



New South Wales

# Government Information (Public Access) Amendment Bill 2018

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Justice Legislation Amendment Bill (No 3) 2018*.

## Overview of Bill

The object of this Bill is to amend the *Government Information (Public Access) Act 2009* (the *principal Act*) to give effect to recommendations arising from a statutory review of the principal Act (the *Review*) tabled in Parliament on 10 August 2017.

## Outline of provisions

**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 the date of assent to the proposed Act.

## Schedule 1      **Amendment of Government Information (Public Access) Act 2009 No 52**

### Access applications

**Schedule 1 [6], [7] and [9]** give effect to recommendation 3 of the Review. **Schedule 1 [6] and [9]** allow an agency to accept access applications electronically, without requiring the electronic form to be approved by the Information Commissioner. **Schedule 1 [7]** provides that an access application must include the applicant's name and postal or email address.

**Schedule 1 [8]** gives effect to recommendation 19 of the Review by requiring an applicant to specify in an access application the name of any other agency the applicant has applied to for

substantially the same information. Failure to disclose the other agency, however, does not invalidate the access application.

**Schedule 1 [10]** gives effect to recommendation 4 of the Review by allowing an agency, for the purposes of transferring part of an access application to another agency, to split the application into 2 or more applications.

### **Disclosure logs**

**Schedule 1 [17]** makes it clear that if a person objects to the inclusion of information in an agency's disclosure log, the agency is to decide whether the objection outweighs the general public interest in including the information in the disclosure log. **Schedule 1 [28] and [30]** give effect to recommendation 2 of the Review by providing that, on review of the agency's decision to include the information, the burden lies with the objector to establish why the objection outweighs the general public interest.

**Schedule 1 [16]** gives effect to recommendation 19 of the Review by allowing a person to object to the inclusion of information on an agency's disclosure log if the information concerns the compilation or analysis of statistics that has been, is being, or is intended to be carried out by the person.

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

**Schedule 1 [14]** gives effect to recommendation 5 of the Review by allowing an agency to consult with another agency when determining whether there is an overriding public interest against disclosure of the information requested in an access application, or whether a person is required to be consulted with under section 54 of the principal Act.

**Schedule 1 [21]** gives effect to recommendation 7 of the Review by providing that an agency, in deciding whether dealing with an access application would require an unreasonable and substantial diversion of the agency's resources, may take into account several considerations, including the agency's size and resources. However, the considerations, on balance, must outweigh the general public interest in favour of disclosure as well as the demonstrable importance of the information to the applicant.

**Schedule 1 [15]** gives effect to recommendation 19 of the Review by providing that an agency may require a person, as a precondition of the agency providing personal information to that person in response to an access application, to take reasonable steps to prove the person's identity.

### **Deciding access applications**

**Schedule 1 [18]** gives effect to recommendation 19 of the Review. The amendment allows an agency to decide that information is already available to an applicant, and is therefore not required to be provided to the applicant, if the information is publicly available on a website, available to the person by way of a standing rule or order of Parliament or if the information has already been provided to the person and the agency has no reason to believe the person is no longer in possession of the information. **Schedule 1 [19]** makes a consequential amendment.

**Schedule 1 [20]** gives effect to recommendation 8 of the Review by allowing an agency to refuse to deal with an access application if the agency reasonably believes the applicant, or a person acting in concert with the applicant, is a party to current court proceedings and able to apply to that court for the information.

### **Internal review of agency decisions**

**Schedule 1 [26]** gives effect to recommendation 9 of the Review by providing that the 15-day period within which an agency must decide an internal review does not commence, in circumstances where more than one person may apply for an internal review, until the end of the time in which any of those persons may apply for internal review.

### External review of agency decisions

**Schedule 1 [27]** gives effect to recommendation 12 of the Review by providing that the required period of review by the Information Commissioner of a decision of an agency is 40 working days, unless the period is extended on agreement with the applicant for review. If, on the expiration of the review period, the Information Commissioner has not made any recommendations, no recommendations by the Commissioner are deemed to have been made.

**Schedule 1 [29]** gives effect to recommendation 13 of the Review by providing that, if an applicant for review is not the access applicant, the decision of an agency must first be internally reviewed by the agency before it can be reviewed by the Civil and Administrative Tribunal (*NCAT*).

