NSW Ombudsman Review of the FOI Act 1989
Response to Discussion Paper

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Objects and presumptions of the FOI Act

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?

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?

For all of the above, I would be happy to see the Objects and Interpretations sections strengthened.

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?

Section 61 should already address this, however it could be strengthened along the lines suggested.

Title of the Act and drafting style

5. Should the title of the Act be retained?

While "Freedom of Information" is not the most accurate title, it has a great deal of recognition from the public and within the public service, It is also the most widely used title in Australia and internationally. None of the alternative titles are strictly any more accurate than "FOI": "Right to Information" – it is not an absolute right; "Access to Information" is also not absolute, and in all cases, it is more accurately about access to "documents" more than "information". In New Zealand, the word "Official" appears to limit its coverage, perhaps unintentionally. The Northern Territory option, *Information Act*, has several points in its favour. However, it includes within that one Act the Privacy provisions and also Records Management, which I think is an excellent combination. In NSW, the retitled Act is unlikely to have such broad

coverage, and so the title may be misleading. So in sum, I favour retaining the current title.

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

This should be the aim of all well-drafted legislation. However it may be difficult to encompass some of the concepts (eg: likelihood of harm) without some "legalistic" wording. I also suspect the review provisions will always be somewhat technical.

Scope — documents/information

8. Should the scope of the FOI Act be broadened to include information not in documentary form?

Broadening the Act to allow access to "information", including of course information not in a recorded form, raises the difficulties referred to in the Review. It would also require a number of changes in approach within agencies. In effect, applicants could simply ask a series of questions of agencies, requiring creation or compiling of responses. Much of this would have to be done by people with a detailed knowledge of the subject matter, rather than by centrally located FOI Officers with knowledge of FOI rather than specific topic areas. FOI Officers could still co-ordinate, but they could not easily compile such responses.

It is akin to the requirement under s.13 of the federal Administrative Decisions (Judicial Review) Act on providing statements of reasons (which, by the way, is an under-utilised accountability mechanism in the federal sphere). Obtaining reasons for decisions is of such significance to the person affected that I would prefer it be enshrined in its own legislative framework rather than FOI trying to encompass this in addition to access to documents.

I think broadening the coverage would have advantages for applicants, but would have significant resource implications for agencies. It would also raise challenges in reviews, when instead of assessing the thoroughness of document searches, specific officers would have to be put under oath to verify that they had provided full and accurate answers.

There is an aspect of the scope of the Act which is not specifically raised by any of the Review questions, but which I think is nonetheless important. Copies of material, often deleted from the agency's main record systems, often survives on the back-up tapes or servers, for disaster recovery purposes. It has been raised in several jurisdictions as a question whether such records are "documents" for the purposes of the FOI Act. I would argue they are not, however, a legislative amendment would make the issue clear.

Such an amendment has been made in Queensland, in various provisions, notably sections 25 and 28A:

s. 25 (6) The application for access to a document may not require an agency or Minister to search for the document from a backup system.

(7) However, subsection (6) does not prevent an agency or Minister searching for a document from a backup system if the agency or Minister considers the search appropriate.
Note--
A search for a document from a backup system is not required before access may be refused under section 28A except in the circumstances mentioned in section 28A(4).

s.28A Refusal of access--document nonexistent or unlocatable

(1) An agency or Minister may refuse access to a document if the agency or Minister is satisfied the document does not exist.
Example--
documents that have not been created

(2) An agency or Minister may refuse access to a document if--
(a) the agency or Minister is satisfied the document has been or should be in the agency's or Minister's possession; and
(b) all reasonable steps have been taken to find the document but the document can not be found.
Examples--
documents that have been lost
documents that have been disposed of under an authority given by the State Archivist

(3) Subject to subsection (4), a search for a document from a backup system is not required before refusing access under this section.

(4) A search for a document from a backup system is required before refusing access under subsection (1) only if--
(a) the document is--
(i) a document required to be kept under the Public Records Act 2002; and
(ii) not a document that the agency or Minister could lawfully have disposed of under the Public Records Act 2002; and
(b) the agency or Minister considers the document has been kept in, and is retrievable from, the backup system.

While on the topic of amendments which would clarify the current provisions, the Queensland FOIA also addresses the question of what documents are covered by a request:

s.25
(3) The application is taken only to apply to documents that are, or may be, in existence on the day the application is received.

(4) However, subsection (3) does not prevent an agency or Minister giving access to a document created after the application is received but before notice is given under section 34 (a post-application document).

(5) If an agency or Minister gives a person access to a post-application document--
(a) no processing charge or access charge is payable in relation to the document; and
(b) the person is not entitled to a review under section 52 or part 5 in relation to a decision about the document made in relation to the application concerned.

9. Should the FOI Act contain a provision making it an offence to destroy or conceal records?

Such a provision is already in the State Records Act s.21, in relation to unauthorized destruction of records, although to my knowledge it has never been invoked. It would be appropriate to also have offence provisions in the FOI Act relating to conduct such as concealing records, tampering with electronic records, etc. If a position of Information Commissioner were established, the offence provision could include obstruction of the Commissioner in the performance of their duties by refusing to provide documents or giving a false statement to the Commissioner and so on. Stronger audit and enforcement action would give teeth to both current and proposed offence provisions, as there would then be some examples as a deterrent to others.

Role of FOI decision-makers

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?

If the power to make a decision were more in the nature of a delegation rather than a direction, that would make their independence clearer.

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?

Supporting the independence of FOI decision makers through offence provisions may not be sufficient for their day to day protection. There are many ways of making an officer fear reprisals from senior officers or Ministers. “Acting under direction” is already a ground upon which administrative decisions can be invalidated, but how often is it proven? Some of the approaches employed elsewhere include the professionalization of FOI officers – in Canada, they are called “Information Rights Professionals” and there are university level courses they undertake to achieve this status. Networks for mutual support, and the support of a central body (whether that is an Information Commissioner, or an FOI Unit similar to the one originally in Premiers in 1989) would also assist.

Exemptions

12. Should public interest or significant detriment tests be incorporated into all exemption clauses?

Public interest or harm tests should be the basis of all exemptions. In some exemptions, the "harm" is understood rather than made explicit (eg: Clause 1 to protect collective responsibility of Cabinet; clause 10 to protect willingness of clients to be full and frank with their legal advisors).

13. Should these tests be the same in all cases?

No. In some cases, the harm could be seen as so great that no public interest could outweigh it – this is usually the case with Cabinet documents, for instance. In others, it is a matter of the relative weight of the harm and the public interests served by disclosure.

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?

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

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?
Yes.

17. Should the number of exemption clauses in the FOI Act be reduced?
Yes. Many of the "class" exemptions are not worthy of retention, and many of the specific items covered in the clauses added since 1989 could easily be incorporated into the older exemptions.

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?

If the Act itself is to be reviewed every 5 years, as suggested, then the review should include the exemptions in the Schedules.

21. Should all exemption provisions be required to be in Schedule 1 or Schedule 2 to the FOI Act?
Yes. It is difficult for practitioners and the public when exemptions are enacted in other legislation, and frankly a risk they will not be correctly applied. They should all be in Schedule 1 or 2.

22. Should the Act contain a provision which authorises agencies and Ministers to refuse to confirm or deny the existence of certain documents?

Absolutely. The lack of a clear provision in these terms has been a problem since 1989. Using section 28(3) is really a workaround to deal with this absence. Legislation in most other jurisdictions has such a provision and there are plenty of models to follow.

