombudsman to "Enhancing Open and Accountable Government — Review of the Freedom of Information Act 1992*, 20 March 2008, p.6.

[34] New Zealand Ombudsmen, *Practice Guidelines — Official Information*, Part B, Chapter 4.8, pp 3-4.

[35] NSW Ombudsman, *Good Conduct and Administrative Practice — Guidelines for state and local government, 2nd edition*, May 2006, at 7.5.

- *it shows the pathway by which agency policy was created,*
- *it will significantly contribute towards the public accountability of an agency,*
- *it will assist or allow inquiry into possible deficiencies in an agency's conduct (for example, by removing suspicion of significant impropriety or exposing significant impropriety),*
- *it consists of information that is legally in the public domain,*
- *it relates to the affairs of the individual who requested the right to inspect the document,*
- *it shows how an agency has dealt with a person's complaint and the outcome of the complaint,*
- *it is innocuous by reason of its stale or trivial content, or*
- *it will overcome any special disadvantages facing persons making claims against an agency.*[36]

Issues

33. Should a public interest test be included in the legal professional privilege exemption clause?
34. Should the legal professional privilege exemption clause be restricted to cases of actual or anticipated proceedings?

5.2.5. Personal affairs

Clause 6 of Schedule 1 to the FOI Act provides:

> *(1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (whether living or deceased).*
>
> *(2) A document is not an exempt document by virtue of this clause merely because it contains information concerning the person by or on whose behalf an application for access to the document is being made.*

The term 'personal affairs' is not defined in the Act, and the parameters of the term have evolved through the common law. In *Commissioner of Police v District Court of NSW and Perrin*,[37] Kirby P defined 'personal affairs' as 'the composite collection of activities personal to the individual concerned.'[38] With this definition in mind, he held that the disclosure of the names of police officers and employees involved in the preparation of reports within New South Wales Police did not constitute disclosure of information concerning their personal affairs. More recent case law has referred to 'personal affairs' as comprising information such as home address and telephone number especially when linked to a person's name,[39] family details and marital status[40], private behaviour and reputation[41] and financial obligations and liabilities.[42]

The equivalent term is defined in the South Australian FOI Act as including a person's financial affairs, criminal record, marital or other personal relationships, employment records and personal qualities or attributes.[43] In the Commonwealth FOI Act, 'personal information' is information or an opinion whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.[44]

The term 'personal information' is already used in other NSW legislation. It is defined in the Privacy and Personal Information Protection Act as:

> *… information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.*[45]

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[36] See 13.2.36.
[37] (1993) 31 NSWLR 606.
[38] As above at 625.
[39] *Gilling v Hawkesbury City Council* [1999] NSWADT 43.
[40] *Re Forrest and Department of Social Security and Wilks* (1991) 23 ALD 131.
[41] *Re Toomer v Department of Primary Industries and Energy* (1990) 20 ALD 275.
[42] *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533.
[43] *Freedom of Information Act 1991,* section 4.
[44] *Freedom of Information Act 1982*, section 4.
[45] *Privacy and Personal Information Protection Act 1988*, section 4.

The FOI Act and the Privacy and Personal Information Protection Act use different terminology and a different approach has been taken by the Courts and the ADT to describe what is essentially the same term. This can be confusing for users of both Acts.

If the term 'personal affairs' was changed to 'personal information' in the FOI Act, it would be important to ensure that the approach adopted by the Supreme Court in *Commissioner of Police v District Court of NSW and Perrin* is not lost.

Issues

35. In relation to 'personal affairs':
    a. Should the references to the term 'personal affairs' in the FOI Act be changed to 'personal information', and to 'health information' in the Health Records and Information Privacy Act, so that consistent terminology is used in both the FOI and privacy legislation? and
    b. Should the definition of 'personal information' in the Privacy and Personal Information Protection Act be changed to reflect the decision in the District Court in *Commissioner of Police v District Court of NSW and Perrin*?
36. Should changes be made to any of the other exemptions in the FOI Act not discussed in detail here? If so, what should these be?

5.3. Exempt bodies or offices

Section 9 of the FOI Act provides that:

> *Any body or office specified or described in Schedule 2 is, in relation to such of the functions of the body or office as are so specified or described, exempt from the operation of this Act.*

As stated in the NSW FOI Manual:

> *If a Schedule 2 body receives an FOI application in relation to its exempt functions, it does not need to make a determination under s.24 and, accordingly, it is not required to give a notice of determination under s.28. Rather, it is sufficient if the relevant body simply advises the applicant that the documents relate to functions specified in Schedule 2 of the FOI Act and therefore those documents are unable to be accessed under the FOI Act: Independent Commission Against Corruption v McGuirk [2007] NSWSC 147; Waite v Director-General, Attorney-Generals' Department [2000] NSWADT 109.*[46]

There are now 26 exempt bodies or categories of bodies (such as universities) listed in Schedule 2 to the FOI Act. 25 are exempt only in relation to certain functions and only the Child Death Review Team is totally exempt from the operation of FOI legislation under Schedule 2.

14 of the 25 bodies that are partially exempt under Schedule 2 are oversight or watchdog bodies that are exempt in relation to their investigative, audit, complaint handling and/or reporting functions.[47]

Four of the bodies are superannuation corporations or the Treasury Corporation that are covered in relation to their investment functions.

The remaining seven bodies or category of bodies include:

- the Office of the Director of Public Prosecutions in relation to its prosecution function
- the Public Trustee in relation to functions exercised in its capacity as executor, administrator or trustee, and
- the Department of Education and Training and all 10 public universities in relation to information about the ranking or assessment of students who have completed the Higher School Certificate for entrance to tertiary institutions.

[46] NSW FOI Manual, at 14.1.2.

[47] The Queensland independent review panel has expressed its support for the continued exemption of similar functions under the Queensland FOI Act. FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, June 2008, p.101.

All of the bodies that are only partially exempt are not exempt in relation to documents covering their administrative functions.

Section 9 of the FOI Act has been discussed in various ADT decisions, and was considered by the Supreme Court in *Independent Commission Against Corruption v Gerard Michael McGuirk*.[48] In that case, Simpson J stated that if it is found an application for access to a document attracts the application of section 9, the FOI Act 'will have no application to the request and therefore the agency can make no determination under s.24 of the FOI Act.'[49] However, Simpson J went on to state that the decision by an agency that it is exempt from the operation of the FOI Act does not preclude the applicant from seeking internal or external review.[50] It was held that, if on review it is decided the agency is exempt from the operation of the FOI Act in respect of a document or documents, it follows that the ADT has no jurisdiction to hear and determine any review application relating to that document or those documents.

Judicial Member Montgomery stated in *McGuirk v NSW Ombudsman*[51] that:

> *If a document is correctly categorised as falling within the scope of Schedule 2, the agency does not need to make a determination under section 24. Similarly, it is not required to give a notice of determination under section 28 of the FOI Act. However, if the agency has wrongly categorised a document and it in fact relates to the agency's non-exempt functions, then the agency is not exempt from the FOI Act in respect of that particular document. In that situation, the agency's failure to make a determination under section 24 would constitute a deemed refusal under section 24(2) of the FOI Act. That deemed refusal could be the subject of both internal and external review.*[52]

The ADT took a similar view in *Cianfrano v NSW Ombudsman*,[53] where it was held that, as all the documents that were the subject of an application related to functions covered by Schedule 2, they were 'satisfied that the Ombudsman does not need to make a determination under section 24 in relation to those documents.'[54]

There is no publicly available decision making rationale to assist legislators to decide what functions should appropriately be listed or excluded from Schedule 2.

In the absence of any statutory criteria or tests in the Act, from a review of the functions currently listed in Schedule 2 it is possible to identify certain criteria that may be relevant to whether a function or agency is included or excluded from the Schedule.

Using complaint handling, investigation, audit, review and reporting functions as an example, relevant criteria might be:

1. For exclusion from Schedule 2:
   - 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, and
   - the records arising from the function will or can influence ongoing interactions, for example with employers, law enforcement officers, health service providers, welfare agencies.
2. For inclusion in Schedule 2:
   - 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, and
   - the rights of affected individuals are usually protected by statutory procedural fairness provisions.

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[48] [2007] NSWSC 147.
[49] As above, at para 27.
[50] As above, at para 29.
[51] [2007] NSWADT 269.
[52] As above, at para 33.
[53] [2007] NSWADT 273.
[54] As above, at para 31.

In relation to investment and/or superannuation functions, relevant criteria might be:

1. For exclusion in Schedule 2:
   - no commercial advantage accrues to Government from confidentiality.
2. For inclusion in Schedule 2:
   - the agency is operating in an open market commercial environment when performing the functions.

Separate to Schedule 2, some agencies have been exempted (in part) from the operation of the FOI Act through the inclusion of provisions in their enabling legislation, for example:

- *Casino Control Act 1992* (s.148)
- *Community Services (Complaints, Reviews and Monitoring) Act 1993* (s.43A re the death review function).

Issues

37. Should any bodies or functions be removed from or added to Schedule 2 to the FOI Act?
38. Should internal/external review rights for decisions that documents relate to functions covered by Schedule 2 be made explicit in the Act (or the review rights in ss.47(7) and 53(3) be re-drafted in more general terms)?
39. Should the FOI Act be amended to require that applicants be formally notified of decisions by agencies that documents requested in their applications relate to functions covered by Schedule 2, and informing them of their internal/external review rights?
40. What would be appropriate criteria for inclusion or exclusion of functions in or from Schedule 2?

5.3.1. Houses of Parliament

While neither House of Parliament falls within the scope of the NSW FOI Act, other jurisdictions, including India, South Africa, Ireland and the United Kingdom, have brought Parliament within their legislative schemes governing access to information.

The United Kingdom's Freedom of Information Act includes both the House of Commons and the House of Lords as public authorities. This is tempered by provisions which enable the Speaker of the Commons or the Clerk of the Parliaments to certify, on a case by case basis, that information is exempt where necessary to avoid infringement of the privileges of either House or where, in the 'reasonable opinion' of the Speaker of the House of Commons or the Clerk of the Parliaments, disclosure would be likely to prejudice the effective conduct of public affairs.

In 2007, a private member's bill was introduced to remove the Houses of Commons and Lords from the scope of the FOI Act. The member responsible for the bill, David Maclean, suggested he was introducing the bill because members of Parliament:

> *… must make decisions about the sanctity of our correspondence on behalf of constituents with public authorities. We have to be able to look constituents in the eye when they come to us about tax credit cases, Child Support Agency cases or their dealings with the police or the council. We must be able to say to them, "I will take up that case on your behalf and pass on your letter or write on your behalf and I guarantee that that will not be released." We cannot at present give that guarantee. The procedures in place allow someone else to make that judgment. If they make an erroneous judgment, that damages us.*[55]

However, a number of members of parliament suggested during parliamentary debate and Committee hearings that high profile requests for detailed break downs of members' allowances may have also been a factor.[56] This issue has been addressed by the British Information Tribunal, which found in favour of disclosure of detailed information on allowances in January 2007.[57]

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[55] The Hon David Maclean, Freedom of Information (Amendment) Bill, Third Reading, House of Commons, 18 May 2007.
[56] Oonagh Gay, *The Freedom of Information (Amendment) Bill, Research Paper 07/18*, Parliament and Constitution Centre, House of Commons Library, 21 February 2007, pp 6-7.
[57] http://www.informationtribunal.gov.uk/Documents/decisions/corpofficer_house_of_commons_v_infocomm.pdf.

The Australian Law Reform Commission recommended in its 1995 report that parliamentary departments should be made subject to the Commonwealth FOI Act.[58]

Issue

41. Should the definition of public authorities be amended to include the Houses of Parliament?

5.3.2. Judicial functions of courts and tribunals

Section 10 of the FOI Act excludes courts and tribunals, their officers and registries, in relation to the court or tribunal's judicial functions, from the definition of agency, and thus excludes them from the scope of the Act.

There is also a specific exemption at Clause 11 of Schedule 1 for documents which would disclose matters relating to the judicial functions of courts and tribunals, matter prepared for the purpose of proceedings, and matter prepared by a court or tribunal in relation to proceedings that are being heard or have been heard.

Given the exemption, there is a question as to what purpose is served by section 10 of the Act.

Issue

42. Should section 10 of the FOI Act be repealed?

[58] Australian Law Reform Commission, *Open Government: A review of the Federal Freedom of Information Act 1982*, 1995 ALRC 77, recommendation 73.

Chapter 6. Machinery Provisions

6.1. Access to electronic records

Section 23 of the FOI Act provides:

> *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.*

The FOI Act was drafted at a time when the vast majority of agency records and information were paper-based. This has changed and it is not uncommon for agencies to use and store a vast quantity of information electronically. Information is increasingly being stored in electronic databases, which can be programmed to generate particular reports which the agency needs to operate effectively. While it has become easier to produce a variety of reports, it is not clear if an agency should be required to produce a report in the format requested by an applicant. The difficulty arises when deciding how much effort an agency should be required to expend in collating data the subject of an application, particularly where the information is not of any operational benefit.

Another important change is the increasing use of electronic records management systems. The introduction of these systems can impact upon FOI applications, as information stored using superseded systems can be difficult to access, and is occasionally lost. This issue may be best addressed through amendments to other legislation, such as the State Record Act or further guidance such as that contained in the *Standard on Recordkeeping in the Electronic Business Environment*[59] produced by the State Records Authority of NSW and the Department of Commerce.

Other challenges relating to electronic records include what can be printed from electronic records management systems, how attachments to electronic messages are stored and inconsistent practices between staff for managing and saving electronic messages and other electronic records.

It may also be worthwhile to consider the level of access FOI officers are given to databases and IT systems in order to search for documents within the scope of an application, and also whether they have the requisite knowledge to conduct a meaningful search.

Issues

Access to information in superseded document management systems

43. Are the provisions of the State Records Act and associated standards on record keeping adequate to ensure information in superseded document management systems can be accessed? If not, what additional measures are necessary?

Access to information held in electronic form

44. Should the statutory right of access to information held in electronic form require that agencies must produce records for applicants:
    a. only in the circumstances set out in s.23 of the FOI Act? or
    b. where they can be produced using the normal computer hardware and software and technical expertise of the agency, and producing them would not interfere unreasonably with the operations of the agency?[60] and

[59] State Records Authority of New South Wales, 2000. Minor updates 2007.
[60] Based on s.10(1) in Newfoundland and Labrador's *'Access to Information and Protection of Privacy Act'*.

c. by allowing them to view the information at the offices of the agency if it is not reasonable to produce a paper record?

