information and privacy commission
new south wales

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Ms Cathryn Cummins
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Standing Committee on Social Issues
Parliament House
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By email: socialissues@parliament.nsw.gov.au

Dear Ms Cummins

Answers to questions on notice: Inquiry into service coordination in communities with high social needs

I refer to your email of 14 October attaching the transcript of my recent appearance before the Committee.

Please find attached responses to the questions on notice raised by Committee members in my capacity as Chief Executive Officer, Information and Privacy Commission and as Information Commissioner.

I would also like to correct some evidence I provided at the hearing *(p.38)* where I stated that around 30 percent of applications to agencies came from not for profit or community groups. This statement was based on data currently held by the IPC, as reported by agencies under the Government Information (Public Access) Regulation 2009. That data had been collected by the IPC since establishment and in 2014 I produced the first annual Information Commissioner's report to Parliament on the operation of the *Government Information (Public Access) Act 2009,* as required by section 37 of the GIPA Act.

As part of transitioning to a new integrated case management and reporting tool for GIPA applications to agencies introduced in July 2015, the IPC undertook a major data upload exercise which identified a small number of significant errors in the data capture of prior years. The transposition of some data in one large agency's report resulted in an over-reporting of the share of applications accounted for by not for profit or community groups. A remediation exercise is now underway. Once the remediation is complete the corrected data will be included in my next report to Parliament on the operation of the GIPA Act.

Please do not hesitate to contact David Marcus, Manager Performance Reporting and Projects, on (02) 8071 7041, or by email at david.marcus@ipc.nsw.gov.au if you have any queries.

Yours sincerely

4 November 2015

Elizabeth Tydd
Chief Executive Officer
NSW Information Commissioner

Attachment: Responses to Questions on Notice

Question 1: (Mr Phelps, p.37)

> "Firstly, what capacity is there for transfer of information both **from government to NGOs** and **NGOs back to government**, but also **from NGO to NGO** who might be working holistically on a broad problem in an area but may be deeply reticent about having to transfer information to another, and perhaps rightly so? Where is the line drawn? Is there a line? If there is not a line, why does there appear to be a line? (IPC emphasis)

Answer

1 A: In regard to the transfer of information from government to NGOs under the GIPA Act

Section 3 of the *Government Information (Public Access) Act 2009* (GIPA Act) fundamentally orients release of information under the Act to members of the public. Sections 6, 7 and 8 of the GIPA Act promote proactive release of information to citizens. Additionally an application under s9 of the GIPA Act would enable the agency to consider release of information through application of the 'public interest' test under s13 of the Act.

Specific provision under the contract between the Non-Government Organisation (NGO) and funding agency may provide for the transfer of government information to the private sector contractor. However s121 (discussed further below) would not form the basis for those provisions.

1 B: In regard to transfer of information from NGOs back to government under the GIPA Act

The GIPA Act provides a legislative mechanism for agencies to have access to information held by contractors engaged for the purpose of public service provision. Under s121 of the GIPA Act agencies are to ensure that contracts entered into with private sector contractors provide for the agency to have an immediate right of access to specified information contained in records held by the private sector contractor. The 'immediate right of access' to information provides the legislative nexus to 'government held' information which is accessible under the GIPA Act (s4 and Sch 4 cl 12).

There are limitations to the operation of this provision. While section 121 enables a government agency to respond to an access application, it does not facilitate exchange of information from agencies to private sector contractors e.g. NGOs, between agencies, or between NGOs.

The relevant provisions and the operation of the GIPA Act are discussed below:

Section: 121 Provision of information by private sector contractors

(1) An agency that enters into a contract (a "government contract") with a private sector entity (the contractor") under which the contractor is to provide services to the public on behalf of the agency must ensure that the contract provides for the agency to have an immediate right of access to the following information contained in records held by the contractor:

(a) information that relates directly to the performance of the services by the contractor,

(b) information collected by the contractor from members of the public to whom it provides, or offers to provide, the services,

(c) information received by the contractor from the agency to enable it to provide the services.

Note: A reference in this Act to government information held by an agency includes

information held by a private sector entity to which the agency has an immediate right of access. See clause 12 of Schedule 4. This means that an access application can be made to the agency for that information.

(2) A government contract is not required to provide for the agency to have an immediate right of access to any of the following information:

(a) information that discloses or would tend to disclose the contractor's financing arrangements, financial modelling, cost structure or profit margins,

(b) information that the contractor is prohibited from disclosing to the agency by provision made by or under any Act (of this or another State or of the Commonwealth),

(c) information that, if disclosed to the agency, could reasonably be expected to place the contractor at a substantial commercial disadvantage in relation to the agency, whether at present or in the future.

Note : The contractor may be entitled to be consulted by the agency under section 54 (Consultation on public interest considerations) in relation to an access application made to the agency for information held by the contractor.

The objects of the GIPA Act provide guidance in determining its application. The GIPA Act enshrines the three precepts of Open Government. It provides a mechanism:

- for citizens to obtain information held by or immediately accessible to government agencies;
- to uphold transparency and accountability; and
- to promote citizen engagement.

These principles of Open Government are reflected in the object of the GIPA Act below:

3 Object of Act

(1) In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:

(a) authorising and encouraging the proactive public release of government information by agencies, and

(b) giving members of the public an enforceable right to access government information, and

(c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

(2) It is the intention of Parliament:

(a) that this Act be interpreted and applied so as to further the object of this Act, and

(b) that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

However unlike legislation enacted by jurisdictional counterparts such as Queensland the GIPA Act can be interpreted as restricting access to a single relationship; that between government and citizens. This view is consistent with the wording of the objects of the Act, in particular 'opening information to the public' and 'giving members of the public an enforceable right to access information'.

In contrast, the objects of the *Right to Information Act 2009* (QLD), set out below, provide a less restrictive focus which has been applied to facilitate exchange of information between agencies.

> ***3 Object of Act***
>
> *(1) The primary object of this Act is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access.*
>
> *(2) The Act must be applied and interpreted to further the primary object.*

However the GIPA Act does contain other mechanisms to promote release of information more generally. For example section 12(3) provides that the Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies. Provisions such as these may have application in promoting release of information by agencies within the jurisdiction of the GIPA Act.

1 C: transfer from NGO to NGO

The GIPA Act also promotes proactive and informal disclosure of information. The sectors regulated under the GIPA Act are provided under section 4: Government Departments; Ministers (including a Minister's personal staff); public authorities; public offices; local authorities; courts, and a person or entity that is an agency pursuant to regulations. Consistent with the objects of the GIPA Act the regulation of information between NGOs is not addressed under the GIPA Act and section 121 does not extend to information exchange between NGOs.

Question 2: Ms Sharpe (p38)

> And are they mainly human services NGOs or is a lot of that coming from environmental and other NGOs?

Answer

Section 7 of the Government Information (Public Access) Regulation 2009 specifies the information that agencies should provide in their annual report on operations under the GIPA Act. The Regulation (in Schedule 2) requires only that agencies describe if GIPA applications were lodged by:

- Media
- Members of Parliament
- Private sector business
- Not for profit organisations or community groups
- Members of the public (application by legal representative)
- Members of the public (other)

It is therefore not possible to identify the type of not for profit or community group that has lodged the application. More detailed information may be held by individual agencies but it is not reported in agency annual reports on operations under the GIPA Act.

I would also like to clarify my response at p.38 of the transcript that the average number of GIPA applications over the last four years (about 13,000 applications) referred to applications to government only. Over the period, applications across all sectors (including local councils, universities and ministers) averaged approximately 15,000 per annum.

Question 3: Mr Donnelly (p40)

> You spoke about some options for the sharing of information by government departments. You referred to at least one specifically by a title. Do you have other options somewhere and if so, could you provide them to the Committee?

Answer

Consistent with my evidence to the Committee international experience and that of our interstate counterparts provide credible models for examination. These models, in part provide options to enable governments to meet the challenge of demonstrating responsible stewardship and a commitment to engagement with citizens to drive enhanced service delivery through innovation and public participation.

The IPC commissioned research to examine opportunities to 'Switch on Open Government'. That research entitled "Advancing the Objects of the Government Information (Public Access) Act 2009 NSW: An international comparative evaluation of measures used to promote government information release" (23 June 2015) is attached. The initiatives outlined in the research exemplify the strategic value of information and the opportunities to harness information to deliver service reforms and realise the economic potential of information.

The approach adopted in the United Kingdom (UK) was recently examined. In July 2014, the UK Law Reform Commission published its report on 'Data sharing between Public Bodies'. The Report examined current legislative and structural arrangements together with existing and proposed oversight mechanisms to progress a contemporary approach to information management.

Similar to the arrangements in NSW, the UK Information Commissioner's Office (ICO) was established to provide a single point of contact for citizens, businesses and all tiers of government. However, the UK model has matured in its recognition of the civic benefits of an integrated holistic approach to 'information management'.

The ICO's role encompasses three specific areas including data sharing; freedom of information; and privacy in administering the *Freedom of Information Act 2000* and the Data Protection Act 1998. Under this regulatory model the ICO houses a central register of organisations 'data controllers' that process personal information. A statutory Data Sharing Code of Practice has been developed to ensure that access is in compliance with the application of the safeguards proscribed in the Code. Guidance is also provided by the ICO through a checklist that explains the application of the legislation including its application to personal data. The OIC, similar to the IPC independently regulates and promotes compliance.

The approach recognises government's responsibility to form a contract with citizens regarding the utilisation of data and information by governments to deliver better services and inform policy and decision-making regarding public expenditure.

The Report provides a cogent set of recommendations to advance information sharing, accountability and transparency including:

1.6 – We recommend that a full law reform project should be carried out in order to create a principled and clear legal structure for data sharing, which will meet the needs of society.

1.7 – The scope of the review should extend beyond data sharing between public bodies to the disclosure of information between public bodies and other organisations carrying out public functions.

1.9 – We consider that the project could usefully include consideration of the functions of the Information Commissioner in relation to data sharing, including the Commissioner's enforcement role. The work of other bodies providing advice and guidance should be explored to improve the consistent application of data sharing law across government and in public service delivery more widely.

1.10 – The investigation should also include consideration of "soft law" solutions such as codes of practice, as well as advice and guidance, training of staff, and ways of sharing best practice in the management of data sharing between public bodies.

The Report recognises the need for an holistic approach to and independent oversight of information management by the OIC.

These principles are critical to the successful delivery of traditionally government sector services by private contractors.

Likewise the promotion of public trust in government as a responsible custodian of information and responsive, effective service provider are also integral to improved service delivery.

After five years of operation the decision making framework provided under the GIPA Act has matured and is accepted as an assessable mechanism to promote information release and appropriately balance factors for and against disclosure of information. This is particularly evident in dealing with applications involving personal information and is exemplified by the Information and Privacy Commission (IPC) case work outcomes. Information Commissioner Guideline 4 (2012) referenced in my previous submission provides guidance to agencies navigating the intersect between the GIPA Act and the PPIP Act. Under the GIPA Act the IPC independently reviews agency decisions in relation to information access applications. In the 2014/15 reporting period the IPC considered 95 reviews of agency decisions that concerned privacy related public interest considerations against disclosure. While there were cases where the Information Commissioner's delegates made recommendations to agencies to reconsider decisions, there were no cases in which the Information Commissioner's delegates recommended consultation with the Privacy Commissioner to facilitate a recommendation against a decision of an agency not to release personal information.

The GIPA Act's focus on proactive and informal information release together with the application of the 'public interest test' to facilitate a balanced release of information provides a sound basis to promote information release.

However current limitations do not reflect more contemporary approaches to management of information as a strategic asset and the requirement to apply that asset to service delivery by the broad public purpose sector.

The benefits of this strategic asset will be maximised through a clear, cohesive and credible governance model which includes an independently oversighted principles based regulatory regime.

The opportunity currently presented by the statutory review of the GIPA Act to re-examine the objects and policy intent of the Act should be harnessed to respond to the significant advances in the way government develops policy and delivers services. These changes, including a growth in provision of traditionally government services by the public purpose sector, should inform a contemporary approach to information management.

Holistic integrated service delivery by the public purpose sector must be supported by an holistic approach to information management and Open Government.

A brief description of the broader application of the *Right to Information Act 2009* (QLD) (RTI Act) is set out in response to Question 1. That model promotes release of government held information through enshrining an enforceable right to information informed by a sound decision making process and 'push' mechanisms similar to the proactive release mechanisms provided under the GIPA Act. However the objects of that Act support a less 'audience specific' focus which promotes the wider release of information.

The RTI Act is also subject to a statutory review and I attach the Queensland Office of Information Commission submission to that review of November 2013. In particular the interaction between information access and privacy in that jurisdiction is discussed at Chapter 3 of the submission which contains recommendations that:

> *OIC recommends a single point of entry for the right of access within the RTI Act. OIC recommends the following consequential changes if access rights for personal information are relocated to the RTI Act, including:*
>
> - *relocating amendment rights for personal information from the IP Act to the RTI Act; and*
> - *mechanisms in the RTI Act to exclude wholly personal applications from application fee and disclosure log requirements.*

The scope of the RTI Act is also discussed in recognition of its application to government documents, which may not facilitate exchange of information outside that definition; for example to encompass documents of other public purpose providers including state owned corporations. However at 4.4 the submission recognises that the RTI Act facilitates other mechanisms to proactively release information. These arrangements may have application to the Committee's consideration of approaches to facilitate exchange of information between NGOs or from NGOs back to agencies.

> *The obligations of Government Owned Corporations (GOCs) under the RTI are different from those of other agencies. Schedule 1 of the RTI Act excludes certain GOC documents from the Act entirely; for some GOCs access rights to other documents are limited only to those which relate to their community service obligations.*
>
> *While GOCs may have limited requirements under the legislation they are required to comply with the Office of Government Owned Corporation's (OGOC) Release of Information Arrangements. Policies issued by OGOC and adopted by GOCs in their Statement of Corporate Intent form part of the agreement between GOCs' boards of directors and the GOCs' shareholding Ministers as to the operation of each GOC.*
>
> *The Release of Information Arrangements state that the push model applies to all GOCs, including those excluded from the operation of the RTI Act.*
> *It specifically requires GOCs to publish information in a Publication Scheme in line with the requirements of the RTI Act and Ministerial Guidelines.*

These recommendations by the Queensland OIC reflect extant legislative arrangements where- by community service functions may fall within jurisdiction and other documentation may not be subject to the RTI Act. The arrangements under that Act arguably provide a broader application in some instances particularly in promoting the exchange of information between government agencies. Additionally it provides options to consider in relation to a more appropriate classification of information for release in certain circumstances. The OIC has derived the benefits of a single point of service through production of integrated guidance such as agency self-audits to promote information release and privacy.

The Committee may wish to give further consideration to this and other approaches. However a further fracturing of information access regimes through the introduction of new 'soft law' solutions or separate instruments governing information release over sighted by separate entities would arguably introduce new complexities and competing interests.

In conclusion, the promotion of information sharing should be examined through a fundamental orientation towards release of information and a cohesive legislative and regulatory approach.

Office of the Information Commissioner
Queensland

Submission to the Department of Justice and Attorney-General
Discussion Paper

Review of the Right to Information Act 2009 and Chapter 3 of the Information Privacy Act 2009

November 2013

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GLOSSARY

Administrative access scheme	A scheme developed by an agency which enables the public to access information from the agency without making a formal access application.
Agency	A department, local government, public authority, GOC or GOC subsidiary which is subject to the RTI Act. For the purposes of this submission, *agency* includes a Minister unless otherwise indicated.
Amendment application	An application made under Chapter 3 of the IP Act to amend personal information.
Application form	The approved application form to be used when making an access application under the RTI Act or Chapter 3 of the IP Act.
CEN	Charges Estimate Notice: an estimate of the charges an RTI applicant may have to pay for their access application.
Considered decision	A decision to grant or refuse access to document in response to a formal access application.
Consulted third party	A third party who is being consulted about the release of a document because the release may be of concern to them.
Contrary to the public interest information	Information which has been subject to the public interest balancing test with the result that a decision-maker has decided it would be contrary to the public interest to release it.
Deemed decision	Occurs where a decision on a formal access application is not made on time. The RTI or IP Act deems that the agency has decided to refuse access to all documents applied for.
Disclosure Log	A list of documents released in response to RTI access applications, generally published on the agency website. Departmental and Ministerial disclosure logs contain additional information about the application and the applicant.
Exempt information	Information which falls into one of the categories listed in schedule 3 of the RTI Act.

Formal access application, access application	An application for access to documents made under the RTI Act or Chapter 3 of the IP Act.
GOCs	Government Owned Corporation
IP, IP Act	*Information Privacy Act 2009*
OIC	Office of the Information Commissioner
Ministerial Guidelines	Mandatory guidelines issued by the Minister responsible for administering the RTI Act which provide agency guidance on publication schemes and disclosure logs.
Processing period	The time in which an agency is entitled to deal with and make a considered decision on a formal access application.
Personal information	Information or opinion about an individual whose identity is reasonably ascertainable.
Public interest balancing test	The act of identifying the factors favouring disclosure and the factors favouring non-disclosure relevant to a document to decide if it is contrary to the public interest to release it.
Public interest factors	The irrelevant factors, factors favouring disclosure of information, and factors favouring non-disclosure of information listed in schedule 4 of the RTI Act.
Publication scheme	A collection of seven categories of information about an agency which an agency is required to routinely publish.
RTI, RTI Act	*Right to Information Act 2009.* For the purposes of this submission, references to the RTI Act also include chapter 3 of the IP Act.

SUMMARY OF OIC RESPONSES TO THE LEGISLATIVE REVIEW OF THE RTI ACT AND CHAPTER 3 OF THE IP ACT

Part 1: Objects of the Act – push model strategies	
1.1	OIC submits that the primary object of the RTI Act remains valid and is increasingly relevant to and consistent with community expectations about open, accountable and transparent government.
1.2	OIC submits that the push model is appropriate and effective. It allows for greater and more timely, less formal, and less costly access to government held information. OIC submits that greater emphasis should be placed on the push model and recommends that further tools be introduced to facilitate this, including legislative amendment to: • to include in Chapter 2 of the RTI Act a clear requirement to adopt administrative access schemes where appropriate • require all agencies to publish details on their website of how and what administrative access is available as part of their publication scheme • include high-level guidance in the Ministerial Guidelines on developing administrative access schemes • amend the protections in the RTI Act to cover: o documents published as part of an agency or Minister's Publication Scheme under section 21 of the RTI Act o policy documents required to be published under Section 20 RTI Act o documents released under an effective administrative access scheme that meets the criteria in the Ministerial Guideline; and • to make it mandatory for all agencies (not just Ministers and departments) to have disclosure logs.
Part 2: Interaction between the RTI and IP Acts	
2.1	OIC recommends a single point of entry for the right of access within the RTI Act. OIC recommends the following consequential changes if access rights for personal information are relocated to the RTI Act, including: • relocating amendment rights for personal information from the IP Act to the RTI Act; and • mechanisms in the RTI Act to exclude wholly personal applications from application fee and disclosure log requirements.

Part 3: Applications not limited to personal information	
3.1 – 3.3	OIC recommends that: • the processing period should be suspended during the section 40 process • the requirements for an agency to again consider whether an application can be made under the IP Act should be removed and an alternative process, similar to the process set out in section 61 of the IP Act be investigated as an alternative; and • the timeframe in section 54(5)(b) IP Act should be amended to ten business days. (OIC notes that if its recommendation at 2.1 is accepted these issues are no longer relevant.)
Part 4: Scope of the Act	
4.1-4.2	OIC considers no amendments to the Act are required to enable decision-makers to refuse access to a document which is neither a document of an agency nor a document of a Minister. OIC submits that the power is one which decision-makers and the OIC already possess as part of their inherent powers to decide jurisdictional matters relevant to their decisions.
4.3	OIC recommends that the timeframe for making a decision that a document or entity is outside the scope of the Act be extended from 10 business days to the processing period that applies for other types of decisions under the Act. This would ensure consistency with other provisions regarding general processing timeframes in the Acts and enable certainty regarding when decisions 'go deemed'.
4.4	No recommendation made, however OIC notes that GOCs appear to be currently complying well with their obligations under the RTI Act.
4.5	No recommendation made.
4.6	OIC recommends that the Government: • consider the impact greater use of the non-government sector to deliver services will have on the community's right of access to information; and • investigate mechanisms to ensure accountability and transparency of government expenditure on services outsourced to non-government entities. However, OIC does not recommend that contractors be made an agency that must process and decide access applications under the RTI Act.

Part 5: Publication Schemes	
5.1-5.2	OIC recommends that all agencies with websites be required to publish their publication schemes on those websites. OIC recommends agency publication schemes be required include a link to relevant data on other websites, for example the Queensland Government Data website.
5.3	OIC submits that there are new ways of making government information available that do not require legislative amendment.
Part 6: Applying for access or amendment under the Acts	
6.1-6.2	OIC recommends amending the RTI Act to allow agencies the flexibility to create their own application forms that comply with requirements set out in the relevant Regulation. OIC recommends retaining the whole of government forms for use by agencies who choose not to develop their own form.
6.3	OIC does not recommend expanding the list of people authorised to certify evidence of identity for RTI and IP Act applications.
6.4	OIC recommends that the requirement to provide evidence of identity and authority be removed for legal representatives who have been retained by the applicant to act on the applicant's behalf. OIC does not recommend removing it for other agents.
6.5	OIC recommends including in the Act a greater discretion to refund or waive the application fee.
6.6	OIC recommends that the provision in the RTI Act specifically enabling applications by a parent on behalf of a child be removed so that the general agency provisions apply. OIC recommends that the provision regarding refusal because disclosure is not in the child's best interests be retained.
6.7	OIC recommends that, to increase certainty and consistency, timeframes be simplified by providing that there is a single period of time for processing applications—the processing period—which is increased to include any further period in which the agency is entitled to continue working on an application.
6.8	OIC does not recommend amending the Act to allow an agency to continue processing an application indefinitely until such time as they are notified a review has been sought. OIC recommends investigating a mechanism that will reduce red tape and the administrative burden on agencies by introducing more flexibility into time periods for decision making. OIC also recommends amending the Act to provide that a deemed decision occurs where a decision is not made by the end of the processing period.

6.9	OIC considers the Charges Estimate Notice system is beneficial and does not recommend it be removed as long as the current charging regime is in place. OIC recommends that a specific review of the current charging regime be undertaken to streamline the charging process.
6.10	OIC recommends that the number of Charges Estimate Notices an applicant can receive remain limited to two.
6.11	OIC recommends against making the amount of the charge a reviewable decision and notes its recommendation at 6.9 that a review of the current charging regime be undertaken. OIC also notes that any introduction of a right of review involving the amount an agency charges would require additional OIC resources to meet additional demand for external review. If it is decided that the amount of charge should be reviewable, OIC recommends that it not be an absolute right and suggests that only total charges over a certain amount should be reviewable, for example where an agency has assessed the charges as being over $500.00.
6.12	OIC recommends that the requirement to provide a Schedule of Documents be omitted from the RTI Act and that mechanisms for facilitating communications between decision-makers and applicants, as discussed at recommendation 12.1, be investigated.
6.13	OIC recommends lifting the threshold in section 37 of the RTI Act from 'concerned' to 'substantially concerned', reinstating the narrower test for required consultation with third parties about intended release of documents.
6.14	OIC recommends that section 37 of the RTI Act be amended to provide that an agency may disclose the applicant's identity to a third party being consulted under that section as long as doing so is not an unreasonable invasion of the applicant's privacy. OIC further recommends that details about this possible disclosure be required as part of an application form's collection notice. OIC does not recommend amending section 37 to permit a decision-maker to tell the applicant who is being consulted on the application.
6.15	OIC recommends permitting agencies to transfer part of an application where it relates to a document held by two entities and the responsibilities of the second agency are more closely aligned with the document than the first agency.

6.16	OIC recommends replacing the Acts Interpretation Act requirements for reasons for decisions with specific RTI Act requirements, with a focus on brevity and clarity.
6.17	OIC does not consider any changes to section 55 of the RTI Act, which allows agencies to neither confirm nor deny the existence of documents, are necessary. OIC does not recommend introducing a requirement that agencies provide further detail about the nature of the prescribed information.
6.18	OIC recommends that there should continue to be no right of review for the content of a notation made by an agency in response to an amendment application.
Part 7: Refusing access to documents	
7.1	OIC considers that listing excluded documents in schedule 1 and excluded entities in schedule 2 is an efficient and appropriate approach to enable refusal of access to specific types of documents and exclude particular entities, or part of their functions, from the application of the Act. OIC recognises that any additions to schedule 1 or schedule 2 could occur only after detailed consideration and consultation.
7.2	No recommendation. However OIC notes that the public interest test provides agencies with significant flexibility to make decisions that reflect the extent of their concerns regarding disclosure of documents. In the event a new exempt information category is considered, careful consideration and consultation would be necessary to ensure it is consistent with the overall objects of the RTI Act.
7.3	OIC considers that the public interest balancing test is working well. OIC recommends that the factors in schedule 4, Parts 3 and 4 be combined into a single list of public interest factors. Further, OIC recommends that consideration be given to grouping the combined factors into related groups. OIC recommends that section 49(3)(a) of the RTI Act be amended to clarify that decision-makers are only required to identify irrelevant factors listed in schedule 4, part 1 and any further irrelevant factors that arise in the circumstances of that application.
7.4	OIC recommends that the wording of items 1, 2, 3, 9 and 10 in schedule 4, part 4 be amended so that those harm factors need only be considered when the relevant outcomes could reasonably be expected to occur. OIC does not consider that any other changes to the public interest factors are required.
7.5	No recommendation. However, OIC notes that the RTI Act includes a broad range of existing protections for communications between Ministers and departments.

7.6	No recommendation. However OIC notes the Hawke Review discussion and acknowledges the Australian Information Commissioner's comments that disclosure of incoming government briefs may diminish the value of such briefs.
7.7-7.8	OIC recommends that no legislative change is required to clarify the operation of the RTI Act. OIC considers that existing provisions provide sufficient flexibility to deal with Commission documents after the Commission of Inquiry has ended.
7.9	No recommendation. However, OIC considers that existing provisions provide sufficient flexibility to deal with applications for information relating to mining safety.
7.10	No recommendation. However, OIC considers that existing provisions provide sufficient flexibility to deal with access applications for information about successful applicants for public service positions.
Part 8: Fees and charges	
8.1	OIC submits that the basis for access to court records is fundamentally different from access to government-held information under the RTI Act.
8.2	No recommendation. However, OIC notes that some exceptions to fees and charges currently exist.
8.3	OIC recommends that, rather than suspending the processing period while a non-profit organisation applies to OIC for financial hardship status, non-profit organisation who wish to have their processing and access charges waived on the grounds of financial hardship be required to apply for financial hardship status before lodging their access application with the agency.
8.4-8.5	OIC recommends that a mechanism be inserted into the RTI Act allowing applications for information about people treated in multiple health services to be made with a single application fee. OIC recommends investigating adaption of the existing transfer provisions as a mechanism for allowing applications to be made across multiple health services with a single application fee.

Part 9: Reviews and appeals	
9.1-9.2	OIC recommends that the legislation be amended to: • make internal review mandatory • broaden OIC's power of remittal back to agencies where: o further searches to locate documents are required o further searches at OIC's instigation have located documents, and an initial decision regarding those documents is required o the agency decision/s to address a jurisdictional or threshold issue has been reviewed by OIC and an initial decision regarding substantive issue of access to the documents is now required o consultation with relevant third parties has not occurred and is required; and • allow OIC to remit decisions back to the agency without the agency requesting further time.
9.3	OIC submits that applicants should be entitled to pursue sufficiency of search concerns through both internal review and external review. OIC recommends that the definition of "reviewable decision" be expanded to include sufficiency of search.
9.4	OIC recommends that consideration be given to lengthening the time period in which an agency must decide an internal review and to allowing an applicant to give an agency extra time to make a decision.
9.5	OIC submits that the protections in the RTI Act currently apply to the release of documents as part of an informal resolution. However, if greater certainty is required, OIC recommends amending section 169 to explicitly include documents released as part of informal resolution.
9.6	OIC considers the current model of mandatory external review prior to right of appeal to QCAT is efficient and effective. OIC does not support adopting the Commonwealth model, with review rights to the Information Commissioner or the Tribunal, in Queensland.
Part 10: Office of the Information Commissioner	
10.1-10.2	OIC considers current legislative provisions are sufficient to allow OIC to deal with repeat applicants. Further, OIC submits existing legislative tools are sufficient for agencies to deal with excessive use of agency resources by repeat applicants. However, OIC considers that agencies may not be using existing tools where it is appropriate to do so.

10.3	OIC submits that it does not require additional powers to obtain documents as part of its performance monitoring, auditing, or reporting functions.
10.4-10.5	OIC does not consider that legislative timeframes for external review should be introduced.
Part 11: Annual reporting requirements	
11.1	OIC recommends that the information agencies are required to report annually be revised to minimise administrative burden, improve utility of data, and facilitate timeliness of reporting. OIC recommends that alternative approaches to collection and reporting of data be investigated to ensure data is available online as soon as possible after each financial year, consistent with the push model and open data initiative.
Part 12: Other issues	
12.1	OIC recommends investigating a method of including a period of time for negotiation for, and clarification of, access applications prior to commencement of the processing period.

EXECUTIVE SUMMARY

The *Right to Information Act 2009* (Qld) (RTI Act) and the *Information Privacy Act 2009* (Qld) (IP Act) provide a strong foundation for Queensland public sector agencies to adopt a 'push model' approach in conducting their activities. Since commencement of the legislation in July 2009, the Office of the Information Commissioner (OIC) has observed considerable progress in movement to a presumption of pro-disclosure and, importantly, proactive disclosure by agencies. This has increased the flow of information to the community as part of how agencies routinely operate and is also evident in the findings of OIC's performance monitoring activities.

OIC welcomes the opportunity to respond to this discussion paper. As the objects of the review include investigating specific issues recommended by the Information Commissioner, OIC provided key issues in June 2011 and March 2013 for investigation during the review. This submission draws on over four years of stakeholder feedback and our experience in applying the legislation and focuses on issues which have caused difficulties and hindered the efficient and effective operation of the legislation for the community, agencies, and OIC.

OIC considers the primary object of the RTI Act—to give a right of access to information in the government's possession or under its control unless, on balance, it is contrary to the public interest to do so—not only remains valid but is critical to achieving and maintaining open, accountable and transparent government. The OIC submits that the RTI Act and its provisions are appropriate to meet its primary objects. The public interest test complements the exempt information provisions to ensure the appropriate balance of public interest factors regarding disclosure. However, OIC recommends investigation of specific issues to improve the operation of the Act and support the push model.

It is also critical that the legislative framework be supported by strong leadership and expectations of the public service. The effectiveness of strong leadership has been recently demonstrated by Premier Newman's Open Data scheme, a push model initiative that requires agencies to publish data online, which has facilitated the broader cultural change required to realise RTI objectives.

In June 2013, the Queensland Police Service launched the Online Crime Statistics Portal. Linked to geospatial information, this is a significant achievement, consistent with the Open Data initiative, recommended by OIC in its 2011 *Queensland Police Service Compliance Review*[1] . This portal provides the community with an interactive tool that enables access to timely crime data.

OIC's performance monitoring activities have found , since the first self-assessed Electronic Audit in 2010, that there has been an improvement in reported compliance with RTI obligations across all agencies. 85% of agencies reported in 2013 that they had fully or partially implemented their obligations under the RTI and IP Acts. Similarly, OIC's Desktop Audit reports of agency websites in

[1] < http://www.oic.qld.gov.au/__data/assets/pdf_file/0007/7792/report-qps-2011-review-report.pdf>

2012-13[2] show that agencies have continued to improve legislative compliance with online publication schemes and disclosure logs, two of the RTI Act's key push model strategies.

OIC has effectively implemented its assistance and monitoring functions created by the RTI Act, supporting agencies to improve RTI practices and promoting greater awareness of information rights and responsibilities. OIC provides extensive online resources, including annotated legislation, operates an Enquiries Service for the community and agencies, and provides training, delivered online and in face-to-face workshops. OIC's performance monitoring activities have brought about substantial change to agency compliance with RTI and IP obligations, including through comprehensive compliance reviews.

Key issues OIC recommends be considered in this review relate to consolidating access applications under a single Act; mechanisms to assist in managing demand for external review, including broadening the ability to remit external reviews back to the agency; streamlining legislative processes; and increasing certainty and consistency. OIC also recommends that changes be made to provide greater support to the push model, including strengthening publication scheme, administrative access and disclosure log requirements. The recommended changes will in turn increase certainty for all parties, reduce red tape for both agencies and the community, and help prevent inefficient use of agency and OIC resources.

OIC considers that the public interest test provides agencies with significant flexibility to make decisions that reflect the extent of their concerns regarding disclosure of documents. The public interest test complements the existing categories of exempt information Parliament has decided would clearly be contrary to the public interest to disclose. In the event any new exempt information category is proposed, careful consideration and consultation would be necessary to ensure it is consistent with the overall objects of the RTI Act. While some may seek the certainty of an explicit exemption, such provisions do not have the flexibility of the public interest test, an effective tool which allows decision makers to take into account all public interest factors relevant to the particular circumstances of each case. OIC has recommended that the public interest test be simplified to in turn streamline decision making.

OIC has experienced a significant increase in demand for external review since commencement of the RTI Act in 2009. Approval to increase the OIC budget to address additional demand has been provided on an annual basis, pending resolution of potential policy solutions through this review.

External review demand continued to increase in 2012-13, to a record 533 applications, indicating that the increased demand is not the short-term result of applicants and third parties testing new legislation; as such, a permanent solution is required. To assist in addressing this demand, particularly for applications prematurely coming to external review, OIC has recommended that several changes be considered, including reinstating mandatory internal review and broadening the

[2] < http://www.oic.qld.gov.au/__data/assets/pdf_file/0008/22310/report-results-of-desktop-audit-2012-13.pdf>

power to remit certain external reviews to agencies for decision. These changes would contribute to reducing demand and the more efficient and effective use of government resources.

There are broader issues of particular relevance to effectiveness of right to information: changes in information communication technology and opportunities for government, and the impact of increased outsourcing of government services.

These issues raise challenges for government in ensuring agencies meet changing community expectations. Transparency can be used as an effective tool in public sector performance and management, and Queensland can draw on the experience of other jurisdictions to seize new opportunities to meet these expectations and build on push model initiatives such as Open Data. Transparency can also contribute to participatory government which enables the community to help identify innovative solutions, eliminate waste and achieve better outcomes consistent with the objectives of the RTI Act.

Please note, when discussing access applications this submission refers primarily to provisions of the RTI Act. If OIC's recommendation at 2.1—that the RTI Act become a single point of access—is ***not*** *accepted those discussion should be read as applying to the equivalent provisions in Chapter 3 of the IP Act. A table of equivalent RTI and IP Act provisions is included at Appendix D.*

THE OFFICE OF THE INFORMATION COMMISSIONER

The Office of the Information Commissioner (OIC) was established under the now repealed *Freedom of Information Act 1992* and continues under the *Right to Information Act 2009* (RTI Act). The Information Commissioner is accountable to the Queensland Parliament through the Legal Affairs and Community Safety Committee.

The statutory role of the Information Commissioner and OIC's functions are set out in the RTI and IP Acts. OIC's role includes assisting in achieving the goal of open and transparent government by promoting better and easier access to public sector information and improving the flow of information to the community. Through its functions, OIC supports the public sector's corporate governance and accountability framework.

The RTI and IP Acts expanded OIC's functions beyond external review of agency decisions. OIC functions now include:

- promoting greater awareness of the operation of the Acts
- providing assistance to the agencies and the community on the interpretation and administration of the Act
- monitoring agency performance of, and compliance with, the RTI and IP Acts; and
- mediating privacy complaints.

There is synergy between all functions of the OIC, as the work of one area supports and complements the work of another. OIC's current model has been adopted or adapted by other jurisdictions; representatives of several jurisdictions have travelled to Queensland to study the efficient and effective way OIC carries out its functions.

The Federal Government's major overhaul of their Freedom of Information legislation adopted the structure put forward by the Queensland reforms, stating that the "establishment of an Office of the Australian Information Commissioner not only supports the important outcome of promoting a pro-disclosure culture and revitalising FOI, but also lays new, stronger foundations for privacy protection and improvement in the broader management of government information". [3]

In relation to external review, activities include reviewing decisions of agencies and Ministers, and reviewing whether, in relation to the decisions, agencies and Ministers have taken all reasonable steps to identify and locate documents applied for by applicants. Under the RTI legislation, OIC seeks to resolve external reviews informally and with as little formality and technicality as possible. Under the RTI and IP Act there is an increased emphasis on early, informal dispute resolution to achieve quick and effective outcomes for all parties. Information, resources and explanatory notes relevant

[3] Second Reading Speech *Australian Information Commissioner Act 2010* 13 May 2010 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F2010-05-13%2F0111;query=Id%3A%22chamber%2Fhansards%2F2010-05-13%2F0176%22>

to decisions and views of the Office on the application of the RTI and IP Acts are captured in the Annotated Legislation, available on OIC's website[4].

Information about OIC's history is set out in Appendix A.

[4] <http://www.oic.qld.gov.au/annotated-legislation>

PART 1: OBJECTS OF THE ACT – PUSH MODEL STRATEGIES

1.1 Is the Act's primary object still relevant? If not, why not?

OIC submits that the primary object of the RTI Act remains valid and is increasingly relevant to and consistent with community expectations about open, accountable and transparent government.

The RTI Act represents a clear move to a 'push' model, requiring government to proactively and routinely release information and to have a pro-disclosure bias when deciding formal access applications, only withholding information where disclosure would, on balance, be contrary to the public interest.

The preamble to the RTI Act states that "Government information will be released administratively as a matter of course, unless there is a good reason not to, with applications under this Act being necessary only as a last resort." A right to information law that strikes an appropriate balance between the right of access and limiting that right of access on public interest grounds is critical to both a robust, accountable government and an informed community. Such laws:

> *…renew accountable democracy. They stimulate responsible freedom in the media. They obviate the plague of leaks that spring up in a world of too many secrets. They encourage a questioning and self-confident citizenry.*[5]

But these laws require more than just aspirational statements. Clear leadership and expectations of the public service are required to create effective right of access to information for the community. These essential elements have been evident in the adoption of the Queensland Government Open Data scheme, which is an effective example of a push model initiative.

The primary object of the RTI Act is perhaps more relevant in 2013 than when the legislation commenced in 2009. It is consistent with current Queensland Government commitments to make the government more open, accountable and accessible for all Queenslanders. Australia is now also a member of the Open Government Partnership[6], an international platform which promotes government transparency and making governments more open, accountable, and responsive. International and Australian jurisdictions are progressing to greater openness, particularly in areas such as data, performance, and the use of technology.

At the recent Open Government Partnership 2013 Annual Summit in London, United Kingdom Prime Minister David Cameron stated "…it's better for us all to have an open system which everyone has access to – the more eyes that look at this information, the more accurate it will be".[7] This has been

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[5] The Hon Justice Michael Kirby *The Seven Deadly Sins*, British Section of *The International Commission of Jurists Fortieth Anniversary Lecture Series*, London, Wednesday 17 December 1997 <http://www.michaelkirby.com.au/images/stories/speeches/1990s/vol40/1997/1470-Freedom_of_Information_-_The_Seven_Deadly_Sins_(ICJ).pdf>, page 4

6 <http://www.opengovpartnership.org/>

[7] https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013

the approach with the Queensland Government Open Data scheme, where OIC understands that inaccuracies in government datasets have often been promptly identified and corrected, providing a better basis for government decision making.

Community expectations are changing with the adoption of technology and developments in Queensland and other jurisdictions as citizens realise that government can do more to increase access to information, particularly online and with as little formality as possible. Push model strategies and initiatives such as publication schemes, publishing data online, administrative access and disclosure logs support government to meet such expectations by reducing red tape and administrative burden and providing better and easier access for the community.

The RTI Act recognises the community's changed expectations, providing that formal access applications should be a last resort, required only where information is unsuitable for release under a push model strategy, and includes in the right of access the right to have a decision refusing access reviewed by an independent body.