23. If such a provision is to be included in the Act, which exemption clauses should it apply to?

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

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)

The scope of the Cabinet exemption should only be as broad as is required to protect the collective responsibility of Cabinet, which is its true purpose. Over the years most jurisdictions have extended it far beyond this. I would recommend the Commonwealth approach (rather than the Victorian approach) as it limits itself most closely to protect the essential interests, with its purposive tests.

While the New Zealand approach seems to have worked well in New Zealand, there is no Australian jurisdiction which has followed suit. There is probably a

thesis in understanding why it has worked in New Zealand! However, I think realistically no Australian government is likely to enact a public interest test on the Cabinet exemption – even the recent Queensland Review did not recommend that. Introducing such a test would also impact on the level of officer delegated to make the FOI decisions on Cabinet documents. It is unfair and probably inappropriate to expect junior and middle-ranking FOI Officers to make decisions to release Cabinet documents in the public interest without fear of reprisals.

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?

While it may be common practice to refuse Cabinet documents, there should still be consideration of the exceptions (Clause 1 (2)) and as such, it does not belong in a Schedule which lists absolute exemptions, that is, those without any exceptions.

26. If such an exemption was included in Schedule 2, should it be subject to a five year sunset clause?

While 5 years is a worthy aspirational time limit on this exemption, I think in practice 10 years will remain. In Ireland the FOI Act as originally enacted had a 5 year limit to protect Cabinet documents, however this was extended to a 10 year limit before the 5th anniversary of the Act. Most governments would accept a 10 year limit, where 5 years is perhaps a little too recent.

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?

Amendments such as these would help limit the misuse of this exemption. Indeed all of these are examples of the decrease in the weight of public interest arguments against release right now. Making it more explicit should

increase the chances of correct disclosure decisions. Specifically, I think (a) is premature, but that the circumstances in (b) and (c) should preclude the application of this exemption.

30. Should the scope of the business affairs exemption clause be changed?
The entire clause should be subject to a full public interest balancing test.

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?

In general, yes, although there may need to be closer consideration of the individual circumstances of agencies. In Ireland, for example, FOI has been extended to the voluntary sector, that is, charitable and other bodies who are in receipt of government funding in excess of a set amount per year. (Examples covered include the National Council for the Blind, the Irish Wheelchair Association, and religious orders providing services for people with an intellectual disability). All of the organizations would provide access to personal information for their clients under Data Protection legislation in any case. The administrative burden placed on such relatively poorly-resourced organizations by FOI is perhaps disproportionate to the increase in accountability. The resource cost to these organizations of implementing FOI has to be recognized as part of their overall funding package.

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

33. Should a public interest test be included in the legal professional privilege exemption clause?

There is precedent for this in the UK, but in general the Australian FOI Acts have left this as an absolute exemption in the Act, subject to its common law exceptions which are in the nature of a limited public interest test. I think the application of a full balancing public interest test is warranted.

34. Should the legal professional privilege exemption clause be restricted to cases of actual or anticipated proceedings?

No, it should extend to advice privilege as well.

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?

The case law which has developed in NSW on the meaning of "personal affairs" is not consistent, although there are some areas of clear agreement. I think there is merit in using the term "personal information". If this were to be done, I would strongly recommend defining the term to specifically include certain aspects, and exclude others (particularly those relating to public officials).

A good example is in the Irish FOI Act (based on the Canadian Privacy Act s.3):

> *s. 2* ***"personal information"*** *means information about an identifiable individual that:*
> *(a) would, in the ordinary course of events, be known only to the individual or members of the family, or friends, of the individual, or*
> *(b) is held by a public body on the understanding that it would be treated by it as confidential,*
>
> *and, without prejudice to the generality of the foregoing, includes:*
> *(i) information relating to the educational, medical, psychiatric or psychological history of the individual,*
> *(ii) information relating to the financial affairs of the individual,*
> *(iii) information relating to the employment or employment history of the individual,*
> *(iv) information relating to the individual in a record falling within section 6 (6) (a),* [(a) is a personnel record, that is to say, a record relating wholly or mainly to one or more of the following, that is to say, the competence or ability of the individual in his or her capacity as a member of the staff of a public body or his or her employment or employment history or an evaluation of the performance of his or her functions generally or a particular such function as such member,]
> *(v) information relating to the criminal history of the individual,*
> *(vi) information relating to the religion, age, sexual orientation or marital status of the individual,*
> *(vii) a number, letter, symbol, word, mark or other thing assigned to the individual by a public body for the purpose of identification or any mark or other thing used for that purpose,*
> *(viii) information relating to the entitlements of the individual under the Social Welfare Acts as a beneficiary (within the meaning of the Social*

Welfare (Consolidation) Act, 1993) or required for the purpose of establishing whether the individual, being a claimant (within the meaning aforesaid), is such a beneficiary,
(ix) information required for the purpose of assessing the liability of the individual in respect of a tax or duty or other payment owed or payable to the State or to a local authority, a health board or other public body or for the purpose of collecting an amount due from the individual in respect of such a tax or duty or other payment,
(x) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name would, or would be likely to, establish that any personal information held by the public body concerned relates to the individual,
(xi) information relating to property of the individual (including the nature of the individual's title to any property), and
(xii) the views or opinions of another person about the individual,

but does not include:
(I) in a case where the individual holds or held office as a director, or occupies or occupied a position as a member of the staff, of a public body, the name of the individual or information relating to the office or position or its functions or the terms upon and subject to which the individual holds or held that office or occupies or occupied that position or anything written or recorded in any form by the individual in the course of and for the purpose of the performance of the functions aforesaid,
(II) in a case where the individual is or was providing a service for a public body under a contract for services with the body, the name of the individual or information relating to the service or the terms of the contract or anything written or recorded in any form by the individual in the course of and for the purposes of the provision of the service, or
(III) the views or opinions of the individual in relation to a public body, the staff of a public body or the business or the performance of the functions of a public body;

If an exclusion for these aspects of public servants' information is not incorporated, it will lead to excessive third party consultation and exemption of fairly trivial information, and reduce accountability. The difficulty of having the same definition apply to both FOI and PPIPA is that the two Acts have different purposes. Public servants must have some rights of privacy, but where accountability outweighs that, as in most disclosures under FOI where they are simply signing off on documents about other topics, they should not be able to remain anonymous.

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?

Clause 4
The threshold of harm for the application of Clause 4(1)(c) is very high, and based on case law from several jurisdictions, has little likelihood of success. The situations causing most concern amongst agencies are closer to the risk

of stalking / harassment rather than threat to life or physical safety. Many of the (relatively rare) situations which cannot otherwise be protected consist of the names of public officials dealing with clients who may be mentally ill or aggrieved with an agency's staff. The staff names could not qualify for exemption under Clause 6 and their information would not usually be regarded as obtained in confidence. An amendment which was made in Queensland, and in Ireland, addresses this. The additional ground of exemption is:

> "A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:
>
> …..to result in a person being subjected to a serious act of harassment or intimidation;"

Clause 12

In the Commonwealth, Queensland and other jurisdictions, the equivalent provision does not apply to all secrecy provisions in other legislation. Following a review process, only certain provisions were identified as being significant enough to override FOI, and where the usual FOI exemptions may not be sufficient to protect the information. I would recommend such a process occur in NSW, and the resulting (small) number of secrecy provisions then be listed in a Schedule to the Act for easy reference. The Commonwealth provision (s.38) is not subject to a public interest test. In the case of Queensland (s.48) the exemption is subject to a stronger version of the public interest test: "Matter is exempt …unless disclosure is required by a compelling reason in the public interest." I would recommend consideration be given to the Queensland approach.