**Schedule 1 [31]–[33]** give effect to recommendation 14 of the Review. **Schedule 1 [31]** allows NCAT to order that a person must not make any further access applications without first obtaining the approval of NCAT if the person, or a person acting in concert with that person, has made 3 access applications in the previous 2 years that lacked merit (a *restraint order*). **Schedule 1 [32]** provides for the ways in which a restraint order may be applied. **Schedule 1 [33]** provides for the matters which NCAT may consider when deciding whether to approve an access application being made by a person subject to a restraint order.

**Schedule 1 [34]** gives effect to recommendation 15 of the Review by allowing NCAT on its own initiative to report an officer of an agency to the Minister responsible for the agency if NCAT is of the opinion that the officer has failed to exercise in good faith a function conferred on the officer by the principal Act. If the Minister is a party to the proceedings, NCAT may report the officer to the Information Commissioner.

### Public interest considerations against disclosure

**Schedule 1 [40]** gives effect to recommendation 16 of the Review by making it clear that information is Cabinet information if it is contained entirely or in part in a document that reveals information concerning a Cabinet decision or reveals a position of a Minister on a matter in Cabinet.

**Schedule 1 [44]** gives effect to recommendation 17 of the Review by providing that it is to be conclusively presumed that there is an overriding public interest against disclosure of information if the information is contained in a document concerning law enforcement and public safety created by a law enforcement agency in another jurisdiction, including a jurisdiction outside of Australia.

**Schedule 1 [46]** gives effect to recommendation 18 of the Review by including information that relates to the review functions of the Privacy Commissioner as excluded information for the purposes of the principal Act.

**Schedule 1 [41], [54] and [55]** give effect to recommendation 19 of the Review. **Schedule 1 [41]** provides that it is conclusively presumed that there is an overriding public interest against disclosure of any information contained in a document that was, in response to a court order, not compelled by a court to be produced on the grounds of privilege.

**Schedule 1 [54]** provides that personal information does not include the information of an individual engaged in the exercise of public functions if the information relates to the individual's position title, public functions or the agency in which the individual works.

**Schedule 1 [55]** provides that information is not considered to be government information held by an agency if the information was unsolicited and not relevant to the agency's business or functions.

### Miscellaneous amendments

**Schedule 1 [53]** gives effect to recommendation 6 of the Review by excluding from the definition of *working day* the period declared by the Premier as the Christmas closedown period.

**Schedule 1 [25]** gives effect to recommendation 10 of the Review by inserting a note to aid interpretation in relation to fees.

The following amendments give effect to recommendation 19 of the Review.

**Schedule 1 [4]** provides that a government contract, to which an agency is a party, is to be recorded on the agency's register if the contract has a value of \$150,000 or more, including GST.

**Schedule 1 [12]** combines similar provisions that relate to statements required to be made by an agency when acknowledging receipt of access applications.

**Schedule 1 [22]** provides that the obligation to refund an application fee does not apply to any application transferred to or from the agency.

**Schedule 1 [23]** provides that the total discount on any processing charge for dealing with an access application must not be more than 50%.

**Schedule 1 [35]** makes it clear that copies of certain annual reports are only to be provided to the Information Commissioner after the report has been tabled in Parliament.

**Schedule 1 [50] and [51]** insert savings and transitional provisions consequential on the enactment of the proposed Act.

**Schedule 1 [1]–[3], [5], [11], [13], [24], [36]–[39], [42], [43], [45], [47]–[49] and [52]** make minor amendments of a law revision nature, including amendments to update cross-references and references to certain officers and agencies that have changed names.



New South Wales

# Government Information (Public Access) Amendment Bill 2018

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New South Wales

# Government Information (Public Access) Amendment Bill 2018

No. , 2018

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## **A Bill for**

An Act to make miscellaneous amendments to the *Government Information (Public Access) Act 2009* following a statutory review of that Act.

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

1

**1 Name of Act**

2

This Act is the *Government Information (Public Access) Amendment Act 2018*.

3

**2 Commencement**

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This Act commences on the date of assent to this Act.

