

E – BRIEF



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FOI update - proposed reforms in NSW

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This E-Brief updates [Freedom of Information – Issues and Recent Developments in NSW](#), Briefing Paper No 6/07. That paper presents an overview of the [Freedom of Information Act 1989](#) (NSW), including the amendments introduced by the [FOI Amendment \(Open Government Disclosure of Contracts\) Act 2006](#). It also reviews key issues in the open government debate, including proposals to introduce an FOI Commissioner for NSW, and presents a survey of the relevant case law.

1 Reform proposals, May 2009

On 6 May the Premier announced the tabling in Parliament of the following exposure draft bills:

- [Open Government Information Bill](#);
- [Information Commissioner Bill](#);
- and
- [Open Government Information \(Consequential Amendments and Repeals\) Bill](#).

The Premier [stated](#):

These Bills constitute the most comprehensive overhaul of FOI laws in New South Wales since the *Freedom of Information Act* was enacted in 1989.

The main features of the proposed reforms were set out in a [Companion Guide](#) prepared by the Department of

Premier and Cabinet. The Guide states:

The new legislation will provide a fresh start. The old FOI Act will be scrapped, and replaced with new legislation which provides a clear focus on openness and a greater emphasis on proactive release of information.

2 Reform proposals in other jurisdictions

This initiative can be placed alongside similar developments in Queensland and at the Commonwealth level.

In Queensland a major report by an independent review panel was published in June 2008,¹ followed by the release of a draft [Right to Information Bill](#) and a draft [Information Privacy Bill](#). Public consultation on the draft bills closed on 31 March 2009.²

At the Commonwealth level, released for public comment in March 2009 were exposure drafts of the [Freedom of Information Amendment \(Reform\) Bill](#) and the [Information Commissioner Bill](#). This followed the introduction to Parliament on 26 November 2008 of a Bill to abolish the power to issue conclusive certificates.³

3 NSW Private Member's Bills

The establishment of an Information Commissioner or its equivalent has been the subject of a number of unsuccessful Private Member's Bills,⁴

as has been the call for an independent review of the FOI Act.⁵

4 NSW Ombudsman report, February 2009

According to the [Premier](#):

The legislation implements the key reforms recommended by the NSW Ombudsman in his independent review of the FOI Act, released earlier this year.

The Ombudsman's report, [Opening Up Government: Review of the Freedom of Information Act 1989](#), summarised what is wrong with FOI in NSW. It was noted that the FOI Act has been the subject of over 60 ad hoc amendments, with the Ombudsman saying:

This has resulted in a confusing and unwieldy piece of legislation for both applicants and practitioners.⁶

Adding to the complexity is the fact that access to information is governed by four other statutes: *Local Government Act 1993*; *Privacy and Personal Information Protection Act 1998*; *Health Records and Information Privacy Act 2002*; and *State Records Act 1998*.⁷

Other significant issues for the Ombudsman were the failure of the FOI Act to keep pace with either technological developments or the changes associated with the contracting out of government services to the private sector.

Citing a 'distinct lack of political support' as a major contributing factor to this unsatisfactory state of affairs, the Ombudsman explained the genesis of his report in these terms:

Our experience with the Act has made us acutely aware of some of

the central problems with FOI in NSW. The Ombudsman has continually brought these problems to the attention of government, both in our annual reports and in special reports to Parliament. We have also pressed the need for an independent, comprehensive review of the Act and its supporting systems. In April 2008, after a continuing lack of interest by government, the Ombudsman announced that he would conduct a comprehensive review of the Act.⁸

The Ombudsman's recommendations, together with the relevant provisions in the proposed legislation, are set out in table form in the [Companion Guide](#) prepared by the Department of Premier and Cabinet.

5 Three key elements

The Ombudsman said the new system proposed in his report has three key elements:

- a greater level of proactive disclosure of government information;
- a new Open Government Information Act to replace the FOI Act; and
- appointment of an independent Information Commissioner.