Clause 13

Both the Commonwealth (s.45(2)) and Queensland (s.46(2)) counterparts of this provision have an exception to limit its use where the confidential material is opinion, advice (etc – from the internal working documents exemption) and the duty of confidence is owed to an internal source. This prevents the age-old argument that internally generated advice may be protected as "confidential". I recommend consideration be given to this exception.

Parents acting on behalf of children

While this issue may not be dealt with strictly as an exemption question, there are difficulties in the lack of legislative or policy guidance on the situation where parents make FOI applications on behalf of their children.

At the level of fees and charges, there is a question whether these can be properly characterized as "the personal affairs of the applicant" and hence attract the 20 hours free processing. If not, then every parent applying to DOCS or Education for their child's records would pay for each hour of processing, instead of the 20 hours free processing being allowed.

In terms of decision making, there is a question of whether the child can still be regarded as having separate personal affairs from their agent, the parent,

and whether any information could then be withheld from the parent-applicant. This is more acute as the child becomes a teenager. It needs to be made clear that the child's best interests are paramount and their privacy and confidentiality can be protected.

One solution which attempts to address some of these issues can be found in the Queensland Act, s.50A. I recommend such a provision be incorporated in the NSW legislation. The Queensland Act states:

> ***50A Applications on behalf of children and matters affecting personal affairs of children***
> *(1) Without limiting the ability of persons to make applications on behalf of children, an application may be made under section 25 on behalf of a child by a parent or a person having guardianship of the child.*
>
> *(2) If an application made under section 25 states that it is made on behalf of a child by a parent or another person having guardianship of the child--*
> *(a) the application must state the name of the child and the name of the parent or other person; and*
> *(b) the child is the applicant for the purposes of division 1A; and*
> *(c) section 105 does not apply in relation to the application but, if the application is for documents that relate to the personal affairs of the child and that contain matter that would be exempt matter if the application were made by a person (other than the child or the child's agent), an agency or Minister--*
> *(i) must not give access to the information unless the agency or the Minister is satisfied of the identity of the child and the parent or other person; and*
> *(ii) must ensure, by the adoption of appropriate procedures, that any information intended for the child is received only by the parent or other person.*
>
> *(3) If an application is made under section 25 by, or on behalf of a child, then, despite section 44(2), if a document contains information concerning the personal affairs of the child, the agency or Minister may refuse access to all or part of the information if the agency or Minister considers access would not be in the best interests of the child.*
>
> *(4) If an application is made under section 25 by a child, the agency or Minister, in deciding whether to give the child access to all or part of the information, must consider whether the child has the capacity to--*
> *(a) understand the information and the context in which it was recorded; and*
> *(b) make a mature judgment as to what might be in his or her best interests.*
>
> *(5) In this section—*
> *child means an individual who is under 18.*
> *guardianship includes guardianship, whether sole guardianship or otherwise and whether for a particular purpose or otherwise, under a law of the Commonwealth or of a State or Territory.*
> *parent see the Child Protection Act 1999, section 11(1) to (4).*
> *Note--*
> *Child Protection Act 1999, section 11(1) to (4)--*
> *11 Who is a parent*
> *(1) A parent of a child is the child's mother, father or someone else (other than the chief executive) having or exercising parental responsibility for the child.*
> *(2) However, a person standing in the place of a parent of a child on a temporary basis is not a parent of the child.*
> *(3) A parent of an Aboriginal child includes a person who, under Aboriginal tradition, is regarded as a parent of the child.*

(4) A parent of a Torres Strait Islander child includes a person who, under Island custom, is regarded as a parent of the child.

37. Should any bodies or functions be removed from or added to Schedule 2 to the FOI Act?

Report of a child at risk of harm are declared to be exempt documents under section 29(5) of the Children and Young Persons (Care and Protection) Act:

> *"s. 29 (5) A report to which this section applies is taken to be an exempt document for the purposes of the Freedom of Information Act 1989 ."*

This acts as an absolute exemption without reference to the usually-applicable exemptions such as Clauses 4, 6 or 13. It therefore should be in Schedule 2.

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)?

Yes - s. 34(7) and s. 53(3) should be redrafted 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?
Yes.

40. What would be appropriate criteria for inclusion or exclusion of functions in or from Schedule 2?

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

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

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?

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? 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?

This is a growing area of concern with the increasing use of electronic records management systems. I would support option (b), with the provisos that the time spent is chargeable, and possibly capped at a level such as 6-8 hours. Programmer time is scarce and expensive for agencies, and they frequently have backlogs in dealing with their own internal requests for information. I do not think that option (c) is really the answer to most situations – it is more that the applicant is asking for answers from a database/system which it is not designed to produce (correlating elements within fields, extracting for periods of time or subsets of data). It is not so much a matter of producing **in writing**, as of producing at all, even on screen. If it were only a matter of difficulty printing (eg: a large complex database) then viewing on screen is an option as long as sensitive data of eg: other clients can be masked during that viewing.

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?
No

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?

Guidelines by State Records should address matters such as this, rather than FOI legislation. I was not aware that agencies were not able to search message attachments electronically – if so, I would have thought that was a records management problem for the agency apart from any FOI issues.

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)?

Depending on the size of the database, and what is to be printed. The output of a search/query could also be saved to an electronic output such as a pdf or email or Excel spreadsheet in some cases, as well as a printed format. Most modern databases should be capable of output in either electronic or printed form, simply to meet the business and record-keeping needs of the agency.

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?

FOI officers need the authority and support within their own agencies to be able to conduct proper searches of all relevant records and systems, and that would come from their designation by the CEO of their role as FOI officer. They should be able to invoke this authority whenever needed. If they are denied access, they cannot do their job properly, and if this cannot be resolved, the FOI legislation should empower the Information Commissioner to investigate the actions of officers in that agency blocking the access.

In a practical sense, FOI officers have to rely on staff in line areas to do a lot of the searching, as those staff are familiar with the plethora of records in their own areas, especially those not captured in formal records management systems such as file indexes. There may be security clearance issues for certain areas, in which case either the FOI officer requires clearance, or a suitably cleared officer undertakes the search as requested and signs a statement for the FOI officer as to their findings. FOI officers may benefit from additional training in records management systems and techniques, but I think they will always have to rely on their in-house experts for much of this. They cannot be masters of all trades.

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?

In the first place, the FOI officer needs to consult the applicant to clarify their request so that the FOI officer knows as precisely as possible what they are asking for, and consequently, where to search for it. If the FOI applicant is aware of synonyms of technical terms used in their request, this may assist the FOI officer who would not have technical knowledge of every field. It may, for instance, be useful for the FOI officer to show the applicant the agency's Keyword Thesaurus, so the applicant could nominate terms which are likely to be successful in the search. If an initial search was not successful, the FOI officer could go back to the applicant to explain this or seek further information to continue the search.

50. Should FOI practitioners be given guidance about searching digital/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?

Yes, all of this should be in the Guidance issued to practitioners. For (a), I would simply say, a record should be kept of all steps taken to search for documents, it does not have to be in a set format. For (b), searching email is often dependent on the proprietary software in the particular agency, and decentralized agencies may have multiple systems in use. Item (c) raises the thorny issue of draft documents, which is poorly dealt with in most agencies in terms of retention and disposal policies and practices more generally. I would venture to say that at present, few FOI officers would retrieve all electronic and paper versions of draft documents – having located one or the other, they would stop searching. A policy on points such as this would help to clarify their responsibilities.

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?

