COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

FIRST REPORT ON THE INQUIRY INTO ACCESS TO INFORMATION

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Chairman's Foreword

The Committee resolved to inquire into access to information in New South Wales in response to a number of concerns which had been raised by the Ombudsman on successive occasions in annual and special reports to the Parliament, and in submissions and evidence to the Committee, particularly in relation to General Meetings held between the Ombudsman and the Committee.

At the time the terms of reference for the inquiry were drafted, the Committee envisaged that it would be able to make a single report. However, as the inquiry progressed and submissions were received, the Committee realised the complexity and full extent of the issues being experienced in relation to freedom of information, contracting and accountability. It quickly became apparent that each of the three areas covered by the terms of reference warranted a separate inquiry.

Consequently, the Committee has elected to report on the inquiry in stages. This first report examines the first and last items in the terms of reference. The remaining areas of inquiry will be matters for the Committee of the 53rd Parliament to consider. The first report does provide a brief outline of some of the issues raised under the remaining items in the terms of reference.

The report does not propose a 'quick fix' to the issues under examination. In the Committee's assessment, the current schemes for accessing information require further analysis. In particular, the Committee is concerned to ensure that any recommendations for reform should work to improve the situation and make the statutory scheme for accessing information in New South Wales more efficient and effective than at present.

On behalf of the Committee, I would like to thank those departments, organisations and individuals who made submissions and gave evidence to this stage of the Committee's inquiry. I have also appreciated the participation of Committee Members and the assistance of Committee Secretariat staff. I especially wish to thank Mr Gareth Griffith of the NSW Parliamentary Library Research Service, who researched and drafted the bulk of the report, in particular Chapters 2-5.

Paul Lynch MP
Chairman

Chapter 1

Background

1.1 Introduction

This inquiry has its genesis in the seventh General Meeting with the Ombudsman, which commenced on 11 June and concluded on 8 July 1998. General Meetings held between the Committee and the Ombudsman involve taking evidence in public on a wide range of subjects relevant to the exercise of the Ombudsman's functions. The questions on notice for the seventh General Meeting included a number concerning internal reporting systems, contracting of services and freedom of information. Following the General Meeting, the Committee decided that the significance of these matters warranted more detailed treatment and reported separately on them. Issues of access to information were raised in subsequent General Meetings the details of which appear below.

The Ombudsman's comments on freedom of information (FOI) can be grouped under two categories: firstly, those relating specifically to the FOI Act and, in particular, calling for a comprehensive review of its provisions; secondly, those comments dealing with the confusion created by the proliferation of access to information regimes. This last issue was raised in the Ombudsman's Annual Report for 1999-2000. There it was pointed out that there are currently three separate Acts which provide access. They are:

- the *Freedom of Information Act 1989* (the FOI Act), which applies to all documents, including personal information, held by all public agencies including local councils;
- the *Privacy and Personal Information Protection Act 1998* (the PPIP Act) which applies to personal information only; and
- the *Local Government Act 1993* (the LG Act), which applies to all documents, including personal information, held by local councils.

A fourth relevant statutory regime is Part 6 of the *State Records Act 1998* which allows people to inspect certain records of a public sector agency that are over 30 years old, or to apply for those records to be made the subject of a direction to allow access.

1.1.1 Seventh General Meeting

In response to a question on notice the Deputy Ombudsman provided the following suggestions for possible amendments to the FOI Act, to overcome attempts by agencies to transfer ownership and control over agency documents to private contractors and to contract out FOI obligations:

> With reference to the question of who holds documents for the purposes of the FOI Act possible options may include:
>
> - amending section 6(2) of the FOI Act to complement the full and accurate records requirement in the new *State Records Act 1998*. The amendment could provide that agencies must maintain an immediate right of access to any document evidencing the operations of that agency;

- amending section 6(2)(e) to make it a breach of the Act for an agency to relinquish ownership and control of documents created or obtained by an agency in carrying out its functions, other than as provided for under the *State Records Act 1998* or some other statute; and/or
- amending section 6(2)(e) to make it a breach of the Act for an agency to enter into any agreement with any person or body that seeks to or would have the effect of limiting the agency' s right of access to documents that contain records of or related to the activities of the agency.

With reference to attempts to contractually limit obligations under the FOI Act, possible options may include:

- amending section 61 of the FOI Act to extend its application to reviews by the Ombudsman of complaints concerning or relating to refusals to grant access to documents on the basis of commercial in confidence agreements;
- a variation on the above option to provide that where an agency fails to establish that the determination was justified, that the agency is not entitled to rely on the exemption clause and must release the documents;
- including a provision in the Act that agencies are precluded from entering into an agreement of any sort with another agency or a private person or body which could be interpreted as contrary to the letter and/or spirit of the FOI Act;
- amending clause 7 of the Schedule 1 to the FOI Act to include a public interest test in each subclause;
- amending section 25 (Refusal of access) of the FOI Act to provide that agencies shall not refuse access to a document on the basis of any commercial confidentiality agreement with any person or agency other than in circumstances where clause 7 of Schedule 1 clearly applies; or
- including a provision in the FOI Act which provides that any agreement entered into between an agency and any other agency or private person or body which seeks to restrict access to information concerning the operations of the agency has no force or effect for the purposes of the FOI Act in the absence of a certificate signed by the Minister that states that a specified confidentiality agreement is essential for the proper working of government.

The Deputy Ombudsman also noted that in the Ombudsman's Special Report to Parliament of November 1997 entitled *Prince Alfred Hospital Project* it was recommended that public sector agencies be informed that it is unacceptable to enter into confidentiality agreements that are contrary to the letter and spirit of the FOI Act, and that this recommendation was rejected.[1]

1.1.2 Matters Arising from the Seventh General Meeting with the Ombudsman

The Committee commented further on these issues in a follow-up report on matters arising from the seventh General Meeting with the Ombudsman.

With regard to complaints about contracted services the Committee reported:

> The Ombudsman has identified complaints about contracted services as a potential inquiry area for the Committee. In particular, the Ombudsman questioned the adequacy and availability of complaint-handling mechanisms for the public where services are funded, either in whole or in part, by the government and delivered or provided under contract by the private sector.

[1] Committee on the Office of the Ombudsman and the Police Integrity Commission, *Seventh General Meeting with the NSW Ombudsman*, August 1998, Appendix 2.

This matter was raised previously in the Ombudsman's Annual Report for 1996-1997, which examined the issue of whether 'the scope for scrutiny of public authorities has been reduced by contracting out and privatisation'. In this section of the report the Ombudsman asserted:

> The issue of the extent to which a public authority is required to monitor and control the conduct of subcontractors is a difficult one. Ultimately, a balance must be reached between the right of the public authority to contract out thereby removing itself from the day to day delivery of services, and the need to ensure that the subcontractor remains accountable to the public authority.[2]

During the seventh General Meeting, the Ombudsman advised the Committee that this issue had been highlighted at the last interstate Ombudsmens' meeting and had been raised in a number of reports by the Commonwealth Ombudsman. Also at federal level, the Administrative Review Council (ARC) has examined access to information as part of a broader inquiry on the administrative law implications of the contracting out of government services.[3] In May 1998 the Senate Committee on Finance and Public Administration published a second report on its inquiry into the contracting out of Government services.[4] The report contains comments and recommendations consistent with the observations and conclusions made by the ARC.

The NSW Ombudsman gave evidence that the Auditor General claims a practice has developed where state agencies enter into contracts with other agencies performing work for them to escape the requirements of freedom of information legislation. In one case an agency removed certain documents in its possession to a wholly-owned subsidiary company in order to avoid FOI. Commercial in confidence and exemption clauses contained in the FOI Act also were identified as an issue and the Ombudsman called for further information about the tendency for agencies to attempt to avoid FOI by stating in contracts that matters are commercial in confidence when this is not the case.[5]

On the basis of the evidence taken by the Committee it was concluded that the issues raised had 'wide-ranging and significant implications for the accountability of private contractors using public sector funds and resources to provide services, goods or other things under contractual arrangements with public sector agencies'. The Committee noted the examples provided by the Ombudsman as 'serious, unacceptable instances of contract provisions being used by public sector agencies to evade accountability and external scrutiny'. The Ombudsman was requested to forward suggestions for possible amendments to the Freedom of Information Act and

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2 Ombudsman's Annual Report 1996-1997, 'The buck stops at the public authority', pp. 44-5.

3 Administrative Review Council, *The Contracting out of Government Services - Issues Paper,* February 1997 and *The Contracting out of Government Services - Discussion Paper - Access to Information,* December 1997. The terms of reference for the ARC's contracting out project were twofold. Firstly, it examined the circumstances in which federal administrative law, and/or other safeguards, should exist to preserve appropriate government accountability where services are provided to the community on behalf of government by private sector contractors. Secondly, the Council examined whether federal administrative law remedies (and/or other safeguards) should be available to members of the public to seek redress from private sector contractors providing services on behalf of the Commonwealth Government. (see ARC Discussion paper, ibid, p. 25.)

4 Senate Finance and Public Administration References Committee, *Contracting out of Government Services, Second Report,* Commonwealth of Australia. May 1998. (www.aph.gov.au/senate/committee/fapa-ctte/contracting).

5 Evidence 8 July 1998, pp. 23-5.

the Committee recommended as follows:

Recommendation 8
The Committee recommends that:

a. the Auditor General provide the Committee with further information on problems experienced by his office in relation to public sector agencies using contractual agreements with private contractors to avoid existing accountability, complaint handling and redress mechanisms, especially freedom of information requirements.

b. the Ombudsman provide the Committee with further information on the specific problems and cases outlined in her evidence at the seventh General Meeting.

c. the information from the Auditor General and the Ombudsman be assessed with a view to deciding whether to conduct an inquiry with respect to:

   i. the use of contract provisions by public sector agencies engaging private contractors to avoid the requirements of the *Freedom of Information Act 1989*, investigation by the Ombudsman and other accountability measures;

   ii. whether the Ombudsman's jurisdiction should be extended to include the conduct of a private contractor engaged by a public sector agency and using public monies to provide services, goods or other things, on behalf of that agency;

   iii. the adequacy of arrangements for complaint handling and redress in relation to services contracted out by public sector agencies;

   iv. possible legislative amendments to overcome the problems experienced by the Ombudsman in relation to private contractors;

   v. any other matters considered by the Committee to be relevant to the inquiry.

d. the legislative amendments to the *Freedom of Information Act 1989* suggested by the Ombudsman in response to questioning from the Committee be further examined and, where supported, taken up with the Premier as the Minister responsible for administering that Act.[6]

1.1.3 Eighth General Meeting

In light of the Ombudsman's evidence at the eighth General Meeting the Committee resolved to review the earlier report recommendation and propose new terms of reference for an expanded inquiry which would include issues not canvassed at the seventh General Meeting. For example, the operation of freedom of information schemes under the Freedom of Information Act, the Local Government Act, and the Privacy and Personal Information Protection Act, and the impact of these schemes upon the jurisdiction of the Ombudsman and the work of the Office.

1.1.4 Ninth General Meeting

The issue of access to information was discussed again at the ninth General Meeting with the Ombudsman on 1 December 2000. At this stage a number of new issues had emerged in relation to problems experienced as a result of the impact of the new privacy legislation on the existing FOI and local government statutory schemes for accessing information. The Ombudsman submitted that:

> With the introduction of Part 2 of the Privacy and Personal Information Protection Act there are now three separate regimes in NSW for seeking access to, and

[6] Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report on Matters Arising from seventh General Meeting with the Ombudsman, third General Meeting with the Commissioner of the PIC, second General Meeting with the PIC Inspector, Talks with Heads of agencies,* August 1998, pp. 45-52.

> amendment of, documents held by certain public sector agencies. The three regimes are largely incompatible and their existence has created considerable confusion for both users and public officials. (QON. 23)[7]

The Deputy Ombudsman gave evidence that the problems associated with the three schemes were wide-ranging and stemmed from the interrelationship between the FOI Act, the PPIP Act and s.12 of the LG Act. In particular, the Deputy Ombudsman was concerned that:

- different terminology, procedures, and protections applied across the three access to information schemes;
- confusion existed on the part of the applicant and the staff of agencies as to which legislation applications should be processed under;
- in the case of councils an application could be made under the FOI Act, the Local Government Act, and the Local Government Act in the case of personal information.

The Office provided an annexure to the 1999-2000 Annual Report, entitled 'Navigating the Maze' to assist the Committee in its deliberations (see Appendix 3 of this report). Summing up the Ombudsman's wide ranging concerns about the access to information schemes, the Deputy Ombudsman commented in evidence:

> **Mr WHEELER**: Our concern relates not just to section 12 of the Local Government Act. It relates to how that section sits with the Freedom of Information Act and with the Privacy and Personal Information Protection Act. Each of them has an access to information regime. They use different terminology. There are different procedures, and different protections. They are very different animals. So, in going to a council, for example, you have three options. You can go under the FOI Act, and for personal information you can go under the Privacy Act and you can also go under the Local Government Act. So that not only are the members of the public unsure as to what the options are and what is the best way to go, but the staff of agencies have no idea as to the differences between these different provisions and which way they should go, whether they can actually insist that an application be made under the Freedom of Information Act or whether it is totally up to the applicant to decide which one to use.
>
> You will see in the final annexure to our annual report entitled, Navigating the Maze, we have tried to compare the three different access regimes on a whole range of topics. You start off with what they apply to. Two of them apply to documents, one applies to information. As you will be aware, the Freedom of Information Act does not relate to information as such; it relates to documents containing information, whereas the Privacy Act relates to information, whether or not it is a document. The Local Government Act relates to documents. You can go through and find their scopes are very different. Their exclusions from coverage are radically different. Exemptions are different. Whether you need to consult is different. The forms of access provided are different. Fees are different. Protections for the agencies are different. The procedures are very different. Limits on disclosure of personal information are different. Whether you have to give reasons and whether they should be in writing is different. Even merit review. If you go to the Administrative Decisions Tribunal under the Freedom of Information Act, the onus is on the agency. If you go under the Privacy Act the onus is on the applicant.[8]

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7 Report of the Committee on the Office of the Ombudsman and the Police Integrity Commission, ninth General Meeting with the NSW Ombudsman, February 2001, p. 13.

8 ibid., pp. 13-4.

The Committee reported that 'Mr Wheeler advised that the Office considers a review of the access to information schemes necessary in order that there is one "simple and clear" system'. The Deputy Ombudsman highlighted inconsistencies between the schemes. For example, the lack of protection for councils providing access to documents, in the absence of a defence of absolute privilege for publication; the failure to provide councils with a formal capacity to charge fees; and the absence of a cap on the level of fees to be charged.

It was in the light of this evidence that the Committee on the Office of the Ombudsman and the Police Integrity Commission resolved to conduct the present 'Access to information inquiry'. The first head of inquiry under the Committee's terms of reference provides:

> Matters raised in the Ombudsman's Annual Report for 1999-2000 in relation to freedom of information, including but not limited to, the need for a review of the FOI Act 1989, and the proliferation of access to information schemes established under the FOI Act, the Privacy and Personal Information Protection Act 1998, and the Local Government Act 1993.

