

New South Wales

# Open Government Information Bill 2009

## Explanatory note

The *Information Commissioner Bill 2009* and the *Open Government Information (Consequential Amendments and Repeals) Bill 2009* are cognate with this Bill.

## Overview of Bill

The object of this Bill is to provide for access to be given to government information on the basis of a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.

Principal features of the new arrangements for access to government information are as follows:

- (a) mandatory proactive release of certain government information (***open access information***) is required and proactive release of other government information is authorised,
- (b) informal release of government information in response to an informal request is also authorised,
- (c) a formal access application will be able to be made for access to government information and there will be a legally enforceable right to be provided with access to government information pursuant to the access application process provided by the Bill,

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- (d) access will not be provided to government information if there is an overriding public interest against disclosure (that is, if there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure),
- (e) the Bill limits the public interest considerations that can be taken into account as public interest considerations against disclosure of information and provides that there is a general public interest in favour of the disclosure of government information,
- (f) the Bill provides that for certain government information (such as Cabinet information) it is to be conclusively presumed that there is an overriding public interest against disclosure,
- (g) agency decisions about access applications are reviewable by a process of internal review, review by the Information Commissioner (to be established under the *Information Commissioner Bill 2009*) and review by the Administrative Decisions Tribunal.

The Bill replaces the *Freedom of Information Act 1989*, which is repealed by the *Open Government Information (Consequential Amendments and Repeals) Bill 2009*.

## Outline of provisions

### Part 1 Preliminary

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** states the object of the proposed Act, requires that the proposed Act be interpreted and applied so as to further that object and requires the discretions conferred by the proposed Act to be exercised so as to facilitate and encourage access to government information.

**Clause 4** contains definitions of key terms used in the proposed Act. Schedule 5 contains other definitions. The clause defines *government information* to mean information contained in a record held by an agency.

### Part 2 Open government information—general principles

#### Division 1 Ways of accessing government information

**Clause 5** provides that there is a presumption in favour of the disclosure of government information, unless there is an overriding public interest against disclosure.

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**Clause 6** requires an agency to make the government information that is its *open access information* publicly available, unless there is an overriding public interest against disclosure of the information.

**Clause 7** authorises an agency to make any government information held by the agency publicly available, unless there is an overriding public interest against disclosure of the information.

**Clause 8** authorises a government agency 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.

**Clause 9** provides that 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) of the proposed Act, unless there is an overriding public interest against disclosure of the information.

**Clause 10** provides that the proposed 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 and 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.

**Clause 11** provides for the proposed Act to override a provision of any other Act or statutory rule that prohibits the disclosure of information, other than a provision of a law listed in Schedule 1 as an overriding secrecy law (for which it is to be conclusively presumed that there is an overriding public interest against disclosure).

## **Division 2      Public interest considerations**

**Clause 12** provides that there is no limit on the 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, and that there is a general public interest in favour of the disclosure of government information.

**Clause 13** provides that there is an *overriding public interest against disclosure* of government information 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.

**Clause 14** provides that 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. It also provides that the public interest considerations listed in Schedule 2 are the only other considerations that may be taken into account as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

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**Clause 15** states the general principles that are to apply to a determination as to whether there is an overriding public interest against disclosure of government information.

## **Division 3 Assistance and oversight**

**Clause 16** requires a government agency to provide advice and assistance, so far as it would be reasonable to expect the agency to do so, to a person who requests or proposes to request access to government information.

**Clause 17** provides for the general functions of the Information Commissioner in connection with the operation of the proposed Act.

## **Part 3 Open access information**

### **Division 1 Preliminary**

**Clause 18** lists the government information held by a government agency that is to be the agency's *open access information* and that is required to be made publicly available by the agency under clause 6 (Mandatory proactive release of certain government information). Open access information includes the agency's current publication guide, its policy documents, its disclosure log of access applications and its register of government contracts with the private sector.

**Clause 19** contains a definition of an agency's *policy documents*.

### **Division 2 Publication guides**

**Clause 20** requires each government agency to have a publication guide.

**Clause 21** requires an agency to adopt its first publication guide within 6 months after the commencement of the proposed section and review its publication guide and adopt a new publication guide at intervals of not more than 12 months.

**Clause 22** requires an agency to notify (and, if required, consult with) the Information Commissioner before adopting or amending a publication guide, and authorises the Information Commissioner to develop guidelines and model publication guides for the assistance of agencies in connection with publication guides.

### **Division 3 Disclosure log of access applications**

**Clause 23** requires each government agency to keep a record (called its *disclosure log*) that records details of every access application that an agency decided by providing access to information applied for.

**Clause 24** lists the information that is to be recorded in a disclosure log.

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## **Division 4      Government contracts with the private sector**

**Clause 25** requires each government agency to keep a register (its *government contracts register*) of government contracts with the private sector 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*).

**Clause 26** provides for how the value of a contract is to be determined.

**Clause 27** lists the details to be included in the government contracts register for class 1 contracts.

**Clause 28** requires further details to be included in the government contracts register for certain significant contracts (*class 2 contracts*).

