

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament. The Government Information (Information Commissioner) Bill 2009 and the Government Information (Public Access) (Consequential Amendments and Repeal) Bill 2009 are cognate with this Bill.

Overview of Bill

The object of this Bill is to provide for access to be given to government information on the basis of a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.

Principal features of the new arrangements for access to government information are as follows:

(a) mandatory proactive release of certain government information (open access information) is required and proactive release of other government information is authorised,

(b) informal release of government information in response to an informal request is also authorised,

(c) a formal access application will be able to be made for access to government information and there will be a legally enforceable right to be provided with

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access to government information pursuant to the access application process provided by the Bill,

(d) access will not be provided to government information if there is an overriding public interest against disclosure (that is, if there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure),

(e) the Bill limits the public interest considerations that can be taken into account as public interest considerations against disclosure of information and provides that there is a general public interest in favour of the disclosure of government information,

(f) the Bill provides that for certain government information (such as Cabinet information) it is to be conclusively presumed that there is an overriding public interest against disclosure,

(g) agency decisions about access applications are reviewable by a process of internal review, review by the Information Commissioner (to be appointed under the Government Information (Information Commissioner) Bill 2009) and review by the Administrative Decisions Tribunal.

The Bill replaces the Freedom of Information Act 1989, which is repealed by the Government Information (Public Access) (Consequential Amendments and Repeal) Bill 2009.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 states the object of the proposed Act, requires that the proposed Act be interpreted and applied so as to further that object and requires the discretions conferred by the proposed Act to be exercised so as to facilitate and encourage access to government information.

Clause 4 contains definitions of key terms used in the proposed Act. Schedule 4 contains other definitions. The clause defines government information to mean information contained in a record held by an agency.

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Part 2 Open government information—general principles

Division 1 Ways of accessing government information

Clause 5 provides that there is a presumption in favour of the disclosure of government information, unless there is an overriding public interest against disclosure.

Clause 6 requires an agency to make the government information that is its open access information publicly available, unless there is an overriding public interest against disclosure of the information.

Clause 7 authorises an agency to make any government information held by the agency publicly available, unless there is an overriding public interest against disclosure of the information.

Clause 8 authorises an agency to release government information held by it to a person in response to an informal request by the person (that is, a request that is not an access application), unless there is an overriding public interest against disclosure of the information.

Clause 9 provides that a person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 (Access applications) of the proposed Act, unless there is an overriding public interest against disclosure of the information.

Clause 10 provides that the proposed Act is not intended to prevent or discourage the publication or giving of access to government information as permitted or required by or under any other Act or law and does not affect the operation of any other Act or law that requires government information to be made available to the public or that enables a member of the public to obtain access to government information.

Clause 11 provides for the proposed Act to override a provision of any other Act or statutory rule that prohibits the disclosure of information, other than a provision of a law listed in Schedule 1 as an overriding secrecy law (for which it is to be conclusively presumed that there is an overriding public interest against disclosure).

Division 2 Public interest considerations

Clause 12 provides that there is no limit on the public interest considerations in favour of the disclosure of government information that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information, and that there is a general public interest in favour of the disclosure of government information.

Clause 13 provides that there is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

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Clause 14 provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1. It also provides that the public interest considerations listed in the Table to the clause are the only other considerations that may be taken into account as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

Clause 15 states the general principles that are to apply to a determination as to whether there is an overriding public interest against disclosure of government information.

Division 3 Assistance and oversight

Clause 16 requires an agency to provide advice and assistance, so far as it would be reasonable to expect the agency to do so, to a person who requests or proposes to request access to government information.

Clause 17 provides for the general functions of the Information Commissioner in connection with the operation of the proposed Act.

Part 3 Open access information

Division 1 Preliminary

Clause 18 lists the government information held by an agency that is to be the agency's open access information and that is required to be made publicly available by the agency under clause 6 (Mandatory proactive release of certain government information). Open access information includes the agency's current publication guide, its policy documents, its disclosure log of access applications and its register of government contracts with the private sector.

Clause 19 provides that Part 3 does not apply to an agency in respect of any functions of the agency listed in Schedule 2 (Excluded information of particular agencies).