The standard “warning” about emails being part of the agency’s records system implies all of the above. It would do no harm to explicitly state this in the Acceptable Use policies, in training and induction, and in standard footers to emails (in a more succinct form).

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

For agencies using electronic processing tools such as Adobe Acrobat / Redax to produce electronically edited documents, this is an easy option to offer applicants. For agencies still using paper, and there are many of these, it could increase workload to scan documents, although many photocopiers are capable of this. It may not work for all document formats, for example where there are embedded formulae in spreadsheets, or where an applicant may be able to identify another person by cross-referencing elements of a database which looks otherwise innocuous. Agencies would need to take care when giving access to documents in editable format (eg: Word rather than PDF) as there may be risks of fraud and misrepresentation.

In the case of records in formats requiring proprietary software to read them, there is an issue about whether or not the applicant can open the electronic document. While software such as the Microsoft Office products are fairly common amongst members of the public, there are other programs which are not common or affordable. Sometimes, in-house software has been used to

create the document, and unless it can then be saved in a portable format (such as PDF), the applicant cannot open and read the document.

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?

If this acceptable to the applicant and they have the means of reading those documents electronically (see provisos above about documents created using proprietary or in-house software). It would be preferable for agencies to offer electronic access as a free option, with hard copies to be provided at commercial rates.

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?

Yes. This maximizes the principle of access, while minimizing the possible harmful consequences of disclosure. The Irish FOI Act has such a provision in its section 12(2):

> *(2) Where a head decides to grant a request under section 7 and the request is for access in a particular form or manner to a record, such access shall be given in that form*
> *or manner unless the head concerned is satisfied_*
> *(a) that such access in another form or manner specified in or determined under*
> *subsection (1) would be significantly more efficient, or*
> *(b) that the giving of access in the form or manner requested would_*
> *(i) be physically detrimental to the record,*
> *(ii) involve an infringement of copyright (other than copyright owned by*
> *the State, the Government or the public body concerned),*
> *(iii) conflict with a legal duty or obligation of a public body, or*
> *(iv) prejudice, impair or damage any interest protected by Part III or section 46.* [The exemption and exclusion provisions]

Situations where this has been used include the following:

(1) During a child protection case conference, allegations made by a child against their parents are read out to the parents in an attempt to resolve the case. When the parents apply for a copy under FOI , it is difficult to argue confidentiality as it has been read out. However, a hard copy in the hands of the parents could be damaging to the child at some future point. The decision on access is to allow inspection but not a copy.
(2) Records of interview were taken with adult survivors of institutional child abuse, where names of alleged abusers and other victims were given. When the adult survivor seeks a copy of their own record of interview, the names of these third parties may need to be deleted from the copy, however access in full can be given by way of inspection so

they can check the accuracy of their statements.

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?

The fee for an initial application is within the normal range in Australian jurisdictions and I do not think warrants an increase. I do not think there should be a fee for internal reviews.

57. Should there be different fees for personal affairs and non-personal affairs applications?

Fee and charges is one of the most debated aspects of FOI everywhere, and there is no system recognized as perfect. I think that it is reasonable to have the same application fee for personal and non-personal applications. One advantage is that it removes the disputes over whether an application is "purely" or "solely" personal etc. It must be subject to waiver or reduction on grounds of financial hardship in the case of personal requests. However, I think it is then reasonable to have different charges for each type of request.

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?

From an applicant's point of view, it is fairer for them to only pay for what they get. (Ireland has a version of this in that their time-based processing costs are refunded proportionately if the documents are exempted). If the applicant requests 5000 documents which are all refused as exempt, they would pay nothing. Of course the agency which spent 200 hours deciding the request would not see this as fair compared to the current system, where most applicants would have baulked at paying the $6000 and the 200 hours would not have been spent, or they would at least have collected $6000 towards their costs. (Not that $30 per hour covers the costs of employing an FOI Officer).

Almost any charging regime presents difficulties for FOI officers, and for some requests the work involved in collecting the charges costs more than the charges themselves. The lowest tier charge would need to be worth invoicing and collecting or it will always be waived, or there could be a free area (eg:first 10 pages free, pay thereafter).

One big advantage of the flat fee system is its simplicity and ease of calculation compared to the current time-based system. A major difficulty of the time-based charging system is the problem of making accurate estimates, without actually undertaking at least some of the work. (At least retrieval of sample or representative files upon which to base the preliminary assessment.) However the charge-per-document system also has problems. How could an agency know the likely percentage of exempt /releasable

documents in advance to notify an applicant of potential charges? By the time the number of documents is known with certainty, the work has been completed and it would be unfair on agencies if at that point, applicants could withdraw the request in whole or part.

59. Should there continue to be a reduction in fees and charges for demonstrated financial hardship and for public interest applications?

Yes, on both grounds. One feature from other jurisdictions which may be of interest is to limit potential abuse of claims of financial hardship. If possession of specified concession cards is the only criterion ("rent a pensioner"), one solution to this is the provision in the Irish 2003 Fees Regulations section 5. It provides that the decision maker can take into account whether the person is making the request concerned on behalf of some other person who, in the opinion of the head, is seeking to avoid the payment of a fee.

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?
Yes.

61. Should the processes surrounding advance deposits be simplified?
I consider the current provisions reasonable, given that all processes concerning fees and charges are somewhat complex.

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?
Yes

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?
No

64. Should agencies only be able to charge a percentage of the estimated cost as an advance 'deposit'?

I think the term "deposit" suggests only a part, not the full amount. Based on other jurisdictions' practices, it would seem fair to charge at least 25% up to a certain limit, and 50% beyond that limit.

Where applicants fail to pay the balance of the charges, the agency could pursue the matter as a debt. However, another approach is used in Ireland, section 10(1)(f) which provides that the agency may refuse a request if:

> *"(f) a fee or deposit payable under section 47 in respect of the request concerned or in respect of a previous request by the same requester has not been paid."*

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?

I think this could more readily be achieved in the Policy Manual rather than the Act.

66. Should the Act specify the minimum time period that an applicant should be given to pay an advanced deposit?
Yes - a period of 21 - 30 days would be reasonable.

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?
The current guidance in the Policy Manual is useful, although it could be enhanced.

68. Should the Act provide that the circumstances in which disclosure of information will be in the public interest should be read broadly?
No, such guidelines are better placed in the Policy Manual.

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?
Again, this is more suited to the Policy Manual.

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)?

Yes. The time frames in NSW are the shortest in Australia, and many agencies struggle within their resource limitations to achieve them. 30 days / 20 working days would be quite reasonable and in keeping with other Australian jurisdictions for the initial determination. In any event, s.18(3) states that an application is to be dealt with “as soon as practicable” which should mean that simpler and smaller requests could still be determined within a shorter period such as 21 days.

While I think the 14 day time period for internal review is more achievable (as the search and retrieval and consultations should already have been undertaken), in practice I think most agencies also struggle with this and it could be extended to 28 days.

71. Should different time periods be provided for the assessment and determination of personal affairs applications and non-personal affairs applications?

The time taken to determine an application is influenced by a number of factors, some of which are reflected in the extensions available under s.59B. However, this does not recognize the impact of the need for extensive searches in multiple locations or voluminous documentation. Other FOI Acts permit extensions of time based on these factors, which can occur in both personal and non-personal 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?
Yes – an extension of time in such circumstances would be warranted.

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?
Yes, and it may be in the context of a trade-off for charges.

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) [s.30(3)(d)], 31(3)(d), 32(3)(d) and 33(3)(d) apply?
Yes

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?

