Improving government accountability through Information Access: Submission in response to the NSW Government's public consultation draft, Open Government Information legislative package

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's expertise in freedom of information legislation

PIAC has a long-standing interest in the operation of the *Freedom of Information Act 1989* (NSW) (**the FOI Act**). For over fifteen years PIAC has utilised freedom of information (**FOI**) legislation on behalf of clients. PIAC has undertaken a number of test cases under freedom of information legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588.

PIAC has also contributed to debate about FOI, including making submissions to the Australian Law Reform Commission inquiry into the *Freedom of Information Act 1982* (Cth) in March and July 1995. More recently, PIAC has made a submission to the NSW Ombudsman in response to his discussion paper on the FOI Act[1] and to the Commonwealth Government in response to its exposure draft Bills to reform the *Freedom of Information Act 1982* (Cth).[2]

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1 Lizzie Simpson with Ee-von Lok and Claire O'Moore, *Freeing up information: response to the NSW Ombudsman's Review of Freedom of Information Law in NSW* (2008) 34 <http://www.piac.asn.au/publications/pubs/sub2008111_20081117.html> at 4 June 2009.

2 Lizzie Simpson, *Putting Public Interest at the heart of FOI: Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) <http://www.piac.asn.au/publications/pubs/SUB2009051_20090519.html> at 4 June 2009.

2. General comments on the Draft Bills

It appears that there is currently a general consensus in Australia on two fundamental points regarding freedom of information legislation. Firstly, that existing freedom of information legislation has not fulfilled its objective of promoting accountable and open government. As Gareth Griffith neatly summarised in a NSW Parliamentary Library Briefing Paper:

> From the outset, the NSW *Freedom of Information Act 1989* has been subject to amendment and criticism. While its introduction was accompanied by high expectations about improved democratic accountability, for many its actual operation has proved inadequate.[3]

Second, there is a general recognition that in order to fulfil this objective, existing FOI regimes need to be fundamentally challenged, reviewed and restructured.

This thinking is reflected in the NSW Ombudsman's report, *Opening up government: Review of the* Freedom of Information Act 1989*, Special Report to Parliament*, (**the Ombudsman's report**) in February 2009. In his report, the NSW Ombudsman concluded:

> There are a number of key problems with FOI in NSW. Firstly, the Act has been the subject of more than 60 amendments since it was enacted. Many of these have been in response to a particular issue or a perceived problem and have sat dormant in the Act ever since. This has resulted in a confusing and unwieldy piece of legislation for both applicants and practitioners. Accessing government information is made even more complex by the existence of four other pieces of intersecting legislation governing access to information… The way people get information from government needs to be simplified, with independent guidance and direction to make the various systems work effectively.[4]

The NSW Ombudsman is not alone in expressing concern about the whether existing freedom of information legislation is operating effectively: at a national level the Federal Government has announced its intention to introduce significant reforms to the legislation, and other states including Victoria, Tasmania and Queensland are also evaluating the effectiveness of their freedom of information legislation.

In response to the NSW Ombudsman's report, the NSW Government has released the Open Government Information Bill 2009 (NSW) (**the OGI Bill**), the Information Commissioner Bill 2009 (NSW) (**the IC Bill**) and the Open Government Information (Consequential Amendments and Repeals) Bill 2009 (NSW) (together, **the Draft Bills**).

PIAC congratulates the NSW Government on its speedy and comprehensive response to the Ombudsman's report. PIAC welcomes the Draft Bills, which implement the vast majority of the recommendations made by the NSW Ombudsman in his February 2009 report.

Some of the key reforms put forward in the Draft Bills are:

- inserting a provision at the outset of the OGI Bill to make it clear that there is a general presumption that the disclosure of government information is in the public interest;
- structuring the OGI Bill to make many of the existing FOI exemptions subject to this overarching public interest test;

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3 Gareth Griffith, *Freedom of Information – Issues and Recent Developments in NSW*, *Briefing Paper No 6/07* (2007) 1.

4 NSW Ombudsman, *Opening up government: Review of the* Freedom of Information Act 1989, *Special Report to Parliament* (2009) 1.

- including a series of offence provisions to ensure that people do not destroy records, wilfully refuse to comply with FOI requests, or engage in other forms of behaviour that would undermine the effective operation of the legislation;
- creating a new independent Information Commissioner to act as an advocate, champion, advisor, monitor and decision-maker;
- making the review procedures more flexible, enabling applicants to choose between internal reviews, reviews by the Commissioner and Administrative Decisions Tribunal reviews depending on the nature of the case;
- transferring Part 4 (amendment of records containing personal information) to the *Privacy and Personal Information Protection Act 1998* (**the PPIP Act**); and
- encouraging proactive release of information through the creation of a new category of 'open access information' including publications guides and disclosure logs.

Overall, PIAC welcomes the draft bills, which PIAC hopes will herald a new era of 'open government information'. From PIAC's point of view, the key to these reforms is the establishment of an independent watchdog and advocate for the new legislative regime, the inclusion of a new test for dealing with requests to information that focuses on disclosure rather than exemptions, and an emphasis on 'pushing' government information out into the public arena, including through disclosure logs and publication guides.

On the other hand, PIAC believes that there are a few aspects of the proposed reforms that need further consideration and amendment. PIAC is particularly concerned by the proposal that personal factors of the applicant be considered by an agency in determining the public interest test for disclosure of government information. PIAC regards this as contrary to the fundamental ethos of the FOI regime and the spirit of the reforms. PIAC contends that this proposal should not be included in the Bills when they are introduced into the NSW Parliament.

Another disappointing aspect of the process of achieving these reforms has been the extremely short time available for public comment on the exposure draft legislation. While PIAC and other organisations had the opportunity to provide comments in response to the NSW Ombudsman's review, this does not reduce the need for an effective consultation period of such significant reforms aimed at improving government processes. It is not at all clear why such little time has been permitted to respond to three draft Bills, particularly given the intention of the Government that the legislation, once passed, will not come into effect for 12 months. This strongly suggests that additional time could have been available to the public to consider and respond to the proposed reforms. Such a limited time for comment is directly at odds with the intention to improve the openness of government in NSW.

In this submission, PIAC does not seek to deal with every amendment contained in the Draft Bills but instead discusses the main issues that PIAC considers are essential to the success of the reforms.