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<b>Schedule 1</b>	<b>Amendment of Government Information (Public Access) Act 2009 No 52</b>	1
		2
<b>[1] Section 4 Interpretation</b>		3
	Insert after the definition of <i>government information</i> in section 4 (1):	4
	<b>Note.</b> <i>Record</i> is defined in clause 10 of Schedule 4.	5
<b>[2] Section 20 Agencies must have agency information guide</b>		6
	Omit “Director-General of the Department” from section 20 (3).	7
	Insert instead “Chief Executive of the Office”.	8
<b>[3] Section 20 (3)</b>		9
	Omit “the Director-General”. Insert instead “the Chief Executive”.	10
<b>[4] Section 27 Register of government contracts valued at \$150,000 or more</b>		11
	Insert “(including GST)” after “\$150,000” in section 27 (1).	12
<b>[5] Section 38 Exception for industry support contracts</b>		13
	Omit “Department of State and Regional Development”.	14
	Insert instead “Department of Industry”.	15
<b>[6] Section 41 How to make an access application</b>		16
	Omit section 41 (1) (a). Insert instead:	17
	(a) it must be in writing sent by post to or lodged at an office of the agency concerned or made in the manner approved by the agency under subsection (2),	18 19 20
<b>[7] Section 41 (1) (d)</b>		21
	Omit “a postal”. Insert instead “the name of the applicant and a postal or email”.	22
<b>[8] Section 41 (1A)</b>		23
	Insert after section 41 (1):	24
	(1A) If the applicant has applied at any time to another agency for substantially the same information, an application must also include the name of the other agency. However, failure to comply with this subsection does not affect the validity of an application.	25 26 27 28
<b>[9] Section 41 (2)</b>		29
	Omit the subsection. Insert instead:	30
	(2) An agency may approve additional facilities for the making of an access application or the payment of an application fee.	31 32
<b>[10] Section 44 Ways in which applications can be transferred</b>		33
	Insert at the end of the section:	34
	(2) An agency may, for the purposes of transferring only part of an access application, split an application into 2 or more applications. Any resulting application is to be treated as a separate application by the applicant.	35 36 37



<b>[11] Section 51 Initial decision as to validity of application</b>	1
Insert “as to the validity of an application” after “decision” in the note to section 51 (2).	2
<b>[12] Section 51 (3) (c)</b>	3
Omit the paragraph. Insert instead:	4
(c) the following statements about the inclusion of information in the agency’s disclosure log (unless the agency considers it unlikely that information about the application will be included in the disclosure log):	5
(i) a statement that information concerning the application is likely to be included in the agency’s disclosure log and that the applicant can object to this,	6
(ii) a statement about the right of review under Part 5 of a decision by the agency to include information in its disclosure log despite the applicant’s objection,	7
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<b>[13] Section 54 Consultation on public interest considerations</b>	14
Omit “will” from section 54 (2A) (a). Insert instead “is likely to”.	15
<b>[14] Section 54A</b>	16
Insert after section 54:	17
<b>54A Consultation with other agencies</b>	18
(1) An agency may, in response to an access application, consult with any other agency for the following purposes:	19
(a) to determine whether there is an overriding public interest against disclosure of the information,	20
(b) to identify a person that may be required to be consulted under section 54.	21
(2) An agency may be consulted under this section even if the agency would not reasonably be expected to have concerns about the disclosure of the information.	22
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<b>[15] Section 55 Consideration of personal factors of application</b>	28
Insert “to take reasonable steps” after “purpose, require the applicant” in section 55 (5).	29
<b>[16] Section 56 Authorised objector can object to inclusion in disclosure log</b>	30
Omit “research” from section 56 (2) (c).	31
Insert instead “research, or the compilation or analysis of statistics,”.	32
<b>[17] Section 56 (3)</b>	33
Omit the subsection. Insert instead:	34
(3) If an authorised objector has objected to the inclusion of information in the agency’s disclosure log, the agency must decide:	35
(a) whether the authorised objector is entitled to object, and	36
(b) if the agency decides that the authorised objector is entitled to object, whether the objection outweighs the general public interest in including the information in the disclosure log.	37
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<b>[18] Section 59 Decision that information already available to applicant</b>	1
Insert at the end of section 59 (1) (c):	2
, or	3
(d) available to the applicant as the applicant has already been provided with access to the information and the agency has no reason to believe the information is no longer in the applicant's possession, or	4 5 6
(e) publicly available on a website, or	7
(f) available to the applicant by way of a standing rule or order of the Legislative Council or Legislative Assembly.	8 9
<b>[19] Section 59 (2)</b>	10
Insert "why the agency believes the information is already available to the applicant and, if necessary," after "indicate".	11 12
<b>[20] Section 60 Decision to refuse to deal with application</b>	13
Insert after section 60 (1) (d):	14
(e) the agency reasonably believes the applicant, or a person acting in concert with the applicant, is:	15
(i) a party to current proceedings before a court, and	16 17
(ii) able to apply to that court for the information.	18
<b>[21] Section 60 (3A) and (3B)</b>	19
Insert after section 60 (3):	20
(3A) In deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency may, without limitation, take into account the following considerations:	21 22 23
(a) the estimated volume of information involved in the request,	24
(b) the agency's size and resources,	25
(c) the decision period under section 57.	26
(3B) Any consideration under subsection (3A) must, on balance, outweigh:	27
(a) the general public interest in favour of the disclosure of government information, and	28 29
(b) the demonstrable importance of the information to the applicant, including whether the information:	30 31
(i) is personal information that relates to the applicant, or	32
(ii) could assist the applicant in exercising any rights under any Act or law.	33 34
<b>[22] Section 63 Deemed refusal if application not decided within time</b>	35
Insert after section 63 (4):	36
(5) Despite this section, the obligation to refund an application fee to the applicant does not apply to any application that was transferred to or from the agency.	37 38
<b>[23] Section 64 Processing charge for dealing with access application</b>	39
Insert after section 64 (4):	40
(5) A processing charge must not be discounted under section 65 or 66 by more than 50% even if both sections apply.	41 42