A further head of inquiry under the Committee's terms of reference provides:

> Legislative amendments to the FOI Act as suggested by the Deputy Ombudsman in response to questioning from the Committee during the 7th General Meeting with the Ombudsman.

1.2 Terms of reference

The following terms of reference for the inquiry were resolved by the Committee on 11 April 2001 and advertised in the *Sydney Morning Herald*, the *Australian* and the *Daily Telegraph* on 21 April 2001:

> In accordance with its functions under s.31B of the *Ombudsman Act 1974* the Committee on the Office of the Ombudsman and the Police Integrity Commission is to conduct an inquiry into:
>
> - matters raised in the Ombudsman's Annual Report for 1999-2000 in relation to freedom of information, including but not limited to, the need for a review of the *Freedom of Information Act 1989,* and the proliferation of access to information schemes established under the FOI Act, the *Privacy and Personal Information Protection Act 1998*, and the *Local Government Act 1993*;
> - the impact of the access to information schemes upon the operation of the Office of the Ombudsman;
> - the use of privacy and confidentiality considerations as a basis for refusing access to information;
> - contractual arrangements between government agencies and private sector contractors providing services on behalf of those agencies, in particular, the reported use of commercial in confidence clauses and the transfer of ownership of documents to avoid the requirements of the FOI Act, investigation by the Ombudsman and other accountability measures;
> - whether the Ombudsman's jurisdiction should be extended to include the conduct of a private contractor engaged by a public sector agency and using public monies to provide services, goods or other things, on behalf of that agency;

- the adequacy of arrangements for complaint handling and redress in relation to services contracted out by public sector agencies;
- legislative amendments to the FOI Act as suggested by the Deputy Ombudsman in response to questioning from the Committee during the 7th General Meeting with the Ombudsman;
- any other matter considered by the Committee to be relevant to the inquiry.

1.3 The inquiry to date

The Committee took evidence from the following individuals and organisations at a public hearing on 21 August 2001:

Mr Bruce Barbour, New South Wales Ombudsman

Mr Gregory Andrews, Assistant Ombudsman

Mr Christopher Puplick**,** Privacy Commissioner, Privacy New South Wales

Mr John Gaudin**,** Legal and Policy Officer, Privacy New South Wales

Mr John Scott, Director, Department of Local Government

Mr David Hugh Roberts, Director, State Records Authority of New South Wales

A list of departments, agencies and individuals who have made submissions to the inquiry is attached at Appendix 1.

Chapter 2

Setting the scene

The Ombudsman, FOI and the proliferation of access to information regimes

2.1 FOI, the Ombudsman and the ADT

In contrast to most other Australian jurisdictions, in NSW there is no person or body specifically charged and resourced to monitor the implementation of the FOI Act. Whatever monitoring and oversight of the Act that does take place is undertaken by the NSW Ombudsman. The Ombudsman's role in the investigations of complaints is set out in sections 52 and 52A of the FOI Act. These provisions are to be read in conjunction with section 26 of the *Ombudsman Act 1974*, which sets out the Ombudsman's powers to report on investigations. As explained by the Ombudsman in his Annual Report for 2000-2001, he has a role:

> to externally review conduct of public sector agencies in relation to FOI applications by the public for access to information held by the agency. We review how agencies handle FOI applications and the merits of the decisions they make.[9]

The Ombudsman's external review powers have been interpreted broadly.[10] Nonetheless, they are only to 'recommend' that, for example, an agency reconsider its determination to restrict access to a particular document. They are not 'determinative' powers. The Ombudsman cannot change or reverse a decision. That power lies with the Administrative Decisions Tribunal (ADT). According to the ADT's President, Justice Kevin O'Connor:

> The ADT's order-making powers in relation to FOI matters are set out in the ADTA [*Administrative Decisions Tribunal Act 1997*] and are to affirm, vary or set aside the decision, or to remit to the agency with recommendations. These are the powers typically given to tribunals in Australia that are responsible for undertaking 'merits review' of administrative decisions by Ministers, agencies and officers of agencies.[11]

To assist public sector officials in the implementation of the FOI Act, the Ombudsman's Office has prepared a document titled, *FOI Policies and Guidelines*, the second edition of which was released in 1997. This operates in addition to the FOI Procedure Manual prepared by the Premier's Department, the third edition of which was released in 1994. At present, the Premier's Department and the Ombudsman's Office are working on a combined FOI Manual to replace the current publications.

2.2 The Ombudsman's access to information survey

As part of his submission to the present inquiry, the Ombudsman conducted in April 2001 an 'access to information survey'. The survey was sent to FOI/Privacy coordinators in public sector agencies and local councils and sought information about: (a) their experience with implementing the PPIP Act; (b) their understanding

9 NSW Ombudsman, Annual Report 2000-2001, p. 104.

10 *Botany Council v The Ombudsman* (1995) 37 NSWLR 357.

11 K O'Connor, 'The privacy and FOI jurisdiction of the NSW Administrative Decisions Tribunal' (2002) 9 *Privacy Law and Policy Reporter* 15.

of the relationship between the FOI Act and the PPIP Act; (c) their views on the interrelationship between the different access to information schemes, the FOI Act and the PPIP Act, and (d) their views on the level of understanding their agency has about how the FOI Act and the PPIP Act interrelate with each other.

The Ombudsman received 98 responses. As summarised in his Annual Report for 2000-2001, some significant findings included:

- Over 60% of those surveyed found the interrelationship between the schemes confusing and/or incomprehensible;
- 91% of the 20% who found the interrelationship clear and simple or understandable still gave incorrect answers or were unsure of the answer as to whether at least three provisions of the FOI Act applied to applications for access under the PPIP Act;
- Over 80% gave incorrect answers or were unsure of the answer as to whether at least three provisions of the FOI Act applied to applications for access under the PPIP Act;
- Only two respondents correctly identified all of the nominated provisions of the FOI Act which applied to applications for access under the PPIP Act. (Interestingly, one of these respondents said they thought the interrelationship between the access to information regimes in the two Acts was clear and simple, understandable as well as confusing);
- More than 50% of respondents stated that people in their agency understood how the FOI Act and the PPIP Act interacted only generally or not at all.

In evidence, the Ombudsman commented in respect to the survey results:

> I think the key issue which comes from the results of the survey is the depth of lack of understanding of practitioners in this area, not only within State Government but also local government, and their confusion about the way in which the various pieces of legislation interact and the way in which they should be applied to different area the subject of request.[12]

2.3 Access to information application rates under the FOI and privacy regimes

The Ombudsman also submitted that the survey found that in the year since the access to information scheme in Part 2 of the PPIP Act began in July 2000, people have not been using it:

> Of the agencies who responded, only 11 of them have received requests and there have only been 54 requests in total. In contrast, in the year before the scheme started, over 5,800 applications were received under the FOI Act for access to information concerning personal affairs held by all the agencies we audited.[13]

The issue was discussed in evidence given by the Ombudsman. In answer to a question from the Chair seeking an explanation 'for the differences in the rates' of access to information applications under the FOI and PPIP Acts, the Ombudsman commented that it is, in part, because the FOI Act 'is the best known of the access regimes'.[14]

12 Evidence, NSW Ombudsman, 21 August 2001.
13 NSW Ombudsman, Annual Report 2000-2001, p. 111.
14 Evidence, NSW Ombudsman, 21 August 2001.

2.4 The Ombudsman's recommendations

These were set out in the Ombudsman's submission of June 2001. Several specific amendments to the FOI Act were recommended. Recommendations relevant to the 'proliferation of access to information regimes' were as follows:

- The FOI Act should be the sole avenue for access to information where an agency or public official has any discretion for the determination of such an application.
- The FOI Act should be the primary avenue for amendment of records concerning personal affairs/information.
- Section 20(5) of the PPIP Act should be repealed and replaced with a clause which exempts bodies subject to the FOI Act from the operation of sections 13-15 of the privacy legislation.[15]
- Section 12(6) and (7) of the Local Government Act should be repealed.[16]

2.5 Comment

In summary, if acted upon, these recommendations would centralise much of the 'privacy' jurisdiction under the auspices of the Ombudsman's office. The Ombudsman has not recommended the repeal of the PPIP Act and section 12 of the LG Act as such, but effectively, as the Deputy Ombudsman submitted in evidence, the recommendations are consistent with the argument for one 'simple and clear' system for seeking access to, and amendment of, documents held by certain public sector agencies. This was confirmed by the Ombudsman in evidence to this inquiry where he supported the proposition put by the Hon Peter Breen MLC that, 'in an ideal world', the FOI and PPIP Acts could be combined.

Two key issues emerge. One is the question of the need for a comprehensive review of the FOI and other access to information regimes. The other is the question of reforming the oversight and administrative mechanisms associated with these regimes.

[15] In effect this is the purpose of section 20 (5) of the PPIP Act at present. The Ombudsman would replace this with a more simply worded provision along the lines of clause 20(5) of the Privacy and Personal Information Protection Bill 1998 which stated: 'Sections 13-15 do not apply to a public sector agency that holds personal information that is subject to the FOI Act 1989'.

[16] Section 12(6) provides that, subject to various exceptions, a Council must allow inspection of documents free of charge. Section 12(7) sets out certain exceptions which apply, including for documents dealing with 'personnel matters concerning particular individuals'.

Chapter 3

Overview of access to information regimes in NSW

Three pieces of legislation regulate access to information in New South Wales. These are the *Freedom of Information Act 1989,* the *Privacy and Personal Information Protection Act 1998* and the *Local Government Act 1993.* The *State Records Act 1998* impacts significantly on the operation of these three Acts.

The relationship between the first three access to information regimes was set out in the Ombudsman's Annual Report for 1999-2000 in a table entitled 'Navigating the Maze'. This is reproduced at Appendix 3 to this report. In July 2002 the NSW Privacy Commissioner published an account, in table form, of the important points of difference between the FOI Act and the PPIP Act. This is reproduced at Appendix 4 to this report.

3.1 The *Freedom of Information Act 1989* (the FOI Act 1989)

3.1.1 Objective

The *Freedom of Information Act 1989* is both shield and sword. As shield, its object is to ensure that government records relating to the personal affairs of individuals 'are not incomplete, incorrect, out-of-date or misleading'. As sword, its object is to extend the right 'to obtain access to information held by the Government'.[17] In this last capacity, the purpose of FOI legislation generally is to make public sector decision making processes more accessible to the public, thereby promoting and enhancing the processes of democracy and representative government. As stated by the Senate Standing Committee on Constitutional and Legal Affairs:

> The essence of democratic government lies in the ability of people to make choices: about who shall govern; or about which policies they support or reject. Such choices cannot be properly made unless adequate information is available. It cannot be accepted that it is the government itself which should determine what level of information is regarded as adequate.[18]

The basic purposes and principles of FOI legislation have been described as follows:

- to make government more accountable by making it more open to public scrutiny;
- to improve the quality of political democracy by giving the opportunity to all members of the community to access information that will permit more meaningful participation in the processes of government, including the formulation of policy;
- to enable persons to be kept informed of the functioning of the decision-making process as it affects them and to know the criteria that will be applied by government agencies in making those decisions; and
- to enable individuals to have access to information about them held on government files, so that they may know the basis on which decisions that

[17] FOI Act 1989, section 5(1).

[18] Parliament of Australia, Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information*, 1979, p. 22.

> can fundamentally affect their lives are made and may have the opportunity of correcting information that is inaccurate, incomplete, out-of-date or misleading.[19]

3.1.2 Main provisions

The Act allows access to a range of information held as records by government agencies. This is an unconditional right of access to government documents under the Act in the sense that an applicant does not have to provide a reason or special need for access to the documents. All members of the public have the same right of access, irrespective of the reason for applying for access. The Act provides that a person has a legally enforceable right to be given access to an agency's documents, or a Minister's documents that relate to the affairs of an agency, in accordance with the Act.[20] An 'agency' is defined as a government department, public authority, local authority or public office.

Document is defined as follows:

> **document** includes:
>
> (a) any paper or other material on which there is writing or in or on which there are marks, symbols or perforations having a meaning whether or not that meaning is ascertainable only by persons qualified to interpret them, and
>
> (b) any disc, tape or other article from which sounds, images or messages are capable of being reproduced.[21]

There is a right of access to all documents (subject to exemptions) regardless of the date the document came into existence.[22]

The right of access includes the right to amend personal information held by the agency, as well as the right to appeal decisions not to grant access to information or amend personal records.

Certain bodies are exempt under the Act. These include the Legislative Council, Legislative Assembly, Parliamentary Committees, Royal Commissions, and Courts and Tribunals in relation to their judicial functions. In addition, Schedule 2 of the Act provides a list of agencies that are exempt in relation to specified functions.

Schedule 1 of the Act specifies categories of documents that are exempt from disclosure. The Act contains a range of exemptions for particular documents such as Cabinet documents and Executive Council documents. A commercial in confidence exemption also applies. Some of these exemptions are subject to some form of public interest test, that is, the public interest in, or against, disclosure must be considered in the decision whether to disclose the requested information. The

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19 Queensland Information Commissioner (Qld IC), Submission by the Information Commissioner (Qld) to the Legal, Constitutional and Administrative Review Committee on the Review of the *Freedom of Information Act 1992* (Qld), 14 May 1999, www.parliament.qld.gov.au/committees/LCARC/LCARC%20FOI.htm

20 Sections 16; and section 35 and definition of 'Minister's document' in section 6.

21 Section 6.

22 Previously an agency could refuse access to a document which came into existence more than five years prior to the commencement of the Act. This provision was repealed in 1992.

Premier can issue a Ministerial certificate in relation to three exemptions: Cabinet documents, Executive Council documents, and documents relating to law enforcement and public safety. A ministerial certificate lasts for two years and is taken to be conclusive evidence that a document is exempt.

There is a $30 application fee under the Act. In addition, there is a processing fee of $30 per hour (there is no fee for the first 20 hours processing for documents about the applicant's personal affairs). There is no maximum fee that may be charged. Fees are subject to a 50% reduction in some circumstances.

The Act requires agencies to publish a 'Statement of Affairs' every 12 months, and a 'Summary of Affairs' every six months. Each agency is also required to prepare an annual report to Parliament on their obligations under the Act.

3.1.3 Administration

The Freedom of Information Unit in the Premier's Department was originally responsible for providing information about the operation of the Act. The Ombudsman has since assumed a de facto oversighting role and mediates complaints about the operation of the Act.

3.1.4 Review

Provision is made for three forms of appeal from an agency's decision: (a) internal review by the agency (where available), a pre-requisite to other appeal options; (b) review by the Ombudsman; and (c) appeal to the Administrative Decisions Tribunal. In effect, if dissatisfied with an agency's internal review of a decision, an applicant can request the Ombudsman to investigate. The Ombudsman is only empowered to make recommendations, not to change decisions. Alternatively, the applicant could request that the ADT review the agency's decision. The Tribunal is empowered to make a fresh determination. The ADT can be used either as an alternative to an external review by the Ombudsman, or after the Ombudsman has completed an external review.

