Comments on the Public Consultation draft of the NSW *Open Government Information Bill 2009*

by Megan Carter
Director, Information Consultants Pty Ltd

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As an overall assessment, the draft *Open Government Information (OGI) Bill* is an enormous improvement on the current FOIA. I applaud many of the specific reforms, some of them addressing problems of 20 years duration. The Bill's increased emphasis on the concept of the public interest in making decisions about disclosure should mean that the objects of the Act can finally be achieved. Facilitating access through publication schemes and the disclosure log is another welcome advance, as is the consolidation of exclusions and exemptions previously scattered through other pieces of legislation. The protection of decision makers is a valuable safeguard, although I suspect in practice it may have its own difficulties.

Due to time constraints, I will be providing only brief comments on specific aspects, and not surprisingly most of these will be to recommend changes. However, this should not detract from my overall positive view of the proposed legislation. The major aspect on which I would like to comment relates to the public interest factors and the Schedules to the Bill. I have made brief comments about other matters in the second half of this submission.

Public Interest factors

The proposed new approach to determining whether access should be given, based on an assessment of the public interest, should lead to a greater fulfilment of the objects of the Act. While I accept the need for some "absolute exemptions" (Schedule 1), I would question the inclusion of, for example, clause 8, Transport Safety in that Schedule. I would also suggest relocating Clause 5, Legal Professional Privilege, to Schedule 2 so that it will be subject to a public interest balancing test.

I strongly recommend following the Queensland model of including a list of factors favouring disclosure in the public interest as an integral part of the Act. It would bring an appropriate balance to the legislation, which otherwise states only briefly the emphasis on public interests favouring disclosure, compared to the length of the clauses setting out public interests against disclosure. While guidelines from the Information Commissioner will be useful for both sets of public interest factors, it diminishes the role of those favouring disclosure to have them solely in guidelines, rather than in legislation.

The factors listed in Part 2 of Schedule 4 of Queensland's recently enacted *Right to Information Act (RTIA)* 2009, are as follows:

Factors favouring disclosure in the public interest

1 Disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability.

2 Disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest.

3 Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community.

4 Disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds.

5 Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official.

6 Disclosure of the information could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.

7 The information is the applicant's personal information.

8 The information is the personal information of a child within the meaning of section 25, the agent acting for the applicant is the child's parent within the meaning of section 25 and disclosure of the information is reasonably considered to be in the child's best interests.

*9 The information is the personal information of an individual who is deceased (the **deceased person**) and the applicant is an eligible family member of the deceased person.*

10 Disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.

11 Disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.

12 Disclosure of the information could reasonably be expected to reveal that the information was—
(a) incorrect; or
(b) out of date; or
(c) misleading; or
(d) gratuitous; or

(e) unfairly subjective; or
(f) irrelevant.

13 Disclosure of the information could reasonably be expected to contribute to the protection of the environment.

14 Disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.

15 Disclosure of the information could reasonably be expected to contribute to the maintenance of peace and order.

16 Disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.

17 Disclosure of the information could reasonably be expected to contribute to the administration of justice for a person.

18 Disclosure of the information could reasonably be expected to contribute to the enforcement of the criminal law.

19. Disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.

Crucially, the RTI Act states clearly that these are not the only public interest factors favouring disclosure which may be taken into account (as does the OGI Bill for those favouring disclosure). As was said by the High Court in *Sankey v Whitlam* (1978) 142 CLR 1, the categories of public interest should not be limited:

> *"34. Relevant aspects of the public interest are not confined to strict and static classes. As Lord Hailsham of St. Marylebone observed in D.v. National Society for the Prevention of Cruelty to Children [1977] UKHL 1; (1978) AC 171, at p 230 "The categories of public interest are not closed . . .". In that case their Lordships discerned an aspect of the public interest, hitherto unremarked and which was quite unconnected with the affairs of central government but which was nevertheless proper to weigh in the balance and which in the outcome sufficed to outweigh that other public interest which exists in there being available to the court the information necessary for it to do justice between litigants. (at p60)"*

Regarding Schedule 2, I am concerned about the limitation to public interest factors set out in the preamble to the Schedule: *"In balancing these considerations, an agency cannot take into account any considerations against disclosure other than those set out in this Schedule."* I strongly recommend altering this to follow the Queensland model, where the lists of public interest factors both for and against disclosure expressly state that they are not the only factors which can be taken into account (s.49(3)).

