

**NSW PARLIAMENTARY LIBRARY
RESEARCH SERVICE**

**Freedom of Information and
Open Government**

by

Abigail Rath

Background Paper No 3 / 2000

ISSN 1325-5142
ISBN 0 7313 1667 3

September 2000

© 2000

Except to the extent of the uses permitted under the Copyright Act 1968, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, with the prior written consent from the Librarian, New South Wales Parliamentary Library, other than by Members of the New South Wales Parliament in the course of their official duties.

Freedom of Information and Open Government

by

Abigail Rath

NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

Dr David Clune, Manager..... (02) 9230 2484

Dr Gareth Griffith, Senior Research Officer,
Politics and Government / Law (02) 9230 2356

Ms Abigail Rath, Research Officer, Law (02) 9230 2768

Ms Rachel Simpson, Research Officer, Law (02) 9230 3085

Mr Stewart Smith, Research Officer, Environment..... (02) 9230 2798

Mr John Wilkinson, Research Officer, Economics (02) 9230 2006

Should Members or their staff require further information about this publication please contact the author.

Information about Research Publications can be found on the Internet at:

http://www.parliament.nsw.gov.au/WEB_FEED/PHWebContent.nsf/PHPages/LibraryPublications

CONTENTS

EXECUTIVE SUMMARY

1.0 INTRODUCTION.....	1
2.0 BACKGROUND TO FOI LEGISLATION IN AUSTRALIA.....	3
3.0 OBJECTIVES OF FOI LEGISLATION.....	13
4.0 THE CONSTITUTIONAL FREEDOM OF COMMUNICATION.....	14
5.0 NECESSARY RESTRICTIONS TO FREEDOM OF INFORMATION.....	17
6.0 FOI LEGISLATION NOT THE ONLY METHOD OF ACCESSING GOVERNMENT INFORMATION.....	17
7.0 OTHER LEGISLATION IN NSW PROVIDING FOR ACCESS TO GOVERNMENT INFORMATION.....	18
8.0 OVERVIEW OF THE NSW FOI ACT.....	22
9.0 STATISTICS ON FOI USAGE AND COMPLIANCE.....	37
10.0 IS THE FOI ACT ACHIEVING ITS OBJECTIVES?.....	38
11.0 IS A NEW APPROACH TO ACCESSING GOVERNMENT INFORMATION NEEDED?.....	42
12.0 NEED FOR REVIEW OF THE NSW FOI ACT?.....	53
13.0 ISSUES REGARDING REFORM OF THE FOI ACT.....	55
14.0 INTERNATIONAL COMPARISON.....	68
15.0 CONCLUSION.....	77

APPENDIX A

Summary of relevant recommendations of Australian inquiries that have considered public access to government contract and tender information

APPENDIX B

New South Wales Premier's Department, Memorandum No 2000-11
Disclosure of Information on Government Contracts with the Private Sector

APPENDIX C

Extract from New South Wales, Department of State and Regional Development
Guidelines for Private Sector Participation in the Provision of Public Infrastructure

EXECUTIVE SUMMARY

Introduction (pages 1-3)

The fundamental aim of Freedom of Information (“FOI”) legislation is to promote and enhance the processes of democracy and representative government by increasing access to information held by the government.

In summary, the New South Wales FOI Act: (a) confers a legally enforceable public right of access (subject to specified exemptions) to documents in the possession of government agencies’ and Ministers; (b) requires government agencies to publish certain information regarding their operations, functions and documents; and (c) establishes the right to seek correction of personal information held by government agencies.

Opinions differ as to whether the NSW FOI Act has provided open and accountable government. Government accountability and secrecy is commonly raised as an issue during election campaigns, with the last New South Wales election being no exception. Further, in the past couple of years, issues in relation to access to government information have been raised in some prominent contexts.

In May this year, the Leader of the Opposition introduced legislation to amend the FOI Act with the aim of increasing access to government information. There has also been recent renewed interest in FOI in a number of other Australian jurisdictions.

Background to FOI legislation in Australia (pages 3-5)

The Westminster system of government has a tradition of official secrecy which originates from the time of monarchical rule. This tradition was supported by secrecy provisions in legislation, such as public service statutes or regulations, that commonly provided that it was an offence for public servants to disclose information to unauthorised persons. In addition, the common law supported the tradition of official secrecy in that it has never recognised a general right of access to government information.

Despite historical origins, official secrecy was considered to be a crucial part of the Westminster system. When the concept of FOI legislation was first debated in Australia, it was argued that FOI legislation was incompatible with Westminster government. This argument was strongly rejected in a 1978 Senate Committee report on FOI.

Enactment of FOI legislation in Australia (pages 5-6)

The Commonwealth was the first Australian jurisdiction to enact FOI legislation (in 1982). It was the first national FOI legislation enacted in a country with a Westminster system of government. All Australian jurisdictions, except for the Northern Territory, have now enacted FOI legislation. Each jurisdiction modelled its legislation on the Commonwealth Act, although a number have endeavoured to make improvements to the federal provisions.

FOI Developments in New South Wales (pages 7-13)

The *Freedom of Information Act 1989* (NSW) commenced operation on 1 July 1989. Significant amendments designed to increase the accountability of government were made in 1992. These amendments were a result of the Charter of Reform between the Greiner Government and three independent members of parliament who held the balance of power in the Legislative Assembly (John Hatton, Clover Moore and Peter McDonald). In 1998, appeals to the District Court under the FOI Act were replaced with appeals to the newly established, and more accessible, Administrative Decisions Tribunal.

Objectives of FOI legislation (pages 13-14)

The fundamental aim of FOI legislation is to promote and enhance the processes of democracy and representative government by increasing access to government information. FOI legislation aims to: provide open and accountable government; increase public participation in government decision-making; ensure that personal information held by the government is relevant, accurate, up to date and complete; and enable individuals to be kept informed of government decision-making processes that affect them.

It has also been recognised that government information is a valuable public resource that is collected and created with public money for public purposes. In this sense, government information belongs to the public, and governments are “trustees” of that information on behalf of the public. It follows from this that government information should generally be accessible to the public.

Further, it has been recognised that inappropriate government secrecy can allow corrupt practices to flourish, and that FOI and other accountability mechanisms help to protect against corruption.

Necessary restrictions to Freedom of Information (page 17)

It is widely accepted that access to government information should not be complete and unfettered. It is recognised that there are legitimate interests which may need protection and, in some circumstances, the public interest in disclosure will be outweighed by the public interest in confidentiality. Interests which may need protection include national security, international relations, cabinet confidentiality, law enforcement, personal privacy and commercial confidentiality. Protection of such interests are provided for in FOI legislation through the exemption provisions. However, defining the boundaries of such exemptions is often a contentious issue.

FOI not the only method of accessing government information (pages 17-18)

Clearly FOI legislation is just one of many ways in which government information is accessible to the public. It has been recognised that FOI legislation is not, and should not be, the only, or even the primary, way of accessing government information. Government information is available through many other sources including voluntary release by the

government, parliamentary processes, review by courts, tribunals and other review bodies, and annual reporting requirements. In this context it has been noted that the importance of FOI lies in the fact that it provides a *legally enforceable* right of access to government information.

Other legislation in NSW providing for access to government information (pages 18-21)

The FOI Act is not the only statute in New South Wales that provides for access to government information. The *Privacy and Personal Information Protection Act 1998* (NSW) (“the PPIP Act”) provides for access to, and alteration of, personal information held by government agencies. It also provides for limits and restrictions on the disclosure of personal information. There is significant overlap between the PPIP Act and the FOI Act, and whether or not information is disclosed may depend on which Act is applying.

The *Local Government Act 1993* (NSW) provides that all local council documents must be available for inspection free of charge subject to limited exceptions. It has been noted that the existence of three access regimes (the Local Government Act, the FOI Act and the PPIP Act) applying to local government has the potential to complicate access issues in the minds of the public and of council officers.

The *State Records Act 1998* (NSW) provides for obligations on government agencies with respect to the creation, management and preservation of government records and archives. Good record management practices are important to the success of FOI.

Overview of the NSW FOI Act (pages 22-36)

Right of access: The FOI Act provides that a person has a legally enforceable right of access to a government agency’s documents, or a Minister’s documents that relate to the affairs of an agency. “Document” is broadly defined and includes “any disc, tape or other article from which sounds, images or messages are capable of being reproduced”.

Exempt Bodies: An “agency” is defined as a government department, public authority, local authority or public office. Exempt bodies include the Legislative Council, Legislative Assembly, parliamentary committees, Royal Commissions, and Courts and Tribunals in relation to their judicial functions. In addition, Schedule 2 of the Act provides a list of agencies that are exempt in relation to specified functions.

Exemptions: Schedule 1 of the Act specifies categories of documents that are exempt from disclosure. Some of these exemptions are subject to some form of public interest test, that is, the public interest in, or against, disclosure must be considered in the decision whether to disclose the requested information.

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

to be conclusive evidence that a document is exempt.

Appeals: The Act provides for three forms of appeal from an agency's decision: (a) internal review by the agency (where available, a pre-requisite to other appeal options); (b) review by the Ombudsman; and (c) appeal to the Administrative Decisions Tribunal.

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

Amendments of Records: A person may apply to an agency for amendment of personal information (about the applicant) held by the agency, where the information is incomplete, incorrect, out of date or misleading.

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

Is the FOI Act achieving its objectives? (pages 38-42)

There appears to be consensus that the FOI Act has worked well in relation to providing access to personal information. More controversial is the question of whether the Act has achieved the objectives of open and accountable government and public participation in government decision-making. Many commentators, including the Ombudsman, Auditor-General, politicians, journalists and academics have expressed the view that too much government secrecy still exists.

Is a new approach to accessing government information needed? (pages 42-44)

Not all advocates of open government are supportive of FOI legislation. The argument that FOI has failed to deliver open government is commonly raised in jurisdictions throughout Australia and overseas. The significant developments that have occurred since the introduction of FOI legislation in Australia have also been noted. These developments include substantial changes to the structure of the public sector due to increasing corporatisation, privatisation and contracting out. In addition, significant advances in information and communications technologies have had a major impact on the way information is accessed, collected, stored, processed, exchanged and disseminated.

These developments, and the perceived failure of FOI to provide open government, have led some commentators to question the continuing relevance of FOI, and to look for other ways of providing access to information.

Reversing the concept of FOI: Pro-active Disclosure (pages 44-48)

FOI legislation requires a person to make a request to an agency or minister in order for information to be released. Thus, FOI legislation is a "reactive" rather than a "pro-active"

approach to the disclosure of government information. A number of reviews in Australia have considered, or are considering, the introduction of pro-active disclosure regimes which put the onus on agencies to routinely release information.

Routine disclosure of contract and tender information and “commercial in confidence” (pages 48-53)

Discussion regarding routine disclosure of information often centres on disclosure of information relating to government contracts and tender information. Public access to contract and tender information has become a contentious issue over the past few years in a number of Australian jurisdictions including New South Wales. There has been a perception that government agencies are using “commercial in confidence” claims too broadly to avoid scrutiny and accountability. A number of inquiries in various Australian jurisdictions have considered what information relating to tenders and contracts should be made routinely available to the public. The New South Wales Government has issued guidelines which provide for the routine disclosure of specified information relating to government contracts.

Need for Review of the NSW FOI Act? (pages 53-55)

When the NSW FOI Act was introduced to parliament, the Government indicated that it would be reviewed after two years. However, in the 11 years the Act has been in operation, it has not been subject to a comprehensive review. Before the last New South Wales election, both sides of politics indicated a willingness to review the Act.

The NSW Ombudsman’s Office has consistently called for a comprehensive review of the FOI Act for a number of years. The Ombudsman’s Office has pointed to significant developments which have occurred since the introduction of the Act to support its call for a review. These developments include: important judicial decisions which have looked at the rights of the public to access government information; technological advancements; increases in the contracting out of government services; and the enactment of other legislation providing for access to government information.

Issues regarding the reform of the FOI Act (pages 55-68)

There is a large amount of material on FOI reform proposals that are directly applicable, or relevant, to the NSW FOI legislation. Such material includes reports by law reform commissions, ombudsmen, parliamentary committees, and academics in Australian, and overseas, jurisdictions. All major aspects of FOI legislation have been reviewed including: objects clauses; exempt bodies; exemption provisions; ministerial certificates; internal and external review provisions, and charging structures.

International Comparison (pages 68-77)

The first law establishing a right to government information was enacted in Sweden in 1776. However, Sweden remained the only country with such legislation until the second

half of the 20th century. Finland adopted such a law in 1951. The influential United States FOI Act was passed in 1966. A number of European countries enacted access legislation in the 1970s. Countries with Westminster systems of government soon followed with Australia, Canada and New Zealand all enacting FOI legislation in 1982. In the past few years interest in FOI legislation throughout the world has accelerated. Approximately 50 countries now have such legislation or are considering introducing it.

1.0 INTRODUCTION

The fundamental aim of Freedom of Information (“FOI”) legislation is to promote and enhance the processes of democracy and representative government by increasing access to information held by the government. FOI legislation aims to provide open and accountable government; increase public participation in government decision-making; ensure that personal information held by government is relevant, accurate, up-to-date and complete; and enable individuals to be kept informed of government decision-making processes that affect them.

All Australian jurisdictions, except the Northern Territory, have enacted freedom of information legislation, and as such, FOI has become a significant part of administrative law in Australia. Prior to the enactment of FOI legislation, there was no general right of access to information held by governments throughout Australia, and it is generally accepted that a culture of government secrecy largely prevailed.

The *Freedom of Information Act 1989* (NSW) commenced operation on 1 July 1989. In summary, the Act:

- (a) confers a legally enforceable public right of access (subject to specified exemptions) to documents in the possession of government agencies’ and Ministers;
- (b) requires government agencies to publish certain information regarding their operations, functions and documents; and
- (c) establishes the right to seek correction of personal information held by government agencies.

Opinions differ as to whether the NSW FOI Act has met its objectives. Government accountability and secrecy is commonly raised as an issue during election campaigns, with the last New South Wales State election being no exception.¹ Further, in the past couple of years, issues in relation to access to government information have been raised in some prominent contexts, for example in relation to secrecy surrounding the organising of the Olympics,² and information regarding the Police Commissioner’s salary.³

¹ See for example, Clark P, “Coalition pledges FOI laws review”, *The Sydney Morning Herald*, 1 March 1999, p 2; Humphries D, Grattan M and Moore M, “Bob Carr - The Final Interview”, *The Sydney Morning Herald*, 26 March 1999; Clark P, “Freedom from information”, *The Sydney Morning Herald*, 1 March 1999, p 13. The Sydney Morning Herald also ran a series of articles under the heading “A Herald Investigation State of Secrecy (see for example, 27 Feb 1999 p 1; 6 March 1999 p 99; 12 March 1999 p 1). For the Premier’s response to the series of articles government secrecy see Carr B, “Some facts in the ‘State of Secrecy’” (letters to the editor), *The Sydney Morning Herald*, 9 March 1999, p 20.

² See for example, Stevenson A, “Top Secret”, *The Daily Telegraph*, 10 July 1999; Milliken R, “The man who smashes secrets”, *The Australian Financial Review*, 1 April 1999; Knox M, “Why the Games still stink”, *The Sydney Morning Herald*, 16 Nov 1999, p 44; Moore M, “The Secret Games”, *The Sydney Morning Herald*, 21 Nov 1998. See n 114 below for an overview of the application of the FOI Act to information relating to the Olympics.

In May this year, the Leader of the Opposition introduced legislation to amend the FOI Act with the aim of increasing access to government information. In the past year there has also been renewed interest FOI in a number of other Australian jurisdictions. The Bracks Government in Victoria moved quickly on its election promise to amend the Victorian FOI Act to strengthen access, thereby reversing the previous trend in that jurisdiction towards restriction of access.⁴ A South Australian parliamentary committee recently published a report on its comprehensive review of the South Australian FOI Act.⁵ In Queensland, a parliamentary committee is currently conducting a comprehensive review of the Queensland FOI legislation.⁶ A parliamentary committee in Victoria also published a report this year on “commercial in confidence” material with recommendations for amendments to the FOI Act.⁷

This Paper provides information on FOI legislation in New South Wales. Section 2 provides an overview of FOI developments in Australia and New South Wales. Some concepts basic to understanding FOI - including objectives of FOI, the constitutional freedom of communication, necessary restrictions to FOI, and other means of accessing government information – are discussed in sections 3 to 7. An overview of the provisions of the NSW FOI Act is provided in section 8.

Statistics on FOI usage and compliance in New South Wales are provided in section 9. Section 10 looks at whether the FOI Act has achieved its objectives. The oft expressed view that FOI has not delivered open government has led some commentators to argue for new approaches to accessing government information. New approaches, and in particular pro-active (i.e. disclosure of material as a matter of course, rather than waiting for a request) approaches, are discussed in section 11. This section also provides an overview of New South Wales government guidelines on the disclosure of government contract and tender information, as discussion of pro-active disclosure often focuses on this type of

³ See for example, Harris T, “Ryan’s pay packet comes under closer scrutiny”, *The Australian Financial Review*, 16 Nov 1999, p 6; Morris L, “Generous with the perks but not with the information”, *The Sydney Morning Herald*, 16 Oct 1999, p 4.

⁴ Pizer J, ‘Putting the “O” back into FOI’ (2000) 74(2) *Law Institute Journal* 63. Paterson M, “Victoria’s new FOI Bill: some long overdue reforms but still room for improvement” (1999) 84 *Freedom of Information Review* 90.

⁵ South Australia, Parliament, Legislative Review Committee (“LRC”), *Report of the Legislative Review Committee Concerning The Freedom of Information Act 1991*, September 2000. Note that the Committee concluded that a complete overhaul of the FOI Act was needed and included a draft FOI Bill (based largely on the New Zealand FOI legislation) in the report.

⁶ The inquiry is being conducted by the Legal, Constitutional and Administrative Review Committee: see <www.parliament.qld.gov.au/committees/LCARC/LCARC%20FOI.htm>.

⁷ Victoria, Parliament, Public Accounts and Estimates Committee (“PAEC”), *Inquiry into Commercial in Confidence Material and the Public Interest*, Thirty-Fifth Report to Parliament, March 2000, chapter 7, <www.parliament.vic.gov.au/paec/pi.htm>.

information. Section 12 discusses whether a review of the NSW FOI Act is needed, and section 13 provides a brief overview of some of the many reform issues that have been raised. Finally, an overview of FOI in overseas jurisdictions (in particular the United States, New Zealand and the United Kingdom) is provided in section 14.

2.0 BACKGROUND TO FOI LEGISLATION IN AUSTRALIA

2.1 Historical origins of official secrecy

In a seminal article on FOI legislation published in 1967, Professor Enid Campbell stated that the right of public servants to act anonymously, and the right of executive departments to keep their records confidential, are firmly rooted in our political tradition.⁸

Professor Campbell stated that the tradition of official secrecy in Australian and British governments was not a result of considered policy, but was a legacy of the time when political authority was concentrated in the monarch:

The tradition of government privacy grew from the subordination of royal officials to the person of the monarch, the urge of monarchs to protect themselves against the incursions of rival power seekers, and the common medieval tendency of expressing public law principles in proprietary terms. Documents prepared by Crown servants became Crown property and, as such, matters which the Crown could disclose or withhold at will.⁹

The tradition of official secrecy was supported by public service statutes or regulations that commonly provided that “public servants shall not disclose information received by them in the course of their employment except to authorized persons”.¹⁰ In addition, all Australian jurisdictions, other than New South Wales, Victoria and South Australia, enacted general criminal offences regarding the disclosure of information that a public servant was obliged to keep secret.¹¹ There were also many provisions in legislation applying to specific areas aimed at preventing the disclosure of government information in those areas.

The common law supported the tradition of official secrecy in that it has never recognised a general right of access to government information. Under the common law, relevant government information may be disclosed in the course of litigation involving the government, but this is subject to the doctrine of public interest immunity (previously referred to as “crown privilege”) which holds that Courts will not compel the disclosure of

⁸ Campbell E, “Public Access to Government Documents” (1967) 41(3) *The Australian Law Journal* 73.

⁹ *ibid*, p 77.

¹⁰ *ibid*, p 78. See also Finn P, *Integrity In Government Project - Interim Report 1 - Official Information*, The Australian National University, 1991, p 89.

¹¹ Finn, *ibid*, p 90.

government information if disclosure would injure an identifiable public interest.¹²

Despite its historical origins, official secrecy was considered to be a crucial part of the Westminster system of government. When the concept of FOI was first debated in Australia, it was argued that FOI legislation was incompatible with the Westminster system of government.¹³ In particular, it was argued that FOI would undermine collective and individual ministerial responsibility, and the neutrality and anonymity of the public service. There were concerns that FOI would weaken Cabinet solidarity, impair open and frank discussion in decision-making processes, and threaten the stability of government.¹⁴ It was argued that accountability was provided for through the clear lines of responsibility in the Westminster system: that is, the public service to the minister, the minister to the parliament, and the parliament to the people.

A 1978 report by the Senate Standing Committee on Constitutional and Legal Affairs, considered, and rejected, arguments supporting the incompatibility of FOI and the Westminster system. While the Committee recognised that an effective FOI Act would cause some revision to the doctrine of a neutral and anonymous public service, and may modify the relationship between ministers and public servants, it held that any changes would be for the better.¹⁵ Further, it concluded that collective responsibility would not be weakened (due to appropriate exemptions to FOI),¹⁶ and individual responsibility may well be strengthened as more information made available through FOI would require ministers to answer for more of the acts and decisions of their departments.¹⁷

The Committee noted the changes in the system of government: the decrease in ministerial control over public officials due to the size and complexity of the modern public service;¹⁸ the decrease in parliament's control over ministers due to the development of the party

¹² Magner E, "Privilege and Public Interest Immunity", subtitle 16.7 in *The Laws of Australia*, The Law Book Company Limited, para 112. Note that previously there was controversy as to whether a claim by a member of the executive government that information was privileged under this doctrine was conclusive. It appears settled now that the a claim by a member of the executive is not conclusive and that courts will decide on a case by case basis whether the information will be protected from disclosure under the doctrine: *Sankey v Whitlam* (1976) 142 CLR 1.

¹³ Australia, Parliament, Senate Standing Committee on Constitutional and Legal Affairs ("SSCCLA"), *Freedom of Information*, AGPS, Canberra, 1979, p 33. Snell and Tyson note that this argument is still raised today: see Snell R and Tyson N, "Back to the drawing Board: Preliminary musings on redesigning Australian Freedom of Information" (2000) 85 *Freedom of Information Review* 2 at 5.

¹⁴ SSCCLA, *ibid*, p 37.

¹⁵ *ibid*, p 54.

¹⁶ *ibid*, pp 35-39, 55 and chapter 18.

¹⁷ *ibid*, pp 43 and 55.

¹⁸ *ibid*.

system;¹⁹ the shift in the balance of power between the elected government and the professional public service;²⁰ and the decline in anonymity of individual public servants.²¹ The Committee said that “[i]t is not that freedom of information will change our governmental system; it is rather that our changing governmental system is contributing to pressures for freedom of information legislation”.²²

The Committee stated the following:

The political system, whatever its form or nature, should exist to one end only: not the convenience of the government, but the service of the people. To this end, no views about the supposed nature of the Westminster system should prevent the strengthening of the accountability of all parts of the government to the people from being achieved...

Very often people have alleged that the Westminster system is under attack by freedom of information legislation when what is actually under attack is their own traditional and convenient ways of doing things, immune from public gaze and scrutiny. We are indeed seeking to put an end to that. What matters is not the convenience of ministers or public servants, but what contributes to better government.²³

2.2 Enactment of FOI legislation in Australia

The Commonwealth was the first Australian jurisdiction to enact FOI legislation. The *Freedom of Information Act 1982* (Cth) commenced operation on 1 December 1982. It was the first national FOI legislation enacted in a country with a Westminster system of government.²⁴ The Commonwealth FOI Act was part of an administrative law reform package commonly referred to as the “New Administrative Law”.²⁵ The reforms grew out of “[c]oncern about the power of the bureaucracy and an awareness that the common law control of the administration was limited”.²⁶

¹⁹ *ibid*, pp 39-44.

²⁰ *ibid*, p 47.

²¹ *ibid*, pp 49-57.

²² *ibid*, pp 26-27.

²³ *ibid*, p 55.