<b>[24] Section 79 Provision of information subject to subpoena</b>	1
Insert after section 79 (1):	2
<b>Note.</b> An agency may refuse to deal with an access application if the information is or was available to the applicant by way of a subpoena or order of the court—see section 60 (1) (d).	3 4 5
<b>[25] Section 85 Fee for internal review</b>	6
Insert after section 85 (1):	7
<b>Note.</b> Section 127 enables an agency to waive, reduce or refund a fee payable or paid under this Act in any case that the agency thinks appropriate, subject to the regulations.	8 9
<b>[26] Section 86 Required period for determination of internal review</b>	10
Insert after section 86 (1):	11
(1A) If the agency reasonably believes more than one person is entitled to an internal review of any reviewable decision for the same access application, the review period does not commence until the expiration of the time within which an internal review can be applied for under this Part by any of those persons.	12 13 14 15
<b>[27] Section 92A</b>	16
Insert after section 92:	17
<b>92A Required period for review</b>	18
(1) The Information Commissioner must complete the review, and make any recommendations to the agency, within 40 working days (the <i>review period</i> ) after the Information Commissioner receives all information the Information Commissioner considers necessary to complete the review.	19 20 21 22
(2) The review period may be extended by the Information Commissioner on agreement with the applicant for review. The Information Commissioner must notify the agency if the review period is extended.	23 24 25
(3) If the Information Commissioner has not made any recommendations within the review period, the Information Commissioner is deemed to have made no recommendations to the agency.	26 27 28
(4) The applicant for review must be notified by the Information Commissioner of the completion of the review and of any recommendations made by the Information Commissioner to the agency.	29 30 31
<b>[28] Section 97 Onus on agency to justify decisions</b>	32
Insert after section 97 (3):	33
(4) If the review is of a decision to include information in a disclosure log despite an objection by the applicant for review, the burden of establishing whether the objection outweighs the general public interest to have the information included lies with the applicant for review.	34 35 36 37
<b>[29] Section 100 Administrative review of decision by NCAT</b>	38
Omit the note. Insert instead:	39
(2) An aggrieved person who is not the access applicant is not entitled to apply to NCAT for an NCAT administrative review of a decision if the person is still entitled to apply for an internal review of the decision under Division 2.	40 41 42