Requirements for digital records

45. Should agencies be required to design their information systems to allow for a report to be produced containing information relevant to an individual that may be the subject of an FOI request, even if the report has no operational benefit to the agency?

Configuration of messaging systems

46. Should agencies be required by statute to configure their messaging systems, such as email, to ensure that attachments to messages can be searched electronically?

Print functions

47. Should agencies be required to ensure that there is a 'print' function for all electronic databases/information storage facilities so that paper documents can be 'created' for disclosure (or external review of decisions to refuse disclosure)?

Powers of FOI decision-makers

48. Should agencies be required by statute to give FOI officers the ability to adequately access all agency IT databases, systems and equipment to enable them to conduct an adequate search for relevant digital/electronic records including:
    a. the means to access all hardware and ability to access all digital/electronic records (whether held centrally or on stand alone computers, laptops, flash drives or other storage devices)?
    b. authorisation to access all relevant records(digital/electronic or hard copy) held by the agency?
    c. training or expert assistance to conduct adequate searches of digital/electronic records, both as to how to use the relevant software and search techniques?

Searches for documents

49. Where an FOI officer is searching for documents should they consult applicants about the search criteria to be used to search the digital/electronic records held by the agency?
50. Should FOI practitioners be given guidance about searching digitial/electronic records on issues such as:
    a. what if any records should be made and retained of the search criteria used in each case;
    b. how to search email streams;
    c. whether all digital/electronic versions of a document should be considered where an application includes a request for drafts;
    d. any other relevant issues?

Privacy considerations

51. Should agencies be required to appropriately advise staff that all messages (eg, emails) sent or received on agency hardware (whether official or personal) may be subject to an FOI request and if so will be reviewed by FOI decision-makers to determine if they should be released?

Options for means of release

52. Should the Act provide that applicants can be given the option of either paper based or electronic release?

53. Should the Act allow agencies to decide to only provide access by electronic means, particularly where an application is made for a large volume of documents and access can be provided by electronic means?

6.2. Options for access

Section 27 of the FOI Act provides:

> *(1) Access to a document may be given to a person:*
>
> *(a) by giving the person a reasonable opportunity to inspect the document, or*
>
> *(b) by giving the person a copy of the document, or*
>
> *(c) in the case of a document from which sounds or visual images are capable of being reproduced, whether or not with the aid of some other device — by making arrangements for the person to hear or view those sounds or visual images, or*
>
> *(d) in the case of a document in which words are recorded in a manner in which they are capable of being reproduced in the form of sound — by giving the person a written transcript of the words recorded in the document, or*
>
> *(e) in the case of a document in which words are contained in the form of shorthand writing or in encoded form — by giving the person a written transcript of the words contained in the document, or*
>
> *(f) in the case of a document in which words are recorded in a manner in which they are capable of being reproduced in the form of a written document — by giving the person a written document so reproduced.*
>
> *(2) If an applicant has requested that access to a document be given in a particular form, access to the document shall be given in that form.*
>
> *(3) Notwithstanding subsection (2), if the giving of access in the form requested:*
>
> *(a) would unreasonably divert the agency's resources away from their use by the agency in the exercise of its functions, or*
>
> *(b) would be detrimental to the preservation of the document or (having regard to the physical nature of the document) would otherwise not be appropriate, or*
>
> *(c) would involve an infringement of copyright subsisting in matter contained in the document,*
>
> *access in that form may be refused but, if so refused, shall be given in another form.*
>
> *(4) If an applicant has requested that access to a document be given in a particular form and access in that form is refused but given in another form, the applicant shall not be required to pay a charge in respect of the giving of access that is greater than the charge that the applicant would have been required to pay had access been given in the form requested.*
>
> *(5) This section does not prevent an agency from giving access to a document in any other form agreed on between the agency and the person to whom access is to be given.*
>
> *(6) An agency may refuse to give access to a document unless any charge payable in respect of dealing with the application, or giving access to the document, has been paid.*

There has been debate about whether decision makers should make their decisions on the basis that the information is effectively being provided to the world at large, not just the applicant. The FOI Act does not allow limitations or conditions to be placed on the release of documents, and applicants are not required to provide any reasons when they request documents from an agency.

In *Marke v Victoria Police*,[61] the Victorian Supreme Court held that it was relevant for decision makers to consider the likelihood that an applicant may disclose documents more widely. Hanse J commented that 'there is nothing in the FOI Act or the authorities that require the Tribunal in this case to assume, without reference to the appellant, that disclosure to the appellant would effectively be disclosure to the world at large.'

[61] (2007) VSC 522.

The ADT has taken a different approach. In *Cheney v Sydney West Area Health Service*,[62] the Appeal Panel held that disclosure of documents under the FOI Act constituted disclosure to the world. The panel suggested that the approach favoured by the Victorian Supreme Court:

> *… leads to a conclusion that an applicant may need to give reasons for an FOI request and advise the agency of what he or she proposes to do with the documents. As we have said there is no mechanism for an agency to assess the credibility of an applicant before reaching a decision as to whether or not disclosure would be unreasonable or whether the override discretion should be exercised.*[63]

Issue

54. Should the Act be amended to provide agencies with the option of allowing 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?

6.3. Fees and charges

6.3.1. Fees and charges generally

Section 67 of the FOI Act provides:

> *(1) The Minister may, by order published in the Gazette, establish guidelines in relation to the imposition, collection, remittal and waiver of fees and charges under this Act.*
>
> *(2) In establishing guidelines under this section, the Minister shall have regard to:*
>
> > *(a) the need to ensure that disadvantaged persons are not precluded from exercising their rights under this Act merely because of financial hardship, and*
> >
> > *(b) the need to ensure that fees and charges should reflect the costs incurred by agencies and Ministers in exercising their functions under this Act.*
>
> *(3) An agency or Minister, in determining the amount of any fee or charge under this Act, shall not contravene any guidelines in force under this section.*
>
> *(3A) The guidelines in force under this section are to be taken into account:*
>
> > *(a) by the Tribunal when reviewing a determination described in section 53(3)(a)(iv) or (v), and*
> >
> > *(b) by the Ombudsman when reviewing the conduct of a person or body in relation to such a determination.*
>
> *(3B) A charge under this Act for dealing with an application or for giving access to a document is not to include any amount for additional time spent in searching for a document that was lost or misplaced.*
>
> *(4) Any fee or charge that is due to an agency or Minister under this Act may be recovered as a debt or liquidated demand in a court of competent jurisdiction.*
>
> *(5) Fees or charges received by agencies or Ministers under this Act do not form part of the Consolidated Fund and may be used by the agencies or Ministers to defray the costs incurred by the agencies of Ministers in exercising their functions under this Act.*

The *Freedom of Information (Fees and Charges) Order 1989* provides in part:

> ***Fees to be imposed***
>
> *4.(1) An application fee under section 17 or 36 of the Act is to be not less than $20 and not more than $30.*
>
> *(2) An application fee under section 34 of the Act is to be not less than $20 and not more than $40.*

[62] [2008] NSWADTAP 29.
[63] As above, at para 20.

Charges to be imposed

5.(1) The charges —

(a) for the giving of access to a document (being a charge determined under section 24(b) of the Act; and

(b) for dealing with an application (being a charge determined under section 24(c) of the Act),

are to be calculated on the basis of an hourly rate of $30 per hour.

(2) Such a charge is not to be imposed in respect of —

(a) the first 20 hours during which —

(i) an application under section 17 or 36 of the Act (being an application made by a natural person in respect of documents relating to his or her personal affairs) is dealt with; or

(ii) access to a document the subject of such an application is given; or

(b) any application under section 34 of the Act.

(3) Such a charge is to be calculated on the time spent by the agency's or Minister's staff in actually dealing with the application or giving access to the document, calculated to the nearest quarter of an hour.

Reduction of fees and charges

6. The fees and charges payable by —

(a) an applicant who holds a pensioner health benefits card issued by the Commonwealth; or

(b) an applicant whose weekly income is less than the maximum weekly income allowable, under the Social Security Act 1974 of the Commonwealth, to holders of such a card; or

(c) an applicant who is under the age of 18 years; or

(d) an applicant who is applying on behalf of a non-profit organisation that can demonstrate financial hardship; or

(e) an applicant whose application relates to information that it is in the public interest to make available,

are to be half the fees and charges that would otherwise be payable in respect of the application.

Refunds of fees and charges

7.(1) Any fee or charge imposed in respect of an application under section 17, 34 or 36 of the Act is to be refunded if the records to which the application relates are subsequently amended in a significant manner as a result of an application under section 40 or 49 of the Act.

(2) Subclause (1) does not apply if those records have to be amended because the information contained in them is incomplete, incorrect, out of date or misleading as a result of an act or omission of the applicant in connection with the recording or maintaining of that information by the agency or Minister concerned.

(3) Any application fee imposed in respect of an application under section 34 of the Act is to be refunded if the application results in a determination that significantly differs from that in respect of which the application has been made.

A comparison of the FOI application fees that can be charged in a range of other FOI jurisdictions is set out in table 1.

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

Jurisdiction	Initial request	Internal review
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

The policy rationale underpinning the fees and charges regime under the FOI Act was discussed in the first and only report prepared by the former FOI Unit of the then Premier's Department on the operation of the FOI Act:

> ***Charging policy***
>
> *The New South Wales Act requires that fees and charges reflect the costs of providing the information:*
>
> > *In establishing guidelines under this section, the Minister shall have regard to —*
> >
> > *(a) the need to ensure that disadvantaged persons are not precluded from exercising their rights under this Act merely because of financial hardship: and*
> >
> > *(b) the need to ensure that fees and charges should reflect the costs incurred by agencies and Ministers in exercising their functions under this Act.' (section 67(2))*
>
> ***Philosophy***
>
> *In approaching the task of determining a charging policy for New South Wales the Government was aware of the contention surrounding Commonwealth FOI charges and costs. To find a balance between the contrasting socio-political and economic objectives was the major difficulty. Low charges would result in more extensive use of FOI by the community, but the cost to the general tax-payer would be high.*
>
> *Higher charges would mean that FOI applicants would pay more of the costs associated with FOI, but would also have the effect of depressing the use of FOI.*
>
> ***NSW policy***
>
> *After assessing all factors, it was decided that New South Wales charging policy, in summary, should recognise the socio-political desirability of FOI, tempered with the recognition that scarce public resources are being used. The charging policy was therefore designed to have the following characteristics:*
>
> - *be as simple as possible;*
> - *for commercial users, be strongly based on a 'user pays' principle; and*
> - *for individual users making personal requests, public interest groups and persons who are experiencing financial hardship, be readily accessible and therefore inexpensive.*
>
> *The resulting policy, established by Ministerial order under section 67 of the Act, incorporates these features. There is a simple fee scale ($20 to $30 application fee, and $30 per labour hour processing charge — the first 20 hours of processing being free for personal requests), and a 50% reduction in fees for applicants suffering financial hardship. For requests which have an identifiable 'public interest' component, a similar reduction in charges applies.*
>
> *The overall effect is to balance the value of the information provided against the cost and effort involved, even though the proportion of costs recovered is still small.*

It has been argued that FOI is a cost of democracy that should be borne by governments in the same way as the courts, police and the electoral system. In the words of Justice Michael Kirby:

> *It is important for governments, whatever their political complexion, to understand that some basic activities of government simply have to be provided at the general costs of the taxpayer. They represent the price of governing a civilised community. To expect the user to pay fully for basic government services, such as a day in court, is surely wrong. The same is true of FOI charges.*[64]

It could also be argued that FOI is 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.

One way of looking at this question is to distinguish between:

- core government functions, namely services provided by government, such as police, the criminal justice system or the electoral system, and
- core government services, namely services consumed at the discretion of users, such as water, electricity, and the civil justice system.

FOI would fall into the second category of government services. The question could then be asked whether the cost of FOI should be based on:

- a small cost (similar to the civil justice system) to ensure that FOI is not misused and to discourage applicants from making wide, generalised requests, or
- full cost recovery (similar to the provision of water and electricity).

When fees were introduced in Ireland for FOI applications, the overall usage of the FOI Act fell by 50%, including a 75% fall in non-personal requests and an 83% fall in media requests. This suggests the use of FOI legislation is particularly cost sensitive.[65]

Given the public policy objectives of FOI, most jurisdictions around the world have adopted the first approach, namely fees and charges that are not intended to cover all costs involved.

Fees and charges can be beneficial in that they cause applicants to be as specific as possible when requesting information and they may also limit the number of times an applicant will apply for the same or similar information.

Issues

55. Do the social policy objectives of the FOI Act still justify the current approach to the cost scheme for the Act?
56. Should the fees for initial and internal review applications be increased or decreased?
57. Should there be different fees for personal affairs and non-personal affairs applications?
58. Should costs be based on the time taken to process a request or be directly related to the amount of information to be released?
59. Should there continue to be a reduction in fees and charges for demonstrated financial hardship and for public interest applications?
60. Should agencies be given explicit authority under the Act to fully refund fees and charges in appropriate circumstances, for example where there has been a significant delay in dealing with an application?

6.3.2. Advance deposits

Sections 21–22 of the FOI Act provide:

> *21. Agencies may require advance deposits*

[64] Kirby J., '*Freedom of Information: The Seven Deadly Sins*', Fortieth Anniversary Lecture Series of the British Section of the International Commission of Jurists, 17 December 1997, p.7.

[65] €15 for an initial request, the €75 for an internal review request and the €150 for a review by the Information Commissioner.

(1) If, in the opinion of an agency, the costs to the agency of dealing with an application are likely to exceed the amount of the application fee, the agency may request the applicant to pay to it such amount, by way of advance deposit, as the agency may determine.

(2) If, in the opinion of an agency, the costs to the agency of dealing with an application are likely to exceed the sum of the application fee and of any advance deposits paid in respect of the application, the agency may request the applicant to pay to it such amount, by way of further advance deposit, as the agency may determine.

(3) The amount of an advance deposit requested by an agency in respect of an application shall not be such that the sum of the application fee, the advance deposit and any further advance deposits paid in respect of the application exceeds such amount as, in the opinion of the agency, will be necessary to cover the costs of dealing with the application.

(4) A request for an advance deposit shall be accompanied by a notice that sets out the basis on which the amount of the deposit has been calculated.

(5) The amount of an advance deposit requested by an agency in respect of an application shall be paid to the agency within such period of time as the agency may specify in the request.

(6) The period of time between the making of a request under this section and the payment of an advance deposit in accordance with the request shall not be taken into account in calculating the period of 21 days within which the relevant application is required to be dealt with.