3.1.5 Assessment of performance

The achievements of the FOI Act in attaining its objectives has been the subject of considerable and varied comment.[23] Criticisms include the argument that the commercial in confidence and Cabinet documents exemptions are over-used to prevent access. A specific area of concern relates to the way contracting out and outsourcing can diminish access to FOI.[24] The Ombudsman submitted that one ground justifying a review of the FOI Act was that 'public sector agencies are increasingly contracting out their functions and activities to bodies that are not subject to the FOI Act'.[25]

It is also said that the Act is mainly being used to gain access to applicants' personal information. Only a minority of requests relate to government policy development and decision-making, and these requests are more likely to be denied.[26] On the other side, it is said that when the requested documents are non-contentious, agencies

[23] For a comprehensive review of these see – A Rath, *Freedom of Information and Open Government*, Parliamentary Library Research Service Background Paper No 3/2000.

[24] Submission No.17, Public Interest Advocacy Centre, 31 May 2001, pp. 2-3.

[25] Submission No.18A, NSW Ombudsman, June 2001, p. 8

[26] A Cossins, *Annotated Freedom of Information Act NSW*, LBC Information Services 1997, p. 34; NSW Ombudsman, Annual Report 1998-1999, p. 109.

appear to be complying well with the letter and spirit of the FOI Act.[27]

3.2 The *Privacy and Personal Information Protection Act 1998* (the PPIP Act 1998)

3.2.1 Purpose, scope and coverage

Privacy legislation is, by definition, more shield than sword, concerned as it is with the 'protection' of personal information and the privacy of individuals. The NSW PPIP Act is no exception.

Coverage is limited to the State public sector. The private sector is regulated instead under the Commonwealth *Privacy Act 1988*, as amended by the *Privacy Amendment (Private Sector) Act 2000* (Cth). In an anomalous position are NSW State-owned corporations. These are not covered under the NSW privacy regime and would only be covered under the federal scheme if expressly prescribed by regulation at the request of the State.[28]

3.2.2 Main provisions

The PPIP Act requires public sector agencies to comply with 12 'information protection principles' (IPPs). These IPPs apply to 'personal information', a term defined to mean 'information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion'. Contrasting this with the information covered under the FOI Act, the Privacy Commissioner noted that personal information under the PPIP Act includes 'genetic material, electronic records, video recordings, photographs and biometric information'.[29]

Three of the IPPs relate to information access and alteration as follows:

- *Information about personal information held by agencies*: s. 13 requires agencies to take reasonable steps to enable individuals to find out if the agency holds information about them, and if so, the nature of that information, what it is used for, and how it may be accessed.
- *Access to personal information held by agencies*: s. 14 requires agencies to provide access to personal information upon the request of the person to

[27] C Wheeler, 'Public sector compliance with FOI in NSW' (1999) 81 *Freedom of Information Review* 38 at 42.

[28] G Griffith, *Information Privacy and Health Records*, NSW Parliamentary Library Research Service Briefing Paper No 6/2002, p. 21. On this jurisdictional issue generally the relevant Second Reading speech commented: 'The bill is not intended to cover State and Territory public sector agencies, as this is a matter for the States and Territories themselves. The bill recognises that State and Territory government business enterprises, or GBEs, take many forms and the dividing line between the public and private sectors is not always clear. In order to ensure certainty, the bill provides that GBEs that are incorporated under the Corporations Law will automatically be covered by the bill unless they are prescribed otherwise by regulation. Those GBEs not incorporated under the Corporations Law, such as statutory corporations, will not be covered by the bill. To meet the varying requirements of State and Territory governments, however, the bill also provides a flexible opt-in opt-out mechanism for prescribing State or Territory instrumentalities. This will be achieved by regulation and will be done only at the request of the State or Territory government' – *Commonwealth Parliamentary Debates (House of Representatives)*, 12 April 2000, p. 15751; *Privacy Act 1988* (Cth), section 6C.

[29] C Puplick, 'Privacy and freedom of information legislation in NSW' (2002) 9 *Privacy Law and Policy Reporter* 13.

whom the information relates. The information must be provided without excessive delay or expense.

- *Alteration of personal information*: s. 15 provides that an agency that holds personal information must, at the request of the person to whom the information relates, make appropriate amendments to ensure the information is accurate, relevant, up-to-date, complete and not misleading.

The PPIP Act also contains information protection principles that provide for limits and restrictions on the disclosure of personal information as follows:

- *Limits on disclosure of personal information*: s. 18 provides that an agency must not disclose personal information to a person or body (other than the person to whom the information relates) unless one of three conditions is satisfied.
- *Special restrictions on disclosure of personal information*: s. 19 provides for special restrictions on the disclosure of personal information in specified circumstances.

3.2.3 Codes

Part 3 of the Act provides for the making of privacy codes and management plans, which can allow an exemption from, or modification to, any of the IPPs in the Act. Codes must be first submitted for consultation to the NSW Privacy Commissioner and be approved by the Minister.

3.2.4 Complaints and review

Part 4 establishes the office of the NSW Privacy Commissioner and sets out the complaints mechanism. Enforcement provisions are then established under Part 5. In brief, individuals have the right to seek a review by an agency where the individual believes their privacy has been breached. The main responsibility for the review lies with the agency, although if requested by the agency the Privacy Commissioner can undertake a review on its behalf. Where an individual is not satisfied with the outcome of an internal review, they can appeal to the Administrative Decisions Tribunal (ADT). As to the role of the Privacy Commissioner, it has been said that he is:

> obliged to seek to resolve complaints by conciliation. The Privacy Commissioner, like the Ombudsman in FOI matters, may make recommendations to a respondent to a privacy complaint as to what action might be taken in response to the complaint.[30]

As to the role of the ADT, its President explained that, in contrast to the position in FOI cases, the Tribunal:

> has a wide power to make appropriate orders in PPIPA cases. It may require the payment of monetary compensation in respect of a contravention to a maximum amount of $40,000. It may, for example, require an agency to cease contravening conduct, to engage in conduct consistent with the principles, to correct personal information that has been disclosed.[31]

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30 K O'Connor, 'The privacy and FOI jurisdiction of the NSW Administrative Decisions Tribunal' (2002) 9 *Privacy Law and Policy Reporter* 15 at 16.

31 ibid.

3.2.5 Relationship with the FOI Act

Clearly there is significant overlap between the FOI Act and the PPIP Act as both Acts provide for a right of access to, and alteration of, personal information held by government agencies. The PPIP Act expressly provides that it does not affect the operation of the FOI Act (section 5). Further it states that sections 13-15 do not affect any conditions or limitations in the FOI Act, and that those conditions or limitations apply as if they were part of the PPIP Act (section 20(5)). It appears that this provision means that an agency can rely on any condition or limitation in the FOI Act to refuse notification, access or correction rights under sections 13-15 of the PPIP Act.[32] The NSW Privacy Commissioner commented in June 2002 that section 20(5) 'is extremely ambiguous as to how exactly the access and correction provisions of the PPIP Act relate to the FOI Act'.[33] It has been noted that the Ombudsman recommended its amendment.

3.3 The *Local Government Act 1993* (NSW) (the LG Act 1993)

3.3.1 Purpose

In 1993 section 12 of the LG Act was created to provide a new and alternative regime, from that available under the FOI Act, to provide access to documents held by councils. The Department of Local Government submitted that the section 'addressed a need for a cheaper, faster and more informal system than FOI applications'.[34]

3.3.2 Content

Section 12 provides that, subject to limited exceptions, all local council documents must be available for inspection free of charge. Information that is to be publicly available includes: annual reports; financial reports; minutes of meetings; development applications; building applications and records of approvals granted. According to the Department of Local Government, the documents listed are those 'considered essential for members of the public to be able to see quickly and free of charge to ensure proper accountability of the council, as well as to enable full public participation in councils' decision-making processes'.[35] On the other hand, under s.12(6), documents that cannot be inspected include: 'personnel matters concerning particular individuals'; documents that deal with personal hardship of a resident or ratepayer; or trade secrets.

Section 12 (2)(8) provides that for the purposes of determining if a document is exempt on the grounds that it may be contrary to the public interest, it is irrelevant if inspection of the document may cause: (a) embarrassment to councillors or council employees; (b) loss of confidence in the council; or (c) a person to misinterpret information contained in the document because of an omission from the document or for any other reason.

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32 NSW Privacy Commissioner, *Local Government and the Privacy and Personal Information Protection Act*, Issues Paper, January 2000, section 3, www.lawlink.nsw.gov.au/pc.nsf/pages/localgovernment

33 NSW Privacy Commissioner, *Position paper on the Health Records and Information Privacy Bill* 2002, 14 June 2002, p. 4 - www.lawlink.nsw.gov.au/pc.nsf/pages/hripcomment
Note that elsewhere the Privacy Commissioner commented: 'The interaction of the access and amendment rights given by the PPIPA with those found under the *Freedom of Information Act 1989*…are addressed by clear provisions in PPIPA indicating that the relevant IPPs do not override the FOI Act' – C Puplick, 'Privacy and freedom of information legislation in NSW' (2002) 9 *Privacy Law and Policy Reporter* 13.

34 Submission No.14, Department of Local Government, p. 5.

35 ibid., p. 6.

Under section 12A, if it is decided that access to a document is not to be granted, then the reasons why must be made public and the restriction reviewed after 3 months. The Council must remove the restriction if it finds there are no grounds for it, or if access to the document is granted under the *Freedom of Information Act 1989.*

3.3.3 Enforcement

It was pointed out by Department of Local Government that decisions under section 12 of the LG Act are not currently reviewable by the Administrative Decisions Tribunal. Instead, a dissatisfied applicant must pursue an action in the Land and Environment Court. According to the Department, 'The Government previously reviewed this issue in 1997, and determined not to make any change to the present system'.[36] As discussed later, the Department supported the retention of the status quo.

3.4 Other relevant legislative schemes – existing and proposed

The relevance of two further Acts, one federal, the other State, and one NSW Bill to information access regimes in this jurisdiction can also be noted.

3.4.1 The *State Records Act 1998* (NSW)[37]

This Act provides for the creation, management and protection of government records and archives. In his second reading speech, the Minister stated:

> It will promote a consistent and coherent regime of management processes from the time of the creation of records and, before creation, in the design of record-keeping systems through to the preservation and use of State records as archives.[38]

Part 2 of the Act sets out the record management responsibilities of public offices, including obligations to:

- make and keep full and accurate records of the activities of the office;
- institute a records management program in accordance with standards and codes of best practice for records management;
- ensure the safe custody and proper preservation of State records;
- maintain accessibility to electronic records; and
- make arrangements for monitoring and reporting on the records management program.

Part 3 of the Act relates to the protection of state records. Under this Part, disposal of state records is prohibited subject to a range of exceptions. Such exceptions include where the State Records Authority has authorised disposal of records, or where disposal of records is done in accordance with normal administrative practice as defined in the Act.

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36 ibid., p. 17.

37 Much of the information in this section is taken from the State Records Authority's website: State Records Authority of NSW, *State Records Act: Summary of Provisions*, www.records.nsw.gov.au/publicsector/sract/actsummaryprov.htm; and State Records Authority of NSW, State Records Act: An introduction to the State Records Act, www.records.nsw.gov.au/publicsector/sract/actintro.htm

38 *NSWPD*, 21/05/98, p. 5017 per the Hon. M Egan MLC.

Part 6 provides that state records are open for access when they are at least 30 years old and they have been declared open by the creating agency. Records that are at least 30 years old are in the 'open access period'. Records in the open access period must be subject to an 'access direction'. An access direction states that the records are open to public access (an 'OPA direction') or are closed to public access (an 'CPA direction'). The Act provides that records may be released for public access by the relevant public office before they enter the open access period. Further, special access arrangements, approved by the Premier, can be made for records that are not open to public access. The Act expressly provides that the fact that a record is not open to public access does not affect any entitlement under the FOI Act (section 56).

The obligations in the State Records Act regarding the creation, maintenance and preservation of government records impacts on what information is potentially available to be accessed under the FOI and privacy regimes.[39] The Minister recognised the importance of good record keeping to accountability when introducing the State Records Bill to Parliament:

> The impetus for change [from the Archives Act to the State Records Act] comes mainly from two sources: first, a perception that governments and other public institutions should be made more accountable, coupled with a recognition by several royal commissions in New South Wales and interstate of the link between accountability and good record keeping.[40]

3.4.2 The federal *Privacy Act 1988*

Prior to the enactment of the *Privacy Amendment (Private Sector) Act 2000* (Cth), which commenced on 21 December 2001, the federal privacy regime was largely confined to the public sector. In effect, it protected personal information held by the federal public sector and tax file numbers wherever held; it also regulated the collection, use and disclosure of consumer credit information by private sector organisations.

The new private sector provisions set up a regime for the regulation of 'organisations'. The term is defined broadly to include an individual, body corporate, partnership, an unincorporated association or a trust; but to exclude:

- a small business operator;
- a registered political party;
- an agency;
- a State or Territory authority; or
- a prescribed instrumentality of a State or Territory.[41]

The private sector regime may be described as a 'light touch' co-regulatory model which allows organisations covered by the legislation to choose to be bound by a privacy code of practice approved by the federal Privacy Commissioner or, where

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39 Australian Law Reform Commission and Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982*, Report No.77 (ALRC) and Report No.40 (ARC), 1995, para 5.8. The report commented on the importance of record keeping for an enforceable FOI regime. These comments were made in relation to the Commonwealth FOI Act, but apply equally to New South Wales.

40 *NSWPD*, 21/05/98, p. 5017, per the Hon. M Egan MLC.

41 *Privacy Act 1988* (Cth), section 6C.

such a code is not in place, by the 10 National Privacy Principles (NPPs). The NPPs are broad legislative principles, rather than highly specific legal rules and, as such, they are intended to operate as a default framework in the absence of industry codes.

No direct overlap exists between the federal privacy regime and its NSW counterpart which operates solely in respect to the State's public sector. Where some overlap may arise is in those areas where the relationship between the public and private sectors is especially close. The obvious example is in relation to health records. In that case, for example, the information held about a patient in the State's public hospital system may be used in a private hospital which is subject to the federal private sector privacy regime.

3.4.3 The *Health Records and Information Privacy Act 2002*

Largely to overcome the unique 'access' problems existing in the health sector, in June 2002 the NSW Government introduced the Health Records and Information Privacy Bill. The Bill received assent on 25 September 2002 but the Act's commencement has not yet been proclaimed. Unlike the PPIP Act, the Health Records Act covers health service providers, as well as organisations that 'collect, hold or use health information', in the public and private sectors.

The relationship between the Act and the PPIP Act is twofold. Firstly, the Act excludes health information from the definition of 'personal information' under the PPIP Act. In this way, the protection of health privacy is made the exclusive concern of the Health Records Act. Secondly, the complaints mechanism established under Part 5 of the PPIP Act remains in operation for public sector health service providers.

This application of the existing privacy complaints regime to public sector agencies is established under Part 3 of the Act which is headed, 'Provisions for public sector agencies'. In effect, breaches of any of the 15 Health Privacy Principles or any relevant code of practice by a public sector agency are to be dealt with in the same way as any breach of an Information Privilege Principle under the PPIP Act. The full requirements for internal review apply therefore, as do the avenues of appeal to the Administrative Decisions Tribunal.