Division 2 Publication guides

Clause 20 requires each agency to have a publication guide.

Clause 21 requires an agency to adopt its first publication guide within 6 months after the commencement of the proposed section and review its publication guide and adopt a new publication guide at intervals of not more than 12 months.

Clause 22 requires an agency to notify (and, if required, consult with) the Information Commissioner before adopting or amending a publication guide, and authorises the Information Commissioner to develop guidelines and model publication guides for the assistance of agencies in connection with publication guides.

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Division 3 Policy documents

Clause 23 contains a definition of an agency's policy documents.

Clause 24 deals with the effect of an agency's policy documents not being publicly available when required.

Division 4 Disclosure log of access applications

Clause 25 requires each agency to keep a record (called its disclosure log) that records details of access applications that an agency decided by providing access to information applied for.

Clause 26 lists the information that is to be recorded in a disclosure log.

Division 5 Government contracts with private sector

Clause 27 requires each agency to keep a register (its government contracts register) of government contracts with the private sector that records information about each government contract to which the agency is a party that has (or is likely to have) a value of \$150,000 or more (class 1 contracts).

Clause 28 provides for how the value of a contract is to be determined.

Clause 29 lists the details to be included in the government contracts register for class 1 contracts.

Clause 30 requires further details to be included in the government contracts register for certain significant contracts (class 2 contracts).

Clause 31 provides that a copy of the contract must be included in the government contracts register, if it is a class 2 contract that has (or is likely to have) a value of \$5 million or more (a class 3 contract).

Clause 32 provides that commercial-in-confidence information and certain other confidential information is not required to be included in the government contracts

register.

Clause 33 requires particulars in the government contracts register to be amended to reflect any material variation made to a contract that would affect the particulars that are required to be included in the register.

Clause 34 provides for the minimum period for which information in an agency's government contracts register must be made publicly available as open access information.

Clause 35 provides for the publication of an agency's government contracts register on the NSW Government tenders website.

Clause 36 requires an agency to obtain the opinion of the Chairperson of the State Contracts Control Board in relation to any disagreement between a party to a government contract and the agency as to the way in which the agency has interpreted its obligations under the proposed Division.

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Clause 37 limits the information that is required to be included in an agency's government contracts register to information that the agency holds or that it is reasonably practical for the agency to obtain.

Clause 38 provides that the proposed Division does not apply to a government contract entered into by the Department of State and Regional Development that involves the provision of industry support.

Clause 39 provides that a State owned corporation or a subsidiary of a State owned corporation is not required to include any details of a government contract in its government contracts register if the contract is entered into in the course of activities engaged in by the corporation or subsidiary in a market in which it is in competition with any other person.

Clause 40 provides that the proposed Division does not require Landcom to include any details of a government contract in its government contracts register, if the contract is a contract for the sale of land.

Part 4 Access applications

Division 1 Making an access application

Clause 41 lists the formal requirements for a valid access application for government information.

Clause 42 permits an applicant to include other information in an access application.

Clause 43 prevents an access application being made to an agency for access to government information that is excluded information of the agency (ie information relating to a function of the agency specified in Schedule 2).

Division 2 Transfer, amendment or withdrawal of access applications

Clause 44 authorises an agency that receives an access application to transfer the application to another agency either by agency-initiated transfer or by applicant-initiated transfer.

Clause 45 requires the consent of the other agency for an agency-initiated transfer of an access application to another agency and provides for the circumstances in which such a transfer is permitted.

Clause 46 requires the agreement of the applicant and the agency to which the application was made to an applicant-initiated transfer of an access application to another agency and requires that it appear that the information relates more closely to the functions of the other agency.

Clause 47 requires an agency that transfers an application to give notice of the transfer to the applicant.

Clause 48 provides for the effect of the transfer of an access application.

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Clause 49 provides for the circumstances in which an applicant is permitted to amend their access application.

Clause 50 allows an applicant to withdraw an access application.

Division 3 Process for dealing with access applications

Clause 51 requires an agency to decide whether an access application that it receives is a valid access application and to notify the applicant of its decision.

