



New South Wales

# Government Information (Public Access) Act 2009 No 52

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New South Wales

## **Government Information (Public Access) Act 2009 No 52**

Act No 52, 2009

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An Act to facilitate public access to government information. [Assented to 26 June 2009]

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See also the *Government Information (Information Commissioner) Act 2009* and the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009*.

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**The Legislature of New South Wales enacts:**

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *Government Information (Public Access) Act 2009*.

### **2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

### **3 Object of Act**

- (1) In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:
  - (a) authorising and encouraging the proactive public release of government information by agencies, and
  - (b) giving members of the public an enforceable right to access government information, and
  - (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.
- (2) It is the intention of Parliament:
  - (a) that this Act be interpreted and applied so as to further the object of this Act, and
  - (b) that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

### **4 Interpretation**

#### **(1) Key definitions**

In this Act:

***access application*** means an application for access to government information under Part 4 that is a valid access application under that Part.

***agency*** means any of the following:

- (a) a Government Department,
- (b) a Minister (including a Minister's personal staff),
- (c) a public authority,



- (d) a public office,
- (e) a local authority,
- (f) a court,
- (g) a person or entity that is an agency pursuant to regulations under clause 5 of Schedule 4.

**Note.** Schedule 4 contains definitions of **Government Department**, **public authority**, **local authority**, **public office** and **court**. The Information Commissioner publishes a list of agencies and their contact details.

**government information** means information contained in a record held by an agency.

(2) **Other interpretative provisions**

Expressions used in this Act that are defined in Schedule 4 have the meanings set out in that Schedule.

## **Part 2 Open government information—general principles**

### **Division 1 Ways of accessing government information**

#### **5 Presumption in favour of disclosure of government information**

There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.

#### **6 Mandatory proactive release of certain government information**

- (1) An agency must make the government information that is its *open access information* publicly available unless there is an overriding public interest against disclosure of the information.

**Note.** Part 3 lists the information that is open access information.

- (2) Open access information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate.
- (3) At least one of the ways in which an agency makes open access information publicly available must be free of charge. Access provided in any other way can be charged for.
- (4) An agency must facilitate public access to open access information contained in a record by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record and it is practicable to delete the matter.
- (5) An agency must keep a record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure. The record is to indicate only the general nature of the information concerned.

#### **7 Authorised proactive release of government information**

- (1) An agency is authorised to make any government information held by the agency publicly available unless there is an overriding public interest against disclosure of the information.
- (2) The information that an agency decides to make publicly available is to be made publicly available in any manner that the agency considers appropriate, either free of charge or at the lowest reasonable cost to the agency.

- (3) An agency must, at intervals of not more than 12 months, review its program for the release of government information under this section to identify the kinds of government information held by the agency that should in the public interest be made publicly available and that can be made publicly available without imposing unreasonable additional costs on the agency.
- (4) An agency can facilitate public access to government information contained in a record by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record.
- (5) The functions of an agency under this section may only be exercised by or with the authority (given either generally or in a particular case) of the principal officer of the agency.

#### **8 Informal release of government information**

- (1) An agency is authorised to release government information held by it to a person in response to an informal request by the person (that is, a request that is not an access application) unless there is an overriding public interest against disclosure of the information.
- (2) An agency can release government information in response to an informal request subject to any reasonable conditions that the agency thinks fit to impose.
- (3) An agency cannot be required to disclose government information pursuant to an informal request and cannot be required to consider an informal request for government information.
- (4) An agency can decide by what means information is to be released in response to an informal request.
- (5) An agency can facilitate public access to government information contained in a record by deleting matter from a copy of the record to be released in response to an informal request if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record.
- (6) The functions of an agency under this section may only be exercised by or with the authority (given either generally or in a particular case) of the principal officer of the agency.

## **9 Access applications**

- (1) A person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 (Access applications) unless there is an overriding public interest against disclosure of the information.
- (2) An agency is not subject to the direction or control of any Minister in the exercise of the agency's functions in dealing with a particular access application.
- (3) The function of making a reviewable decision in connection with an access application made to an agency may only be exercised by or with the authority (given either generally or in a particular case) of the principal officer of the agency.

## **10 Disclosure and access under other laws**

- (1) This Act is not intended to prevent or discourage the publication or giving of access to government information as permitted or required by or under any other Act or law that enables a member of the public to obtain access to government information.
- (2) This Act does not affect the operation of any other Act or law that requires government information to be made available to the public or that enables a member of the public to obtain access to government information.

## **11 Act overrides secrecy provisions in other legislation**

This Act overrides a provision of any other Act or statutory rule that prohibits the disclosure of information (whether or not the prohibition is subject to specified qualifications or exceptions), other than a provision of a law listed in Schedule 1 as an overriding secrecy law.

**Note.** For overriding secrecy laws it is conclusively presumed that there is an overriding public interest against disclosure of the information. Other secrecy laws are to be taken into account as considerations against disclosure in determining whether there is an overriding public interest against disclosure. See section 14.

## **Division 2 Public interest considerations**

### **12 Public interest considerations in favour of disclosure**

- (1) There is a general public interest in favour of the disclosure of government information.

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- (2) Nothing in this Act limits any other public interest considerations in favour of the disclosure of government information that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information.

**Note.** The following are examples of public interest considerations in favour of disclosure of information:

- (a) Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
  - (b) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.
  - (c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
  - (d) The information is personal information of the person to whom it is to be disclosed.
  - (e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
- (3) The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies.

### 13 Public interest test

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

### 14 Public interest considerations against disclosure

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.
- (2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

- (3) The Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information, for the assistance of agencies, but cannot add to the list of considerations in the Table to this section.

**Table**

<b>1</b>	<b>Responsible and effective government</b> <p>There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):</p> <ul style="list-style-type: none"><li>(a) prejudice collective Ministerial responsibility,</li><li>(b) prejudice Ministerial responsibility to Parliament,</li><li>(c) prejudice relations with, or the obtaining of confidential information from, another government,</li><li>(d) prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,</li><li>(e) reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency,</li><li>(f) prejudice the effective exercise by an agency of the agency's functions,</li><li>(g) found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence,</li><li>(h) prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).</li></ul>
<b>2</b>	<b>Law enforcement and security</b> <p>There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):</p> <ul style="list-style-type: none"><li>(a) reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant,</li><li>(b) prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law,</li><li>(c) increase the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency (including any natural disaster, major accident, civil disturbance or act of terrorism),</li><li>(d) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person,</li><li>(e) endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle,</li><li>(f) facilitate the commission of a criminal act (including a terrorist act within the meaning of the <i>Terrorism (Police Powers) Act 2002</i>),</li><li>(g) prejudice the supervision of, or facilitate the escape of, any person in lawful custody,</li><li>(h) prejudice the security, discipline or good order of any correctional facility.</li></ul>

<b>3</b>	<p><b>Individual rights, judicial processes and natural justice</b></p> <p>There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:</p> <ul style="list-style-type: none"> <li>(a) reveal an individual's personal information,</li> <li>(b) contravene an information protection principle under the <i>Privacy and Personal Information Protection Act 1998</i> or a Health Privacy Principle under the <i>Health Records and Information Privacy Act 2002</i>,</li> <li>(c) prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings,</li> <li>(d) prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness,</li> <li>(e) reveal false or unsubstantiated allegations about a person that are defamatory,</li> <li>(f) expose a person to a risk of harm or of serious harassment or serious intimidation,</li> <li>(g) in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed.</li> </ul>
<b>4</b>	<p><b>Business interests of agencies and other persons</b></p> <p>There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:</p> <ul style="list-style-type: none"> <li>(a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,</li> <li>(b) reveal commercial-in-confidence provisions of a government contract,</li> <li>(c) diminish the competitive commercial value of any information to any person,</li> <li>(d) prejudice any person's legitimate business, commercial, professional or financial interests,</li> <li>(e) prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).</li> </ul>
<b>5</b>	<p><b>Environment, culture, economy and general matters</b></p> <p>There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:</p> <ul style="list-style-type: none"> <li>(a) endanger, or prejudice any system or procedure for protecting, the environment,</li> <li>(b) prejudice the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge,</li> <li>(c) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any animal or other living thing, or threaten the existence of any species,</li> <li>(d) damage, or prejudice the ability of the Government or an agency to manage, the economy,</li> <li>(e) expose any person to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Government or an agency.</li> </ul>
<b>6</b>	<p><b>Secrecy provisions</b></p> <ul style="list-style-type: none"> <li>(1) There is a public interest consideration against disclosure of information if disclosure of the information by any person could (disregarding the operation of this Act) reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule (of this or another State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.</li> <li>(2) The public interest consideration under this clause extends to consideration of the policy that underlies the prohibition against disclosure.</li> </ul>

<b>7</b>	<b>Exempt documents under interstate Freedom of Information legislation</b> <ol style="list-style-type: none"><li>(1) There is a public interest consideration against disclosure of information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State if notice has been received from that Government that the information is exempt matter within the meaning of a corresponding law of the Commonwealth or that other State.</li><li>(2) The public interest consideration under this clause extends to consideration of the policy that underlies the exemption.</li><li>(3) In this clause, a reference to a corresponding law is a reference to:<ol style="list-style-type: none"><li>(a) the <i>Freedom of Information Act 1982</i> of the Commonwealth, or</li><li>(b) a law of any other State that is prescribed by the regulations as a corresponding law for the purposes of this clause.</li></ol></li></ol>
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### **15 Principles that apply to public interest determination**

A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles:

- (a) Agencies must exercise their functions so as to promote the object of this Act.
- (b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.
- (c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.
- (d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.
- (e) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

## **Division 3 Assistance and oversight**

### **16 Agencies to provide advice and assistance**

- (1) An agency must provide advice and assistance to a person who requests or proposes to request access to government information, for the purpose of assisting the person to access, or seek access to, information that is or may be made publicly available.
- (2) An agency must provide the following specific advice and assistance to a person who requests access to government information:
  - (a) advice as to whether or not the information is publicly available from the agency and (if it is) how the information can be accessed,



- 
- (b) advice on how to make an access application for the information if the information is not publicly available from the agency but appears likely to be held by the agency,
  - (c) if the information appears unlikely to be held by the agency but appears likely to relate to the functions of some other agency, the contact details of the other agency,
  - (d) the contact details of the Information Commissioner and advice on the availability of and how to access any information published by the Information Commissioner that it appears may be relevant to the person's request.
- (3) An agency is only required to provide advice and assistance under this section that it would be reasonable to expect the agency to provide.

#### **17 Role of Information Commissioner**

The Information Commissioner has the following functions in connection with the operation of this Act:

- (a) to promote public awareness and understanding of this Act and to promote the object of this Act,
- (b) to provide information, advice, assistance and training to agencies and the public on any matters relevant to this Act,
- (c) to assist agencies in connection with the exercise of their functions under this Act, including by providing services to assist with the lodgment, handling and processing of access applications,
- (d) to issue guidelines and other publications for the assistance of agencies in connection with their functions under this Act,
- (e) to issue guidelines and other publications for the assistance of the public in connection with their rights under this Act (including rights of review),
- (f) to review decisions of agencies pursuant to Part 5,
- (g) to monitor, audit and report on the exercise by agencies of their functions under, and compliance with, this Act,
- (h) to make reports and provide recommendations to the Minister about proposals for legislative and administrative changes to further the object of this Act.

## Part 3 Open access information

### Division 1 Preliminary

#### 18 What constitutes open access information

The following government information held by an agency is the agency's *open access information* that is required to be made publicly available by the agency under section 6 (Mandatory proactive release of certain government information):

- (a) the agency's current publication guide (see Division 2),
- (b) information about the agency contained in any document tabled in Parliament by or on behalf of the agency, other than any document tabled by order of either House of Parliament,
- (c) the agency's policy documents (see Division 3),
- (d) the agency's disclosure log of access applications (see Division 4),
- (e) the agency's register of government contracts (see Division 5),
- (f) the agency's record (kept under section 6) of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure,
- (g) such other government information as may be prescribed by the regulations as open access information.

#### 19 Excluded functions of particular agencies

This Part does not apply to an agency in respect of any functions of the agency listed in Schedule 2 (Excluded information of particular agencies).

### Division 2 Publication guides

#### 20 Agencies must have publication guide

- (1) An agency (other than a Minister) must have a guide (its *publication guide*) that:
  - (a) describes the structure and functions of the agency, and
  - (b) describes the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public, and
  - (c) specifies any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions, and

- (d) identifies the various kinds of government information held by the agency, and
  - (e) identifies the kinds of government information held by the agency that the agency makes (or will make) publicly available, and
  - (f) specifies the manner in which the agency makes (or will make) government information publicly available, and
  - (g) identifies the kinds of information that are (or will be) made publicly available free of charge and those kinds for which a charge is (or will be) imposed.
- (2) An agency must make government information publicly available as provided by its publication guide.
  - (3) The Director-General of the Department of Local Government may, in consultation with the Information Commissioner, adopt mandatory provisions for inclusion in the publication guide of local authorities. The publication guide of a local authority must include any such mandatory provision unless the Director-General otherwise approves in a particular case.

## **21 Adoption and review of publication guide**

An agency must adopt its first publication guide within 6 months after the commencement of this section and must review its publication guide and adopt a new publication guide at intervals of not more than 12 months. An agency may update and amend its publication guide at any time.