It is also the case that the FOI Act would not be affected by the Act. Indeed, any rights of access and correction under the FOI regime are to apply as if they were part of the Health Records and Information Privacy Act. These arrangements mirror the relationship between the FOI Act and the PPIP Act.

Complaints against the private sector are dealt with under Part 6 of the Act. A scheme is set in place where complaints are received, assessed and dealt with by the NSW Privacy Commissioner who may: seek to resolve the complaint by conciliation; make further investigations and report on the complaint; or determine that the complaint has been resolved. Where the NSW Privacy Commissioner has reported on a complaint, the outcome can be appealed to the Administrative Decisions Tribunal which has a range of actions open to it, including ordering the respondent organisation to pay compensatory damages of up to $40,000 in the case of a body corporate, or $10,000 in any other case.

The Privacy Commissioner is central to the enforcement and operation of the private sector scheme. One example is that the Commissioner must be consulted about the making of any code of practice before it is submitted to the Minister for approval.

Similarly, under the Act it is the Privacy Commissioner who issues any relevant guidelines, but he or she does so with the Minister's approval.

A point of comparison to make with the position in Victoria is that there the newly established Privacy Commissioner's Office does not handle health information complaints. Instead, these are to be dealt with by the Health Services Commissioner. The NSW model, on the other hand, centralises all privacy-related complaints under the auspices of the NSW Privacy Commissioner. As the Minister noted in the Second Reading speech for the Bill, it follows closely the recommendations of the Ministerial Advisory Committee on Privacy and Health Information chaired by the Privacy Commissioner, Chris Puplick.[42]

In terms of the 'Access to Information Inquiry', the effect of this Act adds an extra legislative layer to the access to information regimes in NSW. The question arises as to whether this would add to the kind of complexity or confusion which has been of concern to the Ombudsman. Probably not, at least to the extent that its public sector provisions reflect those already found in the PPIP Act.

3.5 Comment

A plethora of legislative regimes operates in relation to access to information. Their scope varies. Their objectives are similar though not identical. Clearly, it is in the interests of the public and administrators alike for these regimes to be consistent, intelligible and effectively monitored.

[42] *NSWPD*, 11 June 2002, p. 2958.

Chapter 4

Issues – Confusion, conflict, and overlap

4.1 Similar and varying perspectives

As discussed, the problematic relationship between the three access to information regimes was considered in the Ombudsman's Annual Report for 1999-2000. There it was argued that the way in which the PPIP Act, the FOI Act and the LG Act interact needs to be examined. The same ground was covered by the Deputy Ombudsman in evidence to this inquiry. For the most part, the submissions support the proposition that overlap and potential confusion exist between the three legislative regimes. The Ombudsman's specific formulation of that proposition was expressly endorsed by the Local Government Association of NSW,[43] the Shires Association of NSW[44] and Rockdale City Council.[45] The latter submitted:

> It has become a concern that the increase in the number of access to information procedures has made the process of obtaining information a very complex and confusing one, not only for our customers but also for our staff.

At the same time some disagreement exists over the detail of the Ombudsman's interpretation of the relationship between the regimes, as well as over the general scope of overlap and potential for confusion. For example, the Department of Local Government sets out certain clarifying details. While it acknowledged that the situation for local government is 'reasonably complex', the Department commented 'that there is not always the confusing overlap alluded to by the Deputy Ombudsman in his report to the ninth General Meeting of the Committee'. All the same the Department went on to say that it agreed 'there have been some instances of confusion, and that a more streamlined system of regulating access to information could be beneficial for both members of the public and council staff'.[46]

Note is taken therefore of the fact that, while some core area of agreement exists, different views are found as to the scope and precise nature of the problems concerned. Likewise, the proposed remedies vary considerably. Different perspectives and interests appear to point towards different courses of action. It is with this cautionary note in mind that the Committee reviews the question of the overlap and potential conflict between the access to information regimes.

4.2 FOI and privacy – contrasting objectives

A threshold issue in the debate concerns the relationship between FOI and privacy in terms of their overlapping yet contrasting purposes. Acting as a shield, the PPIP Act aims to protect personal information and the privacy of individuals generally. Although it overlaps at certain points with the FOI Act, its philosophical underpinnings are in some ways quite distinct. Privacy relates to a bundle or collection of rights which all stem from the idea that, subject to certain legitimate

43 Submission No.20, Local Government Association of NSW.
44 Submission No.19, Shires Association of NSW.
45 Submission No.8, Rockdale City Council.
46 Submission No.14, Department of Local Government, p. 2.

qualifications, in a liberal democracy the individual has a right 'to be let alone'.[47] The right at issue, therefore, corresponds with what has been called a 'negative' conception of liberty, that is, the liberty *from interference*.[48]

FOI is not entirely unconnected with this philosophical reasoning. Granting a right of access to individuals, to determine what information government holds about them and to correct any errors they may find, operates as a shield too. It is at this point, where FOI is protective of individual and personal interests, that it intersects with privacy law. FOI is not, however, restricted to this agenda. By providing access for journalists, academics and others to official information it seeks both to curtail official secrecy and to enhance democracy and representative government. As sword, FOI corresponds with the 'positive' liberty *to engage* in the processes by which we make informed choices about who is to govern us and how we are to be governed. It is not a negative right *from interference*, but a positive charter *to participate* in the democratic process.

In brief, both the FOI and PPIP Acts are concerned with access to official information, often for the same or similar reasons, sometimes for different purposes. According to the NSW Privacy Commissioner: 'The FOI Act has both a privacy objective and a "democratic" objective, encompassing goals of participation, open government and accountability'.[49] Yet, the similarities should not mask the differences. In evidence the Privacy Commissioner elaborated on what he called an 'important qualitative difference' in the approach taken by the relevant agencies and legislation:

> namely, that the freedom of information legislation is there for the purposes of allowing the maximum amount of information, essentially about the affairs of government, to be placed before the people for proper scrutiny and for transparency reasons. The overall impetus and the rationale of the freedom of information legislation is for information to be made available to the public. The underlying rationale in the Privacy and Personal Information Act is that the affairs of people should not be specifically disclosed without a good and compelling reason. So, in fact, the rationale there is against disclosure of personal information unless there is either a very specific legislative purpose or a public policy purpose that is served by that information being released.[50]

4.3 FOI and privacy – potential conflict

It has been noted that a conflict may arise between the PPIP Act and the FOI Act where an FOI request includes a document that contains personal information about someone other than the applicant.[51] Whether or not personal information is disclosed may depend on which Act is applying. Personal information may be subject to disclosure under the FOI Act, but required to be withheld under the PPIP Act. There

47 LD Brandeis and SD Warren, 'The right to privacy' (1890) 4 *Harvard Law Review* 193 at 195; G Griffith, *Information Privacy and Health Records*, NSW Parliamentary Library Research Paper No 6/2002, p. 2.

48 I Berlin, *Four Essays on Liberty*, Oxford University Press 1969, pp. 118-172.

49 C Puplick, 'Privacy and freedom of information legislation in NSW' (2002) 9 *Privacy Law and Policy Reporter* 13.

50 Evidence, NSW Privacy Commissioner, 21 August 2001.

51 G Griffith, *Privacy Law Reform: Issues and Recent Developments*, NSW Parliamentary Library Briefing Paper No 20/98, p. 26. For a general discussion of the issue see – P Bayne and K Rubenstein, 'The concepts of "information relating to personal affairs" and "personal information"' (1994) 1 *Australian Journal of Administrative Law* 226.

is a 'personal affairs' exemption under the FOI Act which protects some personal information from disclosure. However, due to differences between this exemption and the relevant provisions of the PPIP Act, the limits of personal affairs information exempt from disclosure under the FOI Act may not coincide exactly with the limits of personal information protected from disclosure under the PPIP Act. As the NSW Privacy Commissioner submitted:

> Under the PPIP Act, personal information is broadly defined to address the various contexts in which information can arise. It appears to cover a broader range of information than the FOI Act's corresponding category of information about the personal affairs of a person. This has been judicially defined as *the composite collection of activities personal to the individual concerned*[52]…The conceptual distinction between personal information and documents containing information about personal affairs is potentially confusing when attempting to apply the FOI Act's conditions and limitations to an application for access or alteration under the PPIP Act.[53]

4.4 FOI and privacy – overlap

The overlap issue was addressed by the NSW Privacy Commissioner in his January 2000 issues paper, *Local Government and the PPIP Act*. The potentially confusing 'existence of overlapping alternatives' was acknowledged. Diverging from the approach adopted by the Ombudsman, the Privacy Commissioner concluded:

> Privacy NSW strongly supports a practical approach which treats the two pieces of legislation as complementary rather than in conflict. Ultimately the Administrative Decisions Tribunal can be expected to provide a forum in which competing interpretations of the two pieces of legislation will be settled. The best that we can do at this stage is to develop a pragmatic approach which draws on a realistic appraisal of the distinct objects of the two pieces of legislation.[54]

This approach was reflected in part in the submission of the Privacy Commissioner to this inquiry. He observed: 'I do not consider that the effects of overlaps between the three pieces of legislation discussed in this submission creates insoluble problems, or that the established procedures for personal access and correction under the FOI Act provide grounds for removing the parallel provisions in the PPIP Act'. However, he added by way of conclusion:

> At the same time I am concerned that the outcomes for individuals could be adversely affected by providing agencies with opportunities to avoid public accountability by playing off the different access regimes. This is not merely an issue of whether agencies are avoiding their obligations to provide a satisfactory level of access to public sector information. It also involves the manipulation of access provisions to avoid taking responsibility for protecting personal information. To this end I support a more detailed review of the appropriate provisions of the three pieces of legislation to minimise areas of inconsistency.[55]

On the issue of legislative forum shopping by government agencies, in evidence the Privacy Commissioner said he was aware of at least one instance 'where one agency chose to make a determination under one Act because it was able to get a

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52 *Commissioner of Police v District Court* (1993) 31 NSWLR 606 (Kirby P).
53 Submission No.21, NSW Privacy Commissioner, 15 June 2001, p. 3.
54 NSW Privacy Commissioner, n 32, p. 6.
55 Submission No.21, NSW Privacy Commissioner, 15 June 2001, pp. 13-4.

more favourable outcome to itself than if it made the determination under the Freedom of Information Act'.[56]

The NSW Privacy Commissioner has also argued that a connection exists between the relative failure of the FOI Act to meet its broader objectives, on one side, and the problem of administrative overlap with the privacy regime, on the other. The Privacy Commissioner commented:

> FOI legislation was originally conceived as a means of opening up the processes of government to public inspection. Its comparative failure to achieve this aim has been masked by its privacy function of assisting individuals to obtain access to, and sometimes correction of personal files. To take an example, in its 1999-2000 Annual Report the Police Service reported 2,290 applications for personal information as against 75 applications for other information. The high volume of personal information applications can be presumably accounted for by the fact that the Police Service uses FOI to deal with applications from people wishing to access copies of their criminal records.
>
> The fact that the great majority of applications for access under the FOI Act have always related to the personal information of applicants, ensured that when privacy legislation caught up there would be some tension between the way the two pieces of legislation are administered. In effect the Ombudsman's office, in its function of investigating and reviewing FOI complaints, has been acting in many cases as a Privacy Commissioner.[57]

As noted, from a different perspective the Ombudsman also commented on this overlap between FOI and privacy, especially in respect to application rates for access to information under the two regimes. He pointed to the relative lack of use made of the privacy legislation as against the more familiar access mechanisms available under the FOI Act.

4.5 LG Act and FOI Act

Views as to the relationship between the LG Act and the FOI Act vary. The Privacy Commissioner submitted that he did 'not wish to go into great detail about the interaction' of the FOI and Local Governments Acts but noted that:

> Chapter 4 Part 2 of the LGA could be seen as providing a more flexible alternative to FOI as a means of obtaining access to local government records. However applicants do not have an adequate method for seeking review of a refusal to allow inspection of a record. Similar considerations apply to people affected by disclosures, for example disclosures which are inconsistent with subsection 7.[58]

Similar concerns expressed by the Ombudsman have been documented. It was pointed out in the Annual Report for 1999-2000 that it would be in the interest of the council to suggest that a person seeking access to information applies under the FOI Act, not the local government legislation, thereby permitting the council to charge fees and to require the applicant to document their request. The greater protections available to councils under the FOI Act would also apply. The Ombudsman concluded: 'Needless to say, the confusion created by these separate and entirely different access to information regimes is not in the public interest and should be

[56] Evidence, NSW Privacy Commissioner, 21 August 2001.
[57] Submission No.21, NSW Privacy Commissioner, 15 June 2001, pp. 2-3.
[58] ibid., p. 9.

addressed as a matter of urgency'.[59]

A contrasting perspective is that of the Department of Local Government. Its submission discussed the FOI Act and section 12 of the LG Act as basically alternative and complimentary access to information regimes. Relatively minor reforms of a 'fine tuning' kind were suggested, 'predicated on the view that the LG Act remains the appropriate location for councils and members of the public to find the rules regulating access to information held by councils in the large "middle ground" between the FOI Act and PPIP Act'.[60] Considered, too, in the Department's submission were the different avenues of appeal available under the two regimes - the Land and Environment Court (LEC) under section 12 of the LG Act, and the Administrative Decisions Tribunal (ADT) under the FOI Act. On this issue, the Department concluded:

> While the remedies available in the LEC may be wider than in the ADT, it is a more complex and expensive jurisdiction for an applicant to contemplate. This may make enforcement of s 12 less practical than enforcement of applications made under the FOI Act. However the Department is of the view that the very existence of a second avenue – namely, FOI applications which may in turn be pursued in the relatively inexpensive ADT – should act as an encouragement to councils to deal with s 12 applications effectively in the first place. Therefore no change is recommended with respect to enforcement issues.[61]

4.6 LG Act and PPIP Act

Several submissions expressed concern about the 'conflicting impact' of the PPIP Act on local government. Although muted in its approach, the Department of Local Government expressed the view that it was 'in the relationship between s.12 LG Act and the much newer PPIP Act rather then the relationship between these two Acts and the FOI Act, that the Department has found most difficulties'.[62] More qualified in its approach was the Local Government Association of NSW, with which the Shires Association of NSW concurred:

> The everyday problem facing councils is a fundamental conflict between section 12 of the LG Act and the provisions of the PPIP Act. Section 12 requires a Council to make copious amounts of information available, whereas the PPIP Act requires that information be held back. There needs to be an amendment to one or other to confirm that the duty under section 12 of the LG Act is paramount. If that happens, Freedom of Information slots into the process without problem.[63]

Baulkham Hills Shire Council also identified the interaction between the privacy legislation and the LG Act as its main concern. 'Unfortunately', it submitted, 'most of the confusion has been with the general public, rate payers and other Council customers, who find it very difficult to understand firstly the conflict in legislation, and secondly the implications of the Privacy Legislation which may now restrict information they previously had access to'. In detailing the administrative confusion it

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59 NSW Ombudsman, Annual Report 1999-2000, p. 110.