**Clause 29** provides that a copy of the contract must be included in the government contracts register, if it is a class 2 contract that has (or is likely to have) a value of \$5 million or more (a *class 3 contract*).

**Clause 30** provides that commercial-in-confidence information and certain other confidential information is not required to be included in the government contracts register.

**Clause 31** requires particulars in the government contracts register to be amended to reflect any material variation made to a contract that would affect the particulars that are required to be included in the register.

**Clause 32** provides for the removal of information from an agency's government contracts register after a certain time.

**Clause 33** provides for the publication of an agency's government contracts register on the NSW Government tenders website.

**Clause 34** requires an agency to obtain the opinion of the Chairperson of the State Contracts Control Board in relation to any disagreement between a party to a government contract and the agency as to the way in which the agency has interpreted its obligations under the proposed Division.

**Clause 35** provides that the proposed Division does not apply to a government contract entered into by the Department of State and Regional Development that involves the provision of industry support.

**Clause 36** limits the information that is required to be included in an agency's government contracts register to information that the agency holds or that it is reasonably practical for the agency to obtain.

**Clause 37** provides that a State owned corporation or a subsidiary of a State owned corporation is not required to include any details of a government contract in its government contracts register if the contract is entered into in the course of activities engaged in by the corporation or subsidiary in a market in which it is in competition with any other person.

**Clause 38** provides that the proposed Division does not require Landcom to include any details of a government contract in its government contract register, if the contract is a contract for the sale of land.

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## Part 4 Access applications

### Division 1 Making an access application

**Clause 39** lists the formal requirements for a valid access application for government information.

**Clause 40** permits an applicant to include other information in an access application.

**Clause 41** prevents an access application for government information being made for the excluded information listed in Schedule 3.

### Division 2 Transfer and withdrawal of access applications

**Clause 42** authorises an agency that receives an access application to transfer the application to another agency either by *agency-initiated transfer* or by *applicant-initiated transfer*.

**Clause 43** requires the consent of the other agency for an agency-initiated transfer of an access application to another agency and provides for the circumstances in which such a transfer is appropriate.

**Clause 44** requires the agreement of the applicant and the agency to which the application was made to an applicant-initiated transfer of an access application to another agency and requires that it appear that the information relates more closely to the functions of the other agency.

**Clause 45** requires an agency that transfers an application to give notice of the transfer to the applicant.

**Clause 46** provides for the effect of the transfer of an access application.

**Clause 47** allows an applicant to withdraw an access application.

### Division 3 Process for dealing with access applications

**Clause 48** requires an agency to decide whether an access application that it receives is a valid access application and to notify the applicant of its decision.

**Clause 49** deals with how an invalid access application can be validated and the obligations that an agency has to assist an applicant to make a valid access application.

**Clause 50** limits the obligation of a government agency to provide access to government information in response to an access application to information held by the agency when the application is received. An agency is required to 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.

**Clause 51** requires an agency to consult with a person before providing access to information in response to an access application, if it appears that the person may reasonably be expected to have substantial concerns about the disclosure of the information and that those concerns may reasonably be expected to be relevant to the

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question of whether there is a public interest consideration against disclosure of the information.

**Clause 52** authorises an agency, in determining whether there is an overriding public interest against disclosure of information in response to an access application, to consider personal factors of the application (such as the applicant's identity and relationship with other persons) as factors in favour of providing the applicant with access to the information.

**Clause 53** provides for an access applicant to request that all or specified information concerning their application not be made publicly available in the agency's disclosure log.

### **Division 4 Deciding access applications**

**Clause 54** requires an agency to decide an access application and notify the applicant of the decision within 20 working days after the agency receives the application, subject to a limited right of the agency to extend this period by up to 15 working days.

**Clause 55** deals with the various ways in which an agency can decide an access application.

**Clause 56** provides for when an agency can decide that information is already publicly available.

**Clause 57** sets out the reasons for which an agency can decide to refuse to deal with an access application.

**Clause 58** requires an agency to provide reasons for its decision to refuse to provide access to information.

**Clause 59** requires an agency to include in a notice of its decision to provide access to information any processing charges that are payable and how those charges have been calculated.

**Clause 60** provides that 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.

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

**Clause 61** allows an agency to impose a *processing charge* for dealing with an access application at a rate of \$30 an hour for each hour of processing time.

**Clause 62** provides for a 50% reduction in the processing charge payable by an applicant suffering financial hardship.

**Clause 63** provides for a 50% reduction in the processing charge payable by an applicant, if the agency is satisfied that the information applied for is of special benefit to the public generally.

**Clause 64** provides that an agency cannot impose a processing charge for the first 20 hours of processing time if an access application is made for personal information about the applicant.

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**Clause 65** allows an agency to require an applicant to make an advance payment of a processing charge (an *advance deposit*).

**Clause 66** limits the advance deposit that can be required from an applicant to 50% of the estimated total processing charge for dealing with the application.

**Clause 67** allows an agency to refuse to deal further with an access application if the applicant does not pay the advance deposit within the required time.

**Clause 68** provides for a refund to be made to an applicant of any amount paid as an advance deposit that exceeds the total processing charges payable for dealing with the application.

