Response to NSW Law Reform Commission Discussion Paper: Privacy and Access to Personal Information

ISSUE 1
How do agencies determine that a document contains information concerning a person's personal affairs, and what steps do and should they take to contact and consult with third parties?

The meaning of "personal affairs" information has been developed over many years through cases in NSW and other jurisdictions. Despite some differing interpretations, particularly with regard to information of public officials, there is not much difficulty identifying personal affairs information of clients. Agencies use this case law, including in its summarized form in the NSW FOI Manual, to assist them to identify "personal affairs" information so that they can assess:

- whether its disclosure would be unreasonable, in which case they can decide to exempt it and do not need to consult the third party;
- whether its disclosure would not be unreasonable, in which case they contact third parties to obtain their views.

Guidance as to the determination of whether disclosure would be reasonable or unreasonable can also be found in the NSW FOI Manual:

> "(1) the nature of the information that would be disclosed;
> (2) the circumstances in which, or the basis on which, the information was obtained by the agency;
> (3) whether the information has any demonstrable relevance to the affairs of government;
> (4) whether the information has any current relevance;
> (5) whether the disclosure of the information would only serve to excite or satisfy the curiosity of the applicant about the person whose 'personal affairs' would be disclosed (in *Director of Public Prosecutions v Smith* (1991) 1 VR 51 the Court noted that the public interest does not mean '*that which gratifies curiosity or merely provides information or amusement'*, drawing a distinction between '*what is in the public interest and what is of interest to know'*);
> (6) the damage likely to be suffered by the person whose '*personal affairs'* would be disclosed, including whether the disclosure of the information would result in some particular unfairness, embarrassment or hardship to a person;
> (7) the relationship between the applicant and the person whose personal affairs may be disclosed (where relevant);
> (8) whether, and if so the degree to which, the information affects or concerns the applicant;
> (9) the applicant's motives or intentions in relation to the application, including whether the applicant intends to use the information for purposes that are illegal, malicious or otherwise not in the public interest (see for example, *BW v Registrar, New South Wales Medical Board* [2002] NSW ADT 76 – at [46]);

(10) whether or not the information is already in the public arena (although the fact that information is in the public arena and no longer private or confidential does not prevent the information from still being categorised as the '*personal affairs*' of an individual but may be relevant to determining whether the disclosure of the information is unreasonable)."

The assessment of whether disclosure would be reasonable, or whether it would be in the public interest (as has been the test in other jurisdictions and is now in the NSW GIPAA), requires agencies to take into account aspects such as the motive or intended use of the information, and the relationship between the applicant and the record-subject, which is not normally the practice in FOI matters (FOI decision makers usually do not inquire into, nor take into account, an applicant's motives etc.). This may require more than the usual initial consultation with the applicant to obtain any relevant information.

The Act requires agencies to take "such steps as are reasonably practicable" to obtain the views of third parties. Where information on file is old, say, more than 10 years old, it can be difficult to contact the third party, as the address we have on file may not be current. Agencies check sources such as the White Pages, Electoral Roll, or even a careful Google search, to attempt to locate a current address for the third party. Depending on the identity and the relationship of the applicant and the third party, the agency may ask the applicant if they are aware of the contact details of the third party, to facilitate the consultation process.

For many agencies, it would be difficult, expensive and time-consuming to take steps beyond those listed here. Some agencies may have internal databases or client lists which they could access to locate a third party, but in most cases it would not be a permissible use of the personal information in the database.

ISSUE 2
How, in practice, do agencies balance the interest of members of the public in being given access to government documents against the interest in protecting the privacy of third parties? In particular, what factors do agencies take into account in assessing the relative public interests? What factors should they take into account?

The factors which are considered in making this decision depend greatly on the identity and relationship of the third parties, the sensitivity of the information and the seriousness of the consequences of either disclosing or withholding the information. I will use some examples to illustrate:

1. A person who was in state care as a child is no longer in contact with his/her family members. The person is requesting information about themselves as a child and about their family members. This information could range from the existence or identity of parents or siblings, to details of the parental neglect which led to their being placed in state care.
2. A public servant who has been unsuccessful in their application for promotion seeks access to the details of the successful applicant.
3. A person against whom a complaint or allegation has been made seeks

access to documents which would identify the complainant.
4. A person seeks access to health records of a deceased relative to obtain information about a possible health condition which may be hereditary.

