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How to use this Manual
The purpose of this Manual is to assist agency and Ministerial staff in their interpretation of the FOI Act and to take them through the steps for handling FOI requests and related matters, including appeals.

Some sections of this Manual also contain statements of Government policy relating to FOI which must be followed by agencies. Where, like this sentence, a sentence or paragraph in this Manual is bolded and underlined, and the word [policy] appears at the end of it, that sentence or paragraph reflects a policy determined by the Department of Premier and Cabinet, which must be observed by all agencies. [policy]

Ombudsman’s Guidance
This Manual has been prepared by the Department of Premier and Cabinet in conjunction with the Ombudsman.

Included in this Manual are various opinions expressed by the Ombudsman, including a number of boxed sections headed ‘Ombudsman’s Guidance’. These set out the Ombudsman’s opinions and policies for dealing with complaints, and are designed to assist agencies to understand how the Office of the Ombudsman interprets the Act and deals with complaints.

The opinions expressed by the Ombudsman in this Manual do not always necessarily reflect the view of the Department of Premier and Cabinet or Government policy. They are included for information and guidance only. Where there is any inconsistency between the views expressed by the Ombudsman and the policies of the Government (including those expressed elsewhere in this Manual), those agencies which are bound to comply with NSW Government policy must comply with Government policy.

Notifying the Department of Premier and Cabinet
The Department of Premier and Cabinet should be notified if agencies, Ministers or any of their staff have significant concerns about the application of FOI policies or when an agency or Minister applies for a Ministerial certificate. [policy]

References to the FOI Act
Unless the context requires otherwise, references in this Manual to any section, part, or schedule are references to that section, part or schedule in the Freedom of Information Act 1989 (referred to as the FOI Act or the Act).

Currency
This Manual is based on the law as at 1 July 2007.
Updating the Manual

The Department of Premier and Cabinet is responsible for updating the Manual periodically. Any change in policy between updates will be notified to agencies by way of a Premier’s Memorandum.

Any comments concerning the Manual should be directed to the Freedom of Information Co-ordinator, the Department of Premier and Cabinet (Phone (02) 9228 4441 or Fax (02) 9228 4421).
1 Overview

1.1 The intention of the FOI Act

1.1.1 The primary purpose of the FOI Act is to provide the public with access to documentation and information held by government agencies. The starting point for agencies is that information must be disclosed on request, unless an exemption applies.

1.1.2 The objects of the FOI Act are:

“To extend, as far as possible, the rights of the public:

(a) to obtain access to information held by the Government, and

(b) to ensure that records held by the Government concerning the personal affairs of members of the public are not incomplete, incorrect, out of date or misleading” (s.5(1)).

1.1.3 It is clearly stated in the FOI Act that the means by which the above objects are to be achieved are:

“(a) by ensuring that information concerning the operations of the Government … is made available to the public, and

(b) by conferring on each member of the public a legally enforceable right to be given access to documents held by the Government subject only to such restrictions as are reasonably necessary for the proper administration of the Government, and

(c) by enabling each member of the public to apply for the amendment of such of the Government’s records concerning his or her personal affairs as are incomplete, incorrect, out of date or misleading” (s.5(2)).

1.1.4 The intention of the Parliament that access be granted to as much information as possible is clearly emphasised in the FOI Act:

“It is the intention of the Parliament:

(a) that this Act shall be interpreted and applied so as to further the objects of this Act, and

(b) that the discretions conferred by this Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information” (s.5(3)).

1.1.5 This statement of principle set out in the FOI Act is consistent with the Interpretation Act 1987, which provides that:

“In the interpretation of a provision of an Act … a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that purpose or object.” (s.33)
1.1.6 The High Court has taken the view that, in relation to the Victorian FOI Act (which is similar in terms to the NSW FOI Act),

“It is proper to give the relevant provisions of the Act a construction which would further, rather than hinder free access to information” (Victorian Public Service Board v Wright (1986) 160 CLR 145, at 153).

1.1.7 This view was reinforced by Justice Kirby in Commissioner of Police v the District Court of NSW and Perrin (1993) 31 NSWLR 606, in the following terms:

“I tend to favour the view that the Act…must be approached by decision makers with a general attitude favourable to the provision of the access claimed…[D]ecision makers…should not allow their approaches to be influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of the Act and its equivalents.”

1.1.8 Although when interpreting and applying the FOI Act a general approach should be adopted which favours the release of information, this principle does not necessarily mean that there is a general presumption when interpreting exemptions that documents should be disclosed (see Tunchon v Commissioner of Police, New South Wales Police Service [2000] NSWADT 73). The provisions of the FOI Act should be interpreted so as to favour disclosure, unless the ordinary meaning of the words in an exemption category can justify a claim for exemption. Even then, agencies should be aware that they generally retain a discretion to release exempt documents under s.25 (see [10.5]).

1.2 **Principal features of the FOI Act**

1.2.1 The FOI Act provides that:

(a) a person may apply for access to documents held by government agencies and, provided the request is a formal FOI request, agencies must, in most cases, respond to that request within 21 days;

(b) in certain circumstances the agency may refuse or defer a request for access;

(c) where a request for access is refused or deferred the agency must provide the applicant with the reasons for its decision;

(d) an applicant may request a review of a determination; however, the avenues of appeal available vary depending on whether certain time limits are observed and whether the document sought is held by an agency or a Minister;

(e) exempt material can be deleted from a document so that partial access can be granted to the document rather than access being denied in full; and

(f) if a person believes that a record held by government agencies about his or her personal affairs is incomplete, incorrect, out of date or misleading, that person may apply to have that record amended.
1.2.2 The FOI Act also imposes certain obligations on agencies and Ministers:

(a) there must be clear arrangements for access to documents;

(b) certain information about the functions of agencies must be published and copies of policy documents must be made publicly available for inspection and purchase; and

(c) the provisions of the FOI Act must be interpreted so as to facilitate and promote, promptly and at the lowest reasonable cost, disclosure of information.

1.3 Alternative processes for accessing information

1.3.1 In addition to the FOI Act, there are a number of alternative means through which the public can access information held by Government about themselves and on other issues more generally. The FOI Act is intended to complement or supplement existing arrangements and not to restrict them.

1.3.2 Certain information is routinely made available by Government:

- as a result of legislative requirements (such as the provisions of the FOI Act which require certain policy documents and contracts to be made available, or the provisions of the Local Government Act 1993 which require documents about certain council matters to be automatically released on request); or
- simply because it is necessary or represents good administrative practice (eg the release of consultation papers on changes to Government policy).

1.3.3 Where material is not otherwise made available, the FOI Act provides the main mechanism through which a person can apply to seek access to such information. The primary alternatives to an application under the FOI Act include:

- **Application under an open access policy:** For example, NSW Health has a policy of giving an individual access to his or her health record on request. Most public sector agencies are able voluntarily to release certain information on request, for example giving staff access to their own personnel files.

- **Privacy and Personal Information Protection Act:** This Act gives a person certain rights to access personal information about himself or herself.

- **Health Records and Information Privacy Act:** This Act gives a person certain rights to access health information about himself or herself.

- **State Records Act:** This Act provides that any person can inspect records over 30 years old if they are subject to an open access direction, or application can be made for an open access direction where one is not in place.

- **Local Government Act:** Members of the public have the right to request access to documents held by local government, in accordance with s.12 of the Local Government Act.
1.3.4 The table in Appendix I summarises the key differences between the main application procedures: ie the processes under the FOI Act, the *Local Government Act*, the *Privacy and Personal Information Protection Act*, and the *Health Records and Information Privacy Act*.

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**Ombudsman's Guidance - Open Government**

The Ombudsman is of the view that agencies should engage in an active, five-pronged, approach to the disclosure of information:

1. pro-active disclosure (voluntary publication of useful information);
2. informal disclosure (automatic release on request);
3. formal disclosure (presumption for release on application under the FOI Act);
4. FOI reporting (summaries of affairs, statements of affairs and annual reporting); and
5. amendment of records that are incomplete, incorrect, out of date or misleading.

**Pro-active Disclosure**

As stated at section 5(4) of the FOI Act, the Act is not intended,

"…to prevent or discourage the publication of information, the giving of access to documents or the amendment of records as permitted or required under any other Act or law."

In their 1996 report on Open Government, the Australian Law Reform Commission and Administrative Review Council stated at page 38 that the,

"…FOI Act prescribes when information must be disclosed. It does not prescribe when information is permitted to be disclosed. Agencies retain a discretion to disclose information at any time. This is expressly acknowledged in the Act… [in the equivalent provision to section 5(4) in the NSW Act]."

This issue was also referred to by a former Commonwealth Ombudsman in her 1994/95 Annual Report at page 35 where she said that,

"ideally, the FOI legislation should be a last resort mechanism to gain adequate information about government decision or action."

Agencies should review the information they make available for the assistance of members of the public to determine whether it is comprehensive, accurate and up-to-date.
Informal Disclosure

Mindful that the protections the FOI Act affords will not apply to the informal disclosure of documents, agencies should, whenever possible, routinely disclose information. To this end agencies should consider:

1. identifying any documents which they are required by law to make available for inspection and purchase, either under the FOI Act (s.15(1)) or under any other legislation which applies to the agency (eg s.12 of the Local Government Act 1993); and

2. classifying their documents and identifying those that can be released:
   (a) informally when a request is made for these documents (with a full refund of the FOI fee if the request is a formal FOI application rather than merely an informal request); or
   (b) if appropriate, under the provisions of the FOI Act (in the case of most agencies this should only consist of a relatively limited number of documents); and/or

3. identifying commonly requested categories of documents, where relevant, and determining whether it is unnecessary to deal with such requests formally under the FOI Act.