²⁴ Australian Law Reform Commission and Administrative Review Council (“ALRC/ARC”), *Open Government: a review of the federal Freedom of Information Act 1982*, Report No 77 (ALRC) and Report No 40 (ARC), AGPS, Canberra, 1995, para 2.1, <www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html>.

²⁵ Other parts of the package include the *Ombudsman Act 1976* (Cth); the *Administrative Decisions (Judicial Review) Act 1977* (Cth); the *Administrative Appeals Tribunal Act 1975* (Cth); and the establishment of an Administrative Review Council to monitor the administrative law system: see Katzen H and Douglas R, *Administrative Law*, Butterworths, 1999, p 10.

²⁶ Katzen and Douglas, *ibid*.

the modifications required and any important issues involved in adapting the United States Freedom of Information Act to the Australian constitutional and administrative structure”³². The IDC’s report was published in 1974.³³ However, following criticism of the report for

²⁷ The Northern Territory Attorney General’s Department informed us that FOI legislation is currently under consideration.

²⁸ ALRC/ARC, n 24, para 3.14. The relevant legislation in each jurisdiction is as follows: *Freedom of Information Act 1982* (Vic) (commenced operation 5 July 1983); *Freedom of Information Act 1982* (ACT) (11 May 1989); *Freedom of Information Act 1989* (NSW) (1 July 1989); *Freedom of Information Act 1991* (SA) (1 Jan 1992); *Freedom of Information Act 1992* (Qld) (19 Nov 1992); *Freedom of Information Act 1991* (Tas) (1 Jan 1993); *Freedom of Information Act 1992* (WA) (1 Nov 1993).

²⁹ This is taken from Bayne P, *Freedom of Information*, The Law Book Company, 1984, pp 4-6; and ALRC/ARC, n 24, paras 3.1-3.7. For a detailed discussion of the history of official secrecy and openness in Australia see Terrill G, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and beyond*, Melbourne University Press, 2000.

³⁰ Spigelman J, *Secrecy: Political Censorship in Australia*, Angus and Robertson, 1972. Spigelman is now the Chief Justice of the Supreme Court of New South Wales.

³¹ Bayne, n 29, p 4.

³² *ibid.*

³³ Australia, Attorney-General’s Department, *Proposed Freedom of Information Legislation: Report of Interdepartmental Committee*, AGPS, Canberra, 1974.

lack of detail, a second IDC was created by the Fraser Government in 1976 to report on policy proposals for FOI legislation. The second IDC report was published in late 1976.³⁴ Also in 1976, the Coombs Royal Commission on Australian Government Administration published its final report.³⁵ The Commission “felt that legislation could contribute to freedom of information, but the majority did not agree with the one member who proposed a draft FOI Bill”.³⁶

An FOI Bill was first introduced into the Senate in 1978. This Bill was referred to the Senate Standing Committee on Constitutional and Legal Affairs for inquiry and report. A comprehensive report containing 93 recommendations was published by the Committee in late 1979.³⁷ A revised FOI Bill was introduced into the Senate in 1981, although it did not reflect the majority of the Committee’s recommendations. The Bill was subsequently passed by both Houses of Parliament and the FOI Act commenced operation on 1 December 1982.

2.2.2 Chronology of FOI developments in New South Wales³⁸

The following timeline provides an overview of major developments relating to FOI legislation in New South Wales.

26 Jan 1977 The Premier, Neville Wran, commissioned the Review of New South Wales Government Administration headed by Professor Peter Wilenski, “to inquire into and report upon improvements in the machinery of Government and State Government Administration and to advise on the implementation of such improvements as the Government decides upon”.³⁹

Nov 1977 The first report by Professor Wilenski, *Directions for Change*, published.⁴⁰ A chapter of the report was devoted to the need for FOI legislation. The report stated:

³⁴ Australia, Parliament, *Policy Proposals for Freedom of Information Legislation: Report of Interdepartmental Committee*, Parliamentary Paper No 400/1996, The Commonwealth Government Printer, Canberra, 1977.

³⁵ Australia, Royal Commission on Australian Government Administration (H.C. Coombs Chair), *Report*, Parliamentary Paper No 185/1976, AGPS, Canberra, 1976.

³⁶ Bayne, n 29, p 4.

³⁷ SSCCLA, n 13.

³⁸ The author acknowledges the assistance of the legislative history of the NSW FOI Act provided in Cossins A, *Annotated Freedom of Information Act New South Wales*, LBC Information Services, Sydney, 1997, pp 8 -14.

³⁹ Wilenski P (Commissioner, Review of NSW Government Administration), *Directions for Change*, Government Printer, NSW, 1977.

⁴⁰ *ibid.*

If we are to have a responsible and accountable administration, we must first be aware of what the administration is doing. The public cannot judge whether the administration is acting in the public interest unless it has the information on which to make that judgment.⁴¹

Wilenski recommended wide public debate on the issue of FOI legislation. He said that he would prepare a draft discussion paper and bill which, if approved by the Government, should be circulated early in 1978. He recommended six months for debate after which further recommendations should be made.⁴²

In the interim, he recommended that the Government “make a statement in favour of greater access to information by citizens and issue broad guidelines to agencies how this should operate”.⁴³ He said that this “will not only provide an immediate improvement in access but also its operation should provide some guidance for the form which a comprehensive legislative system might take”.⁴⁴

Mar 1979

Wilenski forwarded a draft FOI Bill to Premier Wran with a covering letter stating “I believe that this Bill is probably the most important single reform contained in my report and I urge it for your serious consideration”.⁴⁵

May 1982

A second report by Professor Wilenski, *Further Report: Unfinished Agenda*, was published.⁴⁶ The report recommended that FOI legislation be enacted and a model bill was appended to the report. The report stated:

During the last three years there has been a great increase in public discussion of secrecy and open government...⁴⁷

⁴¹ ibid, p 287.

⁴² ibid, p 299.

⁴³ ibid

⁴⁴ ibid.

⁴⁵ Alaba R, *Inside Bureaucratic Power: The Wilenski Review of NSW Government*, Hale & Iremonger, 1994, p 178.

⁴⁶ Wilenski P (Commissioner, Review of NSW Government Administration), *Further Report: Unfinished Agenda*, 1977.

⁴⁷ ibid, p 49.

All this activity has had little effect on the New South Wales administration, except perhaps to reinforce the opposition to increased public scrutiny. The administration remains a bastion of secrecy...⁴⁸

My firm conclusion is that greater openness in the New South Wales Government administration is urgently needed. Furthermore, experience has demonstrated that only legislation will ensure that such openness is maintained. Firm statements of government intent on a policy of more open government have made little impact on bureaucratic secrecy unless accompanied by an Act of Parliament establishing the right of access to documents and procedures by which that right can be enforced...⁴⁹

I cannot place enough emphasis on the need for freedom of information legislation in New South Wales. There is no measure which would have a more widespread effect in improving the conduct of government and stimulating fair and rational behaviour in administration.⁵⁰

14 Oct 1982

The model bill drafted by Wilenski was introduced to Parliament by an opposition MP, Tim Moore, as a private member's bill.⁵¹ Moore delivered a second reading speech, but the bill was not debated further.

1 Dec 1983

Premier Wran introduced an FOI bill into Parliament. In his second reading speech, he said:

It is the principle of open government that underlies this legislation. Open government is a central virtue for any democracy. If democracy is to function well, people need to be in a position to make informed decisions about who will represent them and the policies government pursues. My government has an ongoing commitment to this principle.⁵²

This bill also lapsed at the end of the parliamentary session with no further debate occurring.

⁴⁸ ibid, p 50.

⁴⁹ ibid, p 52.

⁵⁰ ibid, p 54.

⁵¹ *NSWPD*, 14/10/82, p 1679.

⁵² *NSWPD*, 1/12/83, p 4255.

2 June 1988 After a change of government in 1988, the Deputy-Premier, Wal Murray, introduced an FOI bill into Parliament. In his second reading speech, he said:

This bill is one of the most important to come before this House because it will enshrine and protect the three basic principles of democratic government, namely, openness, accountability and responsibility. It is only if these three principles are firmly in place in the form of legislation that we can say with confidence that we have a truly democratic State Government.⁵³

The government called for public submissions in relation to the Bill prior to further debate.

10 Nov 1988 An amended FOI bill was introduced into Parliament. This bill was debated and subsequently passed by both Houses of Parliament.⁵⁴

Dec 1988 An FOI Unit within the Premier's Department was established.⁵⁵ The objectives of the Unit were as follows:

- (a) ... to facilitate the introduction and implementation of FOI in New South Wales through [the] ... development of policies and procedures; provision of training, advice and assistance; co-ordination of legal advice, appeals and issue of ministerial certificates; and provision of advice and assistance to community groups and individuals...;
- (b) ... to monitor and review the operation of FOI in New South Wales, through ... regular collection of statistics, undertaking periodic reviews; [and] preparation of the Premier's Annual Report to Parliament.⁵⁶

1 July 1989 *Freedom of Information Act 1989* (NSW) commenced operation.

June 1991 The FOI Unit within Premier's Department was disbanded by the government as a cost-cutting measure.⁵⁷

⁵³ NSWPD, 2/6/88, p 1399.

⁵⁴ NSWPD, 10/11/88, p 3162.

⁵⁵ Cossins, n 38, p 26.

⁵⁶ Premier's Department, *Freedom of Information Act Annual Report 1989-1990*, 1990, as quoted in Cossins, *ibid*.

⁵⁷ Cossins, *ibid*.

1 July 1992

Significant amendments to the FOI Act contained in the *Freedom of Information (Amendment) Act 1992* (NSW) commenced operation. These amendments were a result of the Charter of Reform between the Greiner Government and three independent members who held the balance of power in the Legislative Assembly (John Hatton, Clover Moore and Peter McDonald). The amendments were designed to increase the accountability of the government, and included:⁵⁸

- a reduction in the time within which agencies must determine applications, from 45 days to 21 days (subject to extension of an additional 14 days in particular circumstances);
- a provision stating that, when determining whether disclosure of a document is in the public interest, it is not relevant to take into account the possibility of: embarrassment to, or loss of confidence in, the Government; or misunderstanding or misinterpretation of the information by the applicant;
- the removal of the right of an agency to refuse access to a document on the ground that it came into existence more than 5 years before the commencement of the Act;
- enabling review of a decision to refuse disclosure on the grounds of substantial and unreasonable diversion of resources;
- providing that the Supreme Court, rather than the District Court, will review whether reasonable grounds exist for the issue of a ministerial certificate;⁵⁹
- limiting the Minister's power to confirm a ministerial certificate (when the Supreme Court has found no reasonable grounds for its issue) to Cabinet and Executive Council documents;
- requiring a Minister to give reasons as to why a document subject to a ministerial certificate is exempt;
- a reduction in the number of exempt agencies, and exempt functions of particular agencies;
- preventing an agency from charging an applicant for time spent in searching for a document that was lost or misplaced;
- enabling the Ombudsman to recommend disclosure of an exempt document when it is in the public interest;
- enabling the Ombudsman to recommend that an agency change

⁵⁸ This is taken from Premier's Department Memorandum No. 92-12, *Commencement of the Freedom of Information (Amendment) Act 1992*, 2 June 1992 (accessible from the Premier's Department website at <www.premiers.nsw.gov.au>) and Cossins, n 38, p 58. See also NSW Premier's Department, *FOI Procedure Manual*, Third Edition, 1994, pp XVIII-XIX (accessible from the Premier's Department's website FOI page at <www.premiers.nsw.gov.au/foi/foi_manual/index1.htm>).

⁵⁹ A ministerial certificate is taken to be conclusive evidence that a document is exempt from disclosure under the FOI Act: see section 8.9.

its procedures for dealing with FOI applications to conform more closely with the objects and requirements of the Act.

- July 1993** Local councils became subject to the FOI Act in relation to all documents held by them. Previously, Councils had been subject to the Act in relation to personal affairs documents only.
- Oct 1998** Appeals to the District Court against agencies' decisions under the FOI Act were replaced with appeals to the newly established Administrative Decisions Tribunal ("ADT").
- 4 May 2000** The Freedom of Information Amendment (Open and Accountable Government) Bill 2000 introduced into Parliament by the Leader of the Opposition, the Hon. Mrs Chikarovski MP. The Bill proposes to amend the FOI Act as follows:
- (i) to provide for the appointment and functions of a Freedom of Information Commissioner, and
 - (ii) to entitle members of the public to be present at all meetings of boards of management of statutory corporations, and
 - (iii) to allow external review proceedings to commence without the need for internal review procedures to have been followed, and
 - (iv) to enable the Ombudsman to give access to an agency's document to a person who has applied to the Ombudsman for a review of the agency's conduct in relation to an application for access made by the person, and
 - (v) to make it clear that agencies have the burden of establishing that documents are exempt documents for the purpose of that Act, and
 - (vi) to provide that the fees and charges that may be charged under that Act are to be set by regulation rather than, as is presently the case, by the Minister...⁶⁰

The Bill proposes that the FOI Commissioner have the principal function of supervising agencies in their fulfilment of the obligations imposed on them under the FOI Act. The Bill provides that the FOI Commissioner and the Ombudsman may be the same person. It is proposed that the Commissioner:

- have the right to enter and search agency's premises;
- have the power to give directions to agencies (failure to comply with such directions will be an offence);
- may direct agencies to number documents in such a way to make it readily apparent if any document, or any part of a document, is unaccounted for in a response made by an agency to an FOI

⁶⁰ New South Wales, Freedom of Information Amendment (Open and Accountable Government) Bill 2000, *Explanatory note*, first print.

- request; and
- may report to the Presiding Officer of each House of Parliament, and name any individuals who have been the cause of a failure to comply with the Act.

4 May 2000

Notice of Motion given by the Hon. Dr Chesterfield-Evans MLC indicating his intention to introduce the Government (Open Market Competition) Bill 2000.⁶¹ The Bill is described in the Notice of Motion as follows:

An Act to require Government contracts, and tenders relating to Government contracts, to be made available for public inspection, and to enable the Auditor-General to audit the accounts of persons and bodies that receive public money by way of grant.

3.0 OBJECTIVES OF FOI LEGISLATION

The fundamental aim of FOI legislation is to promote and enhance the processes of democracy and representative government by increasing access to information. The need for access to information in a democracy was identified in the often-quoted statement by United States President James Madison in 1822:

A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance: and people who mean to be their own governors, must arm themselves with power that knowledge gives.⁶²

As stated by the Senate Standing Committee on Constitutional and Legal Affairs:

The essence of democratic government lies in the ability of people to make choices: about who shall govern; or about which policies they support or reject. Such choices cannot be properly made unless adequate information is available. It cannot be accepted that it is the government itself which should determine what level of information is regarded as adequate.⁶³

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

- to make government more accountable by making it more open to public scrutiny;
- to improve the quality of political democracy by giving the opportunity to all members of the community to access information that will permit more meaningful participation in the processes of government, including the formulation of policy;
- to enable persons to be kept informed of the functioning of the decision-making process

⁶¹ The Bill has not progressed further at the time of writing (September 2000).

⁶² SSCCLA, n 13, p 23.

⁶³ *ibid*, p 22.

as it affects them and to know the criteria that will be applied by government agencies in making those decisions; and

- to enable individuals to have access to information about them held on government files, so that they may know the basis on which decisions that can fundamentally affect their lives are made and may have the opportunity of correcting information that is inaccurate, incomplete, out-of-date or misleading.⁶⁴

It has also been recognised that government information is a valuable public resource that is collected and created with public money for public purposes. In this sense, government information belongs to the public, and governments are “trustees” of that information on behalf of the public. It follows from this that government information should be generally accessible to the public.⁶⁵

Further, it has been recognised that inappropriate government secrecy can allow corrupt practices to flourish, and that FOI and other accountability mechanisms can help to protect against corruption.⁶⁶

4.0 THE CONSTITUTIONAL FREEDOM OF COMMUNICATION

In a series of cases (“**the free speech cases**”), the High Court has held that the Australian Constitution contains an implied freedom of communication on matters of government and politics.⁶⁷ In *Lange v Australia Broadcasting Corporation* (1997), the Court unanimously held that the freedom was an indispensable incident of the system of representative and responsible government established by the terms of the Constitution. This freedom limits both Federal and State legislative and executive power. In its reasoning, the Court recognised the important role that access to government information plays in a system of representative and responsible government:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be “directly chosen by the people” of the Commonwealth and the States, respectively...⁶⁸

⁶⁴ Queensland Information Commissioner (“Qld IC”), Submission by the Information Commissioner (Qld) to the Legal, Constitutional and Administrative Review Committee on the Review of the Freedom of Information Act 1992 (Qld), 14 May 1999, <www.parliament.qld.gov.au/committees/LCARC/LCARC%20FOI.htm>.

⁶⁵ ALRC/ARC, n 24, para 4.9. Qld IC, *ibid*, para A17.

⁶⁶ ALRC/ARC, *ibid*, para 2.3.

⁶⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v The State of Victoria* (1997) 189 CLR 579; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Cunliffe v Commonwealth* (1994) 182 CLR 272; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

⁶⁸ *Lange v ABC*, *ibid*, p 559.

[Sections] 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power...⁶⁹

If the freedom is to effectively serve the purpose of ss 7 and 24 and related sections, it cannot be confined to the election period. Most of the matters necessary to enable “the people” to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the *freedom to receive and disseminate information* were confined to election periods, the electors would be deprived of the greater part of the *information necessary to make an effective choice* at the election...

...those provisions which prescribe the system of responsible government necessarily imply *a limitation on legislative and executive power to deny electors and their representatives information concerning the conduct of the executive branch of government* throughout the life of a federal Parliament. Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature...⁷⁰ (emphasis added)

The Court also recognised the importance of access to a broad range of information, including information relating to all levels of government, and that access to information was important to “the common convenience and welfare of Australian society”:

As McHugh J pointed out in *Stephens*...

“In the last decade of the twentieth century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when, why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. *Information concerning the exercise of those functions and powers is of vital concern to the community.* So is the performance of the public representatives and officials who are invested with them. It follows in my opinion that *the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials.* Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information. With the increasing integration of the social, economic and political life of Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers *at any particular level of government or administration, or in any part of the country, is not of relevant interest to the public of Australia generally*” ...

Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The

⁶⁹ *ibid*, p 560.

⁷⁰ *ibid*, p 561.

*common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters....*⁷¹ (emphasis added)

The free speech cases raise the issue of whether the importance of access to information in a system of representative and responsible government may raise constitutional obligations in relation to freedom of information.⁷² However, such constitutional obligations are unlikely as “the effect of the protected freedom was only intended to be negative and not positive in nature, ie restrictive of legislative power rather than placing a positive obligation upon its exercise”.⁷³ As stated by McHugh J:

... no Commonwealth or State law can validly impair the freedom of communication that the Constitution protects and ... the common law cannot be at odds with the Constitution. The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But ... that right must exist under general law.⁷⁴

Although constitutional obligations to provide access to information are unlikely, the constitutional freedom may provide some protection for the disclosure of government information.⁷⁵ The implied freedom may be a relevant consideration when determining whether disclosure is in the public interest under FOI legislation (as required for some exemptions).⁷⁶ In addition, it has been suggested that the free speech cases provide strong support for the argument that FOI legislation should be interpreted in a way that promotes disclosure of information.⁷⁷

It has also been suggested that the free speech cases may affect the validity of “secrecy” provisions in legislation that prohibit disclosure of information;⁷⁸ and may limit the power

⁷¹ *ibid*, p 570.

⁷² Lindell GJ, “Expansion or Contraction? Some reflections about the recent judicial developments on representative democracy” (1998) 20(1) *Adelaide Law Review* 111 at 134. Jolly R, “The Implied Freedom of Political Communication and Disclosure of Government” *Federal Law Review* 41.

⁷³ Lindell, *ibid*. However, constitutional obligations are arguable: see Jolly, *ibid*.

⁷⁴ *Levy v Victoria* (1997), n 67, at p 622.

⁷⁵ Jolly, n 72.

⁷⁶ *ibid*, p 57.

⁷⁷ *ibid*. ALRC/ARC, n 24, para 2.4.

⁷⁸ See Lindell, n 72, pp 134-135. However, note that the freedom of communication is not

of the executive government to enter into binding obligations of confidentiality.⁷⁹

5.0 NECESSARY RESTRICTIONS TO FREEDOM OF INFORMATION

It is widely accepted that access to information held by governments should not be complete and unfettered. It is recognised that there are legitimate interests which may need protection by withholding access to some information. As stated by the Queensland Law Reform Commission:

Disclosure of some kinds of information collected and held by government or government agencies may have such adverse effects that the public interest in access to that information is outweighed by a countervailing public interest in confidentiality.⁸⁰

Interests that may need protection by restrictions on disclosure of information include: national security, international relations, cabinet confidentiality, law enforcement; personal privacy; and commercial confidentiality. Protection of such interests are provided for in FOI legislation through the exemption provisions. However, defining the boundaries of such exemptions is often a contentious issue.

6.0 FOI LEGISLATION NOT THE ONLY METHOD OF ACCESSING GOVERNMENT INFORMATION

Clearly FOI legislation is just one of many ways in which government information is accessible to the public. As recognised by the Australian Law Reform Commission and the Administrative Review Council “*the FOI Act is not, and should not be, the only, or the even the primary, way of gaining access to government information*”.⁸¹

Information is frequently released voluntarily by government ministers and agencies through publications, community consultation, press releases and press conferences. The Parliamentary processes, such as question time and the expanding parliamentary committee system, also provide for access to information. As confirmed in two important recent cases, the New South Wales Houses of Parliament have the power to require the Government to produce documents to the House which may then be disclosed to the public.⁸² In addition,

absolute. The freedom will not invalidate a law whose object is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and that is reasonably appropriate and adapted to achieving that legitimate object or end: see *Lange v ABC*, n 67, pp 561-562.

⁷⁹ Brennan T, “Undertakings of Confidence by the Commonwealth – Are there limits?” (1998) (18) *AIAL Forum* 8.

⁸⁰ Queensland Law Reform Commission (“QLRC”), *The Freedom of Information Act 1992 Review of Secrecy Provision Exemption*, Report No 46, March 1994, p 9.

⁸¹ ALRC/ARC, n 24, para 2.7.

⁸² *Egan v Willis & Cahill* (1998) 158 ALR 527; and *Egan v Chadwick* (1999) 46 NSWLR 563. For a discussion of these cases see: Griffith G, *Egan v Willis & Cahill: The High Court*

there are other New South Wales statutes that provide for access to government information (see section 7.0 below).

Other mechanisms through which information may become available include judicial and merits review of administrative decisions, review by the Ombudsman and the Auditor-General (although note that both the Ombudsman and the Auditor-General are subject to general secrecy provisions⁸³), and through the annual reporting requirements of government agencies. More limited sources of information include “unattributable leaks” of information, and information disclosed through compulsory court procedures when the government is involved in litigation.

Technological advances are also improving access to government information with much information, such as policy documents and manuals, government reports, parliamentary committee reports, parliamentary debates, legislation, bills, and courts and tribunal decisions, being made readily available to many people through the Internet.

In this context it has been noted that the importance of FOI lies in the fact that it provides a general *legally enforceable right* of access to government information.⁸⁴ That is, FOI provides a public right of access to information that may otherwise be withheld by the government.

7.0 OTHER LEGISLATION IN NSW PROVIDING FOR ACCESS TO GOVERNMENT INFORMATION

The FOI Act is not the only Act in New South Wales that provides for access to government information. A brief overview of the other principal statutes providing for information access is given below.

Privacy and Personal Information Protection Act 1998 (NSW) (“the PPIP Act”):⁸⁵ This Act aims to protect personal information and the privacy of individuals generally. It requires public sector agencies to comply with 12 “information protection principles”. Three of the information protection principles relate to information access and alteration as follows:

- *Information about personal information held by agencies*: section 13 requires agencies

Decision, NSW Parliamentary Library Briefing Paper No 1/99; and Griffith G, *Egan v Chadwick and Other Recent Developments in the Powers of the Elected Upper Houses*, NSW Parliamentary Library Briefing Paper No 15/99.

⁸³ Section 34 of the *Ombudsman Act 1974* (NSW) and section 38 of the *Public Finance and Audit Act 1983* (NSW).

⁸⁴ ALRC/ARC, n 24, para 2.7.

⁸⁵ For a discussion of this Act and other privacy law issues see Griffith G, *Privacy Law Reform: Issues and Recent Developments*, NSW Parliamentary Library Briefing Paper No 20/98.

to take reasonable steps to enable individuals to find out if the agency holds information about them, and if so, the nature of that information, what it is used for, and how it may be accessed.