60 Submission No.14, Department of Local Government, p. 10. These were suggestions, not recommendations, for reform.

61 ibid., p. 17.

62 ibid., p. 2. It added: 'Even in this regard it is worth remembering that many of the documents held by councils do not contain "personal information", and therefore PPIP Act applies to only a sub-set of the documents to which s.12 of the LG Act applies'.

63 Submission No. 20, Local Government Association of NSW, pp. 1-2.

had encountered in this context, the Council offered the practical instance of where it had:

> been placed in a situation where whilst trying to enact the requirements of one particular government department, the Privacy Commissioner inquired as to why certain action was being taken. Not only do we have a situation where the State Government has allowed three conflicting pieces of legislation to be enacted, we also have a situation where Local Government is requested to carry out certain activities and functions at the direction of one department which may be in conflict with the legislation as applied by another department.[64]

In January 2000 the NSW Privacy Commissioner said that the provisions of the LG Act 'have the potential to complicate access issues in the minds of the public and of council officers, when added to the Freedom of Information Act and the Privacy and Personal Information Protection Act'.[65] Specific amendment of section 12(8) of the LG Act was recommended to prevent any potential conflict with the PPIP Act. The concern was that subparagraph (a) could be interpreted so as to remove privacy protection generally from councillors and council employees. This could be remedied, it was said, by adding to (a) a reference to 'in the performance of their public or official duties'. This is consistent with the Commissioner's observation in his submission to this inquiry to the effect that: 'The requirement to disregard possible embarrassment to councillors or council officers seems inconsistent with the test of unreasonable disclosure of personal affairs. These inconsistencies flow through to the PPIP Act under section 20(5) of that Act'.[66]

4.7 The State Records Act and the access to information regimes

The Director of the State Records Authority, David Roberts, submitted that the *State Records Act 1998* 'needs to be considered as part of any review of the access to information schemes' established by other pieces of legislation. On the actual and perceived interaction between all these, he commented:

> Anecdotal evidence suggests that there is significant potential for confusion among members of the public and public officials about the operation of the public access provisions of the State Records Act and the other pieces of legislation, for the same reasons as noted by the Ombudsman. This appears particularly to be the case in relation to balancing rights to access with rights to protection of personal information.[67]

4.8 Comment

Clearly, perspectives vary. Yet, all the parties involved were agreed that some form of amendment and/or review is required.

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64 Submission No. 6, Baulkham Hills Shire Council, pp. 1-2.

65 Privacy Commissioner n 32, section 4.

66 Note that the equivalent provision in the FOI Act (section 59A) is limited to 'embarrassment to the Government'; it does not refer to the individuals comprising a government, such as Ministers or MPs or public servants: Submission No.14, The Department of Local Government, p. 7.

67 Submission No. 24, David Roberts, Director State Records, p. 3.

Chapter 5

Alternative supervisory models – experience in other selected jurisdictions

The Committee does not intend the following review of alternative supervisory models to be comprehensive either in scope or detail. Rather, its purpose is to present, in summary form, the major alternative approaches adopted in other selected jurisdictions. Nor, it should be stressed, does this overview intended to suggest that any alternative model should be imported into NSW.

5.1 Other selected Australian jurisdictions[68]

5.1.1 Victoria

In broad terms the jurisdiction most comparable to NSW at present is Victoria. As here, there is a Victorian FOI Act which uses the Ombudsman as its compliance monitor in the absence of any more formal arrangement.[69] There is, too, privacy legislation, covering the public sector, which established a Privacy Commissioner with similar powers and functions to its NSW counterpart. In addition, Victoria already has a *Health Records Act 2001*, covering the public and private sectors and which, unlike the NSW Health Records Act (not yet commenced), established a Health Services Commissioner to handle the monitoring and related functions. The relevant external review body with determinative powers for all these pieces of legislation is a general appeals tribunal established under the *Victorian Civil and Administrative Appeals Tribunal Act 1998*.

5.1.2 The Commonwealth

Much the same applies in respect to the Commonwealth. At this level of government it is the Attorney General's Department that reports annually on the administration of the FOI Act. Under section 57 of the Act, a complaint to the Ombudsman can be made as an alternative, or preliminary, to Administrative Appeals Tribunal review. Nonetheless, the Ombudsman's powers are recommendatory only. There is no power to set aside a decision and substitute another decision.[70]

A major difference between the Commonwealth, on one side, and NSW and Victoria, on the other, is that the federal *Privacy Act 1988* applies to both the public and private sectors. If nothing else, this would make the establishment of a single Information and Privacy Commissioner more difficult than at the State level. The issue of a combined office was in fact considered in 1995 by the ARC and ALRC in their joint report, *Open Government: a review of the federal Freedom of Information Act 1982*. The proposal was rejected in part because, at that stage, it was envisaged that the privacy regime would be extended to cover the private sector. Other considerations also applied. The report commented:

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68 For a review of recent developments in FOI legislation at the State level see – R Snell, 'Freedom of information: the experience of the Australian States – an epiphany?' (2001) 29 *Federal Law Review* 343.

69 *Freedom of Information Act 1982* (Vic). The Act was amended in 1999 to include a definition of 'personal information'.

70 Australian Law Reform Commission and Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982*, Report No.77 (ALRC) and Report No.40 (ARC), 1995, p. 176.

> There is a need to ensure that the principles of openness and privacy each have a clearly identifiable and unambiguous advocate. The balance between FOI and privacy can sometimes be a fine one and it may be difficult for an individual not to develop, or be perceived to have developed, a stronger allegiance to one over the other which could leave to accusations of bias in favour of either openness or privacy. It is particularly important that the benefits of openness, not only for public accountability but for creativity and commercial exploitation, not be diminished by an overemphasis on privacy. Given the tendency to date for agencies to favour secretiveness over openness and the fact that the overwhelming majority of FOI requests are for applicants' personal information, there is a risk that FOI would become the 'poor cousin' if the Privacy Commissioner were given responsibility for the role of FOI Commissioner…The Privacy Commissioner agrees.[71]

The joint ALRC/ARC report recommended the establishment of a Commonwealth FOI Commissioner as a separate statutory position. In doing so, it also set aside suggestions that the powers and resources of the Commonwealth Ombudsman could be expanded to perform the role proposed for the FOI Commissioner. The report commented:

> The role proposed for the FOI Commissioner is different from that of the Ombudsman in several respects, the most significant of which is that the former does not involve individual complaint resolution. This aspect of the Ombudsman's work could reduce the effectiveness of the proposed advice and assistance role because of a perceived conflict of interests. In addition, the Ombudsman's role makes it important that he or she not become involved in policy development.[72]

These and other issues were revisited recently in the report of the Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*. The bill was introduced in the Senate on 5 September 2000 by Senator Andrew Murray as a private member's bill and included provision for the establishment of a Commonwealth FOI Commissioner along the lines proposed by the ALRC/ARC report. Among other things, the Senate Committee's report allowed the opportunity for the ALRC to update its position on the need for allocating responsibility for FOI in an independent agency. In effect the ALRC remained committed to the view that there should be one officer with primary responsibility for FOI. However, bearing in mind the cost implications of establishing an independent statutory office, the ALRC accepted that the function could be 'subsumed' either within the Commonwealth Ombudsman's office or the federal Privacy Commissioner's office. At the same time the Commonwealth Ombudsman submitted that the functions of an FOI Commissioner 'should be placed within an existing entity such as his own', thereby avoiding the resource and other problems encountered by small and specialised agencies.

Basically, the Senate Committee accepted this view and recommended:

> That the functions to be conferred on the FOI Commissioner under the Bill be conferred on the Commonwealth Ombudsman and that a specialised unit be established within that office for the purpose of supporting the Commonwealth Ombudsman in that role.[73]

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71 Australian Law Reform Commission and Administrative Review Council, *Open Government: a review of the federal Freedom of Information Act 1982*, Report No 77 (ALRC) and Report No.40 (ARC), 1995, pp. 77-8.

72 ibid., p. 76.

73 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Freedom of Information Amendment (Open Government) Bill 2000*, April 2001, pp. 41-50.

If nothing else, the debate at the Commonwealth level highlights the difficulty involved in securing legislative change in the FOI field, as well as the resource and other implications at issue.

5.1.3 Queensland

It has been noted that Queensland has neither a statutory privacy regime nor a generalist administrative appeals tribunal. What it does have is an Information Commissioner, with determinative powers to conduct external review, as established under Part 5 of the *FOI Act 1992* (Qld). A valid application for external review must be preceded by an internal agency review (except when a matter involves a decisions by a Minister or the Principle Officer of an agency).

Under section 61 (2) of that Act the Ombudsman is to be the Information Commissioner unless another person is appointed as Information Commissioner. As a matter of practice, the same person has always held both posts. The Ombudsman has recommendatory powers only; the Information Commissioner has determinative review powers. The decision to establish this combined approach was based in part on New Zealand experience, but also on consideration that the establishment of an additional independent Commissioner could 'lead to a confusing plethora of bodies facing a member of the public with a grievance against the administration'.[74]

The rationale behind the establishment of the Office of the Information Commissioner, which commenced operations in January 1993, has been explained in the following terms:

> The Office of the Information Commissioner…was intended to perform the external review functions provided for by part 5 of this Act (the *FOI Act 1992)* as a specialised and expert dispute resolution service, which was speedier, cheaper for participants, more informal and user friendly than the court system, or tribunals which follow court like procedures.[75]

The appropriateness of this model, notably the role the Ombudsman plays as Queensland's Information Commissioner, was discussed as part of the comprehensive review of the FOI legislation undertaken by the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament. It expressed its concern 'about the perception that the two roles are not entirely independent' and recommended that a dedicated Information Commissioner should be appointed, separate from the Ombudsman. The Committee stated that while it had:

> no difficulty with the offices of the Ombudsman and Information Commissioner sharing corporate services for efficiency reasons, the offices should not share allocated funding and should therefore have separate budgets.[76]

Other recommendations made by the Committee included the expansion of the Information Commissioner's functions to incorporate a monitor, advice and

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74 Parliamentary Committee for Electoral and Administrative Review Report, *Freedom of Information for Queensland*, 1991, para 3.11.10.

75 The Consultancy Bureau, *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner, Volume 2 – Office of the Information Commissioner*, June 2000, p. i. Note that the Deputy Ombudsman informed the Review Team that the role and responsibilities of the Information Commissioner are 'in essence those of a specialist tribunal' (p. 32).

76 Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report No.32, December 2001, p. 135.

awareness role. In effect, this would bring it in line with the Western Australian model.

The Committee had earlier considered the question of the relationship between FOI and privacy as part of its 1998 report *Privacy in Queensland*. There the Committee recommended that a Privacy Commissioner be established under a Queensland Privacy Act. It recommended against combining this proposed office with that of the Information Commissioner, bearing in mind the different purposes served by FOI and privacy legislation, the one concerned with maintaining the privacy of personal information, the other with releasing information into the public arena, unless there are good reasons for not doing so. Agreeing with the views in the joint ALRC/ARC report, the Committee said it did not believe that:

> A combined FOI and privacy office is appropriate given the different focus if the regimes administered by each. The committee fears that it would be difficult for an Information Commissioner to be an impartial advocate for openness of government one day and an advocate for privacy the next.[77]

In 2000 a major review of the operation of the Offices of the Queensland Ombudsman and the Information Commissioner was conducted by the Consultancy Bureau Pty Ltd. The review contains detailed analysis of the actual working of the Information Commissioner's Office, including comparisons with its counterparts in New Zealand and Western Australia.[78] As noted, this was followed in December 2001 by the report of the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament which believed that a 'separate, dedicated Queensland Information Commissioner should be appointed'.

5.1.4 Western Australia

The main difference between the Queensland and Western Australian models is that the latter's Information Commissioner is completely independent and separate from any other office. It also is the case that the WA Information Commissioner, which was established under the *FOI Act 1992* (WA) and commenced operation in 1993, has a broad public awareness function. The Commissioner has said that her office has two distinct statutory responsibilities: those dealing with complaints about decisions made by agencies in respect of FOI applications – the external review and complaint resolution functions; and educating and informing the public and agencies in WA about their respective rights and obligations under the legislation – the advice and awareness functions.[79] Detailed statistical commentary on the operation of these functions is set out in the Commissioner's annual reports.

In a recent speech the WA Information Commissioner commented on the interaction between FOI, State records legislation and privacy principles (albeit not in statutory form in WA). Basically, her view was that the problems encountered in NSW had not arisen in WA 'because of the model used to establish a State Records Commission', a body reporting to parliament and, with some limits, independent of Ministerial direction. This Commission has four members, the Auditor General, the

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77 Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Privacy in Queensland*, Report No 9, April 1998, pp. 116-9.

78 The Consultancy Bureau, *Report of the Strategic Management Review of the Offices of the Queensland Ombudsman and the Information Commissioner, Volume 2 – Office of the Information Commissioner*, June 2000.

79 WA Information Commissioner, 'FOI', *Paper presented at the Past, present and future conference*, Hobart, 30 November 1999.

Ombudsman, the Information Commissioner and a record keeping professional. Reflecting on the reported difficulties encountered in NSW, the WA Information Commissioner had this to say:

> I suspect that part of the reason for the problem identified by the NSW Privacy Commissioner may be that in NSW at least, the responsibility for privacy, FOI and archives is vested in different bodies, each having its own views and perspectives of the relevant importance of its own area.[80]

The WA FOI model has been described as a 'comparative success story'.[81] Nonetheless, the WA Information Commissioner has herself advocated a fundamental reformulation of the design principles associated with access laws.[82]

Note, too, that the WA Law Reform Committee, in its October 1999 report, *Review of the Criminal and Civil Justice System*, recommended that a new WA Civil and Administrative Tribunal be established with jurisdiction including the adjudicative functions of the Information Commissioner.[83]

5.1.5 The Northern Territory

In October 2001 the NT Attorney General tabled in the Legislative Assembly a *Discussion Draft for a Proposed Information Act*. Based on advice from consultants and influenced by experience in certain Canadian Provinces,[84] the draft Act would incorporate FOI, privacy and archives legislation under a single statute. An Information Commissioner would be established with broadly defined functions, including promotional, advice, audit and awareness functions across the FOI and privacy fields (but not in relation to records management). Under Part 7 of the proposed Act the Commissioner would also have a complaints jurisdiction, which would include determinative powers of external review over FOI and privacy related matters. Provision is made for appeals from the decisions of the Information Commissioner to the NT Supreme Court. The proposed Information Commissioner would operate alongside and in addition to the Territory Ombudsman who would continue to have only recommendatory powers.

The 'objects' of the draft Act are defined as follows:

- to encourage the widespread publication of government information;
- to encourage accountability in government by providing the public with a right of access to government information;
- to balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information; and
- to promote efficient and accountable government through improved record keeping and records management.

Clearly, any philosophical and other qualms about the incompatibility of FOI and

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80 WA Information Commissioner, *Address to the Australian Society of Archivists AGM*, Perth, 10 July 2002.