This process should be undertaken in conjunction with the preparation of an agency’s statement of affairs and summary of affairs.

Formal Disclosure

The spirit of the legislation encourages the disclosure of as much information and as many documents as possible. This means that agencies should exempt only the minimal amount of documentation clearly necessary for the effective functioning of government.

The main advantages of access under the FOI Act over informal approaches are that, for the agency, the Act provides a range of protections for the decision-maker and agency whereas, for the applicant, the Act requires a reasoned statement on the disclosure or non-disclosure of documents and provides a number of review opportunities should an unfavourable decision be meted out by the agency. The applicant is also provided with greater assurance that all documents held by the agency which come within the scope of the request have been dealt with. The FOI Act also requires the interests of third parties to be taken into account.

Agency FOI Annual Reports

It is important for the users of FOI that agencies properly report on their compliance with the FOI Act, in terms of both:

- statistics setting out the numbers of applications received and how they were dealt with; and
- an assessment of the impact of FOI on the agency.

The annual reporting requirements in the FOI Act help ensure that agencies are accountable for their actions and decisions. The FOI information required to be included in the annual reports of agencies is necessary for any overall assessment to be made as to:

- the use made by the public of their rights under the FOI Act;
• whether the agencies are complying with the spirit of the legislation; and
• the impact of the legislation on individual agencies and the public sector as a whole.

FOI Summaries of Affairs
It is also important for the success of FOI that each agency prepares and publishes summaries of affairs that fully comply with the statutory requirements of ss 14 and 15 of the FOI Act. Summaries of affairs serve several useful purposes, primarily related to enhancing participatory democracy and protecting members of the public. For example, summaries of affairs:

(1) force agencies to identify all policy documents which influence any of the agency’s work which has to do, in any way whatsoever, with the public (section 14);

(2) allow members of the public to access a wide range of agency documents without the need to make a formal application. All policy documents listed in an agency’s summary of affairs are required to be available for inspection and purchase by members of the public (section 15(1)) subject to the rare limitation provided in section 14(4);

(3) assist members of the public and local interest groups to obtain information about the policies, procedures and practices of an agency, and assist agency staff seeking precedent documents to assist them in drafting or updating policy documents; and

(4) protect members of the public from prejudice arising out of any contravention of the provisions of an agency’s policy document which has either not been identified as a policy document, or has been so identified but not made available for inspection or purchase. However, members of the public must be able to show that they were not aware of the provisions of the document and that they could lawfully have avoided the prejudice had they been so aware (s.15(3)).

In relation to the last point, in effect s.15(3) allows a person to resist prejudicial action by an agency on the basis that the person may have acted differently if they had been aware of a certain policy of an agency but were not aware of that policy because the agency had failed to include it in their summary of affairs.

Clearly the mere publication of summaries of affairs in government gazettes is not likely to lead to the achievement of all the purposes listed above. To make the information more easily accessible to members of the public agencies are encouraged to consider publishing their summary of affairs in their annual reports and on their Internet web sites (as suggested in Premier’s Memorandum 2000-4), as well as considering such options as:

• making copies of their summaries of affairs, or brochures containing that information, available to the public free of charge at offices of the agency;

• annexing the list of policy documents in their summaries of affairs to their management or corporate plans.

Amendment of Records
Where an agency becomes aware that a person disagrees with information in its documents that concerns the person’s personal affairs (because the person believes the information is incomplete, incorrect, out of date or misleading), the agency should ensure that the member of the public is informed of his or her right to apply for the amendment of those records.
1.4  Protections under the FOI Act

1.4.1 While there are many different ways that information can be made available, it is worth noting that the FOI Act provides a number of protections to agencies where information is released under the FOI Act.

Defamation or breach of confidence

1.4.2 Defamation may be committed when a person publishes material which damages the reputation of another person. Publication need only be to a single person.

1.4.3 Section 64 specifically states that the act of giving a person access to documents under the FOI Act cannot be taken as the act of publication which is essential for a legal action for defamation or breach of confidence, provided that the person who made the determination believes in good faith that the FOI Act permits or requires the determination to be made.

1.4.4 It is important to note that s.64 only protects publications made pursuant to the FOI Act, and does not protect the original publication to the Minister or agency (see Ainsworth v Burden [2003] NSW CA 90). In particular, s.64:

“gives no protection to the author or other person merely because the plaintiff became aware of the document by obtaining access to it under the Act and would not otherwise have known that he had been defamed, or been in a position to prove this.”

1.4.5 That said, members of the public writing to a Minister, a public authority or a public official drawing attention to alleged crimes and other wrong-doing, or alleged abuses in public administration, may be protected by qualified privilege under the common law or statute, subject to the conditions on which such privilege is conferred. One of these conditions at common law is that the publication must not be more extensive than the privilege requires or justifies.

1.4.6 Granting access to a document under the FOI Act cannot, for the purpose of the law relating to defamation or breach of confidence, be taken to authorise or approve the further publication of the document or its contents by the person who has been given access.

Criminal actions

1.4.7 The FOI Act states that, if the person who makes a determination to give access to a document does so in good faith, neither that person nor any other person concerned in giving access to the document is guilty of an offence merely because of making the determination or giving the access (s.65).
Personal liability

1.4.8 The FOI Act protects personally from any action, liability, claim or demand a principal officer, a Minister or any person acting under direction from a principal officer or Minister, or under an agency’s direction, provided that their actions were to execute the Act and were done in good faith (s.66).

Advantages and disadvantages of the different procedures for accessing personal information

The area where there is the most potential for overlap amongst the various Acts which allow people to access Government held information is in respect of the procedures for accessing personal information. A table setting out the key differences between the methods of accessing personal information under the FOI Act, the Privacy and Personal Information Protection Act 1998 (PPIP Act), the Health Records and Information Privacy Act 2002 (HRIP Act) and the Local Government Act 1993 is set out in Appendix I.

Where alternative statutory avenues are available to a potential applicant seeking access to information held by an agency, the agency has no right to determine which avenue will be used by the applicant.

When comparing the FOI Act with the PPIP Act and the HRIP Act, it is important to note that if access to a document could be validly refused under the FOI Act (pursuant to Schedule 1 or 2), access can be refused to the same document under the PPIP Act or the HRIP Act. This is because s.20(5) of the PPIP Act and s.22 of the HRIP Act provide, in effect, that the provisions of the FOI Act that impose conditions or limitations (however expressed) with respect to access to or alteration of personal information continue to apply in relation to any such matter as if those provisions were part of the PPIP Act or the HRIP Act.

From a practical perspective, while the differences are relatively minor, there are advantages and disadvantages in using each of the alternative avenues. The relative advantages and disadvantages will vary depending on the information sought, and from what type of agency it is sought.

For example:

(1) Where information is held by a state or local government agency and the information sought is simple, non-complex or non-contentious information concerning the applicant, it is generally better for both the applicant and the agency concerned if the application is made under the PPIP Act or the HRIP Act, as they have fewer formal procedural requirements.

(2) Where the information sought is held by a state government agency and the information is extensive, complex or in any way contentious, there are distinct advantages in making an FOI application for the applicant because this means:

- as the application is required to be in writing, there is proof that an application was made at a certain date and the particular documents were covered by the application;
- the agency must give written reasons for refusal of access, which should help the applicant decide whether and on what basis to seek a review of that decision;
- the applicant has a choice as to the form in which access is to be provided;
- there is a fixed time period with in which the application must be dealt, after which the applicant has a right of appeal or review; and
- in any review application to the Administrative Decisions Tribunal, the onus of proof is on the agency whereas in any appeal from a decision made under the PPIP Act or the HRIP Act the onus is on the applicant.
For agencies, however, the following should be noted:

- when dealing with applications under the PPIP Act or the HRIP Act, agencies are not restricted to the charging regime imposed under the FOI Act and regulations;
- there is no obligation to give reasons for determinations made under the PPIP Act or HRIP Act, unless there is an internal review under those Acts or a review by the ADT (that said, it is good administrative practice to provide reasons);
- there are fewer mandatory procedures that must be followed when dealing with applications under the PPIP Act or the HRIP Act; and
- the onus of proof is on the applicant in any review application to the ADT from a decision made by an agency under the PPIP Act or the HRIP Act, whereas the onus is on the agency under the FOI Act in such situations.

(3) If the information sought is held by a local government agency:

(a) Applicants may prefer to apply under the Local Government Act because the options and discretions available to local government agencies to refuse access to information are more limited than under the FOI Act.

(b) However, there are a number of advantages, particularly for the local government agency, if the procedures under the FOI Act are utilised, including:

- because the applicant must document his/her request for information, there is a reduced possibility of confusion or disagreement;
- the agency can charge fees and, where applicable, advanced deposits, for providing the information; and
- there are greater legal protections available for the agency under the FOI Act than under the Local Government Act.