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

**Clause 69** sets out the ways in which access to government information can be provided.

**Clause 70** prevents an agency from imposing any conditions on the use or disclosure of information when the agency provides access to the information.

**Clause 71** allows an agency to delete from a copy of a record to which access is to be provided information that the agency refuses to provide access to or information that is not relevant to the application.

**Clause 72** allows an agency to provide access to information by creating a new record of that information.

**Clause 73** provides that an agency may provide access to information that is in addition to the information applied for.

**Clause 74** deals with when an agency may defer providing access to information.

**Clause 75** provides that an agency does not have to comply with a subpoena or other court order to produce a document to a person if that document has already been provided to the person in response to an access application by that person.

## **Part 5      Review of decisions**

### **Division 1      Reviewable decisions**

**Clause 76** sets out the decisions of an agency in respect of an access application that are *reviewable decisions*.

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

**Clause 77** gives a person aggrieved by a reviewable decision the right to apply for a review (an *internal review*) of the decision by the agency that made the decision.

**Clause 78** provides that an aggrieved person must apply for an internal review within 20 days of being notified of the decision, unless the agency agrees to accept the application out of time.



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**Clause 79** provides that an internal review is done by a person in the agency, who is more senior than the person who made the original decision, making a new decision.

**Clause 80** provides that a \$40 fee is payable for an internal review.

**Clause 81** requires an agency to conduct an internal review and notify the applicant of its decision within 15 working days after the agency receives the application, subject to a limited right of the agency to extend this period by up to 10 working days.

**Clause 82** provides that there is no processing charge for an internal review.

**Clause 83** provides that there cannot be an internal review of a decision made on the internal review of a reviewable decision.

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

**Clause 84** gives a person aggrieved by a reviewable decision the right to apply for a review of the decision by the Information Commissioner, whether or not an internal review has been conducted.

**Clause 85** requires a person to apply for a review of the decision by the Information Commissioner within 8 weeks after being notified of the reviewable decision.

**Clause 86** provides that the Information Commissioner must not, while conducting a review under the proposed Division, disclose any information for which there is an overriding public interest against disclosure.

**Clause 87** provides that, after conducting a review, the Information Commissioner may make recommendations to the agency concerned about the decision.

**Clause 88** provides that, after conducting a review, the Information Commissioner may recommend that the agency reconsider its original decision and make a new decision.

**Clause 89** provides that, after conducting a review, the Information Commissioner may make a recommendation against a decision of an agency that there is an overriding public interest against disclosure.

**Clause 90** provides that, after conducting a review, the Information Commissioner may make recommendations to the agency concerned about its procedures for dealing with access applications.

**Clause 91** provides for the circumstances in which the Information Commissioner may refuse to review a decision.

**Clause 92** places the onus on an agency to justify its decision in any review by the Information Commissioner, unless the review is of a decision to provide access to information, in which case the onus is on the applicant to establish that there is an overriding public interest against disclosure.

**Clause 93** provides that a matter is not to be the subject of review by the Information Commissioner while it is the subject of proceedings before the Administrative Decisions Tribunal (the *ADT*).

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**Clause 94** provides that the Information Commissioner may refer a decision that is subject to a review under the proposed Division to the ADT with the consent of the applicant.

### **Division 4      Review by Administrative Decisions Tribunal**

**Clause 95** gives a person aggrieved by a reviewable decision the right to apply for a review of the decision by the ADT (an *ADT review*), whether or not the decision has been internally reviewed or reviewed by the Information Commissioner.

**Clause 96** requires a person to apply for a review of the decision by the ADT within 8 weeks after being notified of the reviewable decision, or if the decision has been reviewed by the Information Commissioner, within 4 weeks after being notified of the Information Commissioner's decision, whichever gives the longer period to apply.

**Clause 97** provides that the procedures for internal review in the *Administrative Decisions Tribunal Act 1997* do not apply to reviewable decisions under the proposed Act.

**Clause 98** provides that certain provisions of the *Administrative Decisions Tribunal Act 1997* do not apply to an application for ADT review.

**Clause 99** gives the Information Commissioner, and any person who could be aggrieved by a decision of the ADT, a right to appear and be heard in proceedings before the ADT in relation to ADT reviews.

**Clause 100** places the onus on an agency to justify its decision in any ADT review, unless the review is of a decision to provide access to information, in which case the onus is on the applicant to establish that there is an overriding public interest against disclosure.

**Clause 101** sets out the procedure to be followed for ADT reviews of decisions that relate to Cabinet or Executive Council information.

**Clause 102** provides that the ADT must not disclose any information for which there is an overriding public interest against disclosure and must conduct ADT reviews in private if necessary to prevent disclosure of such information.

**Clause 103** provides that the ADT may make an order giving an agency more time to deal with an access application that is subject to ADT review, if the decision is a decision that was deemed to be a refusal to provide access to information because the agency did not make the decision within time.

**Clause 104** provides that the ADT may refuse to review a decision, if satisfied that the application is frivolous, vexatious, misconceived or lacking in substance.

**Clause 105** provides that the ADT may make a restraint order against a person who repeatedly makes access applications that are totally without merit. A person against whom a restraint applicant order is made is prevented from making an access application without the approval of the ADT.