1.2 Is the push model appropriate and effective? If not, why not?

OIC submits that the push model is appropriate and effective. It allows for greater and more timely, less formal, and less costly access to government held information.

OIC submits that greater emphasis should be placed on the push model and recommends that further tools be introduced to facilitate this, including legislative amendment to:

- ***to include in Chapter 2 of the RTI Act a clear requirement to adopt administrative access schemes where appropriate***
- ***require all agencies to publish details on their website of how and what administrative access is available as part of their publication scheme***
- ***include high-level guidance in the Ministerial Guidelines on developing administrative access schemes***
- ***amend the protections in the RTI Act to cover:***
    - ***documents published as part of an agency or Minister's Publication Scheme under section 21 of the RTI Act***
    - ***policy documents required to be published under Section 20 RTI Act***
    - ***documents released under an effective administrative access scheme that meets the criteria in the Ministerial Guideline; and***
- ***to make it mandatory for all agencies (not just Ministers and departments) to have disclosure logs.***

Is the push model appropriate?

OIC submits that the push model is appropriate.

The RTI Act contains tools to facilitate the push model such as requiring agencies to publish disclosure logs and publication schemes. Disclosure logs contain information about previous formal RTI access applications made to the agency and copies of documents released as a result.

The Ministerial Guidelines, issued by the Attorney-General under the RTI Act and with which agencies must comply, provide that a publication scheme:

> *…sets out the kinds of information that an agency should make routinely available. The information should be easy for any person to find and use. As routinely published information is available as part of an agency's normal business, the information should be simple to access through the agency website or be easily and quickly sent out by an officer of the agency.*

The push model also requires agencies to release information administratively.

OIC notes that the push model philosophy has been adopted by the Government in its Open Data initiative. The Premier's charter letter to Assistant Minister Ray Stevens asks him to "lead culture change within government departments to ensure more raw information is released…and less government resources are needed to present information"[8]. The Open Data portal is designed to improve community access to public sector data to both create a more informed community and build knowledge and innovation.

Opening up government data is consistent with and an important part of Queensland's right to information push model. This proactive release approach is creating new opportunities for the community and the private sector to reuse and remix that data.

The push model, including open data initiatives, will not remove the need for formal access applications to be made because, for example, the information sought may not constitute data, may require consultation with third parties, or may require consideration of the public interest test to determine whether access to some or all of the information should be refused. The RTI Act's right of access will always provide an appropriate and efficient mechanism to carefully consider information's complex sensitivities when determining whether disclosure would be contrary to the public interest.

[8] < http://www.cabinet.qld.gov.au/charter-letters/charter-letters-A-M-ray-stevens.aspx>

Is the push model effective?

OIC submits that the push model is an effective tool to maximise information disclosure to the community, however further work is required to increase its effectiveness.

Part of OIC's role is to monitor and report on agency performance in implementing the RTI reforms. The recent self-assessed Electronic Audit of agencies[9] found that agencies reported that the formal processing requirements of the RTI Act have largely been implemented. Agency implementation and adoption of the push model, however, is less advanced. OIC suggests that, as the former are specifically proscribed in the legislation, which essentially operates as a step by step guide, such requirements were more easily adopted.

This is supported by OIC's findings in relation to different aspects of the push model. Generally, agencies have shown marked improvement in the areas of disclosure logs and publication schemes, but lag far behind on the implementation of administrative access schemes[10], with only one third of agencies reporting in 2013 that progress had been made in this area since commencement of the RTI Act in 2009[11].

In general, shifting to a push model allows information access laws to have a preventative benefit. The proactive and routine release of government-held information heightens the prospect of public scrutiny which consequently should act to deter officials from impropriety and encourage the best possible performance of their functions[12]. Other benefits are set out in the RTI Act's preamble: in a free and democratic society there should be open discussion of public affairs by an informed community, that government openness leads to increased community participation which leads to better government decisions, that right to information legislation improves public administration and government decisions.

The experience in the United Kingdom (UK) has shown that transparency of government information and data can make a real difference and "that publication of data is having a material effect on the behaviour and culture of public officials" [13]. Expense claims for senior civil servants dropped by 40-50% following requirements in 2009 that they be published. Energy consumption was reduced by 15% as a result of publishing real-time energy consumption information. The ability to justify public sector behaviour, decisions, and expenses to the community has become particularly relevant in times when resources are stretched.

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[9] <http://www.oic.qld.gov.au/about/our-organisation/key-functions/compliance-and-audit-reports/2013-right-to-information-and-information-privacy-electronic-audit>

[10] See OIC's 2013 *Right to Information and Information Privacy Electronic Audit* and *Results of Desktop Audits 2012-2013*.

[11] See OIC's 2013 *Right to Information and Information Privacy Electronic Audit.*

[12] Paragraph 3.26, Office of the Information Commissioner Annual Report 1995-1996, <http://www.oic.qld.gov.au/__data/assets/pdf_file/0005/7772/report-oic-annual-report-1995-1996.pdf>

[13] Occasional Paper No. 4 *Transparency in Practice*: *the United Kingdom experience*, Andrew Stott, August 2012 <http://www.anzsog.edu.au/media/upload/publication/100_4-Stott-Transparency-in-Practice.pdf>

The push model creates an environment in which information and documents which raise no public interest concerns can be published without the need for formal access requests. It recognises that information held by government is a public resource and should be made available to the public as a matter of course unless to do so would be contrary to the public interest.

It is important that agencies do not presume to understand what the community wants and to what use information or data can be put. Stakeholder consultation undertaken during OIC agency compliance reviews has proven instructive and demonstrated that agencies need to ensure they are specifically consulting with their stakeholders about their information needs, to ensure agencies are publishing information the community wants.

It was anticipated that cultural change associated with RTI would require strong ongoing leadership and would take time. It is important to maintain a clear objective regarding the approach to be taken when considering whether to publish or release information, not just in relation to formal applications but in day to day government business.

Increasing the push model's effectiveness

Leadership

Effective Right to Information laws require political will, strong leadership, and clear information policy committed to information release. At the Open Government Policy Forum on 13 August 2013, the Premier said:

> *…I want to preside over the most open and transparent and accountable government in the nation. End of story. That is exactly where I want to be. I do not want to be misconstrued.* [14]

OIC welcomes this statement and notes this level of commitment by political and executive leaders is critical.

The Premier's specific commitments and clear expectations that government will publish all data, unless specific exceptions apply, has demonstrated the power of such leadership, not just in setting overall objectives but in identifying specific requirements, criteria, and performance targets. The Premier also dedicated Assistant Minister Ray Stevens and his department to support and monitor implementation. OIC has supported this initiative, working with Department of Premier and Cabinet to provide guidance to agencies to identify potential privacy concerns and options to allow data to be published where appropriate.

Experience in other jurisdictions supports leadership as a critical factor in RTI. For example, the experience in the UK where the UK Cabinet Office is committed to government efficiency, transparency, and accountability through the proactive publication of government data[15].

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[14] The Honourable Campbell Newman, MP, Premier of Queensland, taken from the Open Government Forum transcript <http://www.qld.gov.au/about/rights-accountability/open-transparent/review/>

[15] <https://www.gov.uk/government/policies/improving-the-transparency-and-accountability-of-government-and-its-services>

The recognised importance of leadership also accords with OIC's findings in its audits, which have been tabled in Parliament[16], of agency implementation of the RTI reforms in Queensland. They have consistently identified leadership as one of the key requirements for adoption of the push model. Agencies in which senior executives were committed to the RTI reforms, and where their support for those reforms was communicated, demonstrated a higher level of compliance with the reforms[17].

OIC submits that continued leadership is critical to bring about necessary cultural change, to move agencies to a place where—*as a matter of course*—they see maximising access to government information as an important part of providing government services. Leadership demonstrates to the agency that senior management acknowledge the risks involved in release but are committed to the push model and will manage such risks, instead of taking all possible action to block release even where disclosure would not, on balance, be contrary to the public interest.

Administrative access schemes

Chapter 2 (Disclosure other than by application) of the RTI Act sets out the specific rules and requirements for policy documents and publication schemes. Chapter 3 contains specific rules for disclosure logs and both those requirements are supported by the Ministerial Guidelines[18] which agencies are required to comply with. OIC's experience in measuring agency progress on implementing push model strategies demonstrates that there is a greater level of adoption of publication schemes and disclosure logs, in accordance with RTI obligations, than administrative access schemes.

The RTI Act's only mention of administrative access schemes is as an example under chapter 2, section 19. Given the progress demonstrated by agencies in implementing aspects of the reforms which are clearly set out in the Act, OIC suggests that amending chapter 2 of the RTI Act to include a clear requirement to adopt administrative access schemes would improve agency progress in this area. Elevating it from an example to a requirement shifts administrative access schemes to a clear compliance matter, monitored by OIC as part of its performance monitoring functions.

OIC notes that agencies are required to comply with the Ministerial Guidelines. OIC suggests that progress could be further bolstered by including high-level guidance on effective administrative access schemes in the Ministerial Guidelines, with an emphasis on creating an authorising environment; this would be supported by OIC guidelines. This approach is consistent with publication schemes.

[16] <http://www.oic.qld.gov.au/about/our-organisation/key-functions/compliance-and-audit-reports>
[17] See for example the Department of Transport and Main Roads compliance review <http://www.oic.qld.gov.au/about/our-organisation/key-functions/compliance-and-audit-reports>
[18] http://www.rti.qld.gov.au/right-to-information-act/publication-schemes

Protections

Section 171 of the RTI Act provides protection against actions for defamation and breach of confidence relating to documents published as part of an agency's disclosure log. There is no similar specific protection for agencies who release information under chapter 2 of the RTI Act (publication schemes and policy documents) or through administrative access schemes.

OIC's Enquiries Service often receives queries from agency officers, concerned about whether the protections in the RTI Act cover the release of information outside the formal provisions of the RTI Act. While OIC considers agency officers would be protected it appears to remain an area of concern for agencies, who are unsure if their good faith actions taken in furtherance of the push model are going to be protected.

Disclosure logs

The RTI Act sets out the requirements for disclosure logs[19], however it does not *require* agencies other than departments or Ministers to have a disclosure log[20]. This contrasts with the mandatory nature of publication schemes under section 21 of the RTI Act, which states that an agency must have a publication scheme.

Recent desktop audits[21] have revealed that some agencies, including large South-East Queensland councils, have chosen not to have disclosure logs and other agencies barely populate them.

OIC submits that publishing documents to disclosure logs, like publishing a publication scheme, should be mandatory for all agencies, subject to the general requirements to delete specific sensitive information[22] before publishing.

[19] Section 78 for departments and Ministers; section 78A for all other agencies.
[20] The use of the word 'may' in sections 78A(1)(a), (5) and (7)(a) support this.
[21] Office of the Information Commissioner *Results of Desktop Audits 2012-2013*
[22] Set out in section 78B of the RTI Act.

PART 2: INTERACTION BETWEEN THE RTI AND IP ACTS

OIC recommends a single point of entry for the right of access within the RTI Act.

OIC recommends the following consequential changes if access rights for personal information are relocated to the RTI Act, including:

- ***relocating amendment rights for personal information from the IP Act to the RTI Act; and***
- ***mechanisms in the RTI Act to exclude wholly personal applications from application fee and disclosure log requirements.***

2.1 Should the right of access for both personal and non-personal information be changed to the RTI Act as a single entry point?

Yes. When access rights for personal information were located in a separate piece of legislation, the *Information Privacy Act 2009* (Qld) (IP Act), it was hoped that doing so would create a simpler and quicker process for applicants and agencies, leaving the RTI Act to deal primarily with government accountability matters.

In practice, however, splitting access rights in this way has not created a simpler or quicker process. In OIC's experience making the threshold question for an access application, 'Under which Act should this application be processed?', has created an unnecessarily burdensome process for agencies, confusion and delay for applicants, and a reviewable decision which must be dealt with before an agency can begin processing the access application.

When agencies receive an access application, they must:

- determine whether the access application has been made under the right Act
- if incorrectly made under the IP Act, follow a formal process with the applicant to alter their application or transfer it to the RTI Act[23]
- if incorrectly made under the RTI Act, liaise with the applicant about changing the application to the IP Act; and
- in some circumstances, make a reviewable decision that an access application does not seek personal information and therefore an application purportedly made under the IP Act cannot be dealt with under the IP Act[24].

Section 40 of the IP Act creates a right of access to documents "to the extent they contain the applicant's personal information". OIC has interpreted this section as creating a right of access to an entire document, as long as it contains some amount of the applicant's personal information, and not as a right of access only to the personal information within the document. This means that access to both personal and non-personal information is available under the RTI and the IP Act.

[23] From RTI Act to IP Act – see section 34 RTI Act. From IP Act to RTI Act – see section 54 IP Act.
[24] Section 54(5)(b) of the IP Act.

The separation of access rights between the RTI and IP Acts also creates inconsistencies in how agencies treat an application. OIC is aware of circumstances where applicants have applied to multiple agencies for the same category of documents and there was no consistency in how the applications were treated, some being assessed as IP applications, some as RTI applications.

The RTI and IP Acts prescribe how an access application is to be processed. Apart from Charges Estimate Notice (CEN) and Schedule of Documents obligations in the RTI Act these provisions are essentially identical. Identical review rights are set out in both Acts, as are the processes to be followed for those reviews. The RTI Act and the IP Act both set out when an agency can refuse to deal with an application and what processes it must first follow: these provisions in the IP and RTI Acts are, again, effectively identical.

The table at Appendix D, which contains a table of RTI Act provisions and their Chapter 3 IP Act equivalents, illustrates their similarities.

The RTI Act sets out when access to a document can be refused. The IP Act does not; instead, it refers IP Act decision-makers back to the RTI Act and requires them to use it to make their IP Act access decision. This can be confusing for applicants and can add unnecessary complexity to both the decision making process and to communicating the reasons for a decision.

Given the above, there will be no difference between an access decision made under the RTI Act and one made under the IP Act. It is difficult to see that there are any practical benefits resulting from splitting the access rights into two Acts. The difficulty and time involved with answering the 'Which Act?' question could be removed to the benefit of agencies and applicants, with little to no negative impact on the rights of applicants, by absorbing Chapter 3 of the IP Act's access rights into the RTI Act.

Consequential changes required if IP access rights are relocated to the RTI Act

Amendment applications

Chapter 3 of the IP Act also creates a right of amendment of personal information if it is inaccurate, out of date, incomplete, or misleading. The procedures an agency must follow for an amendment application are essentially identical to those for an IP Act access application; many of the access provisions also apply to amendment applications, including the review rights and refusal to deal provisions. If a single point of entry is created in the RTI Act, access *rights* will be removed from the IP Act but a significant number of the access *provisions* will need to be retained as they also govern amendment applications.

OIC suggests that, if IP access rights are relocated to the RTI Act, it would be simpler to also relocate amendment rights, which would allow Chapter 3 of the IP Act to be removed entirely.

Application fees and disclosure logs

OIC notes that, in order to avoid any adverse impact from relocating access and amendment rights to the RTI Act, there are two key issues that need to be addressed: application fees for, and disclosure log eligibility of, wholly personal applications.

OIC's suggested approach is to require a valid access application to include an answer to a mandatory question, similar to the beneficiary question for RTI applications in section 25 of the RTI Act. For example, such a question could be similar to:

> *"Do you only want access to documents that contain your personal information? By answering yes you pay no application fee, but you acknowledge that the agency will not consider any documents that do not contain your personal information."*.

Applicants must answer either yes or no for the application to be valid.

If they answer yes, the RTI Act should provide that:

- they do not have to pay an application fee
- their application is excluded from the requirement to place application details and released documents on the Disclosure Log; and
- agencies need not provide CENs or Schedules of Documents.

If they answer no, the RTI Act will continue to provide that:

- an application fee is required
- agencies will have to provide CENs and Schedules of Documents; and
- the application would be subject to the Disclosure Log requirements.

This approach would retain the benefits which arise from personal information access rights being contained in Chapter 3 of the IP Act and remove the disadvantages. There would be no obligation on an agency to engage in further consultation with the applicant or answer the threshold question prior to processing the application: if the applicant has indicated they only want documents that contain their personal information, agencies only consider documents that contain personal information within the scope of the request. If the applicant has not limited their application solely to documents that contain their personal information, agencies consider all documents within the scope of the request.[25]

[25] In the latter case, it would be irrelevant if all documents in scope prove to only be ones which contain the applicant's personal information; the application would be processed in the same way as any application that requested documents some of which would not contain the applicant's personal information.

PART 3: APPLICATIONS NOT LIMITED TO PERSONAL INFORMATION

OIC notes that if a single point of entry for the right of access is created in the RTI Act, as recommended by the OIC in Part 2 of this submission, these issues will no longer be relevant. However, if the OIC's submission is not accepted it provides the following comments.

OIC recommends that:

- ***the processing period should be suspended during the section 40 process***
- ***the requirements for an agency to again consider whether an application can be made under the IP Act should be removed and an alternative process, similar to the process set out in section 61 of the IP Act be investigated as an alternative; and***
- ***the timeframe in section 54(5)(b) IP Act should be amended to ten business days.***

3.1 Should the processing period be suspended while the agency is consulting with the applicant about whether the application can be dealt with under the IP Act?

Yes. Section 40 of the IP Act allows applicants to seek access to documents which contain their personal information. If the initial review of an IP application shows that its scope includes documents which do not contain the applicant's personal information the decision-maker is required to take steps to contact the applicant within fifteen business days of receipt of the application.

The applicant has the option of changing their application to the RTI Act by paying the application fee or having it remain under the IP Act by altering their application to exclude documents which do not contain their personal information. If they do neither of these things, and the agency is satisfied the application will capture documents that do not contain the applicant's personal information, the agency makes a decision that the application is not an application that can be made under the IP Act.

The processing period for an application is 25 business days. It does not pause when the agency begins the process outlined in section 54 of the IP Act. Given that the agency must contact the applicant within 15 business days, and the applicant is then able to consult with the agency in relation to changing their application, the processing period could end before the section 40 process is concluded.

If the applicant changes their application to be dealt with under the RTI Act the processing period restarts, so there is no impact on the agency's ability to make the decision in time. If they do not alter their application to remove the non-personal documents the application comes to an end, so again, there is no issue with the agency making the decision on time. However, if the applicant alters their application so it can be processed under the IP Act significant amounts of the allotted processing time may have already passed.

This means that the agency could find itself in the position of:

- having to immediately seek an extension of the processing period from the applicant under section 55 of the IP Act; or
- not being able to make a decision at all, if they have completely run out of processing period and the applicant refuses a request for extra time, as the IP Act states that they are deemed to refuse access if a decision is not made before the end of the processing period.

3.2 Should the requirement for an agency to again consider whether the application can be made under the IP Act be retained?

No. If an application is made under the IP Act but it covers documents that do not contain an applicant's personal information an agency is required to follow the steps set out in the IP Act. The last step requires an agency to revisit its original decision that the application could not be made under the IP Act and effectively reconsider it.

OIC notes that this requirement adds the complexity of an additional step to the section 54 process with little benefit. To begin the section 54 process the agency must be satisfied that the documents applied for include documents that do not contain the applicant's personal information. If the applicant, after consultation with the agency, does not change the application to be made under the RTI Act or to exclude relevant documents it is unlikely the agency's initial decision will have changed.

OIC suggests that the process set out in section 61 of the IP Act (Prerequisites before refusal to deal because of effect on functions) could serve as a template for an amended section 54 of the IP Act, which removes the requirement to again consider the application.

3.3 Should the timeframe for section 54(5)(b) be ten business days instead of calendar days, to be consistent with the timeframes in the rest of the Act?

Yes. Amending the timeframe from calendar days to business days would ensure consistency throughout the IP Act and remove a source of potential confusion for applicants and agencies.

PART 4: SCOPE OF THE ACT

4.1-4.2 Should the Act specify that agencies may refuse access on the basis that a document is not a document of an agency or a document of a Minister?
Should a decision that a document is not a document of the agency or a document of a Minister be a reviewable decision?

OIC considers no amendments to the Act are required to enable decision-makers to refuse access to a document which is neither a document of an agency nor a document of a Minister. OIC submits that the power is one which decision-makers and the OIC already possess as part of their inherent powers to decide jurisdictional matters relevant to their decisions.

General jurisdictional questions

Section 32 of the RTI Act provides that an entity may decide that an application is outside the scope of the Act for the following reasons:[26]

- the document is a *document to which this Act does not apply*, as listed in schedule 1*;* or
- the entity is an *entity to which this Act does not apply*, as listed in schedule 2.

Given that both documents and entities to which the Act does not apply are explicitly defined, it appears that section 32 is limited only to applications for documents, or made to entities, of the kinds listed in schedule 1 and 2 respectively. As such, it could not apply to:

- documents mistakenly sought from an agency (for example, as noted in the discussion paper, medical records of a private practitioner sought from Queensland Health)
- documents of a Minister that do not relate to the affairs of the relevant agency; or
- applications mistakenly made to an entity not covered by the Act, such as a private company.

OIC does not believe that this limits the ability of decision-makers to deal with applications for documents which are not documents of an agency or a Minister, or for applications made to entities which are neither agencies nor Ministers.

OIC notes that section 23 of the RTI Act creates a right of access only to documents of an agency or documents of a Minister and section 24 allows applicants to apply only to an agency or Minister to access the document. It does not create a general right of access to any other document from any other entity.

[26] An application that is outside scope insofar as it seeks to access a document of OIC is also addressed in this provision - see section 32(1)(b)(iii) of the RTI Act.

An application for access to documents which are not documents of an agency or Minister can be dealt with by the agency or Minister as part of their general power to make jurisdictional decisions. OIC submits that this does not need to be specified in the Act. The same holds true for applications to entities which are not agencies or Ministers.

Consequently, OIC submits that it is not necessary for the Act to specify that access may be refused to documents which are neither documents of an agency nor documents of a Minister.

A reviewable decision

Since enactment of the RTI Act OIC has, in three external reviews, considered the issue of whether an entity, despite not being listed in schedule 2 of the RTI Act, is nonetheless *not* subject to the RTI Act. Two of the external reviews were resolved informally: the information was sought from a Commonwealth agency and a private sector entity respectively and the applicants accepted OIC's explanation that these entities were not subject to the Act. The third external review, relating to City North Infrastructure Pty Ltd (CNI), concerned whether it was a public authority and therefore an agency under the RTI Act.

CNI decided that an application made to it was outside the scope of the RTI Act, on the basis that CNI was not established by government under an Act of the Queensland Parliament but was instead established under the *Corporations Act 2001* (Cth). OIC, the Queensland Civil and Administrative Tribunal (QCAT), and the Queensland Supreme Court all considered this issue in terms of whether or not CNI was a public authority under section 16(1)(a)(ii) of the RTI Act and therefore an agency as defined in section 14 of the RTI Act. Notably, neither OIC, QCAT, nor the Supreme Court commented on the lack of an express provision in the RTI Act for making a decision that an entity was not an agency. The issue was simply dealt with as an issue of statutory interpretation regarding the meaning of public authority.

Given all relevant parties' acceptance that OIC, QCAT and the Supreme Court could consider the issue, OIC submits that amendment of the definition of reviewable decision to cover general jurisdictional issues is not required.

4.3 Should the timeframe for making a decision that a document or entity is outside the scope of the Act be extended?

OIC recommends that the timeframe for making a decision that a document or entity is outside the scope of the Act be extended from 10 business days to the processing period that applies for other types of decisions under the Act. This would ensure consistency with other provisions regarding general processing timeframes in the Acts[27] and enable certainty regarding when decisions 'go deemed'.

[27] For example, sections 18, 46 and 46 of the RTI Act.

Section 32 of the RTI Act requires an agency to give the applicant a decision that their application is outside the scope of the Act within 10 business days of the application's receipt[28]. However, the timeframe for making a decision on a valid application (that is, made to an agency or Minister for a document of an agency or Minister) is 25 business days. This timeframe is called the processing period and can pause and resume in a number of circumstances .[29]

This inconsistency creates difficulties for agencies. In general terms, 10 business days is a very short period for what may be a quite complex decision and the 10 business days, unlike the processing period, has no flexibility.

One significant issue arises when a decision-maker makes an 'outside the scope of the Act' decision *after* the 10 business day period expires but *before* the processing period expires. This can cause uncertainty for applicants who, because they did not receive an 'outside the scope of the Act decision', may believe their application has been accepted and that they will receive a decision within the processing period. It can also cause confusion if the decision is reviewed, because there are two possible outcomes:

- either the 'outside scope' decision is wrong but, because it was made before the processing period expired, was made within time; or
- the 'outside scope' decision is correct but, because it was not made before the 10 business day period expired, it should be replaced with a deemed decision.

Difficulties regarding the nature of the deemed decision also arise in this situation: is the deemed decision the same as the purported decision (that is, a decision that the application is outside the scope of the Act) or is it the same as *other* deemed decisions under the Act[30] (that is, a deemed refusal of access)? This lack of clarity has implications for OIC when determining whether it affirms, varies or sets aside a decision[31].

For these reasons, OIC considers that having two different decision making periods creates unnecessary complexity.

In order to avoid these complexities, provide clarity regarding deemed decisions, and give agencies and Ministers adequate time to make decisions that applications are outside the scope of the relevant Act, OIC recommends that the relevant time period[32] should be extended from 10 business days to the processing period that applies for other types of decisions under the Act (that is, 25 business days plus any relevant intervening periods as noted in section 18 of the RTI Act). This would

[28] Section 32(2) of the RTI Act.
[29] See paragraph 2 of the definition of "processing period" in section 18 of the RTI Act, which notes that the following do not count as part of the processing period: transfer periods (under section 38 of the RTI Act); further specified periods (under section 35 of the RTI Act); consultation periods of 10 business days (section 37 of the RTI Act); notice of the effect on the agency or Minister's functions (section 42 of the RTI Act); and revision periods for CEN notices (section 36 of the RTI Act) .
[30] Section 46 of the RTI Act.
[31] Section 110 of the RTI Act.
[32] In section 32(2) of the RTI Act.

ensure consistency with other provisions regarding general processing timeframes in the Act[33] and enable certainty regarding when decisions 'go deemed'.

Consequential amendment of section 46 of the RTI Act regarding deemed decisions is also recommended, to make it clear that if no decision is given to the applicant by the end of the processing period the application is taken to be actual (rather than purported), and the decision is taken to be a deemed refusal (rather than outside the scope of the Act).

4.4 Should the way the RTI Act and Chapter 3 of the IP Act applies to GOCs to be changed? If so, in what way?

No recommendation made, however OIC notes that GOCs appear to be currently complying well with their obligations under the RTI Act.

The obligations of Government Owned Corporations (GOCs) under the RTI are different from those of other agencies. Schedule 1 of the RTI Act excludes certain GOC documents from the Act entirely; for some GOCs access rights to other documents are limited only to those which relate to their community service obligations[34].

While GOCs may have limited requirements under the legislation they are required to comply with the Office of Government Owned Corporation's (OGOC) *Release of Information Arrangements*. Policies issued by OGOC and adopted by GOCs in their *Statement of Corporate Intent* form part of the agreement between GOCs' boards of directors and the GOCs' shareholding Ministers as to the operation of each GOC.

The *Release of Information Arrangements* state that the push model applies to all GOCs, including those excluded from the operation of the RTI Act. It specifically requires GOCs to publish information in a Publication Scheme in line with the requirements of the RTI Act and Ministerial Guidelines.

A recent audit by OIC[35] found that GOCs performed strongly on push model strategies such as disclosure logs and publication schemes, the effectiveness of which is critical to open government. Each GOC audited by OIC had adopted the *Release of Information Arrangements* in their most recently published Statement of Corporate Intent as part of the way in which each GOC had agreed to operate.

OIC is not aware of any issues caused by the current application of the RTI Act to GOCs.

[33] For example, sections 18, 46 and 46 of the RTI Act.
[34] Community service obligations are defined in section 112 of the *Government Owned Corporations Act 1993*
[35] <http://www.oic.qld.gov.au/__data/assets/pdf_file/0008/22310/report-results-of-desktop-audit-2012-13.pdf>

4.5 Should corporations established by the Queensland Government under the *Corporations Act 2001* be subjected to the RTI Act and Chapter 3 of the IP Act?

No recommendation made.

4.6 Should the RTI Act and Chapter 3 of the IP Act apply to the documents of contracted service providers where they are performing functions on behalf of government?

OIC recommends that the Queensland Government:

- ***consider the impact greater use of the non-government sector to deliver services will have on the community's right of access to information; and***
- ***investigate mechanisms to ensure accountability and transparency of government expenditure on services outsourced to non-government entities.***

However, OIC does not recommend that contractors be made an agency that must process and decide access applications under the RTI Act.

OIC notes that, while the RTI Act ensures a right of access to government-held information, where government services are contracted out to the non-government sector, it is likely that the community will not enjoy the same ability to access information because it is held outside government. The community not only seek access to information to ensure accountability and transparency in government expenditure and service delivery performance; individuals often seek information about their own interactions with the government agency providing specific services such as public housing.

This is not a new issue and it is one that many jurisdictions have struggled with for some time. Getting the balance right is complex. Existing private sector accountability mechanisms do not provide remedies equivalent to the RTI Act's right of access to government-held information and other administrative law mechanisms.

OIC does not consider that simply requiring contracted service providers to deal with access applications under the RTI Act is the best approach to this issue and it is likely that doing so would impose an unsustainable administrative burden on private sector and not for profit entities. In any case, access applications are intended to be a last resort under the RTI Act; transparency and accountability mechanisms applying to agencies include push model strategies such as publication schemes, informal administrative access, and disclosure logs, which are intended to deal with the majority of the community's information access needs.

Ultimately, however, if the community cannot follow the money then government expenditure is not open. Transparency of information about expenditure and performance of contracts for government funded services is important to enable the community to help ensure that public funds are working as intended to meet community needs and to identify waste. One suggested approach is to make expenditure and performance information available as part of the relevant agency's publication scheme or, where appropriate, the Open Data portal.

OIC notes that the Commonwealth *Freedom of Information Act 1982* provides that documents of an agency include 'Commonwealth contract' documents. The Commonwealth model brings the documents of contractors relating to the performance of a Commonwealth contract within the ambit of the FOI Act. A Commonwealth contract is one which relates to the provision of services on an agency's behalf to the public.

The FOI Act (Cth) does not bring the contractor within the ambit of the Act; rather, the agency must retrieve the documents from the contractor. The requirement to retrieve documents from the contractor is triggered by the receipt of an access application the scope of which includes Commonwealth contract documents and it can only be exercised where appropriate terms exist in the contract.

Currently, the RTI Act does not apply to documents of contracted service providers performing government functions. In some circumstances documents held by contractors to Queensland government can be sought from a government agency under the RTI Act: if the agency also has possession of the documents or has a legal right to retrieve the documents. A government agency will not always have a legal right to the documents and determining whether or not a legal right exists can be time consuming, as can actually retrieving documents from the contractor.

OIC notes that ensuring documents relating to the performance of government contracted entities can be sought via access applications would be consistent with the approach taken under the IP Act[36], which requires Queensland government agencies to take reasonable steps to ensure that contracted service providers are bound by the privacy principles. This approach is one possible model for consideration to meet the transparency and accountability expectations of the community.

OIC considers that it is important for the Government to:

- consider the impact greater use of the non-government sector to deliver services will have on the community's right of access to information; and
- investigate mechanisms to ensure accountability and transparency regarding government expenditure and services.

OIC does not, however, recommend that the definition of an agency be expanded to include contractors, who would then be required to process and decide access applications under the RTI Act.

[36] Chapter 2, Part 4 IP Act

PART 5: PUBLICATION SCHEMES

5.1-5.2 Should agencies with websites be required to publish publication schemes on their website?
Would agencies benefit from further guidance on publication schemes?

OIC recommends that all agencies with websites be required to publish their publication schemes on those websites.

OIC recommends agency publication schemes be required include a link to relevant data on other websites, for example the Queensland Government Data website.

Under the RTI Act, agencies are required to maintain and populate a publication scheme in accordance with the RTI Act and Ministerial Guidelines. Publication schemes are specifically required by the RTI Act as a push model strategy for disclosure other than by a formal application under the Act, as applications are intended as a last resort. Publication schemes set out the kinds of information that an agency should make routinely available.[37] Most agencies satisfy the publication scheme requirements by publishing a publication scheme on their website, often linking to specific information required under the Ministerial Guidelines.

The OIC *Report of Results of Desktop Audits 2012-13* found that 69% of agencies reviewed had an online publication scheme.[38] All agencies reviewed in the GOC, university and statutory authority sectors maintained an online publication scheme. Only 60% of local governments with websites reviewed maintained an online publication scheme. In addition, all departments have an online publication scheme, however were not included in the 2012-13 desktop audits.

OIC believes that requiring agencies to put their publication schemes on their website:

- will help meet community expectations regarding information being available online; and
- is consistent with the push model of the RTI Act.

In addition, amendments to the Ministerial Guidelines should be considered to increase compliance with requirements to publish government information relating to procurement and contracts with non-government or private sector organisations. The OIC Report of Results of Desktop Audits 2012-2013 found that agencies consistently fail to satisfy the requirement to publish procurement information within the 'Our finances' class of information. Less than 40% of publication schemes published sufficient information about procurement and contracts awarded.[39] Similar poor performance was reported in relation to planning or performance data, required within the 'Our priorities' class.

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[37] Ministerial Guidelines, page 3.
[38] OIC Results of Desktop Audits 2012-13, page 14 <http://www.oic.qld.gov.au/__data/assets/pdf_file/0008/22310/report-results-of-desktop-audit-2012-13.pdf>.
[39] Page 17.

The Ministerial Guidelines could also maximise the Open Data initiative's effectiveness by introducing a requirement to link from the agency's online publication scheme to the data.qld.gov.au portal, or other websites on which their data is published. OIC notes that an agency's website is often the first place someone will look for government information; it may not occur to people to look farther afield. OIC suggests that requiring agency publication schemes to link to their Open Data datasets would make those datasets more easily available.

OIC notes that the purpose of having a publication scheme is essentially to ensure that a member of the community can easily understand how to access similar information routinely made available by agencies using a consistent format and structure. As noted above, most agencies satisfy the requirements by linking to information already available on their website from a publication scheme page.

OIC considers that, over time, the need for legislatively structured publication schemes will be succeeded by consistent user environment standards, which will ensure agencies satisfy these objectives and allow agency websites to adopt contemporary design standards better suited to achieve this purpose.

5.3 Are there additional new ways that Government can make information available?

OIC submits that there are new ways of making government information available that do not require legislative amendment.

There are a range of new ways Government could make information available, however OIC considers further legislative requirements appropriate to facilitate this are limited. Most initiatives are best supported by non-legislative frameworks and require cultural shifts, leadership and commitment of resources to maximise disclosure consistent with the RTI Act.

As discussed in Part 1 of this submission, significant improvements in the adoption of the push model could be made by building on the Open Data scheme. Other jurisdictions have achieved greater efficiency and accountability through a range of data and information transparency initiatives that extend beyond publication of raw data.[40]

Similarly, administrative access schemes are critical to both the successful implementation of the RTI Act and efficient, effective responses to community information requests that ensure formal access applications under the Act are a last resort. Progress in this area is required and is a focus for OIC in supporting agency improvements to meet community expectations.

[40] Please see the Transparency Occasional Papers 1-4: *Transparency and Public Sector Performance*, Richard Mulgan, July 2012; *Transparency and Productivity*, John Houghton and Nicholas Gruen, July 2012; *Transparency and Policy Implementation*, Nicholas Gruen, July 2012; and *Transparency in Practice*, Andrew Stott, August 2012. <http://www.oic.qld.gov.au/about/news/launch-of-transparency-series-occasional-papers>

PART 6: APPLYING FOR ACCESS OR AMENDMENT UNDER THE ACTS

6.1-6.2 Should the access application form be retained? Should it remain compulsory? If not, should the applicant have to specify their application is being made under legislation? Should the amendment form be retained? Should it remain compulsory?

OIC recommends amending the RTI Act to allow agencies the flexibility to create their own application forms that comply with requirements set out in the relevant Regulation. OIC recommends retaining the whole of government forms for use by agencies who choose not to develop their own form.

In some circumstances, requiring people to use a mandatory application form to interact with a government agency can increase the difficulty of that interaction. However, some of the requirements of a valid RTI application are not intuitive, such as the requirement to state whether or not the applicant is applying with the intention of benefiting another entity[41].

If an application form was not required it is likely that the majority of applicants would not include all required information, resulting in agencies expending resources and time dealing with these non-compliant applications and consequential delay for applicants.

Conversely, the unique nature of each agency's business and records management systems means that agencies could benefit from asking applicants to provide them with additional information, beyond what is contained in the current form. Doing so could increase the ease with which agencies are able to identify the specific documents an applicant is seeking and prevent time and resources being wasted searching for unwanted documents. It would also allow agencies to provide specific examples of common document requests to assist applicants in working out if their application is likely to cover wholly personal documents or a mix of personal and non-personal documents.

It is also the case that some agencies are not able to process credit card payments, which can cause difficulties given that the current application form provides for payment by credit card. Where applicants provide credit card details and agencies are unable to accept them it can result in confusion on the applicant's part about when the processing period begins and require the applicant to organise another form of payment.

OIC suggests that specifying the information that must be collected by any agency-developed application form will allow the maximum amount of flexibility for agencies while simultaneously limiting the number of non-compliant applications. For the above reasons, and as a way of ensuring consistency between the processes, OIC suggests the same approach be adopted for amendment applications.

[41] Section 24(2)(d).

6.3 Should the list of qualified witnesses who may certify copies of identity documents be expanded? If so, who should be able to certify documents for the RTI and IP Acts?

OIC does not recommend expanding the list of people authorised to certify evidence of identity for RTI and IP Act applications.

Under the RTI Act, identity documents must be certified by a Justice of the Peace, lawyer, notary public, or Commissioner for Declarations[42]. The majority of RTI and FOI Acts in other jurisdictions do not explicitly require evidence of identity (EoI) documents to be certified. However, many agencies set out their own specific EoI requirements, for example:

- the Commonwealth Attorney-General requires a passport, drivers licence, or other photo identification to be certified by a person who has the power to witness a commonwealth statutory declaration[43]; and
- the NSW Information Privacy Commissioner sets out that agencies may require applicants to provide EoI when applying to access their own personal information and notes that the required form of EoI is not set out in the legislation.

Western Australian legislation requires an agency to take 'reasonable steps' to satisfy itself of the identity of the applicant, but permits discretion at to what this actually involves. There are no provisions in Victoria, South Australia or ACT which deal with evidence of identity requirements but many agency websites note that EoI will be required. The Tasmanian RTI Regulation sets out a comprehensive list of permitted EoI, but does not set out who can certify it.

OIC suggests that setting out who is authorised to certify EoI documents creates certainty for agencies and applicants, and prevents unnecessary conflict about whether or not the certified EoI satisfies the requirement of the RTI Act.

6.4 Should agents be required to provide evidence of identity?

OIC recommends that the requirement to provide evidence of identity and authority be removed for legal representatives who have been retained by the applicant to act on the applicant's behalf. OIC does not recommend removing it for other agents.

Section 24(3)(b) of the RTI Act requires agents acting for applicants seeking their own personal information to provide evidence of their identity to the agency. This includes where the agent is the applicant's legal representative and is corresponding with the agency on their firm's letterhead.

Legal practitioners in Queensland are regulated by their own Act and codes of conduct. The fact that a legal practitioner is corresponding with an agency on their law firm's letterhead, stating that they are acting for their client, should be sufficient for an agency to be satisfied that the practitioner is who they say they are and has the authority they claim.

[42] RTI Regulation section 3(3).
[43] A full list is available here <http://www.ag.gov.au/Publications/Pages/Statutorydeclarationsignatorylist.aspx>

OIC has not experienced or become of aware of situation where someone falsely claimed to be a legal representative in order to access documents from an agency; OIC understands that there are significant professional consequences if a legal practitioner were to mislead an agency. As such, it should not be necessary for legal practitioners to provide a certified copy of an identity document and proof of authority. Requiring legal practitioners to provide evidence of their identity and authority generates unnecessary red tape and places a strain on agency resources when they fail to do so.