## **22 Role of Information Commissioner**

- (1) An agency must notify the Information Commissioner before adopting or amending a publication guide and must, if requested to do so by the Information Commissioner, consult with the Information Commissioner on the proposed publication guide or amendment.
- (2) The Information Commissioner can issue guidelines and model publication guides for the assistance of agencies in connection with publication guides.

## **Division 3 Policy documents**

### **23 What constitutes an agency's policy documents**

An agency's *policy documents* are such of the following documents as are used by the agency in connection with the exercise of those functions of the agency that affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments,

to which members of the public are or may become entitled, eligible, liable or subject (but does not include a legislative instrument):

- (a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents,
- (b) a document containing particulars of any administrative scheme,
- (c) a document containing a statement of the manner, or intended manner, of administration of any legislative instrument or administrative scheme,
- (d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any legislative instrument or administrative scheme,
- (e) any other document of a similar kind.

#### **24 Effect of policy documents not being publicly available**

- (1) A person is not to be subjected to any prejudice because of the application of the provisions of an agency's policy document to any act or omission of the person if, at the time of the act or omission:
  - (a) the policy document was not publicly available as required by this Act, and
  - (b) the person was not aware of those provisions, and
  - (c) the person could lawfully have avoided the prejudice had the person been aware of those provisions.
- (2) This section does not apply to any matter forming part of an agency's policy document that is not made publicly available as a result of being deleted as required by this Act from copies of the policy document that are made publicly available.

### **Division 4 Disclosure log of access applications**

#### **25 Requirement for disclosure log**

An agency must keep a record (called its *disclosure log*) that records information about access applications made to the agency that the agency decides by deciding to provide access (to some or all of the information applied for) if the information is information that the agency considers may be of interest to other members of the public.

#### **26 Required information about access applications**

- (1) The information about an access application that is required to be recorded in an agency's disclosure log is as follows:
  - (a) the date the application was decided,

- (b) a description of the information to which access was provided in response to the application,
  - (c) a statement as to whether any of the information is now available from the agency to other members of the public and (if it is) how it can be accessed.
- (2) No details are required to be recorded in the disclosure log until the access application has been decided.
  - (3) An agency is not required to include in its disclosure log information about any application:
    - (a) for personal information about the applicant (the applicant being an individual), or
    - (b) in respect of which any factors particular to the applicant were otherwise a consideration in the agency's determination of the public interest in connection with the disclosure of the information to the applicant.

## **Division 5 Government contracts with private sector**

### **27 Register of government contracts valued at \$150,000 or more**

- (1) An agency is to keep a register of government contracts (its *government contracts register*) that records information about each government contract to which the agency is a party that has (or is likely to have) a value of \$150,000 or more (*class 1 contracts*).
- (2) Information about a class 1 contract must be entered in the register within 60 days after the contract becomes effective.
- (3) A contract *becomes effective*:
  - (a) when it is entered into by or on behalf of the agency concerned, or
  - (b) if the contract contains a provision to the effect that one or more conditions are to be met before the obligations of the parties under the contract are enforceable—when the condition or conditions have been met (and not when the contract is entered into by the agency).

### **28 Value of contract**

The *value* of a contract is whichever of the following values is appropriate to the kind of contract concerned:

- (a) the total estimated value of the project,
- (b) the total estimated value of the goods or services over the term of the contract,

- (c) the value of the real property transferred,
- (d) the rent for the term of the lease.

**29 Information to be entered in register—class 1 contracts**

The following information about a class 1 contract is to be entered in the government contracts register:

- (a) the name and business address of the contractor,
- (b) particulars of any related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract,
- (c) the date on which the contract became effective and the duration of the contract,
- (d) particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract,
- (e) the estimated amount payable to the contractor under the contract,
- (f) a description of any provisions under which the amount payable to the contractor may be varied,
- (g) a description of any provisions with respect to the renegotiation of the contract,
- (h) in the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed,
- (i) a description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.

**30 Additional information for class 2 contracts**

- (1) Additional information is required to be entered in the government contracts register for class 1 contracts to which any of the following paragraphs applies (*class 2 contracts*):
  - (a) there has not been a tender process, the proposed contract has not been made publicly available and the terms and conditions of the contract have been negotiated directly with the contractor,
  - (b) the proposed contract (whether or not made publicly available) has been the subject of a tendering process and the terms and

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- conditions of the contract have been substantially negotiated with the successful tenderer,
- (c) the obligations of one or more parties under the contract to maintain or operate infrastructure or assets could continue for 10 years or more,
  - (d) the contract involves a privately financed project as defined by guidelines published by the Treasury (as in force from time to time),
  - (e) the contract involves a transfer of a significant asset of the agency concerned to another party to the contract in exchange for the transfer of an asset to the agency.
- (2) The additional information required to be entered in the register for class 2 contracts is as follows:
- (a) particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer,
  - (b) particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer,
  - (c) the results of any cost-benefit analysis of the contract conducted by the agency,
  - (d) the components and quantum of the public sector comparator if used,
  - (e) if relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges),
  - (f) if relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved,
  - (g) particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into,
  - (h) particulars of any other key elements of the contract.

### 31 Register to include copy of class 3 contract

If a class 2 contract has (or is likely to have) a value of \$5 million or more (a *class 3 contract*), the register must include a copy of the class 3 contract.

**32 Confidential information not required to be included in register**

- (1) A requirement of this Division to include information or a copy of a contract in the government contracts register does not require the inclusion of:
  - (a) the commercial-in-confidence provisions of a contract, or
  - (b) details of any unsuccessful tender, or
  - (c) any matter that could reasonably be expected to affect public safety or security, or
  - (d) a copy of a contract, a provision of a contract or any other information in relation to a contract that is of such a nature that its inclusion in a record would result in there being an overriding public interest against disclosure of the record.
- (2) If an agency does not include a copy of a contract in the register, or includes only some of the provisions of a contract in the register, because of this section, the agency must include in the register:
  - (a) the reasons why the contract or those provisions have not been included in the register, and
  - (b) a statement as to whether it is intended that the contract or those provisions will be included in the register at a later date and, if so, when it is likely that they will be included, and
  - (c) if some but not all of the provisions of the contract have been included in the register, a general description of the types of provisions that have not been included.

**33 Variations to contracts**

- (1) If a material variation is made to a contract that would affect the particulars that are required to be included in the government contracts register in relation to the contract, the particulars included in the register are to be amended to reflect the variation within 60 days after the variation becomes effective.
- (2) If a material variation is made to a contract a copy of which is required to be included in the register, a copy of the variation or the varied provisions is to be included in the register within 60 days after the variation becomes effective.

**34 Minimum public access period for information on register**

- (1) Information (including a copy of a contract) required to be included in the government contracts register in relation to a contract is only required to be made publicly available as open access information for the public access period.



- (2) The *public access period* is whichever is the longer of the following periods:
- (a) 30 days,
  - (b) the period until the project to which the contract relates is complete, the goods and services concerned have been provided under the contract, the term of the lease has expired or the real property has been transferred.

### **35 Register to be published on Government tenders website**

- (1) A copy of an agency's government contracts register is to be published on the Government tenders website (that is, the website with the URL of <https://tenders.nsw.gov.au> or such other internet website as the Premier may authorise for the purposes of this section).
- (2) Each of the following agencies is not required to have a copy of its government contracts register published on the Government tenders website but is required to have a copy of the register published on any website of the agency:
  - (a) a State owned corporation or a subsidiary of a State owned corporation,
  - (b) a local authority,
  - (c) a university.
- (3) A copy of an agency's government contracts register is also to be made publicly available in any other manner in which the agency decides to make its open access information publicly available.

### **36 Disputes**

- (1) If a person other than an officer of the agency (including, for example, a party to a government contract) disagrees with the way in which an agency has interpreted its obligations under this Division, the agency is to obtain the opinion of the Chairperson of the State Contracts Control Board in relation to the matter.
- (2) This section does not apply to:
  - (a) a State owned corporation or a subsidiary of a State owned corporation, or
  - (b) a local authority, or
  - (c) a university.

### **37 Agency obligation to find information**

Information is required to be included in an agency's government contracts register only to the extent that the agency holds the

information or it is reasonably practical for the agency to obtain the information.

**38 Exception for industry support contracts**

This Division does not require the Department of State and Regional Development to include any information about or a copy of a government contract in its government contracts register if the contract involves the provision of industry support.

**39 Exception for SOCs—competitive neutrality**

This Division does not require a State owned corporation or a subsidiary of a State owned corporation to include any information about or a copy of a government contract in its government contracts register if the contract relates to activities engaged in by the corporation or subsidiary in a market in which it is in competition with any other person.

**40 Exception for Landcom—contracts for sale of land**

This Division does not require Landcom to include any information about or a copy of a government contract in its government contracts register if the contract is a contract for the sale of land.

**Note.** Any exception under this Division from the requirement to include information about or a copy of a contract on a government contracts register does not of itself constitute grounds for refusing an access application.

## Part 4 Access applications

### Division 1 Making an access application

#### 41 How to make an access application

- (1) An application or other request for government information is not a valid access application unless it complies with the following requirements (the *formal requirements*) for access applications:
  - (a) it must be in writing sent to or lodged at an office of the agency concerned,
  - (b) it must clearly indicate that it is an access application made under this Act,
  - (c) it must be accompanied by a fee of \$30,
  - (d) it must state a postal address in Australia as the address for correspondence in connection with the application,
  - (e) it must include such information as is reasonably necessary to enable the government information applied for to be identified.
- (2) An agency may, with the approval of the Information Commissioner, approve additional facilities for the making of an access application or the payment of an application fee. An application made to any agency by use of such a facility is considered to have been lodged at an office of the agency and a fee paid by use of such a facility is considered to have accompanied the application.
- (3) An access application is not considered to have been received by an agency until it is actually received by the agency.

#### 42 Inclusion of additional information in applications

An access application can include any of the following:

- (a) submissions by the applicant as to any public interest considerations that the applicant thinks the agency should take into account in determining whether or not there is an overriding public interest against disclosure of the information,
- (b) a request for a discount on processing charges for the application (including relevant supporting information, such as evidence of hardship or special public interest),
- (c) any other information that the applicant thinks may be relevant.

**43 Access application cannot be made for excluded information**

- (1) An access application cannot be made to an agency for access to excluded information of the agency.

**Note.** Information is excluded information of an agency if it relates to any function specified in Schedule 2 in relation to the agency.

- (2) An application for government information is not a valid access application to the extent that the application is made in contravention of this section.

**Division 2 Transfer, amendment or withdrawal of access applications**

**44 Ways in which applications can be transferred**

An agency that receives an access application for government information can transfer the application to another agency either by *agency-initiated transfer* or by *applicant-initiated transfer*, as provided by this Division.

**Note.** A decision to transfer an application to another agency is reviewable under Part 5.

**45 Agency-initiated transfer**

- (1) An agency-initiated transfer of an access application to another agency requires the consent of that other agency and cannot be done unless:
- (a) the other agency is known to hold the information applied for and the information relates more closely to the functions of that other agency, or
  - (b) the agency that receives the application decides that it does not hold the information and the other agency is known or reasonably expected to hold the information.
- (2) An agency-initiated transfer cannot be done more than 10 working days after the application was received.

**46 Applicant-initiated transfer**

- (1) An applicant-initiated transfer of an access application to another agency cannot be done unless the applicant and the agency to which the application was made agree that the application should be transferred and it appears that the information relates more closely to the functions of the other agency.
- (2) The consent of the other agency is not required for an applicant-initiated transfer and it does not matter whether the agency that is to transfer the application holds the information (or knows whether it holds the information).

**47 Notice of transfer of application**

An agency that transfers an application must give notice of the transfer to the applicant, advising of the date of transfer and the agency to which it was transferred.

**48 Effect of transfer of application**

- (1) The agency that transfers an application is not required to refund or transfer the application fee to the other agency but cannot impose any processing charges.
- (2) The agency that transfers an application has no obligation to decide the application.
- (3) An application that is transferred to an agency is deemed to have been received by that agency (on the date that it is received by that agency) as an application made by the applicant to that agency, and is to be acknowledged accordingly by that agency.
- (4) The agency to which an application is transferred is not entitled to charge an application fee for the application but is entitled to impose processing charges in accordance with this Act.

**49 Amendment of application**

- (1) An access application may be amended by the applicant at any time before the agency decides the application. Notice of the amendment must be received by the agency before the agency decides the application.
- (2) An amendment to reduce the scope of the information applied for does not require the consent of the agency but any other amendment cannot be made without the consent of the agency.  
**Note.** A decision by an agency to refuse to consent to an amendment is not a reviewable decision (but a fresh access application can be made).
- (3) The agency must give notice to the applicant confirming the amendment of an access application and the date on which it was amended if the amendment requires the consent of the agency or the amendment was not made by the applicant in writing.
- (4) An amendment to reduce the scope of the information applied for does not prevent the agency from imposing a processing charge in respect of time spent before the amendment is made in dealing with any aspect of the access application that the amendment makes unnecessary.
- (5) The amendment of an access application does not affect the period within which the application is required to be decided and does not

entitle the applicant to a refund or reduction of any application fee or advance deposit already paid.

**Note.** The period within which an application is required to be decided can be extended by agreement between the agency and applicant.

#### **50 Withdrawal of application**

- (1) A person who has made an access application may withdraw it at any time before notice of the agency's decision on the application is given to the person.
- (2) The withdrawal of an application does not entitle the applicant to a refund of any application fee or advance deposit already paid.
- (3) The agency must give notice to the applicant confirming the withdrawal of an access application and the date on which it was withdrawn if the withdrawal was not made by the applicant in writing.