1.5 General principles of operation under the FOI Act

Informal consultation

1.5.1 The spirit of the FOI Act is summed up in the intention of Parliament, namely,

“to facilitate and encourage promptly and at the lowest reasonable cost the disclosure of information”.

This has a bearing on how agencies' and Ministers' staff deal with members of the public and their applications. As a general rule, agencies should consult informally with applicants where, for instance, details on their applications need clarification. [policy] This approach can help head off potential problems and time-wasting by reducing unnecessary requests under FOI, directing applicants to alternative options for access where they exist, reducing time for processing unnecessary requests, reducing unnecessary costs to applicants and promoting a better image with the public. Skilled negotiation may be necessary to secure a reasonably specific request and
ensure that the applicant defines his or her needs without feeling the agency is being obstructive.

1.5.2 The FOI Act contains a general duty to assist applicants in respect of incomplete or wrongly directed applications (s.19).

Internal FOI documentation

1.5.3 **Agencies and Ministers’ offices should create a separate file for each FOI request. The file should contain the applicant’s name and the lodgement date. The file should also include all relevant documentation (i.e. documentation which shows whether the request has been granted in full, in part or refused and why, whether a complaint is being made to the Ombudsman or a review application made to the ADT, and the outcome of any such review).** [policy]

1.5.4 Ideally, a cover sheet should be included, from which agencies can complete statistical information for their annual reports, or in the case of Ministers’ offices, for submission to the Department of Premier and Cabinet.

1.5.5 **Agencies which routinely receive significant numbers of FOI requests should also keep a register of requests with details such as the applicant's name, the lodgement date, the finalisation date and the responsible FOI officer.** [policy]

Co-ordination between related agencies

1.5.6 In setting up administrative procedures, agencies will need to give attention to liaison between the different sections of an agency or the different agencies that could receive the same request. It is conceivable that two agencies (e.g. a Ministry, a related statutory authority or a department) could receive requests for the same documents and could, without proper consultation, handle these requests differently. Each agency should make their own individual decision.

Avoiding unnecessary reviews

1.5.7 As a general rule, agencies should try to avoid the need for a formal external review, without diminishing a person’s right to appeal. Practices like deciding to release a document with some deletions rather than refusing to release any of the document could lessen the need for litigation. Similarly, an adequate statement of reasons for any refusal could satisfy some applicants so that they do not feel the need to seek further review.

Proof of identity

1.5.8 In some cases it is essential to be sure of the identity of the applicant. (For guidance, see 'Identification Procedures' at Appendix F).

1.5.9 In these cases staff should require proof of identity before making copies of documents available or before allowing perusal of files.
1.5.10 As well, since different fees apply to applications for personal information, agencies and Ministers' offices will need to know the applicant's identity to determine the relevant fees. The same proof of identity should be required.

1.5.11 To minimise the risk of identity theft, the Office of the NSW Privacy Commissioner recommends that, if agencies consider it necessary to keep a record of documentation used to verify an applicant's identity, they should do so by way of a notation rather than by photocopying or scanning original documents.

Collection of personal information

1.5.12 In the course of receiving and assessing FOI applications, agencies may be required to collect personal information. Agencies should be aware of their obligations under the *Privacy and Personal Information Protection Act 1998* (PPIP Act).

1.5.13 Section 10 of the PPIP Act requires agencies to take such steps as are reasonable in the circumstances, before personal information is collected or as soon as practicable after collection, to ensure that the individual to whom the information relates is made aware of:

- the fact that the information is being collected;
- the purposes for which the information is being collected;
- the intended recipients of the information;
- whether the supply of the information is required by law or is voluntary, and any consequences for the individual if the information (or any part of it) is not provided;
- the existence of any right of access to, and correction of, the information; and
- the name and address of the agency that is collecting the information and the agency that is to hold the information.

Inappropriate comments

1.5.14 Concern has been raised that subjective, gratuitous and, at times, pejorative comments about individuals are sometimes recorded on documents held by agencies or Ministers.

1.5.15 Several issues arise from this practice where it exists:

- It is conceivable that a person referred to in an agency's file may consider that comments made about him or her have been harmful in some way. In extreme cases, legal action (eg a defamation action) may be taken.
- The FOI Act provides protection in certain circumstances against actions for defamation and breach of confidence and protection against personal liability and certain criminal actions (see [1.4] for details).
- Where guidelines are not already established, agencies and Ministers should consider giving their staff clear guidelines about comments that may
be made on files. This is particularly important where staff are required to evaluate people in some way, for instance, in relation to their work performance, or their eligibility for some benefit such as emergency housing, etc.

1.5.16 Such guidelines could include the following points:

- staff should confine any comments they make on files, documents or other records to statements of fact or opinion within their competence, without the use of emotive or pejorative language;
- where relevant, staff can objectively quote statements which have been made by, or which describe the behaviour of, the relevant person;
- staff should never make gratuitous personal or judgemental comments on files or otherwise;
- conclusions and judgements should always be explained and justified in terms of facts;
- evaluations need to be framed in objective terms; and
- any judgements should be relevant to the matter at hand.

Seeking legal advice

1.5.17 Where agencies or Ministers need more information on the interpretation of the FOI Act, there are several avenues of legal advice available. In order, agencies should seek legal advice from the following:

(i) the agency’s FOI coordinator or manager (since that person should be the person in the agency most familiar with FOI);
(ii) the agency’s legal branch / adviser; and
(iii) the Crown Solicitor’s Office. [policy]

1.5.18 Requests for legal advice in connection with the scope of the Cabinet exemption should first be discussed with the Policy Manager, Legal Branch, the Department of Premier and Cabinet (see [10.5.4]). [policy]

1.5.19 General (non-legal) advice on FOI matters can also be sought from the Department of Premier and Cabinet’s FOI officer. The Ombudsman is also available to provide advice to agencies or Ministers.

Decisions on FOI by tribunals in other States and the Commonwealth

1.5.20 FOI legislation has been in place in both the Commonwealth and Victoria longer than in New South Wales. Although the Victorian and Commonwealth legislation does not apply to the same agencies or Ministers and the provisions of the Acts are not always the same, those decisions could be relied upon in a review application to argue a particular interpretation of the NSW Act.

1.5.21 The same line of argument can apply in respect of FOI decisions in any other State or Territories.
1.6 Commonly used words and phrases

1.6.1 Part 1 (Preliminary) of the FOI Act sets out the objects of the FOI Act, its relationship with other Acts and a range of definitions of terms used in the FOI Act. Some of the more complex terms are discussed below.

1.6.2 Terms which relate specifically to the exemptions (eg 'public interest') are discussed in Chapter 10.

‘Agency’ (ss 6-9)

1.6.3 An agency means:

"a Government Department, public authority, local authority or public office, but does not include a body or office that is, by virtue of section 9, exempt from the operation of this Act in relation to all of its functions".

These types of agencies are defined below.

1.6.4 Section 9 states that,

"Any body or office specified in Schedule 2 is, in relation to such of the functions of the body or office as are so specified, exempt from the operation of this Act."

The exempt bodies or offices in Schedule 2 are listed in Chapter 14 at [14.1.7 and 14.1.8].

1.6.5 As well, s.6(2)(b) states that,

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

1.6.6 The FOI Act's definition of an agency is broad. It comprises government departments and local authorities, which are easy to identify, as well as public authorities and public offices, which cover a wide range of bodies.

‘Government department’ (s.6)

1.6.7 ‘Government Department’ means a Department within the meaning of the Public Sector Employment and Management Act 2002. Departments are listed in Schedule 1 to that Act.

‘Local authority’ (s.6)

1.6.8 A ‘local authority’ means a council or county council within the meaning of the Local Government Act 1993.'
‘Public authority’ (s.7)

1.6.9 In the FOI Act:

“a reference to a public authority is a reference to:

(a) a body (whether incorporated or unincorporated) established or continued for a public purpose by or under the provisions of a legislative instrument other than:
   (i) an incorporated company or association, or
   (ii) a body that, under subsection (2) or (3), is not to be taken to be a public authority, or
   (iii) the Legislative Council or the Legislative Assembly or a committee of either or both of those bodies, or
   (iv) a Royal Commission or a Special Commission of Inquiry; or
   (v) a local authority, or

(b) a body (whether incorporated or unincorporated) established or continued for a public purpose otherwise than by or under the provisions of a legislative instrument and declared by the regulation to be a public authority, or

(c) any other body (whether incorporated or unincorporated) declared by the regulations to be a public authority, being:
   (i) a body established by the Governor or by a Minister, or
   (ii) an incorporated company or association over which a Minister is in a position to exercise direction or control, or

(d) … [the NSW Police Force1], or

(e) a Teaching Service, or

(f) a statutory State owned corporation (and its subsidiaries) as defined in the State Owned Corporations Act 1989.″ (s.7(1))

1.6.10 The meaning of ‘a public purpose’ is crucial to deciding whether a particular body established by legislation is a public authority and, therefore, covered by the FOI Act (s.7(1)(a)) (see [1.6.18-1.6.23]).