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**Clause 106** provides that 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 agencies generally.

**Clause 107** provides that if the ADT is of the opinion that an officer of an agency has failed to exercise in good faith his or her functions under the proposed Act, the ADT must bring the matter to the attention of the Minister responsible for the agency.

## Part 6 Protections and offences

### Division 1 Protections

**Clause 108** provides that an action for defamation or breach of confidence cannot be brought against the Crown, an agency or an officer of an agency in respect of a decision to disclose government information, if the person who made the decision believed in good faith that the proposed Act permitted or required the decision to be made.

**Clause 109** provides that a person (and any other person concerned) who makes a decision to disclose government information is not guilty of an offence under the proposed Act, if the person believed in good faith that the proposed Act permitted or required the decision to be made.

**Clause 110** protects persons involved in the administration of the proposed Act acting in good faith from personal liability.

### Division 2 Offences

**Clause 111** provides that an officer of an agency who makes a reviewable decision knowing it is contrary to the requirements of the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

**Clause 112** provides that a person who directs an officer of an agency to make a reviewable decision that the person knows is not required or permitted under the proposed Act or who directs an officer to act in a manner that the person knows is contrary to the requirements of the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

**Clause 113** provides that a person who influences an officer of an agency to make a reviewable decision that the person knows is not required or permitted under the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

**Clause 114** provides that a person who knowingly misleads or deceives an officer of an agency for the purpose of gaining access to government information is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

**Clause 115** provides that a person who destroys or conceals government information for the purpose of preventing the disclosure of the information as authorised or required under the proposed Act is guilty of an offence, which has a maximum penalty of 100 penalty units (currently \$11,000).

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## Part 7 Miscellaneous

**Clause 116** provides that the proposed Act binds the State and all other Australian jurisdictions.

**Clause 117** provides that the proposed Act does not affect the operation of the *State Records Act 1998*.

**Clause 118** limits the powers of the Ombudsman under the *Ombudsman Act 1974* so that the powers do not extend to investigating the conduct of any person or body in relation to a reviewable decision.

**Clause 119** sets out the requirements for agencies, Ministers and the Minister administering the proposed Act to prepare and submit annual reports about their obligations under the proposed Act.

**Clause 120** sets out the notice requirements for agencies under the proposed Act.

**Clause 121** enables an agency to waive, reduce or refund any fee or charge payable under the proposed Act.

**Clause 122** provides that proceedings for offences against the proposed Act or the regulations are to be dealt with summarily before a Local Court and may only be taken by or with the authority of the Director of Public Prosecutions or the Attorney General.

**Clause 123** is a regulation-making power.

**Clause 124** provides for the review of the proposed Act after 5 years.

**Clause 125** provides that the Joint Committee established under the *Information Commissioner Act 2009* is to review Schedules 1–3 to the proposed Act in consultation with the Information Commissioner.

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

**Schedule 1** describes the information for which there is a conclusive presumption of an overriding public interest against disclosure, including information the disclosure of which is prohibited by an *overriding secrecy law*, Cabinet and Executive Council information, information protected by legal professional privilege and documents affecting law enforcement and public safety.

## Schedule 2 Public interest considerations against disclosure

**Schedule 2** sets out the public interest considerations that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information, including responsible and effective

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government, law enforcement and security, individual rights and natural justice and business interests.

## **Schedule 3 Excluded information of particular agencies**

**Schedule 3** lists government information for which an access application cannot be made, including judicial and prosecutorial information, complaints handling and investigative information and personal information.

## **Schedule 4 Savings, transitional and other provisions**

**Part 1 of Schedule 4** to the proposed Act provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act, the *Information Commissioner Act 2009* and the *Open Government Information (Consequential Amendments and Repeals) Act 2009*.

**Part 2 of Schedule 4** contains savings and transitional provisions consequent on the enactment of the proposed Act and the repeal of the *Freedom of Information Act 1989* by the *Open Government Information (Consequential Amendments and Repeals) Act 2009*.

## **Schedule 5 Interpretative provisions**

**Schedule 5** to the proposed Act contains definitions of terms used in the proposed Act and other interpretative provisions.

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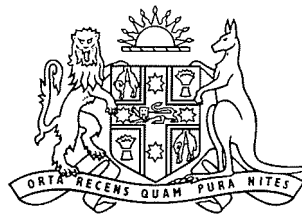
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public consultation draft

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New South Wales

## **Open Government Information Bill 2009**

No. , 2009

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### **A Bill for**

An Act to facilitate open access to government information.

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See also the *Information Commissioner Bill 2009* and the *Open Government Information (Consequential Amendments and Repeals) Bill 2009*.

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Clause 1            Open Government Information Bill 2009

Part 1             Preliminary

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

## **Part 1    Preliminary**

### **1    Name of Act**

This Act is the *Open Government Information 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 each of the following:

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

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Part 1

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- (d) a public office,
- (e) a local authority,
- (f) a court.

**Note.** Schedule 5 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 5 have the meanings set out in that Schedule.

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Clause 5            Open Government Information Bill 2009

Part 2              Open government information—general principles

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## **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 in any manner that the agency considers appropriate and must be made available by at least one means of access (such as electronic access) free of charge. Access by other means may be charged for.