### **Division 3 Process for dealing with access applications**

#### **51 Initial decision as to validity of application**

- (1) When an agency receives an application for access to government information that it appears is intended to be an access application, the agency is to decide whether the application is a valid access application and is to notify its decision to the applicant by either:
  - (a) acknowledging receipt of the application as a valid access application, or
  - (b) notifying the applicant that the application is not a valid access application.

**Note.** An application is not a valid access application if it is an application for excluded information of the agency or does not comply with the formal requirements for access applications.

- (2) An agency's decision as to the validity of an application must be made and notified to the applicant as soon as practicable after the agency receives the application and in any event within 5 working days after the application is received.

**Note.** The decision is reviewable under Part 5.

- (3) An acknowledgement of receipt of a valid access application must include the following:
  - (a) the date by which the application is required to be decided (subject to any suspension or extension of the time for deciding an application),
  - (b) a statement that the application will be deemed to have been refused if not decided by the required date,

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- (c) a statement that information about the application may be made public in the agency's disclosure log and that the applicant may object to this (but this statement is not required if the agency considers it unlikely that information about the application will be included in the disclosure log),
  - (d) such details of rights of review in connection with access applications as the Information Commissioner may from time to time direct.
- (4) Acknowledging receipt of an application as a valid access application does not prevent the agency from subsequently deciding that the application is not a valid access application.
  - (5) An agency's decision that an application is not a valid access application is presumed to be correct, subject to any review of the decision under Part 5.

## **52 Agency assistance with invalid applications**

- (1) The notification of an agency's decision that an application is not a valid access application must:
  - (a) include a statement of the reason why the application is not a valid access application (including reference to the relevant provisions of this Act), and
  - (b) if a reason is non-payment of the required application fee, invite the applicant to pay the fee, and
  - (c) if a reason is failure to provide required information, invite the applicant to provide the information, and
  - (d) notify the applicant of the right of review under Part 5 that applies in relation to a decision that an application is not a valid access application.
- (2) The application becomes a valid access application if the applicant pays the required fee or provides the required information (as appropriate), and is then deemed to have been made when the fee or information was received by the agency.
- (3) An agency must provide advice and assistance, so far as it would be reasonable to expect the agency to do so, to assist an applicant to provide such information as may be necessary to enable the applicant to make a valid access application.
- (4) If the agency waives payment of the required application fee (and the application would have been valid had the fee been paid) the application becomes a valid access application and is deemed to have been made when the fee was waived.

- (5) An applicant is entitled to a refund of any application fee that accompanied an invalid access application (unless the application subsequently becomes valid).

**53 Searches for information held by agency**

- (1) The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.
- (2) An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.
- (3) The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency including resources that facilitate the retrieval of information stored electronically.
- (4) An agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the *State Records Act 1998* or contrary to the agency's established record management procedures.
- (5) An agency is not required to undertake any search for information that would require an unreasonable and substantial diversion of the agency's resources.

**54 Consultation on public interest considerations**

- (1) An agency must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person in response to an access application if it appears that:
  - (a) the information is of a kind that requires consultation under this section, and
  - (b) the person may reasonably be expected to have concerns about the disclosure of the information, and
  - (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.
- (2) Information relating to a person is of a kind that requires consultation under this section if the information:
  - (a) includes personal information about the person, or



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- (b) concerns the person's business, commercial, professional or financial interests, or
  - (c) concerns research that has been, is being, or is intended to be, carried out by or on behalf of the person, or
  - (d) concerns the affairs of a government of the Commonwealth or another State (and the person is that government).

**Note.** The requirement to consult extends to consultation with other agencies and other governments. See the definition of *person* in Schedule 4.

- (3) If consultation is required concerning the release of personal information about a deceased person, that consultation is to be done by consultation with a close relative of the deceased.
- (4) The purpose of consultation under this section is to ascertain whether the person has an objection to disclosure of some or all of the information and the reasons for any such objection.
- (5) The agency must take any objection to disclosure of information that the agency receives in the course of consultation into account in the course of determining whether there is an overriding public interest against disclosure of government information.
- (6) If consultation establishes that a person objects to the disclosure of information but the agency decides to provide access to the information in response to the application, access is not to be provided until the agency has first given the objector notice of the agency's decision to provide access to the information and notice of the objector's right to have that decision reviewed, and is not to be provided while review rights on the decision are pending.
- (7) Review rights on a decision are pending while the objector is entitled to apply for a review of the decision under Part 5 (ignoring any period that may be available by way of extension of time to apply for review), or any review duly applied for is pending.

#### **55 Consideration of personal factors of application**

- (1) In determining whether there is an overriding public interest against disclosure of information in response to an access application, an agency is entitled to take the following factors (the *personal factors of the application*) into account as provided by this section:
  - (a) the applicant's identity and relationship with any other person,
  - (b) the applicant's motives for making the access application,
  - (c) any other factors particular to the applicant.
- (2) The personal factors of the application can also be taken into account as factors in favour of providing the applicant with access to the information.

- (3) The personal factors of the application can be taken into account as factors against providing access if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2–5 (but not clause 1, 6 or 7) of the Table to section 14.
- (4) An applicant is entitled to provide any evidence or information concerning the personal factors of the application that the applicant considers to be relevant to the determination of whether there is an overriding public interest against disclosure of the information applied for.
- (5) An agency may, as a precondition to providing access to information to an applicant, require the applicant to provide evidence concerning any personal factors of the application that were relevant to a decision by the agency that there was not an overriding public interest against disclosure of the information.
- (6) An agency is under no obligation to inquire into, or verify claims made by an access applicant or any other person about, the personal factors of the application but is entitled to have regard to evidence or information provided by the applicant or other person.

**Note.** An agency is not entitled to impose any conditions on the use or disclosure of information when the agency provides access to the information in response to an access application. See section 73.

#### **56 Applicant can object to inclusion in disclosure log**

- (1) An access applicant can object to the inclusion in the agency's disclosure log of all or specified information concerning the application. The objection can be made as part of the application or separately and can include reasons for the objection.
- (2) An applicant is not entitled to object to the inclusion of information on an agency's disclosure log except on one or more of the following grounds:
  - (a) the information includes personal information about the applicant (or a deceased person for whom the applicant is the personal representative),
  - (b) the information concerns the applicant's business, commercial, professional or financial interests,
  - (c) the information concerns research that has been, is being, or is intended to be, carried out by or on behalf of the applicant,
  - (d) the information concerns the affairs of a government of the Commonwealth or another State (and the applicant is that government).

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- (3) An agency's acknowledgement of receipt of an access application is to include the following statements about the inclusion of information in the agency's disclosure log (unless the agency considers it unlikely that information about the application will be included in the disclosure log):
- (a) a statement that information concerning the application will be included in the agency's disclosure log and that the applicant can object to this,
  - (b) a statement about the right of review under Part 5 of a decision by the agency to include information in its disclosure log despite the applicant's objection.
- (4) If an access applicant has objected to the inclusion of information in the agency's disclosure log, the agency's notice of decision of the access application must indicate:
- (a) the agency's decision about whether the applicant was entitled to object, and
  - (b) (if the agency has decided that the applicant was entitled to object) the agency's decision on whether to include the information in its disclosure log.
- Note.** The agency's decisions are reviewable under Part 5.
- (5) An agency that decides that the applicant was not entitled to object to the inclusion of information in the agency's disclosure log is entitled to immediately include the information in the disclosure log.
- (6) An agency that decides that the applicant was entitled to object to the inclusion of information in the agency's disclosure log but decides to include the information despite the objection must not include the information while the objector is entitled to apply for a review of the agency's decision under Part 5 (ignoring any period that may be available by way of extension of time to apply for review), or any review duly applied for is pending.

## Division 4 Deciding access applications

### 57 Required period for deciding application

- (1) An agency must decide an access application and give the applicant notice of the agency's decision within 20 working days (the ***decision period***) after the agency receives the application.
- (2) The decision period can be extended by up to 10 working days for either or both of the following reasons (with a maximum extension under this subsection of 15 working days for any particular access application):
  - (a) consultation with another person is required under a provision of this Act,

(b) records are required to be retrieved from a records archive.

**Note.** The decision period can only be extended to allow for mandatory consultation, not just consultation that the agency chooses to do.

(3) The regulations can also provide for the extension (and further extension) of the decision period.

(4) The decision period can also be extended (and further extended) by agreement with the applicant.

**Note.** A decision by an agency to refuse to agree to extending the decision period is not a reviewable decision.

(5) The agency must as soon as practicable after the decision period is extended (and in any case within 5 working days after it is extended) give the applicant notice of any extension of the decision period (including any extension by agreement with the applicant), indicating the date on which the extended decision period will end.

(6) An access application is considered to have been decided *within time* if the agency decides the application and gives the applicant notice of the agency's decision within the decision period. The decision period is also referred to in other provisions of this Act as the period within which an application is required to be decided.

#### **58 How applications are decided**

(1) An agency decides an access application for government information by:

(a) deciding to provide access to the information, or

(b) deciding that the information is not held by the agency, or

(c) deciding that the information is already available to the applicant (see section 59), or

(d) deciding to refuse to provide access to the information because there is an overriding public interest against disclosure of the information, or

(e) deciding to refuse to deal with the application (see section 60), or

(f) deciding to refuse to confirm or deny that information is held by the agency because there is an overriding public interest against disclosure of information confirming or denying that fact.

**Note.** These decisions are reviewable under Part 5.

(2) More than one decision can be made in respect of a particular access application, so as to deal with the various items of information applied for.

(3) If an agency finds that information or additional information is held by the agency after deciding an access application, the agency can make a

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further decision that replaces or supplements the original decision, but cannot be required to make a further decision in such a case. The further decision can be made even if the period within which the application is required to be decided has expired.

**59 Decision that information already available to applicant**

- (1) An agency can decide that information is already available to an applicant only if the information is:
  - (a) made publicly available by the agency or some other agency in accordance with a legislative instrument other than this Act, whether or not availability of the information is by inspection only and whether or not availability is subject to a charge, or
  - (b) available to the applicant from, or for inspection at, the agency free of charge in accordance with this Act or the agency's policies and practices, or
  - (c) contained in a document that is usually available for purchase.
- (2) An agency is not required to provide access to information that the agency has decided is already available to the applicant, but notice of the decision must indicate how the information can be accessed by the applicant.

**60 Decision to refuse to deal with application**

- (1) An agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason):
  - (a) dealing with the application would require an unreasonable and substantial diversion of the agency's resources,
  - (b) the agency has already decided a previous application for the information concerned (or information that is substantially the same as that information) made by the applicant and there are no reasonable grounds for believing that the agency would make a different decision on the application,
  - (c) the applicant has failed to pay an advance deposit that is payable in connection with the application,  
**Note.** See section 70.
  - (d) the information is or has been the subject of a subpoena or other order of a court for the production of documents and is available to the applicant as a result of having been produced in compliance with the subpoena or other order.
- (2) In deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency is not required to have regard to any extension by agreement

between the applicant and the agency of the period within which the application is required to be decided.

- (3) In deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency is entitled to consider 2 or more applications (including any previous application) as the one application if the agency determines that the applications are related and are made by the same applicant or by persons who are acting in concert in connection with those applications.
- (4) Before refusing to deal with an access application because dealing with it would require an unreasonable and substantial diversion of an agency's resources, the agency must give the applicant a reasonable opportunity to amend the application. The period within which the application is required to be decided stops running while the applicant is being given an opportunity to amend the application.
- (5) Notice of an agency's decision to refuse to deal with an access application must state the agency's reasons for the refusal.
- (6) An applicant is not entitled to a refund of the application fee when the agency refuses to deal with the application.

#### **61 Notice of decision to refuse to provide access**

Notice of an agency's decision to refuse to provide access to information because there is an overriding public interest against disclosure of the information must state the following:

- (a) the agency's reasons for its decision,
- (b) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based,
- (c) the general nature and the format of the records held by the agency that contain the information concerned.

#### **62 Notice of processing charges**

Notice of an agency's decision to provide access to information must state whether any processing charges will be payable for access to the information and indicate how those charges have been calculated.

#### **63 Deemed refusal if application not decided within time**

- (1) If an agency does not decide an access application within time, the agency is deemed to have decided to refuse to deal with the application and any application fee paid by the applicant is to be refunded.

**Note.** A deemed decision to refuse to deal with an application is reviewable under Part 5.

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- (2) The deemed refusal to deal with an application does not prevent the agency from continuing to deal with the application and subsequently deciding the application and giving notice of its decision (a *late decision*) on the application.
  - (3) The obligation to refund an application fee to the applicant is not affected by the making of the late decision and the late decision does not entitle the agency to payment of an application fee.
  - (4) No processing charge can be imposed for dealing with an access application if the application was not decided within time (whether or not a late decision is made on the application).

## **Division 5 Processing charges and advance deposits**

### **64 Processing charge for dealing with access application**

- (1) An agency may impose a charge (a *processing charge*) for dealing with an access application at a rate of \$30 per hour for each hour of processing time for the application.  
**Note.** The decision to impose a processing charge is reviewable under Part 5.
- (2) The *processing time* for an application is the total amount of time that is necessary to be spent by any officer of the agency in:
  - (a) dealing efficiently with the application (including consideration of the application, searching for records, consultation, decision-making and any other function exercised in connection with deciding the application), or
  - (b) providing access in response to the application (based on the lowest reasonable estimate of the time that will need to be spent in providing that access).
- (3) The application fee of \$30 paid by an applicant counts as a payment towards any processing charge payable by the applicant.
- (4) Access to government information granted in response to an access application may be made conditional on payment of any processing charge imposed for dealing with the application.