81 R Snell, n 68, p. 356.

82 See for example – WA Information Commissioner, n 79; R Snell, n 68, p. 356.

83 Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *Freedom of Information in Queensland*, Report No 32, December 2001, p. 133 at fn 383.

84 Information based on telephone advice from the NT Attorney General's Department.

privacy legislation, and any conflict of interest that might arise from their joint administration, have been set aside in this proposed model in favour of a single, streamlined access to information regime.

5.2 New Zealand

The situation in New Zealand is an interesting counterpoint to that in the various Australian jurisdictions. Separate FOI and privacy regimes operate under the *Official Information Act 1982* and the *Privacy Act 1993* respectively. There is, in addition, a *Local Government Official Information and Meetings Act 1987* containing relevant FOI provisions.

A Privacy Commissioner was established by the *Privacy Commissioner Act 1991*. Two years later the Privacy Act was passed to regulate privacy in the public and private sector and to establish the current Office of the Privacy Commissioner. The Commissioner has broad powers to investigate complaints and monitor compliance. As explained by the New Zealand Law Commission:

> The Commissioner must investigate, conciliate and attempt to secure a settlement. If a settlement cannot be secured, the Commissioner must refer the matter to the Director of Human Rights Proceedings to determine whether proceedings should be taken before the Human Rights Review Tribunal…If the Director of Human Rights Proceedings decides that the matter does not have substance and declines to refer it to the Human Rights Review Tribunal, the aggrieved complainant may herself or himself bring proceedings before the Tribunal.[85]

FOI matters are dealt with by the Ombudsman who operates as an external reviewer with determinative powers in this context. A recommendation made by the Ombudsman regarding the release of official information becomes binding on the agency after 21 working days unless the Governor-in-Council by Order-in-Council otherwise directs. These and other provisions were reviewed by the New Zealand Law Commission in its 1997 report, *Review of the Official Information Act 1982*. No major changes were recommended at that time. The model begs the question of the propriety, as a matter of constitutional principle, of the Ombudsman possessing more than recommendatory powers. As a matter of practice, this does seem to have been a problem in New Zealand.

The current New Zealand Law Commission inquiry into the privacy legislation does not appear to be dealing with the interaction between the various access to information regimes. The fact that the Privacy Act covers the public and private sectors places it in a different category to the legislative regime operating at present in NSW.

5.3 Canada

The situation in Canada is more complex, with different regimes operating at the national and various provincial levels. These can be outlined separately. Basically, a key difference is that, whereas nationally, the Information Commissioner and the Privacy Commissioner are distinct entities, in most of the Provinces these offices are established under a single, integrated piece of legislation. On the other hand, a

[85] NZ Law Commission, *Protecting Personal Information from Disclosure: A Discussion Paper*, Preliminary Paper 49, February 2002, p. 6.

common feature of the Canadian regimes considered by the Committee is that they do not require internal review by an agency as a preliminary to external review by the relevant Commissioner.

5.3.1 The federal level

At the federal level FOI is covered by the *Access to Information Act 1982*. This was passed in conjunction with the Privacy Act, with both coming into force on 1 July 1983. Both Acts regulate access to government information. More specifically the Access to Information Act provides a right of access to general government information, while personal information held by the government is governed by the provisions of the Privacy Act.[86] There is, in addition, the Personal Information Protection and Electronic Documents Act which came into force on 1 January 2001 and which sets out how the private sector may collect, use or disclose personal information. Oversight of both these privacy statutes rests with the Privacy Commissioner of Canada. Under the Access to Information Act an Information Commissioner is established to supervise the operation of FOI at the federal level. Note that section 55 of the Privacy Act would permit the appointment of the Information Commissioner as Privacy Commissioner. In fact, the two positions have remained separate.

The prevailing Canadian view appears to be that FOI and privacy legislation are complementary, not conflicting, undertakings. The current Information Commissioner, John Reid, has said in this respect:

> At the federal level, "openness" and "privacy" are complementary, not adversarial, values. The two statutes, which serve these values--the Access to Information Act and the Privacy Act-- were debated and passed by Parliament at the same time and came into force on the same day. They were drafted to fit together like two halves of a whole. I like to think of these two statutes as the Yin and Yang of governmental information policy, which, together, create a harmonious, unified system for dealing with governmental information holdings. The Supreme Court of Canada has made it clear when these values come into conflict, the conflict should be resolved in a way which least infringes both values.[87]

Section 19 of the Access to Information Act recognises privacy as an important human value by requiring the exemption of personal information from any disclosures made under the Act. The Privacy Act's definition of personal information is also that of the Access to Information Act. Explaining the relationship between the two legislative schemes, the Information Commissioner of Canada commented:

> The Access to Information Act takes as it guiding principle that: '…government information should be available to the public, that necessary exceptions to the right of access should be limited and specific…'. Thus the norm is access to governmental information. Not to have access is the exception. Yes, it is true that the Access to Information Act contains a 'notwithstanding any other Act of Parliament' clause and thus, is paramount over all other acts of Parliament, including the Privacy Act. However, the access law contains a very broad, strongly worded exemption which makes it mandatory that personal information be kept

86 Government of Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, June 2002, p. 13.

87 Information Commissioner of Canada, *Remarks to security and privacy for government on-line conference*, Ottawa, 18 April 2001. The leading case is *Dagg v The Minister of Finance (and the Privacy Commissioner of Canada and the Public Service Alliance of Canada)* [1997] 2 SCR 403.

> secret except in very carefully defined situations.[88]

He added that 'In some 18 years of experience since these Acts were passed, it has not proved very difficult to determine when a privacy invasion is justified and when it is not'. The key to bear in mind, according to the Information Commissioner, is that 'both rights are designed to shift the balance of power from the state to the individual'. He explained:

> Whenever access and privacy rights appear to be in conflict, an understanding of what I call the 'accountability pay offs' almost always leads to a sensible resolution of the apparent conflict. For example, the privacy interests of public officials must, in a free and democratic society, be given less weight (in balance with openness) than the privacy interests of private citizens.[89]

All the same, the FOI and privacy regimes are not integrated at the federal level, either legislatively or for supervisory and administrative purposes. At this level, both the Information and Privacy Commissioners are Ombudsmen and, as such, have only recommendatory powers in relation to the complaints they investigate. Both investigate complaints on behalf of individuals (corporations may also make requests under the Access to Information Act) seeking their full rights of access, either to their own records (privacy) or to non-personal records (access to information). Where their recommendations are not followed there is a right of appeal to the federal court.

The mandate of the Information Commissioner was considered recently as part of the comprehensive review of the Access to Information Act. The report of the Review Task Force commented:

> The Act simply stipulates that the Information Commissioner shall receive, investigate and report on complaints and make annual reports (and, where appropriate, special reports) to Parliament. Although the Act does not prohibit the Information Commissioner from performing other functions, such as educating the public, neither does it authorise them. This may have led the Office of the Information Commissioner to define itself, at times, solely as an investigative body with strong coercive powers.[90]

A broader mandate was recommended for the Information Commissioner, to include a public education function. Still, it was recognised that the Commissioner's main function would remain the investigation of complaints. On this issue, the Review Task Force asked whether the Ombudsman model, under which the Information Commissioner has the power to investigate and recommend, but not to decide, is the best model for the future. Recommended was the adoption of an Information Commissioner with determinative powers. However, the need to consider the interaction with the privacy regime was recognised, with the report commenting that the impact of any change 'on the powers of the Privacy Commissioner would have to be studied carefully in the context of the interrelationship between the Access to Information Act and the Privacy Act'.[91] In summary, the connection between privacy and FOI has always been to the fore in the Canadian debate.

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88 Information Commissioner of Canada, *Remarks to security and privacy for government on-line conference*, Ottawa, 18 April 2001.

89 ibid.

90 Government of Canada, n 86, p. 92.

91 ibid., p. 114.

5.3.2 The Provinces

Integrated FOI and privacy regimes are the norm in the Canadian Provinces. For example, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan all have statutes titled the Freedom of Information and Protection of Privacy Act. In Quebec the relevant legislation is titled 'An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information'.[92] Two Provinces also have special legislation covering local government: the Ontario Municipal Freedom of Information and Protection of Privacy Act and the Saskatchewan Local Authority Freedom of Information and Protection of Privacy Act. Specific health privacy law exists in two other Provinces: in Alberta where the Health Information Act came into force on 25 April 2001; and in Manitoba under the Personal Health Information Act.

Ontario is an instance of where the legislation is supervised by an Information and Privacy Commissioner, appointed by the Legislature and therefore independent of the government of the day, with determinative external review powers over government decisions concerning access and privacy. Broadly, the Commissioner's mandate is to resolve appeals, investigate privacy complaints, ensure compliance, research access and privacy issues and educate the public about the relevant laws. The Office was established in 1988 and acquired supervisory jurisdiction over the municipal level of government in 1991, under the Municipal Freedom of Information and Protection of Privacy Act.[93] The Commissioner's annual reports set out the details of the complaints handled by the Office. Also presented is an analytical overview of the judicial review of the Commissioner's orders. The 2001 Annual Report noted that, as at 31 December 2001, there were 36 judicial reviews outstanding; further, 13 judicial reviews had been closed and/or heard in 2001 (7 were subject to appeal; 3 had been abandoned; 1 had been dismissed for delay; and in 2 cases the Commissioner's order had been upheld).[94]

Comparable arrangements are in place in British Columbia where the Office of the Information and Privacy Commissioner was established in 1993, with jurisdiction over the provincial public sector, including local government. Complainants have a right to appeal access and privacy decisions to the Commissioner who is empowered to make orders confirming or setting aside, in whole or in part, a decision of the head of a public body to give or refuse access to information. Section 59 (1) of the Act provides that a public body must comply with a Commissioner's order within 30 days, unless an application for judicial review has been made.

In Alberta the Office of Information and Privacy Commissioner was created in 1995. The Commissioner's powers to make orders are provided for under the Province's Freedom of Information and Protection of Privacy Act, with section 74 of the Act providing that the public body concerned must comply within 50 days, unless an

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92 Quebec also has private sector privacy legislation in the form of *An Act Respecting the Protection of Personal Information in the Private Sector*.

93 The Ontario Government has released a draft *Privacy of Personal Information Act 2002*, which will cover the private sector, including health information held in that sector. This follows the introduction in December 2000 of Bill 159, the Personal Health Information Privacy Act, which lapsed when the Legislature was prorogued in early 2001.

94 Note that judicial review is not expressly provided for under the Ontario legislation. It is the common law tradition which permits judicial oversight of administrative tribunals. There is, in addition, a Judicial Review Procedure Act which permits the courts to set aside decisions for errors of law. Judicial review would be expressly provided for under proposed section 70 of the draft *Privacy of Personal Information Act 2002*.

application for judicial review has been made. The Commissioner also acts as the external review body for the new Health Information Act, section 80 of which sets out the power to make orders, with section 82 stipulating that the 'custodian' of the health information must comply within 50 days. Again, this rule is made subject to an application for judicial review.

5.4 The United Kingdom

A peculiarity of the United Kingdom, at least in the context of those jurisdictions considered by the Committee, is that it established a statutory privacy regime – the *Data Protection Act 1998* - before it had an FOI Act.

A feature of the Data Protection Act, which applies to both the public and private sector, is that it created the Office of the Data Protection Commissioner, with the power to issue enforcement and other notices arising from complaints about privacy matters. Section 48 of the Act provided for appeals from the Commissioner's notices to the Data Protection Tribunal. Judicial review on a point of law from a ruling by the Tribunal was also available under the Act.

The *Freedom of Information Act 2000* received Royal Assent on 30 November 2000. However, in keeping with the Lord Chancellor's implementation timetable its provisions must only be fully implemented by January 2005. This staged approach involves, for example, the application of the Act to local government (except police authorities) by February 2003. Schools and universities are to be covered by February 2004.

After much deliberation the decision was taken to integrate the enforcement mechanism for the FOI Act with that applying to privacy. For this purpose, the Office of the Information Commissioner was established under section 18 of the FOI Act, as an independent authority reporting directly to Parliament, to supervise and enforce the data protection and FOI legislation. This new Office replaced the Data Protection Commissioner; as well, an Information Tribunal was established in place of the former Data Protection Tribunal. In this way, comparable review and appeals processes to those still operative under the Data Protection Act are in place under Parts IV and V respectively of the FOI Act. All privacy and FOI complaints are now to be handled by the Information Commissioner, with all appeals being heard by the Information Tribunal.

Thus, although the statutes remain separate, their enforcement is integrated. According to the Commissioner, Elizabeth France:

> Both the Freedom of Information Act and the Data Protection Act relate to information handling and her dual role will allow the Commissioner to provide an integrated and coherent approach.[95]

5.5 Comment

The above survey shows that many alternative supervisory models operate in the broadly comparable jurisdictions considered by the Committee. Like NSW, all these jurisdictions belong to the Westminster system of parliamentary government. In that sense, the same underlying questions about the operation of accountability and

[95] http://www.dataprotection.gov.uk/commissioner.htm

privacy laws and mechanisms apply. The question whether the Ombudsman should have only recommendatory powers, for example, is one that resonates across all the jurisdictions we have discussed. That said, the Committee also recognises that each model is the product of a distinctive legislative and political history and cannot be understood in isolation from that history. For instance, both the Queensland and Western Australian Information Commissioners have determinative powers, but then neither of those States has a comparable generalist appeals tribunal as exists in NSW under the *Administrative Decisions Tribunal Act 1997*. It is also the case that, of the Australian States, only NSW and Victoria have a legislative privacy scheme in place. The Committee further notes that the NSW Privacy Commissioner does not have 'determinative powers' under the PPIP Act.

At the level of detail, apparently comparable systems can be very different. Jurisdictions have arrived at contrasting answers to the question of how best to achieve effective, independent external review of administrative decisions. In this context meaningful comparisons across jurisdictions are difficult.

The critical issue, in this regard, is to decide what principles and objectives are to be served by access to information legislation and, with this in mind, what administrative arrangements can best achieve those objectives in the NSW context.

Chapter 6

The next step – the Committee's recommendations

6.1 Streamlining the current scheme

The development of the State's laws affecting access to information has not been ad hoc in nature. The PPIP Act itself was the subject of considerable consultation prior to its enactment, and many matters were raised at the drafting stage concerning its interaction with other relevant legislative schemes. That being so, it seems unfortunate that greater attention was not given to the interrelationship of the various legislative schemes governing information, in order to develop a more coherent and harmonious overall system. But it is of the nature of such complex issues that some of the problems and difficulties involved will only become fully apparent with experience. The situation in New South Wales is not unlike that of other jurisdictions. It is only with the experience of the interconnection of privacy and other access to information regimes that the full extent of the potential for confusion and conflict has been made evident.

The evidence and submissions put to the Committee have identified a number of problem areas for the three schemes, including:

- confusion created by the proliferation of access to information schemes, including the different provisions of the FOI, privacy and local government legislation;
- the exploitation by agencies of the procedural differences between the FOI and PIPP Acts to secure outcomes favorable to them;
- the use of exemption categories under FOI to restrict scrutiny;
- significant increases in the number of applications for information held by local councils and implications of this trend for council resources;
- differing fee structures;
- the interaction between s.12 of the LG Act and the PPIP Act, in particular problems for councils in balancing requirements for openness and privacy.