1.6.11 Bodies established for a public purpose other than by legislation must be declared by the regulations to be a public authority so that they are covered by the FOI Act (s.7(1)(b)). If a body has been established by the Governor or by a Minister, or is an incorporated entity under Ministerial control, and the regulation declares it to be a public authority, then it is deemed to be a public authority and

1 The FOI Act refers to the Police Service. By Schedule 2 of the Police Amendment (Miscellaneous) Act 2006 a reference to the NSW Police in any Act is taken to be a reference to the NSW Police Force.
it is not necessary to consider whether it has been established for a ‘public purpose’ (s.7(1)(c)).

1.6.12 The FOI Act also makes provision for agencies to assume responsibility for less significant bodies, rather than have them comply with the FOI Act independently. For example:

“An unincorporated body (being 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) shall not be taken to be a separate public authority but shall be taken to be included in the agency.” (s.7(2))

“The regulations may declare that a specified body is not to be taken to be a separate public authority but is to be taken to be included in a specified agency.” (s.7 (3))

Public authorities and incorporation

1.6.13 The process of incorporation is the method by which the legal system creates new legal entities that are distinct from the individual people employed by them. Entities formed as a result of incorporation have a number of characteristics, such as a corporate name, the ability to own property and the capacity to sue and be sued.

1.6.14 Corporations may be formed in a number of ways – for example, by Royal Charter (the power of the monarch to form corporations, now little used), by statute (the legislative power of Parliament to create corporations, used for example to establish public utilities) and by registration and certification of companies under the relevant companies legislation (the Corporations Act 2001 (Cth)). Although corporations formed under the first two procedures may be subject to FOI legislation in NSW, registered companies are generally exempted under s.7(1)(a)(i). However:

(1) under s.7(1)(b) and (c), such bodies may be declared by regulation to be public authorities; and

(2) an office holder of a corporation incorporated under the Corporations Act may hold ‘public office’ within the meaning of that expression in s.8 of the FOI Act, and as such may constitute an ‘agency’ (see below).

‘Public office’ (s.8)

1.6.15 The FOI Act provides:

“(1) In this Act, a reference to a public office is a reference to:

(a) an office established or continued for a public purpose by or under the provisions of a legislative instrument, other than an office that, under subsection (2), is not to be taken to be a public office, or

(b) an office declared by the regulations to be a public office, being an to which an appointment is made by the Governor or by a Minister
otherwise than by or under the provisions of a legislative instrument.

(2) The regulations may declare that a specified office is not to be taken to be a separate public office but is to be taken to be included in a specified agency." (s.8)

1.6.16 As mentioned under ‘public authority’ above, the meaning of ‘a public purpose’ is crucial for determining eligible public offices (see ‘public purpose’ at [1.6.18-1.6.23]).

1.6.17 The FOI Act specifically excludes from the definition of a public office persons acting in a range of public capacities:

“(3) A person shall not be taken to be the holder of a public office:
(a) by virtue of the person’s holding office as:-
   (i) Governor, Lieutenant-Governor or Administrator of the State, or
   (ii) a member of the Legislative Council or the Legislative Assembly or of a committee of either or both of those bodies, or
   (iii) President of the Legislative Council or Speaker of the Legislative Assembly or chairman of a committee of either or both of those bodies, or
   (iv) a Minister of the Crown, or
   (v) Parliamentary Secretary, or
   (vi) a member of the Executive Council, or
(b) by virtue of the person’s holding:
   (i) an office the duties of which the person performs as an officer of an agency, or
   (ii) an office of member of an agency, or
   (iii) an office established or continued by or under the provisions of a legislative instrument for the purposes of an agency, or
   (iv) an office established or continued by or under the provisions of a legislative instrument for the purposes of a body referred to in section 7(1)(a)(i)-(v).” (s.8(3))

‘Public purpose’

1.6.18 Under s.7, the term ‘public authority’ may include bodies established or continued for a ‘public purpose’ or by legislation, or if declared by regulation to be a public authority. The term ‘public purpose’ is also mentioned in the definition of a ‘public office’ (s.8).

1.6.19 In relation to legislation other than FOI, the phrase ‘public purpose’ has been confined to governmental or Crown purposes. In cases where the functions of
an organisation are not obviously linked to governmental or Crown purposes, the test has been whether it can be said that the purpose is one which the general interest of the community, rather than the particular interests of individuals, is directly and vitally concerned. The phrase may be regarded differently, however, in relation to FOI.

1.6.20 This expression in FOI legislation has been considered by both the Commonwealth and Victorian Administrative Appeals Tribunals. These tribunals have reached different conclusions about the meaning of the same term, so it is difficult to predict how the NSW legislation will be interpreted.

1.6.21 Re Brennan and the Law Society of the Australian Capital Territory (1984) No. A84/29 decided that the ACT Law Society was established ‘for a public purpose’ and was therefore subject to FOI; Richards v the Law Institute of Victoria (County Ct, 13 August 1984, unreported) decided 6 days later that the equivalent Victorian body was not subject to that state’s FOI legislation.

1.6.22 The following factors are likely to be taken into account by Courts in deciding whether or not a body was established for a public purpose:

- whether the powers and functions of the body are conferred by statute, are not possessed by the ordinary citizen and are essentially of a public nature;
- the legislation establishing the organisation will generally reveal the objects of the body (in Re Brennan it was suggested that even if only one object was a ‘public purpose’ the body would still be subject to FOI; in Richards it was suggested that the public function would have to be the dominant one);
- the present activities of the organisation;
- whether there is any control by the Executive (eg in Richards, the Law Society’s by-laws could be revoked by the Governor-in-Council);
- statements in the FOI Act which provide that its provisions should be interpreted so as to further its objects;
- historical context (eg in Re Brennan, conferring on the Law Society powers which had previously been public powers and functions when exercised by the Commonwealth);
- whether the organisation is regarded as a ‘public authority’ or equivalent, in another context (eg in Re Brennan the Deputy President was influenced by the fact that the Society was regarded as a public authority by the Taxation Commission).

1.6.23 So far as NSW is concerned, a relevant case is the District Court decision in Bennett v University of New England (unreported, Judge Dunford, 7 August 1991). This was an amendment of records case. On page 5, his Honour, after referring to the functions of the University, said that he was satisfied ‘that these functions for which the University has been incorporated are a public purpose’. Presumably, other educational institutions would in most cases also be established for a public purpose. The very establishment of a body by
legislation gives it a certain ‘public’ character. As a matter of policy the phrase should be interpreted broadly.

‘Principal officer’ (s.6)
1.6.24 The FOI Act provides that ‘principal officer’ means:

“(a) in relation to a Government Department - the Department Head of the Department, or

(b) in relation to a public authority for which the regulations declare an office to be the principal office in respect of the authority - the holder of the office, or

(c) in relation to a public authority for which the regulations do not so declare:

(i) in the case of an incorporated body that has no members - the person who manages the affairs of the body, or

(ii) in the case of a body (whether incorporated or unincorporated) that is constituted by one person - the person who constitutes the body, or

(iii) in the case of a body (whether incorporated or unincorporated) that is constituted by 2 or more persons - the person who is entitled to preside at any meeting of the body at which the person is present, or

(d) in relation to a local authority - the general manager of the authority, or

(e) in relation to a public office - the holder of the office.”

‘Responsible Minister’ (s.6)
1.6.25 The FOI Act provides that ‘responsible Minister’ means:

"(a) in relation to a Government Department - the Minister responsible for the Department, or

(b) in relation to a public authority referred to in s.7(1)(a) - the Minister administering the provisions of the legislative instrument by or under which the public authority is established, or

(c) in relation to a public authority referred to in s.7(1)(b) or (c) - the Minister declared by the regulations to be the responsible Minister in relation to the public authority, or

(d) in relation to …[the NSW Police Force]- the Minister administering the [Police Act 1990], or

(e) in relation to a Teaching Service - the Minister administering the Teaching

2 The FOI Act refers to the Police Service. By item 1 of Schedule 2 of the Police Amendment (Miscellaneous) Act 2006 a reference to NSW Police in any Act is taken to be a reference to the NSW Police Force.

1.6.26 A responsible Minister has to ensure that all the agencies he or she has responsibility for comply with the publication requirements of the FOI Act (s.14). In this way, all agencies covered by the FOI Act make available the information the FOI Act requires.

1.7 Types of documents referred to in the FOI Act (s.6)

A ‘document’

1.7.1 Documents are defined broadly by the FOI Act to include:

“(a) any paper or other material on which there is writing or in or on which there are marks, symbols or perforations having a meaning, whether or not that meaning is ascertainable only by persons qualified to interpret them; and

(b) any disc, tape or other article from which sounds, images or messages are capable of being reproduced.” (s.6)

1.7.2 For a discussion of what things may constitute ‘documents’ see [3.3].

‘Exempt document’

1.7.3 An ‘exempt document’ is either of the following:

“(i) a document referred to in any one or more of the provisions of Schedule 1, or

(ii) a document which contains matter relating to functions in relation to which a body or office is, by virtue of s.9, exempt from the operation of this Act.” (s.6)

See Part 2 for discussion of Schedules 1 and 2.
‘Restricted document’

1.7.4 A ‘restricted document’ is a document referred to in any one or more of the provisions of Part 1 of Schedule 1.

1.7.5 These provisions refer to:
- Cabinet documents;
- Executive Council documents;
- documents affecting law enforcement and public safety; and
- documents relating to counter terrorism measures.