(3) 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 from the record.

#### **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 undue additional costs on the agency.



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Open government information—general principles

Part 2

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- (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 a government 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 a government 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.

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# public consultation draft

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Clause 10      Open Government Information Bill 2009

Part 2          Open government information—general principles

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- (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.
- (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.
- (3) The Information Commissioner may, for the assistance of government agencies, issue guidelines about public interest considerations in favour of the disclosure of government information.

### 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

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Open Government Information Bill 2009

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Open government information—general principles

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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 Schedule 2 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 may, for the assistance of government agencies, issue guidelines about public interest considerations against the disclosure of government information.

## **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 (so far as it would be reasonable to expect the agency to do so) to a person who requests or proposes to request access to government information, for the purpose of assisting the person to access information that is publicly available.

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- (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.

## **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.

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Open access information

Part 3

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## 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 section 19),
- (d) the agency's disclosure log of access applications (see Division 3),
- (e) the agency's register of government contracts (see Division 4),
- (f) such other government information as may be prescribed by the regulations as open access information.

#### 19 Policy documents

- (1) 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.
- (2) A person is not to be subjected to any prejudice because of the application of the provisions of an agency's policy document (other than such of those provisions as the agency is required to delete from

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Clause 20      Open Government Information Bill 2009

Part 3          Open access information

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the copies of the document that are made publicly available pursuant to this Act) 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.

## **Division 2      Publication guides**

### **20      Agencies must have publication guide**

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.

### **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.

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## 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 may develop guidelines and model publication guides for the assistance of agencies in connection with publication guides.

## Division 3 Disclosure log of access applications

### 23 Requirement for disclosure log

An agency must keep a record (called its *disclosure log*) that records information about every access application 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.

### 24 Required information about access applications

- (1) The information about an access application that is required to be recorded in the disclosure log is as follows:
  - (a) the date the application was received and the date it 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 has since been made publicly available and (if it has) how it may be accessed.
- (2) Details are not 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.

**Note.** An agency could also decide not to include an applicant's details in the copy of the disclosure log to be made publicly available if there is an overriding public interest against disclosure of those details. See section 6.

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## **Division 4      Government contracts with the private sector**

### **25    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).

### **26    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, or
- (b) the total estimated value of the goods or services over the term of the contract, or
- (c) the value of the real property transferred, or
- (d) the rent for the term of the lease.

### **27    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,



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- (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.

## **28 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 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,

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Clause 29      Open Government Information Bill 2009

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- (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) where 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) where 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.

**29 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.

**30 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.

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Open access information

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- (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) where 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.

### **31 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.

### **32 Removal of information from register**

Information (including a copy of a contract) required to be included in the government contracts register in relation to a contract is required to remain on the register for 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.

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

- (1) A copy of an agency's government contracts register is to be published on the website with the URL of [www.tenders.nsw.gov.au](http://www.tenders.nsw.gov.au) (or such other internet website as the Premier may authorise for the purposes of this section).
- (2) Subsection (1) does not apply to the government contracts register of:
- (a) a State owned corporation or a subsidiary of a State owned corporation, or

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Clause 34      Open Government Information Bill 2009

Part 3          Open access information

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(b) a local authority, or

(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.

### **34 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.

### **35 Exception for industry support contracts**

This Division does not apply to a government contract entered into by the Department of State and Regional Development that involves the provision of industry support.

### **36 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.

### **37 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 details of a government contract in its government contracts register if the contract is entered into in the course of activities engaged in by the corporation or subsidiary in a market in which it is in competition with any other person.

### **38 Exception for Landcom—contracts for sale of land**

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

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# public consultation draft

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Open Government Information Bill 2009

Clause 39

Access applications

Part 4

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## **Part 4 Access applications**

### **Division 1 Making an access application**

#### **39 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.

#### **40 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.

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# public consultation draft

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Clause 41      Open Government Information Bill 2009

Part 4          Access applications

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## **41 Access application cannot be made for excluded information**

- (1) An access application cannot be made to a government agency for access to information that relates to the functions listed in Schedule 3 (Excluded information of particular agencies) 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 and withdrawal of access applications**

### **42 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.

### **43 Agency-initiated transfer**

- (1) An agency-initiated transfer of an access application to another agency can only be done with the consent of that other agency and is only appropriate if:
  - (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.

### **44 Applicant-initiated transfer**

- (1) An applicant-initiated transfer of an access application to another agency can only be done if 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).

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## **45 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.

## **46 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 of transfer) 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.

## **47 Withdrawal of application**

- (1) A person who has made an access application may withdraw it at any time before notice of determination of 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) If an application is withdrawn, the agency must give notice to the applicant confirming the withdrawal and the date on which the application was withdrawn.

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

### **48 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

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(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 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 determined (subject to any suspension or extension of the time for determining an application),

(b) a statement that the application will be deemed to have been refused if not determined by the required date,

(c) a statement that details of the application may be made public on the agency's disclosure log and that the applicant may request that this not occur,

(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 an 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 this Act.

### **49 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



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- (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 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).