Changing social mores and specific circumstances may well arise which have not been foreseen in this list. A scenario might be: A person requests details of public

service health sector employees who are suffering from specified (notifiable) diseases. Whilst there are many public interest factors favouring disclosure and non-disclosure, one public interest should relate to damaging the confidence of the public in the ability of the health system to protect sensitive personal information, which may lead to a reduction in the willingness of people to present themselves for testing and treatment. While this could be squeezed into the law enforcement / public safety exemptions, it is more accurately gauged and expressed in its own terms, rather than trying to make it fit a predetermined wording. My concern over having lists of public interest factors has always been that it limits the decision maker and could lead to an unfair or unbalanced decision.

The entire law enforcement and public safety exemption (current Clause 4) should not be subject to a public interest test where before it was absolute. It is still absolute in other Australian jurisdictions. I would also question the change in Schedule 2, Clause 2(a) (currently Clause 4(1)(b)) where the term "informant" replaces the terms "confidential source of information in relation to the enforcement or administration of the law". I am concerned that the term "informant" would be narrowly interpreted as applying only to situations involving criminal activities, whereas the current phrasing performs a valuable role by preserving the free flow of information to regulatory bodies in areas beyond criminal law.

I recommend deletion of the terms *"such as by revealing an opinion, advice or recommendation made for the purpose of or in the course of the deliberative process"* from Clause 1(e) of Schedule 2. The deliberative process exemption has been the most mis-used and abused exemption in the FOI Acts of most jurisdictions, and the one where public interest should be at the core of the decision. There is no harm *per se* in revealing opinions, advice etc, while there can be a harm in the form of prejudice to the deliberative process. Including this phrase perpetuates the old mis-used provision. Decision makers should be able to argue the specific harm to the deliberative process, arising out of the content and context of the documents, or based on the timing of the disclosure. Merely disclosing opinion, advice etc is not harmful and in no way contrary to the public interest.

I am pleased to see the inclusion in Clause 3 of Schedule 2, of several grounds of harm previously not recognized, and yet very necessary – paragraphs (e) and (f) in particular. On a related note, I am also pleased that the definition of "personal information" excludes the name/position details of public servants (in accordance with *Perrin's* case), which would have otherwise potentially led to unnecessary third party issues and restrictions for the Disclosure Log.

I question maintaining Clause 6, Secrecy provisions, in Schedule 2 when the OGI Bill should override pre-existing restrictions on disclosure. Those provisions considered significant enough to override OGI are enshrined in Schedule 1. For all others, the usual grounds of public interest (exemptions) should be sufficient to protect against any harm envisaged from disclosure.

Other matters

The proposed third party consultation provision (section 51) is a great improvement on its predecessors. I agree with the use of the term "substantial concern" to limit time-wasting consultation over trivial issues. While subsection (1) allows a broad range of matters upon which consultation may occur, subsection (3) may appear to limit this. I would recommend the inclusion in subsection (3) of a further ground: that the information was provided on a confidential basis. While this will often overlap with the other grounds, in some cases it would stand alone and merits separate recognition.

I am pleased with the inclusion of section 52, allowing the appropriate weight to be given to relevant considerations arising from personal factors of the particular applicant. This resolves long-standing debates and is a sensible and beneficial provision.

While I understand the intention, I am somewhat concerned over the impact of the proposed amendments to s.12 Local Government Act (LGA). The repeal of the second part of 12(6) preserves the right of the public to inspection at no cost, however it allows the local authority none of the administrative defences available through the OGIA (such as substantial and unreasonable workload, or vexatious applications). These are also problems under the current version of section 12. Without being able to negotiate with an applicant using the prospect of processing charges, local authorities may have to spend many hours making determinations on ultimately exempt documents. If an application under the LGA is refused (eg under s.12 (1A) , (1B) or 12 (7)), then what are an applicant's rights of review? Do they make a fresh application under the OGIA (with consequent delay until they have a right of review)?

The increased publication requirements and the disclosure log should ensure an increasing volume of relevant information is made available free of charge under s.12(1) and I am not sure that the advantages of maintaining the concept of free inspection to other documents outweighs the disadvantages to the local authorities and to the applicant.

As a small procedural inconsistency, section 60(4) seems to indicate that no processing charges are payable for a delayed/late determination; however section 103(2)(a) suggests that such a charge could be payable.

In summary, the Bill represents a significant reform in a vital area of government accountability, and I look forward to working under its provisions once enacted. I would be happy to be contacted for further comments if that would be useful.

Megan Carter
Director
Information Consultants Pty Ltd
megan.carter@gmail.com