1.7.6 See Chapter 11 for discussion of Schedule 1, Part 1.

1.8 Extension of FOI to private-sector entities

1.8.1 Although the FOI Act in its terms applies only to agencies and Ministers, other legislation may extend the operation of the FOI Act to other organisations.

1.8.2 To date, this has occurred in two instances:
- Under the Commission for Children and Young People Act 1998 a person has a right to apply under the FOI Act for access to, or the amendment of, documents about ‘relevant employment proceedings’ against that person. Such an application may be made to any organisation involved in child-related employment, whether that be a government agency or a private body. Details of the regime for the making of FOI applications in relation to child protection are set out in Chapter 9.
- Under s.247 of the Crimes (Administration of Sentences) Act 1999 the provisions of the FOI Act apply to private managers and sub-managers of correctional facilities as if they were a ‘local authority’ (and therefore an ‘agency’) under the FOI Act.
2 FOI publication requirements

2.1 Overview

2.1.1 Members of the public who are contemplating making an FOI application will need to know which agency is likely to hold the documents they are seeking, and whether those documents may be available without an FOI application. For that purpose each agency is required to prepare a Statement of Affairs, which profiles the agency and the types of documents it holds, and a Summary of Affairs, which identifies specific documents which may be of assistance.

2.1.2 These publication requirements are set out in Part 2 (ss13, 14 and 15) of the FOI Act.

2.1.3 The object of this Part is also to ensure that information concerning the operations of agencies (particularly the policies, rules and practices followed in their dealings with members of the public) are published, kept up-to-date and made available to the public.

2.1.4 Part 2 of the FOI Act contains four main requirements:

(1) Agencies are required to publish annual Statements of Affairs which describe:

- the agency’s structure and functions;
- how the agency’s functions affect the public;
- how the public may participate in agency policy development;
- the kinds of documents the agency holds; and
- how members of the public may access and amend agency documents.

(2) Agencies are required to publish six monthly Summaries of Affairs which identify:

- each of the agency’s policy documents;
- the agency’s most recent Statement of Affairs; and
- the contact person, addresses, times etc for obtaining access to the agency’s documents.

(3) Agencies are required to make available for inspection and purchase copies of their:

- most recent Statement of Affairs;
- most recent Summary of Affairs; and
- policy documents.

(4) Agencies are required to publish certain information concerning certain government contracts with the private sector.

These documents must be made available without the need to submit an FOI application.
2.1.5 In addition to the requirements contained in Part 2 of the FOI Act, each agency must, within 4 months after the end of each reporting year, prepare an FOI Annual Report, for tabling in Parliament, on its obligations under the FOI Act (s.68). Agencies may include their FOI Annual Report as a section of their usual annual report. Each Minister also has reporting obligations which is discussed further at [2.9].

2.2 Application of Part 2 of the FOI Act
2.2.1 All agencies subject to the FOI Act are, through their Ministers (or General Managers in the case of local authorities), required to comply with Part 2 of the FOI Act.

2.2.2 Ministers are not required to publish comparable information about documents they hold.

2.3 Time for publication
2.3.1 Statements of Affairs must be published at intervals of not more than 12 months and Summaries of Affairs at intervals of not more than six months.

2.3.2 Summaries are published in a special three-part edition of the Government Gazette each July/August and January/February.

2.4 Manner of publication
2.4.1 Both the Statement of Affairs and the Summary of Affairs should be easy to read and understand. Excessive detail and the use of jargon and unexplained acronyms should be avoided.

2.4.2 There is no set publication manner or style concerning policy documents, and agencies may follow their own ‘corporate style’ for publications. This is quite acceptable as long as policy documents are inexpensive and readily available to the public. Ready availability and affordability are more important than impressive publication, styles and formats.

2.4.3 The Statement of Affairs may be published as a stand-alone document and/or as part of another document, such as the agency’s annual report.

2.4.4 Summaries of Affairs should be on A4-sized paper with margins (top, bottom, left and right) of at least 2cm and be formatted in Times Roman 12 point without page numbering.

2.4.5 The Summary of Affairs must be published in the Government Gazette and may be directed to Government Advertising and Information (GAI) by e-mail to nswgazette@commerce.nsw.gov.au

2.4.6 Copy should reach GAI at least two weeks prior to the end-of-June and end-of-December publication deadlines. For further information regarding the printing requirements in the Government Gazette, contact GAI on telephone 02 9372 7447 or fax 02 9372 7421.
2.5 Availability and cost

2.5.1 Agencies must not require members of the public to submit an FOI application to obtain a copy of the agency’s Statement of Affairs, Summary of Affairs or policy documents. [policy]

2.5.2 The intention of the FOI Act is that Statements of Affairs, Summaries of Affairs and policy documents will be both readily available and understandable to the public. Regardless of the form of publication, ready availability, ease of understanding and affordability are necessary.

2.5.3 Agencies should consider publishing their Statements and Summaries in community languages, where a demand for such publications has been identified.

Distribution of copies

2.5.4 Multiple distribution points, especially in larger, regionalised agencies may be required. It is important to note that while the FOI Act prescribes the minimum requirements which must be met by agencies, other forms of information dissemination are encouraged.

2.5.5 Agencies are encouraged to post their current Statement and Summary on their web sites. [policy] Material from the Statement or Summary may also be included in community newsletters or for distribution through periodic rate notices.

2.5.6 The Premier’s directive on Access To Published Information: – Laws, Policy and Guidelines sets out the requirements of the Copyright Act 1989 for depositing certain publications with designated institutions. Access to Published Information is available on the Department of Premier and Cabinet website (<www.premiers.nsw.gov.au>) (under Publications and then Publishing Information).

The following table summarises agencies’ deposit obligations:

<table>
<thead>
<tr>
<th></th>
<th>Government agencies¹</th>
<th>State owned corporations²</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Library of New South Wales</td>
<td>Two copies of every item in all formats must be deposited.</td>
<td>One copy of printed items must be deposited. Two copies of every item in all formats is recommended.</td>
</tr>
<tr>
<td>NSW Parliamentary Library</td>
<td>One copy of every item in all formats must be deposited unless the Parliamentary Librarian advises otherwise.</td>
<td>One copy of printed items must be deposited. A copy of every item in all formats is recommended.</td>
</tr>
<tr>
<td>National Library of Australia</td>
<td>One copy of every item in all formats must be deposited.</td>
<td>One copy of printed items must be deposited. A copy of every item in all formats is recommended.</td>
</tr>
</tbody>
</table>

¹ See [1.6.7].

² Bodies listed in Schedule 1 or Schedule 5 of the State Owned Corporations Act 1989.
Local councils are also required by s.12 of the *Local Government Act 1993* to make their documents available to members of the public on demand (see [Appendix I]).

**Cost**

2.5.8 Bearing in mind s.5(3)(b):

> "the discretions conferred by this Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information,"

it is expected that agencies will generally make their Statement of Affairs available free of charge (eg by placing it on their website).

2.5.9 The Summary is published in the Government Gazette. Again, it is expected that agencies will generally make copies available free of charge.

**Statement of Affairs**

2.6.1 Section 14(1)(a) requires the Minister responsible for an agency to ensure that an up-to-date Statement of Affairs of the agency is published every 12 months. Section 14(1A) imposes the same responsibilities on the General Manager of a local council.

2.6.2 This requirement does not apply to Ministers’ offices.

2.6.3 Material to be included in the Statement may include material prepared for the NSW Government Directory or for the agency’s annual report. For example, where the Statement of Affairs is included within an agency annual report, the Statement may incorporate by reference other sections of that annual report that satisfy the requirements of the Statement of Affairs.

2.6.4 Issues relating to the manner of publication, availability and cost are discussed at [2.4 and 2.5] above.

**Contents of the Statement of Affairs**

2.6.5 The Statement of Affairs must include a description of:

- the agency’s structure and functions;
- the way its functions affect the public;
• how the public may participate in agency policy development;
• the kinds of documents the agency holds; and
• how members of the public may access and amend agency documents (s14(2)).

These minimum requirements are discussed individually below.

Structure and functions of the agency

2.6.6 The Statement of Affairs must include ‘a description of the structure and functions of the agency’ (s.14(2)(a)).

2.6.7 The description of the structure and functions of the agency should be written in a way which makes clear how the agency was established, how it is organised and the way in which it operates. It should be sufficiently informative to provide an adequate understanding of both the functions of the agency as a whole and the functions of the components of the agency as identified in the organisation chart. More detail is desirable in respect of those parts of an agency which have extensive public contact. Typically, most (if not all) of the material required here will be available already in the agency’s annual report and/or corporate plan.

2.6.8 The type of material to be covered includes:
• the basis on which the agency is constituted (Act, charter etc);
• an organisation chart showing the formal structure;
• a description of the agency’s major functions and powers, including all legislation for which the agency is responsible;
• the agency’s objectives;
• whether or not a corporate plan exists (and how access to that plan may be obtained);
• planning mechanisms within the agency and the role of the corporate plan within those mechanisms;
• criteria for measuring the agency’s performance; and
• a broad indication of the resources employed by the agency, including staff, assets (current values) and operating income and expenditure.

See Example A in Appendix D.

The way the agency’s functions affect the public

2.6.9 The Statement must also include a description of,

“the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public” (s.14(2)(b)).