## **50 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.
- (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.

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## 51 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 in response to an access application if it appears that the person may reasonably be expected to have substantial concerns about the disclosure of the information and that 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.

**Note.** The requirement to consult extends to consultation with other agencies and other governments. See the definition of *person* in Schedule 5.

- (2) The purpose of the consultation 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.
- (3) An agency is not required to consult with a person under this section unless the information applied for:
- (a) includes personal information about the person, or
  - (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).
- (4) 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.
- (5) 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.
- (6) 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.

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## 52 Consideration of personal factors of the 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 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 Schedule 2.
- (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 or information 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 about the personal factors of the application but is entitled to have regard to evidence or information provided by the applicant.

**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 70.

## 53 Applicant may object to inclusion in disclosure log

- (1) An access applicant can request that all or specified information concerning their application not be made publicly available in the agency's disclosure log. The request can be made as part of the application or separately and can include reasons as to why information should not be publicly available.

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- (2) An agency's acknowledgement of receipt of an access application is to inform the applicant that information concerning the application will be made publicly available in the agency's disclosure log and that the applicant can request that this not occur.
- (3) An agency's acknowledgement of receipt of an access application is to inform the applicant about the right of review of a decision by the agency to make information publicly available in its disclosure log despite the applicant's request that this not occur.  
**Note.** The agency's decision is reviewable under Part 5.
- (4) If an applicant has requested an agency not to make information publicly available in its disclosure log, the agency is not to do so 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.
- (5) The agency's notice of determination of the access application is to indicate whether the required details of the access application will be made publicly available in the agency's disclosure log.

### **Division 4      Deciding access applications**

#### **54    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 of 15 working days in any particular case):
  - (a) consultation is required with another person,
  - (b) records are required to be retrieved from a records archive.
- (3) The regulations can also provide for the extension (and further extension) of the decision period.
- (4) The decision period can also be extended by agreement with the applicant and can be extended by agreement more than once.
- (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.

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- (6) When this Act refers to an agency not deciding an access application within time it is referring to the agency not deciding the application and giving the applicant notice of the agency's decision within the decision period, and that period is referred to in this Act as the period within which an application is required to be decided.

## **55 How applications are decided**

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 publicly available, 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, 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.

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.

## **56 Decision that information already publicly available**

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

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## **57 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 determination on the application,
  - (c) the applicant has failed to pay an advance deposit that is payable in connection with the application,  
**Note.** See section 67.
  - (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 entitled to consider 2 or more applications together (including any previous 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.
- (3) 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 determined stops running while the applicant is being given an opportunity to amend the application.
- (4) Notice of an agency's decision to refuse to deal with an access application must state the agency's reasons for the refusal.
- (5) An applicant is not entitled to a refund of the application fee when the agency refuses to deal with the application.

## **58 Reasons for 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:

- (a) the agency's reasons for its decision, and

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- (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.

## **59 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.

## **60 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.
- (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**

### **61 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, with *processing time* being the time spent by any officer of the agency in dealing with the application (including consideration of the application, searching for records, decision-making and any other function exercised in connection with deciding the application).

**Note.** The decision to impose a processing charge is reviewable under Part 5.
- (2) The application fee of \$30 paid by an applicant counts as a payment towards any processing charge payable by the applicant.
- (3) 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.

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## **62 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 61 (2).

- (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.

## **63 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 61 (2). A decision to refuse a processing charge reduction 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 government agencies, publish guidelines about reductions in processing charges under this section.

## **64 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 121.



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## **65 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 in writing of any extension (indicating the new date by which the advance deposit must be paid).

## **66 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).
- (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.

## **67 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.

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- (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).

## **68 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 determine the access application within time.  
**Note.** An agency cannot impose a processing charge if it does not determine an application within time.

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

### **69 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

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- (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.

## **70 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 concerning the way in which access is to be provided (such as a condition that prevents an applicant making notes from or taking a copy of a record that is made available for inspection) does not constitute a condition on the use or disclosure of information and is not prevented by this section.

## **71 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.

## **72 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.

## **73 Providing access to information not applied for**

An agency is not prevented from providing access to government information in response to an access application that is in addition to the information applied for.

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## **74 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 determination 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.

## **75 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**

#### **76 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 publicly available,
- (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.

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

#### **77 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*).

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- (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).

**78 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 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 given as soon as practicable after the agency receives the application and in any event within 5 working days after the application is received.

**79 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.

**80 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 determine the access application within time (and as a result is deemed to have refused to deal with the application).

**81 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.

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- (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.
- (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.

**82 No processing charges for internal review**

An agency is not entitled to impose any processing charges for work done in connection with an internal review.

**83 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.

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

**84 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) A 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.
- (3) The Information Commissioner may exercise any function of the Information Commissioner under the *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 16 of the *Information Commissioner Act 2009*.

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**85    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.

**86    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 an overriding public interest against disclosure.

**87    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.

**88    Recommendation for reconsideration of matter by agency**

- (1) The Information Commissioner may recommend that the agency reconsider the matter 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 matter and make a new decision, whether or not the matter has already been the subject of internal review by the agency.
- (3) The agency's reconsideration of a matter 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 matter and make a new determination.
- (4) Unlike an internal review, the reconsideration of a matter 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 matter that is not an internal review cannot be done by a person who is less senior than the person who made the original decision.