The Committee is of the view that the issue of interaction between the various access to information regimes has not received the attention that it deserves, and is long overdue for analysis and review. However, the Committee recognises that the schemes which have emerged in New South Wales reflect the administrative structures already in place within this State and can only be overturned with considerable disruption. The initial focus of any review should be to identify the extent of those problem areas which need improvement or reform, in an effort to streamline the schemes and bring greater consistency to their operation. The Committee considers this course to be preferable to any radical amendment of existing legislation.

This approach is supported by the Privacy Commissioner who concluded his submission by stating 'I support a more detailed review of the appropriate provisions of the three pieces of legislation to minimise areas of inconsistency'.[96] The

[96] Submission No.21, NSW Privacy Commissioner, 15 June 2001, pp. 13-4.

Department of Local Government, also acknowledged that 'a more streamlined system of regulating access to information could be beneficial for both members of the public and council staff'.[97] The Ombudsman strongly supports a comprehensive review of the FOI Act, in conjunction with a general review of the other relevant legislative schemes: a position that was endorsed by the Local Government Association of NSW, the Shires Association of NSW and Rockdale City Council.

During the course of the Committee's inquiry, the only submission to argue unequivocally that the FOI and PPIP Acts, and s.12 of the LG Act, should be combined under a single statute, was that of the Baulkham Hills Shire Council. Its view was that:

> The issues as outlined in the three pieces of legislation would be much clearer to practitioners and the general public if they were included in one piece of legislation. In this regard it is suggested that the appropriate legislation is the FOI Act.[98]

In evidence the Ombudsman, when asked if 'in an ideal world, that FOI and privacy and personal information could be dealt with in the one Act', responded:

> I believe that it could. I do not see any reason why it cannot. Some of the specific sections that were put into the PPIP Act as a result of the consideration of the United Nations charter were put into a privacy context, if you like, because many other countries did not have freedom of information legislation. But, clearly, most applications relating to personal information are made under the FOI legislation. So I do not see any reason why the issues that are present in PPIP could not be incorporated into the FOI Act.[99]

Implicit in other submissions is the assumption that, overlap and inconsistencies notwithstanding, the three access to information regimes should remain substantially intact. As noted, the Department of Local Government made reference to 'more streamlined' legislative arrangements for regulating access to information. However, suggesting a continuing legislative separation, the Department also acknowledged that:

> Each piece of legislation serves a different but equally important purpose, and therefore it is perhaps not surprising that the three Acts are different in scope, application, and so on.[100]

Clearly, arguments can be found for and against any 'rationalisation' of the different access to information regimes into a single Act. Also, the situation is further complicated by the introduction of the *Health Records and Privacy Information Act 2002*[101] which proposes another distinct regulatory scheme in relation to certain records.

At this stage of the inquiry, the Committee is not prepared to make specific recommendations for legislative amendments to overcome the problem areas which have been identified. This is largely because the Committee considers that more independent evaluation is needed of the way in which the three schemes interact in order to enable informed decision making on the best way to reform and rationalise

97 Submission No.14, Department of Local Government, p. 2.
98 Submission No.6, Baulkham Hills Shire Council, p. 1.
99 Evidence, NSW Ombudsman, 21 August 2001.
100 Submission No.14, Department of Local Government, p. 1.
101 Assented to on 25/9/02, awaiting proclamation.

the three schemes in place. In particular, the Committee is of the view that the experience of individuals and groups who regularly use the legislation also should be examined. The lack of independent and regular monitoring of FOI laws has been identified as the 'Achilles heel of FOI legislation in Australia'.[102] Without detracting in any way from the work undertaken by the NSW Ombudsman's Office in respect of the FOI regime, the Committee endorses the broad thrust of that statement.

6.2 Independent evaluation: the Ombudsman and Auditor General

6.2.1 The Ombudsman

In the absence of any coordinating, centralised body to monitor FOI in New South Wales, the Office of the Ombudsman has been the main source of information on the implementation and operation of FOI since its introduction in 1989.[103] The Office also has been the principal source of advice on interpreting the provisions of the FOI Act and publishes guidelines on the application of FOI.

The Ombudsman regularly reports in his Annual Report on the work undertaken by the Office in relation to its FOI jurisdiction. For instance, the Ombudsman's 2001-2002 Annual Report includes discussion of:

- complaints concerning the use of incorrect procedures and hiding of documents by agencies, and the issue of identity theft in the police jurisdiction;
- the use of legal professional privilege as the basis for declining an application;
- the findings of reviews conducted into the FOI policies and procedures of agencies;
- the application of s.52A of the FOI Act which enables an agency to review an FOI determination in accordance with a recommendation by the Ombudsman;
- confidentiality agreements by regulatory bodies in relation to unauthorised activities;
- types of documents which should be released in the interests of responsible and accountable government.[104]

In addition, the Ombudsman has conducted a number of audits of FOI. The report entitled, *Implementing the FOI Act: A snap-shot*, which was published in 1997, presents the results of a comprehensive audit of compliance by agencies with the

[102] R Snell and H Sheridan, 'A few significant steps towards open government – ALRC/ARC Discussion Paper 59: a summary and comments' (1995) 60 *Freedom of Information Review* 90 at 92.

[103] The Office has published a number of reports on FOI, including *The Prince Alfred Private Hospital Project* (8.12.1997), *Implementing the FOI Act: A snap-shot* (9.7.1997), *Botany Council: Botany Council's challenge to limit the scope of the FOI Act and the jurisdiction of the Ombudsman* (17.1.1996), *Freedom of Information – the way ahead* (27.1.1995), *Proposed amendment to the Freedom of Information Act 1989* (17.3.1994), *Report concerning the operation of the Freedom of Information Act 1989 and the functions of the Ombudsman* (23.5.1990), *Report concerning the GIO and the failure to reply to a reasonable request for information* (26.9.1984). More recently, FOI was raised in the context of the Ombudsman's report, *DOCS: Critical Issues* and the proposed closure of Hunters Hill School.

[104] NSW Ombudsman, Annual Report 2001-2002, pp. 72-81.

requirements of the FOI legislation, including reporting requirements.[105] The Office examined compliance with FOI annual reporting requirements by 135 public sector agencies and reviewed 115 annual reports containing relevant statistical information.[106]

The results of the audit indicated a poor level of compliance by public sector agencies with the reporting requirements and significant under-utilisation of the access to information provisions of the FOI Act. The results of the audit were:

- 52% of the agencies audited did not comply with the annual reporting requirements for FOI;
- most NSW agencies received on average less than 8 FOI applications in 1995-6;
- all requested documents were released in approximately 81% of determinations reported in audited annual reports;
- 92.3% of determinations resulted in the release of either all or some of the documents requested by the applicant;
- internal review was sought in approximately 10% of those applications where access was refused in whole or in part (over 60% of the applications for internal review were completely unsuccessful);
- only 14 applications were made under the FOI Act for the amendment of personal records.[107]

Statistics contained in the Ombudsman's Annual Report for 1998-1999 indicated that there was a continuing poor level of compliance by public sector agencies with the annual reporting requirements of the FOI Act. The audit results showed:

- approximately 40% of the agencies audited did not comply with the FOI annual reporting requirements (an increase from 37% in the previous year);
- 3% of public sector agencies completely failed to comply with the reporting requirements;
- 37% inadequately complied with reporting requirements;
- approximately 60% of the agencies adequately or fully complied with reporting requirements (down from 63% in the previous year);
- in December 1998 at least 47 state government agencies failed to publish a summary of affairs - in June 1999, at least 39 state government agencies failed to do so;
- in December 1998, 20 agencies failed to publish a summary of affairs for the last five reporting periods – in June 1999, at least 17 agencies had failed to publish a summary of affairs for the last six reporting periods.[108]

In the same annual report, the Ombudsman also called for a comprehensive review

[105] The FOI Act requires public sector agencies to regularly publish annually a statement of affairs and a summary of affairs (s.14). Details of the agency's structure, functions, kind of documents held, a list of all policy documents, FOI statistics, and an assessment of the impact of FOI on the agency's activities, should be included. Ombudsman's Annual Report 1998-1999, pp. 126-8.

[106] NSW Ombudsman, *Implementation of the FOI Act: A snap-shot*, July 1997, p. i.

[107] ibid, pp. ii-v.

[108] NSW Ombudsman, Annual Report 1998-1999, pp. 123-8.

of the FOI Act to ensure its continuing relevance in the electronic age, the terms of reference to include:

- complex and inconsistent amendments to the FOI Act since its introduction;
- review of the provisions regarding rights of the public to access information, in light of recent judgements;
- the implications of information technology developments for FOI;
- the FOI implications of contracting out of services by public sector agencies;
- the interaction of access to information schemes – in particular the relationship between the FOI Act and the Privacy and Personal information Protection Act, and the relationship between the FOI Act and s.12 of the Local Government Act;
- relevancy of current FOI exemptions;
- fees and charges;
- the need for an overriding public interest test in relation to those FOI exemptions which do not currently possess such a test;
- the extent of agency exemptions from FOI; and
- granting access via electronic means.[109]

The Ombudsman reported on the results of the fourth FOI annual audit, covering 137 agencies, in the Office's Annual Report for 1999-2000. On this occasion the audit showed:

- 13% of audited reports were seriously deficient in 1998-9, and a further 9% were partially deficient;
- approximately 60% of reports were seriously deficient in terms of the assessment provided of the impact of FOI on the agency's activities;
- despite a consistent improvement in summary of affairs reporting for state agencies between June 1997 and December 1999, a significant reversal of this trend had occurred during the June 2000 reporting period;
- at least 30 state government agencies failed to publish a summary of affairs in December 1999, and at least 50 agencies failed to report in June 2000.[110]

The Office did not conduct an audit for the 2001-2 financial year on the basis of resource constraints.[111]

The Ombudsman has served as the sole independent body to oversight FOI and examine compliance issues in any systematic way. The Committee considers that the audit role performed by the Office in relation to FOI is critical to any ongoing evaluation of the implementation and application of FOI in New South Wales. Five years have passed since the Ombudsman published the Office's snap-shot of FOI and it is the view of the Committee that current and accurate information on compliance with the Act, and the application of FOI generally, should be produced on a regular basis. Therefore, in the long term, the Committee recommends that the Ombudsman's annual audit of compliance with the FOI annual reporting

109 ibid., p. 110.
110 NSW Ombudsman, Annual Report 1999-2000, pp. 116-121.
111 NSW Ombudsman, Annual Report 2000-2001, p. 72.

requirements should continue and adequate resources should be made available for this purpose.

Recommendation 1
The Committee recommends that the Ombudsman's annual audit of compliance with the FOI annual reporting requirements should continue and adequate resources should be made available by the Government for this purpose.

6.2.2 The Auditor General's review of FOI

In the interim, the NSW Auditor General has announced that the provisional list of performance audits to be conducted by the Audit Office during 2002-3 will include an examination of the extent to which FOI arrangements in NSW are efficient, effective and economic.[112] The Committee understands that the Audit Office is in the process of formulating the exact scope of the performance audit that will deal with FOI.

It is the Committee's opinion that the Audit Office's proposed performance audit will provide an appropriate, independent evaluation of the overall operation of FOI legislation in New South Wales at present. An objective assessment of the matters to be dealt with in the review would provide a valuable overview of the practical aspects of the operation of FOI which is not currently available.

However, in view of the evidence and submissions provided to the Committee on the interrelationship between the FOI, privacy and local government legislation, it is recommended that the Auditor General give consideration to broadening the scope of the performance audit. In particular, consideration should be given to the performance audit including an examination of issues arising from those areas of the privacy legislation that interact significantly with FOI in New South Wales.

The Committee is aware that local government is exempted from the Audit Office's jurisdiction. Consequently, the Audit Office does not have jurisdiction to include s.12 of the LG Act within the performance audit. However, the proposed performance audit may be able to offer some insight into problems arising from the local government legislation. The Committee intends to await the outcome of the performance audit before considering whether it would be worthwhile to engage consultants for the purpose of performing a similar exercise in relation to s.12 of the LG Act.

The Committee notes that in 2001 the Auditor General of the Australian Capital Territory reported on a performance audit of compliance by government agencies with the FOI Act, conducted at the request of the Territory's Legislative Assembly Standing Committee on Justice and Community Safety. The Standing Committee's inquiry aimed at improving proposed reforms to the FOI scheme in the ACT to provide citizens with cheaper and quicker access to government held information. The use of commercial in confidence as a ground for exemption was identified as a particular line of inquiry. The objective of the audit was 'to provide an independent opinion to the Legislative Assembly on whether government departments have complied with significant provisions of the *Freedom of Information Act 1989*'.[113] Compliance was examined in relation to:

[112] www.audit.nsw.gov.au/AuditsinProgress/Program-2002-03.htm

[113] Auditor General's Report, *The Freedom of Information Act*, Report No.12, Australian Capital Territory, 2001, p. 37.

- assistance to applicants to make a request for access to information in the proper form and to the proper place;
- processing requests, including giving reasons for decisions where necessary;
- locating relevant documents;
- making reasonable decisions on the use of exemptions;
- making decisions in a timely manner;
- conducting internal reviews of decisions;
- reporting on the operation of the Act;
- making certain information generally available to the public.[114]

The audit focussed on the administration of significant provisions within the FOI Act rather than all aspects of the Act. It did not include an examination of:

- the amendment of personal records under the Act;[115]
- the performance of the Ombudsman under the Act;
- the performance of the ACT Administrative Appeals Tribunal (AAT) under the Act;
- the regime of FOI fees and changes;
- principles of FOI legislation or openness of Government.[116]

The report notes that information on complaints to the Ombudsman and the decisions of the AAT were used to assist in the examination of compliance by agencies with the Act.[117] Compliance was tested against certain criteria developed for the Audit as reasonable and attainable standards of performance for agencies in the administration of their FOI responsibilities. The Audit was conducted on two levels, reflecting the differences between sensitive, difficult requests for non-personal information and the larger proportion of more commonplace, uncontroversial requests for information relating to personal affairs. In keeping with Auditing Standards for the identification of material or high risk areas, the Audit determined that how agencies dealt with requests for documents on policy development and decision making was a central test of compliance with the Act.[118]

The Committee endorses the approach taken in the ACT, which focuses clearly on the operation of the relevant legislative schemes, as distinct from the performance of the complaint, oversight and external appeal bodies. Similarly, the Committee does not propose that the performance of the Ombudsman, the ADT or NSW Privacy should be included in the performance audit by NSW Auditor General. Rather, it is the legislative framework for accessing information, and the application of the acts, which need analysis and review. Also, the Committee emphasises that while the ACT performance audit may be a useful precedent for the FOI performance audit by

114 ibid., pp. 37-8.

115 The provisions for requesting amendment of personal records were seldom utilised. In 1999-2000 three individuals made such requests, one of whom made five of the total seven requests for that year. Only one request was reported for 2000-2001. This part of the Act is supplemented by provisions in the *Privacy Act 1988*. ibid, p. 38.