22. Agencies may refuse to continue to deal with applications if advance deposit not paid

(1), (2) (Repealed)

(3) An agency may refuse to continue dealing with an application if:

(a) it has requested payment of an advance deposit in relation to the application, and

(b) payment of the deposit has not been made within the period of time specified in the request.

(4) If an agency refuses to continue dealing with an application under subsection (3):

(a) it shall refund to the applicant such part of the advance deposits paid in respect of the application as exceeds the costs incurred by the agency in dealing with the application, and

(b) it may retain the remainder of those deposits.

(5) An agency that refuses to continue to deal with an application under this section must forthwith cause written notice of that fact to be given to the applicant.

(6) A refusal to continue to deal with an application under this section is taken to be a determination that is subject to internal review under Part 3 and external review under Part 5, and the provisions of those Parts apply accordingly.

NSW Ombudsman annual audits of FOI reporting by NSW agencies have shown there has also been a marked increase in the number of FOI applications refused on the basis that advance deposits were not paid — up from 36 in 1995–96 to 172 in 2004–05 and 296 in 2005–06. It can be assumed that the increase is primarily due to either an increase in the number of agencies charging advance deposits or the amounts charged.

Section 21(6) of the Act allows for an agency to 'stop the clock' while waiting for an applicant to pay an advanced deposit. The Act does not specify how much time an agency should allow an applicant to pay. This is important, as applicants occasionally need some time to make the payment, particularly for larger amounts. Many agencies set the time limit at two weeks, and are open to negotiating this further if it is not feasible.

The FOI Act provides that charges for the processing of an application, other than application fees, cannot be levied after the initial determination. This can act as an incentive for agencies to process initial determinations as quickly as possible, as well as ensuring that those determinations are as comprehensive as possible. However, when agencies conduct internal reviews, they can find there is a significant amount of additional work required. At the moment an agency has no way of recouping the costs that arise out of internal reviews.

In *McGuirk (GD) v University of New South Wales*,[66] the Appeal Panel concluded that an applicant is not entitled to internal or external review of the reasonableness of the request for an advance deposit until it becomes part of a 'charge' levied under s.24. This decision set aside several previous decisions by the Tribunal in which it assumed it had jurisdiction to review agencies' decisions to request advance deposits.

[66] [2007] NSWADTAP 65.

Issues

61. Should the processes surrounding advance deposits be simplified?
62. Should an applicant be able to seek internal review of a request for an advance deposit without the need to wait for the period specified in the request for such a deposit to expire and for the agency to decide to refuse to continue dealing with the application under s.22?
63. Should an applicant be able to seek external review of a request for an advance deposit or an agency's refusal to deal with an application under s.22(3), without the need for a prior internal review?
64. Should agencies only be able to charge a percentage of the estimated cost as an advance 'deposit'?
65. Should the Act specify exactly what information an agency is required to provide to an applicant to explain how an advance deposit has been calculated?
66. Should the Act specify the minimum time period that an applicant should be given to pay an advanced deposit?

6.3.3. Public interest discounts

Once an assessment has been made by an agency to release a document, a separate assessment needs to be made as to whether the document to be released 'relates to information that it is in the public interest to make available.'

As is set out in s.5, the underlying philosophy of the FOI Act is that it is in the public interest to release information held by government. It could therefore be argued that the release of non-personal affairs documents held by government would generally be in the public interest.

Out of the 14,036 reported FOI applications included in the Ombudsman's 2005–06 review of FOI statistics, 4,270 did not concern the personal affairs of the applicant. While the agencies included in the report gave 448 discounts based on financial hardship considerations, they only gave 48 discounts based on public interest considerations. Of these, 22 were given by just one agency. Leaving aside the 21 Ministerial offices, of the remaining 86 agencies, only 12 gave any public interest discounts. Interestingly, the agency that received most FOI applications overall (the NSW Police Force), which included the most non-personal affairs applications (over 700), gave no public interest discounts.

It could be argued that agencies should treat disclosure of information as being in the public interest where the documents requested relate to issues such as:

- the integrity of public officials, government agencies or the government of the day itself
- the accountability of public officials, agencies or the government of the day, contractors or agents working for agencies or the government, or other persons or organisations performing public official functions
- the performance of public functions by public officials, agencies, the government or the day, contractors/ agents working for agencies or the government, or other persons or organisations performing public official functions
- the expenditure of public money, or the allocation or disposal of public resources by public officials, agencies or the government of the day, and
- any arrangements (including tenders and contracts) for the expenditure of public money or performance of public official functions.

The *NSW Freedom of Information (Fees and Charges) Order 1989* provides for a reduction in fees and charges of up to 50% for applications for information 'that it is in the public interest to make available.'[67]

The Commonwealth FOI Act provides that the fees can be waived, either in part or in full, when 'the giving of access is in the general public interest or in the interest of a substantial section of the public.'[68]

In Victoria, fees can be waived in part or in full when 'the applicant's intended use of the document is a use of general public interest or benefit.'[69]

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[67] Clause 6(e).
[68] *Freedom of Information Act 1982* (Cth) section 30(1)(b)(iii).
[69] *Freedom of Information Act 1989* (Vic) section 22(h)(i).

In Queensland, application fees cannot be waived. Processing or access charges can be waived, but only as provided under the Act, if the applicant is in financial hardship[70] or when the application is delayed.[71] While Queensland does not provide for public interest discounts, it is important to note that fees are only levied in relation to requests for non-personal information.

The USA FOI Act states that:

> *Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations of the government and is not primarily in the commercial interest of the requestor.*[72]

Issues

67. Should more guidance be provided in the Act or a fees and charging order as to the circumstances where disclosure of information would be in the public interest and, if so, what should those circumstances include?
68. Should the Act provide that the circumstances in which disclosure of information will be in the public interest should be read broadly?
69. In assessing whether it is in the public interest to make information available, should the Act specifically provide that the relevant test involves the likely outcome of release, not the possible motives of the applicant?

6.4. Time periods/delay

6.4.1. Time periods

The current time periods specified in the Act are:

- an agency has 21 days to determine an FOI application (ss.24(2), 37(2), 41(3), 50)
- an agency can extend the 21 day period by a further 14 days in certain circumstances (s.59B of the FOI Act and cl.9 of the Freedom of Information Regulation 2005)
- 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 (s.20)
- 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 (s.34(2)(e))
- an agency has 14 days to determine an internal review application (s.34(6))
- 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 as to the results of any investigation (s.54), and
- 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 (s.60).

From the NSW Ombudsman's 2005–06 review of FOI statistics:

- 63% of applications were completed within 21 days
- 11% of applications were completed within 22–35 days, and
- 26% of applications took more than 35 days to complete.

A comparison of time periods for dealing with FOI requests in a range of other FOI jurisdictions is set out in table 2.

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[70] *Freedom of Information Act 1992* (Qld) section 35C.
[71] As above section 79(2).
[72] *Freedom of Information Act* 5 U.S.C. § 552 (a)(4)(A)(iii).

Table 2. Comparison of timeframes for dealing with FOI requests

Jurisdictions	Initial request (days)	Internal review (days)
ACT	30	14
Commonwealth	30	ASAP
NSW	21	14
NT	30	30
Queensland	45 (60 if documents over 5 years old not concerning personal affairs)	28
SA	30	14
Tasmania	30	30
Victoria	45	14
WA	45	15
Canada	30	N/A
NZ	20 working days	N/A
UK	20 working days	N/A
USA	20 business days	20 business days

When a single time period is specified which applies equally to all agencies, no distinction is made between agencies with a single work location and centralised records system and agencies with multiple work locations and a decentralised records system, such as:

- the Department of Education and schools
- the NSW Police Force and police stations
- Area Health Services and hospitals, and
- the Department of Community Services and its regional offices.

Where the records of agencies are held in multiple locations, it may be necessary for FOI requests to be sent to a number of locations that could be anywhere in NSW, asking for information about the existence of relevant documents. This is a far more time consuming process than that facing agencies with only one or two work locations, or with a centralised records system.

Issues

70. Should the time periods for dealing with initial applications and internal review applications be extended to reflect the time periods in most other Australian and equivalent FOI jurisdictions (30 days or 20 working days)?
71. Should different time periods be provided for the assessment and determination of personal affairs applications and non-personal affairs applications?
72. Should different time periods be provided for the assessment and determination of applications for documents that may be held in locations distant from the central office of an agency?
73. Should the Act provide that the time period for dealing with an application can be varied by agreement between the agency and the applicant?

74. Should the Act provide for an extended time limit for the lodging of a review application to the ADT by an FOI applicant in circumstances where an agency determines to only partially release documents to which ss.20(3)(d), 31(3)(d), 32(3)(d) and 33(3)(d) apply?

6.4.2. Deemed outcomes of delay

When an agency fails to determine an FOI application within the applicable time limits:

- the application is deemed to be refused, and
- the applicant has a right to seek an internal or external review (as applicable).

The FOI Act imposes no penalties on agencies who fail to determine FOI applications within statutory time frames.

Section 55(3) of the Commonwealth FOI Act allows an applicant to bypass internal review and proceed directly to the Administrative Appeals Tribunal if there has been a deemed refusal.

In the United States, Senators Cornyn and Leahy put forward a bill to amend the FOI Act which contained, along with a number of other changes, an incentive for agencies to comply with FOI timeframes:

> *(G)(i) If an agency fails to comply with the applicable time limit provisions of this paragraph with respect to a request, the agency may not assert any exemption under subsection (b) to that request, unless disclosure —*
>
> *(I) would endanger the national security of the United States;*
>
> *(II) would disclose personal private information protected by section 552a or proprietary information; or*
>
> *(III) is otherwise prohibited by law.*
>
> *(ii) A court may waive the application of clause (i) if the agency demonstrates by clear and convincing evidence that there was good cause for the failure to comply with the applicable time limit provisions.*[73]

When the bill was signed into law on 31 December 2007 this particular amendment was no longer part of it.

Issues

75. Should the deemed outcomes of delay currently within the FOI Act be reconsidered?
76. If agencies unreasonably delay determining an application, should:
    a. the application be deemed to be approved?
    b. the agency be precluded from claiming certain exception clauses?
    c. the agency lose the right to collect fees or be obliged to refund fees already collected?

6.5. Urgent applications

Unlike the United States and New Zealand FOI legislation, the NSW FOI Act does not include any provision for the expedited assessment and determination of certain FOI applications. In this regard the position in NSW is similar to all other Australian FOI jurisdictions.

In both the Untied States and New Zealand, an applicant must outline why their request is urgent in writing, and in the United States these reasons must be certified as true. The US Department of Justice's FOI Reference Guide states that an application will be processed ahead of others 'only in cases in which there will be a threat to someone's life or physical safety, or where an individual will suffer the loss of substantial due process rights if the records are not processed on an expedited basis.'

[73] S.849 *Open Government Act 2007.*

It is logical to assume that some FOI applicants may have a valid reason for urgently needing the information they have requested. This could include:

- to allow an applicant to contribute to a forthcoming public debate
- to assist the applicant in deciding whether to take certain action prior to the expiry of some limitation period
- providing an applicant with documents or information they require for a clear and legitimate reason where strict timeframes are involved
- for a clearly demonstrable legal or administrative purpose, or
- in the circumstances outlined in the US Department of Justice's FOI Reference Guide quoted above.

If FOI legislation were to provide for urgent applications, it would be necessary to decide what assessment criteria will apply. Options might include:

- the applicant being able to demonstrate 'compelling need' or reasons why the information is needed urgently (similar to FOI legislation in the USA and New Zealand)
- the payment of an urgency fee (presumably subject to a discount for people who can demonstrate financial hardship), or
- both of the above.

The next question is whether agencies should have the discretion to refuse such applications, even if they meet the relevant criteria. This may be reliant on what the applicant hopes to achieve by having their applications dealt with as an urgent request. For example:

- If the Act does not impose a penalty on agencies for failing to determine applications within applicable time periods, the purpose of the urgent application may either be to achieve some priority treatment of the application, or to reduce the period before an application is deemed to be refused.
- If the Act is amended to impose a penalty for delay, then the purpose of an urgent application would be to receive a determination within the reduced period, or to obtain the benefit of whatever penalty is imposed on the agency for failing to finalise the application within the period in question.

Issues

77. Should the Act be amended to include provision for urgent FOI applications?
78. If so:
    a. should the Act prescribe the time limit and fee for dealing with such applications or should this be at the discretion of agencies?
    b. what requirements should be met by the person requesting urgency?
    c. should acceptance of an urgent application that meets the relevant tests be mandatory or discretionary?
    d. what, if anything, should flow from an agency's failure to determine an urgent application within the reduced time limit?

6.6. Voluminous requests

At present, the FOI Act does not provide for an extension of time when dealing with voluminous requests. 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 10.2).

The FOI Acts of Canada, the United States, Northern Territory, South Australia and Western Australia all allow for an extension of processing time when an applicant is requesting a large amount of information. Most of the relevant provisions in these jurisdictions provide for extensions of a reasonable time having regard to the particular circumstances.

In South Australia, the principal officer of an agency can extend the time provided if they are satisfied the application is for access to a large number of documents or necessitates a search through a large quantity of information. The extension must be for a reasonable period having regard to the circumstances and advice of the extension must be given to the applicant in writing.[74]

[74] *Freedom of Information Act 1991* (SA) section 14A.

The Northern Territory Information Act has a similar provision permitting an agency to determine, with reasons, the length of extension its needs.[75]

In the United States, the FOI Act only allows for an extension of 10 days, unless the applicant and the agency agree on a longer timeframe.

Issues

79. Should the FOI Act allow agencies to extend the processing time for applications requesting large amounts of information?
80. If such a provision was introduced, should it provide a specific extension period?
81. How would the decision be made that a request was voluminous?

6.7. Acknowledgement of applications

Unlike the Commonwealth, ACT and Queensland FOI legislation, the NSW Act does not require agencies to send a letter to applicants acknowledging receipt of their request (although it is suggested in the NSW FOI Manual[76] that they do so).

The FOI Act's deemed refusal provision provides that the time in which a review application may be made to the ADT starts to run from the date of receipt of the FOI application. In such circumstances, if the application has not been acknowledged by the agency, the applicant may not be aware:

- that they have a right to make a review application to the ADT
- that their rights to make an internal review application must be exercised within a certain time (49 days after the application was received by the agency), and
- that the agency has not received their application because of a postal or other administrative failure.