Of these options, I think (c) is reasonable, whereas I consider (a) and (b) quite dangerous. I realize they are only there as incentives to prevent unreasonable delay, but in the assessment of what would be “unreasonable delay”, there will be differing opinions. If an agency was deemed to have approved, or was unable to claim, for example, clause 13(a), it would be legally liable for the breach of confidence.

77. Should the Act be amended to include provision for urgent FOI applications?

I have not worked in a system allowing this, so I am not sure of its advantages

and disadvantages. However, there would have to be a combination of a fee and meeting certain criteria or it would simply become Fast FOI for the Wealthy.

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?
It should be prescribed in the Act.

b. what requirements should be met by the person requesting urgency?
There should be criteria, similar to those used in the USA and the others suggested in the review. This is an area which would need a lot more policy development work with input from practitioners. The criteria would need to be somewhat strict, or all FOI applicants will claim the need for urgency (many of them do now, some validly, some from impatience.)

c. should acceptance of an urgent application that meets the relevant tests be mandatory or discretionary?
Discretionary.

d. what, if anything, should flow from an agency's failure to determine an urgent application within the reduced time limit?

The applicant should have their additional "urgency" fee refunded and have the usual rights of appeal against a deemed refusal.

79. Should the FOI Act allow agencies to extend the processing time for applications requesting large amounts of information?

Yes. Ireland and the Northern Territory allow an extension of 4 weeks in this situation.

80. If such a provision was introduced, should it provide a specific extension period?

The extension period could be linked to the volume of information requested: 4 weeks for up to 1,000 pages, 8 weeks for up to 2,000 and so on. I have personally been involved in requests of 10,000 pages and the reading and decision-making time alone could be 80 hours per 1000 pages (depending on their complexity and technicality).

81. How would the decision be made that a request was voluminous?

Interestingly, in the *Cianfrano* decision referred to in my response to questions 106 and 107, the Tribunal lists as a possible relevant factor that a request may take more than 40 hours. This is much lower than I would have thought met the requirement for any but the smallest agencies. The factors listed in that decision, plus the additional one I noted in answer to 107, are appropriate to make the assessment.

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?

Yes, although most agencies routinely acknowledge requests at present. The acknowledgement should advise the applicant of the timeframes and review options.

83. Should any such requirement specify a time period for compliance, and if so, what time period would be reasonable?

If the time limit is kept at 21 days, then 7 – 10 days to acknowledge; if the time limit is 30 days, then 14 days to acknowledge.

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?

Yes. Consultation is time-consuming for the agency, and creates delays and possibly costs for the applicant. While protecting third party rights is very important, delay and cost should not occur without good cause. While I accept it may be difficult to decide what "could reasonably be expected to be of substantial concern", it is really no more difficult than applying the exemptions properly. Some sort of criterion like this would eliminate consultation over trivial matters which could not conceivably support an exemption argument. For example: under s.30(1), a copy of a Commonwealth document which had been substantially disclosed via media release would still require consultation.

An alternative is to echo the harm test of the exemption in the consultation provision, similar to the Northern Territory's s.30 *Information Act*. In that case the FOI officer would have to assess the likelihood of the exemption being met before consulting.

If the more general "of substantial concern" test is not adopted, then the third party provisions should be amended to include consultation with providers of confidential information (clauses 4(1)(b), 13 and 20(1)(d)) as this is currently a deficiency.

An area in which I believe the s.32 consultation provision is often misapplied is the situation of consulting another government agency which may be involved in the documents. Although informal consultation could often solve the problem, I think the attraction of the additional 14 days leads to an overuse of the formal consultation mechanism. To call it the "business affairs" of the consulted agency is often not correct and clause 7 could never apply. However, there may well be a valid reason for consulting (such as checking on the status of the other agency's investigation), and the "substantial concern" test would provide this.

A further amendment which should be made relates to the indirect access provisions within section 31(4) regarding medical or psychiatric information. In the Commonwealth and Queensland, the equivalent provisions (s. 41(3) and 44(3) respectively) have been broadened to cover a wider range of health care material, much of which could be at least as distressing as purely medical or psychiatric information. This is more significant as the volume of and detail recorded within health care records has increased markedly over the past 20 years, and there is no other avenue available in the Act to mediate direct access to the patient if required. I strongly recommend redrafting 31(4) to follow the Commonwealth and Queensland models.

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?

Publication of information

87. Do Statements of Affairs and Summaries of Affairs, in their current form, continue to serve a useful public purpose?

The content is useful, and if made available in a form such as online, then I think they are of greater use to a wider audience.

88. Should the Act be amended to require agencies to publish on the web:

a. their Statement of Affairs?
Yes

b. their Summary of Affairs?
Yes. And for both of these, to provide a service to mail out hard copies of material for clients without access to the internet.

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?

Yes, although where agencies have very large volumes of policy documents, it may have to be a mixture of full text online of the most significant / popular items, and an index of titles of the remainder which could be accessed via hard copy, with a photocopy charge after a certain free area (say, first 20 pages).

89. Should the definition of 'policy documents' be broadened to include such things as:

a. all internal procedure manuals/instructions?

Perhaps not all such internal manuals, although there should be little harm in it (any exempt procedures concerning eg fraud detection, security, would be exempt). However there is a workload impact on the agency if such manuals are not already in a form (eg: intranet) where they can readily be made available to the public.

b. performance measures?
Yes

c. reports to management about compliance with performance measures?
Yes.

90. Should agencies be required to establish and maintain a publications scheme?

There are many useful items in the publication schemes set up in the UK and Scotland under their FOI legislation. However it should be noted that agencies were given several years to develop these schemes, and resources would be required. An increase in the types of information required to be published, along the UK lines, would be a worthwhile enhancement of the Act.

91. Should agencies be required, or at least encouraged, to establish and maintain disclosure logs?

I would say "encouraged" rather than "required". I would also put some criteria on the scheme. For example, all first-party requests (by individuals and businesses) should be excluded. I would also exclude requests from staff members about HR processes. For purely non-personal requests, for reasons of volume, I would certainly publish anything which had been requested more than once, however to publish the full text electronically of all non-personal documents requested would probably be wasteful. A list of the requests themselves could be online, with a link to request more details or copies via email.

92. Should agencies be required to proactively identify and disclose information that is clearly in the public interest?

Yes, although they would need some time to develop criteria and guidance to do so. Many agencies would already publish a lot of information of this kind.

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

Absolutely. Without this protection, we can never succeed in encouraging

agencies to engage in access mechanisms outside FOI, or in proactive release. It should be exactly the same protection for all avenues of giving access.

Amendment of records

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?

Yes, access could have been obtained under an administrative or other statutory access scheme. I would think it a rare occurrence for someone to have improperly obtained a document about themselves which they would then be seeking to amend.

95. Should the reference to 'administrative functions' be clarified?

From other jurisdictions and their caselaw, it seems to me that what was intended was to limit the right to seek amendment to records where making that amendment was relevant and purposeful – where the record in question was being used, and therefore its accuracy mattered. A record which had been sent to secondary storage or Archives, as being of no further use (but only of historic value – and that perhaps limited to a short life before authorized disposal) – there would be no point in amending such a record. I think the term should be clarified and more policy guidance given to agencies.

96. Should guidance be given on what can and cannot be amended, as opposed to appended to records?

It would assist to provide more guidance in this area. Crudely put, it is usually the case that facts or matters which can be proved right or wrong can be amended; but other matters (especially opinions) are more suited to annotation.

Alternative access schemes

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?