6 Proactive disclosure

On this issue the Ombudsman commented:

A key element in the new system we are proposing requires all government agencies to make significant amounts of information available to the public as a matter of course. And it will not be enough to simply make more information available; it must be done in a way so the information is easy to find. We put forward two practical ways of achieving this — the introduction of

publication schemes and disclosure logs.⁹

The [Open Government Information Bill](#) addresses these goals in Part 2 and 3. Part 2 sets out the 'general principles' of open government information. These include the mandatory release of what is called 'open access information' (clause 6). Part 3 then lists what constitutes such information and explains what is meant by the agency's: policy documents; publication guides; disclosure log of access publications; and register of government contracts. Basically, agencies are to ensure that information of this kind is readily available to the public as a matter of course.

Provision is also made for the proactive release by agencies of other government information, providing there is no 'overriding public interest against disclosure' (clause 7(1)). Government information may also be released in response to an informal request (clause 8). The [Companion Guide](#) states:

Importantly, the new legislation ensures that agencies who do release information proactively or in response to an informal request will be given the same protection as they have when they release information in response to a formal application.

7 A new Act

Major overhaul of the FOI regime was proposed by the Ombudsman in the form of new legislation, which would simplify the current legislative schemes and set out 'clear and straightforward procedures' to access government information.

There is no doubt that, taken together, the three draft Bills constitute a

revamping of FOI in this State. Underpinning the new regime are the following features of the [Open Government Information Bill](#):

(i) An applicant has a **legally enforceable right to access information**, subject only to the public interest test, which is explained below (clause 9(1)).

(ii) An agency is to be free of **ministerial direction or control** in FOI matters. Consistent with recommendation 50 of the Ombudsman's [report](#), this means an end to the former Ministerial Certificates (clause 9(2)).

(iii) Only those **secrecy provisions** listed under Schedule 1 will operate as mandatory 'overriding secrecy laws'. However, the existence of a secrecy provision in any other law (State or Commonwealth) can be taken into consideration under Schedule 2.6, that is, as a public interest consideration against disclosure.¹⁰

(iv) There is to be a **presumption in favour of disclosure** with clause 12 providing 'There is a general public interest in favour of the disclosure of government information'.¹¹

(v) A single **public interest test** is to apply to the disclosure of government information, with clause 13 providing:

There is an **overriding public interest against disclosure** of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure. (emphasis in original)

(vi) Read with clause 14(1), Schedule 1 to the Bill sets out '**Information for which there is conclusive presumption of overriding public interest against disclosure**'. These categories of information include: defined overriding secrecy laws; Cabinet and Executive Council information; legal professional privilege; and documents affecting law enforcement and public safety.

(vii) Read with clause 14(2), Schedule 2 to the Bill sets out '**Public interest considerations against disclosure**'. These are only to be 'taken into account' and are not determinative of the issue of disclosure. A note to Schedule 2 explains:

There is a general public interest in favour of the disclosure of government information and an agency can only refuse to provide access to government information if there is an overriding public interest against disclosure. This means that the agency can only refuse to provide access if, on balance, the considerations against disclosure outweigh the public interest considerations in favour of disclosure, including the general public interest in favour of disclosure. In balancing these considerations, an agency cannot take into account any considerations against disclosure other than those set out in this Schedule.¹²

The categories of government information where considerations against disclosure are to be taken into account include: responsible and effective government; law enforcement and security; individual rights, judicial processes and natural justice; business interests of agencies and other persons; and secrecy provisions.

(viii) Schedule 3 is headed '**Excluded information of particular agencies**'.

It sets out specific areas of information which cannot be accessed under FOI. This include all information relating to the functions of the Child Death Review Team and information relating to the main functions of such bodies as the ICAC, the Ombudsman and the Privacy Commissioner. A further category of 'excluded information' is that relating to the HSC ranking or assessment of students for entrance into tertiary institutions.

(ix) Schedule 5, which is headed '**Interpretative provisions**', defines the key terms used in the draft Bill, including: commercial-in-confidence provisions; government contract; public office; and public authority. Contrary to recommendation 29 of the Ombudsman's [report](#), the Houses of the Parliament and their committees are excluded from the definition of 'public authority' and therefore from the reach of the proposed law. On the other hand State Owned Corporations are covered by the draft Bill, subject to an exception for contracts relating to their competitive businesses (clause 37).¹³

(x) Part 5 of the draft Bill is headed '**Review of decisions**' and sets out the proposed schemes for: internal review by the relevant agency; review by the Information Commissioner; and review by the Administrative Decisions Tribunal. Bypassing internal review, under the proposed scheme an applicant can apply for a review directly to the Information Commissioner or the ADT (clauses 84 and 95). As discussed below, the proposed review powers of the Information Commissioner are recommendatory, not determinative, in nature.