<b>[30] Section 105 Onus on agency to justify decisions</b>	1
Insert after section 105 (3):	2
(4) If the review is of a decision to include information in a disclosure log despite an objection by the applicant for review, the burden of establishing whether the objection outweighs the general public interest to have the information included lies with the applicant for review.	3 4 5 6
<b>[31] Section 110 Orders to restrain making of unmeritorious access applications</b>	7
Omit section 110 (1). Insert instead:	8
(1) NCAT may order that a person is not permitted to make an access application without first obtaining the approval of NCAT (a <i>restraint order</i> ) if NCAT is satisfied that:	9 10 11
(a) at least 3 access applications (to one or more agencies) in the previous 2 years have been made that lack merit, and	12 13
(b) the applications were made by the same person or by any other person acting in concert with the person.	14 15
<b>[32] Section 110 (3)</b>	16
Omit the subsection. Insert instead:	17
(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 any one or more of the following:	18 19 20
(a) a specific time period,	21
(b) a specific number of applications, whether in total or to particular agencies,	22 23
(c) particular kinds of information,	24
(d) particular agencies.	25
<b>[33] Section 110 (5A)</b>	26
Insert after section 110 (5):	27
(5A) In deciding whether to approve the making of an access application by a person the subject of a restraint order, NCAT is to consider, without limitation, any of the following:	28 29 30
(a) whether the proposed application is lacking in merit,	31
(b) whether the proposed application is frivolous, vexatious, misconceived or lacking in substance,	32 33
(c) whether the applicant has engaged in conduct designed to harass, to cause delay or detriment, or to achieve another wrongful purpose.	34 35
<b>[34] Section 112</b>	36
Omit the section. Insert instead:	37
<b>112 Report on improper conduct</b>	38
If NCAT is of the opinion on the completion of an NCAT administrative 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, NCAT may on its own initiative bring the matter to the attention of:	39 40 41 42

	(a) the Minister who appears to NCAT to have responsibility for the agency, or	1 2
	(b) if the Minister who appears to NCAT to have responsibility for the agency was a party to the proceedings, the Information Commissioner.	3 4
<b>[35]</b>	<b>Section 125 Reports to Parliament</b>	5
	Insert “after the report has been tabled in each House of Parliament” after “Information Commissioner” wherever occurring in section 125 (1) and (3).	6 7
<b>[36]</b>	<b>Schedule 1 Information for which there is conclusive presumption of overriding public interest against disclosure</b>	8 9
	Omit the matter relating to the <i>Education Act 1990</i> from clause 1 (1). Insert instead:	10
	<i>Education Act 1990</i> —provision made by or under section 18A (Publication of school results) or Division 2 (Obtaining information about students) of Part 5A	11 12
<b>[37]</b>	<b>Schedule 1, clause 1 (1)</b>	13
	Omit “election policy and other costings” from the matter relating to the <i>Parliamentary Budget Officer Act 2010</i> .	14 15
	Insert instead “election policy costings”.	16
<b>[38]</b>	<b>Schedule 1, clause 1 (1)</b>	17
	Omit the matter relating to the <i>Police Regulation 2008</i> . Insert instead:	18
	<i>Police Regulation 2015</i> —clause 54 (Secrecy as to complaints about conduct)	19
<b>[39]</b>	<b>Schedule 1, clause 1 (1)</b>	20
	Omit “ <i>Royal Commission (Police Service) Act 1994</i> ”.	21
<b>[40]</b>	<b>Schedule 1, clause 2 (4)</b>	22
	Omit “the information would”.	23
	Insert instead “the information is contained in a document that, either entirely or in part, would”.	24 25
<b>[41]</b>	<b>Schedule 1, clause 5A</b>	26
	Insert after clause 5:	27
	<b>5A Privilege generally</b>	28
	It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a document that, in response to a court order, subpoena or otherwise:	29 30 31
	(a) was a document a person objected to producing in any court proceedings on the grounds that the document was a privileged document, and	32 33 34
	(b) was not compelled by a court to be given or produced on the grounds of privilege.	35 36
<b>[42]</b>	<b>Schedule 1, clause 7 (d)</b>	37
	Omit “the Department of Corrective Services”.	38
	Insert instead “Corrective Services NSW, Department of Justice,”.	39