3. Objects and general principles of the open government information legislative framework

3.1 Reasons for enactment

PIAC supports the new objects provision contained in clause 3 of the OGI Bill, which represents a significant improvement on the existing objects provision in the FOI Act. However, PIAC submits that consideration should be given to placing the opening statement of clause 3, beginning 'In order to maintain' and ending 'accountable, fair and effective' in a separate provision in order to more forcefully highlight the rationale behind the freedom of information regime.[5]

Additionally, PIAC submits that the objects clause should recognise that access to government information is a fundamental human right as it is an aspect of the right to freedom of speech and expression. For example, Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, said in his 1995 report to the UN Commission on Human Rights:

> Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.[6]

Recommendation:

1. ***That clause 3 of the Open Government Information Bill 2009 (NSW) be amended to begin with the phrase 'The object of this Act…' and that a new clause 3A is inserted into the Bill that sets out the reasons for the enactment of the open government information legislation, including the recognition that 'the freedom of access to government information is a fundamental human right'.***

3.2 Increased use of schedules in the Open Government Information Bill 2009 (NSW)

Generally speaking, the OGI Bill is a substantial improvement on the FOI Act, not least because it simplifies the structure and language of the regime. However, many of the key substantive provisions of the OGI Bill, including public interest considerations against disclosure and the bulk of interpretive provisions, have been tucked away in schedules at the end of the proposed open government information legislation, which may be confusing to applicants. It is also contrary to the NSW Ombudsman's recommendation that the reasons for refusing access should be included in the body of the new Act.[7]

Given that one of the aims of the new legislation is to improve the accessibility and transparency of the regime, PIAC submits that the OGI Bill should be restructured so that these provisions are incorporated into the body of the legislation.

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5 Simpson with Lok & O'Moore, above n1, 4.

6 Abid Hussain, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc E/CN.4/1995/40 (1995) [35], cited in Toby Mendel, *Freedom of Information as an Internationally Protected Human Right* <http://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf> at 13 May 2009.

7 NSW Ombudsman, above n4, 54.

Recommendation:

2. That the Open Government Information Bill 2009 (NSW) be restructured so that Schedules 1-3 and 5 are incorporated into the body of the legislation.

4. Proactive disclosure of government information

4.1 'Open access' information

PIAC strongly supports the introduction of proposed Part 3 of the new Act, which creates a category of information, namely 'open access information' that must be proactively released to the public unless there is an overriding public interest against disclosure. However, PIAC considers that the OGI Bill should be more prescriptive about how this information will be released and suggests that clause 6(2) of the OGI Bill be amended to require that this information be made publicly available on a website (by making it available for downloading or providing a true link), as well as making the information available in any other form that the agency considers appropriate. This is consistent with the current reforms proposed by the Commonwealth Government.[8]

PIAC also emphasises the importance of agencies ensuring that they do not discriminate against people with a disability in the provision of documents under the open government information legislation, including documents available via an agency or department's information publication scheme, and submits that agencies must make their best endeavours to provide information in a form that is accessible to the person. For example, the agency should ensure that where electronic information is provided to a person who is vision impaired, it is in a format that is readable by the person.[9] PIAC notes that this is a requirement under Article 21 of the UN *Convention on the Rights of Persons with Disabilities*.[10]

> Article 21 - Freedom of expression and opinion, and access to information
>
> States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:
>
> a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
> b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
> ...

Recommendations:

3. That clause 6(2) of the Open Government Information Bill 2009 (NSW) be amended to provide that open access information is to be made publicly available on a website as well as providing it in any other manner that an agency considers appropriate.

4. That clause 6 of the Open Government Information Bill 2009 (NSW) be amended to make it clear that an agency must use every endeavour to provide open access information in a manner that

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8 See proposed s 8D(3) and 11C(2) contained in Freedom of Information Amendment (Reform) Bill 2009 item 3, sch 2, cl 3 and sch 3, cl12.

9 See, for example, the European Blind Union's website at <http://www.euroblind.org/fichiersGB/policy.htm> on how to make information accessible to people with vision impairments. Please note, however, the person should be asked what format is suitable for them rather than relying on general advice of this sort.

10 *Convention on the Rights of Persons with Disabilities*, opened for signature 31 March 2007, Doc.A/61/611 (entered into force 3 May 2008), ratified by Australia on 17 July 2008.

is accessible to all members of the public, giving due regard to the rights of people with disability to access information in appropriate formats.

4.2 Disclosure logs

PIAC's supports the establishment of disclosure logs in the new Act. However PIAC submits that the OGI Bill should require agencies to make disclosure logs available on their website or provide true links to the information contained in the disclosure log.

In his report, the NSW Ombudsman suggested that disclosure logs should be limited to documents that an agency decides are 'of general interest'. The OGI Bill has instead adopted the test that information is to be published in a disclosure log if it 'is information that the agency consider may be of interest to other members of the public'.[11] PIAC prefers the latter test but maintains that this test is still subjective and, if interpreted too narrowly, would undermine the value of establishing disclosure logs. Furthermore, given that agencies will have the same protections when releasing information proactively as they are given when documents are released under the OGI Bill[12], there should be no reason to limit the number of documents that are accessible via a disclosure log. PIAC therefore recommends that all documents previously disclosed as a result of an access application should be published on an agency's disclosure log.

Finally, the comments made above in relation to the issue of ensuring that open access information is published or provided in accessible formats apply equally to the publication of accessed documents via disclosure logs.

Recommendations:

5. ***That clause 23 of the Open Government Information Bill 2009 (NSW) be amended so that an agency's disclosure log include information about every access application that results in the disclosure of information.***

6. ***That clause 24 of the Open Government Information Bill 2009 (NSW) be amended so that the information contained in an agency's disclosure log is available on an agency's website or that the agency provides a true link to the information.***

7. ***That clause 24 of the Open Government Information Bill 2009 (NSW) be amended to make it clear that agencies must use every endeavour to publish disclosure logs in a way that is accessible to all members of the public, giving due regard to the rights of people with disability to access information in appropriate formats.***

4.3 Register of government contracts

PIAC strongly supports the proposed inclusion of state-owned corporations and local authorities in the register of government contracts contained in Division 4, Part 3 of the OGI Bill.

While PIAC accepts that state-owned corporations should not be disadvantaged under the new OGI Act in relation to commercial activities that they carry out in competitive markets, PIAC is concerned that the exception contained in clause 37 of the OGI Bill, namely that this division does not require a state-owned corporation to include any details of a contract 'in which it is in competition with any other person' is too vague and further consideration should be given to tightening this clause. Alternatively, it should be possible for the Information Commissioner to review a state-owned corporation's reliance on this provision.

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11 Open Government Information Bill 2009 (NSW) s 23.