Clause 52 deals with how an invalid access application can be validated and the obligations that an agency has to assist an applicant to make a valid access application.

Clause 53 limits the obligation of an agency to provide access to government information in response to an access application to information held by the agency when the application is received. An agency is required to undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received.

Clause 54 requires an agency to consult with a person before providing access to information in response to an access application, if it appears that the person may reasonably be expected to have concerns about the disclosure of the information and that those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

Clause 55 authorises an agency, in determining whether there is an overriding public interest against disclosure of information in response to an access application, to consider personal factors of the application (such as the applicant's identity and relationship with other persons) as factors in favour of providing the applicant with access to the information.

Clause 56 provides for an access applicant to request that all or specified information concerning their application not be made publicly available in the agency's disclosure log.

Division 4 Deciding access applications

Clause 57 requires an agency to decide an access application and notify the applicant of the decision within 20 working days after the agency receives the application, subject to a limited right of the agency to extend this period by up to 15 working days.

Clause 58 deals with the various ways in which an agency can decide an access application.

Clause 59 provides for when an agency can decide that information is already available to an access applicant.

Clause 60 sets out the reasons for which an agency can decide to refuse to deal with an access application.

Clause 61 requires an agency to provide reasons for its decision to refuse to provide access to information.

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Clause 62 requires an agency to include in a notice of its decision to provide access to information any processing charges that are payable and how those charges have been calculated.

Clause 63 provides that if an agency does not decide an access application within time, the agency is deemed to have decided to refuse to deal with the application.

Division 5 Processing charges and advance deposits

Clause 64 allows an agency to impose a processing charge for dealing with an access application at a rate of \$30 per hour for each hour of processing time.

Clause 65 provides for a 50% reduction in the processing charge payable by an applicant suffering financial hardship.

Clause 66 provides for a 50% reduction in the processing charge payable by an applicant, if the agency is satisfied that the information applied for is of special benefit to the public generally.

Clause 67 provides that an agency cannot impose a processing charge for the first 20 hours of processing time if an access application is made for personal information about the applicant.

Clause 68 allows an agency to require an applicant to make an advance payment of a processing charge (an advance deposit).

Clause 69 limits the advance deposit that can be required from an applicant to 50% of the estimated total processing charge for dealing with the application.

Clause 70 allows an agency to refuse to deal further with an access application if the applicant does not pay the advance deposit within the required time.

Clause 71 provides for a refund to be made to an applicant of any amount paid as an advance deposit that exceeds the total processing charges payable for dealing with the application.

Division 6 How access is provided

Clause 72 sets out the ways in which access to government information can be provided.

Clause 73 prevents an agency from imposing any conditions on the use or disclosure of information when the agency provides access to the information.

Clause 74 allows an agency to delete from a copy of a record to which access is to be provided information that the agency refuses to provide access to or information that is not relevant to the application.

Clause 75 allows an agency to provide access to information by creating a new record of that information.

Clause 76 provides that an agency may provide access to information that is in addition to the information applied for.

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Clause 77 provides that an entitlement to access to information granted pursuant to an access application must be exercised within 6 months (or a longer period allowed by the agency).

Clause 78 deals with when an agency may defer providing access to information.

Clause 79 provides that an agency does not have to comply with a subpoena or other court order to produce a document to a person if that document has already been provided to the person in response to an access application by that person.

Part 5 Review of decisions

Division 1 Reviewable decisions

Clause 80 sets out the decisions of an agency in respect of an access application that are reviewable decisions.

Clause 81 provides that the review period within which a person may apply for a review of a reviewable decision when more than one reviewable decision is made on an access application and those decisions are made at different times is extended to the end of the review period for the last of those decisions.

Division 2 Internal review by agency

Clause 82 gives a person aggrieved by a reviewable decision the right to apply for a review (an internal review) of the decision by the agency that made the decision.

Clause 83 provides that an aggrieved person must apply for an internal review within 20 days of being notified of the decision, unless the agency agrees to accept the application out of time.

Clause 84 provides that an internal review is done by a person in the agency, who is not less senior than the person who made the original decision, making a new decision.

Clause 85 provides that a \$40 fee is payable for an internal review.