- *Access to personal information held by agencies:* section 14 requires agencies to provide access to personal information upon the request of the person to whom the information relates. The information must be provided without excessive delay or expense.
- *Alteration of personal information:* section 15 provides that an agency that holds personal information must, at the request of the person to whom the information relates, make appropriate amendments to ensure the information is accurate, relevant, up to date, complete and not misleading.

Clearly there is significant overlap between the FOI Act and the PPIP Act as both Acts provide for a right of access to, and alteration of, personal information held by government agencies. The PPIP Act expressly provides that it does not affect the operation the FOI Act (section 5). Further it states that sections 13-15 do not affect any conditions or limitations in the FOI Act, and that those conditions or limitations apply as if they were part of the PPIP Act (section 20(5)). It appears that this provision means that an agency can rely on any condition or limitation in the FOI Act to refuse notification, access or correction rights under sections 13-15 of the PPIP Act.⁸⁶ However, despite these provisions, it has been noted that the existence of overlapping regimes is potentially confusing for both applicants and agencies.⁸⁷

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

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

It has been noted that a conflict may arise between the PPIP Act and the FOI Act where an FOI request includes a document that contains personal information about someone other than the applicant.⁸⁸ Whether or not personal information is disclosed may depend on which Act is applying. Personal information may be subject to disclosure under the FOI Act, but required to be withheld under the PPIP Act. There is a “personal affairs” exemption under the FOI Act which protects some personal information from disclosure.

⁸⁶ New South Wales, Privacy Commissioner, *Local Government and the Privacy and Personal Information Protection Act*, Issues Paper, January 2000, section 3, <www.lawlink.nsw.gov.au/pc.nsf/pages/localgovernment>.

⁸⁷ Privacy Commissioner, *ibid*.

⁸⁸ Griffith, n 85, p 26.

However, due to differences between this exemption and the relevant provisions of the PPIP Act, the limits of personal affairs information exempt from disclosure under the FOI Act are unlikely to coincide exactly with the limits of personal information protected from disclosure under the PPIP Act.⁸⁹

This discussion does not attempt to cover all possible overlap and conflict between the FOI Act and the PPIP Act. However, clearly duplication, and the potential for differing outcomes, exist thereby placing decision makers, and applicants, in a confusing position.

The NSW Ombudsman has said that the way in which the PPIP Act and the FOI Act interact needs to be examined.⁹⁰

Local Government Act 1993 (NSW): Section 12 of this Act provides that all local council documents must be available for inspection free of charge subject to limited exceptions. It has been noted that the provisions of this Act “have the potential to complicate access issues in the minds of the public and of council officers, when added to the Freedom of Information Act and the Privacy and Personal Information Protection Act”.⁹¹ The NSW Ombudsman has also said that the relationship between the Local Government Act and the FOI Act needs to be examined.⁹²

State Records Act 1998 (NSW):⁹³ This Act provides for the creation, management and protection of government records and archives. It replaced the *Archives Act 1960* (NSW). Unlike the Archives Act, this Act views record and archive management as a “continuum” of record keeping processes. In his second reading speech, the Minister stated:

It will promote a consistent and coherent regime of management processes from the time of the creation of records and, before creation, in the design of record-keeping systems through to the preservation and use of State records as archives.⁹⁴

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

- make and keep full and accurate records of the activities of the office;

⁸⁹ See discussion in Griffith, *ibid*, pp 26-27.

⁹⁰ See section 13.9 below.

⁹¹ Privacy Commissioner n 86, section 4.

⁹² See section 13.9 below.

⁹³ Much of the information in this section is taken from the State Records Authority’s website: State Records Authority of NSW, *State Records Act: Summary of Provisions*, <www.records.nsw.gov.au/publicsector/sract/actsummaryprov.htm>; and State Records Authority of NSW, *State Records Act: An introduction to the State Records Act*, <www.records.nsw.gov.au/publicsector/sract/actintro.htm>.

⁹⁴ NSWPD, 21/05/98, p 5017 per the Hon. M Egan MLC.

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

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

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

The obligations in the State Records Act regarding the creation, maintenance and preservation of government records impacts on what information is potentially available to be accessed under the FOI Act. The importance of good record management practices to the success of FOI has been recognised:

Good recordkeeping and records management are ... important to the success of the FOI Act. Without them, the right of access provided by the Act is unenforceable in practice. Agencies will be unable to locate records efficiently (if at all) and records that ought to be retained may be destroyed.⁹⁵

While not expressly referring to FOI, the Minister recognised the importance of good record keeping to accountability when introducing the State Records Bill to parliament:

The impetus for change [from the Archives Act to the State Records Act] comes mainly from two sources: first, a perception that governments and other public institutions should be made more accountable, coupled with a recognition by several royal commissions in New South Wales and interstate of the link between accountability and good record keeping.⁹⁶

⁹⁵ ALRC/ARC, n 24, para 5.8. Note that these comments are made in relation to the Commonwealth FOI Act, but apply equally to New South Wales.

⁹⁶ NSWPD, 21/05/98, p 5017, per the Hon. M Egan MLC.

8.0 OVERVIEW OF THE NSW FOI ACT⁹⁷

An overview of key aspects of the New South Wales FOI Act is provided below.⁹⁸

8.1 Objects

The **objects** of the FOI Act are provided in section 5(1) as follows:

The objects of this Act are to extend, as far as possible, the rights of the public:

- (a) to obtain access to information held by the Government; and
- (b) to ensure that records held by the Government concerning the personal affairs of members of the public are not incomplete, incorrect, out of date or misleading.

The **means** by which it is intended by Parliament that these objects are to be achieved are provided in section 5(2) as follows:

- (a) by ensuring that information concerning the operations of the Government (including, in particular, information concerning the rules and practices followed by the Government in its dealings with members of the public) is made available to the public, and
- (b) by conferring on each member of the public a legally enforceable right to be given access to documents held by the Government, subject only to such restrictions as are reasonably necessary for the proper administration of the Government, and
- (c) by enabling each member of the public to apply for the amendment of such of the Government's records concerning his or her personal affairs as are incomplete, incorrect, out of date or misleading.

The **intention** of Parliament is provided in section 5(3) as follows:

- (a) that this Act shall be interpreted and applied so as to further the objects of this Act, and
- (b) that the discretions conferred by this Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the

⁹⁷ The NSW Premier's Department's website FOI page contains information on FOI including links brochures on using the FOI Act; the Premier's Department's *FOI Procedure Manual* (see n 58); the NSW Ombudsman's *FOI policies and guidelines* (see n 118); and the Premier's Department's Statement of Affairs and Summary of Affairs: <www.premiers.nsw.gov.au/foi/foi_manual/index1.htm>. Note that the website states that the Premier's Department and the Ombudsman's Office are currently working on a combined Freedom of Information Manual.

⁹⁸ All section references in this background paper are to the *Freedom of Information Act 1989* (NSW) unless specified otherwise.

disclosure of information.

8.2 Unconditional right of access⁹⁹

There is an unconditional right of access to government documents under the Act in the sense that an applicant does not have to provide a reason or special need for access to the documents. All members of the public have the same right of access, irrespective of the reason for applying for access.

8.3 Exempt Bodies

The FOI Act applies to “agencies” and ministers. An agency is defined as a government department, public authority, local authority or public office.¹⁰⁰ Public authority and public office are defined in the Act, and particular bodies are specifically exempted from the definitions.¹⁰¹ Exempt bodies include the Legislative Council, Legislative Assembly or a committee of either or both of these bodies;¹⁰² a Royal Commission or a Special Commission of Inquiry;¹⁰³ and Courts and Tribunals in relation to their judicial functions.¹⁰⁴

In addition, **Schedule 2** of the Act provides a list of agencies that are exempt from the Act in relation to specified functions.¹⁰⁵ The agencies and functions listed in Schedule 2 are as follows:

⁹⁹ Cossins, n 38, p 119.

¹⁰⁰ Section 6(1). Note that under the *Commission for Children and Young People Act 1998* (NSW) the FOI Act extends to some private sector agencies, including private schools, child care centres and kindergartens, in limited circumstances.

¹⁰¹ Section 7 and 8 respectively.

¹⁰² Section 7(1)(a)(iii).

¹⁰³ Section 7(1)(a)(iv).

¹⁰⁴ Section 10. Note that the New South Wales Law Reform Commission has recently considered whether there should be a general right of access to documents involved in court proceedings: see New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43, Sydney, 2000, chapter 11, <www.lawlink.nsw.gov.au/lrc.nsf/pages/dp43toc>.

¹⁰⁵ Section 9 and Schedule 2 of the Act.

Agency	Exempt Functions
The Auditor-General	Investigative, audit and reporting
The Director of Public Prosecutions	Prosecuting
The Independent Commission Against Corruption	Corruption prevention, complaint handling, investigative and reporting
The Public Trustee	Executor, Administrator or trustee
The Treasury Corporation	Borrowing, investment and liability and asset management
The Ombudsman	Complaint handling, investigative and reporting
The Legal Services Commissioner	Complaint handling, investigative and reporting
The Health Care Complaints Commission	Complaint handling, investigative and reporting functions in relation to a complaint being dealt with by the Commission
The Health Conciliation Registry	Conciliation
The Child Death Review Team	All functions
The Police Integrity Commission	Corruption prevention, complaint handling, investigative and reporting
The Inspector of the Police Integrity Commission	Operational auditing, complaint handling, investigative and reporting
The FSS Trustee Corporation	Investment
The SAS Trustee Corporation	Investment
The Axiom Funds Management Corporation	Investment functions exercised on behalf of trustees of superannuation funds
The Department of Training and Education Co-ordination	Storing, reporting, analysis of information regarding the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions
Universities	Dealing with information regarding the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions.
The Inspector-General of Corrective Services	Operational auditing, complaint handling, investigative and reporting
Any body or office that exercises functions under the National Electricity (NSW) Law on behalf of NECA or NEMMCO	those functions
The Privacy Commissioner	Complaint handling, investigative and reporting
The Independent Pricing and Regulatory Tribunal	Complaint handling, investigative and reporting functions in relation to competitive neutrality complaints
The State Contracts Control Board	Complaint handling, investigative and reporting functions relating to competitive neutrality complaints
The Corporation constituted under the Superannuation Administration Authority Corporatisation Act 1999	Provision of superannuation scheme administration services, and related services, in respect of any superannuation scheme that is not a State public sector superannuation scheme

8.4 Information Covered

The Act provides that a person has a legally enforceable right to be given access to an agency's documents, or a Minister's documents that relate to the affairs of an agency, in accordance with the Act.¹⁰⁶

Document is defined broadly as follows:

document includes:

- (a) any paper or other material on which there is writing or in or on which there are marks, symbols or perforations having a meaning whether or not that meaning is ascertainable only by persons qualified to interpret them, and
- (b) any disc, tape or other article from which sounds, images or messages are capable of being reproduced.¹⁰⁷

There is a right of access to all documents (subject to exemptions) regardless of the date the document came into existence.¹⁰⁸

Where a request is for information that is not contained in a written document, and the agency can create a written document containing the information using equipment that is usually available to it for retrieving or storing information, then the agency is to deal with the request as if it were an application for a such a written document.¹⁰⁹

8.5 Refusal of Access

An agency or Minister **may** refuse access to a document for one of the following reasons:¹¹⁰

- The document is an exempt document.
- The work involved in dealing with the request would, if carried out, substantially and unreasonably divert the agency's resources away from its functions.¹¹¹
- The document is already available for inspection whether or not inspection of the

¹⁰⁶ Sections 16; and section 35 and definition of "Minister's document" in section 6.

¹⁰⁷ Section 6.

¹⁰⁸ Previously an agency could refuse access to a document which came into existence more than five years prior to the commencement of the Act. This provision was repealed in 1992.

¹⁰⁹ Section 23.

¹¹⁰ Section 25 (1).

¹¹¹ Access to a document must not be refused on the ground of unreasonable diversion of resources without first consulting with the applicant to determine whether the request can be amended such that it would not create such an unreasonable diversion of resources: section 25(5).

document is subject to a fee.

- The document is usually available for purchase.
- The document genuinely forms part of the library material held by the agency.

An agency or Minister **must** refuse access to a document that is the subject of a ministerial certificate (see section 8.9 below).¹¹²

Access to an exempt document (including a document subject to a ministerial certificate) cannot be refused if it is practicable to give access to a copy of the document with the exempt matter deleted, and the applicant wishes to have access to the document in this form.¹¹³

8.6 Exempt Documents

An “exempt document” is defined as:

- (a) a document referred to in Schedule 1, or
- (b) a document that relates to particular functions of specified bodies (see section 8.3 above).

Schedule 1 provides the categories of exempt documents that potentially apply to documents held by any agency or Minister. The categories are divided into three groups: (a) restricted documents; (b) documents requiring consultation; and (c) other documents.

Restricted Documents include:

- cl 1 Cabinet documents
- cl 2 Executive Council documents
- cl 4 Documents concerning law enforcement and public safety

Documents requiring consultation include:

- cl 5 Documents affecting intergovernmental relations
- cl 6 Documents affecting personal affairs
- cl 7 Documents affecting business affairs
- cl 8 Documents affecting the conduct of research

¹¹² Section 25(3).

¹¹³ Section 25(4).

Other Documents include:

- cl 9 Internal working documents
- cl 10 Documents subject to legal professional privilege
- cl 11 Documents relating to judicial functions
- cl 12 Documents the subject of secrecy provisions
- cl 13 Documents containing confidential material
- cl 14 Documents affecting the economy of the State
- cl 15 Documents affecting financial or property interests
- cl 16 Documents concerning operations of agencies
- cl 17 Documents subject to contempt
- cl 18 Documents arising out of companies and securities legislation
- cl 19 Private documents in public library collections
- cl 20 Miscellaneous documents relating to adoption, whistleblower legislation, the Code of Conduct for Ministers, and the policy in relation to writing off of fines
- cl 21 Exempt documents under interstate FOI legislation
- cl 22 Documents containing information confidential to Olympic Committees¹¹⁴

Restricted Documents may be subject to a ministerial certificate (see section 8.9 below).

For documents falling within the category of “documents requiring consultation”, the agency or Minister is required to obtain the views of the affected third party (that is, the potentially affected government, individual, business or researcher) before deciding whether or not the documents are exempt.¹¹⁵

The exemption provisions under the Act are not mandatory. An agency or Minister has a discretion to disclose a document even though it falls within an exemption provision.¹¹⁶ However, there is no discretion to disclose a document subject to a ministerial certificate.¹¹⁷ The Ombudsman’s FOI Policies and Guidelines manual states:

It is the Ombudsman’s strongly held view that agencies should not refuse access to documents merely because an exemption clause is technically available. Generally speaking, some good purpose should be served for an agency to rely on an exemption clause

¹¹⁴ Note that it appears that the Sydney Olympic Organising Committee for the Olympic Games (SOCOG), the Olympic Co-ordination Authority (OCA) and the Olympic Roads and Traffic Transport Authority (ORTA) are subject to the FOI Act (as they appear to come within the definition of a “public authority” in section 7). However, under Schedule 1, clause 22 of the FOI Act a document is exempt if it has been prepared by or received by SOCOG, OCA or ORTA and it contains matter that is confidential to the International Olympic Committee or the Australian Olympic Committee: see Brabazon M, “The Legal Structure of the Sydney *The University of New South Wales Law Journal* 662.

¹¹⁵ Sections 30 to 33.

¹¹⁶ Section 25(1).

¹¹⁷ Section 25(3).

to refuse access to a document.¹¹⁸

Two of the most discussed exemption provisions have been the Cabinet documents and the “commercial in confidence” exemptions, with claims that these provisions are over-used.¹¹⁹ An overview of these exemption provisions is provided below.

8.6.1 Cabinet Documents Exemption

The following documents fall within the Cabinet document exemption (clause 1 of Schedule 1):

- a document that has been prepared for submission to Cabinet (whether or not it has been so submitted);
- a preliminary draft of a document prepared for submission to Cabinet;
- an official record of Cabinet;
- a document that contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.

Documents created more than 10 years ago are not exempt under the Cabinet documents exemption (unless they were created before the commencement of the Act).¹²⁰ Further, documents that consist merely of factual or statistical information are not exempt.¹²¹

8.6.2 “Commercial in confidence” Exemption

The major exemption provision dealing with documents commonly referred to as being “commercial in confidence” is the “documents affecting business affairs” exemption in clause 7 of Schedule 1. This provision provides exemption for three categories of “business

¹²²

- Documents containing trade secrets of any agency or person.
- Documents containing information (other than trade secrets) that has a commercial value to any agency or other person, if disclosure could reasonably be expected to destroy or diminish the commercial value of the information.

¹¹⁸ NSW Ombudsman, *Ombudsmans FOI policies and guidelines*, second edition, July 1997, p 55 (accessible from the NSW Premier’s Department’s website at <www.premiers.nsw.gov.au/foi/foi_manual/index1.htm>).

¹¹⁹ Jamieson T, “Doors still locked when freedom knocks”, *The Sydney Morning Herald*, 3 July 1999; Harris A, “Public Access to Information and Public Sector Performance,” Paper presented at the “Open Government Conference” held in Sydney on 10 February 1999 organised by the Public Interest Advocacy Centre.

¹²⁰ Schedule 1, clauses 1(2)(b) and 1(3).

¹²¹ Schedule 1, clause 1(2)(a).

¹²² See Cossins, n 38, p 323.

- Documents containing information (other than trade secrets or commercially valuable information) concerning the business, professional, commercial or financial affairs of any agency or other person, if disclosure could reasonably be expected to have an unreasonable adverse effect on those affairs, or could reasonably be expected to prejudice the future supply of such information to the Government or to an agency.

Commercial information may also be protected from disclosure under the “documents containing confidential material” exemption (in clause 13 of Schedule 1) where information has been provided to the government in confidence.¹²³

In addition, clause 15 of Schedule 1 provides another exemption provision which may relate to commercial information. This provision provides an exemption for documents containing information which could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency, if disclosure would, on balance, be contrary to the public interest.

Note also that commercial information may be exempt from disclosure where the document relates to the exempt functions of agencies specified in Schedule 2 (see section 8.3 above), or where the document falls within a specific exemption such as the exemption for documents containing information confidential to Olympic Committees (clause 22 of Schedule 1).

8.7 Public Interest Tests

A number of the exemption provisions include “public interest” tests. There are three different public interest tests in the Act as discussed below.¹²⁴

Document not to be disclosed if contrary to public interest: This public interest test applies to six of the exemptions in Schedule 1: documents affecting inter-governmental relations (cl 5); internal working documents (cl 9); documents containing information obtained in confidence (cl 13(b)); documents affecting the economy of the State (cl 14); documents affecting financial or property interests (cl 15); and documents concerning the operations of agencies (cl 16). Under these exemptions, a document will be an exempt document if it satisfies all the conditions of the particular exemption, and a condition that disclosure of the document “*would, on balance, be contrary to the public interest.*”

Public interest test in unreasonable criterion: The second type of public interest exemption is not expressly provided for in the Act, but has been implied into exemptions which require assessment of whether disclosure would be “*unreasonable*” (personal affairs exemption - Schedule 1, cl 6) or would have an “*unreasonable* adverse effect” (business affairs exemption - Schedule 1, cl 7(c)(ii), and conduct of research exemption – Schedule 1, cl 8(1)(b)). It has been held that in assessing “unreasonableness”, the decision maker is

¹²³ See Cossins, *ibid*, pp 322-3 and pp 397-430.

¹²⁴ See Cossins, *ibid*, pp 43-45.

required to balance the competing public interest factors for and against disclosure.¹²⁵

Document to be disclosed if in public interest: The third type of public interest exemption is only contained in the documents affecting law enforcement and public safety exemption (Schedule 1, cl 4). Under this exemption, specified types of law enforcement and public safety documents (see cl 4(2)) are not exempt if disclosure of the document would, on balance, be in the public interest. This public interest test “creates a presumption that documents covered by this exemption are considered exempt *unless* the disclosure would be in the public interest”.¹²⁶ This differs from the first type of public interest test which suggests that documents are *not* exempt unless their disclosure would be contrary to the public interest.¹²⁷

There is no overriding public interest test in the Act. Thus, there is no public interest test applicable to many of the exemptions including Cabinet and Executive Council documents.

The Act empowers the Ombudsman to recommend the release of a document where disclosure would be in the public interest even though access has been duly refused because it is an exempt document.¹²⁸ However, the Ombudsman cannot compel disclosure.

The 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:¹²⁹

- (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.

The Premier’s Department and the Ombudsman have published guidelines to assist agencies in applying the public interest tests under the Act.¹³⁰

¹²⁵ *Colokovski v Australian Telecommunications Corp* (1991) 29 FCR 429; *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 94; *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 43; *Eyes v Wyong Shire Council* [1999] NSWADT 139; *Vincent Neary v State Rail Authority* [1999] NSWADT 107; *Stephanie Raethel v Director General, Department of Education and Training* [1999] NSWADT 108.

¹²⁶ *Taylor v Chief Inspector, RSPCA* [1999] NSWADT 23 at para 44.

¹²⁷ *ibid.*

¹²⁸ Section 52(6)(a).

¹²⁹ Section 59A.

¹³⁰ *FOI Procedure Manual*, n 58, pp 28, 173-178. NSW Ombudsman, n 118, chapter 5.

8.8 Presumption of disclosure?

The Ombudsman argues that the FOI Act should be interpreted with a presumption in favour of disclosure of documents:

The primary purpose of the FOI Act is to provide the public with access to as much documentation and information held by government agencies as is possible in the circumstances of each application. The starting point for agencies is that information must be disclosed on request, unless a case can be made out justifying exemption. In effect the Act creates a presumption in favour of disclosure.¹³¹

This view accords with the view expressed by Kirby P in *Commissioner of Police v The District Court of NSW & Perrin*:

I tend to favour the view that the Act, understood against its background and interpreted in conformity with the intention of parliament expressed in s.5, must be approached by decision-makers with a general attitude favourable to the provision of the access claimed. It is important that the decision-makers... should not allow their approaches to be influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of the Act and its equivalents.¹³²

8.9 Ministerial Certificates

The Premier (as the Minister administering the FOI Act) can issue a ministerial certificate in relation to restricted documents, that is, Cabinet documents, Executive Council documents, and documents relating to law enforcement and public safety.¹³³ A ministerial certificate is taken to be conclusive evidence that a document is a restricted document (and therefore exempt). Each certificate lasts for 2 years. The issue of a certificate cannot be reviewed by the Ombudsman or the Administrative Decisions Tribunal.

The only avenue of appeal is to the Supreme Court.¹³⁴ The Court can only determine whether or not there are **reasonable grounds** for the claim that the document is a restricted

¹³¹ NSW Ombudsman, n 118, p 3.

¹³² *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606 at 627. Cossins argues that "Kirby P's approach permits the argument that the public interest question is relevant to every aspect of the interpretation of the exemption provisions, so much so that it could be said that Kirby P's approach would permit the importation of a public interest test into every exemption": Cossins, n 38, p 50. See also O'Connor K, *FOI Review Processes: Early Experience of FOI Review in the New South Wales Administrative Decisions Tribunal*, Paper presented at the conference "FOI and the Right to Know" held in Melbourne on 19-20 August 1999 organised by the Communications Law Centre and the International Commission of Jurists, <www.comslaw.org.au/research/Equity/19990922_oconnorfoi.html>.

¹³³ Section 59.

¹³⁴ Sections 58A and 58B.

document.¹³⁵ If the Court determines that there are no reasonable grounds, it can only compel the Premier to remove the certificate on documents relating to law enforcement and public safety.¹³⁶

Where the Premier confirms (i.e. fails to withdraw) a ministerial certificate after the Supreme Court has found that there were no reasonable grounds for its issue, notice of the confirmation must be tabled in both Houses of Parliament.¹³⁷

8.10 Appeals

The appeal options for a person who is aggrieved by a decision of an agency under the Act are:

- seeking internal review with the agency;
- making a complaint to the NSW Ombudsman;
- appealing to the Administrative Decisions Tribunal.

A person may seek review of a determination where: they have been refused access to a document or part of a document; their request to amend a personal document was refused; they believe they have been charged too much; they have been granted access to a document but access is deferred; they are a third party specified in requested documents but they have not been consulted or they have been consulted but disagree with the decision to release the documents.¹³⁸

The only appeal option against a decision in relation to a Minister's documents is to the Administrative Decisions Tribunal: internal review and review by the Ombudsman are not available.