12 Open Government Information Bill 2009 (NSW) ss 108-110.

Additionally, PIAC contends that any disputes about whether an agency has complied with the obligations imposed under this part of the new Act should be determined under the ordinary review mechanisms provided for in the new Act, and not in accordance with the opinion of the Chairperson of the State Contracts Control Board. If the government believes that the opinion of the Chairperson is relevant in determining whether or not an agency has complied with these obligations, it would be more appropriate to insert provisions in the OGI Bill providing that (i) the Chairperson must be consulted in any dispute as to whether an agency had complied with its obligations under this part; and (ii) if the dispute goes to the ADT, that the Chairperson must be given a reasonable opportunity to appear and be heard in relation to the matter.

At the very least, the same procedures should apply to any disputes about the way state-owned corporations, local authorities or universities have interpreted their obligations under this division of the OGI Bill as apply in relation to disputes about whether agencies have correctly interpreted their obligations about government contracts. In making this submission, PIAC notes the Ombudsman's comment:

> Both of these groups [state-owned corporations and local authorities] are making use of public funds on behalf of the community, and we should be able to find out how those funds are being spent.[13]

Finally, PIAC contends that it is not appropriate to exclude all state-owned corporation or local authority contracts entered into before the commencement of the OGI Act from the operation of this division.

Recommendations:

8. That the phrase 'in which it is in competition with any other person' in clause 37 of the Open Government Information Bill 2009 (NSW) be amended to read as follows: 'in which the release is likely to detrimentally affect commercial activities that a State-owned corporation carries out in a competitive market'. Alternatively, that clause76 of the Open Government Information Bill 2009 (NSW) be amended so that a decision made pursuant to clause 37 is a 'reviewable decision'.

9. That clause 34(2) of the Open Government Information Bill 2009 (NSW) be deleted.

10. That paragraph 5 of Schedule 4 of the Open Government Information Bill 2009 (NSW) be deleted.

[13] NSW Ombudsman, above n4, 22.

5. Scope of the new legislation

5.1 Houses of Parliament and Members of Parliament

PIAC notes that, in his report, the NSW Ombudsman recommended that 'the Legislative Council and Legislative Assembly should be included in the ambit of the new Act'.[14] This is consistent with the approach taken to the Houses of Parliament in a number of other jurisdictions including the United Kingdom, Ireland and South Africa.

Similarly, PIAC believes that all aspects of government should be covered by the FOI Act or proposed open government information legislative regime, subject to limited exemptions aimed at balancing the rights of the public to access government-held information against the need to protect legitimate government and public interests in certain documents remaining confidential.

PIAC submits that sensitive documents held by the Legislative Council and the Legislative Assembly should already be protected against disclosure by existing public interest considerations, although consideration should be given to adding a new clause that protects parliamentary privilege.

PIAC also recommends that the OGI Bill be amended so that it applies to individual members of Parliament.

Recommendations:

11. That the definition of 'public authority' in Schedule 5 of the Open Government Information Bill 2009 (NSW) be amended so as to apply, when enacted, to the Legislative Council and the Legislative Assembly of the NSW Parliament.

12. That the definition of 'public office' in Schedule 5 of the Open Government Information Bill 2009 (NSW) be amended so as to apply, when enacted, to members of the Legislative Council and Legislative Assembly of the NSW Parliament.

5.2 State-owned corporations

PIAC supports the inclusion of state-owned corporations in the definition of a 'public authority'.[15] However, as noted above, PIAC considers that further consideration should be given to ensuring that state-owned corporations are subject to sufficiently rigorous reporting requirements in relation to their contracts.

5.3 Private sector bodies

According to the companion guide to the OGI Bill, the recommendation that the resulting Open Government Information Act should extend to records held by non-government and private sector bodies, that relate directly to contracted-out services will be progressed following further consultations.

While it considers that this is a complicated issue[16], PIAC submits that the OGI Bill be extended to apply to all private sector bodies that provide essential services to the community or fulfil functions that would otherwise be provided by government departments, Ministers or agencies.

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14 NSW Ombudsman, above n4, 45.
15 Open Government Information Bill 2009 (NSW), sch 5.
16 Simpson with O'Moore & Lok, above n1, 19-20.

Recommendation:

13. That the Open Government Information Bill 2009 (NSW) be amended to apply, when enacted, to all private sector bodies that provide essential services to the community or fulfil functions that would otherwise be provided by government departments, Ministers or agencies.

6. The right to access government information

6.1 List of public interest considerations in favour of disclosure

PIAC strongly supports many of the changes that the OGI Bill makes to the right to access government information, particularly clauses 5 and 12, which clearly establish a general presumption that it is in the public interest to disclose government information. However, PIAC has a number of reservations about Part 2 of the OGI Bill.

Firstly, although PIAC believes that the statement in clause 12(1): 'there is a general public interest in favour of the disclosure of government information' is a good starting point, PIAC believes that it is important that a non-exhaustive list of public interest considerations be built into the new legislative regime alongside the public interest considerations against disclosure. In PIAC's experience under the current FOI regime, agencies and departments considering FOI requests have spent too much energy considering exemptions and other reasons against disclosure rather than adequately considering public interest factors in favour of disclosure. PIAC believes that if the specific public interest factors favouring disclosure are not listed in the new legislative regime itself, as soon as an agency considers *any* public interest factors against disclosure, there is a risk that these factors will be seen by the agency to be sufficient to overturn the general presumption in favour of disclosure.

While clause 12 enables the Information Commissioner to provide additional guidelines to clarify the types of factors favouring disclosure and also the weight that should be given to factors against disclosure, PIAC submits that, if the NSW Government is genuine about placing public interest at the core of all FOI or open government information decisions, the list of factors for and against disclosure must be in the new Act, rather than in administrative guidelines. Reducing the status of 'for and against' factors to administrative guidelines means that they will not have legal force. On the other hand, if a list of public interest favours favouring disclosure were to be included in the new Act, the Information Commissioner could usefully provide supplementary guidelines providing a more detailed explanation of the principles and weighing-up exercise that should form the basis of a determination under Part 4 of the OGI Act.