6.5 Should agencies be able to refund application fees for additional reasons? If so, what are appropriate criteria for refund of the fee?

OIC recommends including in the Act a greater discretion to refund or waive the application fee.

The RTI Act requires an agency to refund an applicant's application fee if:

- their RTI application could have been made under the IP Act and they ask for it to be changed to an application under the IP Act
- an agency fails to make a decision within the time allowed by the Act, resulting in a deemed decision; or
- the Information Commissioner requires an agency to do so as part of granting additional time to make a decision.

In New South Wales, an agency may waive, reduce, or refund an application fee in any case the agency thinks is appropriate, subject to the Regulations. In South Australia, the application fee must be refunded if a decision is varied on review to grant the applicant access to a document. In the Northern Territory a public sector organisation may choose to waive or reduce an application fee. Some jurisdictions are able to waive the application fee on the grounds of financial hardship[44], which is not possible under the RTI Act.

[44] Victoria, Tasmania, ACT

6.6 Are the Acts adequate for agencies to deal with application on behalf of children?

OIC recommends that the provision in the RTI Act specifically enabling applications by a parent on behalf of a child be removed so that the general agency provisions apply.

OIC recommends that the provision regarding refusal because disclosure is not in the child's best interests be retained.

Applications by a parent on behalf of a child

The RTI Act specifically allows parents to apply for access to, or amendment of, documents on behalf of their child. Western Australia and the Northern Territory are the only other Australian jurisdictions which specifically allow for these types of applications. Very few application of this kind have come on review to OIC[45] since the RTI Act commenced and only two of these applications have been finalised by decision.

The only decision[46] setting out an examination of applications by a parent on behalf of a child and whether or not disclosure is in the child's best interests was made under a similar provision of the FOI Act.[47] The other decision—while involving an access application by a parent on behalf of their child—instead focussed on whether the documents sought were non-existent or unlocatable.[48]

Despite their infrequency, OIC has found that external reviews of applications made by a parent on behalf of their child generally involve contentious issues and often arise in the context of family breakdown or child protection situations. Given that the parent is applying on *behalf* of the child the starting point is that the applicant *is* the child. However, this starting point often gives rise to the question of whether the application is genuinely made by the parent on behalf of the child, which can be difficult to determine.

OIC's only decision examining an application by a parent on behalf of a child noted that, in the relevant circumstances, it became clear during the course of the external review that *'the [applicant] was applying for information about the child for his own information'* rather than applying for information on behalf of the child.[49]

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[45] As at 30 June 2013 – 11 external review applications.

[46] Regarding section 50A of the repealed FOI Act, which is largely replicated in sections 25 and 50 of the RTI Act – see *FGP and Department of Education, Training and the Arts* (Unreported, Queensland Information Commissioner, 24 December 2007) at 46.

[47] Also, one OIC decision preceding insertion of section 50A of the FOI Act in 2005 considered similar issues in absence of a provision enabling applications by a parent on behalf of a child – see *KNWY and Department of Education* (Unreported, Queensland Information Commissioner, 6 January 1998).

[48] Sections 47(3)(e) and 52 of the RTI Act – see *Master N and Department of Education and Training* (Unreported, Queensland Information Commissioner, 23 December 2010).

[49] *FGP and Department of Education, Training and the Arts* (Unreported, Queensland Information Commissioner, 24 December 2007).

In OIC's experience, the following three scenarios may possibly arise in relation to applications on behalf of a child:

- **Scenario one -** the application is genuinely made by the parent on behalf of the child and the provision regarding the child's best interests enables the decision-maker to refuse access to information *'if disclosure of the information would not be in the child's best interests'*[50].

- **Scenario two -** it is accepted that the application is genuinely made by the parent on behalf of the child, but the decision-maker is not satisfied that disclosure *'would not be in the child's best interests'*[51] (or does not want to apply that provision because it could be inflammatory) so the decision-maker moves on to applying the public interest test[52].

- **Scenario three -** it is concluded that the application is not genuinely made by the parent on behalf of the child and is actually made by the parent for the parent's own benefit, and therefore it becomes possible that some information may be exempt on the ground that its disclosure is prohibited[53] and disclosure of other information may, on balance, be contrary to the public interest.

It can be difficult for the decision-maker to examine and determine the particular child's best interests. The information available to the decision-maker usually includes the information sought under the access application and the parties' submissions, however, it does not necessarily include information regarding the particular child's maturity, ability to understand the information, or emotional capacity to deal with becoming aware, or aware in more detail, of the information. In some circumstances, if the decision-maker seeks additional information relevant to determining the child's best interest, it is arguable that doing so may, in and of itself, be detrimental to the child's best interests.

OIC acknowledges that these difficulties are not unique to applications by a parent on behalf of a child. However, the provision specifically enabling applications by parents on behalf of their children effectively adds another responsibility on the agency to consider whether the parent is genuinely applying on behalf of the child. There is no advantage to having specific provisions for a parent acting on behalf of a child, where such could easily be achieved under the general provisions allowing a person to act on behalf of an applicant. Applications where parents apply as an agent for their child are determined, including fees and charges, in the same way as other applications where an applicant has someone acting on their behalf. OIC believes that this would enable better

[50] Section 50(2) of the RTI Act.
[51] Section 50(2)
[52] In this case, the factor favouring disclosure of the personal information of the child applicant (schedule 4, part 2, item 8 of the RTI Act) and the factor favouring nondisclosure of the personal information of the child applicant (schedule 4, part 3, item 4 of the RTI Act) may be relevant; but the harm factor against disclosing personal information cannot be relevant, due to the exception regarding information that solely comprises the personal information of the applicant (see schedule 4, part 4, item 6).
[53] Schedule 3, section 12 of the RTI Act - which is usually enlivened by sections 186 to 188 of the *Child Protection Act 1999*.

management of applications by parents[54] and reduce the red tape involved in making and dealing with such applications.

Ground of refusal: child's best interests

OIC recommends retaining the ground of refusal regarding the child's best interests[55]. This provision would not require amendment if OIC's recommendation above is adopted, as applications *'for a child'* could still be made by a parent, if they could demonstrate they were authorised to act as the child's agent.

The issue of how the child's best interests provision interacts with the public interest test has been raised with OIC, generally where applicants believe false allegations have been made about them. In these types of situations, there could appear to be very strong public interest factors favouring disclosure related to transparency, accountability and contributing to the administration of justice for an applicant.[56] It has been suggested that the provision should be amended to clarify that its only focus is the child's best interests and that broader canvassing of public interest factors is not required. However, it is OIC's view that this provision already makes it clear that this is the case and no amendment to provide greater clarity is required.[57]

6.7 Should a further specified period begin as soon as the agency or Minister asks for it, or should it begin at the end of the processing period?

OIC recommends that, to increase certainty and consistency, timeframes be simplified by providing that there is a single period of time for processing applications—the* processing period*—which is increased to include any further period in which the agency is entitled to continue working on an application.

OIC suggests that, rather than having two separate decision making periods—the *processing period* and the *further specified period*—the entire time should be part of the processing period. OIC suggests that this could be done by, perhaps, defining the processing period as '25 business days plus any additional time granted to an agency to make a considered decision under section 35'. Doing so would simplify the decision making process and resolve the situation which can arise where the agency is permitted by one section of the Act to make a decision on the application but is prevented by another section.

If the agency has requested additional time from the applicant, and the applicant has neither refused nor sought a review, the agency may make a considered decision on the application even if the processing period has run out. However, the RTI Act requires a Charges Estimate Notice (CEN) to

[54] It can be inflammatory or upsetting for a parent to be advised of a decision that the agency considers that they are acting in their own interests, not on behalf of their child.
[55] Section 50 of the RTI Act.
[56] Schedule 4, part 2, item 17 of the RTI Act.
[57] OIC notes that the same issue has also been raised in the context of the ground for refusal of healthcare information (section 51 of the RTI Act). Again, OIC considers that it is not necessary to amend the provision to clarify that its only focus is healthcare information, and it does not require examination of other PI factors.

be issued before the end of the processing period. If the agency did not issue the CEN before they ran out of processing period they are unable to comply with the RTI Act's requirements for issuing a CEN. This results in a situation where, despite being permitted to make a considered decision by one part of the RTI Act they are effectively unable to do so because of the requirements of another. OIC notes that this issue does not arise where an applicant agrees to the agency's request for additional time[58].

OIC considers that any further specified periods granted by an applicant, or time in which an agency is permitted to continue processing an application because the applicant has neither sought a review nor refused the extension, should simply be part of the processing period.

6.8 Should an agency be able to continue to process an application outside the processing period and further specified period until they hear that an application for review has been made?

OIC does not recommend amending the Act to allow an agency to continue processing an application indefinitely until such time as they are notified a review has been sought.

OIC recommends investigating a mechanism that will reduce red tape and the administrative burden on agencies by introducing more flexibility into time periods for decision making.

OIC also recommends amending the Act to provide that a deemed decision occurs where a decision is not* made *by the end of the processing period.

Under the RTI Act an agency is permitted to make a considered decision even if the processing period has ended if they requested further time from an applicant and the applicant neither refused nor sought a review. If an agency has requested further time to make a decision, continues to process the application because the applicant has not responded, and finds they need more time than originally thought, the agency can request another extension of time from the applicant[59]. A decision-maker who does not meet the timeframes set out in the Act loses the ability to make a considered decision on the application. Instead, the Act deems that the Minister or principal officer of the agency has refused access to all documents. This is called a deemed decision.

OIC suggests that to allow an agency to, essentially, process an application indefinitely until the applicant takes certain steps will create uncertainty for agencies, applicants, and any consulted third parties.

While OIC does not support allowing agencies to indefinitely process an application until notice that a review has been sought, OIC considers that there may be ways the Act could be made more flexible.

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[58] Section 35 is titled *Longer processing period*, which appears to indicate that extensions agreed to by the applicant effectively extend the processing period. This is supported by exclusion only of the times in which an agency is permitted to working because the applicant has neither refused nor sought review from the processing period (section 18 2(b))

[59] Section 35(1) provides that an extension of time may be requested at any time before a decision is made, and an agency who continues processing in reliance on section 35(2) has not made a deemed decision.

Currently, an agency is required to request an extension of time; if the applicant does not refuse or seek a review they can continue working on the application; if the agency needs more time, they must again request an extension from the applicant. OIC is aware of situations where an agency has requested a second extension after the first extension had expired and then issued their decision. Technically, the decision was deemed when the first extension expired, yet the agency then went on to issue a considered decision.

When these decisions come on external review they are unnecessarily complex, particularly where they involve consulted third parties, who may have sought a review based on the *considered decision* which was not valid. OIC is also aware of situations where the applicant believed that the agency had been given extra time to make the decision but there was no evidence that extra time had been requested.

OIC suggests that introducing mechanisms which allow an agency to continue processing an application outside the processing period, for example where the agency reasonably believes that the applicant would agree, or has agreed, to grant the agency extra time, could introduce much needed flexibility into the Act to the benefit of applicants, agencies and third parties.

A related issue which also impacts the time in which a decision must be made, and creates uncertainty for decision-makers when making decisions, is the requirement to *deliver* the decision to the applicant by the end of the processing period: section 46(1) of the RTI Act state that a decision becomes deemed if an applicant is not **given** written notice of the decision by the last day of the processing period.

OIC suggests that some of the consequences of linking a deemed decision to the date the notice is received by the applicant, rather than the date the decision is made, include:

- agencies are required to make their decision in fewer than 25 business days in order to ensure that the notice is received by the applicant before the 25 business days ends
- uncertainty for both the agency and the applicant is created as both parties may not know if the considered decision which was made by an agency will actually become a deemed decision if it does not reach the applicant on time
- an applicant's review rights could be affected if they receive a considered decision but, due to delayed delivery, it has without their knowledge actually become a deemed decision and they incorrectly seek an internal review from the agency, which may place them out of time to seek an external review; and
- difficulties with identifying which decision is being reviewed if the decision comes on external review: is it a considered decision made by the agency decision-maker or is it the deemed decision?

OIC can see little benefit to an applicant or agency in calculating a deemed decision based on the date of delivery, as the applicant's review and access rights all begin to run from the date of the decision and not the date the notice is received.

OIC suggests amending section 46(1) of the RTI Act to read "if a considered decision is not made by the end of the processing period…" instead of "if an applicant is not given written notice of the decision…".

6.9 Is the current system of charges estimate notices beneficial for applicants? Should removing the charges estimate notice system be considered?

OIC considers the Charges Estimate Notice system is beneficial and does not recommend it be removed as long as the current charging regime is in place.

OIC recommends that a specific review of the current charging regime be undertaken to streamline the charging process.

OIC considers the Charges Estimate Notice (CEN) system a necessary part of the current charging regime under the RTI Act. It is, however, complex, resulting in agency costs that will in most cases outweigh any charges payable by an applicant.

Under the current RTI charging regime the total processing charge is a debt which an applicant is required to pay if they proceed with their application, even if they never access documents released to them or if access to documents is refused[60]. As such, it is important that an applicant understands, before choosing to proceed, the maximum amount they may be obligated to pay. The current system of providing a CEN, followed by a second CEN if the applicant alters their application to reduce its scope, which sets out the maximum possible charge is an effective tool for the RTI charging regime.

OIC notes, however, that the current charging regime is complicated and the production of CENs for every application represents a significant amount of work on the part of an agency. Additionally, given that there are no specific rules on how processing times should be calculated, there is no consistency across agencies as each agency develops its own internal approach to calculating charges. This increases the complexity of the application process for agencies and applicants, creating unnecessarily bureaucratic processes and engendering confusion and dissatisfaction on the part of applicants applying to multiple agencies.

OIC notes that RTI does not operate on a cost recovery basis[61] and that prior to the RTI Act, revenue generated from access applications was miniscule when compared with administration costs[62]. OIC also notes, as was recognised in the 1995 Australian Law Reform Commission Review into Freedom of Information[63], that the accessibility of information is reduced by a charging regime in the access legislation.

[60] Section 60 of the RTI Act.
[61] LCARC Report *The Accessibility of Administrative Justice*, page 84
[62] For example, in 2002-2003 the cost of administering the FOI Act was almost nine million dollars, while revenue from fees and charges was just over $250,000.00.
[63] ALRC report page 195.

The RTI Regulation permits charging for every fifteen minutes spent searching for or retrieving a document and on making or doing things related to making a decision on an application[64]. In order to assess the charges applicable for each application, in many cases a decision-maker effectively has to process the application, which means significant agency resources are spent on an application before the applicant confirms they wish to proceed.

Given the resources involved in calculating the amount of charges and creating CENs it is likely that, for many applications, the cost to agencies of calculating the charges will exceed the amount received from the applicant paying those charges. Several agencies have noted as much, stating that it costs more to charge the applicant than they collected in charges.

Given this, it may be more cost effective and time efficient for agencies and applicants to simply remove the requirement to calculate charges. However, it has also been argued that fees and charges can assist in managing demand for agencies and review bodies, particularly in relation to multiple applications from individuals. Alternatively, the charging process could be significantly simplified. OIC considers that it may be appropriate to consider the fees and charging regime in more detail in a specific review.

6.10 Should applicants be limited to receiving two charges estimate notices?

OIC recommends that the number of Charges Estimate Notices an applicant can receive remain limited to two.

OIC has not identified any situations in which being able to deliver a third or fourth CEN would be beneficial to either an applicant or an agency. OIC believes that increasing the number of CENs would simply add to the complexity discussed above. Limiting it only to two CENs gives the applicant and agency a reasonable but not infinite chance to negotiate the terms of the application.

6.11 Should applicants be able to challenge the amount of the charge and the way it was calculated? How should applicant's review rights in this area be dealt with?

OIC recommends against making the amount of the charge a reviewable decision and notes its recommendation at 6.9 that a review of the current charging regime be undertaken.

OIC also notes that any introduction of a right of review involving the amount an agency charges would require additional OIC resources to meet additional demand for external review.

If it is decided that the amount of charge should be reviewable, OIC recommends that it not be an absolute right and suggests that only total charges over a certain amount should be reviewable, for example where an agency has assessed the charges as being over $500.00.

[64] RTI Regulation, section 5(4).

Under the RTI Act, the decision to charge is a reviewable decision but the amount of the charge is not. The RTI Act requires agencies to involve applicants in the process of determining which documents they want from those identified by the agency; this process directly impacts the amount of charge and as such, the inability to seek a review of the charge amount does not, in OIC's view, represent a significant impact on the rights of applicants.

Where an agency determines that there will be charges payable in relation to an RTI application they are required to provide the applicant with a CEN. When the applicant receives a CEN, which contains details about the documents identified and the charges associated with them, the applicant has an opportunity to consult with the agency to reduce the amount of the charge by narrowing the scope of the documents sought. This may involve narrowing their application or clarifying with the agency what specific documents or information they are actually seeking, for example, excluding documents the applicant already has, such as their own correspondence. At the end of this process the applicant is issued with a second CEN which they can accept—in which case the application proceeds—or they can reject—in which case the application comes to an end.

This process means an applicant is never required to proceed with an application where the charges are more than they are willing to pay. If they elect not to accept the second CEN, withdrawing their application, they are able to make a new application for fewer or different documents.

The nature of the RTI charging regime requires the agency processing the application to estimate how much time it will take that agency to carry out actions related to making the decision, such as reading and assessing documents, making a decision, and writing a decision letter. This is necessarily going to vary between agencies and between applications. For example, some agencies may be more efficient at processing certain kinds of documents. This may be due to the agency's familiarity with the type of information in the document and its knowledge of, and experience in applying, relevant exempt information provisions and public interest factors. Because of these factors, the amount of time it takes to process an application may vary and is an assessment which an agency is in a unique position to make.

6.12 Should the requirement to provide a schedule of Documents be retained?

OIC recommends that the requirement to provide a Schedule of Documents be omitted from the RTI Act and that mechanisms for facilitating communications between decision-makers and applicants, as discussed at recommendation 12.1, be investigated.

Under section 36 of the RTI Act, an agency is required to give the applicant a Schedule of Documents unless the applicant agrees to waive the requirement. A Schedule of Documents gives a brief description of the classes of documents relevant to the application in the possession, or under the control, of the agency or Minister and sets out the number of documents in each class.

The purpose of requiring a Schedule of Documents was to ensure the applicant receives what they are actually seeking, as it:

- gives the applicant an indication of the nature and extent of documents held by the agency that relate to their application,
- allows the agency to engage with the applicant; and
- allows the applicant to decide which of the listed documents they want to access.

These opportunities were intended to cut processing time, reduce the costs of providing the material, and reduce disputes. The recommendation to require a Schedule of Documents was based on the assumption that decision-makers already prepare a Schedule of Documents drawn from the documents' metadata.

OIC understands that electronic document management systems, which would arguably allow quick and simple generation of Schedules based on document metadata, are not universal across agencies and that significant amounts of documents are only available to decision-makers in hard copy. As a result, creating a Schedule of Documents at an early stage of the process can be time-consuming, as it requires a decision-maker to go through each document by hand and manually create the Schedule. OIC notes that the preparation of a Schedule of Documents is part of processing the application and, as such, that time spent on it is something the applicant pays for.[65]

Generally, most applications relate to a specific subject matter or entity, rather than to specific kinds of documents, and applicants may not be aware of which agency documents may contain the information they are seeking. As such, a Schedule of Documents that lists how many of what type of documents relate to a broad subject may be of limited assistance to an applicant in narrowing the scope of their application.

OIC suggests that the proposed introduction of a 'grace period' discussed in 12.1 of this submission would better serve the purpose originally envisaged for a Schedule of Documents. This would allow a decision-maker to better understand what the applicant is seeking and may assist in building trust between applicant and decision-maker. Trust can be important in achieving more efficient application processing and better customer service. It is OICs experience that an applicant is less likely to seek a review if they believe the decision-maker clearly understood the request and as a result identified all relevant documents.

6.13 Should the threshold for third party consultations be reconsidered?

OIC recommends lifting the threshold in section 37 of the RTI Act from 'concerned' to 'substantially concerned', reinstating the narrower test for required consultation with third parties about intended release of documents.

[65] RTI Regulation 2009, section 5(4).

Section 37 of the RTI Act requires an agency to consult with a third party where the release of information may reasonably be expected to be of concern to the third party. Consulting under this section grants decision-makers an additional ten business days to decide an application; however only one period of ten business days applies regardless of the number of third parties with whom the agency must consult.

Prior to the RTI Act, the requirement to consult had a higher threshold of 'substantially concerned'. OIC considers that the change to a lower threshold has resulted in a significant increase in the number of third parties required to be unnecessarily consulted by both agencies and the OIC. Consequently, this has caused a delay in the processing of access applications initially and during review.

The pro-disclosure bias of the RTI Act, the starting point that all information is to be disclosed, and the proviso that information can only be withheld from release if disclosing it would be contrary to the public interest create a high threshold for refusing access to information. The comparatively low threshold for third party consultation creates an imbalance where the threshold at which agencies are required to consult is much lower than the threshold at which agencies are permitted to withhold.

The requirement to consult at the current threshold of concern has had a substantial resource impact on agencies and on the OIC. It causes unnecessary delay that can result in deemed decisions, generates additional work for decision-makers, and creates unrealistic expectations in the minds of consulted third parties. In addition to those unrealistic expectations it also impacts on consulted third parties' time as they are required to respond to consultation requests when there is little real chance that their submissions will a) have any relevance to the grounds for refusal set out in the legislation and/or b) raise sufficient concern to displace the RTI Act's pro-disclosure bias.

6.14 Should the Acts set out the process for determining whether the identity of applicants and third parties should be disclosed?

OIC recommends that section 37 of the RTI Act be amended to provide that an agency may disclose the applicant's identity to a third party being consulted under that section as long as doing so is not an unreasonable invasion of the applicant's privacy. OIC further recommends that details about this possible disclosure be required as part of an application form's collection notice.

OIC does not recommend amending section 37 to permit a decision-maker to tell the applicant who is being consulted on the application.

Third parties being informed of the applicant's identity

There currently exists numerous different approaches to this issue, varying by both agency and application type. This results in a lack of certainty for applicants, for third parties, and for agency decision-makers. The real difficulty arises when the applicant is an individual, as the question moves beyond a matter of agency policy to a question of privacy principle compliance under the IP Act.

Under the RTI Act, the decision-maker is required to effectively consult with the third party and give them a genuine chance to provide their objections to a document's release. Under the privacy principles, personal information (the fact that an individual has made an application) is not permitted to be disclosed unless, relevantly, the individual agrees or the disclosure is authorised by law[66].

Consultation under section 37 of the RTI Act currently requires a decision-maker to find a balance between these different starting points. Section 37 does not require disclosure of the applicant's identity as a matter of course. It authorises it only where it is not possible to properly consult without disclosing who the applicant is. The onus is on the agency to establish that telling the consulted third party who the applicant is was necessary for the consultation to be effective.

OIC notes that telling the third party who the applicant is can facilitate the consultation process and will often result in the third party having no objections, where if the applicant was unknown the third party would have objected.

Giving decision-makers the clear discretion to advise a third party of the applicant's identity, and the discretion to withhold the applicant's identity where it would not be appropriate to disclose it, will facilitate consultation and assure decision-makers that they are not breaching the privacy principles. The possibility that their identity may be provided to a consulted third party should be highlighted in any application form's collection notice, which will make applicants aware that disclosure is a possibility when they make their application[67].

Applicants being informed of third parties' identities

OIC does not support amending the Act to permit a decision-maker to tell the applicant who is being consulted on the application. Third parties are only consulted if a decision-maker is intending to release a document; in those circumstances the identity of the third party will generally be part of the information contained in the document under consideration.

Consultation can have three outcomes:

- The third party objects but the decision-maker decides to release the document despite their objections, resulting in access to the document being deferred until the third party has exercised or exhausted their review rights.
- The third party objects and the decision-maker decides to refuse access to the document, in which case the applicant will not be given a copy of it unless the decision is overturned on review.
- The third party does not object to releasing the document, meaning (unless the agency decides to refuse access regardless) as soon as the applicant has paid any charges they will be given a copy of it.

[66] Information Privacy Principle 11(1) for agencies which are not health agencies; National Privacy Principle 2(1) for health agencies.
[67] Information Privacy Principle 2 and National Privacy Principle 1 require agencies to inform individuals of potential disclosures when collecting their personal information from them.

If it is not contrary to the public interest for the applicant to receive documents containing the consulted third party's identity they will discover that identity when they receive their documents. If it is contrary to the public interest for the applicant to receive documents containing the consulted third party's identity it would not be appropriate for them to have been told the identity during the process.

6.15 If documents are held by two agencies, should the Act provide for the agency whose functions relate more closely to the documents to process the application?

OIC recommends permitting agencies to transfer part of an application where it relates to a document held by two entities and the responsibilities of the second agency are more closely aligned with the document than the first agency.

Prior to the RTI Act, an agency could transfer an application to another agency where:

- the first agency did not hold a document applied for and the second agency did; or
- both agencies held a document but it related more closely to functions of the second agency.

Under the RTI Act, an application can only be transferred where the first agency does not hold the document and the second agency does. OIC has not been able to locate any indication as to why the ability to transfer in these circumstances was not included in the RTI Act.

OIC suggests reinstating the ability to transfer an application where both agencies hold a document applied for but the second agency's responsibilities relate more closely to the document. Depending on the nature of the document, in many cases if the first agency were to process the document it may find itself required to consult with the second agency in relation to the document. This extends the processing period and introduces unneeded complexity, including the requirement to give the consulted agency review rights and potentially defer access to the document until such times as those review rights are exhausted. The ability to transfer the application to the other agency would remove this requirement to consult and simplify the process.

The second agency must consent before the application can be transferred; if the second agency did not believe it was appropriate to accept the transfer the first agency would continue to process the application in relation to that document.

6.16 How could prescribed written notices under the RTI Act and IP Act be made easier to read and understood by applicants?

OIC recommends replacing the Acts Interpretation Act requirements for reasons for decisions with specific RTI Act requirements, with a focus on brevity and clarity .

Under the RTI Act, agencies are required to provide Prescribed Written Notices (PWNs) for many decisions. The requirements of all PWNs are set out in section 191 and include:

- the decision
- the reasons for the decision
- the day the decision was made
- the name and designation of the person making the decision; and
- if the decision is not the decision sought by the person—any rights of review under this Act in relation to the decision, the procedures to be followed for exercising the rights, and the time within which an application for review must be made.

Agencies are required to include additional, or in some cases less, information in the PWN for some types of decisions.[68] In addition, the *Acts Interpretation Act 1954* (Qld)[69] requires that findings of material questions of fact and references to evidence or other material on which they were based must be included in reasons for decisions.

OIC is aware that the length and complexity of PWNs are an issue for agencies, applicants and third parties consulted under the RTI Act. This length and complexity generally arise from the detail required to be included in the reasons for the decision. The other requirements of a PWN are unlikely to raise difficulties as they involve straightforward statements of fact. It is often the case that the more detailed a PWN the less likely an applicant is to understand it.

From an applicant or consulted third party's perspective, giving reasons for a decision generally serves two purposes: to assist them to understand why a decision has been made and to decide whether or not to appeal a decision. To that end, OIC believes that reasons for a decision could be simplified greatly and still serve that purpose.

The Honourable Justice Garry Downes AM noted that Tribunal reasons are not intended to:

- *develop the law*
- *provide studies of issues of law*
- *deal in detail with all issues of fact and law arising in the case*
- *record how the hearing proceeded*
- *record all facts addressed at the hearing*
- *summarise the file; or*
- *address matters raised in the past which ultimately became irrelevant.* [70]

[68] For example, section 54(2).
[69] Section 27B.
[70] Presentation delivered to the Superannuation Complaints Tribunal Members conference, 1-2 March 2007 <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/DecisionWritingMarch2007.htm>.

These issues are not addressed because "[t]hey will lead to decisions that are likely to confuse the parties, particularly lay parties: The parties want to know the result along with the simplest and clearest explanation of how and why it was reached.". He goes on to state that the goal is reasons which are "comprehensible, concise, cogent, and complete".

OIC believes that these observations are equally applicable to the reasons agencies give to applicants and consulted third parties. OIC notes, however, that these outcomes are not easily legislated. One approach which could assist in reducing the complexity of reasons for decision may be to remove the reference in section 191 to the *Acts Interpretation Act 1954*, instead excluding its requirements for reasons for decisions and replacing it with requirements specific to the RTI Act. OIC suggests that the requirements for an RTI Act statement of reasons should emphasise clearly setting out in plain English the reasons and basis for decisions.

OIC also suggests that legislative change is unlikely to be sufficient on its own to remove length and complexity from agency decisions. OIC will continue to assist decision-makers to further develop their decision writing skills.

6.17 How much detail should agencies and Ministers be required to provide to applicants to show that information the existence of which is not being confirmed is prescribed information?

OIC does not consider any changes to section 55 of the RTI Act, which allows agencies to neither confirm nor deny the existence of documents, are necessary. OIC does not recommend introducing a requirement that agencies provide further detail about the nature of the prescribed information.

The purpose of section 55 of the RTI Act is to allow agencies to 'neither confirm nor deny' the existence of documents in response to an access application in exceptional situations where any other response, for example refusing access to the documents because they were exempt, would disclose prescribed information. Agencies are not required to set out the decision or reasons for the decision when advising an applicant that they neither confirm nor deny the existence of the type of document sought.[71]

If an agency were required to provide detail regarding why the documents sought would contain prescribed information it would, in some cases, cause the very outcome the provision is designed to prevent. Agency decision-makers are required to independently satisfy themselves that the documents sought would, if they existed, be comprised of prescribed information before advising the applicant they neither confirm or deny the existence of such documents. In most cases, this can be done on the basis of the terms of the application alone.

If an applicant is not satisfied, they may seek review.

[71] Section 55(2) of the RTI Act.

6.18 Should applicants be able to apply for a review where a notation has been made to the information but they disagree with what the notation says?

OIC recommends that there should continue to be no right of review for the content of a notation made by an agency in response to an amendment application.

Under the IP Act, if an individual applies to have their personal information amended a notation can be added in two circumstances:

- if the agency decides the information is inaccurate, incomplete, misleading or out of date and attaches a notation to correct the information; or
- if the agency refuses to amend the information and the applicant serves a notice on the agency requiring them to attach a notation which sets out how the applicant thinks the information is inaccurate, incomplete, out of date or misleading and any additional information necessary to correct it.

In the latter situation, the applicant has rights of internal and/or external review. While there are no review rights in the former situation, if an applicant believes strongly that the notation is not an accurate representation of the notice they served on the agency they could make a privacy complaint[72] and seek to have it resolved in that way. Since 2009, OIC has received only one privacy complaint on this ground.

[72] Information Privacy Principles 7 and 8 and National Privacy Principles 3 and 7 oblige agencies to ensure personal information is accurate, complete, up to date and not misleading. If an individual believed an agency's notation did not comply with these principles, they could make a privacy complaint on that basis.

PART 7: REFUSING ACCESS TO DOCUMENTS

7.1 Do the categories of excluded documents and entities satisfactorily reflect the types of documents and entities which should not be subject to the RTI Act?

OIC considers that listing excluded documents in schedule 1 and excluded entities in schedule 2 is an efficient and appropriate approach to enable refusal of access to specific types of documents and exclude particular entities, or part of their functions, from the application of the Act.

OIC recognises that any additions to schedule 1 or schedule 2 could occur only after detailed consideration and consultation.

The discussion paper indicates that, for the purposes of question 7.1:

- an excluded document is a "document to which the RTI Act does not apply" as defined in section 11 of the RTI Act and listed in schedule 1 of that Act; and
- an excluded entity is an "entity to which the RTI Act does not apply" as defined in section 17 of the RTI Act and listed in schedule 2 of that Act.

This section of OIC's submission addresses these types of documents and entities only.[73]

Excluded documents

Fifteen types of excluded documents are listed in schedule 1 of the RTI Act.

Three other Australian jurisdictions exclude specific documents from the operation of their Acts. They are:

- the Commonwealth[74] – which excludes various types of intelligence agency and defence intelligence documents, and documents regarding private sessions at the Commonwealth's Child Sexual Abuse Royal Commission
- the ACT[75] – which excludes lists of housing assistance properties identified as such; and
- NSW[76] - which excludes documents created by five areas of NSW police and corrections agencies.[77]

The issue of excluded documents is infrequently considered on external review.

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[73] It does not address entities that are not agencies as defined by the Acts, and documents that do not fall within the definition of "document of an agency" or "document of a Minister" – which are excluded from the scope of the Acts by decision-makers' general jurisdictional power.

[74] Section 7(2A)-(2E) inclusive of the *Freedom of Information Act 1982* (Cth).

[75] Section 6A(1) of the *Freedom of Information Act 1989* (ACT).

[76] Schedule 1, item 7 of *Government Information (Public Access) Act 2009* (NSW).

[77] The other Australian jurisdictions' provisions regarding law enforcement and public safety information are similar to schedule 3, section 10 of the RTI Act and do not specify particular types of documents.

The documents in schedule 1 are limited to documents that, due to their nature, would invariably be considered exempt or contrary to the public interest to release. Listing these documents in schedule 1 provides decision-makers with a quicker and less complicated way of reaching a decision that would, in OIC's view, be made in any event under different grounds for refusal.

OIC considers that the list of specific documents in schedule 1 provides an efficient and appropriate mechanism for dealing with applications seeking access to those kinds of documents. OIC expects that, given the exceptional nature of documents currently included in schedule 1, decisions to include additional types of document in schedule 1 would only be taken where disclosure of such documents would in all cases clearly be considered contrary to the public interest and following detailed consideration and consultation.

Excluded entities

The excluded entities listed in schedule 2 of the RTI Act generally reflect those which are excluded in other Australian jurisdictions' right to information legislation (although the ACT, NT and Victoria exclude relatively few entities[78]). OIC has infrequently considered the issue of excluded entities on external review.

However, OIC notes that exclusion of entities from the operation of the Act occurs only in exceptional circumstances, consistent with the pro-disclosure bias enunciated in the RTI Act. For this reason, OIC recognises that detailed consideration and consultation would be required before any proposed additions to schedule 2.

When an excluded entity's documents are held by an agency

OIC has noted one ongoing issue with respect to the operation of schedule 2: when documents of a schedule 2 excluded entity are in the possession or control of an agency as defined in the RTI Act (ie *not* the entity listed in schedule 2), schedule 2 cannot be relied on to refuse access to the documents. For example, when documents of a court which relate to the court's judicial functions[79] are in the possession of the Department of Justice and Attorney-General (DJAG)[80] the documents are considered to be DJAG's documents. As DJAG is an agency, it then becomes necessary for the decision-maker to instead consider the general grounds for refusal.[81]

OIC is aware that there has been some suggestion that this creates an anomalous situation. However, decision-makers are able to consider all relevant public interest factors, including those that prompted the excluded entity to be listed in schedule 2 and any factors arising from why and

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[78] See section 7 of *Freedom of Information Act 1982* (Cth), section 43 and schedule 2 of *Government information (Public Access) Act 2009* (NSW), sections 5 and 6 and schedule 2 of *Freedom of Information Act 1991* (SA), and section 6 of *Right to Information Act 2009* (Tas). Fewer entities are excluded in the ACT (see section 6 of the *Freedom of Information Act 1989* (ACT)); Northern Territory (see section 5 of the *Information Act* (NT)); and Victoria (see section 6 of the *Freedom of Information Act 1982* (Vic)).

[79] Schedule 2, part 2, item 1 of the RTI Act.

[80] Which may, for example, be considering those document as part of a broader law reform process.

[81] That is, the grounds set out in section 47 of the RTI Act.

how the particular agency is in possession of, and possibly using, the excluded entity's documents. OIC considers this outcome to be appropriate in such circumstances. Accordingly, OIC does not consider that any amendment of schedule 2 is required to address situations when an excluded entity's documents are in the possession or control of an agency.

7.2 Are the exempt information categories satisfactory and appropriate?

No recommendation. However OIC notes that the public interest test provides agencies with significant flexibility to make decisions that reflect the extent of their concerns regarding disclosure of documents. In the event a new exempt information category is considered, careful consideration and consultation would be necessary to ensure it is consistent with the overall objects of the RTI Act.

An agency may refuse access to a document to the extent that it comprises exempt information.[82] Exempt information is information which Parliament has considered would, on balance and in all circumstances, be contrary to the public interest to release.[83] The various types of exempt information are set out in schedule 3 of the RTI Act.[84]

It is OIC's view that Queensland's exempt information provisions have been carefully considered and align to a great extent with those found in other Australian jurisdictions.[85] In relation to the RTI Act exempt information provisions which have been considered by OIC in its decisions, it is OIC's view that they can generally be applied without giving rise to ambiguity or unnecessary complexity. In relation to the exempt information provisions which have *not yet* been addressed in OIC decisions[86] OIC can discern no issues which might impede their satisfactory operation.

Just over one quarter[87] of the issues considered in OIC's decisions made under the RTI Act involve the exempt information provisions. The most commonly considered exempt information provisions have been breach of confidence[88], legal professional privilege[89], and various aspects of the law enforcement and public safety provision[90]. Parliamentary and court privilege[91] and information the disclosure of which is prohibited by an Act[92] have been considered in a small number of decisions, while the provisions regarding incentive scheme information[93], Cabinet matter preceding

[82] Sections 47(3)(a) and 48 of the RTI Act.
[83] Section 48(2) of the RTI Act.
[84] Section 48(4) of the RTI Act.
[85] OIC notes that: some of the exempt information provisions are treated as PI factors favouring nondisclosure in other Australian jurisdictions; and other exempt information provisions have no counterpart in some (and in some instances all) of the other Australian jurisdictions – presumably leading to consideration of such types of information in the context of those jurisdictions' public interest test equivalents instead.
[86] That is, schedule 3, sections 4, 4A, 4B, 5, 9 and 10(5) of the RTI Act .
[87] 25.6%.
[88] Schedule 3, section 8 of the RTI Act.
[89] Schedule 3, section 7 of the RTI Act.
[90] Schedule 3, section 10 of the RTI Act.
[91] Schedule 3, section 6 of the RTI Act.
[92] Schedule 3, section 12 of the RTI Act.
[93] Schedule 3, section 11 of the RTI Act.

commencement of the Act[94], and Cabinet matter since commencement of the Act[95] have each been addressed once. The opportunity for OIC to issue decisions regarding a new aspect of the law enforcement and public safety exempt information provision[96] and the four new exempt information provisions[97] has not yet arisen, although these provisions have arisen in informally resolved reviews which did not result in a decision.

7.3 Does the public interest balancing test work well? Should the factors in schedule 4, parts 3 and 4, be combined into a single list of public interest factors?

OIC considers that the public interest balancing test is working well. OIC recommends that the factors in schedule 4, Parts 3 and 4 be combined into a single list of public interest factors. Further, OIC recommends that consideration be given to grouping the combined factors into related groups.

OIC recommends that section 49(3)(a) of the RTI Act be amended to clarify that decision-makers are only required to identify irrelevant factors listed in schedule 4, part 1 and any further irrelevant factors that arise in the circumstances of that application.

An agency may refuse access to information in a document to the extent that disclosure of the information would, on balance, be contrary to the public interest.[98] An agency takes the following steps when applying the public interest test:[99]

- identify and disregard any irrelevant factors, including any factors in schedule 4, part 1 that apply to the information
- identify any factors favouring disclosure, including any factors in schedule 4, part 2
- identify any factors favouring nondisclosure, including any factors in schedule 4, part 3 and any harm factors in schedule 4, part 4; and
- balance relevant factors favouring disclosure against relevant factors favouring nondisclosure and decide whether disclosure of the information would, on balance, be contrary to the public interest.

When the RTI Act was introduced there was some concern that the public interest test effectively broadened the scope for agencies to refuse access, allowing them to refuse access to information which would previously have been released. This is because section 49 allows a decision-maker to refuse access even in the absence of a harm factor, ie a factor in schedule 4 , part 4 adapted from previously repealed provisions.