Where available, internal review is a pre-requisite to a complaint to the Ombudsman, or an appeal to the Administrative Decisions Tribunal.¹³⁹ The same matter may not be investigated by the Ombudsman, and be the subject of proceedings before the Tribunal, at the same time.¹⁴⁰

Review by the Ombudsman has the advantage that no fees are payable and the Ombudsman

¹³⁵ Section 58B.

¹³⁶ Sections 58B and 58C.

¹³⁷ Section 58C(6).

¹³⁸ See NSW Premier's Department, *Guidelines for Use of Freedom of Information in New South Wales*, <www.premiers.nsw.gov.au/foi/foi_manual/guidelines.htm>.

¹³⁹ Sections 52(2)(a), 52(2)(b) and 53(2)(a) and 53(2)(b).

¹⁴⁰ Sections 52(2)(c) and 53(2)(c).

has broad powers to examine the decision and assess whether it is correct. However, the Ombudsman has no power to change or reverse a decision.¹⁴¹

The Administrative Decisions Tribunal (“**ADT**”) commenced operation on 6 October 1998. It can make binding determinations (other than in relation to disclosure of restricted documents subject to a ministerial certificate).¹⁴²

In appeal proceedings under the Act, the onus of proof is on the agency or Minister to establish that its decision was justified.¹⁴³

Prior to the creation of the ADT, appeals were to the District Court of New South Wales. The District Court was criticised for its lack of accessibility due to expense and formality.¹⁴⁴ In contrast to a large number of external review decisions in other Australian jurisdictions, only a small number of FOI decisions were delivered by the District Court.¹⁴⁵ Further, these decisions were not published in an accessible way.¹⁴⁶

The Tribunal is designed to be less formal and more accessible than the District Court, and already there is evidence that applicants view it as such.¹⁴⁷ The number of FOI decisions made by the Tribunal (and available on the Internet) already represent a significant increase in the number of accessible FOI decisions in New South Wales.¹⁴⁸

8.11 Fees

The fees for applications for access to documents under the Act is as follows:¹⁴⁹

Application fee	\$30
-----------------	------

¹⁴¹ NSW Premier’s Department, n 138.

¹⁴² Note that the ADT may review a decision not to disclose a restricted document that is not subject to a ministerial certificate. However, it must give the Premier a reasonable opportunity to appear and be heard in relation to the matter: section 57.

¹⁴³ Section 61.

¹⁴⁴ See NSW Ombudsman, *Freedom of Information - the way ahead*, January 1995, p 5; Cossins, n 38, pp 17 and 36.

¹⁴⁵ O’Connor, n 132.

¹⁴⁶ *ibid.*

¹⁴⁷ NSW Ombudsman, *1998/99 Annual Report*, p 111 (accessible from the Ombudsman’s website at <www.nswombudsman.nsw.gov.au/publications/index.html>).

¹⁴⁸ O’Connor, n 132.

¹⁴⁹ NSW Premiers Department, n 138. Section 67 and *Freedom of Information (Fees and Charges) Order 1989* (NSW).

Processing fee for personal affairs documents	\$30 per hour after first 20 hours
Processing fee for non-personal affairs documents	\$30 per hour
Application for internal review of decision	\$40

There is no fee for amendment of personal records or for internal review in relation to amendment of records.

There is no ceiling on the maximum amount that can be charged for the processing fee. Processing charges cannot be imposed for time spent searching for a document that was lost or misplaced.¹⁵⁰

An agency does not have the discretion to waive the fees. However, application and processing fees are subject to a 50% reduction if the applicant can demonstrate financial hardship; it is in the public interest to disclose the documents; or the applicant is under 18 years of age.¹⁵¹

An agency may require the applicant to pay an advance deposit, determined by the agency, where it considers that the cost of dealing with the application is likely to exceed the amount of the application fee.¹⁵²

Application fees and processing charges are refunded when the documents accessed are subsequently amended in a significant manner under the amendment provisions.¹⁵³ Application fees for internal review are refunded if the review results in a significantly different decision.¹⁵⁴

8.12 Time Limit for Determination

An agency or Minister has 21 days to determine an application for access to documents.¹⁵⁵ An agency or Minister that fails to make a determination within 21 days is deemed to have

¹⁵⁰ Section 67(B).

¹⁵¹ Clause 6 of *Freedom of Information (Fees and Charges) Order 1989* (NSW). See Cossins, n 38, p 227.

¹⁵² Section 21.

¹⁵³ Clause 7(1) of *Freedom of Information (Fees and Charges) Order 1989* (NSW).

¹⁵⁴ Clause 7(3) of *Freedom of Information (Fees and Charges) Order 1989* (NSW).

¹⁵⁵ Sections 18(3) and 37.

refused access.¹⁵⁶ The 21 day period may be extended by 14 days if necessary because a third party had to be consulted, or the documents were archived.¹⁵⁷ An internal review by an agency is to be determined within 14 days.¹⁵⁸

8.13 Amendment of Records

A person may apply to an agency for amendment of the agency's records where:¹⁵⁹

- (a) the document contains information concerning the person's personal affairs; and
- (b) the information is available for use by the agency in connection with its administrative functions; and
- (c) the information is, in the person's opinion, incomplete, incorrect, out of date or misleading.

8.14 Publication Requirements

The Act requires an agency to publish a "Statement of Affairs" every 12 months,¹⁶⁰ and a "Summary of Affairs" every 6 months.¹⁶¹ Each agency is also required to prepare an annual report to Parliament on their obligations under the Act.¹⁶²

A Statement of Affairs must include the following information :¹⁶³

- the agency's structure and functions;
- how the agency's functions (including decision-making) affect the public;
- how the public can participate in the agency's policy formulation and functions;
- the kinds of documents usually held by the agency, including those available for inspection, purchase or free of charge;
- how members of the public can access agency documents, and amend agency documents relating to their personal affairs;
- the names of the agency's FOI officers, and the address to which FOI applications are to be sent.

¹⁵⁶ Sections 24(2) and 38.

¹⁵⁷ Section 59B.

¹⁵⁸ Section 34.

¹⁵⁹ Section 39.

¹⁶⁰ Section 14(1)(a).

¹⁶¹ Section 14(1)(b).

¹⁶² Section 68(1).

¹⁶³ Section 14(2). See also chapter 3 of the *FOI Procedure Manual*, n 58.

A Summary of Affairs must identify:¹⁶⁴

- each of the agency's policy documents;
- the agency's most recent Statement of Affairs;
- the name of the contact persons, address and times for inspection or purchase of the agency's policy documents and Statements of Affairs.

In March 2000, the Premier issued a memorandum encouraging agencies to publish their summaries of affairs in their annual reports and, where possible, on their websites.¹⁶⁵

The Annual reporting requirements include:¹⁶⁶

- Various statistical information including the number of new FOI requests; outcome of requests; number of requests requiring formal consultation; number and outcome of amendment requests; number of FOI requests granted in part or refused under specified categories for refusal; cost of processing requests; fees received; number of fee discounts; processing times; number of reviews and appeals.
- a comparison of the statistical information for the previous year;
- an assessment of the impact during the year of the FOI requirements on the agency's activities;
- particulars of any major issues that have arisen during that year in connection with the agency's compliance with the FOI requirements;
- particulars of the circumstances in which there have been any inquiries under the Act by the Ombudsman or any appeals under the Act to the District Court (this should now be changed to the Administrative Decisions Tribunal) or the Supreme Court;
- particulars of the outcomes of any such inquiries or appeals.

Ministers' offices are not required to publish a Statement of Affairs, Summary of Affairs or an annual report on FOI. However, each Minister must provide the Premier with such information relating to their obligations under the FOI Act as the Premier requires.¹⁶⁷ The Premier must prepare an annual report on each Minister's obligations under the Act.¹⁶⁸

¹⁶⁴ Section 14(3). See also chapter 3 of *FOI Procedure Manual*, *ibid*.

¹⁶⁵ NSW Premier's Department, *Freedom of Information Act 1989 - Publication of Summaries of Affairs*, Memorandum to all Ministers, Memorandum No. 2000-4, 28 March 2000 (accessible from the Premier's Department's website: <www.premiers.nsw.gov.au>).

¹⁶⁶ Section 68(6), clause 9 of the *Freedom of Information (General) Regulation 1995*, and Appendix B of the *FOI Procedure Manual*, n 58.

¹⁶⁷ Section 68(2).

¹⁶⁸ Section 68(3).

9.0 STATISTICS ON FOI USAGE AND COMPLIANCE

In contrast to most other Australian jurisdictions, in NSW there is no “person or body specifically charged and resourced to monitor the implementation of the FOI Act”.¹⁶⁹ Therefore, statistics and information on the use made of the Act, and compliance with requirements of the Act, are limited.

In the past few years, the NSW Ombudsman has audited compliance by government agencies with the annual reporting, and summary of affairs, requirements under the FOI Act. A summary of the audit statistics for 1997-98 as reported by the Ombudsman in her 1998-99 annual report is provided below.¹⁷⁰

Total Number of FOI Applications: The Ombudsman estimated that there were 10,000 applications in 1997-98. The Ombudsman said that the total number of FOI applications had declined between 1995-6 and 1997-98.¹⁷¹ The decline was primarily due to the adoption of open access policies by area health services and local councils.

Percentage of Applications for Personal Information: The Ombudsman estimated that approximately 75% of FOI applications in 1997-98 concerned the personal affairs of the applicant.

Resource Implications: The Ombudsman concluded that the FOI Act does not have significant resource implications for most public sector agencies. Approximately 15% of the audited agencies received 82.6% of the reported FOI applications.

Outcome of FOI Applications: All requested documents were released in approximately 76% of determinations reported in the audit. All or some of the documents were released in 91% of determinations.

Refusal Rates: The percentage of applications where access was reported to be refused in full, or in part, was 21%. After discounting the applications where the requested documents did not exist, were not held by the agency, or were already publicly available, the percentage of reported refusals (in full or part) was 15%. The average refusal rate across all audited agencies was 4.5%. A number of agencies had refusal rates much higher than the average. The three highest refusal rates of the audited agencies were the Premier’s

¹⁶⁹ Wheeler C, “Public Sector Compliance with FOI in New South Wales” (1999) 81 *Freedom of Information Review* 38.

¹⁷⁰ The following is taken from NSW Ombudsman, n 147, pp 123-128. Note that statistics for 1998-99 will be available in the Ombudsman’s 1999-2000 annual report which is expected to be published in November.

¹⁷¹ However, the Ombudsman also noted that there has been significant growth of FOI usage since the first year of the operation of the FOI Act. The estimated 10,000 applications in 1997-98 represents a 322% increase on 1989-90 when the reported number of applications was 2,368: see NSW Ombudsman, *ibid*, p 109.

Department (55.5%), the Olympic Coordination Authority (50%) and the Attorney General's Department (45%).¹⁷²

Ministerial Certificates: The Ombudsman reported that no ministerial certificates had been issued in the two years preceding the Ombudsman's report.

Amendment of Records: The Ombudsman reported that very little use was made of the amendment provisions. In 1997-98 only 8 applications for amendment were reported. The Ombudsman stated that the low number of applications is presumably because people are not aware of their rights to apply for amendment of personal records.

Compliance with Annual Reporting Requirements: The Ombudsman reported a continuing poor level of compliance by agencies with the annual reporting requirements: in 1997-98, 40% of audited agencies did not comply.

Compliance with Summary of Affairs Requirements: The Ombudsman also reported a continuing unsatisfactory level of compliance by agencies with summary of affairs requirements. The Ombudsman noted recent improvements, but said that compliance was still unsatisfactory, particularly given that the Premier and the Premier's Department had recently reminded agencies and Ministers of their reporting responsibilities.¹⁷³ The Ombudsman stated that there were improvements in December 1998 and June 1999 in the number of agencies publishing, and in the average length of, summaries of affairs.¹⁷⁴ However, disappointing results were still reported - for example, at least 47 agencies failed to publish a summary of affairs in December 1998.

10.0 IS THE FOI ACT ACHIEVING ITS OBJECTIVES?

It has been noted that it is difficult to assess the impact of the NSW FOI Act in the absence of a central body to collect and collate detailed qualitative and quantitative information on the operation of the Act.¹⁷⁵ The available information in this regard is limited to: the audit statistics collated by the Ombudsman from a sample of annual reports since 1995-96;¹⁷⁶ a comprehensive study done by the now disbanded FOI Unit within the Premier's Department a year after the Act commenced operation;¹⁷⁷ and a handful of surveys/audits conducted by

¹⁷² The Ombudsman stated that "[w]hile the high percentage of refusals is understandable from agencies such as the departments of Corrective Services, Community Services and Health, on the basis of the need for the protection of privacy or for security reasons, the reasons for the high percentage of refusals for other agencies are not so readily apparent": see NSW Ombudsman, *ibid*, p 125.

¹⁷³ *ibid*, p 128.

¹⁷⁴ *ibid*, p 127.

¹⁷⁵ See Wheeler, n 169, p 38; Cossins, n 38, pp 25-6; Allars M, "Interim results of a study of the impact of the NSW FOI Act" (1995) 56 *Freedom of Information Review* 18.

¹⁷⁶ NSW Ombudsman, n 147, pp 123-128.

academics over the years.¹⁷⁸

There appears to be general consensus that the FOI Act has worked well in relation to providing access to personal information.¹⁷⁹ More controversial is the question of whether the Act has achieved the objectives of open and accountable government and public participation in government decision-making. As discussed below, many commentators, including the Ombudsman, Auditor-General, politicians, journalists and academics, have expressed the view that too much government secrecy still exists.

The Ombudsman's 1998-99 annual report stated:

The introduction of the... (FOI Act) in NSW raised expectations of open government. In fact, it was said during the second reading speech that 'voters will have the opportunity to scrutinise the actions of the bureaucracy'. However, after ten years of dealing with reviews of agency's decisions we are of the belief that the aims of the legislation have not yet been achieved.

It is positive to note that in most instances agencies grant full access to information relating to applicants personal affairs or for other non-contentious information. However, agencies rarely disclose sensitive, contentious or political information. In fact, claims of direct political interference in the processing of FOI applications and in the decisions of FOI practitioners continue to be raised from time to time.¹⁸⁰

10.1 Arguments that the FOI Act is working well

It appears that the FOI Act is working well in the following respects:

- When the requested documents are non-contentious, agencies appear to be complying well with the letter and spirit of the FOI Act.¹⁸¹
- Some agencies have adopted open access policies whereby they release information to applicants on request, without requiring compliance with formal FOI procedures.¹⁸²
- The majority of applications received by agencies are granted in full or in part.¹⁸³

A year after the Act commenced operation, the FOI Unit within the Premier's Department carried out a comprehensive survey of agencies to assess their views on the effect of FOI

¹⁷⁷ Cossins, n 38, pp 27-28.

¹⁷⁸ See Cossins, *ibid*, pp 28-35; Allars, n 175.

¹⁷⁹ See NSW Ombudsman, n 147, p 109; Cossins, *ibid*, p 18.

¹⁸⁰ NSW Ombudsman, *ibid*.

¹⁸¹ Wheeler, n 169, p 42.

¹⁸² *ibid*.

¹⁸³ See section 9.0 above. See also, Carr, n 1.

on their administration and their relationships with clients and the community at large.¹⁸⁴ The response was generally very positive.¹⁸⁵ The following benefits to administrative procedures and decision-making were identified:

- improved information systems
- improved efficiency of records management, leading to improved information storage and retrieval procedures
- updated policy and procedure manuals
- clearer and improved decision-making
- formalisation of ad-hoc policies and procedures
- encouragement of responsible protection for personal information and individual privacy
- revision and consolidation of policies as a result of publication requirements
- improved dispute resolution as a result of that revision and consolidation
- revision and updating of administration practices
- greater co-operation and improved communication between staff and members of the public
- identification of the need for attitudinal, organisational and management changes in order to implement FOI
- availability of high standard of publications to the public, that is, agency statements and summaries of affairs
- some changes in attitude towards a more open style of government
- adoption by some agencies of a policy of disclosing as much information as possible without the need for formal FOI applications¹⁸⁶

Interim results of a survey of agencies and users of FOI carried out by Associate Professor Margaret Allars (as she then was) in 1992-1993 also notes positive responses as follows:¹⁸⁷

- The majority of FOI coordinators surveyed thought that there was a trend to openness. Although, over half believed that FOI cannot be regarded as solely responsible for an agency's level of openness.
- The majority of FOI coordinators regarded the general impact of the Act as favourable or very favourable: 68% regarded it as favourable; 7.3% regarded it as very favourable; 11.3% regarded the Act as having no impact; and 4.9% regarded the impact as negative or very negative.
- 82.5% of users surveyed were generally satisfied with the manner in which the agency dealt with their request.

¹⁸⁴ Cossins, n 38, p 27.

¹⁸⁵ Although note that Allars stated that "the information was sought in a loose form, and the detail provided in the responses varied, to some extent in accordance with whether or not the FOI coordinator in the agency wrote the whole response": Allars, n 175, p 18.

¹⁸⁶ Cossins, n 38, pp 27-28.

¹⁸⁷ Allars, n 175. Note that the results were interim and that Allars noted that further analysis was needed.

- 86% of users surveyed said that the request was dealt with in a courteous and helpful manner.
- 66.7% of users surveyed said cost of the application was reasonable.
- 83.3% of users surveyed said the time taken in dealing with the request was reasonable.

10.2 Arguments that the FOI Act is not working well

As stated above, a number of commentators argue that the Act has not achieved the objectives of open and accountable government, and public participation in government decision-making. The following arguments are raised in support of this view:

- The Act is mainly being used to gain access to applicants' personal information. Only a minority of requests relate to government policy development and decision-making, and these requests are more likely to be denied.¹⁸⁸ However, it is access to this type of information which is necessary for government accountability and public participation.¹⁸⁹ It appears that agencies, such as the Cabinet Office and the Premier's Department, which hold a lot of high level "policy" information likely to raise accountability and participation issues, have both low numbers of FOI applications, and low rates of granting access.¹⁹⁰
- The Act has not led to a reversal of the traditional culture of government secrecy. This view is supported by the following:
 - when the information is contentious, it appears that agencies will go to considerable lengths to prevent disclosure;¹⁹¹
 - claims of direct political interference in the processing of FOI applications and in the decisions of FOI practitioners continue to be raised from time to time;¹⁹²
 - there is anecdotal evidence that some public servants avoid placing matters in writing in order to avoid material being sought under the FOI Act;¹⁹³
 - in many instances, agencies have not followed the requirements of the FOI legislation because the requested information was embarrassing or sensitive; or because providing the information would be inconvenient as it would lead to further questions;¹⁹⁴

¹⁸⁸ Cossins, n 38, p 34; NSW Ombudsman, n 147, p 109.

¹⁸⁹ ALRC/ARC, n 24, para 2.11.

¹⁹⁰ Cossins, n 38, p 34.

¹⁹¹ Wheeler, n 169, p 42.

¹⁹² NSW Ombudsman, n 147, p 109.

¹⁹³ *ibid*, p 119.

¹⁹⁴ Allen L, Auditor-gen: "Secrets are dangerous", *The Australian Financial Review*, 21 Aug 1999, p 4.

¹⁹⁸ Writer and political philosopher, John Ralston Saul, argues against FOI laws as follows:

As for the freedom of information or access to information laws, they have simply confirmed that all information is private unless it is specifically requested. Requests must be clearly defined and often cost money, with the result that information is stored in increasingly narrower and more specific categories. A request produces a fragment of information, and only those citizens with funds can engage in these frustrating fishing expeditions.¹⁹⁹

¹⁹⁵ Jamieson, n 119.

¹⁹⁶ Wheeler, n 169, p 40. Harris T, "Information: The Foundation of Accountability" (1999) 6(4) *Agenda* 291 at 292.

¹⁹⁷ NSW Ombudsman, n 147, p 127.

¹⁹⁸ Snell R, "Rethinking Administrative Law: A Redundancy Package for Freedom of Information?" in S Kneebone (ed), *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Papers presented at the 1998 National Administrative Law Forum, Australian Institute of Administrative Law Inc, Canberra, 1999, 84 at p 98.

¹⁹⁹ Saul J R, *The Unconscious Civilization* (1997) at p 46 quoted in Snell, *ibid*.

Other commentators have noted the significant developments that have occurred since the introduction of FOI legislation in Australia.²⁰⁰ Over the past decade, there have been major changes to the role and structure of the ‘state’ with policies aimed at bringing commercial and market-oriented approaches to government activity.²⁰¹ Increasing commercialisation, corporatisation and privatisation of government bodies, and increases in the contracting out of government services, have presented challenges for administrative law generally (and FOI in particular) as the boundary between the “public” and “private” sectors is blurred.²⁰² There have also been significant advances in information and communications technologies since the introduction of FOI legislation. These advances have had a major impact on the way information is accessed, collected, stored, processed, exchanged and disseminated.²⁰³ These developments, and the perceived failure of FOI to provide open government, have led some commentators to question the continuing relevance of FOI, and to look for other ways of providing access to government information.

For example, Victorian MP, the Hon. Victor Perton, has argued that technological and legislative developments may render FOI legislation redundant within the next five to 10 years. Perton has stated that while the principles underpinning FOI remain important, he believes that FOI is failing to live up to the purpose for which it was intended, and is being superseded by new legislative and technical developments.²⁰⁴

Rick Snell, an Australian FOI academic, has stated that he agrees with Perton that the relevance of FOI should be questioned. However, he argues that FOI legislation with the **legal right** to access information is an absolute necessity, and that a major redesign (rather than abandonment) of FOI legislation is required.²⁰⁵

Other means of improving access to information that have been proposed include: proactive and mandatory disclosure regimes (see next section); a Bill of Rights with a right of

²⁰⁰ See Queensland, Parliament, Legal, Constitutional and Administrative Review Committee (“Qld DP”), *Freedom of Information in Queensland – Discussion Paper No. 1*, February 2000, at p 7, <www.parliament.qld.gov.au/committees/LCARC/LCARC%20FOI.htm>.

²⁰¹ See Snell, n 198; Aronson M, “A Public Lawyer’s Response to Privatisation and Outsourcing” in M Taggart (ed), *The Province of Administrative Law*, Hart Publishing, Oxford, 1997.

²⁰² *ibid.* Note that Snell states that “[t]he general dislocation caused to administrative law as a whole by the reinvention of government is magnified for FOI. The state of Australian FOI was already perilous before the transformation of governance in the 1990s”: Snell, *ibid* at p 85.

²⁰³ Qld DP, n 200.

²⁰⁴ VPD (LA), 27/05/99, pp 1371-1376. See also Hannan E, “Open and shut: Freedom of The Age, Section: News Extra, 23 Jan 1999.

²⁰⁵ See Snell R, “Comment” (1999) 79 *Freedom of Information Review* 1; Snell R, “Comment” (2000) 85 *Freedom of Information Review* 1; Snell and Tyson, n 13; Snell, n 198.

access to information;²⁰⁶ and the development of other areas of law such as trust law,²⁰⁷ human rights law,²⁰⁸ and the regulation of privatised and outsourced government services.²⁰⁹

11.2 Reversing the concept of FOI: Pro-active Disclosure

FOI legislation requires a person to make a request to an agency or minister in order for information to be released. Thus, FOI legislation is a “reactive” rather than a “pro-active” approach to the disclosure of government information. One commentator has argued that “[t]here is something profoundly undemocratic about citizens having to ask for official information, more so when the asking involves drawn out, formal and complicated processes”.²¹⁰

A “new approach” to FOI is currently under consideration by the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament (“**the Committee**”) in its review of the Queensland FOI Act. Part of the new approach suggested by the Committee

²⁰⁶ Note that section 32(1) of the *Constitution of the Republic of South Africa 1996* provides that “everyone has the right of access to ... any information held by the state...”. However, section 32(2) states that “National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state”.

²⁰⁷ See Harris, n 196 at p 305; Finn P, “Public trust and public accountability” (1993) 65(2) *Australian Quarterly* 50.

²⁰⁸ Note that Article 19(2) of the *International Covenant on Civil and Political Rights* provides “Everyone shall have the right to freedom of expression; this right shall include **freedom to seek, receive** and impart **information** and ideas of all kinds...” (emphasis added). It has been argued that “the right to seek information warrants a right of access to information held by government”: Mo J, “Freedom of speech, freedom of information and open government in Queensland” (1991) 36 *Freedom of Information Review* 58.