### **65 Discounted processing charge—financial hardship**

- (1) An applicant is entitled to a 50% reduction in a processing charge imposed by an agency if the agency is satisfied that the applicant is suffering financial hardship.  
**Note.** The discount applies only to the processing charge, not the application fee. If a 50% reduction in processing charge applies, the application fee will pay for the first 2 hours of processing time (not just the first hour). See section 64.

(2) The agency may refuse to allow the discount if satisfied that the applicant is making the application on behalf of another person in order to obtain the discount for that person.

(3) The regulations may prescribe circumstances that constitute financial hardship.

**Note.** A decision to refuse to reduce a processing charge is reviewable under Part 5.

#### **66 Discounted processing charge—special public benefit**

(1) An applicant is entitled to a 50% reduction in a processing charge imposed by an agency if the agency is satisfied that the information applied for is of special benefit to the public generally.

**Note.** The discount applies only to the processing charge, not the application fee. If a 50% reduction in processing charge applies, the application fee will pay for the first 2 hours of processing time (not just the first hour). See section 64.

A decision to refuse to reduce a processing charge is reviewable under Part 5.

(2) If the information applied for was not publicly available at the time the application was received but the agency makes the information publicly available either before or within 3 working days after providing access to the applicant, the applicant is entitled to a full waiver of the processing charge imposed by the agency.

(3) The Information Commissioner may, for the assistance of agencies, publish guidelines about reductions in processing charges under this section.

#### **67 Waiver of processing charge for personal information application**

If an access application is made for personal information about the applicant (the applicant being an individual), the agency cannot impose any processing charge for the first 20 hours of processing time for the application.

**Note.** This does not limit an agency's power to reduce, waive or refund processing charges under section 127.

#### **68 Advance deposit for payment of processing charge**

(1) An agency may by notice to an applicant require the applicant to make an advance payment of a processing charge (as an *advance deposit*).

**Note.** The decision to require an advance deposit is reviewable under Part 5.

(2) The period within which the application is required to be decided stops running from when the decision to require an advance deposit is made until payment of the advance deposit is received by the agency.



- (3) The notice requiring an advance deposit must:
  - (a) include a statement of the processing charges for work already undertaken by the agency in dealing with the application, and
  - (b) include a statement of the estimated processing charges for work expected to be required to be undertaken by the agency in dealing with the application, and
  - (c) specify a date by which the advance deposit must be paid (being a date at least 4 weeks after the date the notice is given), and
  - (d) include a statement that if the advance deposit is not paid by the due date the agency may refuse to deal further with the application and that this will result in any application fee and advance deposit already paid being forfeited.
- (4) An agency can extend the date by which an advance deposit must be paid and is to give the applicant notice of any extension (indicating the new date by which the advance deposit must be paid).

#### **69 Maximum advance deposit**

- (1) The maximum advance deposit that can be required is 50% of the amount that the agency estimates to be the total processing charge for dealing with the application (ignoring any reduction in processing charge to which the applicant may be entitled).

**Note.** An applicant can pay the full amount of the agency's estimate of the total processing charge in advance if the applicant wants to, but the applicant cannot be required to pay more than 50% of the estimate as an advance deposit.
- (2) More than one advance deposit can be required so long as the total of the advance deposits required does not exceed the maximum advance deposit.

#### **70 Result of failing to pay advance deposit**

- (1) An agency may refuse to deal further with an access application if the applicant has failed to pay an advance deposit within the time required for payment (unless the applicant has applied for review under Part 5 of the decision to require the advance deposit within the time required for payment of the advance deposit).

**Note.** The decision to refuse to deal further with an access application is reviewable under Part 5.
- (2) An agency must give notice to the applicant of its decision to refuse to deal further with the application.
- (3) The review under Part 5 of a decision to refuse to deal further with an application for failure to pay an advance deposit is to be a review of both the decision to refuse to deal further with the application and the

decision to impose the advance deposit (unless the decision to impose the advance deposit has already been reviewed under that Part).

#### **71 Refund of advance deposit**

- (1) An applicant is entitled to a refund of advance deposits paid by the applicant to the extent (if any) that the advance deposits paid exceed the total processing charges payable for dealing with the application.
- (2) An applicant is entitled to a refund of any advance deposit paid if the agency does not decide the access application within time.

**Note.** An agency cannot impose a processing charge if it does not decide an application within time.

### **Division 6 How access is provided**

#### **72 Forms of access**

- (1) Access to government information in response to an access application may be provided in any of the following ways:
  - (a) by providing a reasonable opportunity to inspect a record containing the information,
  - (b) by providing a copy of a record containing the information,
  - (c) by providing access to a record containing the information, together with such facilities as may be necessary to enable the information to be read, viewed or listened to (as appropriate to the kind of record concerned),
  - (d) by providing a written transcript of the information in the case of information recorded in an audio record or recorded in shorthand or other encoded format.
- (2) The agency must provide access in the way requested by the applicant unless:
  - (a) to do so would interfere unreasonably with the operations of the agency or would result in the agency incurring unreasonable additional costs, or
  - (b) to do so would be detrimental to the proper preservation of the record, or
  - (c) to do so would involve an infringement of copyright, or
  - (d) there is an overriding public interest against disclosure of the information in the way requested by the applicant.

**Note.** Decisions about how to provide access are reviewable under Part 5.

**73 Access to be unconditional**

- (1) An agency is not entitled to impose any conditions on the use or disclosure of information when the agency provides access to the information in response to an access application.
- (2) A condition may be imposed as to how a right of access may be exercised (such as a condition that prevents an applicant making notes from or taking a copy of a record that is made available for inspection) but only to avoid there being an overriding public interest against disclosure of the information.
- (3) A condition may be imposed that access to medical or psychiatric information will only be provided to a medical practitioner nominated by the applicant and not to the applicant personally.

**Note.** Access can also be made conditional on the payment of processing charges (s 64) and on the provision of evidence of identity or other personal factors relevant to the agency's decision to provide access (s 55).

**74 Deletion of information from copy of record to be accessed**

An agency can delete information from a copy of a record to which access is to be provided in response to an access application (so as to provide access only to the other information that the record contains) either because the deleted information is not relevant to the information applied for or because (if the deleted information was applied for) the agency has decided to refuse to provide access to that information.

**75 Providing access by creating new record**

- (1) An agency is not prevented from providing access in response to an access application to government information held by the agency by making and providing access to a new record of that information.
- (2) An agency's obligation to provide access to government information in response to an access application does not require the agency to do any of the following:
  - (a) make a new record of information held by the agency,
  - (b) update or verify information held by the agency,
  - (c) create new information, or produce a new record of information, by deduction, inference or calculation from information held by the agency or by any other use or application of information held by the agency.

**76 Providing access to information not applied for**

An agency is authorised to provide access to government information in response to an access application that is in addition to the information applied for, unless there is an overriding public interest against disclosure.

**77 Period within which access rights must be exercised**

- (1) When an agency decides to provide access to government information the applicant has a period of 6 months (the *access period*) to access the information.
- (2) The access period starts from when notice of the decision to grant access is given to the applicant (even if access is conditional on payment of any processing charge). If the agency has decided to defer providing access, the access period starts from the end of the deferral.
- (3) The agency may extend and further extend the access period in a particular case by notice to the applicant.
- (4) An access applicant's entitlement to access lapses at the end of the access period.

**78 Deferral of access**

- (1) An agency that has decided to provide access to government information in response to an access application may defer providing that access if:
  - (a) the information is contained in a record (or a draft of or extract from a record) that, by or under this Act or some other legislative instrument, is required to be published but is yet to be published, or
  - (b) the information is contained in a record (or a draft of or extract from a record) that has been prepared for presentation to Parliament, or that has been designated by the responsible Minister for the agency as appropriate for presentation to Parliament, but is yet to be presented, or
  - (c) the information is contained in a record (or a draft of or extract from a record) that has been prepared for submission to a particular person or body, or that has been designated by the responsible Minister for the agency as appropriate for submission to a particular person or body, but is yet to be submitted.

**Note.** A decision to defer access is reviewable under Part 5.
- (2) Access may be deferred only until the record has been so published, presented or submitted.

- (3) If access is to be deferred, the notice of decision of the access application given to the applicant must state that access is to be deferred and state the date on which access will be provided or (if that date is not known) describe the event following which access will be provided and the expected date of that event.
- (4) If access to information is deferred for more than 12 months, the applicant is entitled to make a further access application for the information. No application fee or processing charge is payable in respect of the further application and access pursuant to the further application cannot be deferred under this section.

**79 Provision of information subject to subpoena**

- (1) An agency need not comply with a requirement of a subpoena or other order of a court for the production of a document that the person who requested the issue of the subpoena or applied for the order has been given access to by the agency in response to an access application made by the person.
- (2) This section does not apply if the court that issued the subpoena or order specifically orders to the contrary.

## Part 5 Review of decisions

### Division 1 Reviewable decisions

#### 80 Which decisions are reviewable decisions

The following decisions of an agency in respect of an access application are *reviewable decisions* for the purposes of this Part:

- (a) a decision that an application is not a valid access application,
- (b) a decision to transfer an access application to another agency, as an agency-initiated transfer,
- (c) a decision to refuse to deal with an access application (including such a decision that is deemed to have been made),
- (d) a decision to provide access or to refuse to provide access to information in response to an access application,
- (e) a decision that government information is not held by the agency,
- (f) a decision that information applied for is already available to the applicant,
- (g) a decision to refuse to confirm or deny that information is held by the agency,
- (h) a decision to defer the provision of access to information in response to an access application,
- (i) a decision to provide access to information in a particular way in response to an access application (or a decision not to provide access in the way requested by the applicant),
- (j) a decision to impose a processing charge or to require an advance deposit,
- (k) a decision to refuse a reduction in a processing charge,
- (l) a decision to refuse to deal further with an access application because an applicant has failed to pay an advance deposit within the time required for payment,
- (m) a decision to include information in a disclosure log despite an objection by the access applicant (or a decision that the access applicant was not entitled to object).

#### 81 Extended review period where more than one decision made

When more than one reviewable decision is made in respect of a particular access application and those decisions are made at different times, the period (*the review period*) within which a person may apply for a review under this Part of any of those decisions is extended to the end of the review period for the last of those decisions.

## **Division 2 Internal review by agency**

### **82 Right of internal review**

- (1) A person aggrieved by a reviewable decision of an agency is entitled to a review of the decision by the agency that made the decision (which is referred to in this Part as an *internal review*).
- (2) Internal review of a decision is not available if the decision is made by the principal officer of the agency or if the agency is a Minister.
- (3) An internal review can be limited to a particular aspect of a reviewable decision (such as by being limited to particular information to which the decision relates).
- (4) There is to be no internal review of a decision that is or has been the subject of review by the Information Commissioner under this Part except internal review conducted on the recommendation of the Information Commissioner.
- (5) There is to be no internal review of a decision that is or has been the subject of review by the ADT under this Part.

### **83 Time within which internal review can be applied for**

- (1) Internal review of a decision cannot be applied for more than 20 working days after notice of the decision is given to the access applicant or (in the case of the deemed refusal by an agency to deal with an access application) more than 20 working days after the deemed refusal.
- (2) An agency can agree to accept an application for internal review out of time.
- (3) An agency must acknowledge receipt of an application for internal review by notice to the applicant for review given as soon as practicable after the agency receives the application and in any event within 5 working days after the application is received.

### **84 Conduct of internal review**

- (1) An internal review is to be done by making a new decision, as if the decision being reviewed (the *original decision*) had not been made, with the new decision being made as if it were being made when the access application to which the review relates was originally received.
- (2) An internal review is not to be done by the person who made the original decision and is not to be done by a person who is less senior than the person who made the original decision.

**85 Fee for internal review**

- (1) A fee of \$40 is payable by the applicant for an internal review.
- (2) No fee is payable for internal review of a decision to refuse to deal with an access application if the decision arises because the agency did not decide the access application within time (and as a result is deemed to have refused to deal with the application).

**86 Required period for determination of internal review**

- (1) An agency must make its decision on an internal review and give the applicant notice of the agency's decision within 15 working days (the *review period*) after the agency receives the application for internal review.
- (2) The review period can be extended by up to 10 working days if consultation is required with another person with whom the agency has not previously consulted in relation to the application.
- (3) The agency must (before the review period ends) give the applicant notice of any extension of the review period and indicate the date on which the extended review period will end.
- (4) The review period can also be extended by agreement with the applicant for review.
- (5) If a decision on the internal review is not made within the review period, the agency is deemed to have made that decision by making the original decision again, and the applicant for review is entitled to a refund of any fee paid to the agency for the review.

**87 No processing charges for internal review**

- (1) An agency is not entitled to impose any processing charges for work done in connection with an internal review.
- (2) This section does not affect any requirement to pay a processing charge imposed in connection with the original decision (unless the decision on the internal review otherwise requires).

**88 No internal review of decision on internal review**

A person is not entitled to an internal review of a decision made on the internal review of a reviewable decision.