The decision by the ADT in *Sawires v Commissioner of Police*[77] makes it even more important that agencies acknowledge applications and advise applicants that they must make an internal review application within 49 days, even if the agency has not responded to their FOI application. In Sawires, the ADT held that an applicant who had lodged an application for review with the ADT was out of time, as he had not lodged the application within 60 days of the date that the applicant's internal review application was deemed to have been refused by the agency. The ADT rejected the argument that the 60 day time frame to appeal to the ADT flowed from the date that the applicant actually received the notice of the internal review determination from the agency, which was 6 June 2007, and said that the review application to the ADT should have been lodged 79 days after the agency had received the applicant's request for an internal review. The ADT also held that it had no discretion to extend the timeframe for the lodging of an application for review to the ADT and consequently the applicant's appeal was dismissed for want of jurisdiction.

The important dates for applicants include:

- when their FOI application or internal review request is received
- when they must lodge an internal review application with the agency, and
- when they must lodge an external review application with the ADT if their request is deemed refused or otherwise delayed by the agency.

If agencies do not inform applicants of these dates, they may be depriving them of their rights of review and appeal under the FOI Act.

The USA FOI Act was amended in 2007, and now includes a requirement that:

> *(7) Each agency shall —*
>
> > *(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and*

[75] *Information Act 2002* (NT) section 26.
[76] See 3.8.
[77] [2008] NSWADT 91.

(B) establish a telephone line or internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including —

(i) the date on which the agency originally received the request; and

(ii) an estimated date in which the agency will complete action of the request.[78]

The independent review panel in Queensland has recommended the coordinated and consistent introduction of electronic lodgement, payment and access procedures for FOI applications.[79] This may also allow for swift acknowledgement of receipt.

Issues

82. Should the Act be amended to require agencies to acknowledge receipt of all FOI applications, and should this be accompanied by additional information regarding deemed refusal timeframes and review options?
83. Should any such requirement specify a time period for compliance, and if so, what time period would be reasonable?

6.8. Consultation with third parties

The following sections of the FOI Act require agencies to consult with affected third parties before releasing certain documents:

- s.30 — documents affecting inter-governmental relations
- s.31 — documents affecting personal affairs
- s.32 — documents affecting business affairs
- s.33 — documents affecting the conduct of research.

In each case, the circumstances where the agency is required to consult are specified in the Act to be where documents contain matter 'concerning' the affairs/personal affairs/trade secrets/business, professional, commercial or financial affairs/research as the case may be.

The general practice adopted by NSW agencies has been to interpret these provisions as only applying where the release of the documents could 'affect' those affairs or interests (in line with the use of the word 'affecting' in the relevant section and exemption clause headings). On this basis agencies generally would not consult where the information requested, or the information to be 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. If these changes are made, it could be argued that the document no longer relates to a third party's interests, as they cannot be readily identified.

It is possible to apply a broader interpretation to sections 30–33, whereby agencies are required to consult with third parties if the information is in any way 'concerning' the affairs or interests of relevant third parties. This approach would expand the scope of documents where consultation would be required, including those where the identity of a third party cannot be readily identified.

The equivalent provision in the Commonwealth FOI Act relating to requests for documents containing personal information only applies where it appears to the FOI decision-maker that the person 'might reasonably wish to contend that the document … is an exempt document.'[80] In Queensland, the equivalent provision only applies where disclosure of a document 'may reasonably be expected to be of substantial concern to … a person.'[81]

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[78] 5 U.S.C. § 552 (a)(7).
[79] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, June 2008, p.222.
[80] Section 27A(1AA).
[81] Section 51(1).

Issue

84. Should ss.30–33 of the FOI Act be amended to provide 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?

6.9. Use of FOI and subpoenas

Currently people can — and often do — apply for the same information using both the FOI Act and a subpoena. This has resource implications for those agencies which have to deal with both requests and has implications for applicants. Legally, information obtained via subpoena can only be used in the particular proceedings for which it was obtained. In contrast, there is no restriction on the use that can be made of documents obtained under the FOI Act.

Issues

85. Is concurrent use of subpoenas and FOI a problem that needs to be addressed?

86. If concurrent use is a problem, what would be a fair and reasonable way to approach this issue?

Chapter 7. Publication of information

7.1. Publication of summaries and statements of affairs and policy documents

The FOI Act requires government to be proactive in disclosing certain information. The relevant provisions are limited to:

- a requirement to identify an agency's policy documents (through a biannual summary of affairs), and
- a requirement to provide an annual statement of affairs of an agency, including a list of the types of documents it holds.

Sections 14 and 15(1)–(3) of the FOI Act provide:

> *(1) The responsible Minister for an agency (other than a local authority):*
>
> *(a) shall (within 12 months after the commencement of this section and at intervals of not more than 12 months thereafter) cause to be published, in such manner as the Minister administering this Act may approve, an up-to-date statement of the affairs of the agency, and*
>
> *(b) shall (within 12 months after the commencement of this section and at intervals of not more than 6 months thereafter) cause to be published in the Gazette an up-to-date summary of those affairs.*
>
> *(1A) The general manager of a local authority has, in relation to the local authority, the same functions under subsection (1) as the responsible Minister has in relation to an agency.*
>
> *(2) A statement of the affairs of an agency shall contain:*
>
> *(a) a description of the structure and functions of the agency, and*
>
> *(b) a description of the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public, and*
>
> *(c) a description of any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions, and*
>
> *(d) a description of the various kinds of documents that are usually held by the agency, including:*
>
> *(i) a description of the various kinds of documents that are available for inspection at the agency (whether as part of a public register or otherwise) in accordance with the provisions of a legislative instrument other than this Act, whether or not inspection of any such document is subject to a fee or charge, and*
>
> *(ii) a description of the various kinds of documents that are available for purchase from the agency, and*
>
> *(iii) a description of the various kinds of documents that are available from the agency free of charge, and*
>
> *(e) a description of the arrangements that exist to enable a member of the public to obtain access to the agency's documents and to seek amendment of the agency's records concerning his or her personal affairs, and*
>
> *(f) a description of the procedures of the agency in relation to the giving of access to the agency's documents and to the amendment of the agency's records concerning the personal affairs of a member of the public, including:*
>
> *(i) the designation of the officer or officers to whom injuries should be made, and*
>
> *(ii) the address or addresses at which applications under this Act should be lodged.*
>
> *(3) A summary of the affairs of an agency:*
>
> *(a) shall identify each of the agency's policy documents, and*
>
> *(b) shall identify the most recent statement of affairs published under this section, and*
>
> *(c) shall specify the designation of the officer or officers to whom inquiries concerning the procedures for inspecting and purchasing the agency's policy documents and statements of affairs should be made, and*

(d) shall specify the address or addresses at which, and the times during which, the agency's policy documents and statements of affairs may be inspected and purchased.

(4) Nothing in this section requires the publication of information that is of such a nature that its inclusion in a document would cause the document to be an exempt document.

15. Availability of certain documents

(1) An agency shall cause copies of:

(a) its most recent statement of affairs, and

(b) its most recent summary of affairs, and

(c) each of its policy documents,

to be made available for inspection and purchase by members of the public.

(2) Nothing in this section prevents an agency from deleting from the copies of any policy document any information that is of such a nature that its inclusion in the document would cause the document to be an exempt document otherwise than by virtue of clause 9 or 10 of Schedule 1.

(3) A person is not to be subjected to any prejudice because of the application of the provisions of an agency's policy document (other than such of those provisions as the agency is permitted to delete from the copies of the document that are available for inspection and purchase by members of the public) to any act or omission of the person if, at the time of the act or omission:

(a) the policy document was not available for inspection and purchase, and

(b) the person was not aware of those provisions, and

(c) the person would lawfully have avoided the prejudice had the person been aware of those provisions.

As stated in the NSW FOI Manual:

Summaries of affairs serve several useful purposes, primarily related to enhancing participatory democracy and protecting members of the public. For example, summaries of affairs:

(1) force agencies to identify all policy documents which influence any of the agency's work which has to do, in any way whatsoever, with the public (section 14);

(2) allow members of the public to access a wide range of agency documents without the need to make a formal application. [All policy documents listed in an agency's summary of affairs are required to be available for inspection and purchase by members of the public (section 15(1)), subject to the rare limitation provided in section 14(4)];

(3) assist members of the public and local interest groups to obtain information about the policies, procedures and practices of an agency, and assist agency staff seeking precedent documents to assist them in drafting or updating policy documents; and

(4) protect members of the public from prejudice arising out of any contravention of the provisions of an agency's policy document which has either not been identified as a policy document, or has been so identified but not made available for inspection or purchase. However, members of the public must be able to show that they were not aware of the provisions of the document and that they could lawfully have avoided the prejudice had they been so aware (s.15(3)).

In relation to the last point, in effect s.15(3) allows a person to resist prejudicial action by an agency on the basis that the person may have acted differently if they had been aware of a certain policy of an agency but were not aware of that policy because the agency had failed to include it in their summary of affairs.

Clearly the mere publication of summaries of affairs in government gazettes is not likely to lead to the achievement of all the purposes listed above. To make information more easily accessible to members of the public agencies are encouraged to consider publishing their summary of affairs in their annual reports and on their Internet websites (as suggested in Premier's Memorandum 2004–4), as well as considering such options as:

- *making copies of their summaries of affairs, or brochures containing that information, available to the public free of charge at offices of the agency;*
- *annexing the list of policy documents in their summaries of affairs to their management or corporate plans.*

There has been debate around what information should be published under an agency's summary of affairs. Some agencies list all of their policies, including those that do not directly impact on the public. While not all of those policies will be available for distribution to the public, pursuant to section 14(4), the fact that they are listed allows the public to gain a more comprehensive understanding of the way an agency operates, including how many of the agency's processes are documented. However, some agencies take a more literal approach to their publication requirements, and do not list any of their internal policies in the summary of affairs, as they do not 'affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject' (s.6).

One of the benefits of promoting proactive disclosure is that it can reduce the selective and partial use of information accessed through FOI, as well as the cost of processing FOI applications. Making information that is likely to be of significant public interest publicly available means all of the information is available for comment and can be kept up to date.

Issues

87. Do Statements of Affairs and Summaries of Affairs, in their current form, continue to serve a useful public purpose?
88. Should the Act be amended to require agencies to publish on the web:
    a. their Statement of Affairs?
    b. their Summary of Affairs?
    c. all policy documents that could influence or affect the rights of members of the public, or how the agency deals with members of the public?
89. Should the definition of 'policy documents' be broadened to include such things as:
    a. all internal procedure manuals/instructions?
    b. performance measures?
    c. reports to management about compliance with performance measures?

7.2. Publication of electronic document registers and outcomes of FOI applications on websites

There are a number of different approaches to proactive disclosure in other jurisdictions.

The USA FOI Act requires that:

> *(2) Each agency, in accordance with published rules, shall make available for public inspection and copying —*
>
> *(A) final opinions, including concurring and dissenting opinions, as well as orders, made in adjudication of cases;*
>
> *(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;*
>
> *(C) administrative staff manuals and instructions to staff that affect a member of the public;*
>
> *(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) which, because of the nature of the subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and*
>
> *(E) a general index of the records referred to under subparagraph (D)*[82]

These collections of information have become known as reading rooms. Following an amendment in 1999, agencies are now required to make the general index referred to in subsection E available electronically.

[82] *Freedom of Information Act,* 5 U.S.C. § 552.

There have been similar systems introduced in the United Kingdom, which appear to be aimed at encouraging a greater level of proactive disclosure. Under section 19 of the *Freedom of Information Act 2000* (UK):

> *(1) It shall be the duty of every public authority —*
>
> *(a) to adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a "publication scheme"),*
>
> *(b) to publish information in accordance with its publication scheme, and*
>
> *(c) from time to time reviews its publication scheme.*
>
> *(2) A publication scheme must —*
>
> *(a) specify classes of information which the public authority publishes or intends to publish,*
>
> *(b) specify the manner in which information of each class is, or is intended to be, published, and*
>
> *(c) specify whether the material is, or is intended to be, available to be public free of charge or payment.*
>
> *(3) In adopting or reviewing a publication scheme, a public authority shall have regard to the public interest —*
>
> *(a) in allowing public access to information held by the authority, and*
>
> *(b) in the publication of reasons for decisions made by the authority.*
>
> *(4) A public authority shall publish its publication scheme in such a manner as it thinks fit.*
>
> *(5) The Commissioner may, when approving a scheme, provide that his approval is to expire at the end of a specified period.*
>
> *(6) When the Commissioner has approved the publication scheme of any public authority, he may at any time give notice to the public authority revoking his approval of the scheme as from the end of the period of six months beginning with the day on which the notice is given.*
>
> *(7) Where the Commissioner —*
>
> *(a) refuses to approve a proposed publication scheme, or*
>
> *(b) revokes his approval of a publication scheme,*
>
> *he must give the public authority a statement of his reasons for doing so.*

The UK Department of Constitutional Affairs has provided the following list of suggested content for publication schemes:

- any rules, procedures and internal guidelines issued to staff
- background to policy formulation
- information relating to the role, function and management of the agency
- departmental circulars
- information placed in the libraries of the Houses of Parliament
- decisions by the Information Commissioner relating to the agency
- speeches
- relevant legislation and related information
- information regarding procurement, grants, loans and guarantees
- information required to be published under other legislation, and
- research reports, risk impact statements etc.[83]

In addition to complying with this requirement, many public authorities have, of their own initiative, collated the information they have released in response to FOI requests into a disclosure log, which is then made available on their website. In a guide to setting up disclosure logs, the Department of Constitutional Affairs states that they can 'provide easy instant access to information released by public authorities,' and that 'user-friendly, organised and extensive disclosure logs have benefits for both the public and for the public authority.'[84]

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[83] www.foi.gov.uk/practitioner/resources/publicationschemes.htm#part2 (last accessed 27/03/08).

[84] Department of Constitutional Affairs, *Best Practice Guidance on Disclosure Logs*, December 2005, at www.foi.gov.uk/guidance/disclosure_logs.pdf (last accessed 18/03/08).

Several Canadian provinces have built more stringent disclosure requirements into their FOI legislation. In British Columbia, section 25 of the *Freedom of Information and Protection of Privacy Act 1996* states that:

> *(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information*
>
> *(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or*
>
> *(b) the disclosure of which is, for any other reason, clearly in the public interest.*
>
> *(2) Subsection (1) applies despite any other provision of this Act.*
>
> *(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify*
>
> *(a) any third party to whom the information relates, and*
>
> *(b) the commissioner.*
>
> *(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form*
>
> *(a) to the last known address of the third party, and*
>
> *(b) to the commissioner.*

These types of proactive disclosure form part of what Moira Patterson has described as a broader 'push model' approach to government-held information.[85]

This is a concept that has been taken up recently by the independent panel charged with reviewing Queensland's Freedom of Information Act. In its final report, the panel commented that:

> *FOI as a last resort in a push model means that a broader information policy would support government information routinely and proactively disclosed by government without first needing a formal request for the information. This would leave the freedom of information law to manage a much smaller holding of government information representing that which is truly in contest in terms of contrary or competing public interests.*[86]

Issues

90. Should agencies be required to establish and maintain a publications scheme?
91. Should agencies be required, or at least encouraged, to establish and maintain disclosure logs?
92. Should agencies be required to proactively identify and disclose information that is clearly in the public interest?