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[94] Schedule 3, section 1 of the RTI Act.
[95] See *Office of the Leader of the Opposition and Treasury Department* (Unreported, Queensland Information Commissioner, 7 July 2010) regarding schedule 3, section 2 of the RTI Act.
[96] Schedule 3, section 10(5) of the RTI Act.
[97] Schedule 3, sections 4, 4A, 4B and 5 of the RTI Act
[98] Section 47(3)(b) of the RTI Act.
[99] Section 49(3) of the RTI Act.

In OIC's experience, application of the public interest test usually involves consideration of at least one harm factor. As at 30 June 2013, OIC had made 71 decisions in which it applied the public interest test[100]. Of these only five decisions did not involve consideration of a harm factor: in one of those five decisions OIC decided that access should be refused[101]; in the remaining four decisions, OIC found that access should be granted[102]. Consequently, OIC's practical experience applying the public interest test indicates that initial concerns about potential expansion of the grounds of refusal have proven to be unfounded.

OIC believes that considering a harm factor as one of a number of relevant public interest factors contributes to the creation of a single general, flexible public interest test. It encourages and enables the identification and balancing of all relevant factors for and against disclosure, without placing undue emphasis on harm factors. In OIC's view, any difficulties associated with application of the public interest test in its current form can be reduced through the steps outlined below, and by addressing minor technical drafting issues[103], rather than reverting to a threshold approach in which the harm factor must be present.

Combining parts 3 and 4 of schedule 4

The primary difficulty associated with the public interest test in its current form is the existence of two lists of factors favouring non-disclosure: the part 3 factors favouring nondisclosure and the part 4 harm factors. Since enactment of the RTI Act, public interest factors have accounted for over half of the issues considered by OIC in its decisions.[104]

An analysis of the 71 decisions made as at 30 June 2013 indicates that harm factors were separately considered and attributed individual weighting in only five decisions.[105] In the remaining 66 decisions, harm factors and other factors favouring nondisclosure were grouped together and then attributed weight. No distinction between part 3 factors favouring nondisclosure and part 4 harm factors was required to apply the public interest balancing test and consequently no distinction was made.

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[100] As at 8 October 2013.

[101] Access was refused in *DH6QO5 and Department of Health* (.

[102] Access was granted in: *Food business and Gold Coast City Council: Seven Network Operations (Third Party)* ; *Seven Network Operations Limited and Safe Food Production Queensland; Food business (Third Party)* ; *Nine Network Australia Pty Ltd and Brisbane City Council Stewart and SunWater Limited*

[103] OIC can provide DJAG with separate feedback regarding this.

[104] 57.1%.

[105] *Seven Network Operations and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011); *Kalinga Wooloowin Residents Association Inc and Department of Employment, Economic Development and Innovation* (Unreported, Queensland Information Commissioner, 19 December 2011); *Kalinga Wooloowin Residents Association Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 9 May 2012); *Beale and Department of Community Safety* (Unreported, Queensland Information Commissioner, 11 May 2012); *Abbot and The University of Queensland* (Unreported, Queensland Information Commissioner, 16 October 2012).

OIC considers that having two lists of factors favouring non-disclosure is not required to ensure the test operates as intended. When applying the test, the weight attributed to the various factors depends on the nature of the information sought and the circumstances of the particular application. A factor is not given additional weight simply because it happens to be a harm factor in schedule 4, part 4.

OIC recommends that the factors in parts 3 and 4 of schedule 4 be combined. This would remove an unnecessary distinction and somewhat simplify decisions, both for those that write them and those that read them. It would also move the Act closer to a single, general, flexible public interest test.

OIC notes that combining these two parts would result in some of the factors favouring disclosure (the existing part 3 factors) being one sentence in length, while others (the existing part 4 harm factors) were several paragraphs. OIC acknowledges that the resulting list of combined factors will likely appear somewhat disjointed or mismatched relative to usual legislative drafting standards.

To manage this, OIC recommends consideration be given to grouping the combined factors into related groups, perhaps similar to the groupings used in the table of public interest factors in the *Government Information (Public Access) Act 2009* (NSW).[106] Doing so could result in a greater sense of order and, accordingly, a greater understanding of the factors favouring non-disclosure and how they relate to one another. If this recommendation is adopted, OIC suggests grouping the factors favouring disclosure in a similar manner for consistency.

7.4 Should existing public interest factors be revised considering: some public interest factors require a high threshold or several consequences to be met in order to apply; whether a new public interest factor favouring disclosure regarding consumer protection and/or informed consumers should be added; whether any additional factors should be considered?

OIC recommends that the wording of items 1, 2, 3, 9 and 10 in schedule 4, part 4 be amended so that those harm factors need only be considered when the relevant outcomes could reasonably be expected to occur.

OIC does not consider that any other changes to the public interest factors are required.

Schedule 4 factors that require high thresholds or several consequences to be satisfied

OIC notes that varying thresholds must be satisfied before particular public interest factors in schedule 4 become relevant, for example 'contribute to'[107] has a lower threshold than 'ensure' [108]. Also, various public interest factors in schedule 4 link two consequences with the word 'and' and, in

[106] See the table following section 14 of the *Government Information (Public Access) Act 2009* (NSW).
[107] Schedule 4, part 2, items 2, 13 and 15 to 19 of the RTI Act.
[108] Schedule 4, part 2, item 4 of the RTI Act.

doing so, require that both consequences be satisfied before the factor becomes relevant, for example *'promote open discussion of public affairs and enhance the Government's accountability'*[109].

OIC considers it is important to note that the factors in schedule 4 are non-exhaustive.[110] This means that, even where a high threshold or multiple-consequence factor in schedule 4 is not applicable, the decision-maker can consider a similar public interest factor with a lower threshold, for example:

- *'enhance effective oversight of expenditure of public funds'* rather than *'ensure effective oversight of expenditure of public funds'*[111]; or
- *'enhance the Government's accountability'* rather than *'promote open discussion of public affairs and enhance the Government's accountability'*[112].

Consequently, the higher thresholds and multiple-consequences specified in some schedule 4 public interest factors are, in practical terms, not critical issues; they do not preclude consideration of similar public interest factors with lower thresholds or encompassing only one consequence.

The wording of some part 4 harm factors

Another difficulty raised by several of the harm factors relates to their wording. In particular, difficulty arises regarding the harm factors at item 1, 2, 3, 9 and 10 which use the wording *'[d]isclosure of the information could reasonably be expected to cause a public interest harm if disclosure could [result in specified harm]'*.

In these instances, the threshold required to activate the harm factor as a relevant factor when applying the public interest test is low. Based on the current wording of these factors, any likelihood that the specified harm *could* occur, no matter how small, requires the decision-maker to find that disclosure could reasonably be expected to cause the harm factor. In these circumstances, the decision-maker can choose to apply very little weight to the relevant harm factor, but the requirement to consider the harm factor at all is onerous and over-complicates decisions for both those writing and those reading them.

Consequently, OIC recommends that the wording of items 1, 2, 3, 9 and 10 in schedule 4, part 4 be amended so that those harm factors need only be considered when the relevant outcomes could reasonably be expected to occur. OIC notes that the amendments necessary to combine the part 3 and part 4 factors, as recommended above, would likely resolve this issue.

[109] Schedule 4, part 2, item 1 of the RTI Act.
[110] Given the wording of section 49(3)(a), (b) and (c) of the RTI Act.
[111] Schedule 4, part 2, item 4 of the RTI Act.
[112] Schedule 4, part 2, item 1 of the RTI Act.

Adding additional factors to schedule 4

In its decisions, OIC has identified and considered public interest factors other than those listed in schedule 4. As well as the public interest factors mentioned above (similar to existing public interest factors but with lower thresholds or involving only a single consequences), OIC's decisions have included consideration of public interest factors not present in schedule 4, such as supporting informed consumer choices[113] and enabling royalty recipients to access information otherwise unavailable to them regarding royalty calculations[114].

OIC notes that, when the public interest test was introduced, there was some concern that listing public interest factors in schedule 4 could reduce flexibility or freeze the public interest concept in time. However, it was also noted that listing the factors would improve agencies' decision making and result in more uniformity of decision making across agencies.

In OIC's experience, the lists act as prompts which assist decision-makers and parties to identify all public interest factors relevant to a particular application. In this sense, it is arguable that expansion of the current public interest factors to include additional factors which have been identified and applied could be beneficial.

OIC does not consider it good practice to continually expand the schedule 4 factors to include new factors identified and applied by decision-makers. The public interest factors listed in schedule 4 are non-exhaustive. Consequently, parties can raise, and decision-makers can consider, any relevant public interest factor, including those not listed in schedule 4.

OIC is also concerned that adding public interest factors to schedule 4 could reinforce misconceptions that the factors are exhaustive or discourage decision-makers from identifying and applying new factors relevant to their applications. Further, doing so could give rise to the mistaken impression that there were two tiers of public interest factors: those which are listed in schedule 4 and those which are not. This could arguably result in factors listed in schedule 4 being given greater weight than new, decision-maker identified, factors simply because they were 'important enough' to be included.

Decision-makers could also find it difficult to determine whether particular public interest factors were not listed in schedule 4 because they had never before arisen, arose so infrequently their inclusion in schedule 4 was not considered justified, or were awaiting inclusion via an appropriate Bill.

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[113] *Seven Network Operations Limited and Safe Food Production Queensland; Food business (Third Party)* (Unreported, Queensland Information Commissioner, 10 February 2012) and *Nine Network Australia Pty Ltd and Brisbane City Council* (Unreported, Queensland Information Commissioner, 7 June 2012).

[114] *Gordon Resources Limited and Department of Employment, Economic Development and Innovation* (Unreported, Queensland Information Commissioner, 21 September 2011).

In OIC's view, the non-exhaustive nature of the public interest factors provides an effective and flexible framework for applying and balancing public interest factors within the specific context of an access application. Given that the RTI Act's public interest balancing test already grants a decision-maker the capacity and flexibility to consider any public interest factor OIC does not consider it necessary to add new public interest factors to schedule 4.

In addition, OIC considers that its training and resources assist decision-makers to identify and consider public interest factors not listed in schedule 4. OIC's resources can be quickly updated when new public interest factors are identified, to explain them and discuss the types of information or circumstances in which they may become relevant.

7.5 Does there need to be additional protections for information in communications between Ministers and Departments?

No recommendation. However, OIC notes that the RTI Act includes a broad range of existing protections for communications between Ministers and departments.

A number of existing provisions in the RTI Act can apply to communications between Ministers and departments.

Exempt information provisions

- *Cabinet information* - if the communications would reveal information brought into existence for the consideration of Cabinet or information that would reveal any Cabinet considerations.[115]
- *Executive Council information* - if the information was brought into existence for briefing, or the use of the Governor, a Minister, or a chief executive in relation to information submitted to Executive Council or that is proposed or has at any time been proposed to be submitted to Executive Council.[116]
- *Information briefing incoming Minister* - if the information is brought into existence by an agency to brief an incoming Minister about the agency.[117]
- *Contempt of Parliament information* - if disclosure of the information would be in contempt of Parliament – for example, if it comprised responses to possible parliamentary questions.[118]
- *Information subject to legal professional privilege* - if the communications comprise legal advice from departmental or Crown lawyers acting in their capacity as such (or external solicitors or counsel engaged by them), the communications would be subject to the legal professional privilege exempt information provision.[119]

[115] Schedule 3, section 2 of the RTI Act.
[116] Schedule 3, section 3 of the RTI Act.
[117] Schedule 4, section 43 of the RTI Act.
[118] Schedule 3, section 6(c) of the RTI Act.
[119] Schedule 3, section 7 of the RTI Act.

- *Breach of confidence information* - if the communications reveal the information of a third party outside government and disclosure of that information would found an action for breach of confidence.[120]

Contrary to public interest information

Documents which contain the information of third parties outside government may also enliven relevant harm factors in schedule 4, part 4 of the RTI Act when the public interest test is applied, for example, harm factors regarding:

- personal information[121]
- business affairs[122]; or
- confidential information communicated by a third party to the Minister or agency[123].

Related factors favouring nondisclosure in schedule 4, part 3 may also be relevant, for example:

- prejudicing the protection of an individual's right to privacy[124]
- prejudicing private business, professional, commercial or financial affairs[125]; or
- prejudicing an agency's ability to obtain confidential information[126].

Depending on the type of information sought, other public interest provisions may be relevant. For example, the following provisions could be relevant regarding information that may prejudice the State's economic position:

- investment incentive scheme information exempt information provision[127]
- harm factors regarding business affairs, the State's economy, the State's financial and property interests[128]; and
- factors favouring nondisclosure regarding prejudice to the economy of the State and prejudice to an agency's competitive commercial activities[129].

[120] Schedule 3, section 8 of the RTI Act.
[121] Schedule 4, part 4, item 6 of the RTI Act.
[122] Schedule 4, part 4, item 7 of the RTI Act.
[123] Schedule 4, part 4, item 87 of the RTI Act.
[124] Schedule 4, part 3, item 3 of the RTI Act.
[125] Schedule 4, part 3, items 2 and 15 of the RTI Act.
[126] Schedule 4, part 3, item 16 of the RTI Act.
[127] Schedule 3, section 11 of the RTI Act.
[128] Schedule 4, part 4, item 7, item 9, and item 10 of the RTI Act.
[129] Schedule 4, part 3, item 12 and item 17of the RTI Act.

Regardless of the nature of the information sought, the harm factor regarding deliberative processes information[130] is usually relevant when applying the public interest test, as is the factor favouring nondisclosure regarding prejudice to deliberative processes[131]. Similar deliberative process provisions – subject to public interest tests – apply in all other Australian jurisdictions.[132]

Several provisions in the RTI Act may apply to communications between Ministers and departments, depending on the nature of those communications and surrounding circumstances. Given that the list of public interest factors in schedule 4 is non-exhaustive, it remains possible for other public interest factors that are not listed in the RTI Act to be considered where relevant when applying the public interest test regarding communications between Ministers and departments.

Is additional protection needed?

OIC acknowledges the following concerns have been raised regarding the disclosure of deliberative process information:

- disclosure may mean that good, but politically controversial, ideas are not considered further and pursued, and therefore disclosure should only occur after decisions have been made by Cabinet or the relevant Minister; and
- the prospect of disclosure inhibits the frankness and fearlessness of public servants' advice, and some form of protection from disclosure therefore is necessary to ensure that Ministers receive advice that is comprehensive and candid.

OIC is aware that deliberative process has been proposed as the basis of an exempt information provision in place of the existing public interest factors. OIC notes that, other than Tasmania[133], no other Australian jurisdiction has a general exempt information provision regarding deliberative process information. Victorian, Western Australian and Northern Territory each exempt a narrow portion of deliberative process information, that is, Ministerial briefings on matters to be considered by Cabinet.[134]

In Queensland, the deliberative processes harm factor[135] applies to opinion commissioned for and used in deliberative processes until public consultation starts[136].

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[130] Schedule 4, part 4, item 4 of the RTI Act.

[131] Schedule 4, part 3, item 20 of the RTI Act.

[132] See section 47C of the *Freedom of Information Act 2009* (Cth), section 30 of the *Freedom of Information Act 1982* (Vic), item 1(e) in table after section 14 in *Government Information (Public Access) Act 2009* (NSW), schedule 1, item 6 of *Freedom of Information Act 1992* (WA), schedule 1, item 9 in *Freedom of Information Act 1991* (SA), section 35 of *Right to Information Act 2009* (Tas), section 52 of *Information Act* (NT), section 36 of *Freedom of Information Act 1989* (ACT).

[133] The Tasmanian exemption relates to an opinion, advice or recommendation prepared by an agency or Minister, or a record of consultations and deliberations between an agency and Minister *'in the course of, or for the purpose of, providing a Minister with a briefing in connection with the official business of [an agency], a Minister or the Government and in connection with the Minister's parliamentary duty'* – see section 27 of the *Right to Information Act 2009* (Tas).

[134] For example, section 28(1)(ba) of the *Freedom of Information Act 1982* (Vic) (as noted in the discussion paper); schedule 1, item 1(1)(d) of the *Freedom of Information Act* 1992 (WA); and section 45(1)(a)(ii) of the *Information Act* (NT).

[135] Schedule 4, part 4, item 4 of the RTI Act.

OIC has applied this harm factor[137] in recognition of the public interest in the government:

- being able to make informed decisions in the course of carrying out its functions
- having access to the widest possible range of information and advice without fear of interference when doing so; and
- maintaining the confidentiality of their deliberative processes in some circumstances, particularly where those deliberative processes relate to ongoing negotiations.

In very broad terms, OIC's decisions regarding deliberative process information have found that the weight of the factors favouring nondisclosure are:

- greatest before a decision has been made (particularly when negotiations with other parties are ongoing)
- reduced when public consultation has commenced (which renders the deliberative process harm factor inapplicable); and
- reduced further still when a decision has been made.

OIC's current approach avoids the detrimental impact disclosure may have on good but potentially controversial ideas before consultation has occurred or decisions have been made.

OIC considers that deliberative process scenarios can vary and therefore the public interest test is likely to be more suitable due to its flexibility than an exempt information provision with set criteria. In OIC's experience public interest factors favouring disclosure of deliberative processes information[138] are also closely and strongly aligned with the stated policy outcomes of open, accountable and participatory government that accompanied the now repealed FOI Act[139] and with Parliament's stated reasons for enacting the RTI Act[140].

Scrutiny of government decisions, and the reasons and background material behind them, has and remains one of the primary purposes of RTI legislation. It would therefore be particularly difficult to achieve an appropriate balance in creating an exempt information provision to deal with a differing range of circumstances.

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[136] After the commencement of public consultation, the factor favouring nondisclosure regarding prejudice to a deliberative process (schedule 4, part 3, item 20 of the RTI Act) would usually continue to apply. Further, given that the public interest factors listed in schedule 4 are non-exhaustive, a public interest factor similar to the deliberative processes harm factor, but applicable after public consultation begins, could still be relevant.

[137] *Pallara Action Group Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 21 September 2012) at [42]. This continues the approach taken by OIC regarding the repealed FOI Act in *Metcalf and Maroochy Shire Council* (Unreported, Queensland Information Commissioner, 19 December 2007) at [47].

[138] For example, schedule 4, part 2, items 1 to 5 and 11 of the RTI Act.

[139] As noted at page 13 of the FOI Independent Review Panel (2008), *The Right to Information: Reviewing Queensland's Freedom of Information Act.*

[140] See reasons 1(a) to (e) of the RTI Act's preamble.

7.6 Should incoming government briefs continue to be exempt from the RTI Act?

No recommendation. However OIC notes the Hawke Review discussion and acknowledges the Australian Information Commissioner's comments that disclosure of incoming government briefs may diminish the value of such briefs.

The exempt information provision regarding information *'brought into existence by [a] department to brief an incoming Minister about the department'*[141] currently has no direct equivalent in other Australian jurisdictions. While the opportunity for OIC to issue a decision regarding this exempt information provision has not arisen, OIC cannot identify any issues which might impede the provision's satisfactory operation.

It is OIC's understanding that the policy rationale for exempting incoming Ministers' briefs from disclosure relates to the need for Ministers to be fully informed of all relevant departmental issues, so that they may discharge their responsibilities fully and effectively.[142]

OIC notes that Ministers' decisions throughout their tenure gradually render much of the information in their incoming briefs out of date and of historic, rather than political, interest. Consequently, it is arguable that the policy rationale for the exempt information provision is linked to the electoral cycle; if so, the current 10 year period in which the exempt information provision applies may be lengthier than necessary. OIC suggests that consideration could be given to investigating whether some lesser period for the exempt information provision would provide sufficient protection for incoming Ministers' briefs.

The Hawke Review recommends that *'the [Cth] FOI Act be amended to include a conditional exemption for incoming government and minister briefs, question time briefings and estimates hearing briefings'*.[143] This recommendation was made on the basis that frank and fearless advice is inhibited by the prospect of disclosure and therefore some form of protection from disclosure is required to ensure advice is comprehensive and candid.[144]

While the Hawke Report's recommendation suggests a conditional, rather than an absolute, exemption, OIC considers the important and sensitive nature of incoming brief information is sufficient to justify Queensland's exempt information provision remaining absolute. In this regard, OIC agrees with the Australian Information Commissioner's reasoning regarding the important role of incoming briefs in providing confidential, frank and honest advice.

OIC also acknowledges concerns raised by the Australian Information Commissioner, that:

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[141] Schedule 3, section 4 of the RTI Act.

[142] Page 49 of Hawke, A (2013), *Review of the* Freedom of Information Act 1982 *and* Australian Information Commissioner Act 2010.

[143] Recommendation 13 at page 6 of Hawke, A (2013), *Review of the* Freedom of Information Act 1982 *and* Australian Information Commissioner Act 2010.

[144] See pages 47-49 of Hawke, A (2013), *Review of the* Freedom of Information Act 1982 *and* Australian Information Commissioner Act 2010.

…a special feature of an incoming government brief is that it is prepared essentially as a communication limited to an audience that may comprise only one person – the new Minister. If it is known that the brief will be disclosed publicly under the FOI Act, there is a risk that it will be tailored to a different audience or with different interests in mind. This could compromise the quality and value of the brief and make it less relevant to its specific circumstance.

… An incoming brief that is not confidential may include only bland material that will not raise concern, and possibly be of less value to a new government. An associated risk is that the brief will not be comprehensive and will be replaced by oral briefings to the new Minister.[145]

7.7-7.8 Are the current provisions in the RTI Act sufficient to deal with access applications for information created by Commissions of Enquiry after the Commission ends?
Is it appropriate or necessary to continue the exclusion of Commission documents from the RTI Act beyond the term of the inquiry?

OIC recommends that no legislative change is required to clarify the operation of the RTI Act. OIC considers that existing provisions provide sufficient flexibility to deal with Commission documents after the Commission of Inquiry has ended.

One of the excluded entities listed in schedule 2, part 1 of the RTI Act is *'a Commission of Inquiry issued by the Governor in Council, whether before or after the commencement of this schedule'*.[146] Documents of a Commission of Inquiry are not specifically excluded from the application of the RTI Act.

OIC agrees with the view outlined in the discussion paper: that the exclusion regarding Commissions of Inquiry only precludes application of the RTI Act to a Commission of Inquiry while the Commission is operating.

When a Commission of Inquiry has ceased its documents are held by a "responsible public authority"[147]. The exclusion for Commissions of Inquiry does not apply to these documents as an application to access them the agency that now holds them, with the right of access subject to the existing range of refusals set out in the RTI Act. In OIC's view, such refusal grounds are sufficiently flexible to enable an agency to make a decision that reflects any significant concerns regarding disclosure.

OIC does not consider that any additional provisions or exclusion are required to enable the RTI Act to deal appropriately with historical Commission documents.

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[145] In this regard, see the Commonwealth Information Commissioner's comments in *Crowe and Department of Treasury* [2013] AICmr 69 at [85].
[146] Section 17 and schedule 2, part 1, item 4 of the RTI Act.
[147] Section 15 of the *Public Records Act 2002* (Qld).

Clarification that a Commission is an excluded entity only while operating

OIC notes that there has been some suggestion that schedule 2 should be amended to clarify that a Commission of Inquiry is an excluded entity only while the Commission is operating. In OIC's view, the RTI Act already makes it clear that while the Commission exists it is excluded from the definition of "agency"[148] and, as such, the Commission's documents are excluded from the operation of the RTI Act[149]. OIC does not consider that a clarification of this type is necessary. Further, OIC is concerned that adding qualifiers of this kind could have an unintended impact on the relevant provision, or other provisions expressed in similar terms.

Continuing the exclusion beyond the term of the Commission

OIC notes that there has been some suggestion that:

1. A Commission of Inquiry should continue to be excluded from the operation of the RTI Act (as an excluded entity under schedule 2) after the Commission concludes.
2. All, or specified[150], documents of a Commission of Inquiry should be exempt from disclosure when the Commission has ceased.

OIC also notes suggestions that an additional factor favouring non-disclosure relating to documents of a Commission of Inquiry when the Commission has ceased be added schedule 4 of the RTI Act.

The first suggestion is not consistent with the RTI Act. Under the RTI Act, an applicant applies to an agency for documents held by that agency. If the Commission of Inquiry has concluded it serves no purpose to exclude it from the operation of the Act as it no longer exists for an applicant to make and application to.

In relation to the second suggestion, in OIC's view the existing mechanisms for assessing whether disclosure of information would be contrary to the public interest provide appropriate and sufficient flexibility for dealing with historical Commission documents. The public interest test provides an effective framework for considering and balancing all relevant public interest factors, taking into account the nature of the information[151], the sensitivities of the information and surrounding circumstances[152], and its age[153]. The public interest factors are not exhaustive and the decision-maker is required to identify and consider any other factors that are relevant.

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[148] See sections 14(2) and 17 and schedule 2, part 1, item 4 of the RTI Act.
[149] Because the right to access documents relates only to documents of agencies and documents of Ministers – see sections 12, 13 and 23 of the RTI Act.
[150] For example, documents that contain highly sensitive information or information subject to the Commission's non-publication order.
[151] For example, as noted in the discussion paper, public submissions, administrative documents, legal advice and sensitive personal information.
[152] Ranging from innocuous to contentious (as noted in the discussion paper) and scandalous (as noted at page 63 of the Parliamentary Crime and Misconduct Commissioner (2013), *Inquiry into the CMC's release and destruction of Fitzgerald Inquiry documents*, Report No. 90) <http://www.parliament.qld.gov.au/documents/committees/PCMC/2013/FitzgeraldDocuments/rpt-090-5Apr2013.pdf>.
[153] Which, in general terms, lessens as time passes.

OIC notes that a Commission may make a non-publication order regarding any book, document, writing or record produced to it.[154] OIC believes that each Commission is best placed to assess the information produced to it, in light of all relevant circumstances, in order to identify that which is sufficiently sensitive to warrant non-publication orders.

OIC considers that a non-publication order would indicate to a decision-maker that the information is highly sensitive and its publication was contrary to the public interest at the time the order was made. While sensitivity may diminish somewhat over time, in OIC's view a non-publication order is highly likely to raise a factor favouring nondisclosure to which a decision-maker would assign substantial weight, even with the passing of time.

7.9 Are provisions in the RTI Act sufficient to deal with access applications for information relating to mining safety in Queensland?

No recommendation. However, OIC considers that existing provisions provide sufficient flexibility to deal with applications for information relating to mining safety.

It is OIC's understanding that this question relates to access applications seeking information about mining safety and health issues provided by parties under the *Coal Mining Safety and Health Act 1999* (Qld) (CMSH Act). In effect, under the CMSH Act:[155]

- if answering would *not* incriminate a person, the person is compelled to answer questions about any type of incident; but
- if answering *would* incriminate a person, the person is compelled to answer questions about serious accidents and high potential incidents (as defined under the CMSH Act) only.

These two types of answers may be the subject of access applications under the RTI Act.

Where answers are about a serious accident or high potential incident, and the person has been compelled to provide them even though they are self-incriminating, the exempt information provision regarding information given under compelled under an Act which abrogates the privilege against self-incrimination[156] usually applies[157].

When the answers relate to *any* type of incident and do *not* incriminate the person providing them, the situation is more complex. It is arguable that the breach of confidence exempt information provision[158] and public interest factors regarding confidential information[159] would not apply, given that the person is compelled by law to answer.

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[154] Section 16 of the *Commissions of Inquiry Act 1950* (Qld)
[155] Section 157, 158(2) and (3) and 159(2) of the CMSH Act.
[156] Schedule 3, section 10(3) of the RTI Act.
[157] See, for example, *Godwin and Department of Employment, Economic Development and Innovation* (Unreported, Queensland Information Commissioner, 17 January 2011).
[158] Schedule 3, section 8 of the RTI Act.
[159] Schedule 4, part 3, item 16 and schedule 4, part 4, item 8 of the RTI Act.

In OIC's view, existing public interest factors and the capacity to identify new public interest factors are sufficient to enable decision-makers to deal appropriately with access applications regarding answers obtained under the CMSH Act. Depending on the circumstances, factors favouring nondisclosure relating to ensuring the free flow of information about health and safety issues to relevant persons may be considered relevant and attributed weight as appropriate.

OIC notes that no Australian jurisdiction has provisions that deal specifically with mining safety and health information.

7.10 Are the current provisions in the RTI Act sufficient to deal with access applications for information about successful applicants for public service positions?

No recommendation. However, OIC considers that existing provisions provide sufficient flexibility to deal with access applications for information about successful applicants for public service positions.

OIC recognises that access applications seeking information regarding persons appointed to public service positions, and the processes which led to their appointment, involve strong and competing public interest factors. In broad terms, public interest factors regarding the privacy of applicant's personal information weigh against factors regarding accountable and transparent recruitment processes, which encourage probity and maximise effective expenditure of public monies by ensuring that the most qualified person was appointed.

In OIC's view, similar factors arise when considering access applications for information about government tenders; the commercial information submitted by tenderers may be equated with the personal information of job applicants. In both instances, whether or not information is disclosed usually depends on the extent to which disclosure, or the prospect of disclosure, enhances the probity of government appointments and the effective expenditure of public funds.

In OIC's experience regarding both tenders and job applications, it is often the case that the balancing of public interest factors leads to decisions to:

- release a substantial amount of information regarding the successful applicant, because that information indicates the successful applicant's skills and experience; and
- provide meaningful information about the comparative process through which the successful applicant was identified as best suited to the role, often through the disclosure of de-identified information regarding the unsuccessful applicants.

In OIC's view, the RTI Act's public interest test is sufficient to enable decision-makers to adequately and appropriately deal with access applications seeking information about successful applicants for public service positions. The public interest factors enable the decision-maker to canvas all relevant issues. No other Australian jurisdiction has provisions that deal specifically with public service job applications.

If the situation involved harassment or bullying of a successful applicant (as raised in the discussion paper) the exempt information provision regarding a person *'being subjected to a serious act of harassment or intimidation'*[160] could be relevant. Otherwise, given that the public interest factors listed in schedule 4 are non-exhaustive, the decision-maker could identify a public interest factor against disclosure regarding the applicant being subjected to harassment or bullying, and take this into account when applying the public interest test.

[160] Schedule 3, section (1)(d) of the RTI Act.

PART 8: FEES AND CHARGES

8.1 Should fees and charges for access applications be more closely aligned with fees, for example, for court documents?

OIC submits that the basis for access to court records is fundamentally different from access to government-held information under the RTI Act.

Access to government-held information under the RTI or IP Acts

The charging regime under the RTI Act has three components: application fee, processing charge, and access charge. The RTI application fee cannot be waived and processing charges do not apply to documents containing the applicant's personal information or where the agency spends fewer than five hours total processing the application. Under the IP Act, there is no application fee, nor are there any processing charges, but there may be access charges.

Processing and access charges must be waived if the applicant is in, and applies for, financial hardship.

Access to information held by Courts and QCAT

The Queensland Supreme Court charges $12.60 to produce a file for inspection[161] and the Federal Court charges $43.00 to produce a file for inspection[162]. Upon payment of these initial fees the person is given access to the file; they can inspect it, take notes from it, and identify if there are any pages they want copies of. The cost of those copies is:

- for the Federal Court, $1.00 a page; and
- for the Queensland Supreme Court, $2.30 a page, capped at a total of $61.00.

Access to Queensland Civil and Administrative Tribunal (QCAT) records is charged differently. A person who wants to access the file must pay an hourly charge to do so: $15.00 per hour capped at a maximum of $59.00 per day. If the registrar is required to retrieve files from off-site storage there is an additional 'per box' fee payable: $32.10 for the one box, $35.70 for two boxes, $39.80 for three or more boxes. If the person wants copies pages are charged for at $1.75 for fewer than 20 pages, $1.45 for 20 to 50 pages, and $1.00 for more than 50 pages.

[161] Note that this fee is not payable by parties.
[162] Item 123, schedule 1, *Federal Court and Federal Magistrates Court Regulation 2012* (Cth).

Comparison

If access to court documents is cast into RTI terminology the result is:

	RTI Act Government held documents	IP Act Government held documents containing personal information	QCAT	Supreme Court	Federal Court & Federal Magistrates Court
Application Fee	$41.90	0	0	$12.60	$43.00
Processing charge	$25.80/hour[163] when over 5 hours	0	0	0	0
Access: Inspection only	0	0	$15/hour (capped at $51/day) + cost of file retrieval (maximum $39.80/box)	0	0
Access: copies (per page)	$0.20 A4; actual cost for non-A4 documents.	0	$1.75 for fewer than 20 pages; $1.45 for 20-50 pages; $1.00 for 50+ pages	$2.30 to maximum of $61.00	$1
Access: electronic	0	0	N/A	N/A	N/A
Access: Other	Cost recovery basis	Cost recovery basis	N/A	N/A	N/A

[163] At a maximum of $187.50 per day presuming a single officer's working day of 7 hours and 15 minutes.

Under the RTI Act, there is no cap on the amount payable by an applicant. It appears that adopting a fee structure more closely aligned with fees charged for access to court documents may result in less cost payable by many RTI Act applicants, as court costs do not include a component for charging for the time spent by officers working on processing the access application. Further, under RTI, applicants are required to pay the processing charges regardless of whether or not they are given access to the documents.

OIC suggests that accessing information from the courts is not directly comparable to accessing information from an agency under the formal provisions of the RTI Act. Access to government-held documents under the RTI Act requires careful consideration of exempt information provisions and public interest factors, and consultation with third parties. The basis for determining access in relation to an RTI application is quite different to that for a request for court documents and as such they employ different charging regimes. Given this, OIC suggests that court charging regimes are unlikely to be an appropriate basis on which to calculate RTI charging.

8.2 Should fees and charges be imposed equally on all applicants? Or should some applicants pay higher charges?

No recommendation. However, OIC notes that some exceptions to fees and charges currently exist.

Currently, fees and charges are not imposed equally on all applicants. There is a baseline of fees and charges established by the RTI and IP Regulations and these are varied or waived in certain circumstances, for example:

- applicants who are individuals applying solely for documents containing information about them pay no application fee and no processing charge
- applicants applying for a mix of personal and non-personal documents pay only for those that do not contain personal information about them; and
- applicants in financial hardship, be they individuals or non-profit organisations, pay no charges at all.

OIC notes that one of the fundamental principles of FOI and RTI legislation is that the motive of the applicant should not be of concern. Further, as set out in the 1990 Electoral and Administrative Review Commission report:

> *Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens.*
>
> *All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.*[164]

[164] Electoral and Administrative Review Commission, Report on Freedom of Information, December 1990, p. 181.

To introduce a sliding scale of charges on grounds other than those elucidated above is to require a value judgement to be made about the applicant, their purposes, and the respective worth of both. The purpose of RTI legislation is to enhance government openness and accountability and encourage participation in the democratic process by the community. Further, the RTI Act recognises that government holds documents as custodian for the community; that "information in the government's possession is a public resource"[165]. On this basis any proposed changes to differentiate between types of applicants should be carefully considered in the context of the objectives of a right of access to government-held documents.

8.3 Should the processing period be suspended when a non-profit organisation applicant is waiting for a financial hardship status decision from the Information Commissioner?

OIC recommends that, rather than suspending the processing period while a non-profit organisation applies to OIC for financial hardship status, non-profit organisation who wish to have their processing and access charges waived on the grounds of financial hardship be required to apply for financial hardship status before lodging their access application with the agency.

Under the RTI Act a non-profit organisation can apply to the Information Commissioner for financial hardship status; if granted, it has effect for one year. The RTI Act is silent on when the non-profit organisation is required to make their application. As a result, non-profit organisations can either: 1) apply to OIC for financial hardship and then apply to the agency for access; or 2) apply to the agency for access and, during that process, apply to OIC for financial hardship.

Where non-profit organisations apply to the agency for access to documents and then apply to OIC for a financial hardship waiver agencies are required to carry out the administrative processes necessary to receive, assess, and commence an application and then monitor it awaiting an outcome over which they have no control. If the non-profit organisation is not granted financial hardship status and, as a result, elects not to continue with their application, the agency would have unnecessarily diverted their resources.

Rather than having the processing period pause when a non-profit applicant decides to apply to OIC for a financial hardship declaration, OIC suggests that non-profit organisations should be required to obtain financial hardship status before making their access application if they wish to rely on a declaration. This would remove unnecessary complexity and uncertainty for agencies and non-profit organisations, particularly as the latter have no way of knowing, given the RTI Act's silence, which approach they should adopt. Given that the waiver, once granted, is valid for a year it should not disadvantage non-profit applicants.

[165] Preamble of the RTI Act, paragraph 1(b).

8.4-8.5 Should the RTI Act allow for fee waiver for applicants who apply for information about people treated in Multiple HHSs?
If so, what should be the limits of the waiver?

OIC recommends that a mechanism be inserted into the RTI Act allowing applications for information about people treated in multiple health services to be made with a single application fee.

OIC recommends investigating adaption of the existing transfer provisions as a mechanism for allowing applications to be made across multiple health services with a single application fee.

Prior to the creation of the Hospital and Health Services (health services) applicants seeking access to documents about their treatment across multiple hospitals made a single application to Queensland Health. Now, applicants are required to make multiple applications and pay multiple application fees[166] to access documents held by more than one health service. OIC suggests that it would be appropriate to insert a mechanism in the RTI Act which would remove the requirement to make multiple applications and pay multiple application fees in these circumstances.

OIC suggests that the existing transfer provisions could be adapted as the mechanism. Currently, if an agency receives an access application, does not hold some of the documents applied for, and is aware that another agency holds them, the first agency must attempt to transfer the application to the other agency. The other agency is not required to consent to the transfer; if the other agency consents, the applicant is required to pay a second application fee to the other agency to make the transferred application valid.

OIC suggests that a similar procedure could be adopted for applicants treated by multiple health services who are seeking documents about their treatment. Applicants applying to access documents about their treatment could have the option of nominating other health agencies at which they had been treated and from which they wish to access documents about that treatment. OIC suggests that placing a limit on the number of health agencies which can be nominated would be reasonable.

Where a health service receives an application on which an applicant has nominated additional health services the first health service must part transfer the application to the other health services; the other health services would be required to accept the transferred application and the requirement that an application fee be paid in order to make the application valid would be waived. Any such mechanism would likely need to be supported by amendments to the approved application form or, if OIC's recommendation at 6.1 is accepted, by criteria in the Regulation.

[166] Unless their applications are only for documents containing their personal information, in which case there would be no application fee.

PART 9: REVIEWS AND APPEALS

9.1-9.2 Should internal review remain optional? Is the current system working well? If not, should mandatory internal review be reinstated or should other options, such as a power for the Information Commissioner to remit matters to agencies for internal review, be considered?

OIC recommends that the legislation be amended to:

- **make internal review mandatory**
- **broaden OIC's power of remittal back to agencies where:**
    - **further searches to locate documents are required**
    - **further searches at OIC's instigation have located documents, and an initial decision regarding those documents is required**
    - **the agency decision/s to address a jurisdictional or threshold issue has been reviewed by OIC and an initial decision regarding substantive issue of access to the documents is now required**
    - **consultation with relevant third parties has not occurred and is required; and**
- **allow OIC to remit decisions back to the agency without the agency requesting further time.**

Internal reviews – mandatory or optional?

OIC notes that internal review remains mandatory in Western Australia, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory.[167] In New South Wales, internal review is not required if the aggrieved person is the applicant but is otherwise mandatory.[168]

In Victoria, internal review is no longer possible following amendments to the Act in 2012. Victoria's Information Commissioner now provides the first level of review for most types of decisions, however some may be appealed straight to the Victorian Civil and Administrative Tribunal.[169] The impact of this change is not yet clear, given the amendments have only recently taken effect.

[167] See section 66(5) of the *Freedom of Information Act 1992* (WA), section 39(2) of the *Freedom of Information Act 1991* (SA), section 44(1) of the *Right to Information Act 2009* (Tas), section 103 of the *Information Act* (NT) and section 60(2) of the *Freedom of Information Act 1989* (ACT).

[168] Section 89 of the *Government Information (Public Access) Act 2009* (NSW).

[169] Sections 49A and 50 of the *Freedom of Information Act 1982* (Vic).

Internal review is not mandatory under the Commonwealth FOI Act[170] but is encouraged by the Office of the Australian Information Commissioner's guidelines, which state *'going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process'*[171].