Clause 86 requires an agency to conduct an internal review and notify the applicant of its decision within 15 working days after the agency receives the application, subject to a limited right of the agency to extend this period by up to 10 working days.

Clause 87 provides that there is no processing charge for an internal review.

Clause 88 provides that there cannot be an internal review of a decision made on the internal review of a reviewable decision.

Division 3 Review by Information Commissioner

Clause 89 gives a person aggrieved by a reviewable decision the right to apply for a review of the decision by the Information Commissioner.

Clause 90 requires a person to apply for a review of the decision by the Information Commissioner within 8 weeks after being notified of the reviewable decision.

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Clause 91 provides that the Information Commissioner must not, while conducting a review under the proposed Division, disclose any information for which there is an overriding public interest against disclosure.

Clause 92 provides that, after conducting a review, the Information Commissioner may make recommendations to the agency concerned about the decision.

Clause 93 provides that, after conducting a review, the Information Commissioner may recommend that the agency reconsider its original decision and make a new decision.

Clause 94 provides that, after conducting a review, the Information Commissioner may make a recommendation against a decision of an agency that there is an overriding public interest against disclosure.

Clause 95 provides that, after conducting a review, the Information Commissioner may make recommendations to the agency concerned about its procedures for dealing with access applications.

Clause 96 provides for the circumstances in which the Information Commissioner may refuse to review a decision.

Clause 97 places the onus on an agency to justify its decision in any review by the Information Commissioner, unless the review is of a decision to provide access to information, in which case the onus is on the applicant to establish that there is an overriding public interest against disclosure.

Clause 98 provides that a matter is not to be the subject of review by the Information Commissioner while it is or has been the subject of proceedings before the Administrative Decisions Tribunal (the ADT).

Clause 99 provides that the Information Commissioner may refer a decision that is subject to a review under the proposed Division to the ADT with the consent of the applicant for review.

Division 4 Review by Administrative Decisions Tribunal

Clause 100 gives a person aggrieved by a reviewable decision the right to apply for a review of the decision by the ADT (an ADT review), whether or not the decision has been internally reviewed or reviewed by the Information Commissioner.

Clause 101 requires a person to apply for a review of the decision by the ADT within 8 weeks after being notified of the reviewable decision, or if the decision has been reviewed by the Information Commissioner, within 4 weeks after being notified of the Information Commissioner's decision, whichever gives the longer period to apply.

Clause 102 provides that the procedures for internal review in the Administrative Decisions Tribunal Act 1997 do not apply to reviewable decisions under the proposed Act.

Clause 103 provides that certain provisions of the Administrative Decisions

Tribunal Act 1997 do not apply to an application for ADT review.

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Clause 104 gives the Information Commissioner, and any person who could be aggrieved by a decision of the ADT, a right to appear and be heard in proceedings before the ADT in relation to ADT reviews.

Clause 105 places the onus on an agency to justify its decision in any ADT review, unless the review is of a decision to provide access to information, in which case the onus is on the applicant to establish that there is an overriding public interest against disclosure.

Clause 106 sets out the procedure to be followed for ADT reviews of decisions that relate to Cabinet or Executive Council information.

Clause 107 provides that the ADT must not disclose any information for which there is an overriding public interest against disclosure and must conduct ADT reviews in private if necessary to prevent disclosure of such information.

Clause 108 provides that the ADT may make an order giving an agency more time to deal with an access application that is subject to ADT review, if the decision is a decision that was deemed to be a refusal to provide access to information because the agency did not make the decision within time.

Clause 109 provides that the ADT may refuse to review a decision, if satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance.

Clause 110 provides that the ADT may make a restraint order against a person who repeatedly makes access applications that lack merit. A person against whom a restraint order is made is prevented from making an access application without the approval of the ADT.

Clause 111 provides that the ADT may refer any matter to the Information Commissioner that the ADT considers is indicative of a systemic issue in relation to the determination of access applications by a particular agency or agencies generally.

Clause 112 provides that if the ADT is of the opinion that an officer of an agency has failed to exercise in good faith his or her functions under the proposed Act, the ADT must bring the matter to the attention of the Minister responsible for the agency.