(xi) **Offence** provisions are provided for under Part 6 of the draft Bill. These

offence provisions refer to agency officers who make a reviewable decision knowing it is contrary to the proposed Act, and to those who influence or direct agency officers to so act (clauses 111-113). They also refer to those who seek to gain access to government information by false pretences (clause 114) and to those who destroy or conceal government information to prevent disclosure (clause 115). The maximum penalty in all cases is 100 penalty units (currently \$ 11,000).

8 An Information Commissioner

For over a decade the Ombudsman has pressed for comprehensive, independent and transparent review of FOI. A focus of the Ombudsman's concerns has been on the administration of the FOI regime, in the absence of a designated person or body specifically charged and resourced to monitor the implementation of the FOI Act.¹⁴ On this issue, the Ombudsman commented in the 2009 [report](#):

Since the FOI Unit in the Premier's Department was disbanded in 1991, the FOI Act has been without a champion.¹⁵

The Ombudsman went on to say:

External leadership, independent of government, will be an essential element in providing oversight and accountability for the new system. We therefore recommend the creation of an Information Commissioner. As well as being an avenue of external review, the Information Commissioner would be the public proponent for the objects and intentions of the new system and an essential element in changing culture and providing support for those working in agencies to bring about change.¹⁶

As well as setting out the powers and functions of the proposed Information Commissioner, the Ombudsman's recommended:

- The Information Commissioner should be established in the Office of the Ombudsman (Recommendation 84);
- Consideration should be given to making the Information Commissioner responsible for the oversight of privacy as well as FOI (Recommendation 86); and
- The Information Commissioner should be subject to oversight by a Parliamentary Committee (Recommendation 87).

8.1 Recommendation 84

The Government rejected this. It was also opposed by the NSW Law Reform Commission (NSWLRC), which feared a blurring of the Ombudsman's monitoring and scrutiny functions:

For the Information Commissioner, being located within the Ombudsman's office could create the impression that the Commissioner is under the Ombudsman's control. For the Ombudsman, incorporating the Information Commissioner within his office could compromise the perception of him as an independent scrutineer.¹⁷

8.2 Recommendation 86

This was one of several recommendations concerning the intersection between FOI and privacy laws, in relation to which the Government noted that they would be considered in the context of the reviews being conducted by the NSWLRC into privacy.

Different jurisdictions have adopted different approaches to the oversight of FOI and privacy, some separating the two, others combining them, as indicated by the following table:

	FOI/privacy Separate	FOI/privacy Combined
Commonwealth	✓	
Queensland	✓	
New Zealand	✓	
Canada (federal)	✓	
Alberta		✓
British Columbia		✓
Ontario		✓
United Kingdom		✓

In the Canadian Provinces of [Ontario](#), [British Columbia](#) and [Alberta](#) there is an Information and Privacy Commissioner, whereas in the [United Kingdom](#) the oversight functions are combined under the Information Commissioner's Office. In New Zealand on the other hand there is a Privacy Commissioner, while it is the Ombudsman that oversees FOI.

For its part, the [NSW Law Reform Commission](#) opposed the proposed amalgamation of oversight of FOI and privacy legislation:

We are strongly opposed to this recommendation. Just as independence is crucial for the effective working of the freedom of information scheme, the same applies to privacy. Privacy is a finely balanced concept that requires careful monitoring and independent oversight.

While the amalgamation of FOI and privacy oversight was noted in other jurisdictions, notably the United Kingdom and as proposed under the draft [Information Privacy Bill](#) in Queensland, the NSWLRC argued:

strongly for the Information Commissioner and the Privacy Commissioner to operate as two independent sentinels, with commensurate powers and responsibilities, guarding the public's information rights from different, but complementary, perspectives.