The types of decisions reviewed by OIC

The types of decisions reviewed by OIC prior to and since enactment of the RTI Act are set out in the below table.

External review applications	2005-06 (FOI)	2006-07 (FOI)	2007-08 (FOI)	2008-09 (FOI)	2009-10 (FOI)	2009-10 (RTI/IP)	2010-11 (RTI/IP)	2011-12 (RTI/IP)	2012-13 (RTI/IP)
Original	N/A	N/A	N/A	N/A	N/A	244 (72%)	299 (72.5%)	268 (66.5%)	404 (76%)
Internal review	250 (73%)	210 (80%)	211 (73%)	297 (87%)	80 (82%)	62 (18%)	64 (15.5%)	103 (25.5%)	87 (16%)
Deemed	92 (27%)	54 (20%)	78 (27%)	43 (13%)	18 (18%)	35 (10%)	49 (12%)	33 (8%)	42 (8%)
Total	**342**	**264**	**289**	**340**	**98**	**341**	**412**	**404**	**533**

OIC decisions:

Appealed to QCAT	N/A	N/A	N/A	N/A	N/A	1	4	6	7
Judicially reviewed	5	2	1	0	2	0	0	0	0

These figures indicate a consistent and significant increase in demand for external review since enactment of the RTI Act. The figures also indicate that external review of internal review decisions has declined sharply since internal review was made optional by the RTI Act. Now, the vast majority of OIC's external review work involves consideration of agencies' original decisions.

[170] Section 54L of the *Freedom of Information Act 1982* (Cth).

[171] Office of the Australian Information Commissioner, *FOI Fact Sheet 12 – Freedom of information: Your review rights*, <http://www.oaic.gov.au/images/documents/freedom-of-information/foi-factsheets/FOI-fact-sheet12_your-rights_online_April2011.pdf>, viewed 16 October 2013.

Internal review

OIC submits that consideration be given to making internal review mandatory to increase the efficiency and effectiveness of review under the RTI Act. The internal review process gives the agency an opportunity to reconsider its initial decision, gives it greater ownership of the decision and, in most instances, the application will be determined more quickly if external review is not necessary.

The relatively quick nature of most internal reviews is attributable to agencies' relative familiarity with the content of the documents in issue, the identity and contact details of parties mentioned in documents that require consultation, and places where further searches for documents could prove fruitful.

When OIC considers documents that were not the subject of a considered decision by the agency [172], OIC must make an initial decision about access to documents and obtain detailed submissions from the agency. Often liaison between an agency's RTI officer and officers in the agency's operational areas are necessary to gain a complete understanding of the documents and issues, and to identify parties requiring consultation. These processes often mean that external reviews requiring initial decisions by OIC take longer and often involve more work for the agency than would be required for an internal review.

When OIC reviews both deemed decisions and original decisions the applicant does not get an opportunity to raise sufficiency of search concerns directly with the agency. Any sufficiency of search concerns held by the applicant are raised with the agency via OIC and consequently often take longer to work through and resolve than a direct discussion between the applicant and agency.

OIC considers that reinstating mandatory internal review could also assist OIC in managing the increased demand for its resources resulting from the increasing number of external review applications and the generally resource intensive nature of these kinds of external reviews. It will allow agencies greater responsibility for, and ownership of, their decisions, make decisions more timely for applicants and enable sufficiency of search concerns to be addressed as efficiently as possible.

OIC acknowledges agencies' potential concerns that the above may have for their resourcing. However, OIC also notes that the external review process–which usually involves agencies liaising with OIC, conducting searches for OIC, and providing detailed submissions to OIC–commonly requires as much, if not more, agency time and resources as if they had issued a decision.

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[172] Either because the decision was deemed, because the decision did not address documents that were located only after further searches instigated by OIC, or because the decision addressed a jurisdictional or threshold issue rather than the substantive issue of access to the documents, for example, whether a document or entity is within the scope of the RTI Act (under section 32 of the RTI Act or otherwise - see OIC's response to question 4.1) or whether the agency may refuse to deal with the application (under chapter 3, part 4 of the RTI Act).

OIC also acknowledges that some applicants may think mandatory internal review will prolong the process in circumstances where they consider the internal review will not result in a different determination; these applicants would likely wish to retain the option of seeking external review immediately. However, on the whole, OIC considers the relatively fast internal review process provides value for applicants in refining and eliminating issues, particularly those involving sufficiency of search concerns.[173]

A remittal power

OIC currently has a narrow power to remit matters back to an agency: it can only do so if the agency requests further time to deal with the application.[174] It has no power to remit on its own initiative. In terms of a power to remit, OIC notes that:

- New South Wales' Information Commissioner may make a recommendation that the relevant agency reconsider a decision[175]; and
- Victoria's Information Commissioner may, with the agreement of the applicant, refer a matter back to the relevant agency for a fresh decision[176].

The Australian Information Commissioner submitted to the Hawke Report that it should have a remittal power for deemed decisions, where an agency has commenced, but not managed to complete, processing a very large request. The Hawke Report made recommendations consistent with the Australian Information Commissioner's submissions in this regard, that the Australian Information Commissioner has an express power to remit a matter for further consideration by the original decision-maker.[177]

OIC recommends that OIC's power to remit be extended to circumstances where:

- further searches to locate documents are required
- further searches instigated by OIC have located documents and a *de novo* decision regarding those documents is required
- the agency decision/s addressed a jurisdictional or threshold issue and a *de novo* decision regarding substantive issue of access to the documents is now required; and
- consultation with relevant third parties has not occurred and is required.

OIC also recommends excluding, from both existing and any additional remittal powers, the requirement that an agency must apply for further time before OIC can remit.

OIC recognises that the ability to remit part of a decision back to the agency and retain the remainder at external review could potentially cause confusion as a result of different review rights

[173] OIC notes that sufficiency of search concerns are the second most common issue addressed in OIC decisions since enactment of the RTI Act.
[174] Section 93(1)(b) of the RTI Act.
[175] Section 93 of the *Government Information (Public Access) Act 2009* (NSW).
[176] Section 49L of the *Freedom of Information Act 1982* (Vic).
[177] Pages 30-31 and recommendation 4 of the Hawke Report.

accruing to different parts of one application at different times. OIC suggests that this could be managed by giving OIC the power to remit an application on conditions OIC considered appropriate, including what happens if the decision on the remitted application is not made in the specified time.

9.3 Should applicants be entitled to both internal and external review where they believe there are further documents which the agency has not located?

OIC submits that applicants should be entitled to pursue sufficiency of search concerns through both internal review and external review.

OIC recommends that the definition of "reviewable decision" be expanded to include sufficiency of search.

A significant, and increasing, proportion of external reviews concern refusal of access on the basis that documents sought are non-existent or unlocatable. An analysis of OIC decisions since enactment of the RTI Act indicates that sufficiency of document searches is the second most common issue addressed by OIC decisions.

OIC observes that some agencies adopt a risk management approach to locating documents and regularly miss documents that fall within the scope of access applications; other agencies have poor record keeping practices. As a result, large numbers of documents are frequently located after the initial decision, during both internal review and external review.

Applicants who experience this develop significant mistrust of the agency and are often reluctant to consider informal resolution options. Consequentially, these kinds of external reviews take longer for OIC to complete and depend on agencies undertaking proper searches.

As mentioned in OIC's response to questions 9.1 and 9.2 above, OIC's view is that mandatory internal review and vesting OIC with a more general power of remittal would assist in a number of areas, including areas where the sufficiency of an agency's searches for documents is in question.

9.4 Should there be some flexibility in the RTI Act and IP Acts to extend the time in which agencies must make internal review decisions? If so, how would this best be achieved?

OIC recommends that consideration be given to lengthening the time period in which an agency must decide an internal review and to allowing an applicant to give an agency extra time to make a decision.

The processing period for internal review decisions is 20 business days[178], and no further specified period can be sought by the agency or agreed to by the applicant. Additionally, there is no extra time granted if an agency is required to consult with a third party.

[178] Section 83(2) of the RTI Act.

In OIC's view, the time period of 20 business days for internal review decisions is too short. This is particularly so in situations where new documents are located and require an initial decision. Consequently, OIC recommends that consideration be given to lengthening the period within which internal review decisions must be made.

OIC notes that concerns regarding the relatively short, non-extendable period for internal review are generally expressed when an agency is in the midst of processing a large review and both the agency and applicant want the agency to continue with its task. There is no mechanism for extending the internal review timeframe, so even when an applicant is willing to grant an agency extra time, there is no alternative: the decision still 'goes deemed' and must be resolved on external review.

Despite the concerns expressed regarding these particular types of internal reviews, OIC does not in general consider that an agency should be able to request extra time and, with no response from the applicant, continue processing an application until it became aware that an applicant has applied for external review. This would, in OIC's view, create uncertainty for all parties to the application. However, OIC considers that an applicant should be able to give an agency extra time to make an internal review decision if both agency and applicant agree.

9.5 Should the RTI Act specifically authorise the release of documents by an agency as a result of an informal resolution settlement? If so, how should this be approached?

OIC submits that the protections in the RTI Act currently apply to the release of documents as part of an informal resolution. However, if greater certainty is required, OIC recommends amending section 169 to explicitly include documents released as part of informal resolution.

Under section 90 of the RTI Act, the Information Commissioner is required to identify opportunities and processes for the early resolution of an external review application and promote its settlement. As part of settling external review application at early resolution it is common for agencies to agree to release additional documents to the applicant.

The Information Commissioner has expressed the view that the informal resolution process allows an agency to negotiate settlement of an external review, as part of which it can reconsider its original decision[179] and agree to release additional documents. OIC notes that the reconsideration of a decision to refuse access to documents must, by necessity, involve agreeing to release some or all of those documents.

The protections in the RTI Act[180] apply where access was permitted or required to be given under the RTI Act. As such, it is OIC's view that the protections currently apply to the release of documents during the informal resolution process. However, if it is felt that agencies require more certainty, perhaps section 169—Meaning of *access was required or permitted to be given under this Act*—could be amended to expressly include agreement to release during informal resolution. As OIC

[179] *Moon v Department of Health* (2010) at paragraph 26.
[180] Chapter 5 of the RTI Act.

notes in its discussion at 1.3 of this submission, explicit protections can increase an agency's confidence in agreeing to release documents.

9.6 Should applicants have a right to appeal directly to QCAT? If so, should the Commonwealth model be adopted?

OIC considers the current model of mandatory external review prior to right of appeal to QCAT is efficient and effective.

OIC does not support adopting the Commonwealth model, with review rights to the Information Commissioner or the Tribunal, in Queensland.

When conducting an external review, OIC undertakes a merits review of the access application. OIC does not have a complaints function in relation to how the agency conducted itself in dealing with the access application as is available in some other jurisdictions (for example, Commonwealth, Victoria and New South Wales).

Currently, a participant in an external review may appeal an OIC decision to QCAT on a question of law only.[181] A judicial member of QCAT exercises the tribunal's appeal jurisdiction in such matters.[182] The option of judicial review remains open to external review participants[183] (although none have exercised this option since commencement of the RTI Act and QCAT).

In terms of external reviews conducted by OIC:

- In the last financial year, 2012-13, the median number of calendar days for an external review to be finalised by OIC was 59 days.[184] At 30 June 2013 no external review before OIC was older than 12 months. Timeliness in dealing with external reviews is consistently a key concern for applicants. It is difficult to determine how long interstate tribunals take to consider FOI applications. However, OIC is not aware of any other Australian jurisdiction meeting the OIC's finalisation timeframe.[185]

- External review applicants continue to have a high level of satisfaction with the external review process. In 2012-13, 78% of applicants were satisfied with OIC's conduct of their external review, exceeding the target of 75%.[186]

[181] Section 119(1) of the RTI Act.
[182] Section 119(4) of the RTI Act.
[183] Under part 3 of the *Judicial Review Act 1991* (Qld).
[184] The service standard is 90 median days which the OIC has met in the preceding two financial years.
[185] Other jurisdictions' published data provides little guidance in this regard either. This is because, of the various administrative tribunals that hear FOI applications, each body offers only a limited amount of information that is disaggregated from the data used to capture the tribunal's overall workload. Consequently, it is not possible to conclude whether or not tribunals comprise an effective mechanism (in terms of informal resolution rates and timeliness) for finalising right to information matters.
[186] Page 21 of OIC (2013), *Annual Report 2012-13*.

- Very few external review decisions have been appealed. Of the 1,498 external reviews finalised by OIC from 1 July 2009 to 30 June 2013, 1,331 were resolved informally and 167 decisions were issued. No judicial reviews have been sought in relation to these decisions.[187] While OIC's interpretation of many RTI Act provisions was previously untested, in the RTI Act's four years of operation only 18 decisions were appealed to QCAT on the basis of an error of law.[188] Of the 13 finalised appeals, one appeal was successful and two were remitted to OIC; OIC's other decisions were upheld by QCAT.

OIC considers that the Queensland model of review offers a highly cost effective and efficient informal oversight mechanism accessible to the community.

In OIC's view, QCAT's merits review of an agency's initial or deemed decision would be an inefficient use of QCAT's resources. For example, where sufficiency of search was at issue in the review, the applicant would not have had the opportunity to raise these issues with the agency. The sufficiency of an agency's searches is the second most commonly considered issue in OIC decisions. If applicants could appeal directly to QCAT, QCAT would, on a frequent basis, be required to engage with agencies to ensure that searches were sufficient in the same manner as OIC.

OIC notes that there has been some suggestion that agencies simply provide QCAT with a declaration stating that they have conducted all relevant searches. However, in OIC's experience, due to, in many cases, the inadequacies of agency record keeping systems and search processes, most applicants would find this proposed solution unconvincing.

OIC has developed processes for efficiently and effectively, but comprehensively, ensuring that reasonable searches, consistent with agency obligations, are conducted. OIC staff have a good working knowledge of government business and record keeping requirements and practices, which facilitates this process.

Similarly, many external reviews involve large numbers of documents and issues. OIC staff have particular expertise in dealing with the provisions of the RTI Act and in utilising informal resolution techniques. These enable optimal results for the parties to the review by identifying key issues for each party and 'reality testing'—where OIC officers ensure that the views of each party accord with the reality of the Act—consistent with legislative requirements.

Appealing an agency's decision directly to QCAT may require QCAT to make *de novo* decisions, in the same contexts as OIC is often required to[189], regarding at least some of documents sought. In OIC's view this does not comprise an efficient use of QCAT's resources.

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[187] Although this option remains open to external review participants under part 3 of the *Judicial Review Act 1991* (Qld).

[188] Page 16 of OIC (2010), *Annual Report 2009-10*, page 14 of OIC (2011), *Annual Report 2010-11*, page 20 of OIC (2012), *Annual Report 2011-12*, and page 21 of OIC (2013), *Annual Report 2012-2013*.

[189] For example, because the decision was deemed, the decision did not address additional documents located as a result of further searches, or the decision dealt with jurisdictional or threshold issues only.

Where an external review is resolved by decision, the external review function is complemented by the assistance and support functions of the OIC, in particular, extensive online guidance which includes the annotated legislation. OIC is able to ensure that external review decisions are written in plain English, without an emphasis on technical aspects of the legislation, to assist applicants and third parties to understand the reasons for decision. OIC guidelines and annotated legislation present the technical aspects of OIC views on the application of the legislation, and are available for agency decision-makers and other interested parties, such as researchers in other jurisdictions, to draw on.

Such an approach is consistent with evolving community expectations about government in general, as recognised in a recent speech by the Australian Information Commissioner:[190]

> *Complaint and investigation bodies, such as ombudsman and commissioners, now receive and conduct reviews in a more responsive, engaged, interactive and informal manner. Tribunals and courts resolve an increasing proportion of applications by alternative dispute resolution rather than* formal *hearings and, as noted earlier, have embraced technology in the registry and the hearing room…*
>
> *… it is questionable whether people will have the time and interest to wade through lengthy and complex reasons statements in order to understand the principles applied to resolve a dispute. Shorter, clearer, crisper reasons may be required. Equally, the statements of reasons in individual cases may have diminishing importance in developing administrative law principles and jurisprudence. Many people prefer the option of visiting an administrative justice agency's website to read a coherent and comprehensive set of guidelines that explain the principles to be applied from one case to the next.*

Educational and precedent information, once available only in (sometimes quite lengthy or dense) decisions is now available in a number of different ways, suitable not only for decision-makers and reviewers, but also for applicants and members of the community.[191] As noted above, OIC produces extensive online resources that are used during the course of external reviews to explain technical aspects of the legislation to applicants, agencies, and third parties. This approach has proven to be a highly effective and efficient way to meet varying needs previously met only by complex external review decisions.

Wherever possible, OIC resolves reviews informally to maximise efficient use of public monies while providing effective outcomes for parties. In the 2012-13 financial year, 88% of review were resolved informally,[192] and 78% of applicants193 and 97% of agencies[194] were satisfied with OIC's

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[190] Prof John McMillan, Australian Information Commissioner (2013), *Administrative Law in an Interconnected World*, AIAL National Administrative Law Forum, Canberra, 18 July 2013.

[191] For example, OIC produces a number of targeted guidelines to assist decision-makers dealing with applications , which may refer to OIC decisions, Annotated Legislation, or other OIC guidelines, with complementary information sheets intended for applicants receiving such a decision.

[192] Page 20 of OIC (2013), *Annual Report 2012-2013*.

[193] Page 21 of OIC (2013), *Annual Report 2012-13*

performance. Given that only a small number of reviews result in decisions, OIC's online resources play a critical role in capturing and communicating educational and precedent material drawn from OIC views formed in *all* external reviews, not just those resolved by formal decision.

OIC notes that the Commonwealth model referred to in the discussion paper is a "two-tier" model of external review implemented as part of reforms in 2010. These reforms vested both the complaints function, previously carried out by the Commonwealth Ombudsman, and a merits review function in the newly created Commonwealth Information Commissioner. The existing merits review function of the AAT continued.

Since the 2010 reforms, Commonwealth applicants are able apply for merits review on three occasions:

- internal review with the agency (which is optional)
- external review with the Australian Information Commissioner; and
- external review with the AAT.

Generally, an applicant must seek external review with the Australian Information Commissioner before it is possible to apply to the AAT.[195]

OIC notes the Hawke Report's observation that there was insufficient evidence regarding the impact of the Commonwealth's "two-tier" model. Because of this, the Hawke Report did not offer an opinion on the Commonwealth's "two-tier" model, and instead recommended that the model be re-examined as part of a comprehensive review of the FOI Act that it ultimately concluded was required at some future time.[196]

Given the above, OIC does not consider that enabling applicants and relevant third parties to appeal directly to QCAT, requiring QCAT to undertake significant merits reviews, is a more efficient and effective model than external review by OIC. Further, OIC does not support adoption of the Commonwealth model which the Hawke report has suggested that, due to concerns raised during the Hawke review, should be the subject of its own comprehensive review.

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[194] Page 18 of OIC (2013), *Annual Report 2012-13*.
[195] Or the Australian Information Commissioner may decide that in the interests of the administration of the *Freedom of Information Act 1982* (Cth) it is desirable that the decision is considered by the AAT – see section 54W(b) of the *Freedom of Information Act 1982* (Cth).
[196] Page 36 and recommendation 10 of the Hawke Report.

PART 10: OFFICE OF THE INFORMATION COMMISSIONER (OIC)

10.1-10.2 Are current provisions sufficient to deal with the excessive use of OIC resources by repeat applicants?
Are current provisions sufficient for agencies?

OIC considers current legislative provisions are sufficient to allow OIC to deal with repeat applicants. Further, OIC submits existing legislative tools are sufficient for agencies to deal with excessive use of agency resources by repeat applicants. However, OIC considers that agencies may not be using existing tools where it is appropriate to do so.

OIC notes that the references to "repeat applicants" in questions 10.1 and 10.2 were made following discussion of an OIC research paper[197] in which "repeat applicants" were defined as applicants who:

- make a relatively large number of applications
- submit the applications in short bursts of activity; and
- engage in "unreasonable conduct" (that is, unreasonable persistence, demands, lack of cooperation, arguments or behaviours[198]) regarding those applications.

The OIC research paper noted that, during the period examined[199], 19.14% of external reviews finalised were made by 1.06% of external review applicants. These applicants had each made 10 or more external review applications over the relevant period and, in OIC's view, comprised repeat applicants.[200] Since the research paper was published OIC has continued to receive a similar number of external review applications from such applicants.

In OIC's experience, applicants often make numerous and voluminous applications because they are interested in examining government decisions regarding complex situations. Often – whether or not the applicant engages in the types of "unreasonable conduct" set out above – the applications have substantive merit.

Dealing with numerous voluminous but meritorious applications requires a large amount of agency resources initially and on internal review, and a large amount of OIC and agency resources on external review. In OIC's view this should not, on its own, prompt OIC or agencies to rely on the provisions that enable them to deal with excessive use of resources.

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[197] OIC (2010), *Research Paper – External reviews involving repeat applicants* at 1. Note – the definition excluded journalists and Members of Parliament.
[198] C Wheeler, Deputy NSW Ombudsman (2007), *Dealing with Repeat Applications* (2007) 54 AIAL Forum 64 at 65, cited in OIC (2010), *Research Paper – External reviews involving repeat applicants* at 7.
[199] 1 July 2006 to 21 February 2011. Note: there is no significance attached to the date of 21 February 2011; this was simply the date on which the data set was captured.
[200] OIC (2010), *Research Paper – External reviews involving repeat applicants* at 2.

The available provisions on which OIC and agencies can rely to deal with excessive use of resources should be used only when necessary and justifiable, after careful consideration of all the circumstances surrounding the application or applications has been considered. The community's right to access government held information is an important right, and should not be curtailed without caution or a clear basis.

OIC acknowledges that, in some instances, careful consideration of all the circumstances surrounding the application or applications may lead to the view that dealing with the applications could detrimentally impact on other applicants' equitable access to timely and thorough RTI decisions. OIC notes that if the applicant engages in the types of "unreasonable conduct"[201] set out above, the detrimental impact may be compounded.

Current provisions for dealing with excessive use of *OIC* resources by repeat applicants

OIC can rely on the following provisions to manage excessive use of OIC resources by repeat applicants:

- **Vexatious applicant declaration**[202]**:** OIC has the power to declare that a person is a vexatious applicant if the person has a) repeatedly engaged in access actions[203] and a particular access action would be manifestly unreasonable or b) the repeated engagement or a particular access application involves an abuse of process. OIC notes that only two other jurisdictions – the Commonwealth[204] and Northern Territory[205] – have similar vexatious applicant provisions. To date, OIC has made one declaration that a person is a vexatious applicant under the RTI Act.[206]

- **Decision not to deal with vexatious application for external review**[207]**:** OIC may decide not to deal with, or further deal with, a vexatious external review application (or part of it) if satisfied that it is vexatious, frivolous, misconceived or lacking substance. Since July 2009 OIC has made one decision regarding this provision, which found that four applications by one applicant were vexatious.[208] This decision is currently the subject of a QCAT appeal.

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[201] As defined by Chris Wheeler, Deputy NSW Ombudsman (2007), *Dealing with Repeat Applications* (2007) 54 AIAL Forum 64 at 65.
[202] Section 114 of the RTI Act.
[203] Which are defined to include external review applications; see paragraph (c) of the definition of "access action" in section 114(6) of the RTI Act.
[204] Sections 89K-89N of the *Freedom of Information Act 1982* (Cth).
[205] Section 42 of the *Information Act* (NT).
[206] *Vexatious Applicant Declaration; Applicant - University of Queensland* (Unreported, Queensland Information Commissioner, 27 February 2012).
[207] Section 94 of the RTI Act.
[208] *Underwood and Department of Communities and Minister for Community Services and Housing* (Unreported, Queensland Information Commissioner, 9 February 2012). This is presently on appeal before QCAT.

OIC can also rely on the *previous application seeking access to same documents from same agency* provision.[209] OIC has made decisions on this point[210] and often relies on this provision when informally resolving decisions. As this provision is more often relied on by agencies and affirmed by OIC, it is discussed below in the context of agency resources.

OIC considers that these provisions are sufficient to enable OIC to appropriately manage excessive use of its resources by repeat applicants. OIC minimises its need to use these provisions by managing the resource impact of such reviews through efficient and effective practices which draw on the experience of OIC and other similar bodies.

Current provisions for dealing with excessive use of *agency* resources by repeat applicants

Agencies can rely on the following provisions to manage excessive use of their resources by repeat applicants:

- **Previous application seeking access to same documents from same agency**[211]**:** Agencies have the power to refuse to deal with an application made by an applicant who has previously applied for the same documents, unless the applicant discloses a reasonable basis for again seeking access. OIC has made decisions affirming agency decisions on this point. This is an effective tool for applicants who continually request documents about themselves or a particular matter with no reasonable basis for making additional applications on the same terms.

- **Substantial and unreasonable diversion of resources**[212]: Agencies have the power to refuse to deal with an applicant's application or applications when doing so would substantially and unreasonably divert their resources. OIC has considered this point on external review where an agency decision has been made on this basis, or an agency has made such submissions after locating a large volume of documents on external review.

- Agencies may apply to OIC for OIC to make a **vexatious applicant declaration**.[213]

Unlike OIC, agencies do not have the power to declare an applicant vexatious, nor can they refuse to deal with an application on the basis that it is vexatious, frivolous, misconceived or lacking substance. However, an agency can consider similar issues in some respects.[214]

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[209] Section 43 of the RTI Act.
[210] See, for example, *Vanbroque Pty Ltd and Department of Natural Resources and Mines* (Unreported, Queensland Information Commissioner, 17 December 2012).
[211] Section 43 of the RTI.
[212] Section 41 of the RTI Act
[213] Section 114(1) of the RTI Act.
[214] For example, when determining validity of an application or existence of documents claimed by the applicant to exist where the agency can easily and objectively show that the related event never occurred and therefore documents were not produced.

In its submission to the Hawke Review, the Office of the Australian Information Commissioner submitted that the *Freedom of Information Act 1982* (Cth) should be amended to permit agencies to decline to handle repeat or vexatious applications that are an abuse of process, without impacting on the applicant's ability to make other requests or remake the request that was not accepted.[215] This submission was adopted as a recommendation in the Hawke Report.[216] This reflects the position in the United Kingdom[217] and Tasmania.[218] However, the remaining Australian jurisdictions give this power only to their equivalents of OIC.[219]

OIC has considered whether it is necessary for agencies in Queensland to have a power to refuse to deal with an application on the basis that it is vexatious (or frivolous, misconceived or lacking substance).

In OIC's experience, agencies usually rely on the *previous application seeking access to the same agency for the same documents* provision when appropriate. However, OIC considers that agencies often do not rely on the substantial and unreasonable diversion of resources provision in circumstances where it would be reasonable for them to do so. This is usually because the agency exhibits good will and optimistically attempts to process an access application that covers a very large number of documents (and sometimes requires extensive consultation with third parties).

These two provisions, either alone or in conjunction, provide agencies with an effective way of managing the excessive use of agency resources by repeat applicants. In addition, OIC is aware that many agencies have developed efficient and effective practices for dealing with repeat applications from an individual, similar to OIC's, for example, practices that enable easier identification of applications which have been dealt with in earlier reviews.

OIC considers that the grace period mechanism (which would allow an agency time to clarify the scope of a valid application prior to the commencement of the processing period) proposed in 12.1 would further add to the ability of agencies to manage repeat applicants' excessive use of their resources.

OIC believes that leaving the power to refuse to deal with an application with OIC, as an independent statutory body, provides an appropriate level of protection, and that the ability curtail the community's right to access government information should not be extended beyond the minimum necessary to ensure that all applicants have equitable access to timely and thorough consideration of RTI applications.

Given that existing provisions and other resources appear not yet fully utilised by agencies, OIC does not consider it appropriate to suggest that further mechanisms are required at this stage.

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[215] See pages 57-58 of the OAIC submission to the Hawke Review.
[216] Pages 90-93 and recommendation 32 of the Hawke Report.
[217] Section 14 of the *Freedom of Information Act 2000* (UK).
[218] See section 20 of the *Right to Information Act 2009* (Tas).
[219] See section 54W of *Freedom of Information Act 1982* (Cth), section 96 of *Government Information (Public Access) Act 2009* (NSW), section 106 of *Information Act* (NT), section 18 of *Freedom of Information Act* 1991 (SA), section 49G of *Freedom of Information Act 1982* (Vic), and section 67 of *Freedom of Information Act 1992* (WA). Note – the Australian Capital Territory has no equivalent provision.

10.3 Should the Acts provide additional powers for the OIC to obtain documents in performance of its performance monitoring, auditing and reporting functions?

OIC submits that it does not require additional powers to obtain documents as part of its performance monitoring, auditing, or reporting functions.

Under the RTI Act[220], the OIC has a range of performance monitoring functions, including the power to monitor, audit, and report on agencies' compliance with both the RTI Act and Chapter 3 of the IP Act. Since 2009, OIC has undertaken numerous performance monitoring activities, including Desktop Audits of agency websites, self-assessment activities, and agency specific audits. All of these activities have been reported to Parliament[221].

OIC has not encountered a situation in conducting its performance monitoring and auditing functions which would have required or benefited from additional powers to obtain documents. OIC has found agencies to be generally cooperative and willing to participate in OIC's audits.

10.4-10.5 Should legislative timeframes for external review be reconsidered? Is it appropriate to impose timeframes in relation to a quasi-judicial function?
If so, what should the timeframe be?

OIC does not consider that legislative timeframes for external review should be introduced.

The RTI Act does not require external reviews to be decided within a specified time. However, OIC is required to meet service delivery standards to ensure external reviews are conducted in a timely manner. In 2012-2013, OIC's target was 90 median days to finalise an external review; the actual median days taken to finalise an external review in 2012-2013 was 59 days. OIC also met the target of no external review applications older than 12 months at 30 June 2013.

It is difficult to compare OIC's performance with its equivalent bodies in other jurisdictions because of differences in each review bodies' functions and performance measures, however it appears that OIC currently has the most timely completion rate in Australia.

In Australia, only Victoria and Western Australia have legislative timeframes for external review: Victoria has 30 days, which can be extended with the applicant's agreement, and Western Australia has 30 days, unless the Commissioner considers it impracticable to finalise the review in that time. The relevant provisions are summarised in Appendix E.

It is not clear that the existence of these statutory timeframes has impacted timeliness. In Victoria, approximately two-thirds of their 92 review decisions were not made within 30 days, with applicants agreeing to 121 extensions of time. Western Australia does not report on timeliness, however OIC notes that its timeframe only applies when considered practicable.

[220] Section 131 of the RTI Act.
[221] See list of Reports to Parliament here <http://www.oic.qld.gov.au/about/our-organisation/key-functions/compliance-and-audit-reports>.

It is not uncommon for external reviews to involve thousands of pages of documents, or raise complicated or novel issues, both of which may require significant time to address. In OIC's experience, external reviews are often delayed due to:

- time taken by agencies, applicants and third parties to consider and respond to OIC's preliminary views, and extensions sought by them in order to do so; and
- time taken for agencies to conduct further searches in response to sufficiency of search concerns, and extensions sought by them when doing so.

If an external review timeframe were implemented, OIC would be unable to provide agencies and applicants with any flexibility to provide responses or conduct searches, as short timeframes would become necessary and extensions would be very limited. OIC notes agencies and applicants often have good reasons to seek extensions. In addition, imposing a mandatory time frame may negatively impact on OIC's ability to provide procedural fairness to applicants, agencies and third parties. Careful consideration would also have to be given to the consequences of a statutory timeframe not being met; for example, would the review become deemed and increase the workload of QCAT?

PART 11: ANNUAL REPORTING REQUIREMENTS

11.1 What information should agencies provide for inclusion in the Annual Report?

OIC recommends that the information agencies are required to report annually be revised to minimise administrative burden, improve utility of data, and facilitate timeliness of reporting.

OIC recommends that alternative approaches to collection and reporting of data be investigated to ensure data is available online as soon as possible after each financial year, consistent with the push model and open data initiative.

Under the RTI and IP Acts, agencies are required to report on their RTI and IP applications as set out in the RTI and IP Regulations.

OIC is a key user of the RTI and IP Act Annual Report data, primarily in its performance monitoring and reporting functions to:

- assess relative risk of agency non-compliance
- select agencies for compliance audit; and
- prepare desktop audit and other reports.

OIC also uses the RTI and IP annual report data to:

- assess agency throughput
- identify application handling issues for individual agencies and broader trends, including areas in which agencies or the community require additional support; and
- identify opportunities to improve the administration of the RTI and IP Acts.

However, currency of available data significantly undermines the utility of such data; for example, OIC's 2013-2014 performance monitoring activities are based on the 2010-2011 financial year data from the most recent Annual Report. OIC appreciates the work involved by agencies and the Department of Justice and Attorney-General in producing the Report, however the value of such effort is significantly diminished by the lack of currency of the data. OIC considers that a streamlined approach would significantly reduce administrative burden and improve utility of the data.

Such an approach would also be consistent with Queensland Government commitments to open data, which has changed expectations around the nature and timeliness of publishing government data. Open data requires that raw data be published online, unless limited exceptions apply. No such exceptions would apply to the data required to be published under the RTI and IP Acts.

Streamlining the reporting criteria

OIC is aware that annual reporting requirements can be onerous for agencies, particularly where agencies do not have efficient systems in place to collect and report on such data.

In using the data, particularly in its performance monitoring functions, OIC has considered that some data currently required is neither useful nor necessary to enable the assessment of agency performance. For example, section 8 of the RTI Regulation requires agencies to report on the total number of times they rely on a refusal provision in Section 47(3) of the RTI Act. This is done on a 'by page' basis, ie the number of refusal provisions used on each page. OIC notes that in many cases a decision-maker will refuse access to a particular kind of information (for example, an individual's name) that appears multiple times in the documents. OIC suggests that reporting on the total refusal provisions used for an application as a whole could significantly reduce the administrative burden for some agencies, as they could be drawn from the refusal provisions listed in the decision notice or agency's case management system, and increase the data's usefulness.

OIC suggests that it would be beneficial to require reporting on data relating to push model initiatives and proactive release of information, to reflect the emphasis of the RTI Act that applications are intended as a last resort. OIC also suggests that data on applications brought forward, withdrawn, transferred, or finalised and details of applications withdrawn or transferred be added to the Regulations' reporting requirements to increase the accuracy and utility of data.

External review reporting

Agencies are required to report on details of external review applications made from their decisions, including the number of applications, whether they were preceded by an internal review, and how the decision made on external review compared with the decision made by the agency.[222]

OIC notes that it is required to report on external review decisions received and decisions made by the Commissioner.[223] Having OIC report on external review data instead of agencies would provide greater efficiency, reduce the administrative burden reporting places on agencies, and limit the potential for inaccurate or inconsistent data.

Alternative approaches to collection and reporting of data

As noted above, it is critical that annual RTI and IP Act data be made available in a timely manner. The Queensland Government Open Data commitments have also changed expectations in this regard. Departments and statutory authorities are required to publish data, unless limited exceptions apply. This means that, in addition to the annual reporting requirements for RTI and IP data to be published by the Attorney-General, many agencies are now required to publish their own RTI and IP Act data. Given these changes, and the difficulties presented by the lack of currency of Annual Report data under current arrangements, it is timely to consider alternative approaches.

[222] Section 8 of the *Right to Information Regulation 2009* and Section 6 of the *Information Privacy Regulation 2009*.
[223] Section 7 of the *Right to Information Regulation 2009* and Section 5 of the *Information Privacy Regulation 2009.*

Open data requirements currently apply only to Queensland Government departments and statutory authorities; the Local Government Association of Queensland, however, has recently decided to adopt a similar open data policy. There are over 200 agencies under the RTI Act, including GOCs, local government, universities, and public authorities. Therefore a significant proportion of RTI Act agencies are not yet part of an open data scheme.

OIC notes that in other jurisdictions the body equivalent to OIC collects and compiles data on the use of right to information. Western Australia, for example, requires the Information Commissioner's Annual Report to include specific data about the number and nature of applications dealt with by agencies under the Act during the year. To facilitate this, agencies are required to provide this data to the Information Commissioner. The Commonwealth Information Commissioner performs a similar function, collecting and compiling agency and Ministerial data relating to FOI applications received during the year.

OIC has a strong interest in improving the availability of RTI and IP Act data, both for consistency with the push model and because OIC's activities rely on current data. OIC considers that alternative approaches to collection and reporting of data should be investigated to ensure data is available online as soon as possible after each financial year, consistent with the push model and open data policy.

PART 12: OTHER ISSUES

12.1 Are there any other relevant issues concerning the operation of the RTI Act or Chapter 3 of the IP Act?

OIC recommends investigating a method of including a period of time for negotiation for, and clarification of, access applications prior to commencement of the processing period.

The importance of good communication practices in agency RTI units has been a constant theme in OIC's resources, training, and performance monitoring activities. OIC's 2013 *Right to Information and Information Privacy Electronic Audit*[224] (2013 Audit) addressed the extent to which agencies engage with applicants. Agencies reported low levels of engagement when asked about phoning an applicant upon receipt of the application, to clarify the application and/or explore more effective and efficient methods for obtaining the information.

OIC has consistently found that frequent communication with applicants throughout the access application process can result in greater efficiencies, reduced costs, and better outcomes for both applicant and agency. Early communication with an applicant may also allow an agency to identify information which can be provided outside of a formal access application under the RTI Act, in keeping with RTI being intended as a last resort.

Direct timely communication by an agency representative with an applicant is not a legislative requirement. Neither the RTI nor IP Act require an acknowledgement letter be sent to the applicant upon receipt of an application. This can mean the first contact an RTI applicant has from an agency is a Charges Estimate Notice; for an IP applicant, the first contact can be the decision letter.

One of the factors that OIC believes may be inhibiting the adoption of proactive communication practices is time. OIC's 2013 Audit found that approximately one third of agencies identified processing time as an area of concern. It has been OIC's experience that agencies are concerned that contacting the applicant after receiving a valid application will negatively impact their ability to make a decision within the time period allowed by the Act.

The recent report into the review of the Commonwealth *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010* (the Hawke report) included issues for further consideration.[225] One of these was whether there should be a period of time to negotiate or clarify a request prior to commencement of processing time.

[224] < http://www.oic.qld.gov.au/about/our-organisation/key-functions/compliance-and-audit-reports/2013-right-to-information-and-information-privacy-electronic-audit>
[225] Appendix G, the Hawke report <http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx>.

Communication with an applicant can, in many cases, reduce the amount of time and effort an agency spends processing an application. As noted in OIC's 2013 Audit, applicants may not understand how an agency holds its information and may not understand the broad concept of documents. This can result in applications being written in a way that may result in an applicant not receiving the documents they actually want, or in the application being cast so widely that it results in, for an RTI application, prohibitive charges or, for an IP application, a need for the agency to seek extra time or fail to make their decision in time. It is also an avoidable waste of agency resources.

OIC suggests investigating a mechanism which will allow an agency time to clarify the scope of a valid application prior to commencement of the processing period. The benefits of such a grace period after receipt of a valid application would encourage agencies to initiate the kinds of proactive communication OIC has consistently found improves the RTI process.

OIC suggests that any such grace period should have a trigger, perhaps the agency initiating verbal or electronic communication with the applicant, so it would not automatically apply to all applications. In the absence of such a trigger any grace period would likely devolve into agencies treating it simply as an extension to the processing period.

APPENDIX A- HISTORY OF THE OIC

The need for an independent FOI review body has consistently been recognised as an important part of effective FOI laws. Queensland's Electoral and Administrative Review Commission's (EARC) 1990 *Report on Freedom of Information*, the recommendations of which shaped the *Freedom of Information Act 1992*, agreed with the statement that "the right to external review is central to the credibility of the FOI legislation"[226].

Frank Albeitz, Queensland's first Information Commissioner in OIC's first Annual Report, expanded on this point, saying that it was "essential to the credibility of the entire scheme of the legislation that the opportunity is provided for aggrieved applicants to have adverse decisions reviewed on their merits by an authority independent of the executive government"[227].