<b>[43] Schedule 1, clause 7 (e)</b>	1
Omit “Drug Intelligence Unit of the Department of Juvenile Justice”.	2
Insert instead “Security and Intelligence Unit of Juvenile Justice, Department of Justice.”	3
<b>[44] Schedule 1, clause 7 (f)</b>	4
Insert after clause 7 (e):	5
(f) a document concerning law enforcement and public safety created by another entity established under a law of another jurisdiction, including a jurisdiction outside Australia, whose functions substantially correspond with an entity referred to in paragraphs (a)–(e), including any entity declared by the regulations to be a corresponding entity for the purposes of this clause.	6 7 8 9 10 11
<b>[45] Schedule 1, clause 12 (2) and (3)</b>	12
Omit the subclauses. Insert instead:	13
(2) It is to be conclusively presumed that there is an overriding public interest against disclosure of information that has been provided to the Scientific Committee under the <i>Biodiversity Conservation Act 2016</i> if the Minister has, under section 4.20 of that Act, authorised the Scientific Committee to restrict access to the information.	14 15 16 17 18
(3) It is to be conclusively presumed that there is an overriding public interest against disclosure of information in a public register required to be kept under the <i>Biodiversity Conservation Act 2016</i> if the Environment Agency Head (within the meaning of that Act) has, under section 9.10 of that Act, restricted access to the information.	19 20 21 22 23
<b>[46] Schedule 2 Excluded information of particular agencies</b>	24
Insert “review,” after “Privacy Commissioner—” in clause 2.	25
<b>[47] Schedule 2, clause 2</b>	26
Omit “Department of Local Government” and “Director-General”.	27
Insert instead “Office of Local Government” and “Chief Executive”, respectively.	28
<b>[48] Schedule 2, clause 2</b>	29
Omit the matter relating to The DNA Review Panel.	30
<b>[49] Schedule 2, clause 4</b>	31
Omit “and Training”.	32
<b>[50] Schedule 3 Savings, transitional and other provisions</b>	33
Omit clause 1 (1). Insert instead:	34
(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.	35 36

<b>[51] Schedule 3, clauses 1A and 1B</b>	1
Insert after clause 1:	2
<b>1A Continuation of presumption against disclosure of information in Schedule 1</b>	3
(1) The conclusive presumption that there is an overriding public interest against disclosure of any information that is described in Schedule 1, or was described in that Schedule immediately before a provision of that Schedule was amended or repealed, continues to have effect despite:	4
(a) the repeal of any Act or prohibition referred to in that Schedule, or	5
(b) the abolition of any agency referred to in that Schedule, or	6
(c) the amendment of that Schedule.	7
(2) This clause is subject to any express provision to the contrary.	8
<b>1B Continuation of excluded information in Schedule 2</b>	9
(1) Information that relates to a function specified in Schedule 2, or was specified in that Schedule immediately before a provision of that Schedule was amended or repealed, continues to be excluded information for the purposes of this Act despite:	10
(a) the repeal of any Act referred to in that Schedule, or	11
(b) the abolition of any agency referred to in that Schedule, or	12
(c) the amendment of that Schedule.	13
(2) This clause is subject to any express provision to the contrary.	14
<b>[52] Schedule 4 Interpretative provisions</b>	15
Omit “ <i>Coroners Act 1980</i> ” from paragraph (b) of the definition of <i>judicial functions</i> in clause 1.	16
Insert instead “ <i>Coroners Act 2009</i> ”.	17
<b>[53] Schedule 4, clause 1, definition of “working day”</b>	18
Omit “or public holiday”.	19
Insert instead “, public holiday or any day during the period declared by the Premier as the Christmas closedown period”.	20
<b>[54] Schedule 4, clause 4 (3) (b)</b>	21
Insert “, including the individual’s position title, public functions and the agency in which the individual works” after “contact details”.	22
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**[55] Schedule 4, clause 12 (4)**

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Insert after clause 12 (3):

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- (4) Information contained in a record held by the agency that is information that was unsolicited and is not relevant to the agency's business or functions is not government information held by the agency.

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