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### **Division 3      Review by Information Commissioner**

#### **89    Right to have decision reviewed by Information Commissioner**

- (1) A person aggrieved by a reviewable decision of an agency is entitled to have the decision reviewed by the Information Commissioner under this Division.
- (2) When the aggrieved person is the access applicant, the decision is not required to be the subject of internal review by the agency under this Part before it can be reviewed by the Information Commissioner. In any other case the decision is required to be the subject of internal review before it can be reviewed by the Information Commissioner.
- (3) The Information Commissioner may exercise any function of the Information Commissioner under the *Government Information (Information Commissioner) Act 2009* for the purposes of or in connection with the review of a reviewable decision of an agency.
- (4) Conduct of an agency that constitutes a reviewable decision of the agency cannot be the subject of a complaint to the Information Commissioner under section 17 of the *Government Information (Information Commissioner) Act 2009*.

#### **90    Time limit for applying for review by Information Commissioner**

An application for the review of a decision by the Information Commissioner must be made within 8 weeks after notice of the decision to which the review relates is given to the applicant.

#### **91    Disclosure of public interest information**

The Information Commissioner must not, in the exercise of functions in connection with a review under this Division, disclose any information for which there is (or for which an agency claims there is) an overriding public interest against disclosure.

#### **92    Recommendations on review**

- (1) On a review of a decision under this Division, the Information Commissioner may make such recommendations to the agency about the decision as the Information Commissioner thinks appropriate.
- (2) The recommendations specifically provided for by this Division do not limit the recommendations that the Information Commissioner can make.

#### **93    Recommendation for reconsideration of matter by agency**

- (1) The Information Commissioner may recommend that the agency reconsider the decision that is the subject of the Information

Commissioner's review and make a new decision as if the decision reviewed had not been made.

- (2) The agency may, pursuant to such a recommendation, reconsider the decision and make a new decision, whether or not the decision has already been the subject of internal review by the agency.
- (3) The agency's reconsideration of a decision is to be by way of internal review of the decision (under Division 2) unless the decision has already been internally reviewed, in which case the agency is to reconsider the decision and make a new decision.
- (4) Unlike an internal review, the reconsideration of a decision that is not an internal review:
  - (a) can be done by the person who made the original decision, and
  - (b) can be the reconsideration of a decision made by the principal officer of the agency.
- (5) The reconsideration of a decision that is not an internal review cannot be done by a person who is less senior than the person who made the original decision.
- (6) A fee of \$40 is payable (by the person who applied for the Information Commissioner's review) for the internal review of a decision pursuant to a recommendation of the Information Commissioner.

**Note.** No fee is payable for any other reconsideration of a matter pursuant to a recommendation of the Information Commissioner.

**94 Recommendation as to public interest against disclosure**

The Information Commissioner may make a recommendation against a decision of an agency that there is an overriding public interest against disclosure of government information.

**95 Recommendation as to general procedure of agency**

The Information Commissioner may make a recommendation that any general procedure of an agency in relation to dealing with access applications be changed to conform to the requirements of this Act or to further the object of this Act.

**96 Information Commissioner may refuse to review decision**

The Information Commissioner may refuse to review or to deal further with a review of a decision of an agency if the Information Commissioner is satisfied that:

- (a) the application for review is frivolous, vexatious, misconceived or lacking in substance, or

- (b) the review would require an unreasonable and substantial diversion of the resources of the Information Commissioner, or
- (c) the applicant for review has failed without reasonable excuse to co-operate with the Information Commissioner in connection with the review, or
- (d) the applicant for review cannot by reasonable efforts be contacted by the Information Commissioner.

**97 Onus on agency to justify decisions**

- (1) In any review under this Division concerning a decision made under this Act by an agency, the burden of establishing that the decision is justified lies on the agency, except as otherwise provided by this section.
- (2) If the review is of a decision to provide access to government information in response to an access application, the burden of establishing that there is an overriding public interest against disclosure of information lies on the applicant for review.
- (3) If the review is of a decision to refuse a reduction in a processing charge, the burden of establishing that there is an entitlement to the reduction lies on the applicant for review.

**98 No review of decisions reviewed by ADT**

A decision is not to be the subject of review by the Information Commissioner under this Division if the decision is or has been the subject of review by the ADT.

**99 Referral of agency decision to ADT**

The Information Commissioner may, with the consent of the applicant for review, refer a decision of an agency that is the subject of a review by the Information Commissioner under this Division to the ADT for review.

**Division 4 Review by Administrative Decisions Tribunal**

**100 Review of decision by ADT**

A person who is aggrieved by a reviewable decision of an agency may apply to the ADT for a review of the decision (referred to in this Division as *ADT review*).

**Note.** A reviewable decision does not have to be internally reviewed or reviewed by the Information Commissioner before it can be the subject of ADT review.

**101 Time for applying for ADT review**

- (1) An application for ADT review must be made within 8 weeks after notice of the decision to which the review relates is given to the applicant (unless subsection (2) gives a longer period to apply for ADT review).
- (2) If the decision is the subject of review by the Information Commissioner, an application for ADT review can be made at any time up to 4 weeks after the applicant is notified of the completion of the Information Commissioner's review.
- (3) If an application for ADT review of a decision is made while the decision is the subject of review by the Information Commissioner, the Information Commissioner's review is to end.
- (4) The ADT may, on application by a person wanting to make an application for ADT review out of time, extend the time for the making of such an application by the person if the ADT is of the opinion that the person has provided a reasonable excuse for the delay in making the application.
- (5) An application to extend the time for the making of an application for ADT review must be in writing unless the ADT dispenses with the requirement in a particular case.
- (6) The time for making an application for ADT review may be extended under this section even if that time has expired.

**102 No internal review under ADT Act**

- (1) The procedure for internal review of a decision provided for by this Part applies to the exclusion of section 53 (Internal reviews) of the ADT Act in the case of a decision that is a reviewable decision under that Act.
- (2) A reference in the ADT Act to internal review of a reviewable decision under that Act is, in its application to a reviewable decision under this Part, to be read as a reference to internal review of the decision under this Part.

**103 Operation of other ADT Act provisions**

The provisions of section 58 (Duty of administrator to lodge material documents with Tribunal where decision reviewed) and Division 2 (Effect of pending applications on reviewable decisions) of Part 3 of Chapter 5 of the ADT Act do not apply to an application for ADT review under this Division.

**104 Right of appearance before ADT**

- (1) The Information Commissioner has a right to appear and be heard in any proceedings before the ADT (and proceedings on an appeal in respect of any such proceedings) in relation to a review under this Division.
- (2) Any person who could be aggrieved by a decision of the ADT on a review under this Division has a right to appear and be heard in any proceedings before the ADT in relation to the review.

**105 Onus on agency to justify decisions**

- (1) In any review under this Division concerning a decision made under this Act by an agency, the burden of establishing that the decision is justified lies on the agency, except as otherwise provided by this section.
- (2) If the review is of a decision to provide access to government information in response to an access application, the burden of establishing that there is an overriding public interest against disclosure of information lies on the applicant for review.
- (3) If the review is of a decision to refuse a reduction in a processing charge, the burden of establishing that there is an entitlement to the reduction lies on the applicant for review.

**106 Decisions about Cabinet and Executive Council information**

- (1) On an ADT review of a decision by an agency that there is an overriding public interest against disclosure of information because the information is claimed to be Cabinet or Executive Council information (as described in Schedule 1), the ADT is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter.
- (2) If the ADT is not satisfied, by evidence on affidavit or otherwise, that there were reasonable grounds for the claim, it may require the information to be produced in evidence before it.
- (3) If the ADT is still not satisfied after considering the evidence produced that there were reasonable grounds for the claim, the ADT is to reject the claim when determining the review application and may then proceed to make a decision as to the correct and preferable decision on the matter.
- (4) The ADT is not to reject the claim unless it has given the Minister administering this Act a reasonable opportunity to appear and be heard in relation to the matter.
- (5) The Minister administering this Act is a party to any proceedings on an application under this section.

**107 Procedure for dealing with public interest considerations**

- (1) In determining an application for ADT review, the ADT is to ensure that it does not, in the reasons for its decision or otherwise, disclose any information for which there is an overriding public interest against disclosure.
- (2) On an ADT review, the ADT must receive evidence and hear argument in the absence of the public, the review applicant and the applicant's representative if in the opinion of the ADT it is necessary to do so to prevent the disclosure of information for which there is an overriding public interest against disclosure.
- (3) On an ADT review, the ADT must, on the application of the Minister administering this Act or the agency, receive evidence and hear argument in the absence of:
  - (a) the public and the applicant, and
  - (b) the applicant's representative if the ADT is of the opinion that it is necessary to do so to prevent the disclosure of information for which there is, or for which there could be or is claimed to be, an overriding public interest against disclosure.

**108 Delayed decisions**

- (1) The ADT may on the application of an agency make an order allowing the agency further time to decide an access application if the decision that is the subject of ADT review is a decision the agency is deemed to have made because the access application or internal review concerned was not decided within time (referred to in this section as a *deemed refusal decision*).
- (2) Such an order may be made subject to such conditions as the ADT thinks fit, including either of the following conditions:
  - (a) a condition that if a decision is made to provide access to the information concerned during the further time allowed, any charge that would otherwise be payable in connection with providing that access is to be reduced or waived and the applicant for the ADT review may apply to the ADT for an order that the applicant's costs in proceedings on the ADT review are to be paid by the agency,
  - (b) a condition permitting the agency to impose processing charges for work done in connection with the access application (as if the application had been decided within time).
- (3) If an agency makes a reviewable decision (the *subsequent decision*) on an access application following a deemed refusal decision on the application and while the deemed refusal decision is the subject of ADT

review, the ADT may on application by the applicant deal with the application for ADT review as if it were an application for review of the subsequent decision.

**109 ADT may refuse to review decision**

The ADT may refuse to review or to deal further with a review of a decision of an agency if the ADT is satisfied that the application for review is frivolous, vexatious, misconceived or lacking in substance.

**110 Orders to restrain making of unmeritorious access applications**

- (1) The ADT may order that a person is not permitted to make an access application without first obtaining the approval of the ADT if the ADT is satisfied that the person has made at least 3 access applications (to one or more agencies) in the previous 2 years that lack merit. Such an order is a *restraint order*.
- (2) An access application is to be regarded as lacking merit if:
  - (a) the agency decided the application by refusing to deal with the application in its entirety, or
  - (b) the agency decided the application by deciding that none of the information applied for is held by the agency, or
  - (c) the access applicant's entitlement to access lapsed without that access being provided (including as a result of failure to pay any processing charge payable).
- (3) A restraint order may be made to apply to all access applications made by the person the subject of the order or may be limited by reference to particular kinds of information or particular agencies.
- (4) A person who is subject to a restraint order cannot apply to the ADT for approval to the making of an access application by the person without first serving notice of the application for approval on the agency concerned and the Information Commissioner.
- (5) An application for a restraint order against a person may be made by an agency that receives an access application from the person (whether or not the agency has decided the application) or by the Minister or the Information Commissioner.
- (6) The ADT may order that a person who is the subject of a restraint order is not permitted to apply to the ADT for approval to make an access application if the ADT is satisfied that the person has repeatedly made applications for approval that are lacking in substance.
- (7) While a restraint order is in force against a person, any application for government information made to an agency in contravention of the order is not a valid access application.

**111 Referral of systemic issues to Information Commissioner**

The ADT may refer any matter to the Information Commissioner that the ADT considers is indicative of a systemic issue in relation to the determination of access applications by a particular agency or by agencies generally.

**112 Report on improper conduct**

If the ADT is of the opinion as a result of an ADT review that an officer of an agency has failed to exercise in good faith a function conferred on the officer by or under this Act, the ADT may bring the matter to the attention of the Minister who appears to the ADT to have responsibility for the agency.



## **Part 6 Protections and offences**

### **Division 1 Protections**

#### **113 Protection in respect of actions for defamation or breach of confidence**

- (1) If government information is disclosed pursuant to a decision under this Act, and the person by whom the decision is made believes in good faith, when making the decision, that this Act permits or requires the decision to be made:
  - (a) no action for defamation or breach of confidence lies against the Crown, an agency or an officer of an agency by reason of the making of the decision or the disclosure of information, and
  - (b) no action for defamation or breach of confidence in respect of any publication involved in, or resulting from, the disclosure of information lies against the author of a record containing the information or any other person by reason of the author or other person having supplied the record to an agency.
- (2) Neither the giving of access to information pursuant to a decision under this Act nor the making of such a decision constitutes, for the purposes of the law relating to defamation or breach of confidence, an authorisation or approval of the publication of a record containing the information or its contents by the person to whom the information is disclosed.

#### **114 Protection in respect of certain criminal actions**

If government information is disclosed pursuant to a decision under this Act, and the person by whom the decision is made believes in good faith, when making the decision, that this Act permits or requires the decision to be made, neither the person by whom the decision is made nor any other person concerned in disclosing the information is guilty of an offence merely because of the making of the decision or the disclosing of information.

#### **115 Personal liability**

No matter or thing done by an agency or officer of an agency, or by any person acting under the direction of an agency or officer of an agency, if the matter or thing was done in good faith for the purposes of executing this Act, subjects the officer or person so acting, personally to any action, liability, claim or demand.

## **Division 2 Offences**

### **116 Offence of acting unlawfully**

An officer of an agency must not make a reviewable decision in relation to an access application that the officer knows to be contrary to the requirements of this Act.

Maximum penalty: 100 penalty units.

### **117 Offence of directing unlawful action**

A person (the *offender*) must not:

- (a) direct an officer of an agency who is required to make a decision in relation to an access application to make a reviewable decision that the offender knows is not a decision permitted or required to be made by this Act, or
- (b) direct a person who is an officer of an agency involved in an access application to act in a manner that the offender knows is otherwise contrary to the requirements of this Act.

Maximum penalty: 100 penalty units.