Recommendation:

14. That clause 12 of the Open Government Information Bill 2009 (NSW) be amended to include a new sub-clause providing a non-exhaustive list of public interest considerations in favour of the disclosure of government information. This new sub-clause could include the following as some of the public interest considerations in favour of disclosure:

- ***a. disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance government accountability;***
- ***b. disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;***
- ***c. disclosure of the information could reasonably be expected to inform the community of government operations, including in particular, the rules and practices followed by government in its dealings with members of the community;***
- ***d. disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds;***
- ***e. disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct of or administration of a public agency or by public officials;***

f. disclosure of the information could reasonably be expected to evidence or be likely to identify that an agency has, or its staff have, engaged in illegal, unlawful, inappropriate, unfair or the like conduct, or have acted maliciously or in bad faith;

g. disclosure of the information could reasonably be expected to reveal the reasons for a decision;

h. disclosure of the information could reasonably be expected to reveal the reasoning and other useful contextual information behind government decisions that have affected or could have a significant effect on people;

i. disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety; and

j. disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.[17]

6.2 Personal factors of the applicant

PIAC is extremely concerned about the proposal contained in clause 52 of the OGI Bill that an agency may consider the applicant's identity, motive and any other personal factors in weighing up the public interest considerations for and against disclosure.

This proposal is at odds with one of the basic tenets of the FOI Act, namely that the motive of an applicant in seeking access to information is irrelevant. As Gareth Griffith explained in respect of the right of access under the existing FOI Act:

> There is an unconditional right of access to government documents under the Act in the sense that the 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.[18]

Moreover, if one approaches this issue from a human rights perspective, bearing in mind that the right to government information is an aspect of the fundamental right to freedom of speech and expression, this provision is a breach of the fundamental human rights proposition that all people have the same rights irrespective of personal characteristics or other factors. Although this provision does not expressly state that it imposes any preconditions on the disclosure of government information, by allowing an agency to take into account personal factors (such as an individual's identity) in determining whether or not to release documents in response to an access application, the OGI Bill is essentially allowing the government to determine, on the basis of these factors, whether or not it should fulfil this aspect of the fundamental right to freedom of speech and expression.

Furthermore, on a practical level, the inclusion of this provision is extremely problematic. For example, how is an agency supposed to 'rate' the relevance of a person's identity in terms of how this may affect the public interest in disclosing information to the applicant? Is a journalist more worthy of certain information than a single mother (or *vice versa*)? Is there greater public interest in disclosing information to a journalist who may publish the information in a national newspaper than a journalist who plans to publish in a local newsletter?

There are similar problems in trying to assess the relevance of a person's motive to the public interest test. For example, even if an applicant sets out their motive in asking for this information, can this be relied on and what weight should it be given? If an applicant is simply inquisitive, does that weigh more or less in favour of disclosure than if someone wants to use the information in legal proceedings?

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17 See for example, FOI Independent Review Panel, *The Right to Information – Reviewing Queensland's FOI Act* (2008) 152-153.

18 Griffith, above n3, 7.

Although PIAC acknowledges that the Government's view is that under the existing FOI regime, the motive, and at times, identity and particular interest of the applicant will be relevant considerations in determining an FOI request[19], PIAC does not believe that it necessary or appropriate to expressly make these factors relevant considerations in the new Act. To the extent that a court or the Administrative Decisions Tribunal (ADT) determines that it is appropriate to take into account 'personal factors' when reviewing an FOI decision, this practice can continue under the new legislation without the need to include this provision in the OGI Bill. Whereas including this provision into the OGI Bill is problematic, because it would open it up for individual decision-makers rather than courts or tribunals to consider these factors. Thus, there is a significant risk that this provision could lead to decision-makers making decisions that are potentially discriminatory, arbitrary or unfair.

Recommendation:

15. That clause 52 of the Open Government Information Bill 2009 (NSW) be deleted.

6.3 Conditions on access applications

Similarly, PIAC is concerned by clause 15(e) of the OGI Bill, which states that one of the principles governing whether there is an overriding public interest against disclosure is the fact that the use or disclosure of information cannot be made subject to any conditions.

Likewise, PIAC is concerned by clause 70 of the OGI Bill. Although sub-clause (1) provides that an agency is not entitled to impose any conditions on the use or disclosure of information when an agency provides access, sub-clause (2) goes on to say that conditions can be imposed on the way access is given, for example by not allowing a person to take notes while inspecting a document. The difficulty with this sub-clause is the risk that disclosure could become illusory.

In PIAC's experience, individuals make requests for documents under the FOI Act in order to use that information. Sometimes this may be to publish the information widely. In other cases, the use is more limited, for example, informing their decision-making about whether or not to bring litigation or for use during litigation. However, in all of these cases, setting conditions on the way in which people can access documents, for example, by limiting disclosure to a viewing, could undermine the practical value of being provided with access in the first place. There is also a risk that agencies would over-utilise this provision.

Recommendations:

16. That clause 15(e) of the Open Government Information Bill 2009 (NSW) be deleted.

17. That clause 70(2) of the Open Government Information Bill 2009 (NSW) be deleted.

6.4 Conclusive presumption against disclosure contained in Schedule 1

It has been suggested that some exemptions should not be subject to the public interest test because of the public interest in the confidentiality of the exempted documents, including documents relating to Cabinet discussions and matters of national security. However, PIAC is of the firm view that *all* exemptions should be subject to a public interest test to enable consideration of the specific circumstances of each case. For example, some documents may genuinely be of a sensitive nature when they are created, such as a document containing information about a current criminal investigation, hence it would not be in the public interest to

[19] See, for example, NSW Department of Premier and Cabinet & NSW Ombudsman, *The NSW FOI Manual* (2007) para 4.9.1. See also, *Humane Society International Inc v National Parks & Wildlife Service & Ors* [2000] NSWADT 133 at [26]-[31] and [53]-[56].

release them at that time. Yet the sensitivity of those documents may decrease as time passes, in which case they should be available for potential disclosure to the public at the appropriate time.

Recommendation:

18. That Schedule 1 of the Open Government Information Bill 2009 (NSW) be incorporated into Schedule 2, so that all exemptions are subject to a public interest test.

7. Factors against disclosure

As set out in the comments above about the right to access government information, PIAC is of the view that all of the types of information specified in Schedule 1 to the OGI Bill should be subject to a public interest test. PIAC urges the Government to consider removing Schedule 1 entirely and incorporating these documents into Schedule 2 of the OGI Bill. On the other hand, PIAC is pleased that the Government has increased the number of former exemptions that will be subject to the public interest test.

Additionally, PIAC seeks to comment on a number of the specific types of information included in the Schedules.

7.1 Cabinet documents

While PIAC considers that the reference to the 'dominant purpose' in paragraph 2(1)(b) of the OGI Bills is an improvement on the current Cabinet documents exemption[20], this is undermined by (c), which includes, 'document[s] prepared for the purpose of … being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared…' This reintroduces the existing test that a document can be produced for another purpose, but if one of the purposes is it being submitted to Cabinet this is sufficient to attract the exemption.