7.3. Protection for proactive release of documents

Those granting access to documents under the FOI Act are protected from action for defamation or breach of confidence. If access is given to documents by a determining officer who believes in good faith that the Act permits or requires the determination to be made, no action can be taken for defamation or breach of confidence due to the making of the determination or access being given. In addition there is no cause of action for defamation or breach of confidence against the author of the documents. If proactive release of documents outside the FOI Act is to be encouraged, it may be appropriate for the release of documents pursuant to the exercise of corporate discretion to attract the same protections as release pursuant to the FOI Act. The protection could apply, provided the release of documents was not in breach of any secrecy provisions, was in accordance with approved policies of the agency, and the release was authorised by someone with appropriate delegation.

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[85] Moira Patterson, *Freedom of Information and Privacy In Australia*, LexisNexis Butterworths, Sydney, 2005, p.498.
[86] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, June 2008, p.17.

Issue

93. Should the bona fide proactive release of documents attract the same protections as release under the FOI Act?

Chapter 8. Amendment of records

Section 39, which forms part of Part 4 of the FOI Act, provides that:

> *A person to whom access to an agency's document has been given may apply for the amendment of the agency's records:*
>
> *(a) if the document contains information concerning the person's affairs, and*
>
> *(b) if the information is available for use by the agency in connection with its administrative functions, and*
>
> *(c) if the information is, in the person's opinion, incomplete, incorrect, out of date or misleading.*

It could be argued that this may mean 'access to the agency's document has been given' either under the FOI Act or under any other arrangement, and where the applicant is the person who 'has been given access' to the document (s.40(c)).[87]

However:

- while the Ombudsman and the Department of Premier and Cabinet believe that access does not necessarily have to have been given under the FOI Act, this interpretation is far from certain
- the right to apply for amendment of an agency's records is only given to the person to whom access to an agency's document has been given, and
- the meaning of 'administrative functions' is ambiguous.

In practice, people in NSW are able to get access to documents in a range of ways apart from the FOI Act including:

- under any agency open access policy
- in accordance with an agency's discretion to make information available to members of the public, either generally or in a particular case
- pursuant to the Privacy and Personal Information Protection Act
- pursuant to the Health Records and Information Privacy Act
- pursuant to the Local Government Act, and
- pursuant to the State Records Act.

The FOI Act does not state that access to a document, for the purpose of Part 4, must have been given under the FOI Act. It could be argued that awareness of and ability to identify the document or documents which contain the information are of more importance.

Another important matter related to the amendment of records is what functions can properly be defined as administrative functions of an agency. The FOI Manual states that:

> *'Administrative functions' is not defined by the Act. The term should be given a broad meaning. The provisions of the FOI Act dealing with amendment of records are intended to cover the full range of records available in relation to functions of an agency that are part of its day-to-day operations and management. However, as information must concern 'personal affairs' it is unlikely that policy documents will be affected.*
>
> *In the Commonwealth FOI Act, the right to request an agency to amend a record is similarly expressed — 'being used or available for use by the agency or Minister for an administrative purpose'.*
>
> *The Commonwealth AAT has also held that the Commonwealth provision is not confined to records of a purely factual nature and may include those containing a professional judgement or opinion, subjective evaluations and information conveyed by innuendo. In Re Leverett (1985) 8 ALN N 135 at N136 the AAT (Cth) said: 'it would defy common sense to suggest that only factually erroneous assertions should be deleted or revised, while opinions based on these assertions must remain unaltered.'*[88]

There has also been some confusion around the purpose of Part 4. Person J provided some guidance on this question in *Kiernan v Commissioner of Police, NSW Police*:[89]

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[87] The NSW FOI Manual at 5.2.1.
[88] See 5.2.5-5.2.7
[89] [2007] NSW ADT 18.

Section 39 does not permit the review of the merits or validity of official action, or allow the rewriting of history: Crewdson v Central Sydney Area Health Service [2002] NSWCA 345; Botany Council v The Ombudsman [1995] 37 NSWLR 357. A statement given to a police officer would not generally be 'incorrect or misleading' to the extent that it comprises a record of what was said to that officer at the time: Coburn v Commissioner of Police, NSW Police Service [2003] NSW ADT 2. If there are errors of fact or opinion, the appropriate way to amend the agency's records is to add a notation to that effect rather than removing the original opinion: Crewdson v Central Area Health Service [2002] NSWCA 345. That is what the respondent is offering to do, in the form of a supplementary statement.

Issues

94. Should Part 4 of the FOI Act be amended to clarify that its application is not limited to documents to which access was given under the FOI Act and that it applies to any relevant documents of which the applicant is aware?
95. Should the reference to 'administrative functions' be clarified?
96. Should guidance be given on what can and cannot be amended, as opposed to appended to records?

Chapter 9. Alternative access schemes

9.1. Proliferation of access and amendment schemes

There are five separate pieces of legislation which specifically address access to public records in NSW. These are the:

- FOI Act — giving people the right to request access to documents held by government (both state and local)
- Local Government Act (in particular s.12) — giving people the right to request access to documents held by local councils
- Privacy and Personal Information Protection Act — giving people the right to access personal information about themselves
- Health Records and Information Privacy Act — giving people the right to access health information about themselves, and
- State Records Act — giving people the right to inspect records over 30 years old (if they are subject to an open access direction).

A table comparing some of the alternative regimes for accessing personal information in NSW is set out in Annexure A.

It is not clear whether, when the various Acts were drafted, any real consideration was given to the relevant provisions in other Acts dealing with access to information.

There are also statutory rights to apply for, or request, the amendment of an agency's records relating to a person's personal information, health information or personal affairs within three separate Acts:

- the FOI Act (Part 4)
- the Privacy and Personal Information Protection Act (s.15), and
- the Health Records and Information Privacy Act (ss.33–37 and clause 8 of Schedule 1).

The fact there are avenues to apply for or request amendment of personal information, health information or information concerning personal affairs under three separate Acts adds an additional level of complexity, and does not appear to serve any useful purpose.

The situation is so complicated that even those charged with implementing the relevant legislation are confused. As the former Privacy Commissioner commented to the Open Government Forum in 2002:

> *It is now a situation in New South Wales, that we have a number of pieces of state legislation which have been written without due regard to their impact upon each other. It is simply not possible for a government bureaucrat or officer, to obey the Privacy and Personal Information Act, the Freedom of Information Act, and the State Records Act, at the same time. The provisions in those three pieces of legislation are in fact, in a number of key respects, sufficiently incompatible, that an officer will have to be in breach of one of them at some stage.*

In such a situation it would appear that the general public has little hope of understanding their rights and how to exercise them.

Each Act contains a different procedure for seeking and obtaining access to information held by government. The most striking variations are between the FOI Act, which contains detailed procedures, and the Privacy and Personal Information Protection Act, which contains none at all.

Each of the Acts is also the responsibility of a different Minister:

- the FOI Act — the Premier
- the Local Government Act — the Minister for Local Government
- the Privacy and Personal Information Protection Act — the Attorney General
- the Health Records and Information Privacy Act — the Minister for Health, and
- the State Records Act — the Minister for Commerce.

The fact that it is possible to apply for or request amendment of personal information, health information, or information concerning personal affairs under three separate Acts is overly complex and creates confusion. This may be overcome by bringing all options for amending records within one piece of legislation.

This situation is not unique to NSW. Other Australian jurisdictions have multiple pieces of legislation dealing with access to information. In an attempt to overcome this difficulty, the independent panel tasked with reviewing Queensland's FOI

Act has recommended that '[a]ccess and amendment rights for personal information should be moved from freedom of information to a privacy regime, preferably to a separate Privacy Act.'[90]

Issues

97. Should NSW move to:
    a. a single statute that deals comprehensively with access to and amendment of information held by government agencies?
    b. two statutes — one that deals comprehensively with access to and amendment of non-personal information and one that deals comprehensively with access to and amendment of personal information?

9.2. FOI and privacy

The FOI Act includes three separate elements:

- a requirement to publish information about the policy documents held by the department every six months in the Government Gazette;
- procedures for allowing members of the public to apply for access to documents held by government about their personal affairs and documents containing information about non-personal affairs, and
- provisions to allow members of the public to apply to have personal information held by government amended.

The Privacy and Personal Information Protection Act and the Health Records and Information Privacy Act include privacy and information protection principles that largely mirror the framework of FOI legislation. These principles relate to:

- disclosing the nature of the personal/health information held by the agency
- responding to applications for access to personal/health information, and
- responding to requests to correct inaccurate or incomplete personal/health information held by the agency.

The experience in each Australian FOI jurisdiction appears to be that applications for access to personal information are normally successful, and if they are refused it is generally for good reason.

Since at least 2003–04 there has been a downward trend in NSW in the percentage of FOI applications made to agencies for documents containing information about the personal affairs of the applicant. The figure was 78% in 2003–04, 77% in 2002–03, 75.5% in 2004–05 and down to 69.5% in 2005–06. Looking at other jurisdictions, in 2005–06, 46% of FOI applications in Queensland, 59% in Victoria and 85% in SA were recorded as being for personal information.

The current scope of the NSW FOI Act covers both matters of personal concern and those that do not relate to anyone's personal affairs. Both are important, but should they be dealt with in the same way? This is not to say that both personal and non-personal applications should not be dealt with under one Act; what is important is that both processes may be more effective if there was a clear distinction between the way in which personal and non-personal applications are processed.

Applicants will usually seek non-personal information in order to shine light on issues such as decision making processes and the expenditure of public funds. This information can have a wider political impact. This also means that the information may be politically sensitive or that it may create negative comment about the actions of Ministers and government agencies.

By contrast, applications for personal information are generally less contentious. The information is also often easier to locate, unlike much of the information relating to government policies and decisions.[91]

There are some significant practical distinctions that may be drawn between applications to access personal information and those for non-personal information:

[90] FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's Freedom of Information Act*, June 2008, p.47.
[91] Ombudsman Victoria, *Review of the Freedom of Information Act*, p.19.

- applications for personal information will generally be simple to assess and determine — meaning shorter time periods are needed and costs are generally lower
- applications for personal information will generally be far more successful, either in full or in large part,[92]
- applications for personal information will rarely raise issues that are politically or administratively sensitive or controversial.

Given the practical differences between applications for personal and non-personal information, it may be worthwhile considering the most effective processing methods. It may be that applications for personal information should be dealt with under privacy legislation. This would allow greater time and resources to be devoted to dealing with FOI applications for non-personal information.

It may also be worthwhile considering having shorter timeframes for providing personal information, as it is often less dispersed and easy to provide.

Issues

98. Should the relevant legislation be amended to provide that personal information should be accessed through privacy legislation?
99. Should privacy legislation focus on both the protection of privacy and the provision of access to personal information, while FOI legislation primarily focus on the provision of rights of access to non-personal information?
100. If the current position is to be retained, should access to personal information be subject to fewer exemptions and/or a more streamlined processing regime?

9.3. Personnel records

Currently there is no single, clear pathway for an employee to access their personnel file. It may simplify matters for employees and relieve what can be an administrative burden on agencies if there was an explicit statement in the FOI Act, or to the Privacy and Personal Information Protection Act, that current and former employees of agencies covered by the relevant Act have a right to access their personnel file.

Issues

101. Should there be an explicit statement in the FOI Act or Privacy and Personal Information Protection Act, that current and former employees of agencies covered by the Act have a right to access their personnel file?
102. If such a statement was included, should an agency be able to deny access in any particular circumstances and if so what should those be?

[92] See for example: the comment at 8.2 of the Commonwealth Ombudsman's report '*Scrutinising Government — Administration of the Freedom of Information Act 1982 in Australian Government Agencies*', March 2006; and pages 17 and 53 of the Victorian Ombudsman's report '*Review of the Freedom of Information Act*', June 2006.

Chapter 10. Right to deny access

10.1. Repeat FOI applications

Members of the public can apply under the FOI Act for documents as many times as they want. Section 5 of the Act provides a right of access to information held by government that is to be extended 'as far as possible.' While this is an important statement of principle, the NSW Ombudsman is aware that a number of agencies have difficulties with individuals who make unreasonable and repeat applications under the Act and 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. There are several groups of people such as journalists and MPs who use the Act 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 documents, some of which are legitimately exempt.

As part of a joint Australian Ombudsman project about unreasonable complainant conduct, strategies have been analysed to deal with repeat applications. The experience from a range of jurisdictions shows that a small number of people exercise their statutory rights to make applications under FOI and privacy legislation in ways that unreasonably impact on the resources of agencies, create significant equity considerations in relation to other applicants and unreasonably impact on the health and welfare of agency staff. While the numbers of applicants who act so unreasonably are small, their conduct or activities can have significant cost implications for agencies and external review bodies.

Legislation establishing these rights could address this issue by authorising agencies and external review bodies to properly and fairly manage such situations when they occur, without inhibiting or restricting the rights of the vast majority of applicants.

This is not just an issue related to FOI applications. The NSW Attorney General had indicated that he plans to put new legislation before the Parliament dealing with vexatious litigants. In a media statement, the Attorney stated that the Courts are 'there to administer justice and help people to resolve their disputes. They are not for people to misuse by harassing, intimidating or embarrassing people.' He went on to comment that, '[i]f people abuse the system we need to make it easier for judges to banish them from courtrooms, freeing up the justice system and protecting the good citizens of this State.'[93] The *Vexatious Proceedings Bill 2008* was introduced in the Legislative Assembly on 26 June 2008.

The main consideration when dealing with repeat 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. This is a more practical, and perhaps less subjective test than questioning whether an applicant is 'vexatious', which requires an assessment of the applicant's intention or motive.

There are a number of possible approaches to fairly and equitably address the difficulties that may be posed by repeat applicants. For example, where a number of applications are made contemporaneously, or over a relatively short period in relation to the same or directly related matters, it may be possible for agencies to consider them as a single request for the purpose of considering the unreasonable diversion discretion.[94] It may be possible to place limits on this approach to avoid weakening the utility of the Act, such as stipulating that it would not be available where applications are made over an extended period of time, or the relationship between applications is indirect or not obvious.