### **118 Offence of improperly influencing decision on access application**

A person (the *offender*) who influences the making of a decision by an officer of an agency for the purpose of causing the officer to make a reviewable decision that the offender knows is not the decision permitted or required to be made by this Act is guilty of an offence.

Maximum penalty: 100 penalty units.

### **119 Offence of unlawful access**

A person who in connection with an access application knowingly misleads or deceives an officer of an agency for the purpose of obtaining access to government information is guilty of an offence.

Maximum penalty: 100 penalty units.

### **120 Offence of concealing or destroying government information**

A person who destroys, conceals or alters any record of government information for the purpose of preventing the disclosure of the information as authorised or required by or under this Act is guilty of an offence.

Maximum penalty: 100 penalty units.

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## Part 7 Miscellaneous

### 121 Provision of information by private sector contractors

- (1) An agency that enters into a contract (a **government contract**) with a private sector entity (**the contractor**) under which the contractor is to provide services to the public on behalf of the agency must ensure that the contract provides for the agency to have an immediate right of access to the following information contained in records held by the contractor:
- (a) information that relates directly to the performance of the services by the contractor,
  - (b) information collected by the contractor from members of the public to whom it provides, or offers to provide, the services,
  - (c) information received by the contractor from the agency to enable it to provide the services.

**Note.** A reference in this Act to government information held by an agency includes information held by a private sector entity to which the agency has an immediate right of access. See clause 12 of Schedule 4. This means that an access application can be made to the agency for that information.

- (2) A government contract is not required to provide for the agency to have an immediate right of access to any of the following information:
- (a) information that discloses or would tend to disclose the contractor's financing arrangements, financial modelling, cost structure or profit margins,
  - (b) information that the contractor is prohibited from disclosing to the agency by provision made by or under any Act (of this or another State or of the Commonwealth),
  - (c) information that, if disclosed to the agency, could reasonably be expected to place the contractor at a substantial commercial disadvantage in relation to the agency, whether at present or in the future.

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

### 122 Act binds the Crown

This Act binds the State and, in so far as the legislative power of the Parliament of New South Wales permits, the other States, the Territories and the Commonwealth.

### 123 State Records Act not affected

This Act does not affect the operation of the *State Records Act 1998*.

#### **124 Powers of Ombudsman**

The powers of the Ombudsman under the *Ombudsman Act 1974* do not extend to investigating the conduct of any person or body in relation to a decision of an agency that is a reviewable decision under Part 5 of this Act.

#### **125 Reports to Parliament**

- (1) Each agency (other than a Minister) must, within 4 months after the end of each reporting year, prepare an annual report on the agency's obligations under this Act for submission to the Minister responsible for the agency. A copy of the report is to be provided to the Information Commissioner.
- (2) Each Minister must, on or before 31 August each year, furnish the Minister administering this Act with such information concerning the Minister's obligations as an agency under this Act as the Minister administering this Act may require.
- (3) The Minister administering this Act must, on or before 31 December each year, prepare an annual report on the obligations of each Minister as an agency under this Act. A copy of the report is to be provided to the Information Commissioner.
- (4) An annual report under this section must be tabled in each House of Parliament by the relevant Minister as soon as practicable after it is prepared unless it is included in an annual report prepared for the purposes of the *Annual Reports (Departments) Act 1985* or the *Annual Reports (Statutory Bodies) Act 1984*.
- (5) The annual report referred to in subsection (3) may be included in the annual report for the Department of Premier and Cabinet prepared for the purposes of the *Annual Reports (Departments) Act 1985*.
- (6) The regulations may make provision for:
  - (a) the information to be included in annual reports, and
  - (b) the form in which annual reports are to be prepared.
- (7) In this section, a reference to the reporting year of an agency is a reference to:
  - (a) the financial year of the agency for the purposes of the *Annual Reports (Departments) Act 1985* or the *Annual Reports (Statutory Bodies) Act 1984*, or
  - (b) if the agency does not have a financial year for the purposes of either of those Acts, the year ending 30 June.

**126 Requirements for notices given by agencies**

- (1) The following requirements apply to any notice or notification that an agency is required to give under this Act:
  - (a) it must be in writing,
  - (b) it must include the date of the decision or other action of the agency with which the notice or notification is concerned,
  - (c) it must include a statement that gives details of any right of review provided by this Act in respect of any decision of the agency with which the notice or notification is concerned (including details of the period within which any such right of review must be exercised),
  - (d) it must include the contact details of an officer of the agency to whom inquiries can be directed in connection with the decision or other action of the agency with which the notice or notification is concerned,
  - (e) it must not disclose any information for which there is an overriding public interest against disclosure.
- (2) A notice or notification under this Act that is given by an agency to a person by being posted to the person at the postal address provided by the person for correspondence in connection with the matter concerned is considered to have been given to the person when it is posted by the agency.

**127 Waiver, reduction or refund of fees and charges**

An agency is entitled to waive, reduce or refund any fee or charge payable or paid under this Act in any case that the agency thinks appropriate, subject to the regulations.

**128 Nature of proceedings for offences**

- (1) Proceedings for an offence under this Act or the regulations may be dealt with summarily before a Local Court.
- (2) Proceedings for an offence under this Act or the regulations may only be taken by or with the authority of the Director of Public Prosecutions or the Attorney General.

**129 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

- (2) In particular, the regulations may make provision for or with respect to the following:
  - (a) the manner in which agencies are to make government information publicly available,
  - (b) the manner in which an access application can be made,
  - (c) the adoption and amendment of publication guides by agencies (including the obligations of agencies to consult with the Information Commissioner in connection with publication guides and the adoption of model publication guides developed by the Information Commissioner),
  - (d) information to be given to applicants for government information,
  - (e) the circumstances in which and the extent to which an agency must or may waive, reduce or refund any fee or charge payable under this Act.
- (3) The Minister is to consult with the Information Commissioner before recommending the making of a regulation under this Act.

**130 Review of Act**

- (1) The Minister administering this Act is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The Minister is to consult with the Information Commissioner on a review under this section and the Information Commissioner may assist the Minister and provide advice in connection with the review.
- (3) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (4) A report on the outcome of the review is to be provided to the Minister administering this Act and tabled in each House of Parliament within 12 months after the end of the period of 5 years.

**131 Review of public interest provisions by Joint Committee**

- (1) The Joint Committee is to keep the following provisions of this Act under review to determine whether the policy objectives of those provisions remain valid and whether the content of those provisions remains appropriate for securing those objectives:
  - (a) Schedule 1 (Information for which there is conclusive presumption of overriding public interest against disclosure),
  - (b) Schedule 2 (Excluded information of particular agencies),

- (c) Table to section 14 (Public interest considerations against disclosure).
- (2) The Joint Committee is to consult with the Information Commissioner on any review under this section and the Information Commissioner may assist the Joint Committee and provide advice in connection with the review.
- (3) The Joint Committee may report to both Houses of Parliament on any change that the Joint Committee considers should be made to the provisions reviewed under this section.

**132 Government Information (Public Access) Regulation 2009**

- (1) Schedule 5 is taken to be and has effect as a regulation made under this Act.
- (2) Part 2 of the *Subordinate Legislation Act 1989* does not apply to the regulation set out in Schedule 5 (but applies to any amendment or repeal of the regulation).
- (3) For the purposes of section 10 of the *Subordinate Legislation Act 1989*, the regulation set out in Schedule 5 is taken to have been published on the day on which this section commences.
- (4) Sections 39, 40 and 41 of the *Interpretation Act 1987* do not apply to the regulation set out in Schedule 5 (but apply to any amendment or repeal of the regulation).
- (5) Schedule 5 is repealed on the day following the day on which this section commences.

**Note.** The continued effect of the regulation set out in Schedule 5 is unaffected by the repeal of Schedule 5. See section 30 of the *Interpretation Act 1987*.

## **Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure**

(Section 14)

### **1 Overriding secrecy laws**

It is to be conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which is prohibited by any of the following laws (which are referred to in this Act as *overriding secrecy laws*), whether or not the prohibition is subject to specified qualifications or exceptions and whether or not a breach of the prohibition constitutes an offence:

*Assisted Reproductive Technology Act 2007*—Part 3 (Central ART donor register)

*Bail Act 1978*—section 36C (Certain information not to be published or broadcast)

*Biofuel (Ethanol Content) Act 2007*—section 21 (Secrecy)

*Casino, Liquor and Gaming Control Authority Act 2007*—section 17 (Secrecy)

*Charter of Budget Honesty (Election Promises Costing) Act 2006*—section 14 (Confidentiality of information or documents relating to Treasury costing of election promises)

*Child Protection (Offenders Registration) Act 2000*—section 21E (Prohibited disclosure of information concerning registrable persons)

*Crimes (Administration of Sentences) Act 1999*—regulations under section 256 (Victims Register)

*Crimes (Forensic Procedures) Act 2000*—section 109 (Disclosure of information)

*Crimes (Sentencing Procedure) Act 1999*—sections 51B (Certain information not to be published or broadcast) and 100H (Certain information not to be published or broadcast)

*Criminal Procedure Act 1986*—regulations under section 351 (Regulations with respect to the provision or disclosure of information in connection with intervention programs)

*Criminal Records Act 1991*—section 13 (Unlawful disclosure of information concerning spent convictions)

*Dust Diseases Tribunal Act 1989*—section 32I (Information about claims)



*Education Act 1990*—provision made by or under section 18A (Publication of results of certain tests and other matters) or Division 2 of Part 5A (Health and safety risks at schools arising from student behaviour)

*Health Administration Act 1982*—Divisions 6B (Quality assurance committees) and 6C (Root cause analysis teams) of Part 2, and section 23 (Specially privileged information)

*Health Care Complaints Act 1993*

*Independent Commission Against Corruption Act 1988*

*Jury Act 1977*

*Police Act 1990*—section 169A (Identity of complainant not to be disclosed)

*Police Integrity Commission Act 1996*

*Police Regulation 2008*—clause 53 (Secrecy as to complaints about conduct)

*Protected Disclosures Act 1994*—section 22 (Confidentiality guideline)

*Public Lotteries Act 1996*—section 80 (Secrecy)

*Royal Commission (Police Service) Act 1994*

*State Records Act 1998*—section 73 (Authority's duty of confidentiality) but only in respect of information to which a person gains access in the exercise of functions under that Act as a result of the information having been acquired in the course of the administration of another Act mentioned in this Schedule

*Totalizator Act 1997*—section 105 (Secrecy)

*Witness Protection Act 1995*

## 2 Cabinet information

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as **Cabinet information**) contained in any of the following documents:
  - (a) a document that contains an official record of Cabinet,
  - (b) a document prepared for the dominant purpose of its being submitted to Cabinet for Cabinet's consideration (whether or not the document is actually submitted to Cabinet),
  - (c) a document prepared for the purpose of its being submitted to Cabinet for Cabinet's approval for the document to be used for the dominant purpose for which it was prepared (whether or not the document is actually submitted to Cabinet and whether or not the approval is actually given),

Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure

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- (d) a document prepared after Cabinet's deliberation or decision on a matter that would reveal or tend to reveal information concerning any of those deliberations or decisions,
  - (e) a document prepared before or after Cabinet's deliberation or decision on a matter that reveals or tends to reveal the position that a particular Minister has taken, is taking, will take, is considering taking, or has been recommended to take, on the matter in Cabinet,
  - (f) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)–(e).
- (2) Information contained in a document is not Cabinet information if:
- (a) public disclosure of the document has been approved by the Premier or Cabinet, or
  - (b) 10 years have passed since the end of the calendar year in which the document came into existence.
- (3) Information is not Cabinet information merely because it is contained in a document attached to a document referred to in subclause (1).
- (4) Information is not Cabinet information to the extent that it consists solely of factual material unless the information would:
- (a) reveal or tend to reveal information concerning any Cabinet decision or determination, or
  - (b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet.
- (5) In this clause, *Cabinet* includes a committee of Cabinet and a subcommittee of a committee of Cabinet.

### 3 Executive Council information

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information (referred to in this Act as *Executive Council information*) contained in any of the following documents:
- (a) a document that contains an official record of the Executive Council,
  - (b) a document prepared for the purpose of being submitted to the Executive Council (whether or not that is the only or the dominant purpose for which it was prepared and whether or not the document is actually submitted to the Executive Council),

- (c) a document prepared after the Executive Council's deliberation or advice on a matter that would reveal or tend to reveal information concerning that deliberation or advice,
  - (d) a document that is a preliminary draft of, or a copy of or part of, or contains an extract from, a document referred to in paragraphs (a)–(c).
- (2) Information contained in a document is not Executive Council information if:
- (a) public disclosure of the document has been approved by the Governor or the Premier, or
  - (b) 10 years have passed since the end of the calendar year in which the document came into existence.
- (3) Information is not Executive Council information merely because it is contained in a document attached to a document referred to in subclause (1).
- (4) Information is not Executive Council information to the extent that it consists solely of factual material unless the information would reveal or tend to reveal information concerning any deliberation or advice of the Executive Council.

#### **4 Contempt**

It is to be conclusively presumed that there is an overriding public interest against disclosure of information the public disclosure of which would, but for any immunity of the Crown:

- (a) constitute contempt of court, or
- (b) contravene any order or direction of a person or body having power to receive evidence on oath, or
- (c) infringe the privilege of Parliament.

#### **5 Legal professional privilege**

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would be privileged from production in legal proceedings on the ground of client legal privilege (legal professional privilege), unless the person in whose favour the privilege exists has waived the privilege.
- (2) An agency in whose favour legal professional privilege exists is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause.

Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure

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- (3) A decision that an agency makes under subclause (2) is not a reviewable decision under Part 5.

## **6 Excluded information**

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that is excluded information of an agency, other than information that the agency has consented to the disclosure of.
- (2) Before an agency decides an access application by refusing to provide access to information on the basis that it is excluded information of another agency, the agency is required to ask the other agency whether the other agency consents to disclosure of the information.
- (3) A decision that an agency makes to consent or to refuse to consent to the disclosure of excluded information of the agency is not a reviewable decision under Part 5.

## **7 Documents affecting law enforcement and public safety**

It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in any of the following documents:

- (a) a document created by the former Information and Intelligence Centre of the Police Service or the former State Intelligence Group,
- (b) a document created by the Counter Terrorism and Special Tactics Command of the NSW Police Force, the former Counter Terrorist Co-ordination Command of the NSW Police Force, the former Protective Security Group of the Police Service, the former Special Branch of the Police Service or the former Bureau of Criminal Intelligence,
- (c) a document created by the State Crime Command of the NSW Police Force in the exercise of its functions concerning the collection, analysis or dissemination of intelligence,
- (d) a document created by the Corrections Intelligence Group of the Department of Corrective Services in the exercise of its functions concerning the collection, analysis or dissemination of intelligence,
- (e) a document created by the Drug Intelligence Unit of the Department of Juvenile Justice in the exercise of its functions concerning the collection, analysis or dissemination of intelligence.

## **8 Transport safety**

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would disclose:
  - (a) matter relating to an investigation or inquiry under section 65, 67 or 69 of the *Rail Safety Act 2008*, or
  - (b) matter relating to an investigation or inquiry into a transport accident or incident under section 46BA or 46BC of the *Passenger Transport Act 1990*.
- (2) Despite subclause (1) (a), information about a matter referred to in that paragraph ceases to be covered by this clause:
  - (a) in the case of information relating to an inquiry under section 65 into a matter that is not also the subject of an investigation under section 67 or an inquiry under section 69, if the inquiry under section 65 is included in a list forwarded to the Minister under that section, or
  - (b) in the case of information relating to an investigation under section 67 or an inquiry under section 69, when the report into the investigation or inquiry is tabled before both Houses of Parliament.
- (3) Despite subclause (1) (b), information about a matter referred to in that paragraph ceases to be covered by this clause when the report into the investigation or inquiry is tabled before both Houses of Parliament.

## **9 Adoption**

It is to be conclusively presumed that there is an overriding public interest against disclosure of information that would disclose:

- (a) matter relating to adoption procedures under the *Adoption Act 2000*, or
- (b) matter relating to the receipt of an amended or original birth certificate or of prescribed information under the *Adoption Act 2000*.

## **10 Care and protection of children**

It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the *Children and Young Persons (Care and Protection) Act 1998* applies.

## **11 Ministerial Code of Conduct**

It is to be conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which would

Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure

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disclose information contained in the Register of Interests kept by or on behalf of the Premier pursuant to the Code of Conduct for Ministers of the Crown adopted by Cabinet.

**12 Aboriginal and environmental heritage**

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a document that is the subject of a declaration referred to in section 161 of the *National Parks and Wildlife Act 1974*.
- (2) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that is matter that the Director-General under the *Threatened Species Conservation Act 1995* has determined should not be disclosed to the public under section 146 of that Act.
- (3) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that is matter that the Scientific Committee under the *Threatened Species Conservation Act 1995* has recommended to the Minister should not be disclosed to the public under section 146A of that Act and the Minister has accepted that recommendation.
- (4) It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a plan of management or draft plan of management for an area of community land under Division 2 of Part 2 of Chapter 6 of the *Local Government Act 1993* that is the subject of a resolution of confidentiality referred to in section 36DA (2) of that Act (which relates to the disclosure of the nature and location of a place or an item of Aboriginal significance).

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## Schedule 2 Excluded information of particular agencies

**Note.** Information that relates to a function specified in this Schedule in relation to an agency specified in this Schedule is **excluded information** of the agency. Under Schedule 1 it is to be conclusively presumed that there is an overriding public interest against disclosure of excluded information of an agency (unless the agency consents to disclosure). Section 43 prevents an access application from being made to an agency for excluded information of the agency.

### 1 Judicial and prosecutorial information

A court—judicial functions.

The office of Director of Public Prosecutions—prosecuting functions.

### 2 Complaints handling and investigative information

The office of Auditor-General—investigative, audit and reporting functions.

The Independent Commission Against Corruption—corruption prevention, complaint handling, investigative and reporting functions.

The office of Inspector of the Independent Commission Against Corruption—operational auditing, complaint handling, investigative and reporting functions.

The Judicial Commission of New South Wales (including the Conduct Division)—complaint handling, investigative and reporting functions.

The office of Ombudsman—complaint handling, investigative and reporting functions (including any functions of the Ombudsman under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*).

The office of Information Commissioner—review, complaint handling, investigative and reporting functions.

The office of Legal Services Commissioner—complaint handling, investigative, review and reporting functions.

The Health Care Complaints Commission—complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry and any function concerning the provision of information to a registration authority (within the meaning of the *Health Care Complaints Act 1993*) relating to a particular complaint).

The Child Death Review Team—all functions.

The Police Integrity Commission—corruption prevention, complaint handling, investigative and reporting functions.

The office of Inspector of the Police Integrity Commission—operational auditing, complaint handling, investigative and reporting functions.

The office of Privacy Commissioner—complaint handling, investigative and reporting functions.

The New South Wales Crime Commission—investigative and reporting functions.

The President of the Anti-Discrimination Board—complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the President.

The Department of Local Government (including the Director-General and other Departmental representatives)—complaint handling and investigative functions conferred by or under any Act on that Department.

### **3 Competitive and market sensitive information**

The Treasury Corporation—borrowing, investment and liability and asset management functions.

The SAS Trustee Corporation—investment functions.

Any body or office that exercises functions under the *National Electricity (NSW) Law* (including functions under the *National Electricity Code* referred to in that Law) on behalf of National Electricity Market Management Company Limited (ACN 072 010 327) (NEMMCO) or any successor to NEMMCO—those functions.

The Corporation constituted under the *Superannuation Administration Authority Corporatisation Act 1999*—functions exercised in the provision of superannuation scheme administration services, and related services, in respect of any superannuation scheme that is not a State public sector superannuation scheme.

The Workers Compensation Nominal Insurer established under the *Workers Compensation Act 1987*—functions relating to the issuing of policies of insurance to employers and the calculation of premiums (but only in relation to individual employers), the management of specific claims and to asset and funds management and investment.

### **4 Other information**

The office of Public Trustee—functions exercised in the Public Trustee's capacity as executor, administrator or trustee.

The Department of Education and Training—functions relating to the storing of, reporting on or analysis of information with respect to the



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ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions.

Universities—functions relating to dealing with information with respect to the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions.

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## **Schedule 3 Savings, transitional and other provisions**

### **Part 1 General**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:  
this Act  
*Government Information (Information Commissioner) Act 2009*  
*Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009*
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

### **Part 2 Provisions consequent on enactment of this Act**

#### **2 Definition**

In this Part:

**FOI Act** means the *Freedom of Information Act 1989* as in force immediately before its repeal.

#### **3 FOI access applications**

- (1) The FOI Act continues to apply (as if it had not been repealed) to and in respect of:
  - (a) an application under that Act for access to an agency's documents or a Minister's documents that was made or determined before the repeal of that Act, and

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- (b) any determination made in respect of any such application (whether made before or after the repeal of that Act).
  - (2) A provision of an Act amended by the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* has effect in relation to an application under the FOI Act referred to in subclause (1) as if the provision had not been amended by that Act.
  - (3) An application to an agency for access to government information that is made within the period of 12 months after the repeal of the FOI Act that states that it is made under or for the purposes of the FOI Act is deemed to state that it is made under this Act and is to be dealt with accordingly.

#### **4 FOI amendment of records applications**

- (1) The FOI Act continues to apply (as if it had not been repealed) to and in respect of:
  - (a) an application under that Act for amendment of an agency's records that was made or determined before the repeal of that Act, and
  - (b) any determination made in respect of any such application (whether made before or after the repeal of that Act).
- (2) A provision of an Act amended by the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* has effect in relation to an application under the FOI Act referred to in subclause (1) as if the provision had not been amended by that Act.
- (3) An application to an agency for amendment of the agency's records that is made within the period of 12 months after the repeal of the FOI Act that states that it is made under or for the purposes of that Act (or Part 4 of that Act) is deemed to state that it is made under Part 6A of the *Privacy and Personal Information Protection Act 1998* and is to be dealt with accordingly.

#### **5 Register of government contracts**

- (1) Division 5 (Government contracts with private sector) of Part 3 does not apply to a government contract entered into by or on behalf of an agency before 1 January 2007 (being the date of commencement of section 15A of the FOI Act).
- (2) Division 5 of Part 3 does not apply to a government contract entered into by a SOC or local authority before the commencement of this clause.

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## Schedule 4 Interpretative provisions

### 1 Definitions

In this Act:

**access applicant** means the applicant under an access application.

**access application**—see section 4.

**ADT** means the Administrative Decisions Tribunal established by the ADT Act.

**ADT Act** means the *Administrative Decisions Tribunal Act 1997*.

**agency**—see section 4.

**commercial-in-confidence provisions** of a contract means any provisions of the contract that disclose:

- (a) the contractor's financing arrangements, or
- (b) the contractor's cost structure or profit margins, or
- (c) the contractor's full base case financial model, or
- (d) any intellectual property in which the contractor has an interest, or
- (e) any matter the disclosure of which would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.

**contractor**, in relation to a government contract entered into by an agency, means the person with whom the agency has entered into the contract.

**court** includes:

- (a) a tribunal, a Magistrate and a coroner, and
- (b) a registry or other office of a court and the members of staff of that registry or other office.

**disclose** information includes make information available and release or provide access to information.

**Note.** See also the definition of **reveal**.

**disclosure log** means a disclosure log kept by an agency under Part 3 (Open access information).

**excluded information** of an agency specified in Schedule 2 means information that relates to any function specified in that Schedule in relation to the agency.

**exercise** a function includes perform a duty.

**function** includes a power, authority or duty.

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**government contract** means any of the following contracts between an agency and a private sector entity:

- (a) a contract under which a party agrees to undertake a specific project (such as a construction, infrastructure or property development project),
- (b) a contract under which a party agrees to provide specific goods or services (such as information technology services), other than a contract of employment,
- (c) a contract under which a party agrees to transfer real property to another party to the contract,
- (d) a lease of real property.

**Government Department** means a Department under the *Public Sector Employment and Management Act 2002*.

**government information**—see section 4.

**Information Commissioner** means the Information Commissioner under the *Government Information (Information Commissioner) Act 2009*.

**Joint Committee** means the Joint Committee under the *Government Information (Information Commissioner) Act 2009*.

**judicial functions**, in relation to a court, means such of the functions of the court as relate to the hearing or determination of proceedings before it, and includes:

- (a) in relation to a Magistrate—such of the functions of the Magistrate as relate to the conduct of committal proceedings, and
- (b) in relation to a coroner—such of the functions of the coroner as relate to the conduct of inquests and inquiries under the *Coroners Act 1980*.

**legislative instrument** means a Public Act or an instrument made under a Public Act.

**local authority** means a council or county council within the meaning of the *Local Government Act 1993*.

**open access information**—see Part 3.

**person** includes an agency, the government of another jurisdiction (including a jurisdiction outside Australia) and an agency of the government of another jurisdiction.

**Note.** This definition does not limit the definition of **person** in the *Interpretation Act 1987*, which includes an individual, a corporation and a body corporate or politic.

**personal information**—see clause 4.

**principal officer** of an agency means the head or chief executive officer (however designated) of the agency or the person of greatest seniority

in the agency, and includes the Minister in the case of an agency that is a Minister.

**private sector entity** means any person or body (whether incorporated or unincorporated) who or which is not an agency.

**public authority**—see clause 2.

**public office**—see clause 3.

**record**—see clause 10.

**reveal** information means to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).

**reviewable decision** means a decision of an agency that is a reviewable decision under Part 5.

**State** includes Territory.

**State owned corporation** or **SOC** means a State owned corporation under the *State Owned Corporations Act 1989*.

**working day** means any day that is not a Saturday, Sunday or public holiday.

## 2 Public authorities

- (1) In this Act, **public authority** means:
  - (a) a statutory body representing the Crown, or
  - (b) a body (whether incorporated or unincorporated) established or continued for a public purpose by or under the provisions of a legislative instrument, or
  - (c) the NSW Police Force, or
  - (d) the Teaching Service, or
  - (e) a State owned corporation, or
  - (f) a wholly-owned subsidiary of the Crown in right of the State or of a public authority, or
  - (g) a body declared to be a public authority by a regulation under this clause.
- (2) The regulations may declare any of the following bodies to be a public authority:
  - (a) a body (whether incorporated or unincorporated) established for a public purpose otherwise than by or under the provisions of a legislative instrument,
  - (b) a body (whether incorporated or unincorporated) that is established by the Governor or by a Minister or that is an incorporated company or association over which a Minister is in a position to exercise direction or control.