In the first scenario, the competing interests include: the accountability of the agency for removing the child from the parent's care; the need of the (now-adult) child to understand and gain a perspective on that often-traumatic decision, by knowing the reasons for the decision; the social and emotional needs of the (now-adult) child to potentially gain a support network; the privacy rights of the neglectful or abusive parents; and the privacy rights of siblings who may have grown up in ignorance of their brother or sister. Many of these interests and needs have been recognized in reports such as the Senate Report "Forgotten Australians", which recommended a more sympathetic interpretation of the privacy principles:.

> Para 9.117: "That all government and non-government agencies agree on access guidelines for the records of all care leavers and that the guidelines incorporate the following: …
> - the commitment to the flexible and compassionate interpretation of privacy legislation to allow a care leaver to identify their family and background."

In the second scenario, the interests favouring disclosure again relate to accountability and the agency being able to give reasons and justify the decision, balanced against the level of invasion of the privacy of the successful job applicant. If the only material being released is that which is relevant to the selection criteria (relevant qualifications, work history) and does not include aspects such as home address, domestic situation, health issues, that should achieve an appropriate balance of interests for this situation.

In the third situation, the interests which come into play include the principles of procedural fairness or natural justice, entitling the accused to know the substance of the allegations against them. These principles are often misunderstood and misapplied, but it is often possible to protect the identity of complainants while still giving the accused the essence of the allegation. Occasions when this would not be possible are where the complainant is the victim and a material witness to the proving of the alleged conduct, or where only that complainant would have been in a position to know the matter about which they have made allegations. Agencies have often developed policies to deal with the extent of promises of confidentiality for complainants.

In the fourth scenario, there is a private interest of the applicant in finding out the information relevant to their own health, but in addition, there is a broader public interest in allowing members of the public to take all possible steps to prevent health problems through earlier detection or corrective action. The portions of the health record relevant to the diagnosis may well be disclosed, but other parts of the health records, with no relevance to the living descendant, would be exempt.

ISSUE 3
Does clause 6 of Schedule 1 provide adequate protection for the privacy of third parties?

The test in Clause 6 of whether disclosure would be "unreasonable" provided a flexible tool to assess the diverse factors impacting on disclosure. The phrasing of this question is somewhat biased in favour of protection, where FOI legislation is more about an appropriate balance of public interests in disclosure decisions. Individual privacy does not trump all other considerations. There are cases where the public interests favouring disclosure to the applicant are sufficiently strong as to outweigh the importance of protecting the privacy of the third party. It must be remembered that these are not "all or nothing" decisions – frequently, the decision involves disclosure of segments of personal information of the third party, carefully considered by the decision maker to meet the requirements of the public interest or needs of the applicant.

ISSUE 4
What policies do agencies have in relation to access applications for personal information of persons other than the applicant?

One policy which is important is the possible application of the provision to "neither confirm nor deny" the existence of documents (section 58(1)(f) of the new GIPA Act). This is necessary because even responding to one of the following requests with an exemption-based refusal would be highly invasive of the record-subject's privacy:

1. Person A seeks access to the psychiatric records of Person B.
2. Person A seeks access to any records showing that Person B has mistreated their children.
3. Person A seeks access to unsubstantiated allegations against Person B.

ISSUE 5
To what extent are FOI decision-makers aware of PPIPA, in particular the disclosure provisions in sections 18 and 19? Do FOI decision-makers take these provisions into account in deciding whether to give access to a document? Should they do so?

In my view, FOI decision makers are aware of sections 18 and 19 of PPIPA, but are guided more in their disclosure decisions by the test of unreasonableness in the FOI Act. While I have not undertaken a comparative study, I think that the outcomes under the two Acts would not necessarily be the same – the FOI Act would sometimes result in disclosures which would not be in keeping with the provisions of Sections 18 and 19. However I believe that those outcomes are the appropriate outcomes in terms of the balancing of public interests in the matter and so sections 18 and 19 should not become the sole standard for disclosure in FOI (or GIPA) decisions.

ISSUE 6
What problems arise in practice from overlapping provisions concerning disclosure, access and amendment under these different Acts?