²⁰⁹ Chris Finn states that “...a genuine commitment to the efficiency gains claimed to result from the operation of competitive pressures will frequently require the adoption of these same values of openness and transparency. Both democracy and the market hinge upon choice, and the effectiveness with which they function is directly related to the quality of information flows in the system”: Finn C, “The Regulation of Privately Owned Utilities in the *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Papers presented at the 1998 National Administrative Law Forum, Australian Institute of Administrative Law Inc, Canberra, 1999, 169 at p 179. In this article Finn discusses how the regulation of privately owned utilities in the U.K. has resulted in much greater openness, transparency and public participation than previously typified the operation of publicly owned utilities. Mark Aronson also argues that “... there will be contexts in which the mechanisms for delivering government transparency should be expanded, rather than contracted, as government adopts privatisation and outsourcing”: Aronson, n 201, at p 62.

²¹⁰ Queensland, Parliament, Legal, Constitutional and Administrative Review Committee, *Freedom of Information: Transcript of Proceedings*, 12/05/2000, p 50, per Dr Bill De Maria from the Centre for Public Administration, University of Queensland, <www.parliament.qld.gov.au/committees/LCARC/LCARC%20FOI.htm>.

includes consideration of “reversing the FOI concept”, that is, providing for a pro-active approach to disclosure of government information.²¹¹ The Committee’s Discussion Paper states:

the committee poses for consideration a new approach to FOI in Queensland, not only to address any residual culture of secrecy in agencies but also to engender a more accessible, efficient and cheaper regime of access to government held information...

Ideally, agencies should routinely release information - whether for payment of a fee or otherwise - rather than control access to it through formal, resource-intensive FOI processes... FOI should, in practice, exist only as a 'legislative backstop'. Recent advances in technology, especially the Internet, provide even greater capacity for FOI legislation to operate in this manner.²¹²

The Committee noted that the FOI Act (Qld) expressly provides that the Act is not intended to prevent or discourage disclosure of information otherwise than under the Act, and that some agencies have established schemes providing for access to information (particularly personal information) without a formal FOI request.²¹³ However, the Committee noted that something more is needed if routine or discretionary disclosure (without a formal FOI application) is to become more widespread.

The Committee’s Discussion Paper states:

Possibly, specific mechanisms could be developed which aim to reverse the whole approach to FOI, ie, mechanisms which: (a) put the onus on agencies to routinely release information of public interest in the first place rather than on citizens to seek that information through resource-intensive and often untimely FOI processes; and (b) encourage agencies, when requested, to release information informally outside the formal FOI process.²¹⁴

It has been emphasised by some commentators that pro-active disclosure regimes should be seen as a complement to, rather than a replacement of, FOI legislation, as a legislative right to information is needed in circumstances where information is withheld.²¹⁵

²¹¹ Note that the Hon. Victor Perton MP has also discussed the concept of reversing the current structure of the FOI Act: see *VPD (LA)*, 27/05/99, p 1376.

²¹² Qld DP, n 200, at p 11.

²¹³ The position in New South Wales is similar to that in Queensland: the New South Wales FOI Act also provides that the Act is not intended to prevent or discourage disclosure of information otherwise than under the Act (section 5(4)), and some agencies provide access to documents without a formal FOI request. The 1998-99 NSW Ombudsman’s annual report noted that a number of area health services have adopted open access policies as recommended by the Department of Health, and many local councils have also adopted open access policies: NSW Ombudsman, n 147, p 123.

²¹⁴ Qld DP, n 200, p 11.

²¹⁵ Queensland, Parliament, Legal, Constitutional and Administrative Review Committee, *Freedom of Information: Transcript of Proceedings*, 11/05/2000, p 50, per Rick Snell: <www.parliament.qld.gov.au/committees/LCARC/LCARC%20FOI.htm>.

The Committee provides an overview of pro-active approaches to the disclosure of government information that have been considered and/or implemented in other FOI regimes as follows:²¹⁶

ALRC/ARC Review of the Cth FOI Act: A comprehensive review of the Cth FOI Act was conducted by the Australian Law Reform Commission and the Administrative Review Council in 1994-1995. The Review recommended that "*Agencies should regularly examine the types of information they receive to determine whether there are particular categories that could be dealt with independently of the FOI Act. If there are, this should be made clear to potential applicants and staff.*"²¹⁷

ARC Report on Contracting Out: In 1997-1998, the Administrative Review Council ("**ARC**") conducted an inquiry into the administrative law implications of the contracting out of government services. One of the major issues considered by the ARC was access to information. The ARC considered a number of proposals for ensuring that access to information is not lost because of the contracting out process. One proposal raised the possibility of establishing a disclosure regime that would make all government contracts public documents, thereby providing access to contracts without making a formal FOI request.²¹⁸ A number of submissions to the ARC supported this proposal, although in its final report, the ARC recommended against it. The ARC noted that there was already a requirement on agencies to publicise some details of their contracts, and it concluded that in light of these publication requirements, "a separate disclosure regime may impose costs on agencies which are not warranted by the use that is likely to be made of such a regime".²¹⁹

WA Commission on Government: In contrast to the ARC report, the WA Commission on Government (set up in the wake of the "WA Inc." scandal) recommended that government contracts be lodged for public inspection with the State Supply Commission or tabled in Parliament. The Commission stated that "*the public has a right to know how its money is being spent and what goods or services are being provided*", and that "*the principle of accountability of public funds should outweigh any concerns for commercial confidences*".²²⁰

²¹⁶ This section is taken mainly from Qld DP, n 200, pp 11-13.

²¹⁷ ALRC/ARC, n 24, para 4.19.

²¹⁸ Administrative Review Council ("ARC"), *The Contracting Out of Government Services*, Report no 42, CanPrint Communications Pty Limited, Canberra, August 1998, at paras 5.50-5.54, accessible from <www.law.gov.au/ahome/other/arc>.

²¹⁹ *ibid*, para 5.54.

²²⁰ Western Australia, Commission on Government ("WACOG"), *Report no 1*, Perth, August 1995, section 2.3.11, <www.wa.gov.au/cog>.

UK White Paper on FOI: FOI legislation has not yet been enacted in the United Kingdom. However, an FOI Bill is currently before the Parliament. The introduction of the Bill followed the publication of a White Paper on FOI by the Labour Government in 1997. The White Paper proposed that further impetus be given to the pro-active release of information with duties imposed on public authorities to make certain specified categories of information publicly available as a matter of course.²²¹

The UK FOI Bill did not follow the White Paper in this regard.²²² Rather it provides for a system of “publication schemes”. Under the Bill, every public authority must adopt and maintain a publication scheme which must be approved by the Information Commissioner. A publication scheme specifies the classes of information that an agency must publish. Some FOI experts hold the view that publication schemes could be a powerful vehicle for greater openness and could provide for the routine publication of documents such as government contracts.²²³

United States FOI Act’s Reading Rooms: The United States FOI Act provides for what is commonly referred to as “reading room” access and “electronic reading room” access (see section 14.1 below).²²⁴ Under these provisions, agencies must make specified categories of documents routinely available for inspection and copying. These categories include copies of all records which have been released in response to an FOI request, and that the agency determines have become, or are likely to become, the subject of subsequent FOI requests (Category D records). Any records falling within the reading room categories which were created after 1 November 1996 must be made available to the public by “computer telecommunications” (e.g. the internet) or, if computer telecommunications have not been established, by “other electronic means”.

British Columbia’s mandatory disclosure laws: The FOI Act of British Columbia, Canada, requires the head of a public body to disclose, without delay, information about a risk of significant harm to the environment or to the health or safety of the public, or information the disclosure of which is, for any other reason, clearly in the public interest.²²⁵

²²¹ United Kingdom, Government White Paper (“U.K. White Paper”), *Your Right to Know: The Government’s proposals for a Freedom of Information Act*, December 1997 at paras 2.17-2.18, <www.official-documents.co.uk/document/caboff/foi/foi.htm>.

²²² See United Kingdom Home Office’s Freedom of Information Unit website for a copy of the Bill and associated documentation: <www.homeoffice.gov.uk/foi>.

²²³ A House of Commons Committee notes that “Robert Hazell suggests that good schemes might provide, for example, for the publication of departmental manuals, rules and internal guidance... the routine publication of government contracts (contract price, unit prices, performance standards); and the publication of all information which has been the subject of previous Freedom of Information requests”: United Kingdom, Parliament, House of Commons Select Committee on Public Administration, *Third Report*, Session 1998-99, para 47, <www.publications.parliament.uk/pa/cm199899/cmselect/cmpublicadm/570/57002.htm>.

²²⁴ The following information is taken from United States, Department of Justice, *Freedom of Information Act Guide*, May 2000, <www.usdoj.gov/oip/foi-act.htm>.

²²⁵ Section 25 of the *Freedom of Information and Protection of Privacy Act* [RSBS 1996]

Discussion regarding routine disclosure of information often centres on disclosure of information relating to government contracts and tender information. Public access to contract and tender documents has become a contentious issue over the past few years in a number of Australian jurisdictions including New South Wales. Public sector reforms throughout Australia have resulted in increased contracting out of government services, and increased privatisation and corporatisation of government agencies. In this context, there has been a perception that government agencies are using “commercial in confidence” claims too broadly in order to avoid scrutiny and accountability.²²⁸

In the past few years, a number of inquiries in various Australian jurisdictions have investigated the issue of commercial in confidence material and considered what information relating to tenders and contracts should be routinely made available to the public. A summary of the relevant recommendations of these inquiries is provided in Appendix A. Each of these inquiries recommended that more information regarding government contracts should be disclosed. A couple of inquiries recommended that specified information or “contract summaries” be made publicly available.²²⁹ As discussed

Chapter 165 (British Columbia, Canada).

²²⁶ Japan Information Access Project, *Access to Japanese Information*, June 1998, <www.nmjc.org/jiap/specrpts/joho.html>.

²²⁷ Qld DP, n 200, p 12.

²²⁸ See Harris, n 196, p 293; PAEC, n 7, key findings at pp xxxv-xx1iv; Moore M, “Too much secrecy – auditor”, *The Sydney Morning Herald*, 2 October 1999; “Commercial-in-confidence vs the question of trust”, *The Australian Financial Review*, 17 January 2000; Jamieson, n 119.

²²⁹ See PAEC, n 7; New South Wales, Parliament, Public Accounts Committee (“PAC”), *Infrastructure Management and Financing in New South Wales: Volume 1: From Concept*

above, WACOG went further and recommended that full details of contract information be made public.²³⁰

Proponents for the disclosure of contract information argue that *public accountability* requires the disclosure of information regarding the expenditure of *public funds*. The public has a right to know how its money is being spent and what goods and services are being provided.²³¹

It has been argued that information generated in the context of competitive tendering and contracting out requires particular attention due to the potential for corruption and the convergence of vested interests in restricting access.²³² The contractor may resist disclosure to avoid the need to determine precisely what information is confidential, and to make it more difficult for a competitor to make a viable bid in the future. The government agency may resist disclosure in order to avoid scrutiny.

It has also been argued that the effectiveness of outsourcing often requires greater levels of transparency.²³³ Information sharing between agencies can assist them to bargain more effectively with the private sector. In addition, information may help losing bidders to produce more competitive bids in the future leading to increased competition and resultant benefits for the government purchaser.

However, it is generally recognised that the requirements of public accountability need to be balanced against the private sector's legitimate claims for commercial confidentiality. Concerns regarding the disclosure of information relating to tenders and contracts are discussed below.

Disclosure of information relating to tenders

It has been pointed out that in submitting tenders, applicants put together detailed and innovative solutions.²³⁴ If a tenderer is unsuccessful in its application, it will want its solutions to remain confidential in order to be used in future bids, or to avoid competitors effectively gaining free consultancy services. In the course of negotiations for tenders, government agencies can gain access to significant amounts of information regarding a tenderer's business affairs in order to assess the capacity of the business to perform the contract.²³⁵ Understandably, tenderers do not want competitors to get hold of such detailed

to Contract Management of Infrastructure Projects, Report No. 73, July 1993.

²³⁰ WACOG, n 220.

²³¹ *ibid*, para 2.3.11.4.

²³² PAEC, n 7, p 85 and 89.

²³³ Aronson, n 201, p 59.

²³⁴ PAEC, n 7, p 94.

²³⁵ WACOG, n 220, para 2.3.11.4.

business information. It has been argued that if tenderers were not confident that the government agency would preserve confidentiality, then they may refrain from submitting tenders, thus resulting in a loss of competition and consequential loss of efficiency, service improvements and cost savings.

It is recognised that information regarding tenders is needed in order to investigate the probity of the tendering process and to ensure that the agency obtained the best value for money.²³⁶ However, it has been questioned whether the public has a right to detailed tender information if the tenderer is not successful.

The importance of timing in the disclosure of tender and contract information has been identified. Some commentators argue that confidentiality is more important before selection of the successful tenderer or completion of the contract as potential benefits have not yet been secured by contract, and if information was disclosed, it could be usurped by competitors for the same contract.²³⁷

Disclosure of contractual information

A number of inquiries have discussed what types of contractual information is legitimately confidential and what types may be disclosed. In general, there appears to be a distinction between “outcomes” on the one hand, and “inputs and processes” on the other.²³⁸ It is argued that inputs and processes are genuinely confidential. These include: trade secrets; intellectual property; and information on how a business may put its contract or bid together (the methodology) such as detailed financing and pricing strategies, salary rates, classifications of staff, job descriptions, workload indicators, expenses and other costs. Outcomes which are considered non-confidential include specifications for the service; criteria for tender evaluation; criteria for the measurement of the contractor’s performance; time limits; insurances; and the total amount of the contract and constituent elements.

WACOG recognised that there were concerns that the full release of contractual information would reveal commercially confidential information that could damage a tendering company. The inquiry answered these concerns with the following observations:²³⁹

- More careful consideration of the development of contracts may be required so that outcomes, which should not be commercially sensitive, rather than processes (such as methodologies) are specified.
- There should be clear instructions in tender documents that all contract details will be

²³⁶ PAEC, n 7, p 100.

²³⁷ Australia, Parliament, Senate Finance and Public Administration References Committee (“SFPARC”), *Contracting out of Government Services*, Second Report, May 1998, p 55. PAEC, n 7, key finding 6.2.

²³⁸ PAEC, *ibid*, pp 103-104.

²³⁹ WACOG, n 220, para 2.3.11.4.

released. This would enable private firms to determine whether they wish to do business with the government.

- Only the final contract should be released, not the deliberative processes leading up to the contract agreement.
- Details of unsuccessful tenders should not be released.

11.3.1 NSW Guidelines regarding the disclosure of contractual information

In April 2000, the New South Wales Government issued “*Guidelines for the Disclosure of Information in NSW Government Contracts*” which provide for the routine disclosure of specified information relating to government contracts. These guidelines were based on, and are in addition to, the disclosure guidelines set out in the “*Guidelines for Private Sector Participation in the Provision of Public Infrastructure*” which were first issued by the Government in September 1995 (and revised in October 1997).²⁴⁰ An overview of both sets of guidelines is provided below.

(i) Guidelines for the Disclosure of Information in NSW Government Contracts

On 27 April 2000, the Government issued *Guidelines for the Disclosure of Information in NSW Government Contracts*.²⁴¹ The Guidelines are attached to the Premier’s Department Memorandum No. 2000-11 (see Appendix B). The guidelines state that:

The purpose of this procedure is to provide NSW government agencies with a practical model to determine what items of information contained in government contracts with the private sector should be disclosed and what should remain confidential following the award of a contract.

The guidelines state that it is government practice to:

vary the disclosure of information according to the size of the project;

limit the extent of commercial-in-confidence material to very specific areas and not disclose it unless required by law; and

treat the information in an unsuccessful tender as commercial-in-confidence and not disclose it unless required by law

Contracts and Agencies covered by the Guidelines: The guidelines apply to all procurement contracts (construction, infrastructure, property, goods and services, information technology etc.). The guidelines are to be implemented by government

²⁴⁰ The disclosure requirements in these guidelines closely follow the recommendations in the NSW Parliament’s Public Accounts Committee’s report: PAC, n 229.

²⁴¹ New South Wales Premier’s Department, Memorandum No. 2000-11, *Disclosure of Information on Government Contracts with the Private Sector* (accessible from the Premier’s Department’s website: <www.premiers.nsw.gov.au>).

agencies (except the Department of State and Regional Development) including Government Trading Enterprises, and State Owned Corporations that include the guidelines in their statements of corporate intent.

Three levels of disclosure: The guidelines provide for three levels of disclosure as follows:

1. *For projects less than \$100,000:* items in Schedule 1 of the guidelines must be disclosed on request.
2. *For projects \$100,000 or above:* a summary of the items in Schedule 1 must be routinely disclosed. This includes: a description of the project to be completed, the goods or services to be provided, or the property to be transferred; the commencement date of the contract; the period of the contract; the identity of the successful tenderer including cross ownership details; the price payable and the basis for future changes in price; the evaluation criteria for tender assessment; and the provisions for re-negotiation.
3. *For projects \$5 million or above involving private sector financing, land swaps, asset transfers and similar arrangements:* a summary of the items in Schedules 1 and 2 must be routinely disclosed. Schedule 2 items include: details of asset transfers; operation and maintenance provisions; results of cost-benefit analyses of the successful tender; risk sharing details; significant guarantees or undertakings between the parties; and any other key non-commercial-in-confidence elements.

Means and Timing of disclosure: The information is to be provided by the agency at no cost and within 90 days of the award of the contract. The information is to be made available in a form that is readily accessible to the public. The guidelines suggest release of the information on agencies' Internet sites.

Negotiation with Tenderers: The guidelines provide that tender documents should contain information about the disclosure process and schedules of items to be disclosed. Tenderers are invited to nominate items they consider should not be disclosed and why. Where there is a disagreement between the agency and the "preferred tenderer" as to what should be disclosed, the agency is to seek the advice of the Chairman of the State Contracts Board. The Chairman is to provide a report and recommendations to the agency.

Information not to be disclosed: Schedule 3 of the guidelines specifies items that are not to be disclosed. This includes: the contractor's financing arrangements; the contractor's cost structure or profit margins; intellectual property of the contractor; and other matters where disclosure would place the contractor at a substantial commercial disadvantage.

Access to other information: The guidelines state that specific requests for information outside the ambit of the contract details, such as inquiries regarding an unsuccessful tender, should continue to be dealt with under the *Freedom of Information Act*.

(ii) Guidelines for Public Sector Participation in the Provision of Public Infrastructure

The disclosure requirements in the *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*²⁴² are provided at Appendix C. The guidelines generally apply to large infrastructure projects.²⁴³

In summary, the disclosure requirements in the guidelines provide that **contract summaries** containing specified information are to be made public within 90 days of contract. The Auditor-General is to certify the summaries. The summaries are to be tabled in Parliament and advertised in the “Public Notices or similar”.

The summaries are to include: the full identity of the successful proponents including details of cross ownership; the duration of the contract; details of asset transfers; all maintenance provisions; the price payable and the basis for future changes in price; provisions for renegotiation; the results of cost-benefit analyses; risk sharing details; significant guarantees or undertakings entered into; and any remaining key elements of the contractual arrangements.

The guidelines also specify categories of information that must not be disclosed including: the private sector’s cost structure or profit margins; intellectual property; and any other matters where disclosure would substantially disadvantage the contracting firm.

12.0 NEED FOR REVIEW OF THE NSW FOI ACT?

When the FOI Act was introduced to parliament, the Greiner Government indicated that it would be reviewed after two years.²⁴⁴ However in the 11 years the Act has been in operation, it has not been subject to a comprehensive review. In contrast, a number of other Australian jurisdictions – including the Commonwealth,²⁴⁵ Victoria,²⁴⁶ Tasmania,²⁴⁷ South

²⁴² New South Wales, Department of State and Regional Development, *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*.

²⁴³ *ibid*, p 2.

²⁴⁴ *NSWPD*, 26/3/92, p 2103 per the Hon. T Moore MP.

²⁴⁵ The Commonwealth FOI Act was comprehensively reviewed in 1994/1995 by the Australian Law Reform Commission and the Administrative Review Council: ALRC/ARC, n 24. In addition, in 1998, both the Administrative Review Council and the Senate Finance and Public Administration References Committee published reports making recommendations for amendments to the FOI Act aimed at preserving rights of access to information relation to government services which have been contracted out to the private sector: ARC, n 218; SFPARC, n 237. The operation and administration of the Commonwealth FOI Act was also reviewed in 1987 by the Senate Standing Committee on Legal and Constitutional Affairs: Australia, Parliament, Senate Standing Committee on Legal and Constitutional Affairs (“SSCLCA”), *Freedom of Information Act 1982 – Report on the Operation and Administration of the Freedom of Information Legislation*, AGPS, Dec 1987.

²⁴⁶ Victoria, Parliament, Legal and Constitutional Committee (“LCC”), *A Report to Parliament*

Australia,²⁴⁸ and Queensland²⁴⁹ - have reviewed, or are currently in the process of reviewing, their FOI legislation.²⁵⁰

Before the last New South Wales election, both sides of politics indicated a willingness to review the FOI Act (NSW). The Leader of the Opposition is reported as saying that it was clear the Act needed to be reviewed,²⁵¹ and the Premier is reported as being willing to “look at sensible proposals that represent an amplification of FOI rights”.²⁵² In May this year, the Leader of the Opposition introduced the Freedom of Information Amendment (Open and Accountable Government) Bill 2000 into Parliament proposing a number of amendments to the Act (see section 2.2.2 above).

The NSW Ombudsman’s Office has consistently called for a comprehensive review of the FOI Act for a number of years.²⁵³ In the 1998-99 annual report, the Ombudsman once again called for a comprehensive review of the Act as follows:

We call for a review of the NSW FOI Act.

The *FOI Act* needs a comprehensive review to ensure its continuing relevance in the electronic age.

In the 10 years since the Act commenced:

- numerous minor amendments have been made to the Act without any overall review of how these amendments interact, leading to unintended complexities and even direct contradictions;
- some important judicial decisions in NSW, as well as elsewhere in Australia, have looked at the rights of the public to access government information, and the

upon Freedom of Information in Victoria, 1989.

²⁴⁷ Tasmania, Parliament, Legislative Council Select Committee (“LCSC”), *Freedom of Information Report*, Government Printer, Tasmania, 1997.

²⁴⁸ LRC, n 5.

²⁴⁹ The Legal, Constitutional and Administrative Review Committee of the Queensland Parliament is currently conducting a wide-ranging review of the Queensland FOI Act: see n 6. The Queensland Law Reform Commission also reported on a review of the “secrecy provision” exemption in the Queensland FOI Act in 1994: QLRC, n 80.

²⁵⁰ Although note that many of the recommendations made by the various reviews have not been implemented in the applicable legislation.

²⁵¹ Clark, n 1.

²⁵² Humphries, Grattan and Moore, n 1.

²⁵³ See NSW Ombudsman, *Proposing Amendments to the Freedom of Information Act*, Special Report to Parliament, Report No 1/94, 17 March 1994, p I; NSW Ombudsman, n 144, p i (note that the Ombudsman made detailed recommendations for amendment to the FOI Act in this report); NSW Ombudsman, n 147, p 110.

-
- provisions of the Act have not been reviewed in their light;
 - the way in which official records are made and stored has changed significantly, with the public sector moving from a paper based environment into an information technology environment. This will certainly have implications for access to computer records and will also affect the manner in which agencies publish their summaries and statements of affairs;
 - public sector agencies are increasingly contracting out their functions and activities to bodies that are not subject to the *FOI Act*, such as private sector organisations or controlled entities established under the *Corporations Law Act*; and
 - other legislation has been introduced which provides a right to seek access to, and amend, documents in some circumstances, creating confusion due to: different terminology used, different procedures involved, inconsistent exemption provisions; and a variation in available legal protection.