EARC recommended[228] the creation of an Office of the Information Commissioner (OIC) because, when compared with the adversarial, trial-type procedures of a court or tribunal, OIC would be able to provide flexible and expeditious dispute resolution and no tribunal existed which could undertake the external review function as cheaply or efficiently; the creation of OIC would allow reviews to be conducted in a specialised and informal manner.

The Administrative Review Council's (ARC) 1996 report *Open government: a review of the federal Freedom of Information Act 1982* said that the appointment of an independent person to monitor and promote the FOI Act and its philosophy was the most effective means of improving the administration of the Act"[229]. It considered that many of the shortcomings in the Act's operations and effectiveness "could be attributed to the lack of a consistent, independent monitor of, and advocate for, FOI"[230].

Queensland's Legal, Constitutional and Administrative Review Committee's 2001 report *Freedom of Information in Queensland* recommended[231] that an independent entity be established with general responsibility for monitoring the administration of and compliance with the FOI regime, promoting public awareness and understanding of FOI, and assisting agencies and the public in the application of the FOI Act.

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[226] Paragraph 17.6, <http://www.parliament.qld.gov.au/documents/TableOffice/TabledPapers/1991/4691T2498.pdf>.
[227] Paragraph 1.8, Office of the Information Commissioner Annual Report 1992-1993.
[228] Paragraphs 17.33-17.35 and 17.26, Electoral and Administrative Review Commission *Report on Freedom of Information.*
[229] Paragraph 6.4, <http://www.arc.ag.gov.au/Documents/Report+40+-+pdf+version+(ARC++ALRC).pdf>.
[230] Paragraph 6.2, ibid.
[231] Committee Finding 5 – Recommendation, section 4.2.1.
<http://www.parliament.qld.gov.au/documents/committees/LJSC/1999/FOI/Report-32.pdf>.

APPENDIX B - HISTORY OF THE RTI AND IP ACTS

As noted by the Premier, the Honourable Campbell Newman[232], the history of freedom of information in Queensland traces back to the Inquiry by Tony Fitzgerald QC into Queensland police corruption. In 1992, in the wake of the Fitzgerald Inquiry and the subsequent Electoral and Administrative Review Commissioner report and recommendations, Queensland introduced the *Freedom of Information Act 1992* with the aim of ensuring open and accountable government.

The *Freedom of Information Act 1992*

Fitzgerald stated that "the professed aim of [freedom of information] is to give all citizens a general right of access to Government information…The importance of the legislation lies in the principle it espouses and in its ability to provide information to the public and to Parliament"[233].

The object of the FOI Act was to extend as far as possible the right of the community to have access to information held by Queensland government. The reasons for its enactment included that a free and democratic society benefits from open discussion of public affairs and enhanced government accountability and that the community should be kept informed of government's operations.

Like the RTI Act that would follow, it recognised that disclosure was not an absolute and that where disclosure of information could have a prejudicial effect doing so would be contrary to the public interest; it attempted to strike a balance by giving members of the community the greatest possible right of access to information with limited exceptions to prevent prejudicial effects on the public interest. Upon receipt of a valid application, the decision-maker was required to consider whether access was to be given to the document applied for.

The FOI Independent Review Panel

In 2009, with a similar aim of achieving greater government accountability and openness, freedom of information gave way to right to information with the introduction of the *Right to Information Act 2009* and the *Information Privacy Act 2009*. These Acts arose out of 2008's *Independent Review of Freedom of Information in Queensland*, conducted by the Independent FOI Review Panel which was chaired by Dr David Solomon (the Panel).

The Panel found that Freedom of information laws require more than public policy statements about open government; they require an overarching policy on government information, one that supports the objects of the FOI Act. The Panel also found that the FOI Act had not brought about the anticipated "major philosophical and cultural shift in the institutions of government and the democratisation of information"[234]. The recommendations made by the Panel were meant to

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[232] The Honourable Campbell Newman, MP, Premier of Queensland, taken from the Open Government Forum transcript <http://www.qld.gov.au/about/rights-accountability/open-transparent/review/>, 13 August 2013.
[233] Section 3.4.3, Fitzgerald, GE, *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* 1989.
[234] Page 13, report by the FOI Independent Review Panel (the Solomon Report), <http://www.rti.qld.gov.au/__data/assets/pdf_file/0019/107632/solomon-report.pdf>.

achieve not merely an upgrade to freedom of information but rather an entirely new model[235] of open government. This new model of open government is reflected in the RTI Act.

The RTI and IP Acts

The RTI Act introduced the push model of information release, intended to maximise the release of government information and make formal access applications a last resort. Chapter 3 of the IP Act mirrors the RTI Act but applies only to documents containing personal information.

The starting point for a decision-maker under the FOI Act—to consider whether they would give access to the documents applied for—was reversed by RTI. Now, the starting point for all government information is that it is open by default. Decision-makers are required to have a pro-disclosure bias when considering access applications and must release information to an applicant unless it is demonstrably contrary to the public interest to do so.

Since its commencement in July 2009, the RTI Act and Chapter 3 of the IP Act have been amended. For convenience, these amendments are set out in Appendix C to this submission.

The objects of the RTI Act and its reasons for enactment are discussed in part 1 of this submission.

[235] Page 1, Solomon Report.

APPENDIX C - AMENDMENTS TO THE RTI AND IP ACTS

Amendments to the RTI Act since commencement

Date effective	Amended by	Affected Section	Details of amendment
1 July 2009	2009 Act No. 21 Infrastructure Investment (Asset Restructuring and Disposal) Act 2009	Sch 2 Part 2 (Entities to which this Act does not apply in relation to a particular function)	Inserted item 21: 'a declared entity under the Infrastructure Investment (Asset Restructuring and Disposal) Act 2009, all or part of whose businesses, assets and liabilities are being disposed of in a declared project under that Act, in relation to the following functions— (a) if all of the entity's businesses, assets and liabilities are being disposed of—all of the entity's functions; (b) otherwise—the functions that relate to the businesses, assets and liabilities being disposed of'
19 Nov 2009	2009 Act No. 48 State Penalties Enforcement and Other Legislation Amendment Act 2009	Section 30(6) (Decision-maker for application to agency)	Inserted: 'power to deal, with an access application, includes power to deal with an application for internal review in relation to the access application.'
		Section 31(3) (Decision-maker for application to Minister)	Inserted: 'deal, with an access application, includes deal with an application for internal review in relation to the access application.'
		Section 55(4) (Information as to existence of particular documents)	Inserted: 'To avoid any doubt, it is declared that a decision that states the matters mentioned in subsection (2) is a decision refusing access to a document under section 47.'
		Section 80(1), notes (Internal review)	Inserted: '3 An internal review application may be dealt with under a delegation or direction. See sections 30 and 31.'
		Section 107 (IC to ensure proper disclosure and return of documents)	Omitted — (1), 'to ensure' Inserted —'to ensure that any document that is given to the commissioner and is the subject of the decision being reviewed' Omitted — Section 107(a), 'information or a document given to the commissioner' & Section 107(b), 'any document given to the commissioner'
		Ch 7, Part 3 (Transitional	Inserted:

Date effective	Amended by	Affected Section	Details of amendment
		provisions for State Penalties Enforcement and Other Legislation Amendment Act 2009)	s204 Definition for pt 3 In this part— relevant period means the period starting on 1 July 2009 and ending immediately before the commencement of this part. s205 Retrospective validation for particular delegations and directions (1) A delegation, or an amendment of a delegation, made by a principal officer under this Act during the relevant period is taken to be, and always to have been, as valid as if section 30, as in force immediately after the commencement of this part, had been in force on the day the delegation, or the amendment, was made. (2) A direction given by a Minister under this Act during the relevant period is taken to be, and always to have been, as valid as if section 31, as in force immediately after the commencement of this part, had been in force on the day the direction was given. s206 Decision under s 55(2) is a reviewable decision (1) A decision made during the relevant period stating the matters mentioned in section 55(2) is, and always has been, a reviewable decision under this Act as if section 55, as in force immediately after the commencement of this part, had been in force on the day the decision was made. (2) Despite section 82(c) or 88(1)(d), an application for internal review or external review in relation to the decision may be made within 20 business days after the commencement of this part. (3) If an application for internal review or external review in relation to the decision is made before the commencement of this part, for the purposes of any review, the application is taken to have been made immediately after the

Date effective	Amended by	Affected Section	Details of amendment
			commencement of this part.'
1 Jan 2010	2009 Act No. 52 Integrity Act 2009	Schedule 1, section 6	Inserted: 6 Documents received or created by integrity commissioner for Integrity Act 2009, ch 3 A document created, or received, by the Queensland Integrity Commissioner for the Integrity Act 2009, chapter 3.
1 Feb 2010	2009 Act No. 29 Adoption Act 2009	Schedule 3, section 12(1), second dot point	Inserted: • Adoption Act 2009, section 314
23 May 2010	2010 Act No. 19 Transport and Other Legislation Amendment Act (No. 2) 2010	Chapter 8 (Transitional provisions for members of QR Group)	Inserted: s207 Definitions for ch 8 In this chapter— change of ownership means the beginning of the day notified by the Treasurer by gazette notice for this chapter. commencement means the commencement of this chapter. interim period means the period from the commencement to the change of ownership. member of QR Group means QR Limited or a related body corporate of QR Limited. QR Limited means QR Limited ACN 124 649 967. related body corporate has the meaning given in the Corporations Act. Treasurer means the Minister who administers the Financial Accountability Act 2009. s208 Application of Act to members of QR Group during interim period A member of QR Group is taken to be an agency for the purposes of this Act during the interim period. s209 Certain provisions continue to apply until change of ownership despite their repeal Until the change of ownership— (a) schedule 2, part 2, items 16, 17 and 18 as they were in force immediately before the commencement continue to apply, despite their repeal, to a member of QR Group; and (b) schedule 2, part 2, item 16 as in force on the commencement does not apply to a member of QR Group.

Date effective	Amended by	Affected Section	Details of amendment
		Sch 2 (Entities to which this Act does not apply)	Omitted: Schedule 2, part 2, items 16, 17 and 18 Inserted: '16 a rail GOC (within the meaning of the Transport Infrastructure Act 1994), or a subsidiary of a rail GOC, in relation to freight or insurance operations, except so far as they relate to community service obligations'.
		Sch 6 (Dictionary)	Omitted: definition QR freight operations Inserted: 'change of ownership, for chapter 8, see section 207. commencement, for chapter 8, see section 207. interim period, for chapter 8, see section 207. member of QR Group, for chapter 8, see section 207. QR Limited, for chapter 8, see section 207. related body corporate, for chapter 8, see section 207. Treasurer, for chapter 8, see section 207.'
1 July 2010	2010 Act No. 23 City of Brisbane Act 2010	Amendment of s 21 (Requirement for publication scheme)	Renumbered section 21(4) as section 21(5) Inserted new section 21(4): 'Without limiting subsection (3), the Minister may make guidelines about a publication scheme of the Brisbane City Council requiring the scheme to set out that the council has available information of or about the council's Establishment and Coordination Committee.'
		Schedule 3 (Exempt information)	Inserted: 4A BCC Establishment and Coordination Committee information 4B Budgetary information for local governments
1 September 2010	2010 Act No. 6 Transport (Rail Safety) Act 2010	Schedule 3, section 12(1), third last dot point	Inserted: • Transport (Rail Safety) Act 2010, part 9, division 2
1 November 2010	2010 Act No. 37 Integrity Reform	New sections 140A and 140B	Inserted: 140A Declaration of interests

Date effective	Amended by	Affected Section	Details of amendment
	(Miscellaneous Amendments) Act 2010		(1) This section applies to the information commissioner on appointment. Note— Appointment includes reappointment. See the Acts Interpretation Act 1954, section 36, definition appoint. (2) The information commissioner must, within 1 month, give the Speaker a statement setting out the information mentioned in subsection (3) in relation to— (a) the interests of the information commissioner; and (b) the interests of each person who is a related person in relation to the information commissioner. (3) The information to be set out in the statement is the information that would be required to be disclosed under the Parliament of Queensland Act 2001, section 69B if the information commissioner were a member of the Legislative Assembly. (4) Subsections (5) and (6) apply if, after the giving of the statement— (a) there is a change in the interests mentioned in subsection (2); and (b) the change is of a type that would have been required to be disclosed under the Parliament of Queensland Act 2001, section 69B if the information commissioner were a member of the Legislative Assembly. (5) The information commissioner must give the Speaker a revised statement. (6) The revised statement must— (a) be given as soon as possible after the relevant facts about the change come to the information commissioner's knowledge; and (b) comply with subsection (3). (7) The Speaker must, if asked, give a copy of the latest statement to—

Date effective	Amended by	Affected Section	Details of amendment
			(a) the Minister; or (b) the leader of a political party represented in the Legislative Assembly; or (c) the Crime and Misconduct Commission; or (d) a member of the parliamentary committee; or (e) the integrity commissioner. (8) The Speaker must, if asked, give a copy of the part of the latest statement that relates only to the information commissioner to another member of the Legislative Assembly. (9) A member of the Legislative Assembly may, by writing given to the Speaker, allege that the information commissioner has not complied with the requirements of this section. (10) A reference in this section to an interest is a reference to the matter within its ordinary meaning under the general law and the definition in the Acts Interpretation Act 1954, section 36 does not apply. (11) In this section— integrity commissioner means the Queensland Integrity Commissioner under the Integrity Act 2009. related person, in relation to the information commissioner, means— (a) the information commissioner's spouse; or (b) a person who is totally or substantially dependent on the information commissioner and— (i) the person is the information commissioner's child; or (ii) the person's affairs are so closely connected with the affairs of the information commissioner that a benefit derived by the person, or a substantial part of it, could pass to the information commissioner. s140B Conflicts of interest (1) If the information commissioner

Date effective	Amended by	Affected Section	Details of amendment
			has an interest that conflicts or may conflict with the discharge of the information commissioner's responsibilities, the information commissioner— (a) must disclose the nature of the interest and conflict to the Speaker and parliamentary committee as soon as practicable after the relevant facts come to the information commissioner's knowledge; and (b) must not take action or further action concerning a matter that is, or may be, affected by the conflict until the conflict or possible conflict is resolved. (2) If the conflict or possible conflict between an interest of the information commissioner and the information commissioner's responsibilities is resolved, the information commissioner must give to the Speaker and parliamentary committee a statement advising of the action the information commissioner took to resolve the conflict or possible conflict. (3) A reference in this section to an interest or to a conflict of interest is a reference to those matters within their ordinary meaning under the general law and, in relation to an interest, the definition in the Acts Interpretation Act 1954, section 36 does not apply.
		Ch 7, Part 4 (Transitional provision for Integrity Reform (Miscellaneous Amendments) Act 2010)	Inserted: s206A Declaration of interests by information commissioner (1) This section applies to the person who, immediately before the commencement of this section, was the information commissioner. (2) The person must comply with section 140A(2) within 1 month after the commencement of this section.'
1 January 2011	2010 Act No. 38 Public Interest Disclosure Act 2010	Schedule 3	Omitted — 'Whistleblowers Protection Act 1994' Inserted — 'Public Interest Disclosure Act 2010'
8 April 2011	2011 Act No. 8 Revenue and Other	Schedule 3, section 12(1)	Omitted eighth dot point

Date effective	Amended by	Affected Section	Details of amendment
	Legislation Amendment Act 2011		
13 June 2011	2011 Act No. 15 Parliament of Queensland (Reform and Modernisation) Amendment Act 2011	Section 188(7) (Report of strategic review)	Omitted — 'section 84(2)' Inserted —'section 92(2)'
		s 189 (Functions of parliamentary committee)	Omitted — note
		Schedule 6 (Dictionary)	Omitted — definition parliamentary committee Inserted — 'parliamentary committee means— (a) if the Legislative Assembly resolves that a particular committee of the Assembly is to be the parliamentary committee under this Act—that committee; or (b) if paragraph (a) does not apply and the standing rules and orders state that the portfolio area of a portfolio committee includes the information commissioner—that committee; or (c) otherwise—the portfolio committee whose portfolio area includes the department, or the part of a department, in which this Act is administered. portfolio area see the Parliament of Queensland Act 2001, schedule. portfolio committee see the Parliament of Queensland Act 2001, schedule. standing rules and orders see the Parliament of Queensland Act 2001, schedule.'
9 September 2011	2011 Act No. 26 Aboriginal Land and Torres Strait Islander Land and Other Legislation Amendment Act 2011	s 113 (Disciplinary action)	Omitted section 113(3)(c) Renumbered section 113(3)(d) to (h) as ss113(3)(c) to (g)
6 December 2011	2011 Act No. 45 Civil Proceedings Act 2011	s 138 (Leave of absence)	Replace with: The information commissioner is entitled to the leave of absence decided by the Governor in Council.'
		Sch 2 (Entities to which this Act does not	Omit Schedule 2, part 2, item 20

Date effective	Amended by	Affected Section	Details of amendment
		apply)	
		s 154 (Leave of absence)	Replaced with: The information commissioner may approve a leave of absence for the RTI commissioner in accordance with entitlements available to the RTI commissioner under the RTI commissioner's conditions of office.
1 January 2012	2011 Act No. 18 Work Health and Safety Act 2011	Schedule 3, section 10(1)(h)	Omitted example
18 May 2012	2012 Act No. 6 Parliament of Queensland and Other Acts Amendment Act 2012	section 13, note section 24(1), note 1 schedule 6, definition Minister.	The provisions are amended by omitting 'a Parliamentary Secretary' and inserting 'an Assistant Minister'.
1 July 2012	2012 Act No. 9 Health and Hospitals Network and Other Legislation Amendment Act 2012	Schedule 1, section 9(b)	Omitted — 'Health Services Act 1991, part 4B' Inserted— 'Hospital and Health Boards Act 2011, part 6' Inserted note 2 'Hospital and Health Boards Act 2011, part 6, see sections 94 and 95'
		Schedule 2, part 1, paragraph 6	Inserted — 'a quality assurance committee established under the Health and Hospitals Network Act 2011, section 82'.
22 November 2012	2012 Act No 33 Local Government and Other Legislation Amendment Act 2012	Amendment of s 113 (Disciplinary action)	Section 113(3), definition responsible Minister, paragraph (c)— insert— '(c) in relation to another local government—the Minister administering the Local Government Act 2009; or'.
		Sch 3 section 4A(2) (Exempt information)	Inserted: '(2) Subsection (1) does not apply to— (a) information officially published by decision of the council; or (b) if the council delegates a power to the committee under the City of Brisbane Act 2010, section 238—information relating to the delegation or the power to be exercised under the delegation.'
22 February 2013	2012 Act No 45 Right to Information and Integrity (Openness and Transparency)	s 24(2) (Making access application)	Inserted: (d) state whether access to the document is sought for the benefit of, or use of the document by— (i) the applicant; or

Date effective	Amended by	Affected Section	Details of amendment
	Amendment Act 2012		(ii) another entity; and Example for paragraph (d)(ii)— A journalist makes an access application for a document for use of the document by an electronic or print media organisation. (e) if access to the document is sought for the benefit of, or use of the document by, an entity other than the applicant—the name of the other entity.
		Section 54(2)(a)(iii) and (iv) (Notification of decision and reasons)	Replaced with: (iii) details of the publication of the document, or of information about the document, that is required or permitted by section 78 or 78A, if the applicant accesses the document within the access period and the document does not contain personal information of the applicant; and (iv) details of the publication of the document, or of information about the document, that is required or permitted by section 78 or 78A, if the applicant fails to access the document within the access period and the document does not contain personal information of the applicant
		Section 78 (Disclosure logs)	Overhauled and replaced with: (1) This section applies if a person makes a valid access application to a department or a Minister. (2) The department or Minister must, as soon as practicable after the application is made, include the following information about the application in a disclosure log— (a) details of the information being sought by the applicant, as stated in the application; (b) the date the application was made. (3) If the department or Minister decides to give access to a document that does not contain personal information of the applicant and the applicant accesses the document within the access period, the following must be included in a disclosure log as soon as practicable after the applicant accesses the document—

Date effective	Amended by	Affected Section	Details of amendment
			(a) a copy of the document; (b) the applicant's name; (c) if access to the document was sought for the benefit of, or use of the document by, an entity other than the applicant—the name of the other entity. (4) If the department or Minister decides to give access to a document that does not contain personal information of the applicant and the applicant fails to access the document within the access period, details identifying the document, and information about the way in which the document may be accessed and any applicable charge, must be included in a disclosure log as soon as practicable after the access period ends. (5) A person may access a document the details of which are included in a disclosure log under subsection (4) on payment of the applicable charge, and in the way mentioned in the disclosure log. 6) After a person accesses a document under subsection (5)— (a) no further charge is payable for access to the document by any person; and (b) a copy of the document must be included in a disclosure log. (7) However, the inclusion of a document or information in a disclosure log under this section is subject to section 78B(2). (8) In this section— valid access application means an access application that— (a) is in a form complying with all relevant application requirements; and (b) is not an application to which section 32 applies. 78A Disclosure logs—other agencies (1) If an agency makes a decision in

Date effective	Amended by	Affected Section	Details of amendment
			relation to an access application to give access to a document that does not contain personal information of the applicant and the applicant accesses the document within the access period— (a) a copy of the document may be included in a disclosure log, if this is reasonably practicable; or (b) otherwise—details identifying the document and information about the way in which the document may be accessed may be included in a disclosure log. (2) A person may access a document the details of which are included in a disclosure log under subsection (1)(b) for no charge and in the way mentioned in the disclosure log. (3) If an agency decides to give access to a document that does not contain personal information of the applicant and the applicant fails to access the document within the access period, details identifying the document, and information about the way in which the document may be accessed and any applicable charge, may be included in a disclosure log. (4) A person may access a document the details of which are included in a disclosure log under subsection (3) on payment of the applicable charge, and in the way mentioned in the disclosure log. (5) After a person accesses a document under subsection (4)— (a) no further charge is payable for access to the document by any person; and (b) a copy of the document may be included in a disclosure log. (6) However, the inclusion of a document or information in a disclosure log under this section is subject to section 78B(2).

Date effective	Amended by	Affected Section	Details of amendment
			(7) In this section— agency does not include a department or a prescribed entity under section 16. 78B Requirements about disclosure logs (1) An agency maintaining a disclosure log must ensure the disclosure log complies with any guidelines published by the Minister on the Minister's website (to the extent the guidelines are consistent with this Act). (2) Without limiting subsection (1), an agency must delete from any document or information included in a disclosure log under section 78 or 78A, any information (including an individual's name)— (a) the publication of which is prevented by law; or (b) that may be defamatory; or (c) that, if included in the disclosure log, would unreasonably invade an individual's privacy; or (d) that is, or allows to be ascertained, information— (i) of a confidential nature that was communicated in confidence by a person other than the agency; or (ii) that is protected from disclosure under a contract; or (e) that, if included the disclosure log, would cause substantial harm to an entity. (3) In this section— agency includes a Minister but does not include a prescribed entity under section 16.
		Section 170(2) (Access—protection against actions for defamation or breach of confidence)	After 'section 78'— insert— 'or 78A'.
		Section 171 (Publication—protection against actions for defamation or breach of confidence)	Replaced with: Section 171(1) (a) the publication was— (i) required or permitted under section 78 or 78A; or (ii) authorised by a Minister, or an officer having authority in relation to

Date effective	Amended by	Affected Section	Details of amendment
			disclosure logs, in the genuine belief the publication was required or permitted under section 78 or 78A; or'. Section 171(2), after 'section 78'—insert—', 78A'.
		Section 173(a) (Publication—protection in respect of offences)	Inserted: the publication was— (i) required or permitted under section 78 or 78A; or (ii) authorised by a Minister, or an officer having authority in relation to disclosure logs, in the genuine belief the publication was required or permitted under section 78 or 78A; o
		Schedule 6 (Dictionary)	Inserted: 'disclosure log means a part of an agency's website called a disclosure log.'
3 May 2013	2013 Act No 19 Queensland Rail Transit Authority Act 2013	Section 16(1) Schedule 2, part 2, item 16	Inserted: (ca) a rail government entity under the Transport Infrastructure Act 1994; Replaced with: rail government entity under the Transport Infrastructure Act 1994
29 August 2013	2013 Act No 35 Justice and Other Legislation Amendment Act 2013	Amendment of s 114 (Vexatious applicants)	Renumbered Section 114(6) as section 114(8). Inserted: (6) The commissioner may publish— (a) a declaration and the reasons for making the declaration; and (b) a decision not to make a declaration and the reasons for the decision. (7) The commissioner may publish the name of a person the subject of a declaration under subsection (1) when publishing the declaration and the reasons for making it.

Amendments to Chapter 3 of the IP Act since commencement

Date effective	Amended by	Affected Section	Details of amendment
19 Nov 2009	2009 Act No. 48 State Penalties Enforcement and Other Legislation Amendment Act 2009	s 50(6) (Decision-maker for application to agency)	Inserted— 'power to deal, with an access or amendment application, includes power to deal with an application for internal review in relation to the access or amendment application. Examples of dealing with an application for internal review— • making a new decision under section 94(2) • giving notice under section 97(3)'. 221
		s 51(3) (Decision-maker for application to Minister)	Inserted— 'deal, with an access or amendment application, includes deal with an application for internal review in relation to the access or amendment application. Examples of dealing with an application for internal review— • making a new decision under section 94(2) • giving notice under section 97(3)'.
		s 69 (Information as to existence of particular documents)	Inserted— '(3) To avoid any doubt, it is declared that a decision that states the matters mentioned in subsection (2) is a decision refusing access to a document under section 67. Note— A decision refusing access to a document under section 67 is a reviewable decision—see schedule 5, definition reviewable decision, paragraph (f).'
		Amendment of s 94(1), notes (Internal review)	Inserted— '3 An internal review application may be dealt with under a delegation or direction. See sections 50 and 51.'
		s 120 (Information commissioner to ensure proper disclosure and return of documents)	Omitted — 'to ensure' Inserted— 'to ensure that any document that is given to the commissioner and is the subject of the decision being reviewed' Omitted — section 120(a), 'information or a document given to the commissioner' & section 120(b), 'any document given to the commissioner'

Date effective	Amended by	Affected Section	Details of amendment
1 September 2011	2011 Act No. 27 Local Government Electoral Act 2011	s 126(3) (Disciplinary action) definition responsible Minister, paragraph (d)	Omitted — 'Local Government Act 1993' Inserted —'Local Government Act 2009'
9 September 2011	2011 Act No. 26 Aboriginal Land and Torres Strait Islander Land and Other Legislation Amendment Act 2011	Section 126(3), definition responsible Minister, paragraph (c)	Omitted — 'Local Government (Aboriginal Lands) Act 1978' Inserted — 'Aurukun and Mornington Shire Leases Act 1978'
18 May 2012	2012 Act No. 6 Parliament of Queensland and Other Acts Amendment Act 2012	section 43(1), note 1 section 44(1), note 1 schedule 5, definition Minister	Omitted 'a Parliamentary Secretary' Inserted 'an Assistant Minister'
29 August 2013	2013 Act No. 35 Justice and Other Legislation Amendment Act 2013	s 127 (Vexatious applicants)	Renumbered section 127(6) as section 127(8). Inserted new sections 127(6) & (7)— (6) The commissioner may publish— (a) a declaration and the reasons for making the declaration; and (b) a decision not to make a declaration and the reasons for the decision. (7) The commissioner may publish the name of a person the subject of a declaration under subsection (1) when publishing the declaration and the reasons for making it.

APPENDIX D - TABLE OF RTI ACT PROVISIONS AND THEIR EQUIVALENT IP ACT PROVISIONS

RTI Act section	IP Act section	Description/differences	Description/differences
23	40	Sets out that a person has right to be given access to documents of an agency	IP Act is limited to documents to the extent they contain personal information.
N/A	41	Sets out the right to amend documents of an agency to the extent they contain personal information.	
24(1)	43(1)	Sets out that a person wishing to access a document under the Act may apply for it.	
24(2)-(3)	43(2)-(3)	Sets out how a person must apply for the document.	RTI Act includes requirement that an applicant indicate whether or not they are applying to benefit a third party.
N/A	44(1)	Sets out that a person who wishes to amend a document under the Act may apply to do so.	
N/A	44(4)-(5)	Sets out how an amendment application must be made.	
25	45	Sets out how an application may be made for a child.	Amendment applications are included in the IP Act.
26	46	Provides that an access or amendment application may not be to the Information Commissioner, except for staff personal information.	There is no exception for OIC staff in the RTI Act.
27	47	An access application is only for a document existing at the time of the application.	
28	48	An access application is taken not to include application for access to metadata.	
29	49	An access application does not require a search of backup systems.	
30	50	Sets out who is to be a decision maker for applications to agencies.	Amendment applications are included in the IP Act.

RTI Act section	IP Act section	Description/differences	Description/differences
31	51	Sets out who is to be a decision maker for applications to Ministers.	Amendment applications are included in the IP Act.
32	52	Sets out what must be done if a purported application is outside the scope of the Act.	Amendment applications are included in the IP Act.
33	53	Sets out what must be done is a noncompliant application for access or amendment is received.	Amendment applications are included in the IP Act.
N/A	54	Sets out what an agency must do if it receives an access application which cannot be made under the IP Act, but should have been made under the RTI Act.	
34	N/A	Sets out what an agency must do if it receives an access application which could have been made under the IP Act.	
35(1)-(2)	55(1)-(2)	Sets out how an agency can ask for a longer time in which to process an application.	Amendment applications are included in the IP Act.
35(3)-(4)	55(3)-(4)	Sets out when an agency may continue to make a considered decision.	Amendment applications are included in the IP Act.
37	56	Sets out what an agency must do if disclosure under an access application may reasonably be expected to be of concern to a third party.	
38	57	Sets out the requirements of transferring an application to another agency.	Amendment applications are included in the IP Act.
39	58	Sets out that the Act should be administered with a pro-disclosure bias, and that an application that is able to be refused under the Act may still be dealt with.	Amendment applications are included in the IP Act.

RTI Act section	IP Act section	Description/differences	Description/differences
40	59	Sets out that if an access application relates to documents, or a class, that all contain exempt information, the agency may refuse to deal with the application without having identified the documents.	
41-42	60-61	Sets out the circumstances in which dealing with an application may be refused because of the detrimental effect on the performance of the agency's functions.	
43	62	Sets out when an agency may refuse to deal with an access application because it is for the same documents earlier applied for.	
N/A	63	Sets out when an agency may refuse to deal with an amendment application because it is the same as an earlier amendment application.	
44	64	Sets out that there is to be a pro-disclosure bias in deciding to give access, and that access may be given even where the Act allows it to be refused.	
45	65	Sets out the requirements for a considered decision (one made within the allotted time) on an access application.	
46	66	Sets out that, where a decision is not made within the allotted time, a deemed decision is taken to have been made on the last day of the processing period, refusing access, and that a prescribed notice must be given as soon as possible.	

RTI Act section	IP Act section	Description/differences	Description/differences
47	67	Sets out the grounds on which access to a document may be refused.	The RTI sets out what the grounds are; the IP Act refers to section 47 of the RTI Act as ground for refusing access under the IP Act.
54	68	Sets out the requirements of a prescribed written notice of a decision on an access application and that it must include a statement of reasons.	
55	69	Sets out that nothing requires an agency to confirm the existence or non-existence of a given document, and how it is to neither confirm nor deny its existence.	

APPENDIX E - EXTERNAL REVIEW TIMEFRAMES IN OTHER JURISDICTIONS

This table relates to the discussion at Part 10.4 and 10.5 of this submission.

	Victoria	Western Australia
Provision	As part of significant amendments to its legislation in 2012, which included the creation of a Freedom of Information Commissioner, Victoria introduced a timeframe for reviews conducted by that Commissioner. The reviews must be completed 30 days after the application for review is received – however, the applicant may agree to a longer period in writing. If reviews are not completed within the required or agreed period, the Victorian Freedom of Information Commissioner is taken to have upheld the agency's decision.	The Western Australian Information Commissioner must make a decision within 30 days after the application for review was made *'unless the Commissioner considers that it is impracticable to do so'*. The legislation does not indicate that, if a decision is not made within 30 days, the Commissioner is taken to have upheld the agency's decision. Presumably, in all cases where a decision is not made within this period, the Commissioner considers that a decision within the period is impracticable, and makes the decision at a later date.
Performance against statutory timeframes	Victorian Freedom of Information Commissioner's annual report for 2012-13 records that applicants agreed to a total of 121 extensions of time across 94 reviews, and approximately one-third of the 92 review decisions made were made within 30 days of receipt of the application. This was against a background of receiving 258 applications and finalising 190 of them. The report does not provide any further information regarding the length of time taken to finalise reviews, nor does it indicate if any deemed decisions of the Commissioner were amongst those appealed to the Victorian Civil and Administrative Tribunal.	The most recent annual report by the Western Australian Information Commissioner does not provide information regarding how many reviews are finalised outside the 30 day period, or any other information regarding the length of time taken to finalise reviews. The report does note that 129 applications for external review were received and 119 were finalised in 2012-13.

UTS
UNIVERSITY OF TECHNOLOGY, SYDNEY

ADVANCING THE OBJECTS OF THE GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 (NSW):

AN INTERNATIONAL COMPARATIVE EVALUATION OF MEASURES USED TO PROMOTE GOVERNMENT INFORMATION RELEASE

COMMERCIAL IN CONFIDENCE

This Project Report has been prepared by the University of Technology, Sydney ("UTS") on terms agreed between the University and the IPC.

FOR THE ATTENTION OF:

The Information and Privacy Commission (NSW)
Level 11, 1 Castlereagh Street, Sydney 2000

UTS REPORT

Title

Advancing the Objects of the Government Information (Public Access) Act 2009 (NSW): An international comparative evaluation of measures used to promote government information release

REPORT PREPARED BY:

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23 June 2015

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PREFACE

The following independent report was commissioned by the Information Privacy Commission NSW in 2015. The report is based upon desk top research including literature review and analysis, documentary analysis and has been enhanced through contributions from the IPC and the IPAC. The specific aims of this report were developed in collaboration with the Information and Privacy Commission. The overall aim being to *undertake a comparative analysis of how open government may be achieved through identifying mechanisms which promote information release in open government*. Subsidiary aims were to:

- Describe what 'open government' means; how open government should look and how it can be delivered through tangible mechanisms (with focus upon any 'switches' which encourage the release of information);

- Identify jurisdictions leading open government and discuss current measures to evaluate open government (such as Open Government Ranking measures); and

- Suggest future research (eg. is there a research gap in effective measurement and evaluation of the delivery of open government).

The report was undertaken within a four month timeframe from March 2015 to June 2015. This report is aimed at being practical in nature. It is not intended to provide a detailed examination of legislative or policy framework(s). The task of the report was to consider the challenges and opportunities which arise for proactive information release by government and to provide a helpful reference for stakeholders in the context of explaining mechanisms which may usefully and effectively be applied to promote information sharing.

In terms of scope and breadth the comparative research commenced with the base line of the international rankings for Open Government Countries with a particular focus on the more mature United Kingdom approach. Here specific regard was had (but not be limited or directed by) to the identification of tangible mechanisms to achieve 'best practice' in open government. The report then, as appropriate, selected other jurisdictions for investigation. Extension of the jurisdictions covered was aimed at quality of the identification of strategic responses and not quantity.

The report is divided into:

- An executive summary;
- a discussion document;
- appendices; and
- a reference list.

For ease of access the Executive Summary contains the findings of the report. The Executive Summary is then followed by a more detailed study in the Main Report.

As the author of this report I worked entirely independently and reached my own conclusions.

Professor Anita Stuhmcke
Faculty of Law
University of Technology Sydney 23 June 2015

EXECUTIVE SUMMARY

The purpose of this report is to provide insight into the types of practical mechanisms utilised in selected international jurisdictions to promote open government through information sharing. The NSW *Government Information (Public Access) Act 2009* (GIPA Act) states the following 'Object of Act' in section 3:

> (1) In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:
> (a) authorising and encouraging the proactive public release of government information by agencies, and
> (b) giving members of the public an enforceable right to access government information, and
> (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

This project focuses upon s3(1)(a), the first avenue outlined in the objects of the GIPA Act, how to encourage the proactive public release of government information by agencies. This report is aimed at being of practical use for agencies and interested stakeholders and a helpful reference point in that context. Importantly, the report does not proffer systemic reform options nor does it suggest the creation of new directions in strategic policy, law reform or administrative initiatives.

This report examines 'best practice' switches or mechanisms to promote information release in open government. This is intended as a scoping of practical options. It identifies governments leading international open government rankings. It then isolates strategic mechanisms used to achieve proactive information release. The report presents switches to promote information release and information sharing between:

(a) government agencies (see Section 5); and
(b) government and the public (see Section 6).

In Section 5 the report notes barriers to information sharing across government agencies. It identifies three switches which facilitate inter-agency information sharing. These are identified from the 'best practice' models of comparative world leading open government jurisdictions.

In Section 6 the report identifies eight practical mechanisms used by these world leading open government jurisdictions to promote information release by government to the public.

Generally the mechanisms suggested in Sections 5 & 6 have not been subject to evaluation. Future research designed around how to improve and assure effective evaluation is highly recommended as an area of need for future research.

This executive summary describes the key findings of each section of the Main Report. The methodology used in this report is a literature survey. Appendix 1 details the methodology used and identifies the strengths and weaknesses of this approach.

SECTION 3: The Concept of Open Government: History and challenges

This report bases its findings upon the three characteristics of open government as defined by the Organisation for Economic Co-operation and Development (OECD): transparency, accessibility, and

responsiveness. Proactive release of government information is a critical plank in building these characteristics.

In Australian jurisdictions there are cultural and organisational barriers to information release. These barriers have become increasingly evident due to the rapidly changing context within which the promotion of government information sharing occurs. Technology has heightened expectations as to efficient release and effective use of government data. However as technology continues to drive change to governance models the government response can be characterised as slow and uncoordinated. In Australia macro and micro policy reform has not grappled with information sharing between agencies nor adequately addressed existing barriers to information release from government agencies to the public. This approach seems set to continue.

SECTION 4: Leading International Jurisdictions: How open government should look

The open government movement is global. Public data is big business and promises a new model of democratic interaction between citizen and government. In 2011 the international Open Government Partnership (OGP) was launched as an initiative by 8 founding governments. Today this includes 65 countries. This report identifies the governments which lead the international open government rankings. The United Kingdom is typically identified as the world leader in this area. The report then uses these comparative jurisdictions to identify:

(a) three switches to encourage inter-agency information sharing (see Section 5); and
(b) eight practical mechanisms to encourage proactive government information release to the public (see Section 6).

SECTION 5: Encouraging information release in open government: Strategic tangible mechanisms to promote information sharing by government agencies

In Australia the closed government culture is a barrier to open data policy. This section identifies three switches to overcome the behavioural/oganisational issues which prevent information sharing:

Switch 1	**Legislative/structural features that build success: promoting a model of proactive agency information sharing**	**Best practice UK regulatory model that facilitates exchange of data between agencies (Data Protection Principles and Data Sharing Code of Practice)**
Switch 2	Promoting proactive release of government data across organisational walls: Recognise and reward the individual	Promote agency Open Data Champions; individual data release prizes and challenges; and identify agency data 'boundary spanners'
Switch 3	Build inter-agency trust: the use of soft regulation	Adopt UK 'Personal Information Promise'; investigate multi-agency models; develop feedback loops on information sharing

SECTION 6: Encouraging information release in open government: Strategic tangible mechanisms to promote information release by government to the public

This project approaches the sharing of government information between agencies and release of government information to the public as initiatives which involve more than putting government data on the Internet. The eight mechanisms identified in Section 6 are:

Mechanisms to promote transparency:

1: Democratize information sharing through using Games Contests, App development and Hackathons (Civic Hacking) to crowd source ideas and promote government information release

2: Measure government performance and encourage citizen rankings

Mechanisms to promote accessibility:

3: Select policy area as the moderator for transparency and usage by combining a bottom-up and top-down approach to select specific data sets for release

4: Use non-government platforms to promote government information

5: Promote republishing and re-using government data

Mechanisms to promote responsiveness:

6: Integrate citizens, consumers and non-government organisations into policy making

7: Ensure sustainable change through the integration of "ecosystems" of key actors

8: Encourage production of government information through individual citizen contributions

SECTION 7: Evaluation of open government

The report concludes that evaluation of measures used to promote successful open release of government information is limited. Indeed even the global open government ranking systems have been described as a 'patchwork of ratings' and lack a uniform and comprehensive overview of open government performance. Most notably there is an absence of focus upon inter-agency information sharing. There is a clear need for future research in this area. The implementation of the mechanisms in this report will provide opportunity for much needed evaluation and reflection as to how to achieve best practice in information release for open government both between agencies and to the public.