Issues

103. Should agencies be able to refuse FOI applications (subject to rights of external complaint or review) on the basis of criteria such as:
    a. The number of applications made to an agency over a specified period of time, and if so how many applications in any 12 month period (not including applications from MPs or journalists)?

[93] NSW Attorney General, *New laws to stop legal harassment*, media release 11 May 2008. Last accessed 3 June 2008.
[94] *Cianfrano v Director General, Premiers Department* [2006] NSW ADT 137 at para 50.

b. A number of applications that would, if dealt with, substantially and unreasonably divert resources away from the agency in the exercise of its functions?

c. The number of applications for the same or substantially the same information or documents as in previous requests that were unsuccessful?

104. To deal with unreasonable numbers of applications made by individuals exercising their statutory rights, should agencies be able to seek orders from the ADT:

a. That the Tribunal's consent is required for any further application to be made by a particular applicant to them?

b. Imposing a condition on any further applications to the agency that the applicant must pay the full costs incurred by the agency in dealing with those applications?

c. Imposing an upper limit on the number of separate applications a particular individual might make to an agency in any given period?

105. Are there any other criteria that would be appropriate in relation to 103 and 104 above?

10.2. Substantial and unreasonable diversion of resources

Section 25(1)(a1) of the FOI 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.*

The ADT has set out a number of factors which it considers to be relevant to an assessment of whether an application might constitute an unreasonable diversion of resources:

> *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;*
>
> *(d) the timelines binding the agency;*
>
> *(d) 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*
>
> *(e) 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.*[95]

[95] NSW FOI Manual, at 4.5.10.

Issues

106. Does the scope of s.25(1)(a1) need to be changed or should its terms be clarified?

107. Are the factors set out by the ADT appropriate?

108. Are the factors appropriately followed by agencies?

10.3. Ministerial certificates

Section 59 of the FOI Act provides:

> *(1) A certificate that is signed by the Minister and that states that a specified document is a restricted document by virtue of a specified provision of Part 1 of Schedule 1 shall, except for the purposes of Division 3 of Part 5, be taken to be conclusive evidence that the document is a restricted document by virtue of that provision.*
>
> *(1A) A certificate under this section must specify:*
>
> > *(a) the reasons for the Minister's decision that the document is a restricted document, and*
> >
> > *(b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.*
>
> *(1B) A copy of a certificate under this section is to be given to an applicant seeking access to the document concerned. Such a copy is, for the purposes of section 28(2)(e), sufficient notice to the applicant of the reasons for the refusal of access and the relevant findings underlying those reasons.*
>
> *A certificate under this section ceases to have effect at the end of 2 years after it is signed by the Minister unless it is sooner withdrawn by the Minister.*
>
> *Nothing in subsection (2) prevents the Minister from issuing a further certificate in respect of the same document.*
>
> *Nothing in this section requires any matter to be included in a certificate if it is of such a nature that its inclusion in the certificate would cause the certificate to be an exempt document.*

The NSW Ombudsman is only aware of one Ministerial Certificate that has been issued in NSW, which was issued in the first years of operation of the Act.

Both Victoria and Western Australia have recently taken steps to abolish similar certificates in their jurisdictions, and the policy of the new Federal Government is to abolish such certificates at the Commonwealth level.

Section 52(3) of the FOI Act provides that the Ombudsman cannot exercise his coercive investigation powers in respect of a document the subject of a Ministerial certificate, while sections 58A–C make provision for the Supreme Court to consider the grounds on which it is claimed a document that is the subject of a Ministerial certificate is a restricted document.

Issues

109. (a) Should s.59 (and by extension ss.52(3), 58A–58C) of the FOI Act be retained?

(b) If so, what amendments if any should be made to the scope and duration of the section?

Chapter 11. Reviews

11.1. Internal reviews

11.1.1. Procedural requirements

The FOI Act makes provision for applicants who are dissatisfied with a decision of an agency to request a review by another officer of the agency, other than in circumstances where the original decision was made by the CEO of the agency.

A request for an internal review:

- Must be made within 28 days of the notice of determination being given to the applicant, or within 49 days of the access application being received by the agency (s.34(2)(e)). Where they do not receive a determination, some applicants will not be aware that the time period starts from the date their application was received by the agency. This may result in applicants losing their rights to seek an external review of the agency's decision.
- Should be dealt with by the agency within 14 days (s.34(6)). After 14 days, the review request is deemed to have been refused. The applicant can then seek an external review by either the Ombudsman or the ADT.
- Must not be dealt with by the person who dealt with the original application or by a person subordinate to that person (s.34(5)).
- May not be the subject of any charges other than the $40 application fee (cl.5(2)(b), FOI (Fees and Charges) Order 1989).
- Is a prerequisite should an applicant wish to seek an external review by the Ombudsman or the ADT (ss.52(2) and 53(2)).

11.1.2. Outcomes of requests for internal review

Where the outcome of an internal review does not satisfy an applicant, the requirement to seek an internal review has delayed the applicant's right to seek an external review by at least three weeks (14 days for the decision to be made followed by several days for the determination to be received by the applicant). This delay, and the extra complexity of the Act involved in setting out the requirements for internal reviews, is only justified if the right to seek an internal review serves some practical purpose.

Based on the NSW Ombudsman's annual review of agencies' FOI statistics, the 286 internal review applications made in 2005–06 constituted 2% of all FOI applications, 3% of all determinations and 6% of all refusals in full or part in relation to those agencies that year (similar to the 7% of all refusals in 2004–05, 6.5% in 2003–04, 6.8% in 2002–03 and 6.5% in 2001–02). Of the 286 FOI applicants who sought an internal review, the original decisions were upheld in 68% of the cases.

While details of the success rate of applications to the ADT are unavailable, an assessment of the outcomes of complaints made to the Ombudsman about denial of access to documents (including alleged inadequate searches for documents) indicates that in approximately 42% of cases the agency agreed with an Ombudsman suggestion or recommendation to release additional documents.

11.1.3. Changes to external review practice since the Act commenced

When the Act was introduced, if an applicant was dissatisfied with a decision:

- the agency would first be given an opportunity to review its original decision
- the Ombudsman would then be able to undertake a formal investigation under the Ombudsman Act into the conduct of the agency relating to the determination of the application (looking at conduct, procedural, and/or merit issues), and make formal recommendations, and
- the District Court would then be able to conduct a formal merits review of the determination and replace the agency's decision with its own (it is unlikely it was anticipated that this avenue of review would often be used — as proved to be the case).

There have been a number of important changes since 1989:

- the Ombudsman Act has been amended to give the Ombudsman power to conduct preliminary inquiries (s.13AA)

- the FOI Act has been amended to enable an agency to review a determination in accordance with a suggestion made by the Ombudsman in the course of a preliminary inquiry (or in the course of a formal investigation), and
- the District Court was replaced by the much more informal and user friendly ADT as an external review body for FOI matters.

The Ombudsman has always tried to use its preliminary inquiry and suggestion powers whenever possible. After receiving a complaint about refusal of access to documents, the standard practice is to:

- review the complaint to determine whether it is within jurisdiction (has the complainant applied for an internal review and waited for the required period before complaining)
- call or write to the agency requesting that it forward the relevant documents for review
- form a preliminary view as to whether the agency has correctly interpreted the relevant exemption clauses
- write to the agency explaining this view and suggesting that it review its determination when the preliminary view is that the agency has not adopted the correct approach, and
- write to the complainant if the preliminary view is that the agency has adopted the correct approach, explaining why this was the view of the Ombudsman.

The ADT has also adopted a less formal approach, with the first stage often being a pre-hearing planning meeting, where agencies have an opportunity to reconsider their original decision.

The changes to the relevant legislation and to the approach adopted by both the Ombudsman and the ADT have meant that, from an agency's perspective, they are being asked to conduct several identical reviews.

There are, however, several fundamental differences:

- when a complainant requests that an agency review its decision, this request is often made by a person with little technical knowledge of the FOI Act and not uncommonly is based largely on a statement of dissatisfaction with the original decision
- when the Ombudsman requests that an agency review its decision, this request is supported by detailed reasons based on longstanding expertise in the interpretation and operation of the FOI Act, and
- when a review is undertaken as a result of an ADT planning meeting, this is done with the benefit of the discussion that has taken place at that meeting, chaired by a Tribunal member.

Issues

110. Are the internal review provisions of the Act in effect a duplication that in practice creates unnecessary costs for agencies and serves little purpose for applicants?
111. Should internal review be optional before an applicant can seek external review?
112. Should any changes be made to the way in which internal review provisions currently operate?
113. Should the Act require agencies to issue notices of review and appeal rights even where no determination is made?

11.2. External reviews

11.2.1. Structure and scope of external reviews

The possible scope of external reviews of FOI related matters can include:

- reviews of questions of law (heard either by the courts or appeal panels of tribunals)
- reviews of the merits of decisions (dealt with or heard either by Ombudsman/Information Commissioner and/or courts/tribunals)
- reviews of the reasonableness and appropriateness of agency conduct relating to an application (dealt with by an Ombudsman/Information Commissioner), and
- reviews of the operation of the FOI system, for example scrutiny of agency policies, procedures and practices for dealing with FOI applications (by an Ombudsman/Information Commissioners).

Reviews of questions of law are a component of most FOI legislation around the world.

Reviews of the merits of decisions are generally limited to the reviewer standing in the shoes of the original decision-maker and making a fresh decision based on all available information. The Supreme Court held in *University of NSW v McGuirk*[96] that the ADT was able to re-exercise the over-ride discretion provided by section 25(1)(a) to allow disclosure, even where this discretion had been used by the agency to refuse to disclose.

Reviews of reasonableness and agency conduct can include a range of functions including:

- reviewing the merits of the decision
- reviewing the conduct of an agency or its staff in relation to an application (eg, reasons for any delays, sufficiency of search issues, inappropriate interference in the decision-making process by third parties).
- reviewing the general approach of an agency which is of concern (eg, where the issue does not relate to a single application but to the sum of a series of decisions), and
- reviewing the conduct of an agency or its staff that is disclosed by an FOI application, either due to the way it was dealt with or the actual content of the documents to which access was sought (such as inappropriate recordkeeping practices, repeated failures to file note official meetings, maladministration by the agency or its staff).

In relation to merit reviews, there are a number of different review models. These include:

- single avenue review options (one body with determinative merit review powers):
  - courts (the approach in the USA) or administrative tribunals
  - Information Commissioners (the approach in WA, QLD and the NT), or Ombudsman (the approach in Tasmania and SA).
- dual avenue review options, one body with determinative merit review powers and another body with an advisory/recommendatory role, for example an Ombudsman/Information Commissioner and a court/ administrative tribunal (the current approach in the Commonwealth, Victoria and NSW).

The current approach in NSW is for FOI applicants or third parties to be able to:

- make a complaint to the NSW Ombudsman in relation to merit issues or any conduct of the agency or its staff in relation to an FOI application
- make a review application to the ADT in relation primarily to merit issues (but including issues such as sufficiency of search), or
- both of the above (sequentially not concurrently).

There are a range of arguments for and against retaining the current dual avenue external review structure or moving to a single avenue review structure.

The benefits of a single avenue review structure include:

- greater simplicity
- the possibility of a less legalistic approach (if the review body is a tribunal and not a court, but the experience of some jurisdictions indicates this is not guaranteed).

The benefits of a dual option review structure include:

- two different perspectives on the same issues
- greater barriers to governments influencing the approach adopted in external reviews through the appointment of a person in the single review agency who is likely to be more sympathetic to the views of the government
- both external review bodies adopting the same or similar interpretations of provisions can lend greater weight to an interpretation than when it is expressed by a single review body, and
- the agency performing the advisory/recommendatory function has far greater ability to adopt informal approaches to resolving disputes, and can focus on questions of broader principle in agency determinations rather than on each agency decision it has cause to review.

[96] [2006] NSWSC 1362.

Issues

114. Should the external review structure in the Act be:
    a. a single avenue external review structure, such as an Information Commissioner with determinative powers;
    b. a dual avenue review structure, such as an Ombudsman/Information Commissioner with recommendatory powers and the ADT with determinative powers?
115. Should rights to legal representation before the ADT be limited in any way?
116. Should the ADT have a public interest override discretion to provide access to documents that are exempt?

11.2.2. Scope of NSW Ombudsman external reviews

Section 52 of the FOI Act outlines the scope of the Ombudsman external review role:

> *(1) The conduct of any person or body in relation to a determination made by an agency under this Act may be the subject of a complaint, and may (subject to this section) be investigated by the Ombudsman, under the Ombudsman Act 1974.*
>
> *(2) The Ombudsman shall not investigate the conduct of any person or body in relation to a determination made by an agency under this Act:*
>
> > *(a) while the determination is subject to a right of review under section 34 or 47, or*
> >
> > *(b) if the determination has been subject to a right of review under section 34 or 47 but no application for review of the determination was made while it was subject to that right, or*
> >
> > *(c) while any relevant proceedings are before the Tribunal under Division 2.*

However, as stated in the NSW FOI Manual:

> *When dealing with access to information issues, the Ombudsman considers that he has two sources of jurisdiction which co-exist to conduct inquiries and investigations — the FOI Act and the Ombudsman Act. These are not inconsistent nor should they be interpreted in a way which unduly restricts the obligations and traditional functions of the Ombudsman (Botany Council v The Ombudsman (1995) 37 NSWLR 357).*
>
> *In addition to the jurisdiction conferred by s.52(1) of the FOI Act, issues relating to access to information may also trigger the Ombudsman's general jurisdiction under s.12 and Schedule 1 to the Ombudsman Act.*
>
> *The following is a list of some of the allegations which, in the Ombudsman's view, might be the subject of a complaint and investigation (under either the FOI Act or the Ombudsman Act):*
>
> - *conduct in relation to a determination made under the FOI Act;*
> - *a failure or refusal to deal with and determine an FOI application;*
> - *delay, denial of rights, recordkeeping practices and the like relating to FOI matters;*
> - *a course of conduct or a general approach which is of concern (i.e. where the complaint does not concern any single decision but the sum of those decisions);*
> - *inappropriate interference by Ministerial staff in the determination of applications;*
> - *conflict of interests of agency staff who assess and/or determine applications;*
> - *delegation of FOI decision-making to a person or organisation external to the agency;*
> - *failures by agencies to inform applicants of their internal review rights (as required by s.28(2)(g)), where the time for an internal review has expired before an applicant became aware that such a right existed;*
> - *refusal by agencies to accept applications for internal reviews on the basis that such applications have been made outside the 28 day statutory period, where the 28 day period has been incorrectly calculated;*
> - *refusals by agencies to allow a further period for an applicant to apply for an internal review (s.34(2)(e)(iii));*

- *failures by agencies to consult with third parties where the third party only learnt of the failure to consult after the internal review period had expired (per ss.34(2)(e) and (7)(b)(ii));*
- *where access was refused in part or access was granted subject to a charge (and a right of review under s.34 therefore exists), but the applicant wishes to complain about a matter that is outside the grounds listed in s.34(7) such as:*
- *delay by the agency in determining the FOI application (where the eventual determination is to grant access to the documents sought);*
- *complaints about bona fides of claims made by an agency that no documents are held by the agency that are covered by the terms of an application (as opposed to claims that documents can not be found), which it could be argued pursuant to ss28(1) and 34(7)(a)(i) does not constitute a determination to refuse access to documents;*
- *refusal by an agency to comply with cl 6 of the Freedom of Information (Fees and Charges) Order 1989 in relation to the reduction of application fees by 50% for pensioners, people under 18 years, non profit organisations that can demonstrate financial hardship, or in relation to applications relating to information that it is in the Bullet public interest to make available (application fees are not one of the matters listed in s.34(7) as founding a right of review);*
- *the reasonableness of any advance deposit already paid by the applicant, which arguably is a matter not covered by s.34(7)(a)(iv) or (v), which on their face, appear to cover situations where charges have not been paid at the time the internal review application is lodged.*

Although the FOI Act does not give the Ombudsman jurisdiction to initiate an investigation under the FOI Act of his or her own motion, the Ombudsman is of the view that, if the matter is one which falls within the general jurisdiction conferred by the Ombudsman Act, then the Ombudsman could initiate an investigation under that Act (but not the FOI Act). This was also the view taken in Botany Council v Ombudsman (unreported, proceedings No 30071, 16 June 1995), by Spender J at first instance (at pp 20–21).[97]

Issue

117. Should the FOI Act be amended to specifically provide that the Ombudsman's powers under the Ombudsman Act are not limited by s.52 of the FOI Act?