PIAC submits that the better approach would be to adopt a new purposive test that focuses on the consequences of disclosure rather than continuing to tinker with the existing provision.[21] This is the case in New Zealand.

Finally, PIAC maintains that the Cabinet documents exemption should be subject to the public interest test. While PIAC accepts that it is extremely unlikely that the public interest in releasing documents that are properly characterised as 'cabinet documents' would ever outweigh the public interest in those documents remaining confidential (see, for example, *Commonwealth v Northern Land Council* (1993) 176 CLR 604[22]), it is more consistent with the objectives of the FOI Act and the proposed open government information regime that this exemption contain a public interest test.

Recommendation:

19. That the Cabinet documents described in clause 2 of Schedule 1 of the Open Government Information Bill 2009 (NSW) and clauses 1(a) and (b) of Schedule 2 of the Bill be deleted and a new purposive test that focuses on the consequences of disclosure be inserted into Schedule 2 of the Bill.

7.2 Law enforcement

PIAC notes the comments made by the NSW Ombudsman in relation to the list of specific operational units contained in clause 7 of Schedule 1 of the OGI Bill.[23]

PIAC maintains that the documents created by these units would be adequately covered by clause 3 of Schedule 2 of the OGI Bill.

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20 Cf *National Parks Association of NSW Inc v Department of Lands* [2005] NSWADT 124 at [26].

21 See, for example, *Official Information Act 1982* (NZ) s 9.

22 Cited by the FOI Independent Review Panel, above n17, 115-116.

23 NSW Ombudsman, above n4, 60.

Recommendation:

20. That clause 7 of Schedule 1 of the Open Government Information Bill 2009 (NSW) be deleted.

7.3 Other unnecessary exemptions

PIAC submits that clause 1(f) of Schedule 2 of the OGI Bill is too broad and should be deleted. The information that would be protected by this clause would be covered by other exemptions, including clause 1(e) of Schedule 2 (deliberative processes).

Similarly, PIAC considers that clauses 4(e) and 5(d) of Schedule 2 of the OGI Bill are unnecessary and should be deleted.

Recommendation:

21. That clauses 1(f), 4(e) and 5(d) of Schedule 2 of the Open Government Information Bill 2009 (NSW) be deleted.

7.4 Retaining a schedule of excluded agencies

PIAC notes that the excluded agencies currently listed in Schedule 2 of the FOI Act have largely been retained in the OGI Bill, albeit that they are no longer entirely excluded from the operation of the open government information regime, but rather are listed as agencies whose information it is conclusively presumed to be against the public interest to disclose.

This represents an improvement on the existing regime, as these agencies will now be required to comply with other obligations under the OGI Bill, other than being required to release documents in response to an access application. For example, they will be required to publish their open access information. However, PIAC maintains that all exemptions should be subject to a public interest test.[24]

Recommendation:

22. That Schedule 3 of the Open Government Information Bill 2009 (NSW) should be incorporated into Schedule 2 of the Bill, so that all exemptions are subject to a public interest test.

[24] See also Simpson with Lok & O'Moore, above n1, 14.

8. Processing issues

8.1 Refusal to deal with an access application

PIAC submits that in determining whether to refuse a request on the basis that a practical refusal reason exists, an agency or Minister should also be required to balance the practical refusal reasons against the public interest in disclosure of the information requested. For example, in the case of *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171, PIAC sought documentation about pituitary hormone treatments under the National Human Pituitary Hormone Programme. While the agency provided access to personal files, it refused access to some 600 policy files pursuant to section 24 of the *Freedom of Information Act 1982* (Cth) on the basis that providing those documents would be an unreasonable diversion of its resources. While PIAC argued before the Administrative Appeals Tribunal (AAT) that the agency should not have been able to issue such a blanket refusal, the AAT concluded that the *Freedom of Information Act 1982* (Cth) was intended to concentrate on individual documents and rights and not on such far-ranging enquiries and therefore upheld the agency's decision to refuse access to these documents. PIAC considers that the OGI Bill should not limit access to such important information merely because of the volume involved.

PIAC also considers that clause 57(3) of the OGI Bill should be amended to require an agency to provide an applicant with assistance in revising their request. This would prevent unnecessary refusals that could be met if requests were appropriately revised following consultation.

Recommendations:

23. That clause 57 of the Open Government Information Bill 2009 (NSW) be amended by inserting a new sub-clause (2A) that states:

In deciding whether an application would require an unreasonable and substantial diversion of an agency's resources, an agency must be required to balance the extent to which the application would be an unreasonable and substantial diversion against the public interest in disclosure of the information requested.'

24. That clause 57(3) of the Open Government Information Bill 2009 (NSW) be amended by adding the words 'and must provide assistance to an applicant in revising the application' after the phrase 'the agency must give the applicant a reasonable opportunity to amend the application'.

8.2 Access applications and subpoenas

Subpoenaed documents can only be used for limited purposes and only in relation to the proceedings for which they were issued. Consequently, PIAC contends that an applicant should be able to request the information under the open government information legislation notwithstanding that it may have previously been provided pursuant to a subpoena.

Similarly, applicants should be able to subpoena documents previously obtained pursuant to the open government information legislation. It is possible to imagine a situation where a person obtains documents under the FOI/open government information legislation and later obtains advice from a lawyer that leads them to commence proceedings. If the person cannot be sure that they have not lost any documents they should be entitled to obtain them under the open government information legislation Act.

Further, there are different regimes regulating the granting of subpoenas and freedom of information and the proposed open government information proposal, and different considerations relevant to the making of decisions under each regime. PIAC considers it would be inappropriate and unhelpful to the legal process to prohibit an applicant subpoenaing documents obtained previously under the open government information legislation.

Recommendation:

25. That clause 57(1)(d) of the Open Government Information Bill 2009 (NSW) be deleted.

26. That clause 75 of the Open Government Information Bill 2009 (NSW) be deleted.

8.3 Fees and charges

PIAC firmly maintains the position that the idea of recovering costs from applicants is at odds with the fundamental principle that the freedom of information regime concerns the right of individuals to access information:

> [R]ights should not be made conditional on paying for them. This is a cost that government should bear as part of fulfilling its democratic responsibilities of being transparent and accountable to the people. On a practical level, PIAC is not convinced that the existing fees actually cover the costs involved in acknowledging receipt of a freedom of information request and making an initial assessment of the request, particularly if the application fee is reduced on the basis of financial hardship or public interest to only $15 to make an initial application and $20 to seek an internal review.[25]

PIAC is particularly concerned about the current practice of charging fees for processing a request based on the time taken, rather than the amount of information disclosed. In its submission to the NSW Ombudsman, PIAC argued that the latter approach is more transparent, encourages applicants to narrow their search and ensures that applicants are not penalised if agencies have poor record-keeping systems.