SECTION 8: Conclusion

Glossary of terms

Cherry picking or forum shopping is often a point of methodological concern as it is the act of pointing to individual cases while ignoring related cases or data which may contradict that position.
Ran Hirshi, *Comparative Matters: The Renaissance of Comparative Constitututional Law*, (2014) Oxford University Press, 279

Cloud/cloud computing: The Internet and the delivery of hosted services (infrastructure, platform, and software) over the Internet.
http://www.cmd.act.gov.au/open_government/report/connected_community,_connected_government#fn-201-103

Crowdsourcing: An online, distributed problem solving and production model in which an online community is called upon to solve a particular problem.
http://www.cmd.act.gov.au/open_government/report/connected_community,_connected_government#fn-201-103

Creative Commons licences provide a simple standardised way for individual creators, companies and institutions to share their work with other on flexible terms without infringing copyright. The licences allow users to reuse, remix and share the content legally.
http://creativecommons.org.au/learn/licences/

Data: is information in a raw or pre-interpreted form, typically comprised of numbers or words. Data does not contain an explicit narrative and is primarily intended for consumption by software, not to be read by humans. A dataset is a collection of related data units. Electronically stored information or recordings. Examples include documents, databases of contracts, transcripts of hearings, and audio/visual recordings of events.
http://www.dpc.wa.gov.au/Consultation/Pages/WAWholeofGovernmentOpenDataPolicy-Draft.aspx

Data re-use, also called 'secondary data use' or 'secondary data analysis', occurs when data that was previously collected, often for another purpose, is analysed in a new or different way (1,2). Original (i.e., 'primary') data collectors or generators can be researchers, government, or commercial or public institutions.
http://ands.org.au/discovery/reuse.html

Dis-intermediate means the stripping out or slimming down or simplification of intermediaries in the process of delivering public services.
Patrick Dunleavy, (2010) *The future of joined-up public services* 2020 Public Services Trust
http://eprints.lse.ac.uk/28373/1/The_Future_of_Joined_Up_Public_Services.pdf, 7

e-government: [t]he use of technology, particularly the Internet, as a means to delivery government services and to facilitate the interaction of the public with government entities'
American Library Association, http://www.ala.org/advocacy/advleg/federallegislation/govinfo/egovernment/egovtoolkit

Free (or public) data: licensed data which allows a user to access and use the data freely - data that is not subject to valid privacy, security or privilege limitations.

Information: a structured, interpretable incarnation of data, "information, including all information products in any format, and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for public entities (governments or

public institutions) in all branches and at all levels be presumed to be in the public domain, unless another policy option (e.g. a legal right such as an IP right or personal privacy) is adopted and clearly documented, preventing it from being freely accessible to all."
Maureen Henninger, 'The Value and Challenges of Public Sector Information' (2013) 5(3) *Cosmopolitan Civil Societies Journal* 75-95, 78

Government Information: means information contained in a record held by an agency
(GIPPA 2009, s 4)

Government 2.0: [t]he application of Web 2.0 collaborative tools and practices to the processes of government
(Government 2.0 Taskforce, 2009: p.2).

License: refers to the legal conditions under which the work is made available. Where no license has been offered this should be interpreted as referring to default legal conditions governing use of the work (for example, copyright or public domain).
http://opendefinition.org/od/

Open: Knowledge is open if anyone is free to access, use, modify, and share it — subject, at most, to measures that preserve provenance and openness.
http://opendefinition.org/od/

Open data: In the Australian context data that is freely-available, easily-discoverable, accessible and published in ways and under licences that allow reuse. Open data may be available in other forms that do not meet those standards. For example, data published in a PDF file with all rights reserved is less open than data in a spread sheet file published under a Creative Commons BY licence. See below data.gov.au for more advice about open data. Although Open Data has many definitions one of the clearest is in the The Open Data Handbook : "Open data is data that can be freely used, reused and redistributed by anyone - subject only, at most, to the requirement to attribute and sharealike".
Available at: http://opendatahandbook.org/en/what-is-open-data/.

Open Government Data: data published by public agencies or governments

Public sector information: (see also open government data) data, information or content that is generated, collected, or funded by or for the government or public institutions
http://www.oiac.gov.au/

MAIN REPORT

1. Terms of Reference

1.1 This report summarises the findings of a research project commissioned by the Information Privacy Commission NSW (IPC) on 11 February 2015. The agreed terms of reference for this report are to:

> *Undertake a comparative analysis of how open government may be achieved through identifying mechanisms which promote information release in open government*. Subsidiary research aims were to:
>
> - Describe what 'open government' means; how open government should look and how it can be delivered through tangible mechanisms (with focus upon any 'switches' which encourage the release of information);
> - Identify jurisdictions leading open government and discuss current measures to evaluate open government (such as Open Government Ranking measures); and
> - Suggest future research (eg. is there a research gap in effective measurement and evaluation of the delivery of open government).

This report is aimed at being of practical application. It is not intended to provide a detailed examination of policy nor legislative framework(s). The task is to consider the challenges and opportunities which arise through information release by government and provide a helpful reference for stakeholders in the context of explaining mechanisms which may usefully and effectively be applied in the promotion of information sharing. The report is written entirely independently of the IPC. The report was finalised by the end of June 2015.

2. Introduction

2.1 In recent years the promise of 'open government' is increasingly becoming a commitment for governments around the world. There is considerable external scrutiny of this commitment. Where appropriate, this report takes into account insights established by this former work.

2.2 As this report makes clear the landscape of open government is one of rapid change (see Section 3 & Appendix 2). While the open government agenda is global, the pace of technological, political and social change differs across local, sub-national and national governance frameworks. Consequently, identifying mechanisms that will be equally relevant across the whole of government to promote government information sharing is a difficult task. Most government agencies and other relevant stakeholders will be heavily influenced by idiosyncratic pressures which will feature significantly in the way they operate. Nonetheless the mix of information sharing mechanisms in this report (see Section 5 and 6) drawn from leading open government jurisdictions will be applicable to NSW government agencies in different ways and to different extents.

2.3 Following the Terms of Reference (Section 1) and this Introduction (Section 2), the report is in four main sections:

* **Section 3** introduces the context of open government, its three characteristics of being transparent, accessible, and responsive and then identifies challenges faced by the open government agenda;

* **Section 4** identifies leading open government jurisdictions, describes what open government means and how it should look;

* **Section 5** discusses three switches which promote positive information sharing between agencies, drawn from the open government jurisdictions which lead global rankings;

* **Section 6** discusses eight tangible mechanisms which promote positive information sharing between government and the public, drawn from the open government jurisdictions which lead global rankings;

* **Section 7** examines evaluation of open government and suggests future research; and

* **Section 8** concludes.

2.4 Figures 1 and 2 below summarise the key switches/mechanisms identified in Sections 5 & 6 of the report. Figure 1 summarises Section 5 and the three switches which promote positive information sharing between agencies.

Figure 1 - three switches which promote positive information sharing between agencies

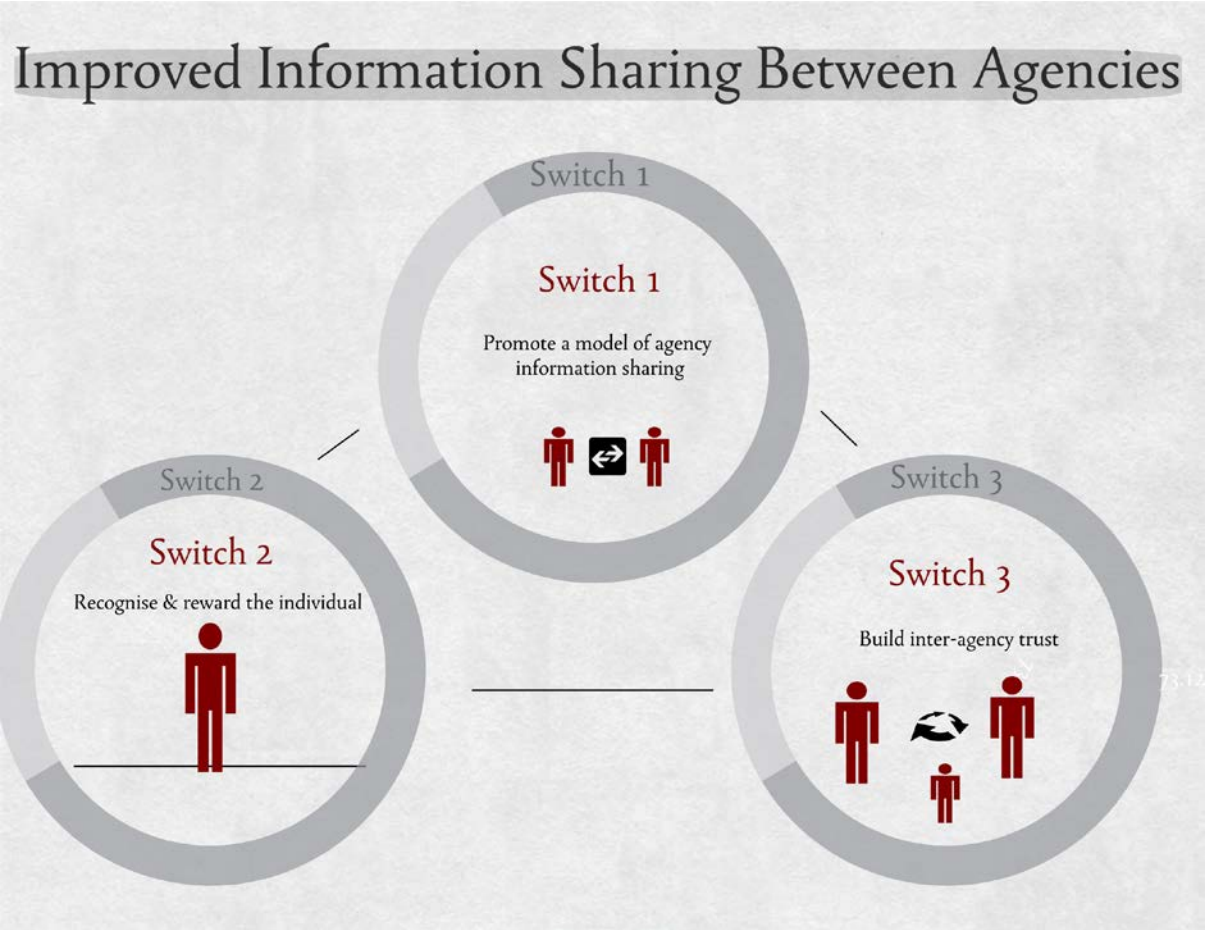
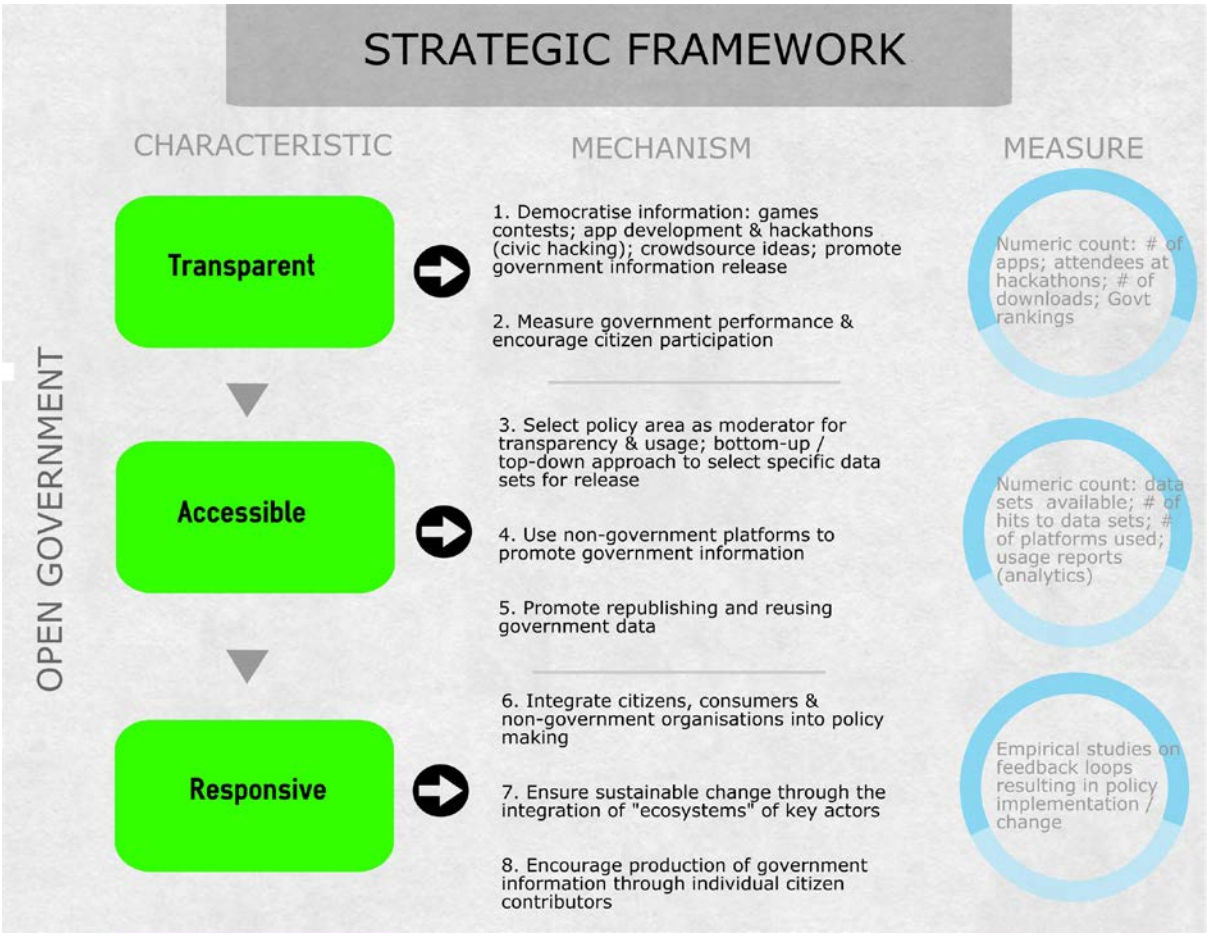


Figure 2 summarises Section 6 and eight tangible mechanisms which promote positive information sharing between government and the public. Briefly, given that the term 'open government' is not defined in statute[1], but is effectively a 'brand' name which encompasses a variety of practices, policy initiatives and meanings (see Section 3) the key characteristics of open government used in this report are identified as: *Transparency; Accessibility; Responsiveness*. Each mechanism in Figure 2 is allocated against a characteristic of open government.

Figure 2 - eight mechanisms which promote positive information sharing between government and the public



[1] See here the *Government Information (Public Access) Act 2009*, Part 2 titled "Open Government Information – General Principles".

3. The Concept of Open Government: History and challenges

3.1 This section provides an overview of the development of open government, with the aim of charting where we are now and how we got here. It provides:

(a) a brief historical overview (see also Appendix 2);

(b) identifies two challenges which arise from the rapidly changing context within which the promotion of government information sharing occurs;[2] and

(3) briefly describes the promise of open government.

3.2 The concept of 'open government' has a **long history** and is today well established. The Organisation for Economic Co-operation and Development (OECD) identifies the three characteristics of open government as being transparent, accessible, and responsive, describing these as:[3]

- Transparency – that its actions, and the individuals responsible for those actions, will be exposed to public scrutiny and challenge;
- Accessibility – that its services and information on its activities will be readily accessible to citizens; and
- Responsiveness – that it will be responsive to new ideas, demands and needs.

Governments around the world institutionalise these characteristics through law and policy aimed at accountable government decision making such as by introducing right to information legislation and privacy laws. This is also the case in NSW (see Appendix 4). Open government is also operationalized through the independent government oversight agencies including Ombudsman, audit offices, information commissioners and anti-corruption bodies. The international literature is in broad agreement that these developments deliver a democratic government model.

3.3 While the democratic values of open government have remained constant for centuries,[4] the nature and understanding of how open government may be best achieved is today unfolding at exponential speed. In Australia this change is reflected in two waves of open government reform. The first may be broadly characterised as a top-down approach which began in the 1970s. It resulted in the first federal and state integrity institutions and freedom of information laws. As this is the most developed field of open government regulation and it is only incidentally relevant to the mechanisms discussed in this report. The second wave of reform, and the central focus of this report, formally originates in 2009 (see Appendix 2) and is evolving as more of a bottom-up approach which encourages proactive information release by government and collaborative use of such information by citizens. The first wave of reform has been viewed as a vertical relation between

[2] See the Chronology of Open data across Australia available at http://www.finance.gov.au/blog/
[3] Organisation for Economic Co-operation and Development, 'Modernising Government The Way Forward, 2005, 29.
[4] Joshua Tauberer, *Open Government Data: The Book*, Second Edition: 2014; Abdul Waheed Khan, Foreward to Mendel T, (2003) *Freedom of Information: A comparative legal survey*. New Delhi: UNESCO, 1; Clarke Amanda & Mary Francoli, 'What's in a Name?' (2014) 6(1) *Journal of eDemocracy* 248.

citizens and government where citizens are objects of government policy whereas the second wave is a horizontal relationship where citizens are partners or co producers of government policy.[5]

3.4 The description of open government as occurring in two waves of reform may give the misleading impression that this has occurred in a planned or orderly way. Instead steps taken towards open government have been both incremental and ad hoc. Indeed, there is a 'dearth of open government definitions'. [6] This absence of definition is apparent in Australia where despite appropriation of the term in significant reports such as the Australian Government 'Declaration of Open Government[7] and national inquiries such as those by the Australian Law Reform Commission[8] there is no agreed statement as to what open government means.

3.5 In the absence of agreed definition the **first key challenge** facing the open government agenda is a narrowing of how it should look. The Australian Federal government states that '[T]he possibilities for open government depend on the innovative use of new internet-based technologies'[9] and emphasizes new technology using names such as "citizensourcing", "eDemocracy", eParticipation, "eGovernment", "Collaborative Public Management", "Citizen Engagement", "Wiki government" or "government 2.0"'.[10] However this report begins from the premise that open data is not synonymous with open government, acknowledging the argument in the literature that a narrow focus upon the release of data both between agencies and from government to citizens may represent significant long term risk for the open government 'brand'.[11]

Figure 3 nicely articulates the difference and commonalities of open, big and government data – all of which are acknowledged here as being relevant to improving the flow of government information

[5] Meijer Albert, 'Government Transparency in Historical Perspective: From the Ancient Regime to Open Data in the Netherlands' (2015) 38(3) *International Journal of Public Administration* 189, 196.
[6] Bern W Wirtz & Stevem Birkmeyer, 'Open Government: Origin, Development and Conceptual Perspectives' 381, 382 (identifying only six authors that have attempted to define the term open government).
[7] Australian Government, Department of Finance, *Declaration of Open Government*, http://www.finance.gov.au/policy-guides-procurement/declaration-of-open-government/
[8] Australian Law Reform Commission, *Open Government – A review of the Federal Freedom of Information Act*, 31 December 1995, Report 77; Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, December 2009, Report 112.
[9] Australian Government, Department of Finance, *Declaration of Open Government*, http://www.finance.gov.au/policy-guides-procurement/declaration-of-open-government/
[10] Fons Wijnhoven, Michel Ehrenhard and Johannes Kuhn, 'Open Government objectives and participation motivations' (2015) 32 *Government Information Quarterly* 30, 31.
[11] Frank Bannister, 'The Trouble with Transparency: A Critical Review of Openness in e-Government' (2011) 3(1) *Policy and Internet* 1-30; Lauriault Tracy P, 'Republic of Ireland's Open Data Strategy: Observations and Recommendations' *The Programmable City Working Paper 3* <http//www.nuim.ie/progcity/>; Alon Peled & Nahon Karine, 'Towards Open Data for Public Accountability: Examining the US and the UK Models' iConference 2015; Yu Harlan & David G Robinson, 'The New Ambiguity of "Open Government" (2012) 59 *UCLA L Rev Disc* 178, 182.

(author Joel Gurin https://toolkit.data.gov.au/index.php?title=Definitions).

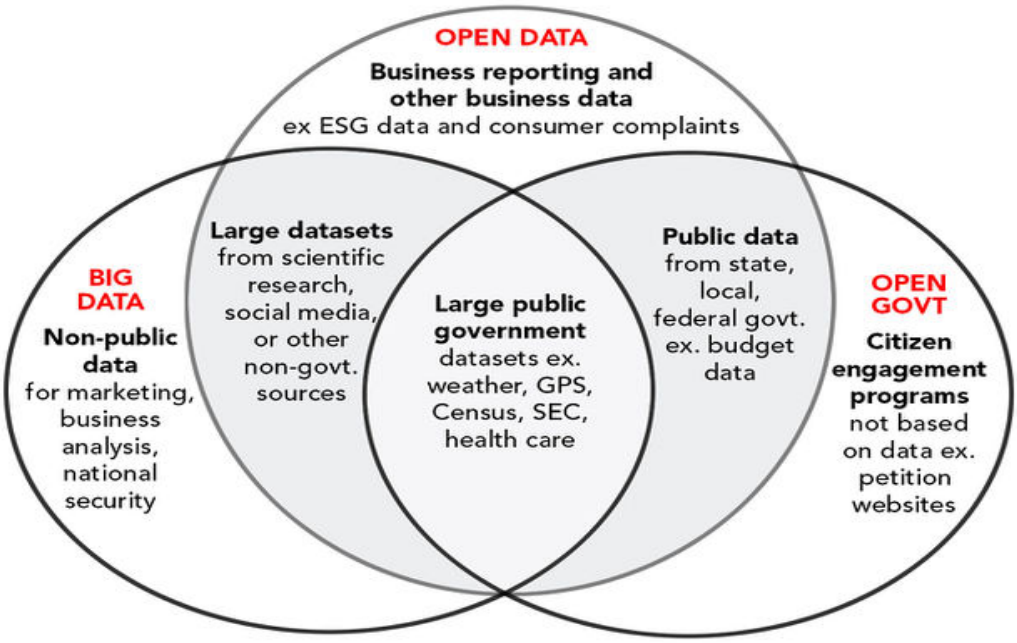


Figure 3 – Data and Open Government

3.7 The **second key challenge** is the legal landscape regulating release of information, being incoherent muddled and confusing to government and citizens alike (see Appendix 4). In terms of inter-agency information release this is a significant challenge for how open government should look. Practical barriers to inter-agency information release are also a barrier and are at times described as 'cultural impediments'[12] to open government. Switches that have been discuss in Australia to such cultural impediments include: agency leadership, officer innovation, community engagement and investment in information infrastructure.[13] Additional barriers and solutions are discussed in Section 5 of this report.

3.8 The **promise of open government** is great. There is growing recognition that no one government agency has adequate information to address high risk and often complex issues alone. Sharing of information between departments should improve the integration of service delivery. Further, open government aims to bring democracy back to its roots in giving citizens a real say in how their communities and nations are governed. Thus an important benefit of open government is democratization of government. Open government is more than high level political commitment. It is argued that social and economic benefits will flow from the release of government data. For example, it has been estimated that 'vigorous open data policies could add around AUD 16 billion

[12] John MacMillan <http://www.oaic.gov.au/news-and-events/speeches/information-policy-speeches/enabling-tomorrows-open-government>.
[13] John McMIillan, OAIC, *Report on Agency Implementation of the Principles on open public sector information* <http://www.oaic.gov.au/information-policy/information-policy-resources/information-policy-reports/open-public-sector-information-from-principles-to-practice>.

per annum to the Australian economy.'[14] The following section now identifies leading international jurisdictions as to how open government should look.

[14] Omidyar Network, *Open for Business: How Open Data can help Achieve the G20 Growth target*, June 2014, <https://www.omidyar.com/.>.

4. Leading International Jurisdictions: How open government should look

4.1. How open government should look on the ground is a difficult question. Open government rankings provide one mechanism to identify best practice in open government. This section identifies the comparative jurisdictions leading the open government rankings. This has two objectives. Firstly, to make explicit choices made in the methodology of this report so as to minimise, or at least contextualise, the 'cherry-picking' of specific strategic mechanisms in Sections 5 and 6. This methodology is further explained in Appendix 1. Secondly, this section provides basis for the subsequent discussion on evaluation (Section 7) and recommendations for future research.

4.2 The open government movement is global. For example in September 2011 the international Open Government Partnership (OGP) was launched as an initiative by 8 founding governments. Today this includes 65 countries.[15] These countries are committed to:

* Increase the availability of information about governmental activities

* Support civic participation

* Implement the highest standards of professional integrity

* Increase access to new technologies for openness and accountability

4.3 International rankings have been issued to determine open government success. These rankings are uncoordinated and disparate (see Section 7). In terms of data release the United Kingdom ranks first. Sweden ranks first (and the United Kingdom ranked 8th out of 102 countries) on the broader World Justice Project Open Government index which measures (1) publicized laws and government data, (2) right to information, (3) civic participation, and (4) complaint mechanisms: [16]

(a) World Wide Web Foundation open data barometer (second edition January 2015)

The United Kingdom ranked first (also did so in 2013) and the United States ranked second.

"Aims to uncover the true prevalence and impact of open data initiatives around the world. It analyses global trends, and provides comparative data on countries and regions via an in-depth methodology combining contextual data, technical assessments and secondary indicators to explore multiple dimensions of open data readiness, implementation and impact.": http://barometer.opendataresearch.org/report/summary/

(b) Open Knowledge Foundation Open Data Index 2015

The United Kingdom first and Denmark second.

"The Global Open Data Index tracks whether this data is actually released in a way that is accessible to citizens, media and civil society and is unique in crowd-sourcing its survey of open data releases around the world. Each year the open data community and Open Knowledge produces an annual ranking of countries, peer reviewed by our network of local open data experts.": http://index.okfn.org/place/

[15] Open Government Partnership <http://www.opengovpartnership.org/.>.
[16] World Justice Project *Open Government Index* 2015 Report <http://worldjusticeproject.org/sites/default/files/ogi_2015.pdf>

(c) World Justice Project Open Government Index 2015

Sweden first and New Zealand second.

"…measure government openness based on the general public's experiences and perceptions worldwide constructed from 78 variables drawn from more than 100,000 household surveys and in-country expert questionnaires collected for the WJP Rule of Law Index": http://worldjusticeproject.org/open-government-index

There are related ranking systems not referred to in this report including: Waseda University World e-Government Ranking (topped by Singapore for 5 years 2009-2013); United Nations e-Government Survey; The World Economic Forum Global Information Technology Report etc.

4.3 Notably this report does not discuss institutional and civil society measures which encourage government information release . However the dominant polling position of the United Kingdom in relation to ease of accessing government information highlights that a major driver for encouraging government information release is government will . In contrast Australia has 'been portrayed as an open data laggard. The label resulted from the nation being ranked 10th in the Open Data Barometer report published by the World Wide Web Foundation.'[17]

4.4 The focus of this report is on triggers for proactive government information release. As such the mechanisms in the following section are sourced from the governments leading the top rankings of the open data indexes and measures such as the Open Government Awards for the OGP. The primary jurisdiction used in this report is the United Kingdom.

[17] Steven Hulse, 'Opening up on 'Open Data', 17 March 2015, *Technology Spectator*, <http://www.businessspectator.com.au/article/2015/3/17/technology/opening-open-data>.

5. Encouraging information release in open government: Strategic tangible mechanisms to promote information sharing between Government agencies

5.1 This section identifies three switches to overcome the behavioural/oganisational issues which prevent inter-agency information sharing (see Figure 1). It draws three mechanisms as practical switches to promote sharing between government agencies from the jurisdictions identified as world open government leaders.

5.2 A 2011 study nominated Australia as a country where the closed government culture is an important barrier to open data policy, one of the respondents to the study stating that 'government practitioners are rewarded for secrecy, not openness'.[18] Existing studies on data sharing relationships between agencies suggest that although technical issues are important it is ultimately behavioural and organisational issues that 'determine the fundamental success or failure of inter-organizational data sharing. [19] A recent NSW study by Keeley et. al, agrees with this, observing that overcoming technological issues is 'less difficult' than the twin factors of organisational barriers and the need for political/policy change which influence information sharing.[20]

5.3 Switch 1 thus focuses upon political/policy change. It is the most critical and substantive change presented in this Section. This Section adopts the broad view of the UK Information Commissioner Office (ICO) which refers to agency information sharing as the disclosure of data which is:[21]

> "from one or more organisations to a third party organisation or organisations, or the sharing of data between different parts of an organisation. Data sharing can take the form of:
> - a reciprocal exchange of data;
> - one or more organisations providing data to a third party or parties;
> - several organisations pooling information and making it available to each other;
> - several organisations pooling information and making it available to a third party or parties;
> - exceptional, one-off disclosures of data in unexpected or emergency situations; or
> - different parts of the same organisation making data available to each other."

[18] Tijs van den Broek, Bas Kotterink, Noor Huijboom, Wout Hofman and Stef van Grieken TNO (Netherlands Organisation for Applied Scientific Research) Open Data need a vision of Smart Government 2011

[19] Zorica Nedovic-Budic & Jeffrey K Pinto, 'Information sharing in an interorganizational GIS environment' (2000) 27 *Environment and Planning B: Planning and Design* 455.

[20] Matthew Keeley, Jane Bullen, Shona Bates, Ilan Katz & Ahram Choi, *Opportunities for information sharing: Case studies*, Report Prepared for NSW Department of Premier and Cabinet, (April 2015) Social Policy Research Centre UNSW, 17.

[21] Information Commissioner Office, *Data Sharing Code of Practice* <https://ico.org.uk/media/for-organisations/documents/1068/data_sharing_code_of_practice.pdf>, 9. Note that the IOC uses the term 'data' – a narrower term than information.

Switch 1: Legislative/structural features that build success: promoting a model of proactive agency information sharing

5.4 Good privacy governance around the release of personal information is both essential to, and at times in tension with, the release of information between agencies.[22] The single commission model of the NSW Information Privacy Commission reflects the complementary nature of privacy of personal information and information sharing which facilitates the operation of these twin principles and their enforcement.

5.5 Removal of doubt as to when private information can be shared is critical. Existing research shows that staff in government agencies find the process of information sharing challenging due to factors which include: unfamiliarity with legislation; lack of resources to access legal advice or time to consult with colleagues from other organisations; or commercial sensitivities; or concern that information sharing will have negative repercussions for clients.[23]

5.6 A clear legal and policy framework to promote a model of agency sharing is critical. While the IPC has Data Protection Principles[24] these are a 'best practice' guide. This Switch suggests promoting a model of inter-agency information release by adopting the principles based UK regulatory framework.

5.7 **EXAMPLE**  In the UK the legal requirements for data sharing are legally enforceable by the ICO. Everyone responsible for using data has to follow strict rules called 'data protection principles'. The principles are enacted under the Data Protection Act (UK) (see Appendix 4). Broadly, a public body may only share data if it has the power to do so (under legislation or the common law). If the agency has the relevant legal power to share information the next step is to consider whether the proposal is compatible with the eight data principles.[25]

5.8 The principles are in essence a code of good practice for processing personal data. For example for bulk sharing of personal data with other public bodies or organisations it is strongly advisable to have in place a Data Sharing Agreement or Memorandum of Understanding to formally define the project, ensure that relevant considerations have been considered, and record the respective obligations of the parties absence of a written agreement underpinning such data sharing may be a

[22] Matthew Keeley, Jane Bullen, Shona Bates, Ilan Katz & Ahram Choi, *Opportunities for information sharing: Case studies*, Report Prepared for NSW Department of Premier and Cabinet, (April 2015) Social Policy Research Centre UNSW, 23-26.
[23] Matthew Keeley, Jane Bullen, Shona Bates, Ilan Katz & Ahram Choi, *Opportunities for information sharing: Case studies*, Report Prepared for NSW Department of Premier and Cabinet, (April 2015) Social Policy Research Centre UNSW, 19.
[24] http://www.ipc.nsw.gov.au/data-protection-principles
[25] See Appendix 4 Schedule 1 and 2 – personal data under Schedule 1 cannot be processed unless one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

breach of the seventh data protection principle.[26]The United Kingdom Information Commissioner Office has developed a Data Sharing Code of Practice which is a statutory code. [27] While it does not impose additional legal obligations it can be used in evidence in any legal proceeding. One aim of the Code is to enable agencies to share data with confidence.

5.9 This switch is a regulatory tool which ensures collective agency responsibility for proactive information sharing. It will provide a model of inter-agency information sharing and facilitate information exchange. However it is not a panacea. A recent report of the UK Law Commission notes, that despite the data sharing framework, 'the law applicable to information disclosure by public bodies is fragmented and complex'.[28] It is also noteworthy that the submission to the UK Law Commission by the ICO observes that an even '…more prominent place for data protection law would help simplify the legal landscape.'[29]

Switch 2: Promoting proactive release of government data across organisational walls: Recognise and reward the individual

5.10 The literature consistently identifies a barrier to proactive information release as a silo mentality which resists information sharing across government. Suggested strategies to overcome this include faster diffusion and sustainability of opening data within public administration by the complement of a data culture along with direct technical and legal support to employees.[30]

5.11 **EXAMPLE**  The United Kingdom is growing a data culture through recognising Open Data Champions. The Open Data Champions were selected for putting data back into the hands of citizens and communities to create opportunities for innovation, economic and social growth and better public services: [31]

To promote a data culture the UK Government selected sixteen local and regional authorities as 'setting the standard in open data and transparency'. These authorities were recognised as 'Open Data Champions'. They took part in a roundtable event on 24 March 2015 which brought together leaders and CEOs from these authorities to explore the role of open data in the local authority of the future.

The aim of this initiative is to establish a group committed to releasing open data, and creating and sharing stories that show the benefits of open data.

[26] https://www.justice.gov.uk/downloads/information-access-rights/data-sharing/annex-h-data-sharing.pdf
[27] Information Commissioner Office, *Data Sharing Code of Practice* <https://ico.org.uk/media/for-organisations/documents/1068/data_sharing_code_of_practice.pdf> 6
[28] Law Commission, *Data Sharing between Public Bodies: A scoping Report* (Law Com No 351), 10 July 2014, 49.
[29] Law Commission, *Data Sharing between Public Bodies: A scoping Report* (Law Com No 351), 10 July 2014, 166-167.
[30] Ivan Bedini, Feroz Farazi, David Leoni, Juan Pane, Ivan Tankoyeu, Stefano Leucci, 'Open Government Data: Fostering Innovation' (2014) 6(1) *Journal of eDemocracy* 69-79, 78; Hartog, Martijn and Bert Mulder, Bart Spee, Ed Visser and Antoine Gribnau 'Open Data Within Governmental Organisations' (2014) 6(1) *Journal of eDemocracy* 49-61, 58
[31] Jamie Whyte, Trafford Recognised by Cabinet Office as Open Data Champions http://www.infotrafford.org.uk/lab/blog/cabinet-office-open-data-champions

5.12 **EXAMPLE** United States research identified employees who have no need for technical or legal support in that they operate as 'boundary spanners'.

A United States study by Nahon & Pelod [32] identifies 555 individual gatekeepers as responsible for the disclosure of public data in US federal agencies. These were detected by studying and analysing the metadata author of each information asset. Of these they then identified two individuals responsible for releasing large amounts of information. These individuals were described as 'boundary-spanners' – as they sought opportunities to disseminate open data information deeply and extensively inside their own agency and across organisational walls in government, and between government and other sectors and thus being prepared to operate across silos.

The research has not gone further than identification nonetheless this mechanism has potential to overcome the barrier identified in the literature of the need for education and training of government employees in general. A 'boundary spanner' is recognition of how open data may disrupt government's traditional role as holder or owner of the data[33] and is an informal variation upon firstly, the more formal Chief Data Officer roles (focusing on analytics) in the United Kingdom and in many US cities starting with Chicago (in 2011) and secondly a nominated point of contact for the release of open data such as the NSW government where agencies nominate individuals (see here http://data.nsw.gov.au/plan).

5.13 **EXAMPLE** The Obama Administration has made prizes and challenges standard tools in every Federal agency's toolbox. Nearly 400 prizes and challenges have been posted on challenge.gov since September 2010 (see https://www.whitehouse.gov/open). Recognition may also be given by external independent evaluators:

In the United States an independent publication 'Citylab' which names ten of its favourite metro data sets **'Best Open Data Releases'** from cities across North America in an annual look at the extensive information now available from city governments, and the tools people are building with it. One of the top ten of 2012 is:

…Bikeshare rides in Boston. Boston's Hubway bikeshare system published a massive file of historic trip data… then invited riders and developers to turn the information into something useful with a data visualization challenge.

See http://www.citylab.com/tech/2012/12/best-open-data-releases-2012/4200/

Prizes are used internationally as a carrot to encourage agencies and individuals to promote transparency. In Australia the Report of the Government 2.0 Taskforce recommends awards for individual public servants and agencies.

5.14 The use of prizes and awards is based on notions of incentives or a 'pull' factor for proactive information release. Identifying Open Data Champions and boundary spanners is perhaps,

[32] Karine Nahon & Alon Peled, 'Data Ships: An Empirical Examination of Open (Closed) Government Data' *Proceedings of the 48th Annual Hawaii International conference on System Sciences* (HICSS 48) 2015.
[33] Natalie Helbig, Anthony M Cresswell, G Brian Burke and Luis Luna Reyes, *The Dynamics of Opening Government Data: A white paper* (2012) Center for Technology in Government

somewhat more broadly, based on the principle of dis-intermediating. These mechanisms collapse boundaries between politicians, public servants, and citizens. They free public servants from their traditional gatekeeping role where the public servant is the middleperson between government and the citizen and therefore the distributor/withholder of information.

Switch 3: Build inter-agency trust: the use of soft regulation

5.15 Keeley et. al, identify 'shared understandings and trust, or at least management of mistrust, as among the most important determinants of whether staff from different organisations are prepared to share information'.[34] Solutions in the literature include: communicating good practice systems, providing adequate resources for training and security systems, maintaining good working relationships with other public bodies and providing clarity of rules of disclosure while maintaining flexibility.[35] This Switch provides examples of 'soft law' regulatory choices which may facilitate trust. This acknowledges that problems with information sharing between agencies is both structural/legal and practical.

5.16

EXAMPLE 

The ICO urges urges heads of organisations and government departments to sign up to the *Personal Information Promise*. The promise is to demonstrate their organisation's senior level commitment to data protection and also is designed to send 'a clear signal to the workers in the organisation about the importance of looking after people's personal information and that this is something taken very seriously at senior level'. [36] It is neither mandatory nor legally enforceable nor intended to replace Information Charters. The signatories are publicly listed on the ICO website. Other examples of soft regulatory approaches include self-assessments, ICO privacy seals and education packages.

5.17

EXAMPLE 

A recent report in the United Kingdom examined multi-agency models with respect to children and vulnerable adults.[37] It identified a spectrum of agencies – ranging from those with some existing forms of coordination in practice through to those with virtual links and finally agencies with real time information sharing (ie: MASH). Such organisations rotate staff, enable peer-to-peer learning, have joint training and information sharing protocols.