Other issues that need to be examined include:

- whether all current exemption clauses are still relevant;
- whether any exemption clauses need to be clarified in the light of judicial decisions;
- whether an overriding public interest test should be built into those exemption clauses in the *FOI Act* which do not currently have a public interest test;
- fees and charges;
- the way in which the *FOI Act* and the *Privacy and Personal Protection Act* interact...
- the relationship between the *FOI Act* and the alternative access regime set out in s 12 of the *Local Government Act*;
- whether the Act should be expanded to cover the release of ‘information’ known to agencies, and not just the release of ‘documents’ held by agencies;
- whether there are too many agencies listed in Schedule 2 that are exempt from the *FOI Act* itself; and
- whether access can be granted under the *FOI Act* by electronic means, such as email or through the internet.²⁵⁴

13.0 ISSUES REGARDING REFORM OF THE FOI ACT

There is a large amount of material on FOI reform proposals which are relevant to the NSW FOI legislation. Such material includes reports by law reform commissions, ombudsmen, parliamentary committees, and academics in Australian and overseas jurisdictions. This section provides a brief overview of some of the major reform issues which have been raised.

13.1 Should the Objects Clause specify the underlying rationale of the Act?

Objects clauses play an important role in providing guidance on how the provisions of an Act are to be interpreted, particularly where there is any vagueness or ambiguity. In relation to FOI legislation, objects clauses can impact on whether the Act is interpreted in a way that promotes disclosure.²⁵⁵

²⁵⁴ NSW Ombudsman, n 147, p 110.

²⁵⁵ Qld DP, n 200, p 9.

The objects clause in the Commonwealth FOI Act (which is in similar terms to the objects clause in the NSW Act) has been criticised for not explaining the underlying purpose of the Act.²⁵⁶ The ALRC/ARC recommended that the Commonwealth objects clause be amended to explain the underlying purpose to ensure that the Act is interpreted in a way that favours disclosure. The ALRC/ARC stated that the objects clause should make it clear that the right of access to documents is not an end in itself, rather the underlying purpose of the Act is to provide for open and accountable government which underpins Australia's constitutionally guaranteed representative democracy.²⁵⁷

13.2 Does the FOI Act apply to all appropriate bodies?

Clearly the range of bodies to which FOI legislation applies will impact on the extent of information which is available under the legislation. The NSW Ombudsman has stated that the issue of whether there are too many exempt agencies in Schedule 2 of the NSW Act needs to be examined.²⁵⁸ Further as discussed below, some inquiries have considered whether there should be agency based exemptions at all.

The contracting out of government services, and the corporatisation and privatisation of public agencies, raises issues of what bodies should be subject to FOI including: whether state owned corporations should be subject to FOI; and whether FOI legislation should apply to information relating to government services which have been contracted out to the private sector. These issues are also discussed below.

13.2.1 Should there be agency based exemptions?

The Victorian Legal and Constitutional Committee considered the arguments for and against agency based exemptions in its 1987 review of the Victorian FOI Act. It concluded that "*exemptions should not be accorded to agencies as a whole. Rather exemptions should be considered only on a document by document basis*".²⁵⁹

The Committee stated that the following arguments were raised to support agency based exemptions:²⁶⁰

- The majority of documents produced by some agencies are exempt. FOI imposes additional workload on these agencies which is unnecessary and diversionary.

²⁵⁶ ALRC/ARC, n 24, para 4.4.

²⁵⁷ ALRC/ARC, *ibid*, para 4.6.

²⁵⁸ NSW Ombudsman, n 147, p 110.

²⁵⁹ LCC, n 246, para 3.12.

²⁶⁰ *Ibid*, paras 3.4-3.5.

- Some agencies are already fully accountable to either the Parliament or to their particular constituency. Thus, FOI imposes an additional, burdensome and unnecessary form of accountability on them.

The Committee gave the following reasons in support of its rejection of agency based exemptions:²⁶¹

- There was no evidence that the agencies that were seeking agency based exemption had to undertake significant additional work as a result of FOI.
- It is inconsistent with the philosophy of open government to provide for blanket exemptions for some agencies. If agencies are exempted from the Act, then the general right of access is compromised.
- Existing exemptions are adequate to protect confidentiality of documents where required.
- FOI has produced substantial benefits for public administration, and it would be regrettable if those benefits were lost for some agencies due to exemption.
- Accountability to Parliament is qualitatively different from accountability through FOI. Different forms of accountability should be cumulative, not alternative, methods of assuring agency effectiveness.
- If some agencies are exempted from the Act, it is likely that other agencies will pressure the government for exemption.

13.2.2 Should State Owned Corporations be subject to the Act?

“Public authorities” are subject to the NSW FOI Act.²⁶² The definition of a public authority includes a body (whether incorporated or unincorporated) established for a public purpose by, or under the provisions of, a legislative instrument.²⁶³ Statutory State Owned Corporations (“SOCs”) as defined in the *State Owned Corporations Act 1989* (NSW) are expressly included in the definition.²⁶⁴ However, incorporated companies or associations are expressly excluded.²⁶⁵

A number of reviews of FOI legislation in Australia have considered whether government corporations operating in commercial environments should be subject to FOI. Opinions on this matter differ. The ALRC/ARC recommended that government business enterprises (“GBEs” - as SOCs are known at the Commonwealth level) should generally be subject to the Commonwealth FOI Act, but that GBEs that are engaged predominantly in commercial

²⁶¹ Ibid, paras 3.8-3.21.

²⁶² See the definition of “agency” in section 6(1).

²⁶³ Section 7(1)(a).

²⁶⁴ Section 7(1)(f).

²⁶⁵ Section 7(1)(a)(i).

activities in a competitive market should not be subject to the Act.²⁶⁶ However, the Commonwealth Ombudsman disagreed - she recommended that all GBEs be subject to the FOI Act.²⁶⁷ The Tasmanian Legislative Council Select Committee agreed with the Commonwealth Ombudsman in its review of the Tasmanian FOI Act.²⁶⁸

Arguments against subjecting SOCs to FOI legislation are:²⁶⁹

- The objectives of FOI legislation, which focus on the accountability of the executive government, are irrelevant to SOCs. SOCs operate in a commercially competitive environment and should not be directly accountable to the public through FOI.
- Sufficient accountability is provided by market forces and the regulatory mechanisms that apply to the private sector generally. SOCs are subject to reporting, accounting and audit requirements, and market mechanisms ensure a high quality of administration.
- FOI places additional administrative and financial burdens on SOCs and reduce their efficiency and competitiveness. This disadvantages SOCs as compared to their private sector competitors. It defeats one of the main purposes for creating SOCs, that is, to increase efficiency and competitiveness.

The arguments in favour of subjecting SOCs to FOI legislation are:²⁷⁰

- SOCs are publicly funded and thus they should be accountable to the public in relation to that expenditure.
- SOCs are accountable to Ministers financially and strategically, and therefore the public has a democratic interest in their operation.
- SOCs often provide essential public services such as water, electricity and communications. The fundamental nature of these services is such that FOI and other administrative law mechanisms are applicable. The commercial competitive environment does not necessarily provide a fair and just provision of goods and services, or adequate public accountability.
- Many SOCs provide services in a less competitive or monopoly market and thus, are not subject to strong market forces.
- SOCs should be subject to FOI legislation so that their operations are as transparent as possible - this is important because SOCs enjoy advantages over their private sector competitors due to their connection with government, for example in relation to access to capital, cost of capital, taxation and other regulatory privileges.

²⁶⁶ ALRC/ARC, n 24, para 16.13.

²⁶⁷ *ibid*, para 16.14.

²⁶⁸ LCSC, n 247, p 89.

²⁶⁹ This is taken Australian Law Reform Commission/Administrative Review Council ("ALRC/ARC"), *Freedom of Information*, Discussion Paper 59, May 1995, para 10.8.

²⁷⁰ This is taken from ALRC/ARC, *ibid*, para 10.9.

- SOCs that carry out regulatory public functions should be subject to FOI legislation as regulation is a government function.
- The exemption provisions in FOI legislation provide adequate protection for documents relating to the commercial competitive activities of SOCs.

13.2.3 Should the FOI Act apply to information relating to government services that have been contracted out to the private sector?

When government services are contracted out, information in relation to the service may be held by the contractor rather than the government agency. As the FOI Act does not apply to private bodies, rights of access to information relating to government services may be lost or diminished.²⁷¹

The ARC and a Senate Committee have recently held inquiries into contracting out. Both the inquiries concluded that rights of access to information should not be lost or diminished due to contracting out. The ARC considered five options for protecting information access rights as follows:²⁷²

1. Extending the FOI Act to apply to contractors.
2. Deeming specified documents in the possession of the contractor to be in the possession of the government agency.
3. Deeming documents in the possession of the contractor that relate directly to the performance of their contractual obligations to be in the possession of the government agency.
4. Incorporating information access rights into individual contracts.
5. Establishing a separate information access regime.

Both the ARC and the Committee favoured the third proposal.²⁷³ This proposal has the following advantages:

- it avoids the constraints of needing to prescribe in the contract for the provision of services those documents intended to be accessed by individuals;
- it provides access to a wider scope of documents than simply those to which the government is legally entitled;
- it ensures FoI rights will not be bargained away in the contract negotiation process;
- members of the community will continue to be able to enforce their rights directly in the courts; and
- it ensures that the government remains responsible for the access to government related information.²⁷⁴

²⁷¹ ARC, n 218, para 5.6.

²⁷² ARC, *ibid*, paras 5.20-5.49.

²⁷³ ARC, *ibid*, recommendations 15 and 16; SFPARC, n 237, p 49.

²⁷⁴ Auzimour Just F, "Freedom of information and the contracting out of government services: Preserving rights in a changing environment" (1999) 79 *Freedom of Information Review* 4.

13.3 Does the FOI Act provide appropriate access regardless of the format of the information?

The FOI Act provides for access to “documents”. “Document” is defined broadly, but it has been questioned whether the right to access documents is adequate. In particular, it has been questioned whether access should be to the broader concept of “information”, and whether there is appropriate access to electronic information.

13.3.1 Access to “information” rather than “documents”?

In her 1998/99 annual report, the Ombudsman asks “*whether the Act should be expanded to cover the release of Information known to agencies, and not just the release of*”²⁷⁵ Access to “information” is provided for in other jurisdictions. New Zealand has very wide rights of access to official information, including access to documents and unrecorded information.²⁷⁶

The NSW Ombudsman recently reported that a senior manager with the Department of Corrective Services claimed that the FOI Act has meant that senior managers now verbally direct staff rather than place matters in writing so as to avoid material being sought under the Act.²⁷⁷ If the Act provided for access to information rather than documents, then agencies may not be able to avoid public access to information in this manner.

The ALRC/ARC considered whether the Commonwealth FOI Act should apply to unrecorded information. They concluded that it would be unreasonable to expect agencies to record previously unrecorded information in order to satisfy an FOI request because: such an obligation could impose a significant resource burden on the agency; and documents created from memory may be unreliable and open to manipulation.²⁷⁸

13.3.2 Adequacy of access to electronic information

The definition of “document” is broad enough to include electronic documents. However, it has been questioned whether the FOI Act provides for adequate access to all electronic information. Advances in information and communications technologies have had a major impact on the way information is accessed, collected, stored, processed, exchanged and disseminated. This raises a number of issues relating to FOI. Such issues include:²⁷⁹

²⁷⁵ NSW Ombudsman, n 147, p 110.

²⁷⁶ Aitken J, “Open Government in New Zealand”, in McDonald A and Terrill G (eds), *Open Government Freedom of Information and Privacy*, Macmillan Press Ltd, 1998, 117 at p 123.

²⁷⁷ NSW Ombudsman, n 147, p 119.

²⁷⁸ ALRC/ARC, n 24, para 7.3.

²⁷⁹ See Qld DP, n 200, pp 26-28; ALRC/ARC, n 24, para 7.2; Lewis J, “Reinventing (Open)

- Does the Act provide for adequate access to electronic data (as opposed to just discrete electronic documents)?
- What type of electronic searches should be undertaken in order to answer an FOI request?
- Should agencies be required to write a computer program to produce the requested information?
- Should access under the FOI Act be granted via electronic means, such as email or through the Internet?
- Have information systems been designed to provide for adequate public access to information, for example, do systems allow for the appropriate identification of information? Are adequate indexes and search tools provided for?
- Should agencies process FOI requests online? If requests are processed online, and exempt material is deleted electronically, should the extent of the deletion be indicated and, if so, how?
- Are FOI officers sufficiently familiar with the agency's electronic information systems?
- Should agency databases, and the software developed to manipulate those databases, be subject to disclosure under FOI?

13.4 Are exemption provisions appropriate?

The number and scope of exemption provisions in FOI legislation play a central role in determining what information is released to the public. In her 1998/99 annual report, the NSW Ombudsman stated a review of the FOI Act should include consideration of “*whether all current exemption clauses are still relevant*”, and “*whether any exemption clauses need to be clarified in the light of judicial decisions*”.²⁸⁰

The exemption provisions in the NSW Act are contained in Schedule 1. There are 21 exemption clauses, many of which specify multiple bases on which a document may be held to be exempt. It has been argued that the exemption provisions are framed in broad terms and are difficult to interpret and apply.²⁸¹

13.4.1 Should exemptions be categorical or content based? Should all exemptions be subject to a harm test?

Some exemption provisions contain “harm tests” which provide that the exemption does

Government: State and Federal Trends” (1995) 12(4) *Government Information Quarterly* 428.

²⁸⁰ NSW Ombudsman, n 147, p 110. There is a large amount of material dealing with proposals to amend particular exemptions provisions which are relevant to the NSW FOI Act: see for example, NSW Ombudsman, n 144, pp 19-21; and ALRC/ARC, n 24, chapters 9-11.

²⁸¹ Cossins, n 38, p 19.

not apply unless harmful consequences would result if the requested information were disclosed. The harm tests are expressed in a variety of ways. For example, a document may be exempt if its disclosure could reasonably be expected to “prejudice”, or “cause damage”, or “have a substantial adverse effect on” some specified interest.

Other exemption provisions do not contain harm tests. Under these exemptions, if a document falls within a specified “class” or “category”, then it will be exempt regardless of whether its disclosure would result in any harmful consequences.

It has been argued that FOI legislation should not contain any categorical or class exemptions.²⁸² Rather, the focus should be on whether harm would result from the disclosure of requested information. There has also been discussion regarding the level of harm that should be required before a document is exempted from disclosure. Pro-disclosure advocates argue that a high threshold (such as *substantial* harm) should be established.²⁸³ However, it may be argued that a high threshold would not provide appropriate protection to the interest sought to be protected by the exemption provision.

13.4.2 Should all exemptions be subject to an overriding public interest test?

A number of commentators have questioned whether there should be an overriding public interest test applicable to all exemption provisions. The NSW Ombudsman has argued that the Act should contain an overriding public interest test that requires agencies to disclose information “*whenever the public interest in disclosure outweighs the public interest(s) protected by any exemptions which may otherwise apply*”.²⁸⁴ The Ombudsman reasoned that a document should not be exempt from disclosure for the sole reason that it falls within a particular class of documents, rather consideration should be given to whether some good purpose is served by withholding access to the document in each case.²⁸⁵

13.5 Are ministerial certificates necessary? Should ministerial certificates be subject to binding external review?

The continuing relevance of ministerial certificates has been questioned. Cossins calls for consideration of whether the power to issue ministerial certificates impedes the objectives of government accountability and responsibility.²⁸⁶ She says that if the ministerial certificates are to be retained, then the Premier should be required to show why the public interest requires a certificate to be issued, and how that public interest outweighs the public

²⁸² Snell and Tyson, n 13, p 3. Snell, n 198, p 101.

²⁸³ *ibid.*

²⁸⁴ NSW Ombudsman, n 144, p 18.

²⁸⁵ *ibid.*

²⁸⁶ Cossins, n 38, p 69.

interest in open government.²⁸⁷ The ALRC/ARC considered whether there is a legitimate role for conclusive certificates in the Commonwealth Act. They concluded that such certificates were justified in a limited range of circumstances.²⁸⁸

Supporters of ministerial certificates argue that they are justified on the basis that decisions on very sensitive information should be taken at the very highest level of government.²⁸⁹ Opponents of ministerial certificates argue that highly sensitive matters which may cause a public debate are exactly the sort of material the Act is designed to give access to, and thus they undermine the objects of FOI legislation.²⁹⁰ Other writers have noted that the operation of FOI over time has shown that the exemption provisions provide adequate protection for sensitive documents without the need for extra protection provided by ministerial certificates.²⁹¹

In New South Wales, there have been calls for review of the limited avenue of appeal against the decision to issue a ministerial certificate. Only the Supreme Court can review the decision, and only on the limited basis of determining whether there were reasonable grounds for the claim that the document is a restricted (i.e. Cabinet, Executive Council or law enforcement and security) document.

13.6 Should internal review be abolished or made optional?

Some commentators argue that internal review of FOI requests should be abolished or made optional.²⁹² Currently under the NSW FOI Act, where internal review is available, it is a prerequisite to seeking external review by the Ombudsman or the ADT. The Freedom of Information Amendment (Open and Accountable Government) Bill 2000 introduced by the Leader of the Opposition proposes to amend the FOI Act to allow external review without the need for prior internal review (see section 2.2.2 above). The ALRC/ARC recognised that internal review had advantages for both applicants and agencies, but it recommended that internal review not be a prerequisite to external review.²⁹³

²⁸⁷ *ibid.*

²⁸⁸ The ALRC/ARC concluded that conclusive certificates were justified in respect of the “national security and defence” and “cabinet documents” exemptions: see ALRC/ARC, n 24, para 8.17.

²⁸⁹ *ibid.*

²⁹⁰ *ibid.*

²⁹¹ See Lye J and Moe T, “Prospects for Review of FOI – Can the Commonwealth Regain the *Administrative Law: Are the States Overtaking the Commonwealth?*, Australian Institute of Administrative Law Inc, Canberra, 1996, 131 at p 151.

²⁹² See Snell, n 198, p 102.

²⁹³ ALRC/ARC, n 24, paras 13.3-13.6.

Supporters of internal review argue that it:

- allows an agency to reconsider a decision;
- is cost effective and relatively quick;
- enables senior staff to monitor the quality of decision-making within the agency;
- provides applicants with the chance to be given a more favourable decision;
- allows applicants to submit new arguments and/or evidence for consideration; and
- potentially reduces the number of external review applications... (and hence the time and delay associated with that review).²⁹⁴

Those who question the value of internal review argue that:

- the majority of internal review decision-makers affirm the original decision; ...
- many applicants are sceptical about the impartiality of another review within the same agency;
- internal review makes the appeal process more cumbersome and costly; ...
- junior officers might 'play it safe' knowing that their decision can be reviewed by a more senior officer.²⁹⁵

13.7 Should an Information Commissioner be created?

A number of jurisdictions both in Australia and overseas, including Western Australia, Queensland, Canada and Ireland, have created a body called an "Information Commissioner".²⁹⁶ Two main roles may be assigned to an Information Commissioner: (a) monitoring and promoting FOI; and (b) acting as an external review body of agency decisions. These roles are discussed below.

13.7.1 Monitoring and Promotion role

Since the FOI Unit in the NSW Premier's Department was disbanded in 1991, there has been no body specifically charged and resourced to monitor the implementation of the NSW FOI Act.²⁹⁷ The lack of independent and regular monitoring of FOI laws has been identified as the "*Achilles heel of FOI legislation in Australia*".²⁹⁸ Snell and Sheridan state that the key appeal of the independent monitor concept is that "*it addresses a major deficiency in FOI operation, namely, that it is largely self-regulating and relies on*

²⁹⁴ Qld DP, n 200, p 30.

²⁹⁵ *ibid.*

²⁹⁶ Note also that an Information Commissioner is proposed under the Freedom of Information Amendment (Open and Accountable Government) Bill 2000: see section 2.2.2 above.

²⁹⁷ Wheeler, n 169, p 38.

²⁹⁸ Snell R and Sheridan H, "A few significant steps towards open government ALRC/ARC Discussion Paper 59: a summary and comments" (1995) 60 *Freedom of Information Review* 90 at 92.

*governments to promote a device which can cause them inconvenience, bad publicity, or threaten possible loss of office etc”.*²⁹⁹

The ALRC/ARC recommended that an Information Commissioner, with monitoring and promotion functions, be created at the Commonwealth level. They held the view that an Information Commissioner would: lift the profile of FOI; assist applicants to use the Act; and give agencies an incentive to accord higher priority to FOI.

The ALRC/ARC recommended that the functions of an FOI Commissioner include:

- auditing agencies’ FOI performance
- preparing an annual report on FOI
- collecting statistics on FOI requests and decisions
- publicising the Act in the community
- issuing guidelines on how to administer the Act
- providing FOI training to agencies
- providing information, advice and assistance in respect of FOI requests
 - at any stage of an FOI request
 - at the request of the applicant, the agency or a third party
- providing legislative policy advice on the FOI Act³⁰⁰

The ALRC/ARC noted that although many submissions supported the creation of an Information Commissioner, a number of agencies thought it was not necessary as some of the proposed functions were already being performed by other bodies, and it would merely add another layer of bureaucracy.³⁰¹

13.7.2 External Review role

An Information Commissioner may be empowered to issue binding or non-binding determinations in relation to the correctness of an agency’s decisions. It has been argued that Information Commissioners have demonstrated a willingness to adopt a pro-active, less formal, and less adversarial approach to the resolution of FOI disputes.³⁰² Further it has been argued that a specialist Information Commissioner is in a better position to ensure that FOI and the review process are working well.³⁰³

However, the ALRC/ARC noted that “[i]t is not usual for an institution responsible for formulating guidelines on the administration of legislation to have individual case dispute

²⁹⁹ ibid.

³⁰⁰ ALRC/ARC, n 24, recommendation 19.

³⁰¹ ibid, para 6.3.

³⁰² Lye and Moe, n 291, p 140.

³⁰³ ibid.

resolution powers”.³⁰⁴ The ALRC/ARC recommended against giving the proposed Information Commissioner determinative review powers. They argued that if one body had both monitoring and promotion functions and review functions, then conflicts of interest, and a perception of a lack of independence, could arise. Further, they held that there was no need to create another merits review mechanism because the Commonwealth Administrative Appeals Tribunal could adjust its practices to ensure effective FOI review.

13.8 Is the charging structure appropriate?

The charging regime and the charges levied under the NSW FOI Act have come under criticism from a number of sources.³⁰⁵ In 1995, the NSW Ombudsman strongly criticised the charging structure and made detailed recommendations for reform.³⁰⁶ He said that a number of FOI applicants had been required to pay large fees and/or advance deposits ranging from \$600 to \$13,000, and that this was totally at odds with the objects of the Act.³⁰⁷

The charging structure under FOI laws has been considered by a number of reviews of FOI legislation throughout Australia.³⁰⁸ Some of the questions considered by these reviews include:

- Should there be an application fee?
- Should there be a cap on the maximum amount that can be charged?
- Should there be waiver of fees in any circumstances? If so, what should those circumstances be? For example, should fees be waived when the information sought is in the public interest, or the applicant can demonstrate financial hardship?
- Should members of parliament applying for information under the Act automatically qualify for waiver of fees?
- Should fees be charged for access to personal information?
- Should there be a detailed prescription of what can and cannot be charged for? For example, should charges be levied for time spent supervising an applicant’s inspection of disclosed documents?
- Should charges be levied if access to documents is not given? Should charges be levied for time spent examining documents for exempt material?
- Should agencies be required to notify applicants when the charge reaches a specified

³⁰⁴ ALRC/ARC, n 24, para 6.20.

³⁰⁵ For example, NSW Ombudsman, n 144, p 4 and chapter 10; Cossins, n 38, p 17; Nason D, “Free info comes at cost of \$26,000”, *The Australian*, 6 Dec 1997, p 8; *NSWPD*, 23/11/99, p 3578, per the Hon. DJ Gay.

³⁰⁶ NSW Ombudsman, n 144, chapter 10.

³⁰⁷ *ibid*, pp 3 and 23.

³⁰⁸ See for example NSW Ombudsman, n 144, p 3 and chapter 10; LCC, n 246, chapter 3; ALRC/ARC, n 24, chapter 14; LCSC, n 247, chapter 7; SSCLCA, n 245, chapter 19.

- amount before incurring further charges?
- Should fees be charged for internal and external review?

Opinions differ on the appropriate answers to the above questions. In general, it is argued that in setting appropriate fees and charges a balance needs to be struck between the public interest in there being appropriate access to government information and the public interest in protecting agencies from unreasonable disruption and expense.