This is a perennial dilemma with FOI and Privacy legislation. The recent Queensland proposals to split requests for personal and non-personal requests will face difficulties with any "mixed" requests, similarly in the UK

which has made a similar split between their FOI and Data Protection Acts. The interface between the two Acts in the UK is extremely complex (UK FOI Act s.40) and confuses even FOI practitioners. It is not possible to have them mutually exclusive, because even a request for personal information involving oneself and family members is not clearly a purely "personal" request. The Privacy Act would still need the same sort of exemptions to protect third party information as there are in FOI. Therefore I would favour a single statute for personal and non-personal requests. This would not take away from other statutory or administrative rights of access to personal and non-personal information. The other Privacy Principles would still be covered in the Privacy Act, but the Access and Amendment principles would be dealt with in FOI.

It would also be wise to await the outcome of the reviews of Privacy at present before a definitive answer to this question is proposed.

98. Should the relevant legislation be amended to provide that personal information should be accessed through privacy legislation?
As above, no.

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?
See above in answer to question 97 – no.

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?

As it stands, there are only half a dozen or so exemptions which generally apply to personal information (Clauses 4, 6, 12, 13 (a) and (b), occasionally 10, parts of 20, 26). While it is technically possible for the other exemptions to apply, the content of personal documents almost never gives rise to their application. Of the clauses which are generally used, I would see them all as serving a proper purpose. I do not see that the number of potential exemptions could be reduced.

In terms of processing, there could be improvements, although I suspect the most straightforward of personal requests are already being dealt with outside FOI, either through administrative access or other mechanisms. In my view, FOI is needed when protection is needed: for the applicant, for third parties, or for the agency. In other cases, FOI is overkill. The other mechanisms offer the simpler, more streamlined processing option, as there is no need for complicating factors such as third party consultation.

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?

Such a statement should be first and foremost in the legislation concerning employees' rights and entitlements more generally, that is, the *Public Sector Employment and Management Act (PSEMA)* or its regulations, and other legislation covering staff of other government bodies. Moreover, that avenue should be the preferred method of current and former staff obtaining access to their files – FOI should be a last resort. In the Commonwealth, section 15A was inserted to reduce the volume of public servants using FOI to access information, and to make them use the other mechanisms first:

> *15A Request for access to personnel records*
> *(1) In this section:*
> *"personnel records" , in relation to an employee or former employee of an agency, means those documents containing personal information about him or her that are, or have been, kept by the agency for personnel management purposes.*
>
> *(2) Where:*
> *(a) there are established procedures in an agency (apart from those provided for by this Act) in accordance with which a request may be made by an employee of the agency for access to his or her personnel records; and*
> *(b) a person who is or was an employee of the agency wishes to obtain access to his or her personnel records;*
> *the person must not apply under section 15 for access to such records unless the person:*
> *(c) has made a request for access to the records in accordance with the procedures referred to in paragraph (a); and*
> *(d) either:*
> *(i) is not satisfied with the outcome of the request; or*
> *(ii) has not been notified of the outcome within 30 days after the request was made.*

If there is matter which cannot be disclosed (complaints, allegations, investigations at certain stages) under the PSEMA processes, then they could still seek access under FOI, with its protections and rights of appeal.

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?

Staff of agencies should not be put in a more favourable position than a comparable member of the public, that is, if matter would be exempt for one, it should be exempt for the other. The most problematic situations in terms of access to staff-related material is that involving third parties. While recruitment and selection processes pose some challenges, I think the most difficult areas are in grievances and disciplinary processes. Allegations, complaints, witness statements all involve third parties and degrees of confidentiality, more so at certain stages of the process. These should all be protected to the extent required by the law.

Rights to deny access

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)?

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?

There need to be provisions to refuse access in all of the above situations, subject to rights of review. As the review correctly states, there is a small minority of applicants who cause agencies disproportionate work and stress associated with their FOI applications. Some cases I am familiar with range from several dozen applications in a year, to over one hundred. Options which have been implemented elsewhere include provisions regarding repeat applications such as Queensland's s.29B:

> *29B Refusal to deal with application--previous application for same documents*
>
> *(1) This section applies if an applicant applies to an agency or Minister (the later application) for access to documents that have been the subject of an earlier application made by the same applicant to the same agency or Minister (the earlier application).*
>
> *(2) However, this section does not apply if the applicant withdrew the earlier application or the application was taken to be withdrawn under section 25A(5), 29A(5) or schedule 4, section 2.*
>
> *(3) The agency or Minister may, to the extent the later application relates to documents sought under the earlier application, refuse to deal with the later application on a ground mentioned in subsection (4) if--*
>
> *(a) the agency or Minister is satisfied the documents sought under the later application are the documents sought under the earlier application; and*
> *(b) the later application has not disclosed any reasonable basis for again seeking access to the documents.*
>
> *(4) The grounds are as follows-*
> *(a) the agency's or Minister's decision on the earlier application--*
> *(i) is the subject of a review under part 5 and the review is not complete; or*
> *(ii) has been the subject of a completed review under part 5;*
> *(b) when the later application was made, the agency or Minister had not decided whether to grant access to the documents under the earlier application;*
> *(c) the agency or Minister has decided this Act, or a part of this Act, does not apply to an entity--*
> *(i) because the entity is not an agency for this Act; or*
> *(ii) because of section 11 or 12 or another Act;*

Note--
Schedule 3 lists provisions of other Acts that exclude or limit the operation of this Act--see section 11D.
(d) the agency or Minister has decided--
(i) this Act, or a part of this Act, does not apply to the documents because of section 11, 11A, 11B, 11C or 12 or another Act; or
(ii) access to the documents may be refused under section 22; or
(iii) the documents sought under the earlier application were exempt from disclosure;

Note--
Schedule 3 lists provisions of other Acts that exclude or limit the operation of this Act--see section 11D.
(e) the agency or Minister has decided the applicant is not entitled to access because of section 11E;
(f) the agency or Minister refused access to the documents under section 28A in relation to the earlier application.

(A parallel provision for repeat applicants for amendment of records is in Queensland FOIA s. 54D)

Applicants who are often termed “vexatious” may not be in the form of repeat requests for the same or even similar material, although there may be a connection between their requests. While this has been a difficult area to deal with in all FOI laws, without limiting the general right of access, some options tried elsewhere are:

Queensland s.96A Vexatious applicants

(1) The commissioner may declare in writing that a person is a vexatious applicant.

(2) The commissioner may make the declaration on the commissioner's own initiative or on the application of 1 or more agencies.

(3) The commissioner may make a declaration only if the commissioner is satisfied that--

(a) the person has made repeated applications under this Act in relation to the agency or agencies; and

(b) the repeated applications involve an abuse of the right of access, amendment or review under this Act.

(4) For subsection (3)(b), repeated applications involve an abuse of the right of access, amendment or review if, for example, the applications were made for the purpose, or have had the effect, of--

(a) harassing or intimidating an individual or an employee or employees of the agency or agencies; or

(b) unreasonably interfering with the operations of the agency or agencies.

(5) The commissioner must not make a declaration in relation to a person without hearing the person and giving the person an opportunity of being heard.

(6) A declaration has effect subject to the terms and conditions, if any, stated in the declaration.

(7) Without limiting the conditions that may be stated, a declaration may include a condition that the vexatious applicant may make an application for access under section 25, an application for amendment under part 4 or an application for review under section 52, 60 or 73 only with the written permission of the commissioner.