8.3 Recommendation 87

This is reflected in clause 43 of the [Information Commissioner Bill](#), by which the Commissioner's functions are to be overseen by a Joint Parliamentary Committee.¹⁸

8.4 Should the Information Commissioner have the power to make determinative decisions?

A further issue raised by the NSW Law Reform Commission in response to the Ombudsman's report is whether the Information Commissioner should have 'determinative powers to replace the Administrative Appeals Tribunal in the FOI process'?

At present the Ombudsman's role in the investigations of complaints is set out in sections 52 and 52A of the FOI Act. These provisions are to be read in conjunction with section 26 of the *Ombudsman Act 1974*, which sets out the Ombudsman's powers to report on investigations. Basically, while the Ombudsman's external review powers have been interpreted broadly, they are only to 'recommend' that, for example, an agency reconsider its determination to restrict access to a particular document. They are not 'determinative' powers. The Ombudsman cannot change or reverse a decision. That power lies with the Administrative Decisions Tribunal (ADT).

Under the draft [Open Government Information Bill](#), in keeping with the

Ombudsman's recommendation, the Information Commissioner would have the same powers to 'recommend' various courses of action (clauses 87-90). The power to make determinative decisions would remain with the ADT.

The NSWLRC has questioned this strategy. It argues that:

the type of powers and functions that should be exercised by the Information Commissioner requires much greater consideration, particularly when viewed in the broader context.

It had previously raised the issue of whether the NSW Privacy Commissioner should be able to make final determinations.¹⁹ On a comparative note, the NSWLRC added that other jurisdictions have FOI review bodies capable of making determinations, including Queensland, the Northern Territory, New Zealand and the United Kingdom.²⁰ [Western Australia](#) can be added to this list.²¹

8.5 Terms of appointment/removal

The rule in NSW for such independent statutory officers as the Ombudsman, the Auditor-General and the ICAC Commissioner is that they are appointed for a specified term of years (5 or 7 years) and that their prior removal is by the Governor on the address of both Houses of Parliament. The same applies in respect to the proposed Information Commissioner.²²

However, clause 7(2) of the draft Bill proposes that the Governor be conferred with the additional power to remove the Commissioner on the grounds of incapacity, incompetence or misbehaviour. With the partial exception that the Governor can suspend the Auditor-General for misbehaviour or incapacity, and

remove the ICAC Assistant Commissioner on similar grounds, this provision represents a widening of the Governor's power to remove an independent statutory officer.

9 Case law issues

[Briefing Paper No 6/07](#) discussed the complex case law arising from the operation of the FOI Act in this State. A number of the issues considered in the paper are addressed in the draft [Open Government Information Bill](#). Its approach to statutory secrecy provisions has been noted, as has the Bill's inclusion of an express presumption in favour of disclosure.²³

9.1 Cabinet information

A significant and ongoing issue under the current FOI regime relates to the exemption from disclosure for 'Cabinet documents'.²⁴ Under the draft Bill, 'Cabinet information' as it is now called is listed under Schedule 1 as one of the categories of information for which there is a conclusive presumption of overriding public interest against disclosure. While the precise formulation of what constitutes 'Cabinet information' has altered, dispute over its application to particular information may well proceed unabated.

Note, too, that one of the public interest considerations against disclosure in Schedule 2 refers to where disclosure of information could reasonably be expected to 'prejudice' either collective Ministerial responsibility or Ministerial responsibility to Parliament.

9.2 ADT's 'residual discretion' and restricted documents

Does the ADT have a 'residual discretion' to order access to exempt documents under Schedule 1 of the

current FOI Act? For O'Connor DCJ, this was a 'major policy question – possibly the most fundamental in the formulation of FOI review schemes, and is clearly one on which express direction would be expected from Parliament'.²⁵

The answer was that, following the decision in *University of NSW v McGuirk*,²⁶ the ADT did have this residual discretion. This was further to s 63 of the *Administrative Decisions Tribunal Act 1997 (NSW)*, by which the Tribunal is empowered to decide the 'correct and preferable decision' in respect to 'the material before it'. For this purpose the Tribunal 'may exercise all of the functions' conferred or imposed on the agency itself. The nub of the argument therefore was that, by s 63(2), the ADT has a similar power to agencies contained in s 25 of the FOI Act, permitting them to release a document even if an exemption could be relied upon.