116 ibid., pp. 38-9.

117 ibid.

118 ibid., pp. 41-2.

the NSW Auditor General, it should be clearly recognised that the ACT precedent is based in the Territory's particular FOI legislative framework, aspects of which do not apply in New South Wales.

Recommendation 2
The Committee recommends that the Auditor General give consideration to broadening the scope of the proposed performance audit into FOI to include not just FOI, but also a detailed examination of efficiency and effectiveness issues arising from those areas of the privacy legislation that interact significantly with FOI in New South Wales.

6.3 Proposed principles

In the interim, pending the completion of the Audit Office performance audit, the Committee proposes that the following principles should be observed in any future decision-making about changes to the existing access to information legislation:

i. where appropriate, terminology and definitions across the FOI, privacy and local government legislation should be consistent;
ii. procedures for accessing information should be standardised wherever possible;
iii. as far as possible, exemption provisions should be consistent;
iv. the publication of material by councils, in accordance with s.12 of the LG Act, should be subject to the same protection from any legal action, liability, claim or demand as exists under s.66 of the FOI Act;
v. fees and charges should be calculated on a uniform scale and limits on the levels of fees set;
vi. uniform appeal mechanisms should apply;
vii. contracting by public sector agencies and commercial in confidence clauses should not be used to avoid FOI and FOI annual reporting requirements and obligations.

With regard to the principle of uniform appeal mechanisms, the Committee notes that appeals from FOI decisions made by local councils are heard before the Land and Environment Court, as distinct from the avenue of appeal to the ADT under the FOI Act. The Committee has previously reported on the operation and jurisdiction of the Administrative Review Tribunal (ADT) and recommended against the further proliferation of specialist tribunals. In the context of FOI, the Committee considers that the ADT should have responsibility for independent external review of administrative decisions affecting access to information. The ADT should be a more accessible and less costly avenue of appeal than the Land and Environment Court. However, the resource implications of such a change would need to be fully assessed and this may be an issue to be examined by the Attorney General, as part of the current review of the ADT, undertaken in accordance with s.147 of the ADT Act.

Appendices

Appendix 1: List of Submissions

1. Mr David Simpson
2. Residents of Blacktown & Seven Hills Against Further Traffic Inc
3. Mr Kurt Lance
4. Mr Andrew Kalajzich
5. Anonymous
6. Baulkham Hills Shire Council
7. Mr Wayne Kosh
8. Rockdale City Council
9. Australian Association for Humane Research Inc
10. Mr Robert Randazzo
11. Mr Brendan Mills
12. Mr Denys Clarke
13. The Hon Dr Arthur Chesterfield-Evans MLC
14. Department of Local Government
15. The Environmental Defender's Office (NSW)
16. Humane Society International Inc
17. Public Interest Advocacy Centre
18. NSW Ombudsman
19. Shires Association of NSW
20. Local Government Association of NSW
21. Privacy NSW
22. Mr Rick Snell
23. Ms Helen Ferns
24. State Records
25. Local Government Governance Network Group
26. Pittwater Council
27. Leichhardt Municipal Council

Appendix 2: Minutes

MINUTES

Meeting held 6.30pm, Wednesday 28 March 2001
Room 1043, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon P Breen MLC
Mrs Grusovin MP	Hon R Colless MLC
Mr Kerr MP	

Also in attendance: Ms Helen Minnican and Ms H Parker

Apologies: Hon J Hatzistergos MLC, Mr Smith MP

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3. GENERAL BUSINESS

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b Proposed access to information inquiry

That the Committee:

(1) meet with the NSW Ombudsman in relation to the Committee's proposed access to information inquiry to discuss terms of reference and have the Ombudsman provide an update on developments regarding issues which have been identified in past General Meetings including:
- problems with the three information regimes established under the Freedom of Information Act, Personal Privacy Information Protection Act and the Local Government information scheme; and
- contracting out and FOI;

(2) meet with representatives of Cabinet Office, the Premier's Department and the Auditor General's office to discuss the proposed inquiries in light of information provided by the Ombudsman; and

(3) finalise its terms of reference following these meetings.

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MINUTES

Meeting held 6.40pm, Wednesday 11 April 2001
Room 1043, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon R Colless MLC
Mrs Grusovin MP	Hon J Hatzistergos MLC
Mr Kerr MP	
Mr Smith MP	

Also in attendance: Ms Helen Minnican and Ms H Parker

Apologies: Hon P Breen MLC

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4. GENERAL BUSINESS

i. Access to information inquiry
The Committee Manager briefed the Committee on developments re freedom of information since the General Meeting with the Ombudsman.

Resolved on the motion of Mr Hatzistergos, seconded Mr Smith:

- That the Committee seek informal advice from the Cabinet Office, the Premier's Department and the Auditor General's Office on relevant developments in the access to information and privacy areas.
- That, in accordance with its functions under s.31B of the *Ombudsman Act 1974* the Committee on the Office of the Ombudsman and the Police Integrity Committee conduct an inquiry into:
  - (a) matters raised in the Ombudsman's Annual Report for 1999-2000 in relation to freedom of information, including but not limited to, the need for a review of the *Freedom of Information Act 1989*, and the proliferation of access to information schemes established under the FOI Act, the *Privacy and Personal Information Protection Act 1998*, and the *Local Government Act 1993*;
  - (b) the impact of the access to information schemes upon the operation of the Office of the Ombudsman;
  - (c) the use of privacy and confidentiality considerations as a basis for refusing access to information;
  - (d) contractual arrangements between government agencies and private sector contractors providing services on behalf of those agencies, in particular, the reported use of commercial in confidence clauses and the transfer of ownership of documents to avoid the requirements of the FOI Act, investigation by the Ombudsman and other accountability measures;
  - (e) whether the Ombudsman's jurisdiction should be extended to include the conduct of a private contractor engaged by a public sector agency and using public monies to provide services, goods or other things, on behalf of that agency;

(f) the adequacy of arrangements for complaint handling and redress in relation to services contracted out by public sector agencies;
(g) legislative amendments to the FOI Act as suggested by the Deputy Ombudsman in response to questioning from the Committee during the 7th General Meeting with the Ombudsman;
(h) any other matter considered by the Committee to be relevant to the inquiry.

- That the Committee advertise the inquiry and call for public submissions.

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MINUTES

Meeting held 12.25pm, Friday 1 June 2001
Room 1043, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon P Breen MLC
Mrs Grusovin MP	Hon J Hatzistergos MLC
Mr Kerr MP	
Mr Smith MP	

Also in attendance: Ms Helen Minnican, Ms Pru Sheaves and Ms H Parker

Apologies: Hon R Colless MLC

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4. INQUIRIES

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(b) Access to Information

The Secretariat briefed the Committee. Submissions and other information are to be distributed to the Committee.

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MINUTES

Meeting held 10.00am, Tuesday 21 August 2001
Rooms 814/815, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon P Breen MLC
Mr Kerr MP	Hon J Hatzistergos MLC
Mr Smith MP	

Also in attendance: Ms H Minnican, Ms H Parker and Ms P Sheaves.

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PUBLIC HEARING recommenced at 2.20pm.

Access to Information Inquiry

Bruce Alexander Barbour, New South Wales Ombudsman, and Gregory Robert Andrews, Assistant Ombudsman, were affirmed and acknowledged receipt of summons. The Ombudsman tabled a submission. The Chairman questioned Mr Barbour and Mr Andrews, followed by other Members of the Committee. Questioning concluded the witnesses withdrew.

Christopher John Guelph Puplick, Privacy Commissioner, took the oath and John Howard Gaudin, Legal and Policy Officer, Privacy New South Wales, was affirmed and both acknowledged receipt of summons. Mr Puplick tabled a submission and addressed the Committee. The Chairman questioned Mr Puplick and Mr Gaudin, followed by other Members of the Committee. Questioning concluded the witnesses withdrew.

The hearing adjourned at 3.25pm and resumed at 3.50pm.

John Leslie Scott, Director of Policy and Research, Department of Local Government, was affirmed and acknowledged receipt of summons. Mr Scott tabled a submission. The Chairman questioned Mr Scott, followed by other Members of the Committee. Questioning concluded the witness withdrew.

David Hugh Roberts, Director, State Records Authority of New South Wales, was affirmed and acknowledged receipt of summons. Mr Roberts tabled a submission and addressed the Committee. The Chairman questioned Mr Roberts, followed by other Members of the Committee. Questioning concluded the witness withdrew.

The hearing concluded at 4.45pm.

MINUTES

Meeting held 1.00pm, Thursday 29 November 2001
Rooms 814/815, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon P Breen MLC
Mr Kerr MP	Hon J Hatzistergos MLC
Mrs Grusovin MP	
Mr Smith MP	

Apologies: Hon R Colless MLC

Also in attendance: Ms H Minnican, Ms H Parker, Ms P Sheaves, Mr S Frappell

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3. GENERAL BUSINESS

i. The Committee manager briefed the Committee on the status of the Administrative Decisions Tribunal report and the Access to Information inquiry. The Committee discussed holding a teleconference to consider the draft ADT report.

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MINUTES

Meeting held 6.00pm, Wednesday 13 November 2002
Room 1043, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon P Breen MLC
Mr Smith MP	Hon R Colless MLC
	Hon J Hatzistergos MLC

Apologies: Mrs Grusovin MP

Also in attendance: Ms H Minnican, Ms P Sheaves and Ms H Parker

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3. INQUIRY PROGRAM

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b. Access to Information Inquiry

The Committee Manager briefed the Committee. The Committee agreed to table an interim report before the expiry of the Parliament.

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Appendix 3: Navigating the maze[119]

A guide to alternative regimes for access to personal information in NSW.

[119] NSW Ombudsman, Annual Report 1999-2000, pp. 196-9.

Appendix 4: FOI and Privacy Acts compared[120]

Purpose	
FOI Act	To promote 'openness, accountability and responsibility' in all public areas and to confer a legal right to access personal information and documents and to request amendments to records of a personal nature that are inaccurate, incomplete, misleading or out-of-date.
PPIPA	To promote fairness and accuracy in the way that personal information is collected, stored, used, accessed and disclosed and to govern the disclosure of personal information from 'public registers'.
Applies to	
FOI Act	Personal or non-personal information held by NSW government authorities, government ministers, local councils and other public agencies.
PPIPA	Personal information about the individual held by NSW public sector agencies, including local councils and prescribed bodies which are outsourcing data services and personal information in public registers.
Modified by	
FOI Act	Not applicable
PPIPA	Privacy codes of practice may modify, in relation to an agency or class of agencies, the operation of both the IPPs and the public register privacy principles. This includes exemptions from the operation of an IPP, as well as specifying the manner in which the IPP will apply.
Information covered	
FOI Act	Documents containing personal and non-personal information, including audio-visual film, tapes and discs.
PPIPA	Personal information, including genetic material, electronic records, video recordings, photographs and biometric information.
Exempt agencies	
FOI Act	Exemptions include some or all of the functions of some agencies including: Office of Auditor General; Director of Public Prosecutions; Independent Commission Against Corruption; Public Trustee; State Bank of NSW; State Authority Superannuation Board; State Superannuation Investment and Management Corporation; and the NSW Ombudsman.
PPIPA	State-owned corporations; Police Service; Independent Commission Against Corruption; Police Integrity Commission; and the Crime Commission (except in relation to their administrative and educative functions).
Exempt information	
FOI Act	NSW government cabinet and executive council documents (excepting those that are factual or statistical and do not disclose deliberations or decisions); documents exempt under Commonwealth or other States' FOI legislation; documents concerning law enforcement and public safety; documents subject

[120] C. Puplick, 'Privacy and freedom of information legislation in NSW' (2002) 9(1) *Privacy Law and Policy Reporter* 13.

	to legal professional privilege or secrecy provisions in other legislation, affecting the personal affairs or business affairs of another person or business and the economy of NSW. Additionally, documents may be subject to a Ministerial Certificate stating that a specific document is exempt and restricted.
PPIPA	Information in publicly available publications and information or an opinion about a person's suitability for appointment of employment as a public sector official. Several of the IPPs are also declared to be inapplicable if the agency is lawfully authorised or required not to comply with the principle concerned, or if non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law.
Exempt functions	
FOI Act	Judicial functions of courts and tribunals and the investment, complaint handling, investigative and reporting functions of certain agencies.
PPIPA	Some exemptions apply to the law enforcement, investigative and complaints handling activities of certain agencies.
Applicant/complainant	
FOI Act	An individual or group of individuals or a corporation or association.
PPIPA	An individual. Third party complaints may not be allowed.
Application or complaints procedure	
FOI Act	Application in writing to the agency for access to specified documents held by the agency. The agency must advise in writing within 21 days that the information is available, or if the request has been deferred or refused. This period may be extended by a further 14 days if special circumstances apply, such as the need to consult with a third party. Application fee of $30, processing fee of $30 an hour. Requests for an internal review to be made in writing within 28 days of being told of the agency's decision. Review application fee of $40.
PPIPA	Complaints about alleged breaches of privacy or applications for access to personal information, preferably in writing, can be made to the agency or the Privacy Commissioner. The agency is obliged to inform an applicant whether they hold personal information about the applicant and give access to it without undue delay or expense. Under Pt 5, the individual may seek an internal review of the agency's conduct or decisions regarding an alleged breach of the IPPs, a code of practice, or the public register provisions in Pt 6, or they may make a complaint to the Privacy Commissioner under Pt 4. If the individual complains under Pt 5, the agency must then conduct an internal interview and notify the Privacy Commissioner, and it may request the Commissioner to undertake the internal review on the agency's behalf. If the individual makes a complaint to the Commissioner under Pt 4, the Commissioner must attempt to resolve the complaint by

	conciliation, and, on completion of an investigation, can only make report and recommendations.
Review	
FOI Act	In dissatisfied with the internal review, the applicant may request that the NSW Ombudsman investigate. The Ombudsman can make recommendations but cannot change or reverse a decision. Alternatively, the applicant may request that the Administrative Decisions Tribunal (ADT) review the agency's decision. The ADT can make a fresh determination. The ADT can be used either as an alternative to an external review by the Ombudsman or after the Ombudsman has completed an external review.
PPIPA	Under Pt 5, if the person is dissatisfied by the internal review, or the action taken by the agency as a result, or if the review is not completed within 60 days, the individual can make an application to the ADT for a review of the conduct concerned.
Remedies	
FOI Act	The ADT can recommend that it is in the public interest to give access to a document which has been refused as exempt; the decision of an agency be reconsidered; action be taken to change the agency's conduct; reasons be given for a decision; or the law or practice be changed.
PPIPA	Any application to the ADT may go to the findings of the agency review or to the action proposed to be taken by the agency. The ADT may decide not to take any action following review. If it considers that action is warranted it may make one or more of the following orders: monetary compensation up to $40,000; restraining order; specific performance order; correction order; remedial steps order; non-disclosure order in the case of public register complaints; and ancillary orders.
Overlap	Agencies can refuse notification, access or correction rights under s. 13 to 15 of PPIPA by using an exemption available to that agency under the FOI Act.