Again, much of the material is likely already to be included in the agency’s annual report.

2.6.10 While it may be argued that any government function has some effect on members of the public, the intent is to address those functions having a tangible
or direct effect on people (see s.5(2)(a)). Greater attention, therefore, should be given to identifying those functions having, or potentially having, wide public effect, rather than those which have only an indirect effect on members of the public.

2.6.11 The section should provide a general description of the powers exercised in the performance of the relevant functions. Agencies should include such detail as is sufficient to indicate the nature and purpose of powers conferred by legislation and subordinate legislation such as regulations, as well as any powers conferred by Government policy or Ministerial direction. See Example B in Appendix D.

How the public may participate in agency policy development

2.6.12 The Statement must describe arrangements for public participation in policy formulation and, in particular, “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” (s.14(2)(c)).

2.6.13 The term ‘arrangements’ refers to activities of a continuing character, not an arrangement which is confined to a single case or issue. Arrangements may be established under legislation, or they may have been set by the Government, Minister or chief executive officer. They may exist as a matter of practice, without having been the subject of any formal establishment.

2.6.14 The reference to ‘the formulation of the agency’s policy’ includes the formulation of policy by the Minister responsible for the agency. The Statement of Affairs should therefore include advisory bodies, through which there is public (external) participation, which provide advice directly to the relevant Minister, as well as similar bodies which provide advice to the relevant Department.

2.6.15 The Statement should include the particulars of arrangements such as:
- the structure of any body which is the vehicle for outside participation;
- the basis for constituting that body;
- the basis upon which membership exists and the procedures by which persons may become members of the body;
- reference to proceedings such as public hearings or other consultative processes; and
- whether submissions or representations made in accordance with the arrangements are received on a confidential basis or whether they are open to public scrutiny.

See Example C in Appendix D.

Kinds of documents the agency holds

2.6.16 The Statement must include a description of the kinds of documents held by the agency and, in particular:
“(i) a description of the various kinds of documents that are available for inspection at the agency (whether as part of a public register or otherwise) in accordance with the provisions of a legislative instrument other than this Act, whether or not inspection of any such document is subject to a fee or charge; and

(ii) a description of the various kinds of documents that are available for purchase from the agency; and

(iii) a description of the various kinds of documents that are available from the agency free of charge” (s.14(2)(d)).

2.6.17 The intent is that agencies should describe the kinds of records they keep, including those in archival storage, so that members of the public will be better informed generally about how agencies operate and affect them. It should also assist applicants to be able to describe the documents they seek when making FOI applications.

2.6.18 Agencies are not required to list all documents but only all categories of documents, irrespective of when they were created or came into the agency’s possession.

2.6.19 Agencies should provide in this part of their Statement:

- a listing of all categories or types of documents they hold;³
- a listing of those categories of documents which are available to be inspected under any legislative requirement (other than the FOI Act), whether such inspection is free or subject to a charge (see [Chapter 6]);
- a listing of those categories of documents that are available for sale from the agency; and
- a listing of those categories of documents that are available free of charge from the agency.

2.6.20 Documents which have been created and transferred by an agency to State Records, the Australian Museum, the Museum of Applied Arts and Sciences, the State Library, the NSW Ombudsman or another prescribed agency are deemed to be the documents of the agency which created and transferred them (s.11(1)).

2.6.21 The nature of the categories used in the Statement will depend on the nature of the agency and its functions. Categories of documents, such as personnel files and accounting records, will be common to most agencies. Beyond the obvious common categories, the way in which categories of documents are described will depend on the functions of each agency concerned and on the manner in which it keeps its records.

³ An agency is not required to publish information in its Statement of Affairs that is of such a nature that its inclusion would cause the Statement to be an exempt document (s.14(4)). Rarely would a category of documents not be included in this description because the mention of the category itself (not the documents behind the category) would cause this part of the Statement to be exempt. While a particular category of documents (eg Cabinet documents) may be exempt, such a category must still be listed. The inclusion in the listing of a particular category of documents does not mean that access under the FOI Act is available to any or all of the documents in that category.
2.6.22 The description for each category in the listings should:

- be sufficiently full and clear to enable members of the public to exercise effectively their rights under the FOI Act and to assist agency staff in responding accurately and speedily to requests;
- detail how the documents relate to the agency’s legislative and other functions; and
- detail the manner in which the material is kept (eg stored in computer systems) and the location of the material (eg central office, regional and/or local offices).

See Example D in Appendix D.

Access arrangements, procedures and points of contact

2.6.23 The Statement must also include a description of access arrangements, procedures and points of contact, in particular:

“(e) a description of the arrangements that exist to enable a member of the public to obtain access to the agency’s documents and to seek amendment of the agency’s records concerning his or her personal affairs [whether through FOI or other processes], and

(f) a description of the procedures of the agency in relation to the giving of access to the agency’s documents and to the amendment of the agency’s records concerning the personal affairs of a member of the public, including:

(i) the designation of the officer or officers to whom enquiries should be made, and

(ii) the address or addresses at which applications under this Act should be lodged.” (s.14(2)(e) and (f)).

2.6.24 Taken together these sections should describe the arrangements the agency makes for people to obtain access to documents and to seek to amend documents about their personal affairs under the FOI Act and under any other provisions that may apply to the agency. They should also describe how the agency deals with FOI applications and other applications to obtain access to documents and to amend documents about personal affairs.

2.6.25 As a minimum the following details should be included:

- the locations at which people may access the various kinds of documents held by the agency, including libraries at which copies of the documents have been deposited;
- the times during which people may access the various kinds of documents held by the agency;
- the manner in which people may access the various kinds of documents held by the agency (eg by personal visit, letter, phone);
• similar information in relation to the amendment of documents about personal affairs;
• costs of such arrangements (eg FOI and/or other application and processing fees); and
• how the agency deals with such applications:
  – how access is given,
  – how amendment to documents about personal affairs is made,
  – the designation of the officers to whom enquiries should be directed,
  – addresses,
  – phone numbers,
  – times for access, etc.
See Example E in Appendix C.

2.7 Summary of Affairs

2.7.1 The responsible Minister for an agency is required to ensure that an up-to-date Summary of Affairs of the agency is published in the Government Gazette every six months (s14(1)(b)). The same responsibility is imposed on the General Manager of a local council (s14(1A)).

2.7.2 The requirement to publish a Summary of Affairs does not apply to Ministers’ offices.

2.7.3 Issues relating to the manner of publication, availability and cost are discussed at [2.4 and 2.5].

Ombudsman’s Guidance – Importance of Summaries of Affairs

The Ombudsman is of the view that it is important for the success of FOI that agencies prepare and publish Summaries of Affairs that fully comply with the statutory requirements. Summaries of Affairs serve several useful purposes, primarily related to enhancing participatory democracy and protecting members of the public. Summaries of Affairs are used to:

• compel agencies to identify all policy documents which influence any of the agency’s work which has to do, in any way whatsoever, with the public (s.14);
• allow members of the public to access a wide range of agency documents without the need to make a formal application - all policy documents listed in an agency’s Summary of Affairs are required to be available for inspection and purchase by members of the public (s.15(1)) (subject to the limited exception for exempt material - s.14(4));
• assist members of the public to obtain information about the policies, procedures and practices of an agency;
• assist agency staff by providing precedent documents that may be used in drafting or updating policy documents;
• protect members of the public from prejudice arising out of any contravention of the provisions of an agency’s policy document which has either not been identified as a policy document, or has been so identified but not made available for inspection or purchase. However, members of the public must be able to show that they were not aware of the provisions of the document and that they could lawfully have avoided the prejudice had they been so aware (s.15(3)).
Contents of the Summary of Affairs

2.7.4 The contents of the Summary of Affairs are specified in s.14(3) as including the identification of:
   - each of the agency’s policy documents;
   - the agency’s most recent Statement of Affairs; and
   - the contact person, addresses, times etc for obtaining access to the agency’s documents.

2.7.5 These requirements are discussed in the following sections of this Manual.

Identification of each of the agency’s policy documents

2.7.6 A Summary of Affairs is required to identify each of the agency’s ‘policy documents’ (s14(3)(a)).

2.7.7 The title of each of the agency’s policy documents must be listed in the Summary. Copies of each policy document are required to be made available for inspection and purchase.

2.7.8 See [2.8] for guidance as to what constitutes a ‘policy document’.

Identifying the agency’s most recent Statement of Affairs

2.7.9 The Summary of Affairs must also identify the most recent Statement of Affairs published by the agency (s14(3)(b)). All that is necessary to satisfy this requirement is to state the name and date of publication of the agency’s most recent Statement, and how it may be inspected or purchased. A brief description of the contents of the Statement would also be helpful.

Contact arrangements

2.7.10 The Summary must specify agency contact arrangements and, in particular:

   “(c) shall specify the designation of the officer or officers to whom inquiries concerning the procedures for inspecting and purchasing the agency’s policy documents and statements of affairs should be made, and

   (d) shall specify the address or addresses of which and the times during which, the agency’s policy documents and statements of affairs may be inspected and purchased.” (s.14(3)(c) and (d)).

2.7.11 This information will make it easier for the public to deal with agencies. In most cases these details are likely to be identical to those provided in the Statement of Affairs (see [2.6.15]).