PIAC notes that the Independent Review Panel[26] and the ALRC Report 77 support the approach proposed by PIAC.[27] PIAC also notes that other jurisdictions, including the UK, Tasmania and the ACT, do not charge any fees for initial requests or internal reviews.

Recommendations:

27. That clauses 39(1)(c), 57(5), 60(3) and 61(2) of the Open Government Information Bill 2009 (NSW) be deleted, and that the reference to 'application fees' in clause 47(2) of the Bill be deleted.

28. That clause 80(1) of the Open Government Information Bill 2009 (NSW) be deleted.

29. That clause 61 of the Open Government Information Bill 2009 (NSW) be amended so that processing charges are calculated on the basis of the amount of information disclosed, not the time taken to process the application.

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25 Simpson with Lok and O'Moore, above n1, 34.

26 FOI Independent Review Panel, above n17, 192-194.

27 Australian Law Reform Commission, *Open government: a review of the federal* Freedom of Information Act 1982, *Report No 77* (1995) 187.

8.4 Discounts for public interest access applications

PIAC notes the argument made in the NSW Ombudsman's report that given the fundamental idea that it is always in the public interest for documents to be disclosed, the existing test for reducing processing charges, namely that it is in the public interest to make the information available, lacks meaning.[28]

On the other hand, PIAC is concerned that the test contained in clause 63 of the OGI Bill, namely that an applicant is entitled to a reduction of 50% if an agency is satisfied that the information applied for is 'of special benefit to the public generally' is too stringent. PIAC's experience is that agencies are generally prepared to reduce fees and charges when its clients can demonstrate financial hardship, for example, by providing a pensioner card. However, they are generally extremely reluctant to reduce fees on the basis of public interest. Imposing a higher test is likely to make it even harder for an individual or an organisation to obtain a discount on the basis of public interest.

On balance, PIAC is of the view that it would be better to retain the existing test and suggests that the Information Commissioner issue guidelines to assist agencies in determining those cases in which it is in the public interest to make the information generally available to the public.

Recommendation:

30. That clause 63 of the Open Government Information Bill 2009 (NSW) be amended so that an applicant is entitled to a 50% reduction in a processing charge if the agency is satisfied that the information applied for is in the interest of the public to be made generally publicly available.

8.5 Advance deposits

PIAC strongly believes that access to government information and documents is a government service, which should be provided free from charge wherever possible. PIAC submits that charging advance deposits of up to 50%, as the Ombudsman recommends, is prohibitively high.

This is compounded by the proposal contained in sub-clause (2) of clause 66 that an agency can charge more than one advance deposit. Allowing an agency to impose more than one advance deposit also complicates the process of imposing charges and could be used as a mechanism to delay processing a request by charging a number of deposits and stopping the clock on each occasion.

PIAC submits that the limit for advance deposits should be set at 25% of the estimated costs as it is under the current Commonwealth FOI legislation.

Recommendation:

31. That clause 66 of the Open Government Information Bill 2009 (NSW) be amended to (a) limit the maximum advance deposit to 25%; and (b) provide that an advance deposit cannot be required more than once.

[28] NSW Ombudsman, above n4, 83.

9. Review mechanisms

9.1 Internal reviews

PIAC supports the proposal in the Draft Bills that internal reviews should be optional. However, for the reasons outlined above in relation to application fees, PIAC considers that fees should not be imposed on applicants seeking an internal review under the OGI Bill.

9.2 Information Commissioner reviews

PIAC supports the inclusion of a non-binding review function for the Information Commissioner in the OGI and IC Bills. However, PIAC submits that time frames should be built into external reviews by the Information Commissioner to ensure that these reviews provide a satisfactory alternative for applicants.

There are a number of different ways of achieving this outcome. Firstly, specific time periods could be built into Commissioner reviews. For example, the Independent Review Panel has suggested that the Queensland freedom of information legislation should specify that there are 20 working days for an initial investigation, and a further 60 working days for the Commissioner to investigate a complaint and reach a decision.[29]

Alternatively, the OGI Bill could be amended so that the Information Commissioner is expressly obliged to establish and publish case-management procedures consistent with those adopted by the ADT or to ensure that matters are properly dealt with in a timely manner.

Finally, the OGI Bill could be amended to allow applicants to withdraw an application from the Information Commissioner at any time and still be able to seek an ADT review of a reviewable decision.

PIAC's preference is for the first of these options but believes that all of these options are a considerable improvement.

Recommendation:

32. That Division 3, Part 5 of the Open Government Information Bill 2009 (NSW) be amended to introduce appropriate time frames into reviews by the Information Commissioner.

9.3 Administrative Decision Tribunal reviews

While PIAC notes that clause 101 of the OGI Bill is consistent with existing section 57 of the FOI Act, PIAC contends that the ADT should not be constrained to deciding whether or not there were reasonable grounds for relying on the Cabinet documents or executive council provisions, but should have the jurisdiction to conduct a full merits review of such a decision.

Thus, PIAC submits that clause 101 of the OGI Bill should be deleted or, if the NSW Government believes that there should be additional safeguards to ensure that these documents are not inadvertently disclosed during an ADT review, it should adopt additional procedural safeguards such as considering whether an exemption applies on the basis of affidavit or other evidence and only requiring inspection of the document if not satisfied that the exemption applies. Similarly, the provision could be amended to provide the Minister with the right to

[29] FOI Independent Review Panel, above n17, 250-53.

give evidence if the ADT proposes to find that the documents are not Cabinet or executive council documents.[30]

Recommendation:

33. That clause 101 of the Open Government Information Bill 2009 (NSW) be deleted, or alternatively, that clause 101 be amended to delete the limitation on the Administrative Decisions Tribunal considering whether the decision was the correct and preferable decision but incorporating additional procedural safeguards, such as requiring the Tribunal to determine whether the document is a Cabinet document firstly on the basis of affidavit or other evidence, and only requiring inspection of the document if not satisfied it is not a Cabinet document.