Supporters of a “user-pays” approach to FOI argue:

- An unreasonable financial and administrative burden would be placed on agencies if access was free or fees were set too low.³⁰⁹
- Fees can act as a substantial barrier to frivolous, mischievous or excessive requests.³¹⁰
- Taxpayers should not pay for the pursuit of private interests and inappropriate use of FOI, such as where commercial organisations use the FOI as a means of obtaining cheap commercial research.³¹¹

Supporters of minimal (or no) fees and charges argue:

- Responding to FOI requests takes time and resources, but it is a fundamental part of democratic society.³¹²
- Fees can act as a significant deterrent to potential applicants, particularly potential applicants for policy and administrative documents, thus defeating the objectives of government accountability and public participation.³¹³
- Cost recovery must not be emphasised at the expense of the social, administrative and political benefits of FOI, many of which are intangible and unquantifiable.³¹⁴

It has been pointed out at the Commonwealth level that, despite substantial fees and charges imposed under the Act, the revenue collected represents only a small percentage of the estimated cost of FOI to the Government. Moe and Lye argue:

The contrast between levels of charges on the one hand, and the actual cost of FOI on the other, highlights the philosophical difference between principles of administrative law and dictates of cost recovery. The argument can be made that this difference should be acknowledged rather than submerged, and the appearance of cost recovery dispensed

³⁰⁹ ALRC/ARC, 24, para 14.2.

³¹⁰ LCSC, n 247, p 65.

³¹¹ *ibid*, pp 65-6.

³¹² *ibid*, pp 66.

³¹³ NSW Ombudsman, n 144, p 31; Lye and Moe, n 291, p 144.

³¹⁴ ALRC/ARC, n 24, para 14.2; SSCLCA, n 245, p 277.

with.³¹⁵

13.9 How does the FOI Act interact with other legislation?

As discussed in section 7.0 above, the FOI Act is not the only Act in New South Wales that provides for access to information. The *Privacy and Personal Protection Act 1998* (NSW) provides for access to, and alteration of, personal information held by government agencies. It also specifies limits and restrictions on the disclosure of personal information by agencies. The *Local Government Act 1993* (NSW) provides for access to specified documents held by local councils. Thus, there is overlap between these two Acts and the FOI Act. In the 1998-99 annual report, the Ombudsman said that the way in which the FOI Act interacts with these two Acts should be examined.³¹⁶

14.0 INTERNATIONAL COMPARISON

The first law establishing a right to government information was enacted in Sweden in 1776. However, Sweden remained the only country with such legislation until the second half of the 20th century. Finland adopted such a law in 1951. The influential United States FOI Act was passed in 1966. A number of countries enacted such legislation in the 1970s including: Denmark (1970); Norway (1970); the Netherlands (1978) and France (1978). Countries with Westminster systems of government soon followed with Australia, Canada and New Zealand all enacting FOI legislation in 1982.

In the past few years interest in FOI legislation throughout the world has accelerated. Snell recently reported that “[b]efore the 1990s the number of countries with any type of FOI legislation was only just into double figures. At last count, and dependent on whether you count vague constitutional guarantees of right to access information or right to information, the number of countries that now have access legislation or are debating such legislation is approximately 50 plus”.³¹⁷

A brief overview of the FOI legislation in the United States and New Zealand, and the position in the United Kingdom, is provided below.

14.1 United States

The U.S. FOI Act has been an influential model for access legislation both in Australia and throughout the world. As discussed below, significant amendments to the Act were made in 1996 with the aim of improving access to government information in the electronic age.

³¹⁵ Lye and Moe, n 291, p 144.

³¹⁶ Note s 5 of the *Privacy and Personal Protection Act 1998* (NSW) provides that nothing in the Act affects the operation of the Freedom of Information Act 1989.

³¹⁷ Snell R, “Comment”, (2000) 86 *Freedom of Information Review* 17.

Overview

Major aspects of the federal Freedom of Information Act³¹⁸ are as follows:³¹⁹

- The Act provides a right of access to federal agency records, subject to nine exemptions and three special law enforcement exclusions.
- The Act covers all federal executive agencies, including the CIA and FBI. It does not apply to Congress, the courts or the office of the President.
- There is a longstanding problem of FOI backlogs at a number of agencies. An agency is required to respond to an FOI request in 20 days (increased from 10 days in 1997), but some agencies greatly exceed this deadline.
- In 1993, the Attorney General issued a memorandum to agencies stating that a presumption of disclosure was to apply to the FOI Act, and that the Department would no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, the Department would only defend those cases where the agency reasonably foresees that disclosure would cause harm to an interest protected by the relevant exemption.³²⁰
- Some agencies receive very large numbers of FOI requests and devote significant resources to processing those requests. For example, in 1998-99, the Department of Justice (including agencies coming within the portfolio such as the FBI) received 230,492 FOI and Privacy Act requests and had over 1000 staff with full time FOI duties. The estimated total cost for the Department for FOI Act processing and litigation related activities for that 1998-99 was \$59,234,088.53.³²¹
- There is an active market in the U.S. in obtaining government information and reselling it.³²² These resellers provide information obtained under the FOI Act to the public for a fee. Customers of these companies include businesses seeking information on competitors, journalists and media organisations, law firms, and educational institutions.
- Access to information relating to government contracts has been a major source of FOI

³¹⁸ 5 U.S.C. Sec 552 (1994 & Supp. II 1996).

³¹⁹ See United States, Department of Justice, n 224.

³²⁰ United States, Office of the Attorney General, *Memorandum for Heads of Departments and Agencies -The Freedom of Information Act*, 4 October 1993, <www.usdoj.gov/04foia/931004a.htm>.

³²¹ United States, Department of Justice, *Freedom of Information Act (FOIA) Report For Fiscal Year 1999*, <www.usdoj.gov/oip/foia-ar.htm>.

³²² Amos J, *Freedom of Information and Business & Appendices*, The Constitution Unit, School of Public Policy, University College London, June 1999, p 9. Halstuk M, "Bits, Bytes, and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases" (1999) 15(1) *Santa Clara Computer & High Technology Law Journal* 73 at 94. For an example of a reseller see FOIA Group Inc: <www.foia.com>.

Act litigation.³²³ While the formal contract bid listing the total price of the contract is routinely made public, competitors of winning bidders commonly attempt to obtain more detailed information via FOI to assist in future bids.³²⁴

- The Act provides for what is commonly referred to as “**reading room**” access. This is a requirement under the Act for agencies to make the following categories of records routinely available for inspection and copying without an FOI request:
 - (A) final opinions and orders rendered in the adjudication of cases;
 - (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
 - (C) administrative staff manuals and instructions to staff that affect a member of the public;
 - (D) copies of all records which have been released in response to an FOI request and that the agency determines have become, or are likely to become, the subject of subsequent FOI requests (this category was added in the 1996 amendments contained in the Electronic Freedom of Information Act – see below).

Electronic Freedom of Information Act

Significant amendments were made to the FOI Act with the passage of the Electronic Freedom of Information Act³²⁵ (“**the EFOIA**”) in 1996. The Act amended the FOI Act with the aims of improving access to government information in the electronic age, and reducing delays in agencies’ responses to requests. The amendments included the following:³²⁶

- *Findings*: The EFOIA expressly states the following findings:
 - (5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and
 - (6) Government agencies should use new technology to enhance public access to agency records and information
- *Electronic Records*: A definition of the term “record” was added to confirm that records in any format, including electronic records, are subject to the Act.
- *Computer Reference Material*: The definition of the term record establishes that all electronic records are subject to disclosure, including information libraries, reference

³²³ O'Reilly J, *Federal Information Disclosure*, 2nd edn, McGraw Hill, United States, c1990-, section 14.13.

³²⁴ *ibid.*

³²⁵ *Electronic Freedom of Information Act of 1996*, Pub. L. No. 104-231, sections 1-12, 110 Stat. 3048, (1996) (codified as amended in various sections of 5 U.S.C. Sec. 552).

³²⁶ This information is mainly taken from two documents prepared by the Public Citizen Litigation Group: *Highlights of the Electronic FOIA Amendments* at <www.citizen.org/litigation/foic/efoia_highlight.html>; and *Summary of the Electronic Freedom of Information Act Amendments of 1996* at <www.citizen.org/litigation/foic/summary_efoia.html>.

material and other value-added databases.³²⁷

- *Format of Requests*: The amendments provide that an agency must supply the requested records in the format (including electronic format) requested by the applicant if the record “is readily reproducible in that format”.
- *Searches for Electronic Records*: The amendments require agencies to make “reasonable efforts to search for records in electronic form or format”.
- *Reading Room Access*: An extra reading room category was added – i.e. all records which have been released in response to an FOI request and that the agency determines have become, or are likely to become, the subject of subsequent FOI requests.
- *Electronic Reading Room Access*: The amendments require agencies to establish “**electronic reading rooms**”. Under these provisions, any records falling within the reading room categories that were created after 1 November 1996 must be made available to the public by “computer telecommunications” (e.g. the internet), or if computer telecommunications have not been established, by “other electronic means”.
- *Indexes*: The amendments require agencies to make available **online** an index of all previously released records that have been, or are likely to be, the subject of additional requests. This amendment is intended to assist requesters in obtaining previously released records, and to assist agencies in complying with the time limits under the Act (as it allows previously released records to be processed more readily).
- *Guides*: The amendments also require agencies to make available, on request, reference material or a guide for requesting records from an agency. These guides must include:
 - (1) an index of all major information systems of the agency;
 - (2) a description of major information and record locator systems maintained by the agency; and
 - (3) a handbook for obtaining various types and categories of public information from the agency.
- *Multitrack and Expedited processing*: The amendments provide for *expedited processing* (in cases of exceptional urgency) and *multitrack processing*. Multitrack processing allows simple requests to be processed in one track, and more complex requests processed in another track. This allows for simple requests to be processed more quickly.
- *Computer Redaction*: The amendments provide that where exempt information is deleted from released records, the amount of information deleted must be indicated in the record. This is designed to overcome the problem where the extent of deletions, or even the fact that deletions have been made, is not discernible on the released record due to computer redaction (i.e. review of material and deletion of exempt material).

Opinions on the Electronic Freedom of Information Act differ. On the one hand it has been

³²⁷ MacDonald D, “The Electronic Freedom of Information Act Amendments: A Minor Upgrade” *Rutgers Computer and Technology Law Journal* 357.

Note that prior to the passage of the EFOIA, a Court had held that electronic information libraries and other value-added databases were not subject to the FOI Act. In *SDC Development Corp. v Mathews* 542 F.2d 1116 (9th Cir. 1976), the Court held that a widely used medical database, compiled and stored by the National Library of Medicine did not qualify as a “record” under the Act and thus was not subject to disclosure.

³²⁸ Between these two extremes, it has been described as “a significant step forward in embracing internet technology’s potential for improving public access to government information”.³²⁹

Michael Tankersley (of the Public Citizen Litigation Group) argues that the EFOIA represents a new paradigm. He argues that the provision for extending reading room access to records which are likely to be subject to multiple requests, and the requirement for these records to be made available online, represent a revolutionary shift. He states that these provisions shift emphasis away from a “request-and-wait” model to a new paradigm that “requires agencies to anticipate requests and make broad categories of records immediately available to the public at agency records depositories and, using telecommunications technology, at requesters’ home computers”.³³⁰ Thus, he argues that the provisions “fundamentally alter the relationship between FOIA users and agencies, and the role of FOIA in federal information policy”.³³¹

In contrast, other commentators have argued that the EFOIA is a missed opportunity:

[The EFOIA] could have been an opportunity for Congress to revise federal public access policy in order to anticipate, accommodate, and take advantage of advancing information technologies. Instead, Congress chose to limit the ambit of .. [the FOIA] to technical upgrades and administrative reforms. While these provisions will have an impact, for better and for worse.. they do not represent a fundamental rethinking of the underlying policy issues of public access... [The EFOIA] treats new information technology as essentially more of a good thing, without thought for how these technologies may or should alter the operating paradigm, of information access.³³²

14.2 New Zealand

The New Zealand FOI legislation – the *Official Information Act 1982* (NZ) (“**the OIA**”)³³³ - has been widely praised. Snell argues that the OIA “has achieved a significantly higher

³²⁸ MacDonald, *ibid.*

³²⁹ Perritt H, “Electronic Freedom of Information” (1998) 50(2) *Administrative Law Review* 391 at 418.

³³⁰ Tankersley M, “How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age” (1998) 50(2) *Administrative Law Review* 421 at pp 422-423.

³³¹ *ibid.*, p 423.

³³² MacDonald, n 327, p 387.

³³³ Note that in 1993 the rights of access to personal information in the OIA were transferred to the *Privacy Act 1993* (NZ).

level of openness in government than Australian FOI legislation”.³³⁴ The view that the OIA provides superior rights of access to most, if not all, other FOI legislation has been echoed by other commentators.³³⁵ A South Australian parliamentary committee recently concluded that the New Zealand access legislation was by far the best legislative approach for South Australia, and proposed a draft FOI bill modelled on the OIA.³³⁶

It has been noted that the OIA shares the same general objectives of FOI legislation in Australia, but it differs significantly on matters of principle.³³⁷ Snell argues that these differences in “design principles” have led to the superior performance of the OIA.³³⁸ Aspects of the OIA praised by commentators include the following:³³⁹

- The Act provides a right of access to “information” (as opposed to “documents”), including unrecorded information.
- The question of whether any official information is to be made available is to be determined in accordance with the purposes of the Act and “*the principle that information shall be made available unless there is a good reason for withholding it*” (section 5). The Courts have interpreted this provision to mean that a decision-maker who is in two minds should come down on the side of availability of information.³⁴⁰
- Exemption provisions are worded in “consequential” (as opposed to “categorical”) terms.
- The majority of exemptions are subject to a public interest test. As stated above, the Act provides that information will be available unless there is a “good reason” for withholding it. Good reasons include “conclusive reasons” and “other reasons”.

³³⁴ Snell R, “The Kiwi Paradox – A Comparison of Freedom of Information in Australia and New Zealand”, paper to be published in (2000) 28 *Federal Law Review* 575.

³³⁵ Liddell states that the OIA “suffers from fewer deficiencies than most if not all other freedom of information statutes”: see Snell, *ibid*. The Chief Ombudsman of New Zealand has stated that “[i]n appearance and substance the ... [OIA] furthers the right to know in a manner which so far as I know is unmatched”: Elwood B, “The New Zealand Model – The Official Information Act 1982”, Paper presented at the conference “FOI and the Right to Know”, held on Melbourne on August 19-20, 1999, organised by the Communications Law Centre and the International Commission of Jurists, <www.comslaw.org.au/research/Equity/19990924_elwoodfoi.html>. Dr Bill De Maria of the Centre for Public Administration at the University of Queensland has described the OIA as “world beater FOI legislation”: see Dr De Maria’s oral submissions to the Legal, Constitutional and Administrative Review Committee, n 210, p 46.

³³⁶ LRC, n 5.

³³⁷ Buchanan R, “Cabinet, policy documents and freedom of information: the New Zealand *Freedom of Information Review* 2 at 2.

³³⁸ Snell, n 334.

³³⁹ See Snell, *ibid*; Elwood, n 335.

³⁴⁰ Elwood, *ibid*.

Section 6 provides conclusive reasons for withholding information, including prejudice to security, defence, or the maintenance of the law, or serious damage the economy etc. Conclusive reasons are not subject to a public interest test. However, the majority of exemption provisions are set out in section 9 which provides “*other reasons*” for withholding information. Section 9(1) subjects all of these other reasons to the same public interest test. Thus, it has been stated that the OIA “*effectively places the public interest at the core of the FOI regime*”.³⁴¹

- There is no requirement for internal review.
- External review of the OIA is by the Ombudsmen. It has been noted that “the flexibility of the office [of the Ombudsmen], its non-adversarial approach and its ability to achieve negotiated settlements have been its great strengths in the role”.³⁴²

14.3 United Kingdom

FOI legislation has not yet been enacted in the United Kingdom. However, an FOI Bill introduced by the Government is currently before the Parliament. The FOI regime in the Bill is intended to replace the non-statutory *Code of Practice on Access to Government Information* which was issued by the Conservative Government in 1994.

Prior to introducing the Bill into Parliament, the Labour Government issued a White Paper on its FOI proposals which was published in 1997.³⁴³ The White Paper was widely praised and there was general consensus that it proposed a generous FOI regime.

Following public consultations and a parliamentary committee inquiry, the Government issued a draft FOI bill in May 1999. The draft bill differed from the White Paper in a number of significant respects. Publication of the draft Bill was followed by another period of public consultation and a process of pre-legislative scrutiny by two parliamentary committees. The draft Bill was widely criticised by FOI lobby groups, members of parliament, academics and both parliamentary committees.

A re-drafted bill was introduced into Parliament on 18 November 1999.³⁴⁴ The Bill reflected some of the criticisms raised in relation to the draft Bill, but a number of the concerns remained unaddressed. The Government has published further amendments to the Bill which it intends to move when the Bill is in the Lords committee stage. A prominent FOI lobby group has stated that these amendments represent modest improvements but fundamental problems with the Bill remain.³⁴⁵ Aspects of the White Paper and the Bill that

³⁴¹ QLD DP, n 200, p 19.

³⁴² Buchanan, n 337, p 2.

³⁴³ U.K. White Paper, n 221.

³⁴⁴ The website of the Freedom of Information Unit in the United Kingdom Home Office provides links to the Bill, the White Paper, the parliamentary committee reports and other relevant information: see <www.homeoffice.gov.uk/foi>.

³⁴⁵ See the Campaign for Freedom of Information (“the CFI”), *Freedom of Information Bill*:

have received the most attention are briefly discussed below.

The 1997 White Paper

Although not immune from criticism altogether, the 1997 Government White Paper was widely praised.³⁴⁶ It appears that the Paper proposed a more generous regime than many commentators were expecting. The Campaign for Freedom of Information described it as a “surprisingly radical approach”.³⁴⁷ Australian academic, Spencer Zifcak stated that the Paper:

contains some of the clearest thinking about access to official information published by government in recent years. It has its deficits of course. But overall its analysis of the issues and problems surrounding a right to know and the solutions it proposes augur well for British freedom of information (FOI) legislation. It also contains much from which established FOI jurisdictions can learn.³⁴⁸

Aspects of the White Paper which were widely praised include:³⁴⁹

- The coverage of the proposed regime was broad extending to nationalised industries, public corporations, privatised utilities and private organisations insofar as they carry out statutory functions.
- The proposed access right was to both “records” and “information”, including unrecorded information.³⁵⁰
- Proposed exemptions were limited to seven specified interests.
- The Paper emphasised a “contents” based approach to exemptions rather than a “class” or “category” based approach. A “substantial harm” test was proposed for all exemptions except one (for which a simple harm test was proposed). That is, information would only be exempt if its disclosure would cause **substantial** harm to a specified interest.

Lords Committee Stage: Note on Government amendments, 9 August 2000, <www.cfoi.org.uk/govfoiamends0800.html>.

³⁴⁶ Snell R and Sheridan H, “Fol developments in the United Kingdom White Paper – ‘Your Freedom of Information Review 2; Frankel M, “Unlocking the Truth: The Government’s FOI white paper”, *The Guardian*, 16 Dec 1997, <www.cfoi.org.uk/wp161297art.html>; Zifcak S, “Thinking Clearly about the Right to Know: Britain’s White Paper on Freedom of Information” (1998) (16) *AIAL Forum* 35.

³⁴⁷ Frankel, *ibid*.

³⁴⁸ Zifcak, n 346, p 35. Zifcak also notes in the same article that the White Paper “was leaked to the press prior to its final approval by Cabinet apparently in order to sidestep anticipated opposition from senior ministers in the Blair Government. As soon as its recommendations were canvassed in the broadsheet media, it became very much more difficult for the oppositional faction in the Cabinet to argue that the White Paper should not be released”.

³⁴⁹ See Snell and Sheridan, n 346; Frankel, n 346; Zifcak *ibid*.

³⁵⁰ Snell and Sheridan, *ibid*, p 2. Frankel, *ibid*.

- It was proposed that some sort of “public interest” test would apply to disclosure decisions, and an attempt would be made to increase the clarity and certainty of individual decisions by defining what constitutes the public interest.
- The proposed Act would be enforced by an Information Commissioner with wide-ranging powers, including the power to order the disclosure of information.
- The Paper expressly rejected providing for ministerial certificates and vetoes in the proposed Act.

The Freedom of Information Bill

Although the White Paper proposals met with broad approval, a number of commentators were sceptical about whether the proposals would be implemented in subsequent legislation.³⁵¹ It appears that this scepticism was well-founded. The Bill differs from the White Paper in a number of significant respects. Although the Government has made, and proposed, a number of amendments to Bill in response to criticisms, many of the concerns raised have not been addressed. These concerns include the following:³⁵²

- There is no clear presumption in favour of disclosure.
- The Bill contains broad class exemptions that are not subject to a harm test. In particular, the breadth of the exemption relating to policy formulation and advice has been strongly criticised.
- For those exemptions that are subject to a harm test, agencies need only show that disclosure would cause “prejudice” to specified interests. The “substantial harm” test specified in the White Paper has been abandoned.
- The Bill requires authorities to consider releasing exempt information if it is in the public interest to do so. Currently the Information Commissioner could only recommend, not require, disclosure. Under amendments proposed by the Government, the Commissioner would be able to require disclosure in the public interest. However, cabinet ministers would be able to veto disclosure. This contrasts with the express rejection of ministerial vetoes contained in the White Paper.

The Campaign for Freedom of Information argues that “[t]he combination of the veto and the class exemptions mean that even information whose disclosure caused no harm at all, and which the Commissioner considered should be disclosed on public interest grounds, could be suppressed”.³⁵³

³⁵¹ Snell and Sheridan, *ibid*, p 2.

³⁵² See Oonagh G, *The Freedom of Information Bill*, Research Paper 99/98, Parliament and Constitution Centre, House of Commons Library, 3 December 1999, <www.parliament.uk/commons/lib/research/rp99/rp99.htm>; The Campaign for Freedom of Information (“the CFI”), *It’s not too late to improve the Freedom of Information Bill*, 3 April 2000; the CFI, *Freedom of Information Bill: Briefing for Lords Second Reading*, 20 April 2000; the CFI, n 345. The CFI documents are accessible from its website at <www.cfoi.org.uk>.

³⁵³ The CFI, n 345.

However, the Campaign for Freedom of Information has praised the Bill for applying to a wide range of bodies at the central, regional and local level, and for a charging system that seems likely to be modest.³⁵⁴ Unlike many FOI regimes, the Bill applies to the Houses of Parliament. However, the Speaker or the Clerk of the Parliaments has the power to issue a certificate exempting information from disclosure to avoid an infringement of the privileges of Parliament.

15.0 CONCLUSION

Given the important role (as recognised by the High Court in the free speech cases) that access to government information plays in a system of representative and responsible government, FOI legislation could be said to be of constitutional importance. However, there is a commonly held view throughout many jurisdictions that FOI has failed to produce open government.

This had led some commentators to question the relevance and efficacy of FOI. However, others have stressed that FOI should be retained, but that it should be subject to a major redesign.

The NSW Ombudsman has recognised that there is ‘a basic conflict between FOI and open government on the one hand, and the desire of governments and their bureaucrats to avoid criticism and to keep accountability within “acceptable” limits on the other’.³⁵⁵ It has also been recognised that there is an inherent tension in FOI between extending the right of access to information as far as possible, and protecting specified public and private interests, which may require withholding information.³⁵⁶

Given these inherent tensions, the commonly held view that FOI has not achieved open government, and the constitutional importance of access to information, it is arguable that close monitoring and review of FOI legislation is required.

However, in New South Wales, there is no body specifically responsible for the monitoring of the implementation of the FOI Act, and the Act has not been subject to formal review in its 11 years of operation.

The NSW Ombudsman has consistently called for a formal review of the FOI Act for a number of years. In the past few years FOI legislation has been reviewed in a number of other Australian jurisdictions. It may be that such a review is also required in New South Wales.

³⁵⁴ The Campaign for Freedom of Information, Freedom of Information Bill: *Briefing for Lords Second Reading*, 20 April 2000.

³⁵⁵ NSW Ombudsman, n 144, p 1.

³⁵⁶ Cossins, n 38, p 46.

APPENDIX A

Summary of relevant recommendations of Australian inquiries that have considered public access to government contract and tender information

1 VICTORIAN PARLIAMENTARY COMMITTEE REPORT ON COMMERCIAL IN CONFIDENCE MATERIAL AND THE PUBLIC INTEREST, MARCH 2000¹

In March 2000, following a two year investigation, the Victorian Public Accounts and Estimates Committee released its report on Commercial in Confidence Material and the Public Interest. The 30 “key findings”, 41 recommendations, and draft guidelines for the treatment of commercial information provided to government agencies by individuals and organisations.