2.7.12 Agencies should include the following details:

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5 An agency is not required to publish information in its Summary of Affairs that is of such a nature that its inclusion would cause the Summary to be an exempt document (s.14(4)). As mentioned in relation to Statements of Affairs (at footnote 4 above), in very rare cases it may be that the very identification of a particular policy document is exempt, in which case the agency is not be required to disclose it.
• the designation of the officer/s to whom enquiries concerning the procedures for inspecting and purchasing the agency’s policy documents and statements of affairs should be made;

• the telephone number/s of these officers;

• the addresses at which the agency’s policy documents, Summary of Affairs and Statement of Affairs may be inspected or purchased including the State and other libraries where the agency has deposited a copy of policy documents, publications and statements; and

• the times during which inspection or purchase may be arranged.

2.8 Policy Documents

Meaning of ‘policy documents’

2.8.1 The FOI Act states that a ‘policy document’ in relation to an agency, means:

“(a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents, or

(b) a document containing particulars of any administrative scheme, or

(c) a document containing a statement of the manner, or intended manner, of administration of any legislative instrument or administrative scheme, or

(d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any legislative instrument or administrative scheme, or

(e) any other document of a similar kind,

that is used by the agency in connection with the exercise of such of its functions as 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.” (s.6)

2.8.2 This broad definition has three major components. Each must be examined in turn to decide which of the agency’s documents are ‘policy documents’ that have to be identified in accordance with this requirement:

1) the documents must concern the functions of the agency, that is, the tasks that the agency has been established to perform, as set out in the Statement of Affairs (often the agency’s functions will be set out in its governing legislation, its charter, its annual report and/or corporate plan);

2) it has to be ascertained whether the agency’s functions have, or have the potential to have, an effect on members of the public - in the words of the above definition,

“as 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”; and
3) the agency needs to identify all documents of the types referred to in (a) to (e) of the definition of ‘policy document’ which relate to its functions and which have the effect, or potential effect, outlined in the bullet point above.

2.8.3 By way of example, the Greyhound and Harness Racing Regulatory Authority is responsible for controlling and regulating greyhound and harness racing, developing policy conducive to the development and welfare of the greyhound and harness racing industry and having affiliations with such organisations as the Authority deems appropriate. These functions have a direct effect on people — affecting the safety of drivers, interests of patrons, trainers etc. Therefore any documents containing ‘policy’ (instructions, precedents, guidelines, interpretation, rules or practices) that relate to these functions, would have to be identified as ‘policy documents’ in the Authority’s Summary of Affairs and made available to the public.

2.8.4 Generally, the number of people affected by a function is not a relevant consideration in this context. Obviously, though, priority should be given to identifying policy documents connected with functions that have an effect on a wide section of the public.

2.8.5 Also, the age of the policy or policy document is not a relevant consideration in this context. What is relevant, however, is whether the policy document is used by the agency. Thus, superseded policy documents do not have to be published, but old policy documents which are still in use do have to be published.

2.8.6 An ‘administrative scheme’ is one which is not established or conducted under legislation. An example would be the provision of cash assistance to people in financial hardship by the Department of Community Services where there is no statutory support, but there is a Treasury allocation.

2.8.7 Acts, Regulations and other ‘legislative instruments’ (eg the Freedom of Information (Fees and Charges) Order 1989) are not ‘policy documents’ for the purpose of the FOI Act.

2.8.8 Documents which are of an internal nature, brought into being for the management needs of an agency to enable it, or to assist it, to do the job for which it is set up, may not relate to the agency’s functions in the relevant sense.

2.8.9 For example, if the Department of Health has internal guidelines about the observance and management of flex-time within its organisation, it need not identify and publish those guidelines. While the guidelines would have a direct effect on some members of the public (ie working conditions etc of Health Department employees), they would not relate to any of the Health Department’s functions.

2.8.10 However, documents about flex-time conditions for all public sector employees promulgated by the Public Employment Office would be policy documents of that agency, because they would relate to its particular functions.
Identification and classification of policy documents

2.8.11 The best approach to identifying and classifying policy documents will depend on the nature of the agency and its functions. Each agency should choose the method which most clearly identifies the documents it uses in connection with the exercise of its functions.6

2.8.12 These sections of the FOI Act do not require the preparation of policy documents, manuals or other such material where they are not already in existence. Rewriting an existing policy is required only to the extent that it is necessary to exclude from that document exempt material which the agency does not wish to disclose (s.15(2)) (see [2.8.19-2.8.22]).

2.8.13 The very nature of the requirements demands that each agency be able to readily identify what constitutes its policy documents. Thus codification and/or consolidation of policies, procedures, etc into manuals, is likely to be highly beneficial.

2.8.14 Statements of policy, precedents or policy-related legal opinions etc may need to be extracted from other sources and reproduced in a standard policy format. Those other sources may include internal memos or minutes used in head office or regional divisions of agencies, Ministerial or departmental correspondence, advice from legal officers, and working files. Consolidation of policy records is also useful where officers’ interpretations during the implementation stage have varied or widened the original policy decision.

2.8.15 Such action will simplify the process of identifying policy documents. It will also facilitate easier and quicker access to policy documents, thereby enabling agencies to comply with the requirement in s.15(1) to publish policy documents. Furthermore, it will assist agencies to ensure consistency in decision-making on matters affecting members of the public.

Prejudice and the availability of agency policy documents

2.8.16 The FOI Act provides:

“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 permitted to delete from the copies of the document that are available for inspection and purchase by members of the public) to any act or omission of the person if, at the time of the act or omission:

(a) the policy document was not available for inspection and purchase, 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.” (s.15(3))

6The State Records Authority of NSW (www.records.nsw.gov.au) and other professional records management organisations are able to advise on methods for identifying, classifying and consolidating policy documents. Advice on computer software for such purposes is also available.
2.8.17 The intention of this section is to ensure that members of the public are not to be placed in a more detrimental position than they would otherwise have been in by not being aware of certain (unpublished) agency policies.

2.8.18 This provision prevents a person from being subject to prejudice as a result of an agency’s policy document, where all of the following are met:

- that policy document was not publicly available,
- the person was not aware of its provisions, and
- the person could have avoided the prejudice if he or she were aware of its provisions.

No requirement to publish exempt policy documents

2.8.19 To ensure that there is no inconsistency between rights of access to information under Part 2 and the exemptions provided through Part 3, the FOI Act provides:

“Nothing in this section prevents an agency from deleting from copies of any policy document any information that is of such a nature that its inclusion in the document would cause the document to be an exempt document otherwise than by virtue of clause 9 or 10 of Schedule 1.” (s.15(2))

2.8.20 The FOI Act encourages and requires agencies to make policy documents available to the public. Agencies are not, however, required to publish information which is exempt (see [Chapter 10]). This applies in respect of all the exemption clauses except clauses 9 and 10 of Schedule 1. In other words, material does not have to be published if it would be exempt in terms of the law enforcement and public safety, the personal affairs, the business affairs, etc exemptions, but not because it would be exempt in terms of either the internal working documents or legal professional privilege exemptions (clauses 9 and 10 of Schedule 1).

2.8.21 If a policy document contains exempt information, agencies should consider whether it is feasible to delete that information from an original (unpublished) policy document and to publish the copy of the policy document excluding that information.

2.8.22 It is particularly important that agencies carefully consider whether the counter-terrorism exemption in clause 4A of Schedule 1 applies to any of their policy documents. The types of documents that might be covered include:

- agencies’ security and risk management plans, including plans for private and public critical infrastructure;
- information about the location and number of police officers, emergency services’ equipment and personnel, and medical supplies in the event of a terrorist attack;
- agencies’ plans for terrorism prevention, preparedness, response or recovery; and
- other documents, where their release may facilitate terrorism.
2.9 Annual Reports to Parliament (s.68)

2.9.1 FOI Annual Reports to Parliament provide information on the FOI activities of agencies and Ministers during the reporting year. Section 68 provides that:

“(1) Each agency 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 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 each Minister’s obligations 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 1985.

(5) The annual report referred to in subsection (3) may be included in the report for the Premier’s Department prepared for the purposes of the Annual Reports (Departments) Act 1985.

(6) The regulations may make provision for:

(a) the information to be included in annual reports, and

(b) the form in which annual reports are to be prepared.

(7) In this section, a reference to the reporting year of an agency is a reference to:

(a) the financial year of the agency for the purposes of the Annual Reports (Departments) Act 1985 or the Annual Reports (Statutory Bodies) Act 1984, or

(b) if the agency does not have a financial year for the purposes of either of those Acts, the year ending 30 June.”

2.9.2 The FOI section of an agency’s annual report may itself constitute the FOI Annual Report required under s.68 of the FOI Act. It is common for agencies to include their FOI Annual Reports in their annual reports prepared under the relevant Annual Reports (Departments) Act or Annual Reports (Statutory Bodies) Act.

Requirements of the FOI Annual Report

2.9.3 The *Freedom of Information Regulation 2005* requires agencies to publish in their FOI Annual Reports:

- such statistics as are set out in Appendix B of this Manual; and
- a narrative comprising:
- a comparison of the statistical information with the information for the previous year;
- an assessment of the impact during that year of the FOI requirements on the agency’s activities;
- particulars of any major issues that have arisen during that year in connection with the agency’s compliance with the FOI requirements;
- particulars of the circumstances in which there have been any investigations under the FOI Act by the Ombudsman or any applications for review under the FOI Act to the Administrative Decisions Tribunal or the Supreme Court; and
- particulars of outcomes of any such investigations and applications for review.