9.4 Unmeritorious applications

PIAC accepts that agencies should be able to refuse requests that are only meant to harass or intimidate staff or unreasonably interfere with the operations of an agency. However, PIAC is concerned that the power to stop applicants making access applications should be carefully defined to avoid it being applied when applications are merely considered a nuisance.

PIAC considers that clause 105 of the OGI Bill as it is currently drafted is too broad. For example, this clause does not specify the number of applications that will satisfy the test of 'repeatedly', nor does it specify the time period within which these applications could be made. Thus, this provision could be applied to an applicant who makes three or four requests over a ten-year period provided that all the applications are 'totally without merit'.

Recommendation:

34. That clause 105 of the Open Government Information Bill 2009 (NSW) be amended so that it applies where the same applicant has, within a 12-month period, made a substantial number of unsuccessful applications to the same agency for the same or substantially the same information.

[30] See, for example, Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2009 (Cth) ss 15 and 17.

10. Information Commissioner

PIAC strongly supports the creation of the independent statutory position of Information Commissioner. PIAC takes the view that along with changing the name of the Act, there is a symbolic importance to establishing a new Commissioner. In PIAC's view, the Information Commissioner will be an essential part of changing the existing culture of secrecy within many government agencies. However, PIAC has a number of suggestions about the Information Commissioner proposals contained in the Draft Bills.

Firstly, PIAC submits that consideration should be given to adopting the recommendation of the FOI Independent Review Panel that within the office of the Information Commissioner there should be two deputies, one responsible for privacy legislation and the other for the freedom of information (or open government information) legislation.[31]

Secondly, consultation mechanisms should be built into the function of the Information Commissioner. This should take the form of both a resourced Information Advisory Committee, similar to the Privacy Advisory Committee established under Part VII of the *Privacy Act 1988* (Cth), and regular broad consultation with particular sectors. Consultation with these groups about proposed guidelines would be another way of ensuring the relevance of any guidance produced by the Information Commissioner.

Finally, PIAC submits that a provision should be inserted into the IC Bill that expressly states that in performing the functions set out in the OGI and IC Bills, the Information Commissioner should exercise those functions having regard to the objects of the OGI legislation.

Recommendations:

35. That the Information Commissioner Bill 2009 (NSW) be amended to provide for two deputies within the Office of the Information Commissioner, one responsible for privacy legislation and the other for the open government information legislation.

36. That the Information Commissioner Bill 2009 (NSW) be amended to provide for the creation of an Information Advisory Committee.

37. That a provision be inserted into the Information Commissioner Bill 2009 (NSW) that expressly states that in performing the functions set out in the Open Government Information Bill and Information Commissioner Bill 2009 (NSW), the Commissioner should exercise those functions having regard to the objects of the open government information legislation.

10.1 Complaints

PIAC considers that clause 21 of the IC Bill should be amended to set out relevant considerations that would assist the Information Commissioner in deciding whether to investigate or discontinue an investigation under the legislation.[32] In particular, PIAC contends that the IC Bill should expressly provide that in deciding to discontinue an investigation under the legislation, the Information Commissioner 'shall have regard to the public interest'.[33] Furthermore, if the Information Commissioner discontinues an investigation, he/she should provide the interested parties with reasons for the decision.

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31 FOI Independent Review Panel, above n17, 273-274.

32 See, for example, *Ombudsman Act 1974* (NSW) s 13.

33 *Ombudsman Act 1974* (NSW) s 13(4A).

Finally, PIAC contends that all reports made about the compliance of agencies with the open government information legislation should be made publicly available as well as provided to the Minister, the agency and to the complainant (where relevant). This would increase the accountability and transparency of the open government information regime, as it would allow for public scrutiny of agencies compliance with the legislation. Alternatively, the Information Commissioner should be given the power to table an investigation report with the Houses of Parliament if he/she believes that an agency has defaulted in taking the appropriate consequential actions recommended in the report.[34]

Recommendations:

38. That clause 21 of the Information Commissioner Bill 2009 (NSW) be amended to expressly provide: (a) that the Information Commissioner shall have regard to the public interest in determining whether or not to investigate a complaint; and (b) that if the Information Commissioner discontinues an investigation, he/she must provide the interested parties with reasons for the decision.

39. That Division 3, Part 3 of the Information Commissioner Bill 2009 (NSW) be amended to provide that all investigation and complaint reports are made publicly available, or alternatively that the Information Commissioner should be given the power to table an investigation report with the Houses of Parliament if he/she believes that an agency has defaulted in taking the appropriate consequential actions recommended in a report.

[34] See, for example, *Ombudsman Act 1974* (NSW) s 27.

11. Summary of recommendations

1. That clause 3 of the Open Government Information Bill 2009 (NSW) be amended to begin with the phrase 'The object of this Act…' and that a new clause 3A is inserted into the Bill that sets out the reasons for the enactment of the open government information legislation, including the recognition that 'the freedom of access to government information is a fundamental human right'.

2. That the Open Government Information Bill 2009 (NSW) be restructured so that Schedules 1-3 and 5 are incorporated into the body of the legislation.

3. That clause 6(2) of the Open Government Information Bill 2009 (NSW) be amended to provide that open access information is to be made publicly available on a website as well as providing it in any other manner that an agency considers appropriate.

4. That clause 6 of the Open Government Information Bill 2009 (NSW) be amended to make it clear that an agency must use every endeavour to provide open access information in a manner that is accessible to all members of the public, giving due regard to the rights of people with disability to access information in appropriate formats.

5. That clause 23 of the Open Government Information Bill 2009 (NSW) be amended so that an agency's disclosure log include information about every access application that results in the disclosure of information.

6. That clause 24 of the Open Government Information Bill 2009 (NSW) be amended so that the information contained in an agency's disclosure log is available on an agency's website or that the agency provides a true link to the information.

7. That clause 24 of the Open Government Information Bill 2009 (NSW) be amended to make it clear that agencies must use every endeavour to publish disclosure logs in a way that is accessible to all members of the public, giving due regard to the rights of people with disability to access information in appropriate formats.

8. That the phrase 'in which it is in competition with any other person' in clause 37 of the Open Government Information Bill 2009 (NSW) be amended to read as follows: 'in which the release is likely to detrimentally affect commercial activities that a State-owned corporation carries out in a competitive market'. Alternatively, that clause76 of the Open Government Information Bill 2009 (NSW) be amended so that a decision made pursuant to clause 37 is a 'reviewable decision'.