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- (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.

**89 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.

**90 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.

**91 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.

**92 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.

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**93    No investigation of matters before ADT**

A matter is not to be the subject of review by the Information Commissioner under this Division while the matter is the subject of proceedings before the ADT.

**94    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 under this Division to the ADT for review.

## **Division 4      Review by Administrative Decisions Tribunal**

**95    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.

**96    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 or, if the decision is the subject of review by the Information Commissioner, within 4 weeks after the applicant is notified of the completion of the Information Commissioner's review (whichever gives the longer period to apply for ADT review).
- (2) 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.
- (3) 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.
- (4) The time for making an application for ADT review may be extended under this section even if that time has expired.

**97    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.

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- (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.

## **98 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 (Duty to give reasons on request) of Part 2 of Chapter 5 of the ADT Act do not apply to an application for ADT review under this Division.

## **99 Right of appearance before ADT**

- (1) The Information Commissioner has a right to appear and be heard in any proceedings before the ADT 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.

## **100 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.

## **101 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.

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- (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.

## **102 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.

## **103 Delayed determinations**

- (1) The ADT may on the application of an agency make an order allowing the agency further time to deal with 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 determined within time (referred to in this section as a *deemed refusal decision*).

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- (2) Such an order may be made subject to such conditions as the ADT thinks fit, including a condition that if a decision is made to provide access to the information concerned during the further time allowed:
  - (a) any charge that would otherwise be payable in connection with providing that access is to be reduced or waived, and
  - (b) 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.
- (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.

#### **104 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.

#### **105 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 repeatedly made access applications that are totally without merit. Such an order is a *restraint order*.
- (2) An access application is to be regarded as being totally without merit if the agency decided the application by refusing to deal with the application.
- (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.

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- (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.

**106 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.

**107 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.

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Clause 108

Protections and offences

Part 6

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## **Part 6 Protections and offences**

### **Division 1 Protections**

#### **108 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.

#### **109 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.

#### **110 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.

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Clause 111      Open Government Information Bill 2009

Part 6            Protections and offences

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## **Division 2      Offences**

### **111    Offence of acting unlawfully**

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

Maximum penalty: 100 penalty units.

### **112    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.

### **113    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.

### **114    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.

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

A person who destroys or conceals 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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Clause 116

Miscellaneous

Part 7

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## Part 7 Miscellaneous

### 116 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.

### 117 State Records Act not affected

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

### 118 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 determination of an agency that is a reviewable decision under Part 5 of this Act.

### 119 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.
- (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.
- (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.

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Part 7            Miscellaneous

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- (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.

## **120 Requirements for notices given by agencies**

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 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,
- (c) it must include the contact details of an officer of the agency to whom inquiries can be directed in connection with the decision of the agency with which the notice or notification is concerned.

## **121 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.

## **122 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.

## **123 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,

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Clause 124

Miscellaneous

Part 7

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- (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.
- (3) The Minister is to consult with the Information Commissioner before recommending the making of a regulation under this Act.

## **124 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.

## **125 Review of Schedules by Joint Committee**

- (1) The Joint Committee is to keep Schedules 1–3 under review to determine whether the policy objectives of those Schedules remain valid and whether the content of those Schedules remains appropriate for securing those objectives.
- (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 Schedules 1–3.

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Open Government Information Bill 2009

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

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

### **1 Overriding secrecy laws**

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)

*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 (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*—regulations under section 18A (Publication of results of certain tests and other matters)

*Gambling (Two-up) Act 1998*—section 29 (Secrecy)

*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*

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

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*Independent Commission Against Corruption Act 1988*

*Jury Act 1977*

*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) 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),
  - (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).

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

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- (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,
  - (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) 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.

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

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- (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**

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) 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 is required to consider whether it would be appropriate for the agency to waive legal professional privilege before the agency refuses to provide access to government information on the basis of this clause.
- (3) A decision that an agency makes under subclause (2) is not a reviewable decision under Part 5.

#### **6 Information about functions of particular government agencies**

Information that relates to any function listed in Schedule 3 of an agency listed in that Schedule.

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

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 Terrorist Co-ordination Command of the NSW Police Force, the former Protective Security Group of the Police Service, the former Special Branch

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

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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) Information the disclosure of which would disclose:
  - (a) matter relating to an investigation or inquiry into a railway accident or incident under section 66, 67 or 67B of the *Rail Safety Act 2002* or 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 66 into an accident or incident that is not also the subject of an investigation under section 67 or an inquiry under section 67B, if the inquiry under section 66 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 67B, 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.



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

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## **9 Adoption**

Information the disclosure of which 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**

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**

Information the disclosure of which would 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 Superannuation**

Information contained in a record held by the Corporation constituted under the *Superannuation Administration Authority Corporatisation Act 1999* and is information concerning the personal affairs of a member of a superannuation scheme that is not a State public sector superannuation scheme.