The key findings included the following:²

- Claims of commercial confidentiality are now being used too broadly by the public sector as a means of preventing disclosure of a wide range of information.
- It is unlikely that much of the material for which such exemptions have been claimed would stand up to serious scrutiny as being legitimately commercially confidential.
- On occasion, government agencies are using the pretext of commercial confidentiality as a shield against the disclosure of information which is commercially embarrassing to the government or which raises issues of probity.
- From a public accountability perspective, the present rules and guidelines concerning the disclosure of information about tenders and contracts are inadequate.

The Committee made the following comments:

Democratic principles require that information about government decisions and processes, including information about the expenditure of public money should be made public unless there are good reasons why it should be withheld.

The Committee believes that this should be the starting point for decisions concerning disclosure. While there may be a legitimate role for commercial in confidence provisions protecting the government’s relationship with commercial enterprises, these should not be permitted to reduce effective scrutiny by the Parliament or accountability to the public.³

The Committee’s recommendations included the following:

Disclosure of tender information: The Committee recommended that the identity of each tenderer for a government contract, and the tender price, should be publicly disclosed. For

about the relevant performance criteria to allow for an assessment of the integrity of the tender process” (recommendations 6.1 and 6.2).

¹ Victoria, Parliament, Public Accounts and Estimates Committee (“PAEC”), *Inquiry into Commercial in Confidence Material and the Public Interest*, Thirty-Fifth Report to Parliament, March 2000, <www.parliament.vic.gov.au/paec/pi.htm>.

² See Key Findings and Recommendations, *ibid*, pp xxxv-1iv.

³ *ibid*, pp 88-89.

Disclosure of government contract information: The Committee recommended that the following information about government contracts be made publicly available (recommendations 6.1 and 6.3):

- the full identity of the contractor, including details of the cross ownership of relevant companies;
- the duration of the contract;
- details of any transfer of assets under the contract;
- all maintenance provisions in the contract;
- the price payable by the government agency and the basis for changes in this price;
- any renegotiation and renewal of right;
- the results of any cost benefit analysis;
- details of any risk sharing in the developmental and operational stages of the contract;
- details of any sanctions for non-performance;
- any significant guarantees or undertaking, including any loans, agreed to or entered into; and
- any other information required by statute to be disclosed to the Australian Securities Commission and made available to the public.

Other Information relating to tendering and contracting out: The Committee recommended that disclosure of other documents relating to the contracting out process be dealt with under the Freedom of Information Act provided that:⁴

- (a) the Act be amended so that relevant documents in the possession of the contractor fall within the ambit of the Act; and
- (b) the government agency be required to provide a summary of the reasons for selecting the winning tender.

Guidelines for dealing with commercially confidential material: The Committee recommended that government adopt a formal set of principles and guidelines relating to the treatment of commercial information held by government agencies (recommendation 6.4). The Committee also recommended that protocols, signed off at the ministerial level, should be developed for agencies to follow before classifying material as commercial in confidence (recommendation 6.10).

Procedures for dealing with commercial in confidence claims from tenderers: The Committee made a series of recommendations setting out procedures to be followed when dealing with commercial in confidence claims from tenderers (recommendations 6.5-6.8 and 6.21-6.22). Key aspects of those recommendations are:

- Applicants for tenders should be made aware that particular information will be made public.
- Applicants should be given an opportunity to seek exemption of material that would otherwise be made public.
- Any exemption in relation to the specified contract and tender information to be disclosed to the public should be approved by the Ombudsman.
- If an application seeking exemption is rejected, then the tenderer should be given an opportunity to withdraw or change the tender.

⁴ *ibid*, pp 106-108. Note that the Committee also made other recommendations for amendments to the Freedom of Information Act: see *ibid*, chapter 7.

Requirements for confidentiality clauses in contracts: The Committee recommended that the relevant Minister be required to approve any confidentiality clauses in contracts that protect information generated by the government (recommendation 6.9). It also recommended that the Ombudsman be required to approve any confidentiality clauses in respect of key contract information (recommendation 6.11).

2 ADMINISTRATIVE REVIEW COUNCIL REPORT ON THE CONTRACTING OUT OF GOVERNMENT SERVICES, AUGUST 1998⁵

In its inquiry into the administrative law implications of the contracting out of government services, the Administrative Review Council (“**the ARC**”) rejected a proposal that would make all government contracts public documents (thereby providing access to contracts without making a formal FOI request).⁶ The ARC noted that there was already a requirement for Commonwealth agencies to publicise some details of their contracts.⁷ It concluded that in light of these publication requirements, “a separate disclosure regime may impose costs on agencies which are not warranted by the use that is likely to be made of such a regime”.⁸

3 INDUSTRY COMMISSION REPORT ON COMPETITIVE TENDERING AND CONTRACTING BY PUBLIC SECTOR AGENCIES, JANUARY 1996⁹

The Industry Commission made the following recommendation in relation to access to commercial information:¹⁰

Recognising the balance between commercial confidentiality and accountability, governments should make public as much information as possible to enable interested people to assess contracting decisions made by agencies.

Of particular importance is information on :

- the specifications of the service;
- the criteria for tender evaluation;
- the criteria for the measurement of performance; and
- how well the service provider has performed against those criteria.

⁵ Administrative Review Council, *The Contracting Out of Government Services*, Report no 42, CanPrint Communications Pty Limited, Canberra, August 1998, accessible from <www.law.gov.au/aghomes/other/arc>.

⁶ *ibid*, paras 5.50-5.54.

⁷ The ARC stated the following (*ibid*, para 5.52-5.53): “Under the *Financial Management and Accountability Regulations 1997* (Cth), it is mandatory [for Commonwealth Government agencies] to notify available business opportunities, including activities such as invitations to bid and expressions of interest and new commitments or contracts arranged and standing offers of \$2000 or greater in the [Commonwealth (Purchasing and Disposals) Gazette]... However, if the Chief Executive of an agency decides that details of a contract or standing offer are exempt matters under the *Freedom of Information Act 1982*, he or she may direct in writing that the details are not to be notified in the Gazette”.

⁸ *ibid*, para 5.54.

⁹ Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Australian Government Publishing Service, Melbourne, 24 January 1996.

¹⁰ *ibid*, p 95.

4 WESTERN AUSTRALIAN COMMISSION ON GOVERNMENT REPORT NO 1, AUGUST 1995¹¹

The Western Australian Commission on Government (“WACOG”) held the view that full details of government contracts should be made public. It stated that “the public has a right to know how its money is being spent and what goods or services are being provided”, and that “the principle of accountability of public funds should outweigh any concerns for commercial confidences”.¹²

WACOG made the following recommendations:

1. Upon the awarding of a government contract, regardless of whether the contract involves the commitment of expenditure, the charging of a royalty, or the sacrifice of revenue rights, a copy of the complete contract should be lodged for public inspection with the State Supply Commission or tabled in a house of Parliament.
2. The State Supply Commission guidelines should provide that, as a pre-condition for doing business with government, tenderers must be prepared for the details of any contract to be made public. These guidelines are to be applicable across the public sector and include all GTEs [Government Trading Enterprises] and should encompass public sector agencies and GTEs not currently the subject of State Supply Commission review.¹³

WACOG recognised that there were concerns that full release of contractual information would reveal commercially confidential information that could damage a tendering company. The report answered these concerns with the following observations:¹⁴

- More careful consideration of the development of contracts may be required so that outcomes, which should not be commercially sensitive, rather than processes (such as methodologies) are specified.
- There should be clear instructions in tender documents that all contract details will be released. This would enable private firms to determine whether they wish to do business with the government.
- Only the final contract should be released, not the deliberative process leading up to the contract agreement.
- Details of unsuccessful tenders should not be released.

The WACOG report provides extracts from evidence given by a former member of parliament, Mr Les McCarrey, who compared his experience in gaining access to gas supply contracts in Western Australia, United States and Canada.¹⁵ Mr McCarrey stated that he had

¹¹ Western Australia, Commission on Government (“WACOG”), *Report no 1*, Perth, August 1995, <www.wa.gov.au/cog>.

¹² *ibid*, para 2.3.11.4.

¹³ *ibid*, para 2.3.11.5. Note that the State Supply Commission is a Crown body established by legislation with responsibilities in relation to: the supply of goods and services for, and by, public authorities; the disposal of goods by public authorities; and the sale of government businesses: see *State Supply Commission Act 1991* (WA).

¹⁴ *ibid*, para 2.3.11.4.

¹⁵ *ibid*.

considerable trouble accessing a W.A. government contract even though he was the chairman of a committee appointed to review the contract. In contrast, he noted that gas supply contracts in the United States were easily accessible as they were filed with the Federal Energy Regulatory Commission in Washington.

5 NEW SOUTH WALES PARLIAMENTARY COMMITTEE REPORT INTO INFRASTRUCTURE MANAGEMENT AND FINANCING, JULY 1993¹⁶

In 1993, the New South Wales Parliament's Public Accounts Committee published its report on Infrastructure Management and Financing in New South Wales. As part of its inquiry, the Committee considered the issue of confidentiality of infrastructure contracts. The Committee stated:

A recurring theme in this inquiry was the difficulty of achieving a balance between two sometimes contradictory requirements: on the one hand, the public's and the Parliament's right to know the details of an infrastructure contract between the government and the private sector, and on the other, the need to protect the private sector's commercial confidentiality.¹⁷

The Committee stated that it was surprised at the relaxed attitude towards confidentiality that was expressed by the private sector participants at the workshop. The Committee stated that:

The private sector representatives generally exhibited a much greater readiness to see key elements of the contracts disclosed than did those from outside the private sector. It should be stressed here that in expressing their reluctance to see greater disclosure, the speakers from outside the private sector appeared merely to be attributing views to the private sector which the Committee was most interested to note the private sector did not hold in actual fact.¹⁸

Recommendations¹⁹

The Committee recommended that for all privately-financed projects above \$5 million, the relevant government agency should, within 90 days after the contract is signed, prepare a summary of the main points of the contract, unless the contract has already been disclosed in full (recommendation 46).

The Committee recommended that the Premier's Department prepare guidelines on what should be included in the summaries (recommendation 45). The summaries should be vetted for accuracy by the Auditor-General or his nominee, and these services should be paid for by the public sector agency (recommendation 48). If the Auditor-General is not satisfied with the accuracy of the summary, or has difficulty in obtaining information, then he should refer the matter to the Public Accounts Committee (recommendation 49).

The Committee believed that the following information should be included in the contract summaries (recommendation 47):

¹⁶ New South Wales, Parliament, Public Accounts Committee, *Infrastructure Management and Financing in New South Wales: Volume 1: From Concept to Contract – Management of Infrastructure Projects*, Report No. 73, July 1993.

¹⁷ *ibid*, p 146.

¹⁸ *ibid*, p 152.

¹⁹ *ibid*, pp 165-166.

- the full identity of the successful proponents, including details of cross ownership of relevant companies;
- the duration of the contract, including details of future transfers of assets of significant value to the government at no or nominal cost and details of the right to receive the asset and the date of the future transfer;
- the identification of any assets transferred to the contractor by the public sector;
- all maintenance provisions in the contract;
- the price payable by the public;
- the basis for changes in the price payable by the public;
- provisions for renegotiation;
- the results of cost-benefit analyses;
- the risk sharing in the construction and operational phases quantified in net present value terms (where possible) and specifying the major assumptions involved;
- significant guarantees or undertakings, including loans, entered into or agreed to be entered into, with an estimate of either the range, or the maximum amount, of any contingent liability;
- to the extent not covered above, the remaining key elements of the contractual arrangements;
- any other information required by statute to be disclosed to the Australian Securities Commission and made available to the public.

The Committee stated that the following information should **not** be disclosed (recommendation 47):

- the private sector's cost structure or profit margins;
- matters having an intellectual property characteristic; and
- any other matters where disclosure would substantially commercially disadvantage the contracting firm with its competition.

Comments by the Committee

The Committee stated that its first preference was for full disclosure of contracts, but that it recognised that there are commercial in confidence concerns about disclosing parts of some contracts.²⁰ The Committee held the view that both the private sector and government agencies would welcome guidelines on what information should be included in summaries.²¹ The private sector would welcome knowing, from the outset, what information will be publicly available and what will remain confidential. Government agencies would benefit from guidelines as this would prevent exaggerated efforts to protect information the private sector is happy to release, and would also help achieve consistent disclosure policies across agencies. The Committee also noted that, in contrast to a long and complex contract, a plain English summary of a contract would be more easily understood by the public at large.²²

In justifying its recommendation to provide access to contractual summaries rather than the primary contractual documents, the Committee made the following points:²³

²⁰ ibid, p 156.

²¹ ibid, p 161.

²² ibid, p 160.

²³ ibid, pp 163-164.

- Although complete disclosure is the ideal, it is necessary to protect commercially sensitive material in order to encourage private participation in infrastructure development.
- An agency is held accountable for its handling of a contract, and the results obtained, by the fact that relevant details of the contract, including cost-benefit analysis, are being published in the summary. The summary will form the basis of public scrutiny of the deal and of any debate in the political arena on the merits or otherwise of the deal.
- This provides for a significant, but not excessive, amount of scrutiny of the process. Too many levels of scrutiny, especially second guessing shortlisted tenders would clog up and severely hinder the process and thus drive off private investment.
- The fact that public servants know that key details of the deals they negotiate will be made public for later scrutiny or debate is a powerful check and incentive to achieve the best result for the public.

APPENDIX B

New South Wales Premier's Department, Memorandum No 2000-11,
Disclosure of Information on Government Contracts with the Private Sector.

MEMORANDUM NO. 2000 - 11

DISCLOSURE ON INFORMATION ON GOVERNMENT CONTRACTS WITH THE PRIVATE SECTOR

(Memorandum to all Ministers)

This memorandum introduces guidelines designed to clarify what information relating to the Government's contractual arrangements with the private sector should, and should not, be made public.

Cabinet has approved the guidelines which are detailed in the attached document. The guidelines will ensure a uniform approach across government to the disclosure of contract information to industry and the public in general.

The guidelines have immediate effect and apply to all contracts entered into by NSW Government agencies from the date of this memorandum (excepting those entered into by the Department of State and Regional Development which involve industry support). It should be noted that privately funded public infrastructure projects will additionally need to comply with the disclosure guidelines set out in the *Guidelines for Private Sector Participation in the Provision of Public Infrastructure* (first issued September 1995, revised October 1997 – Treasury Circular TC 95/15).

The guidelines provide agencies with a practical model to determine what items of contract information should be disclosed and what should remain confidential. The Chairman of the State Contracts Control Board is the authority nominated to provide independent advice to CEOs should any disagreement arise prior to contract award between an agency and the preferred tenderer as to what parts of a contract will be subject to disclosure.

Ministers should ensure that all agencies under their administration, including Government Trading Enterprises, adopt the disclosure guidelines and incorporate them into their tender documents and related policy manuals. The shareholding Ministers and boards of State Owned Corporations may also give consideration to voluntarily adopting the guidelines by incorporating them into their statements of corporate intent.

Bob Carr
Premier

Issued by: Public Works and Services
Contact officer: Alan Griffin
Telephone: 02 9372 8818
Date: 27 April 2000

Attachment to Premier's Memorandum No. 2000 - 11

GUIDELINES FOR THE DISCLOSURE OF INFORMATION IN NSW GOVERNMENT CONTRACTS

The purpose of this procedure is to provide NSW government agencies with a practical model to determine what items of information contained in

government contracts with the private sector should be disclosed and what should remain confidential following award of the contract.

The procedure:

is to be implemented by all agencies including Government Trading Enterprises (but excluding the Department of State and Regional Development). The procedure may also be implemented by those State Owned Corporations that include the guidelines in their statements of corporate intent by way of agreement between their shareholding Ministers and boards.

applies to all procurement contracts (construction, infrastructure, property, goods and services, information technology etc).

Schedules of disclosure (based on the disclosure requirements of *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*) are attached. The schedules establish it is government practice to:

vary the disclosure of information according to the size of the project;

limit the extent of commercial-in-confidence material to very specific areas and not disclose it unless required by law; and

treat the information in an unsuccessful tender as commercial-in-confidence and not disclose it unless required by law.

In addition to these guidelines privately funded public infrastructure projects will also need to comply with the disclosure guidelines set out in the *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*.

Agencies must ensure that:

For all contracts above \$100,000 (or where government transfers ownership of property over the value of \$100,000) a summary of the main items of the contract listed in Schedule 1 is routinely released within 90 days of award of the contract. (Note: For contracts under \$100,000 Schedule 1 items need only be released upon request).

For contracts over \$5 million involving private sector financing, land swaps, asset transfers and similar arrangements a summary of the main items of the contract listed in Schedule 1 **and** 2 is routinely released within 90 days of award of the contract.

The information included in an unsuccessful tender is treated as commercial-in-confidence material. In exceptional circumstances, such information may be released with the agreement of the unsuccessful tenderer(s), or if the original tender provisions allowed for the release of such information.

Tender documents contain information about the disclosure process and schedules of items to be disclosed.

Tenderers are invited to nominate items they consider should not be disclosed and why.

In the event of disagreement between an agency and the 'preferred tenderer' as to what should be disclosed (for example, there may be some debate as to what the contractor claims as intellectual property) the agency seeks the advice of:

The Chairman

State Contracts Control Board

Level 23 McKell Building

2-24 Rawson Place

Sydney NSW 2000

The Chairman, who has responsibility for reviewing complaints about government tendering, may consult with the Crown Solicitor and may seek the advice of independent experts. The Chairman will provide a report and recommendations to the Chief Executive Officer of the agency involved in the tender.

Specific requests for information outside the ambit of the contract details, for example enquiries regarding an unsuccessful tender, continue to be dealt with under the provisions of the Freedom of Information Act.

Method of disclosure:

The table below shows the relationship between the size of the project and the level of contract disclosure.

Project size	Level of disclosure	Agency's responsibility:
\$0 to \$100,000	Schedule 1 Items	Disclose on request
\$100,000 and above	Schedule 1 Items	Disclose routinely
\$5M and above involving private sector financing, land swaps, asset transfers and similar arrangements	Schedule 1 and 2 Items	Disclose routinely

All information should be provided by the agency free of charge within 90 days of the award of the contract. The means of disclosing information is left to the discretion of the agency, but should take a form which is readily accessible to the public.

It is suggested that:

where an agency is required to routinely disclose contract information (Schedule 1 Items for all projects over \$100,000 and Schedule 1 and 2 items for projects over \$5M which involve private sector financing, land swaps, asset transfers and similar arrangements) the information be either posted on a notice-board accessible to the public or released on the agency's Internet site; and

where a request is made to an agency for contract information which is not routinely disclosed (Schedule 1 items for projects under \$100,000) the agency, in consultation with the entity making the request, shall determine the most suitable method of delivering that information.

SCHEDULES OF DISCLOSURE

SCHEDULE 1

Items to be disclosed for all contracts

▪	Details of contract (description of project to be completed or goods/services to be provided or property to be transferred; commencement date of the contract; the period of the contract);
▪	The full identity of the successful tenderer including details of cross ownership of relevant companies;
▪	The price payable by the agency and the basis for future changes in this price;
▪	The significant evaluation criteria and the weightings used in tender assessment;
▪	Provisions for re-negotiation (where applicable).

SCHEDULE 2

Additional items to be disclosed for contracts over \$5 million involving private sector financing, land swaps, asset transfers and similar arrangements

▪	Details of future transfers of assets of significant value to government at no or nominal cost and details of the right to receive the asset and the date of the future transfer;
▪	The identification and timing of any assets transferred to the contractor by the agency;
▪	All operation and/or maintenance provisions in the contract;
▪	The basis for changes (price variation clauses) in the price payable by the agency;
▪	The results of cost-benefit analyses of the successful tender;
▪	The risk sharing in the construction and operational phases of the project, quantified in net present value terms (where possible) and specifying the major assumptions involved;
▪	Significant guarantees or undertakings between the parties, including loans entered into or agreed to be entered into;
▪	To the extent not covered above, the remaining key non-commercial-in-confidence elements of the contractual arrangements.

SCHEDULE 3

Commercial –in-confidence information -

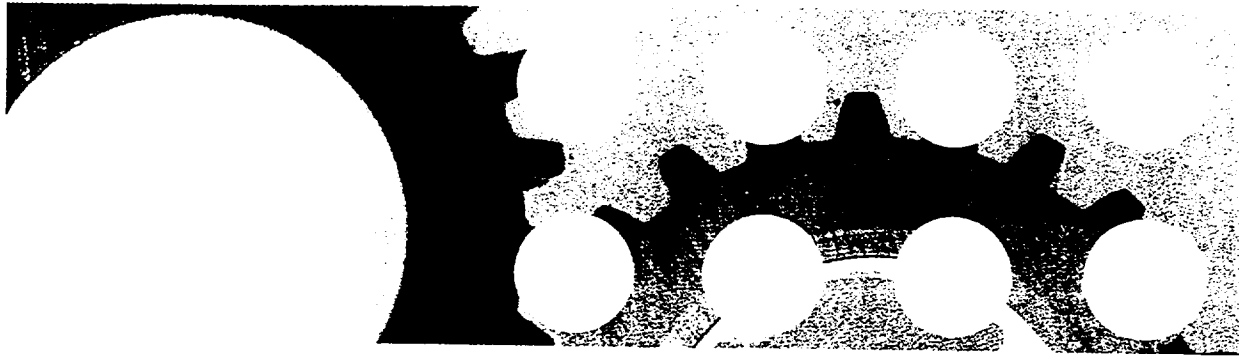
Items not to be disclosed for any contracts

▪	The contractor's financing arrangements;
▪	The contractor's cost structure or profit margins;
▪	Items of the contractor having an intellectual property characteristic (eg. non-tangible property that is the result of creativity, such as patentable ideas or inventions, trademarks, copyrights, etc.);
▪	Any other matters where disclosure would place the contractor at a substantial commercial disadvantage with its competitors both at the time of entering into the contract and at any later date when there would be an effect on future competitive arrangements.

NOTE: In addition to these guidelines privately funded public infrastructure projects will still need to comply with the disclosure guidelines set out in the *Guidelines for Private Sector Participation in the Provision*

APPENDIX C

Extract from
New South Wales, Department of State and Regional Development,
*Guidelines for Private Sector Participation in the Provision of Public
Infrastructure.*



1. Disclosure and Implementation Phase

(I) Contract summaries

Contract Summaries are to be made available to the Auditor-General for certification on signing of the contract. It is intended that the Contract Summaries will be made public within 90 days of contract. They will become effective through being tabled in Parliament by the responsible Minister and advertised in the Public Notices or similar. Where Parliamentary Sittings cannot accommodate the 90 day rule, tabling within three days of the start of the next Parliamentary Session will suffice. The elements in the Summary will include:

- the full identity of the successful proponents, including details of cross ownership of relevant companies;
- the duration of the contract, including details of future transfers of assets of significant value to Government at no or nominal cost and details of the right to receive the asset and the date of the future transfer;
- the identification and timing of any assets transferred to the contractor by the public sector;
- all maintenance provisions in the contract;
- the price payable by the public, and the basis for future changes in this payable price;

- provisions for renegotiation;
- the results of cost-benefit analyses;
- the risk sharing in the construction and operational phases;
- significant guarantees or undertakings, including loans, entered into or agreed to be entered into;
- to the extent not covered above, the remaining key elements of the contractual arrangements; The statement must not disclose:
- the private sector's cost structure or profit margins;
- matters having an intellectual property characteristic;
- any other matters where disclosure would substantially disadvantage the contracting firm commercially with its competition.

(II) Progress reports

For major projects, the Budget Committee of Cabinet may require regular progress reports to enable it to monitor implementation. The need for formal reporting to the Committee will be decided on a case-by-case basis.

(III) Post implementation review

All private sector infrastructure projects will be subjected to a post implementation review. These reviews should be seen as a valuable tool in refining the processes used in developing private sector infrastructure projects. The review, to be undertaken by the agency which initiated the project, should focus on:

- project formulation
- project objectives
- brief appropriateness
- design performance
- approvals process
- project delivery
- risk exposure/risk sharing
- delivery time
- budget performance
- project management/procedures
- functional competence of infrastructure
- project operations and financing
- industry development

The review should be initiated 12 months after physical completion of the project. A report should be prepared on the outcome of the review and a copy submitted to the NSW Treasury. However, the NSW Treasury may require an earlier review in some circumstances.