9. That clause 34(2) of the Open Government Information Bill 2009 (NSW) be deleted.

10. That paragraph 5 of Schedule 4 of the Open Government Information Bill 2009 (NSW) be deleted.

11. That the definition of 'public authority' in Schedule 5 of the Open Government Information Bill 2009 (NSW) be amended so as to apply, when enacted, to the Legislative Council and the Legislative Assembly of the NSW Parliament.

12. That the definition of 'public office' in Schedule 5 of the Open Government Information Bill 2009 (NSW) be amended so as to apply, when enacted, to members of the Legislative Council and Legislative Assembly of the NSW Parliament.

13. That the Open Government Information Bill 2009 (NSW) be amended to apply, when enacted, to all private sector bodies that provide essential services to the community or fulfil functions that would otherwise be provided by government departments, Ministers or agencies.

14. That clause 12 of the Open Government Information Bill 2009 (NSW) be amended to include a new sub-clause providing a non-exhaustive list of public interest considerations in favour of the disclosure of government information. This new sub-clause could include the following as some of the public interest considerations in favour of disclosure:

    (a) disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance government accountability;
    (b) disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;
    (c) disclosure of the information could reasonably be expected to inform the community of government operations, including in particular, the rules and practices followed by government in its dealings with members of the community;
    (d) disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds;
    (e) disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct of or administration of a public agency or by public officials;
    (f) disclosure of the information could reasonably be expected to evidence or be likely to identify that an agency has, or its staff have, engaged in illegal, unlawful, inappropriate, unfair or the like conduct, or have acted maliciously or in bad faith;
    (g) disclosure of the information could reasonably be expected to reveal the reasons for a decision;
    (h) disclosure of the information could reasonably be expected to reveal the reasoning and other useful contextual information behind government decisions that have affected or could have a significant effect on people;
    (i) disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety; and
    (j) disclosure of the information could reasonably be expected to contribute to innovation and the facilitation of research.

15. That clause 52 of the Open Government Information Bill 2009 (NSW) be deleted.

16. That clause 15(e) of the Open Government Information Bill 2009 (NSW) be deleted.

17. That clause 70(2) of the Open Government Information Bill 2009 (NSW) be deleted.

18. That Schedule 1 of the Open Government Information Bill 2009 (NSW) be incorporated into Schedule 2, so that all exemptions are subject to a public interest test.

19. That the Cabinet documents described in clause 2 of Schedule 1 of the Open Government Information Bill 2009 (NSW) and clauses 1(a) and (b) of Schedule 2 of the Bill be deleted and a new purposive test that focuses on the consequences of disclosure be inserted into Schedule 2 of the Bill.

20. That clause 7 of Schedule 1 of the Open Government Information Bill 2009 (NSW) be deleted.

21. That clauses 1(f), 4(e) and 5(d) of Schedule 2 of the Open Government Information Bill 2009 (NSW) be deleted.

22. That Schedule 3 of the Open Government Information Bill 2009 (NSW) should be incorporated into Schedule 2 of the Bill, so that all exemptions are subject to a public interest test.

23. That clause 57 of the Open Government Information Bill 2009 (NSW) be amended by inserting a new sub-clause (2A) that states:

    'In deciding whether an application would require an unreasonable and substantial diversion of an agency's resources, an agency must be required to balance the extent to which the application would be an unreasonable and substantial diversion against the public interest in disclosure of the information requested.'

24. That clause 57(3) of the Open Government Information Bill 2009 (NSW) be amended by adding the words 'and must provide assistance to an applicant in revising the application' after the phrase 'the agency must give the applicant a reasonable opportunity to amend the application'.

25. That clause 57(1)(d) of the Open Government Information Bill 2009 (NSW) be deleted.

26. That clause 75 of the Open Government Information Bill 2009 (NSW) be deleted.

27. That clauses 39(1)(c), 57(5), 60(3) and 61(2) of the Open Government Information Bill 2009 (NSW) be deleted, and that the reference to 'application fees' in clause 47(2) of the Bill be deleted.

28. That clause 80(1) of the Open Government Information Bill 2009 (NSW) be deleted.

29. That clause 61 of the Open Government Information Bill 2009 (NSW) be amended so that processing charges are calculated on the basis of the amount of information disclosed, not the time taken to process the application.

30. That clause 63 of the Open Government Information Bill 2009 (NSW) be amended so that an applicant is entitled to a 50% reduction in a processing charge if the agency is satisfied that the information applied for is in the interest of the public to be made generally publicly available.

31. That clause 66 of the Open Government Information Bill 2009 (NSW) be amended to (a) limit the maximum advance deposit to 25%; and (b) provide that an advance deposit cannot be required more than once.

32. That Division 3, Part 5 of the Open Government Information Bill 2009 (NSW) be amended to introduce appropriate time frames into reviews by the Information Commissioner.

33. That clause 101 of the Open Government Information Bill 2009 (NSW) be deleted, or alternatively, that clause 101 be amended to delete the limitation on the Administrative Decisions Tribunal considering whether the decision was the correct and preferable decision but incorporating additional procedural safeguards, such as requiring the Tribunal to determine whether the document is a Cabinet document firstly on the basis of affidavit or other evidence, and only requiring inspection of the document if not satisfied it is not a Cabinet document.

34. That clause 105 of the Open Government Information Bill 2009 (NSW) be amended so that it applies where the same applicant has, within a 12-month period, made a substantial number of unsuccessful applications to the same agency for the same or substantially the same information.

35. That the Information Commissioner Bill 2009 (NSW) be amended to provide for two deputies within the Office of the Information Commissioner, one responsible for privacy legislation and the other for the open government information legislation.

36. That the Information Commissioner Bill 2009 (NSW) be amended to provide for the creation of an Information Advisory Committee.

37. That a provision be inserted into the Information Commissioner Bill 2009 (NSW) that expressly states that in performing the functions set out in the Open Government Information Bill and Information Commissioner Bill 2009 (NSW), the Commissioner should exercise those functions having regard to the objects of the open government information legislation.

38. That clause 21 of the Information Commissioner Bill 2009 (NSW) be amended to expressly provide: (a) that the Information Commissioner shall have regard to the public interest in determining whether or not to investigate a complaint; and (b) that if the Information Commissioner discontinues an investigation, he/she must provide the interested parties with reasons for the decision.

39. That Division 3, Part 3 of the Information Commissioner Bill 2009 (NSW) be amended to provide that all investigation and complaint reports are made publicly available, or alternatively that the Information Commissioner should be given the power to table an investigation report with the Houses of Parliament if he/she believes that an agency has defaulted in taking the appropriate consequential actions recommended in a report.