## **13 Aboriginal and environmental heritage**

- (1) 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) 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) 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) 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 Public interest considerations against disclosure

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## **Schedule 2 Public interest considerations against disclosure**

**Note.** This Schedule must be read in conjunction with Division 2 of Part 2 (Public interest considerations). In particular, an agency cannot refuse to provide access to government information merely because one or more of the considerations against disclosure set out below is present. There is a general public interest in favour of the disclosure of government information and an agency can only refuse to provide access to government information if there is an overriding public interest against disclosure. This means that the agency can only refuse to provide access if, on balance, the considerations against disclosure outweigh the public interest considerations in favour of disclosure, including the general public interest in favour of disclosure. In balancing these considerations, an agency cannot take into account any considerations against disclosure other than those set out in this Schedule. There is no limit to the public interest considerations that may be taken into account in favour of disclosure.

### **1 Responsible and effective government**

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):

- (a) prejudice collective Ministerial responsibility,
- (b) prejudice Ministerial responsibility to Parliament,
- (c) prejudice relations with, or the obtaining of confidential information from, another government,
- (d) prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,
- (e) prejudice a deliberative process of government or an agency, such as by revealing an opinion, advice or recommendation made for the purpose of or in the course of the deliberative process,
- (f) prejudice the effective exercise by an agency of the agency's functions,
- (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,
- (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).

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Open Government Information Bill 2009

Public interest considerations against disclosure

Schedule 2

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## **2 Law enforcement and security**

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):

- (a) reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant,
- (b) prejudice the prevention, detection, investigation, or enforcement of a contravention or possible contravention of the law,
- (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),
- (d) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person,
- (e) endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle,
- (f) facilitate the commission of a criminal act (including a terrorist act within the meaning of the *Terrorism (Police Powers) Act 2002*),
- (g) prejudice the security or good order of any correctional facility.

## **3 Individual rights, judicial processes and natural justice**

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:

- (a) reveal a person's personal information,
- (b) prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings,
- (c) prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness,
- (d) reveal false or unsubstantiated allegations about a person that are defamatory,
- (e) subject a person to a serious act of harassment or intimidation,
- (f) 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.

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Schedule 2 Public interest considerations against disclosure

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## **4 Business interests of agencies and other persons**

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:

- (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,
- (b) reveal commercial-in-confidence provisions of a government contract,
- (c) diminish the competitive commercial value of any information to any person,
- (d) prejudice any person's legitimate business, commercial, professional or financial interests,
- (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).

## **5 Environment, economy and general matters**

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:

- (a) endanger, or prejudice any system or procedure for protecting, the environment,
- (b) prejudice the conservation of any place or object of natural, cultural or heritage value, or threaten the existence of any species,
- (c) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any animal or other living thing,
- (d) damage, or prejudice the ability of the Government or an agency to manage, the economy,
- (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.

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Open Government Information Bill 2009

Public interest considerations against disclosure

Schedule 2

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## **6 Secrecy provisions**

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).

## **7 Exempt documents under interstate Freedom of Information legislation**

- (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.
- (2) In this clause, a reference to a corresponding law is a reference to:
  - (a) the *Freedom of Information Act 1982* of the Commonwealth, or
  - (b) a law of any other State that is prescribed by the regulations as a corresponding law for the purposes of this clause.

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Open Government Information Bill 2009

Schedule 3 Excluded information of particular agencies

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## **Schedule 3 Excluded information of particular agencies**

### **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 report functions.

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

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

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

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

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 report functions.

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

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

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

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Schedule 3

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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 NEMMCO (the company established under the *Corporations Law* under the corporate name National Electricity Market Management Company Limited (ACN 072 010 327)) 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 Personal 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 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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Open Government Information Bill 2009

Schedule 4 Savings, transitional and other provisions

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## **Schedule 4 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  
*Information Commissioner Act 2009*  
*Open Government Information (Consequential Amendments and Repeals) 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 as in force immediately before its repeal 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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Savings, transitional and other provisions

Schedule 4

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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 *Open Government Information (Consequential Amendments and Repeals) 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 as in force immediately before its repeal 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 *Open Government Information (Consequential Amendments and Repeals) 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 4 (Government contracts with the 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 4 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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Open Government Information Bill 2009

Schedule 5 Interpretative provisions

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## Schedule 5 Interpretative provisions

### 1 Definitions

In this Act:

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

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

**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** means information that relates to the functions listed in Schedule 3 in relation to the agencies specified in that Schedule.

**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*.

**Information Commissioner** means the Information Commissioner under the *Information Commissioner Act 2009*.

**Joint Committee** means the Joint Committee under the *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.

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**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 9.

**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) an office of member of an agency,

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- (g) an office established or continued by or under the provisions of a legislative instrument for the purposes of an agency,
- (h) 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 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 that is contained in a publicly available publication,
  - (c) 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,
  - (d) 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 declare agency to be part of another agency**

The regulations may declare that a specified 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 References to the Government**

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

#### **7 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.

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## **8 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.

## **9 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.

## **10 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.

## **11 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).

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- (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.

## 12 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 has been created by an agency other than the agency that holds the record, is taken to be held by the 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.

## 13 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



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- (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.

#### **14 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.

#### **15 Notes**

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