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- (3) None of the following is a public authority for the purposes of a provision of this Act:
- (a) an incorporated company or association (unless declared to be a public authority for the purposes of the provision by a regulation under this clause),
  - (b) the Legislative Council or the Legislative Assembly or a committee of either or both of those bodies,
  - (c) a Royal Commission or a Special Commission of Inquiry,
  - (d) a local authority.
- (4) An unincorporated body that is a board, council, committee, subcommittee or other body established or continued by or under the provisions of a legislative instrument for the purpose of assisting, or exercising functions connected with, an agency is not to be regarded as a separate public authority and instead is to be regarded as part of and included in the agency.
- (5) A regulation declaring a body to be a public authority may declare a body to be a public authority either generally or for the purposes only of specified provisions of this Act.

### **3 Public offices**

- (1) In this Act, *public office* means:
- (a) an office established or continued for a public purpose by or under the provisions of a legislative instrument, or
  - (b) any other office to which an appointment is made by the Governor or by a Minister that is declared by the regulations to be a public office.
- (2) None of the following is a public office for the purposes of this Act:
- (a) the office of Governor, Lieutenant-Governor or Administrator of the State,
  - (b) the office of a member of the Legislative Council or the Legislative Assembly or of a committee of either or both of those bodies,
  - (c) the office of President of the Legislative Council or Speaker of the Legislative Assembly or Chair of a committee of either or both of those bodies,
  - (d) the office of a Minister of the Crown, Parliamentary Secretary or member of the Executive Council,
  - (e) an office the duties of which the person performs as an officer of an agency,
  - (f) the office of a judicial officer of a court,

- (g) an office of member of an agency,
- (h) an office established or continued by or under the provisions of a legislative instrument for the purposes of an agency,
- (i) an office established or continued by or under the provisions of a legislative instrument for the purposes of a body that is excluded from the definition of *public authority* by clause 2 (3).

#### 4 Personal information

- (1) In this Act, *personal information* means information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion.
- (2) Personal information includes such things as an individual's fingerprints, retina prints, body samples or genetic characteristics.
- (3) Personal information does not include any of the following:
  - (a) information about an individual who has been dead for more than 30 years,
  - (b) information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions,
  - (c) information about an individual that is of a class, or is contained in a document of a class, prescribed by the regulations for the purposes of this subclause.

#### 5 Regulations may include persons and entities as agencies

- (1) The regulations may declare a person or entity that is not otherwise an agency to be an agency (a *deemed agency*) for the purposes of all or specified provisions of this Act and the *Government Information (Information Commissioner) Act 2009* in relation to all or specified agency functions of the person or entity.
- (2) A function of a person or entity is an *agency function* if it is:
  - (a) a function of a kind that is or was ordinarily exercised by an agency, or
  - (b) a function of an agency that the person or entity is exercising pursuant to a contract or other arrangement with the agency.
- (3) A deemed agency is an agency only in respect of information that relates to the exercise by the deemed agency of the agency functions in respect of which it is declared to be an agency and only while the



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deemed agency exercises those functions (or for such shorter period as may be provided by the regulations).

- (4) A regulation under this clause may provide that information relating to any specified function of a deemed agency is excluded information of the agency under this Act.
- (5) The regulations under clause 6 may also declare that a deemed agency is not to be regarded as a separate agency and instead is to be regarded for the purposes of this Act as part of and included in another specified agency.
- (6) The Minister must, before recommending the making of a regulation under this clause, consult with the person or entity concerned and with any agency with which the person or entity has a contract or other arrangement for the exercise of the functions concerned.

**Note.** The Minister is also required to consult with the Information Commissioner. See section 129 (3).

#### **6 Regulations may declare agency to be part of another agency**

- (1) The regulations may declare that a specified agency (the *subsidiary agency*) is not to be regarded as a separate agency and instead is to be regarded for the purposes of this Act as part of and included in another specified agency (the *parent agency*).
- (2) An access application made to the parent agency specifically for government information held by the subsidiary agency can be dealt with by the parent agency as an access application only for government information held by the subsidiary agency and not for government information otherwise held by the parent agency.

#### **7 References to the Government**

A reference in this Act to the Government includes, where appropriate, a reference to an agency.

#### **8 Bodies forming part of agencies**

A reference in this Act to an agency includes a reference to any body that forms part of the agency or that exists mainly for the purpose of enabling the agency to exercise its functions.

#### **9 Officer of an agency**

A reference in this Act to an officer of an agency includes a reference to a member of the agency, the principal officer of the agency and any other person employed within the agency or as a member of staff of the agency, and in the case of an agency that is a Minister, includes a reference to the Minister.

**10 Meaning of “record”**

- (1) In this Act:  
*record* means any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means.
- (2) A reference in this Act to a record includes a reference to a copy of the record.
- (3) For the purposes of the definition of *record* in this Act, the knowledge of a person is not a record.

**11 Government information held by Minister**

A reference in this Act to government information held by an agency is, when the agency is a Minister, a reference to government information held by the Minister in the course of the exercise of official functions in, or for any official purpose of, or for the official use of, the office of Minister of the Crown.

**12 Government information held by agency**

- (1) A reference in this Act to government information held by an agency is a reference to:
  - (a) information contained in a record held by the agency, or
  - (b) information contained in a record held by a private sector entity to which the agency has an immediate right of access, or
  - (c) information contained in a record in the possession or custody of the State Records Authority (or that the Authority has in the custody or possession of some other person) to which the agency has an immediate right of access, other than a record that is withheld from public access under section 59 of the *State Records Act 1998*, or
  - (d) information contained in a record that is in the possession, or under the control, of a person in his or her capacity as an officer or member of staff of the agency (including, in the case of a Minister, the personal staff of the Minister).
- (2) Information that would be regarded as government information held by an agency because the agency has access to a record that contains the information is not to be regarded as government information held by the agency if the public generally has access to the record (for example, because the record is available on the Internet).
- (3) Information contained in a record that genuinely forms part of the library material held by an agency is not government information held by the agency.

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**13 Records in certain agencies**

- (1) A record that is held by:
  - (a) the State Records Authority, or
  - (b) the Australian Museum, or
  - (c) the Museum of Applied Arts and Sciences, or
  - (d) the State Library, or
  - (e) any other prescribed agency,but that was originally created or received by another agency is taken to be held by that other agency.
- (2) A record that is held by an agency referred to in subclause (1) and that relates to the affairs of a Royal Commission or a Special Commission of Inquiry is taken to be held by the Minister administering the *Royal Commissions Act 1923* or the Minister administering the *Special Commissions of Inquiry Act 1983*, as appropriate.
- (3) Information contained in a record held by an agency that is a public archive is not government information for the purposes of this Act if:
  - (a) the record was not created by an agency in relation to the functions of an agency, and
  - (b) the record is held in the public archive subject to a condition imposed by the person or body (not being an agency) by whom it has been placed in the possession of the archive prohibiting its disclosure to members of the public generally or to certain members of the public or restricting its disclosure to certain members of the public.
- (4) In this clause, **public archive** includes:
  - (a) each of the agencies referred to in subclause (1), and
  - (b) a library that forms part of a university, college of advanced education or college of technical and further education.

**14 Defunct agencies**

- (1) When an agency (the **former agency**) ceases to exist:
  - (a) any government information taken to be held by the former agency is instead taken to be held by the successor agency, and
  - (b) an access application made to the former agency is taken to have been made to the successor agency, and
  - (c) a decision under this Act made by the former agency is taken to have been made by the successor agency.

- (2) The *successor agency* to a former agency is:
- (a) another agency on which the former agency's functions have devolved, or
  - (b) if the former agency's functions have devolved on 2 or more other agencies—the agency on which have devolved the functions to which the government information concerned most closely relates, or
  - (c) if the former agency's functions have not devolved on another agency—such other agency as the Minister administering this Act may, after consultation with the responsible Minister for that agency, nominate.
- (3) For the purpose of enabling an application or determination to be dealt with under this Act:
- (a) an agency to which an application is to be taken to have been made, or
  - (b) an agency by which a determination is to be taken to have been made,
- is, if the agency did not exist at the time the application or determination was in fact made, taken to have been in existence at that time.

**15 References in other Acts—information not required to be disclosed**

A reference in any other Act or statutory rule to information that an agency would not be required to disclose under this Act is a reference to information that the agency would not be required to disclose in response to an access application made to the agency under this Act.

**16 Notes**

Notes included in this Act do not form part of this Act.

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## Schedule 5 Government Information (Public Access) Regulation 2009

(Section 132)

### Part 1 Preliminary

#### 1 Name of Regulation

This Regulation is the *Government Information (Public Access) Regulation 2009*.

#### 2 Definitions

- (1) In this Regulation:  
*LGA* means the *Local Government Act 1993*.  
*the Act* means the *Government Information (Public Access) Act 2009*.
- (2) Notes included in this Regulation do not form part of this Regulation.

### Part 2 Open access information of local authorities

#### 3 Additional open access information

The government information listed in Schedule 1 that is held by a local authority is prescribed as open access information of the local authority.

**Note.** The fact that information is open access information does not create an obligation to keep records indefinitely and does not interfere with records management practices and procedures of local authorities that are consistent with the *State Records Act 1998*.

#### 4 Additional ways in which open access information is to be made available

- (1) A local authority must make its open access information publicly available by:
  - (a) making the information available for inspection free of charge by any person at the office of the local authority during ordinary office hours, and
  - (b) providing a copy of a record containing the information (or providing the facilities for making a copy of a record containing the information) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.
- (2) This clause does not prevent a local authority from archiving records that contain open access information in accordance with the authority's records management practices and procedures. The authority is required

to retrieve archived records and make the information available in accordance with this clause in response to a request for access as soon as reasonably practicable after the request is made.

- (3) This clause extends to open access information of a local authority that is open access information listed in section 18 of the Act (and is not limited to information listed in Schedule 1).

## **Schedule 1 Additional open access information— local authorities**

(Clause 3)

### **1 Information about local authority**

- (1) Information contained in the current version and the most recent previous version of the following records is prescribed as open access information:
- (a) the model code prescribed under section 440 (1) of the LGA and the code of conduct adopted under section 440 (3) of the LGA,
  - (b) code of meeting practice,
  - (c) annual report,
  - (d) annual financial reports,
  - (e) auditor's report,
  - (f) management plan,
  - (g) EEO management plan,
  - (h) policy concerning the payment of expenses incurred by, and the provision of facilities to, councillors,
  - (i) annual reports of bodies exercising functions delegated by the local authority,
  - (j) any codes referred to in the LGA.
- (2) Information contained in the following records (whenever created) is prescribed as open access information:
- (a) returns of the interests of councillors, designated persons and delegates,
  - (b) agendas and business papers for any meeting of the local authority or any committee of the local authority (but not including business papers for matters considered when part of a meeting is closed to the public),
  - (c) minutes of any meeting of the local authority or any committee of the local authority, but restricted (in the case of any part of a

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- meeting that is closed to the public) to the resolutions and recommendations of the meeting,
- (d) Departmental representative reports presented at a meeting of the local authority in accordance with section 433 of the LGA.
- (3) Information contained in the current version of the following records is prescribed as open access information:
- (a) land register,
  - (b) register of investments,
  - (c) register of delegations,
  - (d) register of graffiti removal work kept in accordance with section 13 of the *Graffiti Control Act 2008*,
  - (e) register of current declarations of disclosures of political donations kept in accordance with section 328A of the LGA,
  - (f) the register of voting on planning matters kept in accordance with section 375A of the LGA.

## **2 Plans and policies**

Information contained in the current version and the most recent previous version of the following records is prescribed as open access information:

- (a) local policies adopted by the local authority concerning approvals and orders,
- (b) plans of management for community land,
- (c) environmental planning instruments, development control plans and contributions plans made under the *Environmental Planning and Assessment Act 1979* applying to land within the local authority's area.

## **3 Information about development applications**

- (1) Information contained in the following records (whenever created) is prescribed as open access information:
- (a) development applications (within the meaning of the *Environmental Planning and Assessment Act 1979*) and any associated documents received in relation to a proposed development including the following:
    - (i) home warranty insurance documents,
    - (ii) construction certificates,
    - (iii) occupation certificates,
    - (iv) structural certification documents,

- (v) town planner reports,
  - (vi) submissions received on development applications,
  - (vii) heritage consultant reports,
  - (viii) tree inspection consultant reports,
  - (ix) acoustics consultant reports,
  - (x) land contamination consultant reports,
  - (b) records of decisions on development applications (including decisions made on appeal),
  - (c) a record that describes the general nature of the documents that the local authority decides are excluded from the operation of this clause by subclause (2).
- (2) This clause does not apply to so much of the information referred to in subclause (1) (a) as consists of:
- (a) the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected, or
  - (b) commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.
- (3) A local authority must keep the record referred to in subclause (1) (c).

#### **4 Approvals, orders and other documents**

Information contained in the following records (whenever created) is prescribed as open access information:

- (a) applications for approvals under Part 1 of Chapter 7 of the LGA and any associated documents received in relation to such an application,
- (b) applications for approvals under any other Act and any associated documents received in relation to such an application,
- (c) records of approvals granted or refused, any variation from local policies with reasons for the variation, and decisions made on appeals concerning approvals,
- (d) orders given under Part 2 of Chapter 7 of the LGA, and any reasons given under section 136 of the LGA,
- (e) orders given under the authority of any other Act,
- (f) records of building certificates under the *Environmental Planning and Assessment Act 1979*,



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- (g) plans of land proposed to be compulsorily acquired by the local authority,
  - (h) compulsory acquisition notices,
  - (i) leases and licences for use of public land classified as community land.

[Agreement in principle speech made in Legislative Assembly on 17 June 2009  
Second reading speech made in Legislative Council on 24 June 2009]

BY AUTHORITY