NT Information Act S.42:

(2) The Commissioner may only make a declaration if satisfied that
(a) over a period of time, the person has repeatedly applied to the public sector organisation –
(i) for access under Division 2 (Accessing government information) to government information or a number of pieces of government information that share a common characteristic; or
(ii) for review under Division 4 (Review by public sector organisation) of the organisation's decisions about access to government information or a number of pieces of government information that share a common characteristic; and
(b) the repeated applications are –
(i) unnecessary;
(ii) an improper use of the right of access or review; or
(iii) made for the purpose of harassing or obstructing or otherwise interfering with the operations of the organisation.

Irish FOI Act s.10(1)(e) :

"the request is, in the opinion of the head, frivolous or vexatious, or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert"

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?

Yes, with proper evidence to support their application, either by a single agency or several agencies together.

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

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

The case law from s.25(1)(a1) and its interstate counterparts is often of little practical help to agencies. The cases cited in *Cianfrano v Director General,*

Premier's Department [2006] NSWADT 137 at para 51 range from tens of thousands of pages, to millions. The workload also has to be seen in terms relative to the resources of the agency: for an agency with 30 staff and a part-time FOI officer, dealing with 1,000 pages is probably a substantial diversion of resources, where it would be taken within the stride of a larger agency.

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

The factors set out in *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137 at para 62 are appropriate. However I would add one factor to them, probably in connection with factor (b) :

> "(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 (see further Rowlands P in *Re Borthwick*)"

To this should be added "the importance of the document/s in the public interest or to the public more generally". A matter of greater public interest or significance is more worthy of government resources being expended on it, as the Tribunal notes at para 48 of this case.

Interestingly, the Tribunal includes a factor not repeated in the Policy Manual:

> "(g) the indication that is found in the Annual Report reporting requirements suggesting that requests involving more than 40 hours' work are seen as lying at the upper end of the range; suggesting at least that the view of government administrators is that a processing time that goes well beyond 40 hours may properly raise concerns".

Most FOI practitioners would find that kind of guidance of great value, still bearing in mind the relative resources of each agency.

108. Are the factors appropriately followed by agencies?

I cannot comment about all agencies' practices, other than to say I think many agencies find it difficult to make accurate estimates of the work likely to be required, often finding their initial assessments were too low. An improved methodology for estimating work, both for this provision and for estimating advance deposits, would be of benefit to applicants and agencies.

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

No. In light of the very low usage of such certificates in FOI's history, and in keeping with reforms elsewhere, all certificates should be abolished.

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

Reviews

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?

Properly undertaken, internal review is an opportunity for an agency to correct its own errors (if any), search more thoroughly, consider new arguments, re-assess its own position, and present a more favourable decision, or a better set of reasons to the applicant. It should also reduce the number of cases proceeding to external review. If an agency regards internal review as a "rubber stamp" or a "loyalty test", then it simply wastes the time of the applicant and the agency. I support a proper internal review system, and would prefer that it remain mandatory (other than when the original decision was made by the agency head or Minister).

111. Should internal review be optional before an applicant can seek external review?
See above

112. Should any changes be made to the way in which internal review provisions currently operate?

Improvements could be made in allowing additional time if it becomes apparent only at that stage that consultation is required with third parties, for example. If the timeframe for decision is increased to 28 or 30 days anyhow, this is not as important, but if it remains as 14 days, I would recommend allowing extensions at the internal review stage.

113. Should the Act require agencies to issue notices of review and appeal rights even where no determination is made?
Yes

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?

I would prefer an Information Commissioner with determinative powers, whose decisions can be appealed on points of law. In this model, the specialist review body is able to develop deep expertise in FOI; traditionally it always has a more consistent approach in its decision making. (All jurisdictions with the Tribunal model have problems with internal consistency in their approach to FOI exemptions – ADT, AAT, VCAT). The Commissioner model offers the advantages for applicants of accessible, affordable justice; they do not need legal representation, there are few if any of the formalities of

Tribunals. Commissioners, like Ombudsmen, have a wide range of flexible methods to achieve a result, including investigation, mediation, negotiation and shuttle-diplomacy.

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?
Yes

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?
Yes

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?

119. Should there be a provision in the FOI Act to require that the legislation be reviewed every five years?
Yes.

120. Should any such review be conducted by an independent committee/panel?
Yes

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?
Yes

Oversight and accountability

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

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).

Option (b) is preferable, however, option (a) has been quite successful in other jurisdictions (eg: Queensland until recently, and Ireland). Option (a) is often pursued due to resource constraints and it saves the administrative expenses of setting up a separate Office.

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?

The Information Commissioner should have the powers and responsibilities for investigating complaints about FOI as part of their review jurisdiction. Matters such as sufficiency of search, unreasonable delay by agencies, withholding documents etc should all be within their remit. There could be referral of complaints to the Ombudsman on more general administrative malpractice which arises, and vice versa for matters coming up in an Ombudsman investigation. The Ombudsman could also deal with complaints about the Commissioner – in most jurisdictions, the biggest area of complaint is delay at the Commissioner level.

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

The Information Commissioner should have a determinative role.

127. What functions should an Information Commissioner have?

I would prefer that this question be dealt with in conjunction with the question of a central co-ordinating body for FOI. The ideal model, and one followed in many places, is that there is an FOI Policy Unit within government, and an external review body with a level of independence from government. This happens in the Commonwealth, Queensland, South Australia, United Kingdom and Ireland amongst others. Most jurisdictions begin with such a model, but over time the central unit is disbanded, and problems set in.

I believe there are valid and separate roles for the two bodies, and that while many of the functions listed below could be performed by either body, there are benefits to the separation of some roles. For example: the central body has to establish government policy, often without any cases yet being decided on the particular matter. Subsequent decisions of the Information Commissioner may or may not be in keeping with the policy. The government agency has the choice to appeal the decision, or to amend their policy or even amend the legislation. Commissioners and governments do not always, historically, see eye to eye on policy matters. To have the Information

Commissioner the sole body responsibly for the policy and the determination of cases is not healthy for policy development. Many parallels are available for such a separation – the federal specialist appeals tribunals (Social Security, Immigration) determine matters and influence policy, but the line agencies are responsible for developing policy.

The role of supporting and advising practitioners, which has been poorly done for many years in NSW, is best done by a central body. The difficulty for the review body undertaking such a role is that the matter may well come before them for decision, and this could lead to a conflict of interest, knowledge of which usually prevents them from providing the advice in the first place. No such problem with this role being undertaken by a central unit. Also, over time, individual agencies and the Commissioner may fall into more adversarial roles due to conflict over particular cases, and this may make agencies unwilling to approach the Commissioner to seek expert advice.

I have provided a non-exhaustive list below of the functions which could be performed by a central body and/or an Information Commissioner. Around the world, various models exist with different combinations of these roles. I would be happy if at least someone were performing all of these roles! As said above, I think there are advantages to certain of the roles being performed within government by a central policy unit. However, if such a unit does not exist, then many of those functions will fall by default to an Information Commissioner, which is not ideal but better than not being performed at all.