11.2.3. Search and scrutiny powers

To be able to effectively review the FOI practices, procedures and determinations of agencies, an external review body needs appropriate powers to obtain information. An essential element of such powers is the ability, when necessary, to obtain entry to relevant premises, to conduct appropriate searches for documents (in both physical and electronic form), and to take or make copies of relevant information.

The traditional formulations of the power to enter premises, inspect those premises, to make copies of documents and to seize relevant documents or objects, is of little assistance in the modern electronic office. Current search and seizure powers are not drafted to address such issues as electronic security systems, key card door accesses, log-on passwords, encryption, the 'paper-less' office, and centralised electronic recordkeeping systems.

Issue

118. What, if any, additional search powers should an external review body have to ensure effective searches can be conducted as part of a formal investigation?

[97] NSW FOI Manual, at pages 115-116.

11.3. Review of the legislation

Unlike most modern Acts of Parliament, the FOI Act contains no provision requiring that it be reviewed to determine, for example, whether its policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The FOI Act has been in place for 19 years without any comprehensive review of its provisions. In that time it has been amended on over 60 separate occasions. While a number of these amendments only involved minor alterations, a number have made significant amendments to the Act, including:

- *Freedom of Information (Amendment) Act 1992*
- *Local Government (Consequential Provisions) Act 1993*
- *Statute Law (Miscellaneous Provisions) Act (No 2) 1995* [which inserted s.52A into the Act]
- *Administrative Decisions Legislation Amendment Act 1997*
- *Privacy and Personal Information Protection Act 1998*
- *Freedom of Information Amendment (Terrorism and Criminal Intelligence) Act 2004*
- *Freedom of Information Amendment (Open Government — Disclosure of Contracts) Act 2006* [which inserted s.15A into the Act].

A review of the table of amendments to the Act indicates that:

- 23 sections have been amended
- 11 sections have been inserted
- nine sections have been substituted, and
- three sections have been replaced.

Further, the table of amendments indicates that Schedule 1 to the Act has been amended on approximately 23 occasions and Schedule 2 on approximately 26 occasions.

Including a review requirement in the FOI Act may mean that it remains both relevant and effective. When introducing recent amendments to Western Australia's FOI Act, Attorney General Jim McGinty stated that his government 'considers that an on-going review of the FOI Act is an important element in ensuring that the FOI Act continues to operate effectively and that the openness and accountability of government is maintained.'[98]

A difficulty introducing a regular review requirement could be the inherent conflict faced by government dealing with FOI. Politicians and public officials are likely to perceive FOI legislation as creating political risks for the government of the day and risks to the reputation of their agency. FOI legislation creates an environment where particular situations are beyond their direct control. They do not know what will be asked for or when, what might be disclosed, how it might be used, and what the consequences might be. This may lead to a reluctance on the part of government for the FOI Act to operate as effectively as possible.

This difficult situation may be able to be overcome by including a requirement in the FOI Act for a regular, independent review of the Act. This could be the responsibility of a Parliamentary committee, similar to that which oversees the work of the NSW Ombudsman.

Issues

119. Should there be a provision in the FOI Act to require that the legislation be reviewed every five years?
120. Should any such review be conducted by an independent committee/panel?
121. Should the report of each five year review be made to the Premier, as Minister responsible for the FOI Act, or the Parliament?
122. If to the Premier, should the Premier be required to table the report in Parliament within a certain period of its receipt, together with advice as to any action taken or proposed on each recommendation in the report?

[98] Mr J A McGinty (Attorney General), *Freedom of Information Amendment Bill 2007*, second reading 28 March 2007.

Chapter 12. Oversight and accountability

12.1. Oversight Models

As shown in table 3, the various FOI jurisdictions in Australia and around the English speaking world have tried a range of models for external review of FOI and privacy issues.

Table 3. Different models for external review

	Ombudsman		FOI Commissioner	Privacy Commissioner	Information Commissioner
	FOI	Privacy			
Australia (Commonwealth and States/Territories)	6	2	1	3	1
New Zealand	1	—	—	1	—
Ireland	1	—	—	—	—
Canada	—	—	1	1	—
Scotland	—	—	1	—	—
UK	—	—	—	—	1
Totals	8	2	3	5	2

The primary distinction between the approach adopted in many jurisdictions is whether the review and/or oversight role is performed by an Ombudsman, an FOI Commissioner, a Privacy Commissioner, or an Information Commissioner with both access and privacy roles.

1. In Australia:
   - six of the eight jurisdictions have given the FOI role to their Ombudsman, two with what is effectively a determinative role (South Australia and Tasmania)
   - two jurisdictions have given the FOI role to an Information Commissioner (Queensland and the Northern Territory), one of which is also the review body for privacy issues (Northern Territory), and
   - three jurisdictions have given the privacy role to Privacy Commissioners (the Commonwealth, NSW and Victoria), and two jurisdictions have given the privacy role to their Ombudsman (Tasmania and Western Australia).
2. In New Zealand the Ombudsman has responsibility for FOI, while the Privacy Commissioner has a privacy role.
3. In Ireland there is an FOI Commissioner who is also the Ombudsman.
4. In Canada:
   - at the federal level, there is an Information Commissioner and a Privacy Commissioner, and
   - at the provincial level, each province has an office that has jurisdiction in relation to both access to information and privacy (three of which are the provincial Ombudsman).
5. In the UK, there is an Information Commissioner with both access and privacy roles and the Scottish Information Commissioner with just an access role.

Another distinction between the approaches adopted in many jurisdictions is whether the review/ oversight office has a recommendatory or a determinative role.

1. In Australia:
   - three jurisdictions have an Ombudsman and a Privacy Commissioner with recommendatory powers, and a tribunal with a determinative power (the Commonwealth, NSW and Victoria)
   - one jurisdiction has an Ombudsman with recommendatory powers and a tribunal/court with a determinative power (WA)

- two jurisdictions have an Information Commissioner with determinative powers (Queensland and NT), and
- two jurisdictions have an Ombudsman with what is in effect a determinative power (SA and Tasmania).

2. In New Zealand the Ombudsman has a determinative power.
3. In Ireland the Information Commissioner has a determinative power.
4. In Canada:
   - at the federal level, the Information Commissioner and Privacy Commissioner have recommendatory powers, and
   - at the provincial level, eight review/oversight offices have recommendatory powers and four have determinative powers.
5. In the United Kingdom both the Information Commissioner and the Scottish Information Commissioner have determinative powers.

In each jurisdiction where the review/oversight office only has a recommendatory power, a court or tribunal has the determinative power.

One possible problem with combining the oversight role with a determinative power is that this could be seen to raise conflict of interest or conflict of duty issues.

The main benefit of separating the recommendatory/oversight and determinative roles is that it allows the Ombudsman or Information Commissioner to focus on informal resolution and systemic issues.

Whatever is the preferred model, it is important to ensure as far as possible that there is no duplication with any other oversight regime.

Issues

123. Should a statutory position of Information Commissioner be created?

124. If so, should the holder of such a position be:

    a. the Ombudsman (possibly either directly in that capacity as a separate statutory designation for the Ombudsman, or with the Ombudsman being authorised to delegate day-to-day responsibility to another statutory office holder within the Office of the Ombudsman, such as a Deputy or Assistant Ombudsman), or

    b. a separate Information Commissioner who would be appointed on a similar basis to the Ombudsman (based on a five to seven year term, the appointment being subject to veto by any Parliamentary Committee established to oversight the operation of the FOI legislation and subject to dismissal only on the address of the Parliament to the Governor).

125. Should an Information Commissioner be given responsibility for investigating complaints relating to how FOI applications have been dealt with or should this role remain with the Ombudsman?

126. Should an Information Commissioner have a determinative role or should the determinative role remain with the ADT?

127. What functions should an Information Commissioner have?

128. Should an Information Commissioner have both FOI and privacy roles?

12.2. Parliamentary Joint Committee

In NSW there are a range of Parliamentary Committees set up by statute to oversight/review the operations of integrity/oversight bodies.

Table 4. NSW Parliamentary Committees

Committee	Establishing Act	Agency under scrutiny
Public Accounts Committee	*Public Finance and Audit Act 1983*	Auditor General
Committee on the Office of the Ombudsman and the Police Integrity Commission	*Ombudsman Act 1974*	NSW Ombudsman PIC Inspector of the PIC
Committee on the Independent Commission Against Corruption	*Independent Commission Against Corruption Act 1988*	ICAC Inspector of the ICAC
Committee on the Health Care Complaints Commission	*Health Care Complaints Act 1993*	HCCC
Committee on Children and Young People	*Commission for Children and Young People Act 1998*	CCYP

The functions of each of these Parliamentary Committees are largely the same. As an example, the functions of the Committee on the Office of the Ombudsman and the Police Integrity Commission in relation to the Ombudsman are:

- capacity to veto the appointment of the Ombudsman
- to monitor and to review the exercise by the Ombudsman of the Ombudsman's functions under this or any other Act
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed
- to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report
- to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman, and
- to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.

In performing these functions, the Committee cannot:

- investigate a matter relating to particular conduct
- reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint
- reconsider the findings, recommendations, determination or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27, or
- exercise functions in relation to the Ombudsman's functions under the *Telecommunications (Interception) New South Wales Act 1987*.

If a position of Information Commissioner was established in the Office of the NSW Ombudsman, such a position would come under the scrutiny of an existing Parliamentary Committee. If a separate Office of the Information Commissioner was established, new oversight and accountability arrangements would need to be considered.

Issue

129. If a separate Office of the Information Commissioner was created, should that Office and relevant legislation be under the oversight of a Parliamentary Committee?

12.3. Reporting of FOI statistics

Every FOI jurisdiction in Australia apart from NSW has in place an obligation on agencies to report statistics about their implementation of FOI to a central agency. The responsible agency in each jurisdiction then produces and publishes a comprehensive annual report on the operation of FOI.

From the commencement of the Act until 1991, the Premier, as the Minister charged with administering the Act, was required to present an Annual Report to Parliament outlining information relevant to the administration of the Act (s.68(1)).

However, under the *Statute Law (Miscellaneous Provisions) (No.2) Act 1991*, section 68 of the FOI Act was omitted and replaced. Under this new section the only reporting obligation on NSW agencies is a requirement to publish FOI statistics in each of their annual reports. There is no mechanism in place in the NSW Act to ensure compliance with this obligation or to analyse reported FOI statistics on a state wide basis.

As shown by the Ombudsman's reviews of FOI annual reporting by a sample of agencies, many agencies do not comply with the mandatory annual reporting requirements. This means that NSW, unlike other jurisdictions, does not have comprehensive, accurate statistical information regarding FOI applications.

Issues

130. Should there be a statutory obligation on agencies to report annually to a central agency on their implementation of the FOI Act?

131. Should any such reports be made to:

    a. a central government agency such as the Department of Premier and Cabinet or the Attorney General's Department? or

    b. an independent watchdog/oversight body such as the Ombudsman or an Information Commissioner?

132. Should the body in receipt of such agency reports be required to produce an annual report to Parliament on the implementation of FOI within NSW?

Chapter 13. Guidelines and training

13.1. Publication of FOI guidelines

Given the length and complexity of the FOI Act and the rate of turnover of FOI staff in many agencies, it is particularly important that comprehensive guidance be readily available as to how the Act is to be implemented by agencies.

The former FOI Unit of what was then the Premier's Department prepared and published the first detailed Procedure Manual on the Act in July 1989.[99] The second edition of that Manual was prepared by that Unit and published in June 1991.[100] Three years later the third edition of the Manual was published by the NSW Premier's Department.[101] Later that year the NSW Ombudsman published the first edition of the *FOI Policies and Guidelines*.[102] This was followed by a second edition in July 1997.[103]

In 1998, at the instigation of the Premier's Department, the NSW Ombudsman agreed to prepare a joint Manual that combined and updated the 3rd edition of the Premier's Guidelines (published in 1994) and the 2nd edition of the Ombudsman's Guidelines (published in 1997). The intention was to create a single document incorporating the views of both organisations.

The Ombudsman prepared the first draft of the Manual and sent it to the Premier's Department and The Cabinet Office in 1999. This joint Manual was not finalised for a further eight years — nine years after the original decision to publish a joint Manual.

The delay in finalising the joint Manual was largely due to the high turnover of staff at both the Premier's Department and The Cabinet Office, which were responsible for reviewing the draft. Given the size and complexity of the Manual (the final version is 376 pages long), this was no easy task.

Two of the primary reasons why there was such a delay between the 1998 agreement to produce a joint Manual and its eventual publication in August 2007 were that:

- too many organisations were involved, and
- there was no statutory obligation on any person or body to prepare an updated FOI Manual.