But note that the position in respect to those exempt documents listed as 'restricted documents' under Schedule 1 was less clear. These 'restricted documents' are listed as: Cabinet documents; Executive Council documents; documents affecting law enforcement and public safety; and documents affecting counter-terrorism measures. In subsequent cases it was decided that 'the residual or override discretion' did not apply 'in respect of restricted documents claims'.²⁷

The issue is specifically addressed by clause 101(1) of the draft [Open Government Information Bill](#). Specifically in relation to Cabinet and Executive Council information, where it is claimed there is an overriding public interest against disclosure:

the ADT is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter.

It would seem therefore that the ADT's residual discretion would apply to other categories of information listed under Schedule 1 of the draft Bill – but not to Cabinet and Executive Council information.

9.3 Information that might be misinterpreted

Is the possibility that a document may mislead the public at large relevant when deciding whether disclosure would be contrary to the public interest?²⁸ Currently, s 59A of the FOI Act provides that, for the purpose of determining whether the disclosure of a document would be contrary to the public interest, it is irrelevant that the disclosure may:

- (a) cause embarrassment to the Government or a loss of confidence in the Government, or
- (b) cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

Note that the FOI Act states that it is irrelevant that disclosure may cause *the applicant* to misinterpret or misunderstand the information. It leaves open the possibility that exemption may be granted to documents that may mislead or be misunderstood by the public at large.²⁹

The position is clarified by clause 15(d) of the draft [Open Government Information Bill](#), which provides:

The fact that disclosure of information might be misinterpreted or misunderstood **by any person** is irrelevant and must not be taken into account. (emphasis added)

10 Media responses

While some issues of concern have been raised, in broad terms the long-awaited reform of FOI has been received positively in the media.³⁰ One comment in the *Sydney Morning Herald* was that the Ombudsman's recommendation that the NSW Parliament be subject to FOI laws, following the example of the Westminster Parliament,³¹ 'was rejected with no explanation'. The article continued:

British MPs recently appealed to the High Court in an attempt to avoid disclosing details of how they have spent various allowances but the High Court rejected their arguments and required them to disclose all spending of public moneys.³²

In *The Daily Telegraph* it was claimed that the proposed reforms:

failed to remove the use of legal privilege by government agencies to establish a legal secrecy around documents and statements made by government employees.³³

As noted, under Schedule 1 of the draft [Open Government Information Bill](#) legal professional privilege is one category of information for which there is a conclusive presumption of overriding public interest against disclosure.

11 Conclusion

[Briefing Paper No 6/07](#) concluded by commenting:

The reason why freedom of information is so central to the current political debate is clear enough. In effect, it encapsulates the key tension in representative democracy, between the right of individual voters and the public at large to be informed about the workings of government, set against the Executive's claims for confidentiality in those areas where it is required for the effective conduct of government business. The question is how broadly are these claims to be drawn? Where does the legitimate concern to protect government confidentiality end and an unjustifiable level of secrecy begin? Where and how is the balance to be struck between the competing claims and tendencies involved? Does the State's FOI Act, in its present form, offer the best available answer to that question?

Clearly, the answer is that the State's current FOI Act does not strike the right balance between public disclosure of government information and Executive confidentiality. The proposed reforms will alter that balance, not least by their inclusion of a presumption in favour of disclosure of government information. The proposal to establish an Information Commissioner, with adequate powers and resources, is another significant development.

¹ [The Right to Information: Reviewing Queensland's FOI Act](#), June 2008.

² Queensland Government, [Right to Information](#).

³ [Freedom of Information \(Removal of Conclusive Certificates and other measures\) Bill 2008](#). See generally the Commonwealth Government's [FOI Reform webpage](#).

⁴ Stretching at least as far back as the [Freedom of Information Amendment \(Open and Accountable Government\) Bill](#) introduced by Kerry Chikarovski in April 2000.