Roles and functions of central bodies

Policy and systems development role:

- Prepare drafting instructions for initial FOI legislation and any later amendment of it
- Prepare FOI regulations and other subordinate legislation
- Review / participate in review of secrecy provisions (statutory bars) in other legislation and recommend their amendment or removal
- Develop and issue FOI policies, guidelines and procedures
- Obtain / provide legal advice on matters of interpretation of FOI Act and distribute advice to agencies / incorporate into FOI policies
- Develop FOI systems and infrastructure (eg: FOI ICT systems for tracking and processing requests)
- Develop / approve templates for agencies' publication schemes
- Co-ordinate review of the operation of the Act (usually at intervals set in the legislation itself, or set by government)
- Co-ordinate information access policies – FOI, Privacy and others
- Review impact of FOI decisions by review bodies and courts; assess whether policy or legislative change may be required
- Develop or have input into the overall information policies of the government: how the government manages, provides access to, publishes, and charges for its information, and the impact of technology on these policies
- Develop or have input into policies on records management and archiving of government information

- Assist agencies to identify avenues for providing information routinely, without the need for formal FOI requests

Training and advisory role:

- Provide advice for FOI decision makers in government departments and agencies
- Develop training syllabus and materials / deliver training courses / accredit providers of training (there are many options for the role of central bodies in training)
- Facilitate the establishment and maintenance of networks of practitioners to ensure skill levels are maintained
- Provide forums (face to face, online) for discussion of difficult issues or issues which the practitioners have in common
- Analyse and distribute summaries of decisions by review bodies and courts in FOI matters for the guidance of practitioners
- Provide advice /assist in processing difficult or contentious FOI decisions
- Provide mechanisms for consultation on cross-agency issues or ("Round Robin") requests

Supervisory / monitoring role:

- Collect information / statistics on the operation of the Act
- Monitor and evaluate the operation of the Act
- Research and monitor developments in relation to freedom of information and the protection of privacy
- Identify, develop and promote best practice and achieve greater consistency in FOI administration across whole of government
- Monitor pricing policies of government agencies for documents on sale (and therefore inaccessible under FOI)
- Monitor and evaluate the FOI performance of individual government agencies
- Conduct audits of agencies to ensure that their FOI practices and administration are adequate
- Prepare Annual Report to Parliament on operation of FOI, including statistics and assessments of agencies' performance, results of audits, and highlighting any persistent poor performance

Public awareness / promotional role:

- Develop materials for promotion of public FOI awareness (brochures, posters, videos, advertising in media, web-based)
- Promote awareness of FOI in the community
- Deal with inquiries from the public about FOI generally
- Provide assistance to the public in preparing FOI requests
- Undertake educational programs to promote public awareness of freedom of information and privacy, including making public statements about relevant legislation matters

Dispute resolution / review role:

- Approve/review/accept complaints about agencies' publication schemes

- Deal with complaints by the public about agency's FOI decisions including delayed decisions and refusals
- Mediate / facilitate resolution of or investigate FOI complaints and appeals
- Make recommendations or binding decisions on FOI complaints and appeals
- Enforce decisions using penalties, legal sanctions

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

There is ample precedent for this, both in Australia and overseas. Because it is not possible to absolutely separate personal information requests from non-personal, there will always be an overlap even with two access regimes (as in the UK – where their Information Commissioner is also the Data Protection Commissioner). There is a great deal of merit in combining the two roles, and I do not see a conflict in this.

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?
Yes

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

As I said in answer to question 127 above, I see an important monitoring role which should be performed by some body. A central FOI policy Unit is probably the best choice for receiving / collating the statistics for presentation to Parliament in a report. This is done for example in the Commonwealth and Queensland by the FOI Unit within Attorney Generals (now Prime Minister and Cabinet) and Justice and Attorney General. The Information Commissioner would produce their own report, with their own statistics and observations (and criticisms! based on Commissioners in other jurisdictions).

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?
Yes, as said above.

Guidelines and training

133. Should the FOI Act provide for a designated body to issue guidelines for implementation of the FOI Act?

This is a crucial role for some agency to perform, and one that has fallen by the wayside in NSW for many years. It could be set out in the Act, which would ensure that the body in question could not simply be disbanded in the future, although under-staffing such a body or unit can effectively deprive them of the ability to undertake their legislatively-given role. Oversight by a vigilant Parliamentary Committee should prevent this occurring.

134. If guidelines are to be issued, how can their helpfulness and relevance to FOI practitioners be assured?

Working with practitioners, involving them in working parties drafting and editing the guidelines, and being receptive to ongoing feedback about them would be a good start. To remain relevant they need to constantly under review and updated to reflect external review decisions, whether they are made by an Information Commissioner, ADT, or higher courts. For such frequency of update, it is apparent that they need to be in an electronic online format, with downloadable PDF option.

135. Should such guidelines be binding on agencies subject to the FOI Act?

With policy, it is difficult to say it is “binding” as it is so open to interpretation. However, in general, yes, the policy should be binding on agencies as long as it is legally accurate. The procedural and processing guidelines need not be binding in that agencies are very different, in size, in structure, in FOI decision-making options, and it would be difficult to write these in a way that would be useful to all and also binding on all agencies.

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?

As I said in my answer to question 127 above, I consider such a role best suits a central FOI policy unit, wherever located in government. The Ombudsman and Information Commissioner would have input into such guidelines of course. If there is no central FOI policy unit, and understaffing leads to delays such as occurred in NSW for 14 years, then the Information Commissioner or Ombudsman would have to step in, although they too have resource constraints. The importance of having good quality, up to date guidelines cannot be overstated – they lead to consistent, accurate and fair application of the law to all cases, which should minimize complaints and

appeals.

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?

South Australia has a system of accrediting their FOI officers following completion of training. Within Queensland Health, which has a network of over 60 decentralised FOI decision-makers, they are not given a written delegation from the Director General, or permitted to sign off on an FOI decision until they have completed their 2 day FOI course (which I have been conducting with them for over 15 years). Twice a year, Professional Development Sessions are convened for the FOI officers to update their knowledge.

It is most important for the first-line FOI decision makers to have undertaken basic training, and it is surprising how many have not done so. The problem is worse however with the delegate for internal review, most of whom are senior officers who do not have time to do formal FOI training. Perhaps for this group, the "basic" training could be reduced to say ½ day, as they can hardly do a thorough internal review without understanding the exemption provisions of the Act (which is the main aspect they have to deal with).

Refresher training is also important. Some staff work only part-time on FOI and deal so rarely with requests that they do not have the chance to apply the knowledge acquired during training, and need refresher training after several years. On the other end of the spectrum, experienced full-time FOI decision makers need advanced training where they can discuss the latest external review decisions and hone their skills in the more difficult exemptions using case studies and so on.

The FOI Central Policy Unit or Information Commissioner could require reports from agencies as to the training status of their decision makers. The target would be 100% for first-line decision makers, but perhaps more realistically, 85% for internal reviewers.

138. Should a government organisation or agency have responsibility for the coordination or provision of FOI training?

There are a number of different roles a government organisation could play in FOI training. I have personally played most of those roles in my career – as an in-house FOI trainer, as a trainer/consultant to whole-of-government in the Central Policy Unit; working in a team with the Information Commissioner on training programs; and as an independent private sector consultant/trainer. As long as there is government involvement in approving the course design and content, and ensuring the skills and qualifications of the trainer, the training itself could be provided by government or private sector providers, or a combination of both. As I said in answer to question 137 above, what is important is that the central body ensure that all relevant staff have received training.

139. Should all FOI training courses require certification by an Information Commissioner or similar body before they can operate?

Yes, the course content and the course provider should be assessed and approved by the Information Commissioner or similar body.

Note: I regret that time has not permitted me to respond to every question raised. I would be happy to provide further information about any of my responses if required.

Note about the author:
I have been working in the field of FOI since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory; I have also worked on implementing FOI in Ireland, the United Kingdom, the Cayman Islands and China. Much of this time has been as an FOI practitioner, consultant and trainer. I have personally made over a thousand initial and review FOI decisions, and have trained over 10,000 staff in FOI in Australia and overseas. I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. In 2006 I co-authored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London – details are at www.freedomofinformation.com.au) and my most recent conference paper is at: http://www.icic2007.org.nz/programme_day2.html (link under my name for 1.30 session).