Issues

133. Should the FOI Act provide for a designated body to issue guidelines for implementation of the FOI Act?
134. If guidelines are to be issued, how can their helpfulness and relevance to FOI practitioners be assured?
135. Should such guidelines be binding on agencies subject to the FOI Act?
136. Should an obligation to issue such guidelines be placed on:
    a. a central government agency such as the Department of Premier and Cabinet or the Attorney General's Department? or
    b. an independent watchdog/oversight body such as the Ombudsman or an Information Commissioner?

13.2. Provision of training

There are several major reasons why FOI training is critical:

- the FOI Act incorporates a number of complex provisions (particularly some of the exemption provisions)

[99] *FOI Procedure Manual*, 1989, NSW Premier's Department.
[100] *FOI Procedure Manual*, 2nd edition, 1991, NSW Premier's Department.
[101] *FOI Procedure Manual*, 3rd edition, 1994, NSW Premier's Department.
[102] *FOI Policies and Guidelines*, 1994, NSW Ombudsman.
[103] *FOI Policies and Guidelines*, 1997, NSW Ombudsman.

- the wording of several of the exemption clauses provides FOI decision-makers with considerable discretion, and
- the objects and purpose of the FOI Act run counter to the traditional public sector preference for secrecy.

When introducing the FOI Act into NSW, the former FOI Unit of the Premier's Department commented on the importance of training:

> ***Staff Training***
>
> *Several major impediments to the successful introduction of FOI had been identified, particularly the sceptical attitude of many agencies towards FOI, together with an entrenched community cynicism towards perceived traditional government secrecy in NSW…*
>
> ***Need for training***
>
> *Staff at all levels, from counter staff through to departmental heads, needed to be familiar with the major features of the Act and how these features affected their responsibilities.*
>
> *Administrative and decision making processes had to be established for dealing with FOI applications. These aspects involve basic issues such as:*
>
> - *Who in the agency should be the first point of public contact for FOI requests?*
> - *Who should make the decision on FOI requests?*
> - *Who should handle internal reviews?*
> - *Where should the agency go to seek legal advice on more complex FOI applications?*
> - *Are its records in order and can they find documents quickly and easily?*
>
> ***Practitioners Meetings***
>
> *The overall training strategy identified a need for information about FOI developments, issues, problems and successes to be disseminated regularly throughout the public sector. Two principal means for doing this were selected — FOI Practitioners meetings and production of a newsletter, 'FOI Update'.*
>
> *Practitioners Meetings conducted by the FOI Unit are held on a monthly basis. The first was held in February 1989, before the Act commenced. These meetings are essentially aimed at FOI officers, but anyone who is interested may attend. Total attendance for the year was 530.*
>
> *The meetings have a number of purposes. Firstly, they provide up to date information to practitioners about FOI developments, news and further explanation of requirements, interpretations etc.*
>
> *Secondly they provide a forum for practitioners to raise questions, for problems to be dealt with and to build up a common pool of practice knowledge.*
>
> *Thirdly, they have a useful coordinating function, allowing practitioners to meet their counterparts from other organisations to discuss areas of common interest.*

When the Premier's Department's FOI Unit was disbanded in 1991, the government entered into an arrangement with a private sector consulting firm to provide FOI training.

Between 1991 and 2007 this was the only formal training on the FOI Act that was available to agencies and their staff. No government agency took responsibility for providing or facilitating training on the FOI Act and attendance by FOI staff at courses run by the consultant was optional.

Since the start of 2008, a number of new training providers have contacted the NSW FOI/Privacy Practitioner's Network. In addition to these private consultants, the NSW Crown Solicitor's office offers an introductory FOI training course.

Issues

137. What mechanism can be introduced to ensure that staff who have a role in the assessment and/or determination of FOI applications have completed certain basic training on the FOI Act?
138. Should a government organisation or agency have responsibility for the coordination or provision of FOI training?
139. Should all FOI training courses require certification by an Information Commissioner or similar body before they can operate?

Summary of Issues

		Page
35.	In relation to 'personal affairs': a. Should the references to the term 'personal affairs' in the FOI Act be changed to 'personal information', and to 'health information' in the Health Records and Information Privacy Act, so that consistent terminology is used in both the FOI and privacy legislantion? and b. Should the definition of 'personal information' in the Privacy and Personal Information Protection Act be changed to reflect the decision in the District Court in *Commissioner of Police v District Court of NSW and Perrin*?	**20**
36.	Should changes be made to any of the other exemptions in the FOI Act not discussed in detail here? If so, what should these be?	**20**
37.	Should any bodies or functions be removed from or added to Schedule 2 to the FOI Act?	**22**
38.	Should internal/external review rights for decisions that documents relate to functions covered by Schedule 2 be made explicit in the Act (or the review rights in ss.47(7) and 53(3) be re-drafted in more general terms)?	**22**
39.	Should the FOI Act be amended to require that applicants be formally notified of decisions by agencies that documents requested in their applications relate to functions covered by Schedule 2, and informing them of their internal/external review rights?	**22**
40.	What would be appropriate criteria for inclusion or exclusion of functions in or from Schedule 2?	**22**
41.	Should the definition of public authorities be amended to include the Houses of Parliament?	**23**
42.	Should section 10 of the FOI Act be repealed?	**23**

Machinery provisions

43.	Are the provisions of the State Records Act and associated standards on record keeping adequate to ensure information in superseded document management systems can be accessed? If not, what additional measures are necessary?	**25**
44.	Should the statutory right of access to information held in electronic form require that agencies must produce records for applicants: a. only in the circumstances set out in s.23 of the FOI Act? or b. where they can be produced using the normal computer hardware and software and technical expertise of the agency, and producing them would not interfere unreasonably with the operations of the agency?[104] and c. by allowing them to view the information at the offices of the agency if it is not reasonable to produce a paper record?	**25**
45.	Should agencies be required to design their information systems to allow for a report to be produced containing information relevant to an individual that may be the subject of an FOI request, even if the report has no operational benefit to the agency?	**26**
46.	Should agencies be required by statute to configure their messaging systems, such as email, to ensure that attachments to messages can be searched electronically?	**26**
47.	Should agencies be required to ensure that there is a 'print' function for all electronic databases/information storage facilities so that paper documents can be 'created' for disclosure (or external review of decisions to refuse disclosure)?	**26**

[104] Based on s.10(1) in Newfoundland and Labrador's *'Access to Information and Protection of Privacy Act'*.

Guidelines and training

Annexure A

Alternative regimes for accessing personal information in NSW.[105]

	Freedom of Information Act 1989	Privacy and Personal Information Protection Act 1998	Local Government Act 1993
To what do people have a right of access?	Documents held by agencies and Ministers	Personal information about the applicant held by public sector agencies (i.e., information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion)	Documents held by local governments
What documents/ information are excluded?	'Exempt' documents (listed in Schedule 1) (s.25(1)(a)) — see Chapter 10 of this Manual Documents relating to certain functions of certain agencies listed in Schedule 2 (s.9) Documents relating to judicial functions of courts and tribunals (s.10) Documents which are the subject of a Ministerial Certificate (s.25(3))	Information which would not be able to be obtained under the FOI Act (see previous column) (s.20(5)) Information which does not comprise personal information of the particular applicant (s.4(3)) Information relating to courts and tribunals exercising judicial functions, and royal commissions (s.6) Information held by ICAC, NSW Police, the Police Integrity Commission and the NSW Crime Commission, in respect of certain functions (listed in s.27) Information concerning law enforcement and related matters (s.23) Information concerning certain functions of investigative agencies (s.24)	Correspondence and reports relating to a matter received or discussed at, or laid on the table or submitted to, a meeting when closed to the public (s.11(2)) [this probably overrides s.12(1) and 12(6)] Correspondence or reports relating to a matter laid on the table or submitted to a meeting open to the public where the council or committee resolves that they are to be treated as confidential (s.11(3)) Business papers for matters considered when part of a meeting is closed to the public (s.12(1)) Minutes of any parts of a council or committee meeting closed to the public (other than resolutions and recommendations) (s.12(1)) Certain parts of DAs or other applications for approval to erect a building (s.12(1A))

[105] This table only concerns applications for access to information about the applicant's own personal affairs. The table is meant to provide indicative guidance only, and is not exhaustive.

	Freedom of Information Act 1989	Privacy and Personal Information Protection Act 1998	Local Government Act 1993
What documents/ information are excluded? cont'd			The documents contain personnel matters concerning particular individuals (s.12(7)) The documents contain information about personal hardship of any resident or rate payer (s.12(7)) The documents contain trade secrets (s.12(7)) The documents contain matter the disclosure of which would: — constitute an offence against an Act; or — found an action for breach of confidence (s.12(7)) The documents contain information disclosing a person's place of living, and disclosure would place the personal safety of the person or family at risk (s.739 and cl.284 and Form 1 in Sch.11, Local Government (General) Regulation 2005)
On what other bases can access be refused?	Processing the application would result in a substantial and unreasonable diversion of agency resources (s.25(1)(a1)) The documents are otherwise available for inspection or purchase (s.25(1)(b1), (c)) An advance deposit is required but has not been paid (s.22)	The information is otherwise available for inspection or purchase (s.20(5)) Refusal to provide access is lawfully authorised or required (s.25) Refusal to provide access is otherwise permitted under any Act or law (s.25) Providing access would prejudice the individual concerned (s.26) Other exemptions (s.28)	Allowing inspection would be contrary to the public interest (s.12(6))

	Freedom of Information Act 1989	Privacy and Personal Information Protection Act 1998	Local Government Act 1993
When will consultation with third parties be required?	Consultation is required prior to releasing documents affecting personal affairs of persons other than the applicant (s.31) Consultation is also required in respect of documents containing information about other people's business affairs, the conduct of research and inter-governmental relations (ss.30, 32, 33)	Same as under the FOI Act (eg., consultation is required prior to providing access to information affecting personal affairs of persons other than the applicant [s.31, FOI Act]) (s.20(5))	No consultation required
What documentation is required?	Applications must be in writing (ss.17 and 36) Determinations must be in writing (s.28)	Applications need not be in writing Determinations need not be in writing	Applications need not be in writing Determinations need not be in writing
In what form can access be provided?	Applicant can generally choose the form of access (s.27)	Applicant cannot choose the form of access	Applicant cannot choose the form of access Inspection must be provided free of charge (s.12(1)–(3)) Copies can be made or obtained from the council (ss.9(2), 12B) [except for electoral rolls, candidate information sheets and building certificates]
What fees apply?	Fees and advance deposits for access applications can be required or charged subject to the regulations (ss.21, 22 and 67)	Fees can be charged for giving an individual a copy of, allowing inspection and copying of, or amending, 'health information'	No provision [other than a reasonable copying charge for documents to be taken away (s.12B(3))]
What legal protections are afforded to agencies and staff on releasing documents/ information?	Protection in respect of actions for defamation or breach of confidence (s.64) Protection in respect of certain criminal actions (s.65) Protection in relation to personal liability (s.66)	Protection against all civil actions for acts done in good faith (eg., defamation, breach of confidence).(s.66A)	Protection in respect of actions, liabilities, claims or demands if matters or things done in good faith for the purpose of executing any Act (s.731)

	Freedom of Information Act 1989	Privacy and Personal Information Protection Act 1998	Local Government Act 1993
What procedures apply for dealing with applications for access to and amendments of records?	Applications (s.17) Persons who are to deal with applications (s.18) Incomplete or wrongly directed applications (s.19) Transfer of applications (s.20) Advance deposits (ss.21–22) Information stored in computer systems (s.23) Determination of applications (s.24) Refusal of access (s.25) Deferral of access (s.26) Forms of access (s.27) Notices of determination (s.28) Consultation (ss.30–33) Applications for amendment of records (s.40) Persons who are to deal with such applications (s.41) Incomplete applications (s.42) Determination of applications (s.43) Refusal to amend records (s.44) Notices of determination (s.45) Notations to be added to records (s.46)	Consultation [s.30–33, FOI Act] (s.20(5))	No procedures for dealing with applications for access to documents [other than reasons being given to council and public for refusal of access (s.12A)] No provision in the Act for the amendment of documents [other than for amendment of particulars in electoral rolls–s.303]

	Freedom of Information Act 1989	Privacy and Personal Information Protection Act 1998	Local Government Act 1993
What limits apply on the release of documents about a person's personal affairs/personal information to third parties?	**Disclosure is required unless:** • disclosure would involve the unreasonable disclosure of information concerning the personal affairs of any person (cl.6, Schedule 1); or • the document is otherwise exempt under a clause of Schedule 1	**Disclosure must not be made unless:** • disclosure is directly related to the purpose for which the information was collected and there is no reason to believe that the individual concerned would object to the disclosure; or • personal information requested by the applicant includes information about a 3rd person; and – the 3rd person is or is reasonably likely to be aware that information of that kind is usually disclosed to other persons; or • the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned, or another person (section 18) **Disclosure also need not be made if:** • disclosure would involve the unreasonable disclosure of information concerning the personal affairs of any person (cl.6, Schedule 1 FOI Act); or • the document is otherwise exempt under a clause of Schedule 1 FOI Act (s.20(5))	**Discretionary disclosure of parts of documents dealing with:** • personnel matters; or • personal hardship of any resident or ratepayer (s.12(6), (7))

	Freedom of Information Act 1989	Privacy and Personal Information Protection Act 1998	Local Government Act 1993
If access is refused, do reasons for have to be provided?	Reasons for refusal of access must be given to applicant (s.28(2)(e))	No reasons required (unless there is a subsequent appeal to the ADT)	No reasons required to be given directly to applicant [reasons for refusal of access must be given to the council and made publicly available (s.12A)]
In what circumstances will there be a deemed refusal?	Initial applications — if a decision is not made within 21 days (s.24(2)) [subject to extension in certain circumstances – s.59B] Internal reviews — if a decision is not made within 14 days (s.34(6))	Initial applications — no provision Internal reviews — if a decision is not made within 60 days (s.53(6))	Requests — no provision
To whom may complaints be directed?	The agency itself NSW Ombudsman (ss.52–52A)	The agency itself Privacy NSW (ss.45–51)	The council itself NSW Ombudsman (ss.12 and 13, Ombudsman Act) Department of Local Government (ss.429–434A, *Local Government Act 1993*)
What rights do applicants have to apply for a merits review (ie., to appeal)?	Application for external merits may be made to the ADT (ss.52B–58) Onus of proof on respondent (s.61)	Application for external merits may be made to the ADT (s.55) Onus of proof on applicant	No provision for merit review by external body Council must review any restriction on access to information within 3 months and then every subsequent 3 months on request (s.12A) Persons may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act (s.674)

NSW Ombudsman
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Sydney NSW 2000

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