- ⁵ The [Freedom of Information Amendment \(Improving Public Access to Information\) Bill](#) introduced by the Greens MLC, Lee Rhianon, in May 2006.
- ⁶ NSW Ombudsman, [Opening Up Government: Review of the Freedom of Information Act 1989](#), February 2009, p 1.
- ⁷ For a commentary see G Griffith, [Freedom of Information – Issues and Recent Developments in NSW](#), NSW Parliamentary Library Research Service Briefing Paper No 6/07, pp 35-37.
- ⁸ NSW Ombudsman, n 6, p 4.
- ⁹ NSW Ombudsman, n 6, p 7 and pp 19-26. Note was made of a change in attitude towards disclosure, notably in connection to the Premier's release of Ministerial Memorandum M 2008-19, [Proactive release of information by government agencies](#).
- ¹⁰ For a commentary on secrecy provisions see Griffith, n 7, pp 50-55.
- ¹¹ For a commentary on the current position see Griffith, n 7, pp 56-58.
- ¹² The note adds, 'There is no limit to the public interest considerations that may be taken into account in favour of disclosure'.
- ¹³ Currently, by s 15A(14) of the FOI Act, State owned corporations (and their subsidiaries) are excluded from the definition of 'agency' and therefore from the coverage of the Act: Griffith, n 7, p 31.
- ¹⁴ Griffith, n 7, p 43.
- ¹⁵ NSW Ombudsman, n 6, p 1.
- ¹⁶ NSW Ombudsman, n 6, p 8.
- ¹⁷ NSWLRC, [The Ombudsman's Review of the Freedom of Information Act 1989 \(NSW\)](#), March 2009, p 10.
- ¹⁸ By clause 5 of the same Bill, the proposed appointment of a Commissioner is to be subject to veto by a parliamentary committee. These provisions need to be read alongside Part 4A of the Ombudsman Act 1974, which establishes a Joint Parliamentary Committee to oversight the Ombudsman.
- ¹⁹ NSWLRC, [Privacy Legislation in NSW](#), Consultation Paper 1, 2008, paras 7.46-7.50.
- ²⁰ The NSWLRC paper includes comparative tables for FOI and privacy regimes.
- ²¹ In this last case, the FOI powers of the WA Information Commissioner were not subsumed under the jurisdiction of the WA State Administrative Tribunal when this was established in 2004 - [State Administrative Tribunal Act 2004](#) (WA).
- ²² [Information Commissioner Bill](#), clauses 4 and 7(2).
- ²³ Griffith, n 7, pp 56-58.
- ²⁴ Griffith, n 7, pp 63-70.
- ²⁵ *Neary v The Treasurer*, NSW [2002] NSWADT 261 at para 82.
- ²⁶ [2006] NSWSC 1362.
- ²⁷ *IPART v Sercices Sydney Pty Ltd (GD)* [2008] NSWADTAP 79 at para 46; *Black v Commissioner of Police NSW Police Force (GD)* [2008] NSWADTAP 80 at para 20. There the limitation on the ADT's jurisdiction was held to apply to clauses 1, 3 and 4 of Schedule 1 of the FOI Act.
- ²⁸ Griffith, n 7, pp 70-72.
- ²⁹ In the different statutory context of the Commonwealth FOI Act, a comparable issue was considered in *McKinnon v Secretary, Department of Treasury* (2006) 229 ALR 187.
- ³⁰ I Salusinszky, 'Obstruction a crime under new FOI laws', [The Australian](#), 6 May 2009.
- ³¹ Griffith, n 7, pp 46-49. An exception to the disclosure rule is made where parliamentary privilege may be infringed: [FOI Act 2000](#) (UK), s 34. For this purpose the certificate of the Speaker of the House of Commons would provide conclusive evidence (s 34(3)).
- ³² M Moore, 'FOI changes would exclude MPs', [SMH](#), 6 May 2009. The relevant case is: [Corporate Officer of the House of Commons v Information Commissioner](#) [2008] EWHC 1084 (Admin). The privileges of the House of Commons were not at issue in the case. No certificate by the Speaker, further to s 34(3) of the [FOI Act 2000](#) (UK), had been signed. For a commentary see 'FOI: MPs reach end of road in battle over secret expenses', [The Independent](#), 23 May 2008. The case and its aftermath (to date) is reviewed on [Wikipedia](#).
- ³³ S Benson, 'Ref to oversee more openness for Freedom of information', [The Daily Telegraph](#), 6 May 2009.

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