In the past 18 months, reviews have been undertaken of (at least) the federal, NSW and Queensland FOI Acts, and the question of access mechanisms has been raised. There is no one perfect model to provide access to personal information.

An important issue is that very few access applications, even those expressed to be for the applicant's own personal information, contain SOLELY their personal information. Examples:

- Request for their medical file by a patient:
    - Documents on file include information received from family member about themselves and also about the patient eg: a patient's mother advises medical staff in confidence about her own gynaecological history which is relevant to the patient's treatment but not necessarily known to the patient.

- Request for their file by former ward or child in need of protection:
    - Documents contain information about the child, their parents, other family members, alleged abuser/s

- Request for documents concerning complaint made to local council about the applicant:
    - Documents contain information about the complainant, the matter complained about (eg: construction, waste) and the applicant

- Request for documents concerning investigation of the applicant:
    - Documents contain information about the applicant, informants, witnesses, procedural documents

Where there is more than one option in place to seek access to documents, difficulties will arise at the intersection of the various regimes. For example, in Queensland, the new Information Privacy Act (IPA) gives the right of access to individuals to documents "to the extent they contain the applicant's personal information." Applications for any other information, about other people or topics, have to be dealt with under the Right to Information Act. The questions raised by the dual-access structure include situations where documents contain severable segments of information about several individuals, such as family members – can these be dealt with under the IPA ?

These issues make it difficult to have a "purely" personal information access regime, and a "purely" non-personal regime, although that is what many of the review recommendations have been aiming for. Conceptually it would be neater to have an FOI (or GIPA) Act which deals solely with non-personal requests, and a PPIP Act which deals solely with personal requests. However I do not think it is possible to achieve a precise dividing line which would address the difficulties mentioned.

In practice, where there are multiple possible avenues to seek access, members of the public tend to choose whichever is the cheapest or quickest. Where agencies are trying to attract clients to use an administrative access scheme

rather than one of the statutory options, they design the scheme to have advantages compared to the statutory schemes, often through the fees and charges, or the timeframes, or through value-added aspects such as personal explanations of documents.

ISSUE 7
How will the new provisions of GIPA be applied? Will they provide greater or less protection for privacy in NSW?

The provisions relating to personal information in the GIPA Act should provide greater protection for privacy in NSW than the previous ones of the FOI Act. By using the term “personal information” rather than “personal affairs”, the potential amount of information protected by the new Act has increased. The new Act has adopted a public interest balancing test in respect of personal information, and has listed 5 considerations against disclosure (in Consideration 3: **Individual rights, judicial processes and natural justice**) which the decision maker must take into account, and there are several amongst the other considerations such as 1(g) and 2(a) which will also have the effect of protecting privacy. While the Act is less prescriptive about the public interest considerations favouring disclosure, the guidelines which will be issued by the Information Commissioner will no doubt be able to address the wide range of relevant considerations favouring disclosure, such as I have mentioned in my response to Issue 2 above. The identification of these considerations should assist decision makers to make a more balanced decision, and result in appropriate protection of privacy interests.

ISSUE 8
Do FOI decision-makers consider any additional or different factors where the access applicant seeks personal information about public officials? Should they?

I have always preferred that the term “personal information” was defined to carefully exclude specified aspects of the information about public officials. Canada and Ireland both have such a provision; in the Irish example, the definition states:

> *“”personal information … 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,”*

Without this qualification, the potential need to consult with, or delete innocuous personal information of public officials, would be enormous. Files of clients of government agencies are filled with the names, signatures, titles, handwriting and opinions of public officials. The disclosure of these is essential to proper

accountability of the agency for its actions and decisions, and should not have to be considered from a privacy point of view. The meaning of "personal affairs" as set out in Perrin's case supports this approach.

The only situations where the names of public officials could be considered for exemption are the rare cases where the public official is at risk of being stalked or harassed if their name or contact details were disclosed. This can be achieved through protections such as: Public Interest consideration 2(d) in GIPA ("...endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person,") or 3(f) ("...expose a person to a risk of harm or of serious harassment or serious intimidation"), rather than relying purely on the privacy arguments.

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Note: I regret that time has not permitted me to respond in detail to every issue. 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. In recent months I have been closely involved in the implementation of the new Queensland Right to Information and Information Privacy Acts. 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).