5.18

EXAMPLE 

Trustworthiness can be heightened by reducing disincentives to share and promoting incentives to do so. [38] Simple steps which

[34] Matthew Keeley, Jane Bullen, Shona Bates, Ilan Katz & Ahram Choi, *Opportunities for information sharing: Case studies*, Report Prepared for NSW Department of Premier and Cabinet, (April 2015) Social Policy Research Centre UNSW, 17.
[35] Law Commission, *Data Sharing between Public Bodies: A scoping Report* (Law Com No 351), 10 July 2014, 56 (and see p 84).
[36] ICO, https://ico.org.uk/for-organisations/improve-your-practices/personal-information-promise/
[37] Home Office, *Multi Agency Working and Information Sharing Project*, Final Report July 2014.
[38] Law Commission, *Data Sharing between Public Bodies: A scoping Report* (Law Com No 351), 10 July 2014, 105-106.

promote trust with respect to information sharing may be followed: such as (1) feedback on the outcome of sharing the information and (2) ensuring that the agency supplying the information understands the public benefit of its provision. Acknowledgement of resource and economic implications of data requests should be made – this is often all the more necessary as the sharing of data is often not regarded as 'core business'.[39]

6. Encouraging information release in open government: Strategic tangible mechanisms to promote information release between Government and the public

6.1 The eight mechanisms below are inexpensive switches to promote release of government information to the public. As such they do not overly require permanent policy, legislative or administrative change. The mechanisms are grouped under the three characteristics of open government identified by the OECD – Transparent, Accessible, Responsive (see Figure 2).

TRANSPARENT: Promoting proactive release of government information: Democratizing information sharing

Mechanism 1: Democratizing information sharing through using Games Contests, App development and Hackathons (Civic Hacking) to crowd source ideas and promote government information release

6.2 This refers to public sector problem solving. Initiatives such as 'hackathons' which 'crowdsource' an online community to solve a problem through ideas and software development. These are already used successfully in NSW where the first State Government apps competition in Australia was introduced.[40] Another example is the MashupAustralia contest held by the Government 2.0 Taskforce, cash prizes of up to $10 000 were offered for 'excellence in mashing' and special prizes offered for students. The usefulness of contests such as "hackathons" or app development is not to necessarily derive useful innovations but rather to view each one as a small part of an incredibly broad movement.

6.3 **EXAMPLE**   Democratizing information sharing in this way is extensively used in the United Kingdom.[41] Innovations are also occurring in the United Sates with respect to crowdsourcing ideas through gaming. For example the US Institute for the Future, which identifies emerging trends and discontinuities has written a white paper[42] on

[39] Law Commission, *Data Sharing between Public Bodies: A scoping Report* (Law Com No 351), 10 July 2014, 111.
[40] < http://data.nsw.gov.au/apps4nsw>.
[41] Public Data Group, *Statement on Public Data,* Summer 2014 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/329817/bis-14-969-public-data-group-open-data-statement-2014.pdf>.

whether a game can 'generate insight into a complex problem facing the Navy?' The example used was a multiplayer online wargame (mmowgli) which gave the US Navy a chance to crowd source ideas on how to tackle energy problems. [43]

One example of the public using this space innovatively is the group named 'Code for America' https://www.codeforamerica.org/geeks/ . Their website states 'You have the power to help your city: Here are some simple ways to get started with civic hacking' - one example of a tool developed by them is called 'Aunt Bertha' which helps users find food, health, housing and employment programs based on their postal code.

Mechanism 2: Measure Government Performance: Encourage Citizen Rankings

6.4 Measurement tools vary. This mechanism is intentionally expansive and includes reporting on government performance through local, state and national rankings and organisational rankings. It includes the global rankings (see section 4). It extends to non-global rankings. Citizen rankings or regular on-going satisfaction measurement in relation to government service provision is the less common form of ranking. This is to be encouraged. In Australia there have been surveys undertaken such as the 2010, Quantum's social research survey - *AustraliaSCAN* – which asked a question aimed at measuring satisfaction ratings against a list of 15 variables, across the three tiers of government. In addition Australian citizen dashboards are slowly being developed (see http://au-city.census.okfn.org/ and http://australia.census.okfn.org/).

6.5

EXAMPLE

The U.S. Public Interest Research Group Education Fund who issued a recent report "Following the Money 2015: How the 50 States Rate in Providing Online Access to Government Spending Data". This compares US states on an inventory of the content and ease-of-use of states' transparency websites (assigning each state a grade of "A+" to "F"). Other examples, of which there are many, include:

(a) government reporting on its own progress such as: in the United States the Project Open Data Dashboard (http://labs.data.gov/dashboard/offices) shows how Federal agencies are performing on the Open Data policy;

(b) government reporting on its own open data initiatives (such as DATA NSW - http://data.nsw.gov.au/ and also see Issy-les-Moulineaux a small city on the outskirts of Paris https://www.data.gouv.fr/en/dashboard/;

(c) Ongoing reporting by government against targets listed in strategic plans. An example is the City of Edmonton citizen dashboard whereby the city posts its targets and reports where it is at with them: https://dashboard.edmonton.ca/.

(d) Citizen rankings or regular on-going satisfaction measurement (www.patientopinion.org.uk/ ; www.patientopinion.org.au/;www.patientopinion.com/)

[42] Institute for the Future, 'Government for the 100%: using games to democratize innovation and innovative democracy' <http://www.iftf.org/fileadmin/user_upload/downloads/MMOWGLI_Government_SR-1539.pdf>.
[43] Julia Pyper and ClimateWire, (2012) 'Navy Recruits Players for Online War Game to Tackle Energy Challenges' *Scientific American*.

6.6 **EXAMPLE**  In the United Kingdom info-philanthropy [44] is encouraged. This term described the creation by individuals or not-for-profit based organisations of information assets as a public good:

Armchair Auditor OnTheWight. http://armchairauditor.onthewight.com/ With this Website you can easily and quickly find out where the Isle of Wight council has been spending their/our money. We've also gathered a large amount of the council's Credit Card spending, so you can look through that too.

ACCESSIBLE: Improve consumption of government information:

Mechanism 3: Selecting policy area as the moderator for transparency and usage by combining a bottom-up and top-down approach to select specific data sets for release

6.7 The literature consistently identifies a gap between what government stakeholders and what citizens think is important information to publish.[45] This gap is viewed internationally as problematic. This gap is critical to resolve given the *NSW Government Open Data Policy*, September 2013, V1.0 encourages the release of 'high value' data sets which 'will be identified by the agency responsible for managing the Dataset (the 'custodian')'. The story of data release by government is one littered with error. This learning curve is reflected in the Australian experience. For example Data.gov.au was established in 2011. Its aim is to provide an easy way to find, access and re-use public datasets from the Australian Government. When it was Relaunched 17 July 2013 (using the CKAN, Comprehensive Knowledge Archive Network) platform on the Amazon cloud (Australian based) the number of data sets fell from 1200 to 500.[46]

6.8 **EXAMPLE**  The United Kingdom strategic approach to data set selection combines a top-down push directing departments to release data sets and a bottom-up process to prioritise data for release.[47] The UK government suggests that this results in the release of stakeholder relevant information and not just information the government regards as 'core'. Formal steps have been taken such as the establishment of a group in the Cabinet Office comprising 14 officially selected volunteers from the civil society and the private sector who

[44] Report of the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0,* 2009, 13.
[45] Craig Thomler, 'Government stakeholders and citizens see different priorities for open data release' Blog post, March 21, 2014 <http://egovau.blogspot.com.au/2014/03/governmetn-stakeholders-and -citizens.html> citing Socrata.com.
[46] Allie Coyne, 'Govt finds one third of open data was "junk" (2013) <http://www.itnews.com.au/News/363834,finance-finds-one-third-of-open-data-was-junk.aspx>.
[47] HM Government, *The Government Response to Shakespeare Review of Public Sector Information*, June 2013

play an advisory role on the data the government should release.[48] The importance of combining approaches is confirmed in the following study:

> An empirical study comparing the release of information by two Czechoslavakian public sector bodies – focused upon the benefits of a 'top down' information release approach as opposed to a 'bottom up'.[49] The study found a bottom-up approach (releasing a specific data set) to be quicker and to allow the body to learn from experience. Here noting that selecting the right databases might also be significant – selection being done according to large FOI requests and the fact that a portion of it was already published on the website). This would then promote re-use – this was seen as a significant evaluation factor – tracking and mapping re-use of data. The bottom up initiative consumed only 30 man-hours while the top-down took several personnel months – the top down was an analysis of available datasets in order to identify suitable data sets for opening up and priorities of release were set – so all datasets examined and a subset selected.

An empirical study of two Swedish municipalities – Stockholm and Skelleftea - showed that there is a difference in information release as to whether open data is approached as a long term or short term strategy. [50] A long term bottom-up approach was favoured by the study.

6.9 In summary a 'purposeful approach to information release will enable the value of information as a strategic asset to be realised'.[51] In Australia purposeful release is practically possible and is encouraged through the use of Freedom of Information (FOI) Disclosure logs (see: *Government Information (Public Access) Act 2009 (NSW)* (GIPA Act) s 25; *Freedom of Information Act 1982* s 11C(3)). As noted in a NSW IPC Knowledge Update in 2012 the appearance of FOI disclosure logs provide opportunity as 'it indicates to the agency the type of information that it should consider releasing proactively…'. A further bottom up example is the use of public suggestion through websites (ie: data.gov.au) which allow citizens to suggest data sets for public release.

Mechanism 4: Use non-government platforms to promote government information

6.10 This is part of the Commonwealth government push for open data. The Government encourages usage of third party sites to reduce future duplication of online services between government and user-generated sites and to complement citizen-led endeavours rather than crowd them out of the market. For example its *Publishing Public Sector Information – Web Guide*[52] states that options for publishing datasets include:

- agency websites
- *data.gov.au*
- Data collections or catalogues
- third party sites

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[48] Ubaldi, B, 'Open Government Data: Towards Empirical Analysis of Open Government Data Initiatives' (2013) *OECD Working Papers on Public Governance*, No. 22, OECD Publishing. <http://dx.doi.org/10.1787/5k46bj4f03s7-en>, 35.

[49] Jan Kucera & Dusan Chlapek, 'Comparison of Approaches to Publication of Open Government Data in Two Czech Public Sector Bodies' (2014) 6(1) *Journal of eDemocracy* 106-111.

[50] Josefin Lassinantti, Birgitta Bergvall-Kareborn and Anna Stahlbrost 'Shaping Local Open Data Initiatives: Politics and Implications' (2014) 9(2) *Journal of Theoretical and Applied Electronic Commerce Research* 17-33

[51] Elizabeth Tydd, 'Around the world with open government' (2015) 42 *Public Administration Today* 53

[52] Australian Government, 2011, *Publishing Public Sector Information – Web Guide* <http://webguide.gov.au/web-2-0/publishing-public-sector-information/>.

This mechanism may extend across platforms such as apps, blogs, social media and established websites. One benefit is to ensure that government does not duplicate the efforts of pre-existing user-generated sites or. It will also allow government to work with service users more cheaply by working with pre-existing non-government user platforms. This strategy is clearly necessary as shown in a 2015 survey by UK Public Data Group confirming the significance of combining data from different sources:

> In the UK a recent survey which received 143 responses from organisations including a range of size and sectors - from GCSE students, to established major financial institutions.
> Responses supported the idea that the value in data lies in combining it with other data sources. In fact almost 86% of responses from those using data were using data from more than one source. There were very few instances of organisations using the same combination of data sets but the importance of both Ordnance Survey data and data from Local Authorities was clearly made. Another noticeable point is the number of respondents who aren't exclusively using open data. 40% for example were using paid data from private sources in addition to other data sources. [53]

6.11 **EXAMPLE**  Exeter City Council has a clear policy as to the third party websites the authority will and will not link to (http://www.exeter.gov.uk/). This encourages combining data and information from different sources and identifies the potential benefits of government using established third party platforms. As stated in a 2007 UK report:[54]

> "I was once on holiday in a foreign country where some very active political unrest started kicking off. ..the situation was serious enough for the Foreign Office to issue a travel advisory. I got chatting to this guy in a bar who worked at the British Embassy, and he was saying he was very frustrated that his bosses wouldn't let him go and post something on the Lonely Planet forum. He knew perfectly well that was where all the travellers were looking for information and discussing the situation. "We should be in there, part of that conversation, or what's the point" he said."

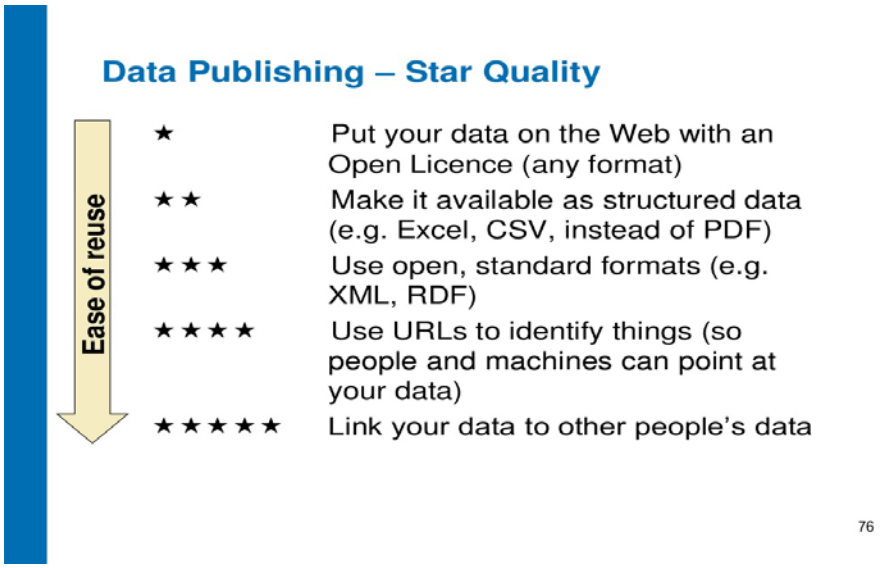
Mechanism 5: Republishing and re-using government data

6.12 Free data, flexible licencing, accessible, re-usable and easy to find data sets which are released as timely and relevant are all preconditions to this mechanism. This mechanism is concerned with what happens after data is released. In NSW government data should be released with a statement as to its quality.[55]

6.13 **EXAMPLE**  The United Kingdom scheme for data publishing (see data.gov.uk) ranks data published according to a 5-star rating scheme. This is

[53] Public Data Group, *Statement on Public Data,* Spring 2015 Updatehttps://www.gov.uk/government/uploads/system/uploads/attachment_data/file/414811/bis-15-247-public-data-group-open-data-statement-2015.pdf
[54] Mayo Ed & Tom Steinberg, *The Power of Information*, (June 2007) <http://www.opsi.gov.uk/advice/poi/power-of-information-review.pdf>,43.
[55] NSW Government, *Open Data Policy*, September 2013, 1.0, <http://www.finance.nsw.gov.au/>.

presented in the diagram below: [56] indicate whether the data and the format that it is published in is open.



The Sunlight Foundation also recommends not only listing available data sets but to make the listing of data as useful as possible. For example such a list should be guaranteed in terms of availability of data and also encompass data that may be viewed as sensitive or unlikely to be released (along with any other helpful context).

6.14 The literature contains some answers as to how to effectively encourage individuals to engage in data re-use. Three of which are:

1. Emphasize local use of data: such as the fact that data often becomes more useful when it is local (this does not currently occur with many Australian data reuse stories which are available, see http://ands.org.au/discovery/reuse.html);

2. Create physical localities for data sharing: 'makerspacers' sometimes referred to as hackerpsaces' or physical locations where people gather together to share resources an knowledge have increased from 9 to 97 in the UK since 2010 (see http://www.nesta.org.uk/blog/top-findings-open-dataset-uk-makerspaces); and

3. Use young people and parents: A UK Nesta study found that 82% of young people say they are interested in digital making and 89% of parents say it is a worthwhile activity (see http://www.nesta.org.uk/publications/young-digital-makers).

RESPONSIVE: Sharing information: involving non-government actors as co producers in governance

Mechanism 6: Integrate established non-government organisations into policy making

[56] Andrew Stott, 'Open Data: its value and lessons learned' UK Transparency Board, Presentation to Australian Government Open Data Group, February 2014 <http://www.slideshare.net/dirdigeng/20140203-opendataaustralia01>.

6.15 This mechanism suggests linking government with established non-government organisations to co produce information. The benefit of using such organisations is the established springboard they offer for a horizontal approach to promote open government through proactive information release.

6.16 EXAMPLE  Danish Case Study: In 2014 the Danish Senior Citizens Councils won the global Open Government Awards for the international Open Government Partnership (OGP).

Senior Citizens Councils is a voluntary nationwide organization which consists of Senior Citizens Councils, each representing one of the 98 municipalities in Denmark. The purpose is to work as a connection between the elderly people (over 60s) and the local decisionmakers, by being consulted in all matters regarding elderly people ...Senior Citizens Councils are based on Danish social legislation and are tied to the local politicians and local government. The Councils have proven efficacy and have a real impact on local government policy relating to the elderly....

In addition to consulting the local SCC in formal decision-making processes, many local city councils involve the SCC earlier in the process, such as in the planning phase of construction of new care housing, relocation of bus stops, developing special measures for people with Alzheimer's, etc. The Council members are critical, but also view every issue as a whole and respect that it may be necessary for politicians to prioritise and make tough choices.

6.17 This model of collaboration between government and non-government citizen organisations exists to varying degrees across Australia. A variety of well-established civil society groups perform a similar role to the Danish Senior Citizen Councils. Prominent examples of such organisations are the Australian Council of Social Service (ACOSS) and the Council of Social Service of New South Wales (NCOSS). For example ACOSS (with organisations such as the Australian Council of Trade Unions and the Business Council of Australia)[57] submits proposals to government for improvements to employment assistance services and NCOSS describes its own role as a 'channel for consultation with government and between parts of the non-government sector with common interests and diverse functions' and is involved in many government and private sector committees and advisory bodies (see Appendix 4).[58]

6.18 EXAMPLE  **Case Study: ACOSS and The Give Grid**: In May 2014 ACOSS launched a National Project to help community organisations to cut energy use and costs. ACOSS' Give Grid Project has involved workshops and webinars, as well as the provision of online resources to help community service workers to reduce electricity use in the workplace. It is being evaluated this year.

The project was developed by ACOSS in response to a sectorwide survey conducted in 2013 to find out how the community sector copes with energy costs and accessing energy efficiency. In the survey, 70% of community organisations told ACOSS they want to undertake an energy efficiency audit to help them cut costs, but that the costs involved were the main barrier to doing so.

[57] ACOSS Annual Report 2013-2014.
[58] NCOSS Annual Report 2013-2014, 11-12.

In response ACOSS developed The Give Grid as a hub for sharing and supporting Good Energy Stories across the community sector. The aim is to implement 'The Give Grid' as a project to support community organisations large and small become more energy efficient, and enjoy all the savings that brings http://www.thegivegrid.org/

The project received funding from the Australian department of industry as part of the energy efficiency information grants program, linking at establishment stage the Australian Government Department of Industry and ACOSS

The Give Grid case study highlights two obvious differences between the Australian organisations and the Danish Senior Citizen Councils. Firstly, the Australian organisations operate as private companies. There is an absence of the formal legislative framework which exists in the Danish example which limits the coproduction model. This is a structural limitation which may be of relevance to the efficacy of using existing organisations as mechanisms for information exchange. Secondly, and more importantly, there is a missing information loop exchange. In the Danish case study citizen input into governance occurs prior to decision making arguably this step is required in order to establish non-government organisations as co producers of government policy.

Mechanism 7: Ensure sustainable change through the integration of "ecosystems" [59] of key actors

6.19 This mechanism is based upon the promise that the creation of the right ecosystem – i.e. a community of key actors - is essential not only to reap the economic benefits, but also to generate the value of open government data initiatives in social and political terms. The point is not that the ecosystem exists broadly but is identified on a scaled down version - as specific communities of actors to interact with. This will promote open data use by third parties, as well as the uptake of the use of technology through the apps (and other forms of social media) based on open data, which are essential factors to make open government data initiatives sustainable and to create value. The aim is that in doing so this overcomes or perhaps even removes the need for an intermediary between open data and users of open data, enabling the ecosystem to provide the target group for raw data.[60] This mechanism suggests *strategic ecosystem thinking,* which may include '(1) identifying the people and organizations that act as essential components of the ecosystem; (2) understanding the nature of the transactions that take place between those entities, perhaps aided by the creation of a visualization of the localized ecosystem in action; (3) recognizing what resources are needed by each entity in order to engage with each other in transactions of value; and (4) observing the indicators that signal the relative health of the ecosystem as a whole'. [61]

6.20 **EXAMPLE** The app —Asthmopolis‖ is an example of an application developed thanks to an ecosystem of people – here asthma sufferers. The app has

[59] Ubaldi, B, 'Open Government Data: Towards Empirical Analysis of Open Government Data Initiatives' (2013) *OECD Working Papers on Public Governance*, No. 22, OECD Publishing. <http://dx.doi.org/10.1787/5k46bj4f03s7-en> , 34.

[60] Ann-Sofie Hellberg and Karin Hedstrom, 'The story of the sixth myth of open data and open government' (2014) *Transforming Government: People, Process and Policy* (2015) 9(1) 35-51, 42.

[61] Teresa M. Harrison, Theresa A. Pardo and Meghan Cook 'Creating Open Government Ecosystems: A Research and Development Agenda' (2012) 4(4) *Future Internet* 900-928.

brought social value and improved quality of life to a vulnerable segment of the population: people with asthma.

…a small Bluetooth device that attaches to an inhaler, sending updates to an app on an iPhone or Android smartphone. The app collects detailed data about when and where people use their inhaler, relying on the GPS on their phone to pinpoint their location, with the app automatically creating an "asthma diary" for them. This information can help asthma patients and their doctors track exactly when and where they have asthma symptoms, as well as identify when their asthma is not under control.

Public data and data provided by people affected by the disease have been merged into the app to enable the identification of highly dangerous spots in the U.S. for asthmatic people. Hospitals have recorded a decrease of 25% of the incidents since the app was created.

Mechanism 8: Encourage co-production of information through individual citizen contributions

6.21 This mechanism focuses upon how to engage the citizen as a co producer of government information. This recognises the citizen evolving from a dependent relationship upon government for information to one of mutuality and reciprocity where citizens in receipt of government services are conceived as resources of value to, and collaborators in animating, the system, rather than as mere beneficiaries of it. This means that citizens as users of public services are not defined entirely by their needs, but also by what they might contribute to service effectiveness, and to other users and their communities through their own knowledge, experience, skills and capabilities. [62]

6.22 **EXAMPLE**  Innovations such as Canberra Connect introduced by the ACT Government in 2001 exemplify e-government initiatives which make access to government easy by providing a whole-of-government platform for customer service delivery. [63] These initiatives have been classified as the first wave of digital era governance or Web 1.0 systems. These systems remain significant today, for example the Singapore government uses a 'OneInbox' which ' is the official Government platform where individuals can receive their government-related correspondences electronically, in place of hardcopy letters'.[64]

6.23 **EXAMPLE**  The next wave is made possible by Web 2.0 developments such as social networking approaches through cloud computing. This is also characterized by innovative use of digital systems. Websites are being used in innovative ways to enhance the interaction between citizens and government. For example in the United States:[65]

[62] Brenton Holmes, 'Citizens' engagement in policymaking and the design of public services' (22 July 2011) Parliament of Australia, *Research Paper no. 1 2011-2012*.
[63] ACT Government *Open Government: Opportunities for e-Services Delivery in the ACT* <http://www.cmd.act.gov.au/open_government/report/connected_community,_connected_government#fn-201-103> Citing Patrick Dunleavy, (2010) *The future of joined-up public services* 2020 Public Services Trust
[64] Singapore eGov, <http://www.egov.gov.sg/egov-masterplans/egov-2015/programmes;jsessionid=BD149FDB4A222EF141C38B096FFEC1E3>.
[65] 2014 Open Government Awards <https://www.opengovawards.org/Awards_Booklet_Final.pdf>.

The National Archives engages citizens to help unlock historical government records through crowdsourcing projects on the Citizen Archivist Dashboard. Since 2012, citizens have contributed millions of tags, metadata, transcriptions, video subtitles, and digital images to the project.

6.24 **EXAMPLE** Apps promote interactivity between citizen and government. For example the City of Edmonton has developed a "311 mobile App" - the 311 apps are cited as one of the top ten innovations for smart cities.[66]

Report your concerns on the go with the Edmonton 311 App!

Help keep Edmonton great! Be the eyes and ears on the streets!

Send a photo with your request and use your smartphone's GPS function to pin point an issue's location. By doing this, you're helping us to better assess, prioritize and determine the corrective action based on severity, location, and other factors.

[66] <http://www.villageswithoutborders.com/#!about/c20r9>.

7. Evaluation of open government

7.1 The pressing question is how best to evaluate the success of any open government effort and more particularly the proactive sharing of government information? As section 4 identifies there are a number of international ranking or benchmarks used in this area. This leads some commentators to observe that the problem is not that transparency has not been measured enough but that rather what we see is a patchwork of ratings and indices evaluating various aspects of government openness, '[T]here is no single rating that is both comprehensive and truly global in scope'.[67]

7.2 Rankings do not measure inter-agency information release. Further, while countries such as the United States and the United Kingdom lead the world performance rankings for open government, significant blocks to information release remain in those jurisdictions. For example, despite US agencies self-evaluation of themselves as meeting expectations of the Open Government Directive[68] Nahon and Peled[69] found that 5 years after the announcement of open government by the Obama Administration that most US federal agencies do not comply with the standard while 25 partially and weakly comply with it. The same authors identify blocks to evaluation of agency performance in the United States as:

- Agencies not setting openness deadlines or publishing performance data;
- Refusing to share data release plans;
- Did not live up to goals they themselves set.

7.3 Formal and reliable evaluation of the mechanisms suggested in this report do not exist. Indeed metrics for assessing the impact of government efforts to operationalize the principles of open government through proactive information release both between agencies and from government to the public are not obvious. [70] Existing evaluation tends to focus on compliance, assessment of more complex indicators of value such as information availability, use, and impact proves considerably more complicated. In short no consensus has emerged on what counts as metrics for success in open government.

7.4 That said there are building blocks for future research on evaluation of open government distributed throughout the literature. A recent report used case studies to examine information sharing across agencies in NSW;[71] examples of evidence based evaluation include peer comparisons

[67] Sheila S Coronel, 'Measuring Openness: A survey of transparency ratings and the prospects for a global index' *freedominfo.org* http://www.freedominfo.org/2012/10/measuring-openness-a-survey-of-transparency-ratings-and-the-prospects-for-a-global-index/

[68] Angela M Evans & Adriana Campos, 'Open Government Initiatives: Challenges of Citizen participation' (2013) 32(1) *Journal of Policy Analysis and Management* 177

[69] Karine Nahon & Alon Peled, 'Data Ships: An Empirical Examination of Open (Closed) Government Data' *Proceedings of the 48th Annual Hawaii International conference on System Sciences* (HICSS 48) 2015

[70] Karen Gavelin, Simon Burall and Richard Wilson, *Open Government: beyond static measures*, A paper produced by Involve for the OECD, July 2009

[71] Matthew Keeley, Jane Bullen, Shona Bates, Ilan Katz & Ahram Choi, *Opportunities for information sharing: Case studies*, Report Prepared for NSW Department of Premier and Cabinet, (April 2015) Social Policy Research Centre UNSW.

and comparisons to targets[72] and statistical analysis of time series data – an example of such an evaluation being that of the Chicago Alternative Policing Strategy (CAPS) which started in 1993.[73]

7.5 There is current research underway, such as the Australian Open Data 500 and the OGP research agenda, however more nuanced and extensive research is required. As McMillan states '[o]pen government is multi-dimensional: it is more than the disclosure of hitherto secret information; it is also about how society is governed, who participates in government, how decisions are made, and how information is managed.'[74] Future research must map inter-agency information sharing. Questions to investigate may include: What are enablers for information sharing? What is being done well in NSW? What information-sharing policies are needed? How can the dissemination of government information between agencies (and to the public) be done most efficiently and effectively be realised in a context-relevant, timely and actionable manner? Future research must also identify and evaluate the different stages of information release (ie: infrastructure development and education of citizens and government employees; usage of information and transformation such as public value).

7.6 This report recommends that the **immediate next step** is to implement selected mechanisms from this report and to evaluate them. It is suggested that Switch 1, in Section 5, be the first mechanism implemented and evaluated. The UK model of a principles based regulatory model to promote a model of proactive agency information sharing – adapted and applied in the NSW context promises to build upon the strategic direction already taken in NSW.

7.7 Longer term this report recommends both a macro and micro approach for future research.

A **macro impact** evaluation will examine the broad outcomes of an initiative from a social, political and economic perspective. Needed research includes:

1. Development of a core list of performance indicators across each of the three characteristics of open government: transparency, accessibility, responsiveness. This should be done for both inter-agency information sharing as well as for government to public information sharing. It will facilitate evaluation and strategic development of initiatives.
2. A deep assessment of demand for information by firstly government agencies from other agencies and secondly whether the flow of information actually benefits all sectors of the population and promotes democratic principles.
3. A broader investigation of possible applications inter-disciplinary applications of thought such as the relevance of organizational learning research[75] to facilitate knowledge transfers across government agencies.

[72] Ken Wolf and John Fry 'Benchmarking Performance Data' in Brett Goldstein and Lauren Dyson, *Beyond Transparency: Open Data and the Future of Civic Innovation* (2013) Code for America Press http://beyondtransparency.org/pdf/BeyondTransparency.pdf 245

[73] So Young Kim and Wesley G. Skogan 7 February 2003 *Community Policing Working Paper 27* Statistical Analysis of Timeseries Data on Problem Solving http://www.ipr.northwestern.edu/faculty-experts/docs/policing_papers/caps27.pdf

[74] John McMillan, 'Twenty Years of Open Government – What Have We Learnt?' *Inaugural Professorial* Address, delivered 4 March 2002, p 6.

[75] Jeffrey H Dyer and Kentaro Nobeoka, 'Creating and managing a High Performance Knowledge-sharing Network: The Toyota Case' (2000) 21(3) *Strategic Management Journal* 345-367

At a **micro level**, we must move past simple counts of datasets as benchmarks for evaluating open government success. Case studies and surveys will be useful in providing a clearer understanding of the extent and impact of innovations made in specific sectors and under prescribed conditions. This form of evaluation will assist to improve strategy and develop principles of measurement based around shared, timely, and actionable information.

8 Conclusion

8.1 The methodology used in this report is a literature survey. This approach combines strengths with weaknesses. An obvious strength is to showcase innovative and international initiatives in open government and proactive information release. An obvious limitation is the absence of a coherent model to evaluate the success of the mechanisms identified. This is not to suggest that this is superficial approach. Although a literature review will only produce a surface picture of what is happening internationally it also provides a more comprehensive overview as to triggers for information release than that which exists today. Indeed one way to build on this report is to put together collaborative case studies of open government success. While the mechanisms here are not suggested as magic bullets the suggestion is that they nonetheless serve as strategic steps focus and evaluate efforts to promote more transparent, accessible and responsive government.

Appendix 1: Methodology

Research aims:

The overall research aim was to *undertake a comparative analysis of how open government may be achieved through identifying mechanisms which promote information release in open government*. Subsidiary research aims were to:

- Describe what 'open government' means; how open government should look and how it can be delivered through tangible mechanisms (with focus upon any 'switches' which encourage the release of information);

- Identify jurisdictions leading open government and discuss current measures to evaluate open government (such as Open Government Ranking measures); and

- Suggest future research (eg. is there a research gap in effective measurement and evaluation of the delivery of open government).

Research questions:

The following set of research questions were designed to operationalize and fulfil the research aims:

(1) How is information release encouraged in open government?
(2) Are there tangible mechanisms which can be introduced to promote information release in open government?
(3) How is best practice in open government evaluated internationally?
(4) Is there a need for future research?

Research design:

The research questions were investigated using the following methods:

- Academic literature review and analysis;
- Documentary analysis of annual reports and corporate plans from selected open government schemes *and*
- Input from the IPC and IPAC

For additional information, government documents, newspaper articles, blogs and relevant Internet sites containing information on open government were analysed. The search was limited to documents reports and Web sites that could be accessed through the website of UTS or the UTS Library. The analysis was based on over 80 articles, 25 government and parliamentary documents and relevant legislation and case law. Internet searches were used extensively. The main websites cited in this report are listed in Appendix 3. The aim of this review of existing academic literature and documents produced by policymakers and practitioners was to provide context.

One difficulty in the research scope is that open government includes discussion of much more than information sharing – for example, whistleblowing, secrets, privacy – also open government has been subject to a change in terminology over time. For example accountability has arguably always been in discussions of legal and other regulatory frameworks. While the research covered many of these aspects the attempt was made to limit it. Thus a number of areas to explore in-depth based on the research aims was identified and the literature was reviewed under the following themes:

- Changing government behaviours with respect to information;
- Emerging open government models;
- Data;
- International open government rankings;
- Evolution of open government;
- Policy developments on information sharing; and
- Justice

From this traditional literature review the project then departs from a typical approach to research methodology and uses a variation of the approach first adopted by a 'bright spots' concept and then used in the Open Government Bright Spots Competition:

"The basic premise is simple: our typical approach to problem-solving is to develop a hypothesis about what might work, introduce some sort of 'treatment' or intervention, and then spend months or years trying to figure out whether our intervention is having a positive impact. But an alternative approach is to look around for individual examples of where things are going well, and then lift up the hood to see what seems to be driving that success. - See more at: http://www.opengovpartnership.org/blog/linda-frey/2013/10/22/get-ideas-get-concrete-get-inspired-watch-bright-spots-talks-ogp-summit#sthash.cVt8ywPI.dpuf"

Adopting this approach the project utilises the Open Government rankings to select leading jurisdictions and to identify examples of real initiatives which seem to be going well. It attempts to identify creative solutions to proactive release of government information. In doing so the criteria applied are very broad, being to provide practical examples of mechanism which may be used to promote government information release under each of the characteristics of open government. Given the general absence of formal evaluation of the majority of the ten mechanisms the selection process was without the benefit of a rigorous criteria for selection.

Appendix 2: Key events in open government

1776

Freedom of the Press Act (1776) (Sweden)

Sweden was the first country in the world to adopt a law granting citizens the right to access information held by public bodies, having adopted its Freedom of the Press Act in 1776. The Act, part of the Swedish Constitution, guarantees the right of access through Chapter 2 On the Public Nature of Official Documents. Despite the title, the right is available to everyone, not just the press Article 1 of Chapter 2 of the Act states that "every Swedish subject shall have free access to official documents."

1966

International Covenant on Civil and Political Rights (art 19) (United Nations)

1966

United States *Freedom of Information Act* (United States)

1972

Whitlam Government promises to enact a freedom of information Act along the lines of the United States law – the promise was realised ten years later (Cth)

1980

International Covenant on Civil and Political Rights (art 19) ratified by Australia (Cth)

1 December 1982

Freedom of Information Act 1982 (Cth)

Freedom of Information Act 1982 (Vic)

1989

Freedom of Information Act 1989 (NSW)

Freedom of Information Act 1989 (ACT)

1991

Freedom of Information Act 1991 (SA)

Freedom of Information Act 1991 (Tas) (came into effect 1 January 1993)

1992

Freedom of Information Act 1992 (Qld)

Freedom of Information Act 1992 (WA)

21 January 2009

Memorandum on Transparency and Open Government; Memorandum on the Freedom of Information Act (US)

7 December 2009 (UK)

Prime Minister Gordon Brown "Smarter Government" speech (UK)

8 December 2009

United States Open Government Directive (US)

December 2009

Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* Report 112 (Cth)

22 December 2009

Report of the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0* (Cth)

Investigates Government 2.0 or the use of the new collaborative tools and approaches of Web 2.0 (including blogs, wikis and social networking platforms) offering the opportunity for more open, accountable, responsive and efficient government. Taskforce observed the lack of coordinated governance framework to underpin individual agency efforts and seeks to provide that framework (p 16). Taskforce recommends a Declaration of Open Government emphasising the role of Web 2.0 tools

2010

Declaration of Open Government Department of Finance and Deregulation, Commonwealth of Australia, *Declaration of Open Government* (16 July 2010) http://www.finance.gov.au/policy-guides-procurement/declaration-of-open-government/ (Cth)

2010

The Office of the Australian Information Commissioner (OAIC) (Cth)

An independent statutory agency within the Attorney General's portfolio The OAIC was established under the *Australian Information Commissioner Act 2010* (AIC Act), which provides for the appointment of the Australian Information Commissioner (Information Commissioner), the Privacy Commissioner (previously appointed under the *Privacy Act 1988*) and the Freedom of Information Commissioner (FOI Commissioner).

2010

Open Government Directive required agencies by January 22 2010 to make three high value data sets available to the public by Data.gov and by April 7 to post an Open Government Plan. (US)

2011

Launch of Data.gov.au (Cth)

(Launched and then Relaunched 17 July 2013)

2011

All federal government departments must disclose Freedom of Information logs (Cth)

1 January 2011

The Information and Privacy Commission NSW (IPC) established as an independent statutory authority that administers New South Wales' legislation dealing with privacy and access to government information. The Privacy Commissioner reports to Parliament at regular intervals on the operation of the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and *Health Records and Information Privacy Act 2002* (HRIP Acts).

2012

NSW Government ICT Strategy 2012 (released in May 2012)

In which open data supports the open government principles of transparency, participation, collaboration and innovation that are identified as priorities NSW Government ICT Strategy;

Victorian DataVic Access Policy

enables public access to government data was launched alongside the IP Policy and other initiatives such as the use of Performance agreements

May 2013

Australia signs letter of intent to join the Open Government Partnership (OGP) by April 2014 (Cth)

2015

UK *Open data roadmap for the UK* 2015 (UK)

Three steps: Commit to data training and skills development for government, business and citizens; Incentivise government to consume open data, not just publish it; and Connect research and development frameworks to open data.

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Website List

Site 1: Open Data Barometer

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Site 2: Sunlight Foundation

http://sunlightfoundation.com/

Site 3: Open Government Partnership

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Site 4: World Bank

http://data.worldbank.org/

Site 21: Information Commissioner Office

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Site 6: Australian Government

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Site 7: Open Data 500 Australia

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Site 8: AusGOAL (Australian Government Open Access and Licencing Framework)

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Site 9: Apps4nsw

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Site 10: Singapore eGov

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Site 11: 2014 Open Government Awards

https://www.opengovawards.org/Awards_Booklet_Final.pdf

Site 12: Villages Without Borders

http://www.villageswithoutborders.com/#!about/c20r9

Site 13: Edmonton 311 app

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Site 14: Code for America'

https://www.codeforamerica.org/geeks/

Site 15: Local Open Data Census

http://au-city.census.okfn.org/

Site 16: Australia's Regional Open Data Census

http://australia.census.okfn.org/

Site 17: UK Open Data

https://www.data.gov.uk/

Site 18: Nesta

http://www.nesta.org.uk/

Site 19: Exeter City Council

http://www.exeter.gov.uk/

Site 20: Chronology of Open data across Australia

http://www.finance.gov.au/blog/2013/07/17/new-datagovau-%E2%80%93-now-live-ckan/

Site 21: Issy-les-Moulineaux

https://www.data.gouv.fr/en/organizations/ville-d-issy-les-moulineaux/

Appendix 4: Select Legislation

Government Information (Public Access) Act 2009 (GIPA Act)

Government Information (Information Commissioner) Act 2009 (GIIC Act)

Privacy and Personal Information Protection Act 1998 (NSW) (PPIP Act)

Data Protection Act 1998 (UK): Schedule 1 & 2 (3 not extracted here)

SCHEDULE 1 THE DATA PROTECTION PRINCIPLES

PART I THE PRINCIPLES

1Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a)at least one of the conditions in Schedule 2 is met, and

(b)in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4Personal data shall be accurate and, where necessary, kept up to date.

5Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6Personal data shall be processed in accordance with the rights of data subjects under this Act.

7Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

1The data subject has given his consent to the processing.

2The processing is necessary—

(a)for the performance of a contract to which the data subject is a party, or

(b)for the taking of steps at the request of the data subject with a view to entering into a contract.

3The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4The processing is necessary in order to protect the vital interests of the data subject.

5The processing is necessary—

(a)for the administration of justice,

(aa)for the exercise of any functions of either House of Parliament,(b)for the exercise of any functions conferred on any person by or under any enactment,

(c)for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d)for the exercise of any other functions of a public nature exercised in the public interest by any person.

6(1)The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2)The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.