Part 6 Protections and offences

Division 1 Protections

Clause 113 provides that an action for defamation or breach of confidence cannot be brought against the Crown, an agency or an officer of an agency in respect of a decision to disclose government information, if the person who made the decision believed in good faith that the proposed Act permitted or required the decision to be made.

Clause 114 provides that a person (and any other person concerned) who makes a decision to disclose government information is not guilty of an offence under the proposed Act, if the person believed in good faith that the proposed Act permitted or required the decision to be made.

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Clause 115 protects persons involved in the administration of the proposed Act acting in good faith from personal liability.

Division 2 Offences

Clause 116 provides that an officer of an agency who makes a reviewable decision knowing it is contrary to the requirements of the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

Clause 117 provides that a person who directs an officer of an agency to make a

reviewable decision that the person knows is not required or permitted under the proposed Act or who directs an officer to act in a manner that the person knows is contrary to the requirements of the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

Clause 118 provides that a person who influences an officer of an agency to make a reviewable decision that the person knows is not required or permitted under the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

Clause 119 provides that a person who knowingly misleads or deceives an officer of an agency for the purpose of gaining access to government information is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

Clause 120 provides that a person who destroys, conceals or alters government information for the purpose of preventing the disclosure of the information as authorised or required under the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

Part 7 Miscellaneous

Clause 121 requires government contracts with the private sector to include provision that will give the contracting agency an immediate right of access to certain information in the records of the private sector contractor, so as to include that information as information held by the agency for the purposes of an access application.

Clause 122 provides that the proposed Act binds the State and all other Australian jurisdictions.

Clause 123 provides that the proposed Act does not affect the operation of the State Records Act 1998.

Clause 124 limits the powers of the Ombudsman under the Ombudsman Act 1974 so that the powers do not extend to investigating the conduct of any person or body in relation to a decision that is reviewable under the proposed Act.

Clause 125 sets out the requirements for agencies, Ministers and the Minister administering the proposed Act to prepare and submit annual reports about their obligations under the proposed Act.

Clause 126 sets out the notice requirements for agencies under the proposed Act.

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Clause 127 enables an agency to waive, reduce or refund any fee or charge payable under the proposed Act.

Clause 128 provides that proceedings for offences against the proposed Act or the regulations are to be dealt with summarily before a Local Court and may only be taken by or with the authority of the Director of Public Prosecutions or the Attorney General.

Clause 129 is a regulation-making power.

Clause 130 provides for the review of the proposed Act after 5 years.

Clause 131 provides that the Joint Committee to be established under the Government Information (Information Commissioner) Bill 2009 is to review Schedules 1 and 2 and the Table to clause 14 in consultation with the Information Commissioner.

Clause 132 provides that the Regulation set out in Schedule 5 is taken to be a regulation made under the proposed Act, and deals with the operation of the statutory rule making process and staged repeal process in respect of the Regulation.

Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure

Schedule 1 describes the information for which there is a conclusive presumption of

an overriding public interest against disclosure, including information the disclosure of which is prohibited by an overriding secrecy law, Cabinet and Executive Council information, information protected by legal professional privilege and documents affecting law enforcement and public safety.

Schedule 2 Excluded information of particular agencies

Schedule 2 lists government information for which an access application cannot be made, including judicial and prosecutorial information and complaints handling and investigative information.

Schedule 3 Savings, transitional and other provisions

Part 1 of Schedule 3 to the proposed Act provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act and the proposed Government Information (Information Commissioner) Act 2009 and Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009.

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Part 2 of Schedule 3 contains savings and transitional provisions consequent on the enactment of the proposed Act and the repeal of the Freedom of Information Act 1989 by the proposed Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009.

Schedule 4 Interpretative provisions

Schedule 4 contains definitions of terms used in the proposed Act and other interpretative provisions.

Schedule 5 Government Information (Public Access) Regulation 2009

Schedule 5 contains a proposed regulation that is taken to be made under the proposed Act. The Regulation prescribes additional information as open access information of local authorities and imposes additional requirements on local authorities concerning the providing of access to open access information.