2.9.4 The annual reporting requirements in the FOI Act help ensure that agencies are accountable for their actions and decisions. The FOI information required to be included in agency annual reports allows for an overall assessment to be made as to:

- the use made by the public of their rights under the FOI Act;
- compliance by agencies with their obligations under the FOI Act; and
- the impact of the FOI Act on individual agencies and the public sector as a whole.

2.9.5 Ministers are required to report to the Premier annually on their FOI activities in accordance with s.68(2). These reports are consolidated into the FOI part of the Department of Premier and Cabinet Annual Report.

2.10 Government contracts with the private sector

2.10.1 Section 15A of the FOI Act requires agencies to publish certain information in relation to government contracts with the private sector. These requirements are explained in detail in Appendix C.
3 Applications for access to documents

3.1 ‘Persons’ who may make FOI requests

3.1.1 The FOI Act gives a person a legally enforceable right to be given access to government documents (s.16). A ‘person’ can include:

- any person (whether or not an Australian citizen or resident) who can supply an Australian address;
- children under the age of 18 years if they are capable of understanding the effect of the FOI Act and the nature of the FOI request;
- solicitors, social workers and other professionals or people authorised to act on behalf of another person (written authorisation of that person may be required);
- parents of children or guardians of persons with an intellectual disability where those children or persons are unable to understand the effect of the FOI Act and the nature of the FOI request; and
- a corporation, a body corporate or a body politic.

3.1.2 Although a reference to a ‘person’ in the FOI Act may also be a reference to a corporation, corporations do not have personal affairs for the purposes of:

- s.31 (consultation about personal affairs);
- clause 6 of Schedule 1 (unreasonable disclosure of information concerning personal affairs);
- s.39 (amendment of agencies’ documents concerning personal affairs); and
- s.48 (amendment of Ministers’ documents concerning personal affairs). (See [5.7])

3.2 Applications made on behalf of another person

3.2.1 FOI applications made by a person authorised to act on behalf of the person to whom the documents concern are generally acceptable. [policy]

3.2.2 Where such applications are for documents relating to personal affairs, two points should be noted:

1. fees and charges are lower for personal affairs requests (refer to Chapter [6]), and
2. the written consent of, or authorisation by, the person the subject of the records may be necessary.

3.2.3 There are some circumstances where it is commonplace to have a person act on behalf of another, for instance, solicitors for their clients, doctors for patients, and parents for children. In addition, the Guardianship Tribunal may appoint persons to look after the affairs of others. Once appointed, the guardian has custody of the person with a disability and has such responsibilities he or she would have if the person were under 18 years of age. Such persons may also have a ‘representative’ who acts on their behalf without a formal legal
declaration. For applications made on behalf of dependent children and adults, see [3.2.6-3.2.9] below.

3.2.4 Even in the absence of a relationship of legal dependency, an application may be made by a person's relative for documents containing information about the person's personal affairs. Usually a letter of authorisation by the person whose affairs are dealt with in the documents needs to be supplied. Where this is not possible, for example, due to illness or a physical inability on the part of the person to grant such authorisation, the applicant should be required to demonstrate that he or she is acting on behalf of the relative. See [3.2.16 - 3.2.20] below for applications made on behalf of deceased persons.

3.2.5 Each application should be judged on its merits. The test is whether release of the documents to the relative would constitute an unreasonable disclosure of information about the subject person's personal affairs (see [12.3.21 - 12.3.28]).

Applications by or on behalf of children and dependent adults
3.2.6 After children attain legal adulthood at the age of 18 years, a parent has no right to the files pertaining to those children, without their authority. Normally, the person concerned (ie the ‘person’ of 18 years or over) would seek access in his or her own right.

3.2.7 Where applications are made on behalf of dependent children or adults, there will usually be no privacy issue raised if parents or guardians seek access. Where for example, school records are concerned, the child’s and the parents’ interests will generally coincide.

3.2.8 This will not always be the case, however, and agencies should be aware of the possibility that the respective interests may be in conflict. For example, a child's school records may contain reference to allegations made by the child against a parent, or other privacy issues may arise. Agencies should not assume that the disclosure of information on the basis of financial, custodial or other guardianship relationship is reasonable in all circumstances.

3.2.9 If, for instance, the agency considers that to disclose the document to the parent or guardian would not be in the interests of the dependent child or adult, and would invade their privacy, in the absence of express authority the agency should consider whether the personal affairs exemption applies (see [12.3]).

Children’s rights of independent access
3.2.10 There is legal authority to suggest that the child's right of independent access and privacy exists well before the age of legal majority (18 years). The Minors (Property and Contracts) Act 1970 states, for instance, that a child over 14 years of age may consent to medical or dental treatment in his or her own right (ie independently of his or her parents).
3.2.11 Generally, access can only be granted to a person if the person is capable of understanding the nature of the request (Wallace v Health Commission of Victoria (1985) VR 403). If an agency forms the view that a person (e.g., a child or an adult with an intellectual disability) cannot understand the nature of the FOI process, then the agency may consider giving access via a third party intermediary.

‘Unreasonable disclosure’ to parents or guardians

3.2.12 Where there are reasonable grounds to believe that the granting of access to records sought by a parent or guardian may prejudice the interest of the person under the parent’s or guardian’s control, access may be refused on the basis of the personal affairs exemption (clause 6, schedule 1) if disclosure would be an ‘unreasonable disclosure of information relating to a person’s personal affairs’. (For further details on this exemption see [12.3]).

3.2.13 In assessing whether a disclosure would be an ‘unreasonable disclosure’, the agency should balance the rights of the guardian who has specific (including legal) responsibilities for a person’s overall welfare against the privacy rights of the person under the guardian’s control. Relevant considerations for agencies in deciding whether or not the disclosure is unreasonable include:

1. the nature of the information requested;
2. the circumstances in which the information was obtained (i.e., is there a confidential relationship between the person and the agency?);
3. the degree of invasion of the person’s privacy;
4. the requestor’s motives in wanting the information (i.e., could granting access to the guardian prejudice the interests of the child?); and
5. the capacity of the person to understand the contents of the record and the extent to which that person objects to the release of information to others.

3.2.14 Where an agency forms the view that the disclosure of the information may be substantially invasive of the person’s privacy, and the person has sufficient understanding of the nature of the information sought, the agency should seek the views of that person prior to making a decision to release the information.

3.2.15 Where appropriate, the young person who is the subject of the documents could be encouraged to apply personally for access under the FOI Act.

Applications by relatives of deceased persons

3.2.16 The question of deciding who is a ‘person’s closest relative’ (s.31(5)) needs to be considered only where an application is made for personal information about a deceased person.

3.2.17 In this case, the closest relative must be 18 years or above. Useful guides to determining this question are the statutory order for dividing the estate of a person who dies without a will and the relevant provisions of the Mental Health Act 1990.
3.2.18 The order of ‘closeness’ for dividing estates is:

1. spouse (legal or de facto; opposite or same sex),
2. children,
3. parents,
4. brothers and/or sisters,
5. grandparents, and
6. uncles and/or aunts.

3.2.19 Schedule 1 of the *Mental Health Act 1990* defines, for the purposes of that Act, the terms ‘near relative’ and ‘nearest relative’. A patient’s ‘near relative’ is a parent, brother, sister or child or the spouse of the person. A patient’s ‘nearest relative’ is their spouse (legal or de facto, opposite or same sex), followed by their parent(s) and then, if the person has no spouse or living parents, the person who has the care or custody of the patient.

3.2.20 The FOI Act requires the agency to take ‘reasonable steps’ to consult with the deceased person's closest relative to determine whether disclosure would be unreasonable. If no relatives can be located, then there is strictly no need to consult. In that case the agency has to make an independent decision as to whether release of information would be an unreasonable disclosure of information about the deceased person's personal affairs (see s.31, particularly s.31(2) and (5)).

3.3 ‘Documents’ held by an agency or Minister

3.3.1 A person has a legally enforceable right to be given access to an agency's or a Minister's ‘documents’ in accordance with the FOI Act. The definition of ‘documents’ is deliberately very broad and is likely to cover every form in which information can be recorded or stored.

3.3.2 The word ‘document’ is defined in the FOI Act to include:

“(a) any paper or other material on which there is writing or in or on which there are marks, symbols or perforations having a meaning, whether or not that meaning is ascertainable only by persons qualified to interpret them; and

(b) any disc, tape or other article from which sounds, images or messages are capable of being reproduced.” (s.6)

3.3.3 In accordance with the intention of the FOI Act, agencies are expected to construe the term ‘document’ broadly, and it is arguable that all information in a physical form held by an agency would be covered by this definition. Two points should be noted:

1. the definition in the FOI Act is not exhaustive, so things not listed may nevertheless be documents (eg under the Victorian legislation, which is similar, pathology specimens have been considered documents); and
(2) an item cannot be rejected as a document merely because its meaning can only be ascertained by persons qualified to interpret its information (eg medical reports). Material stored in computers, on CD-ROMS, ultra sound tapes, X-rays etc are all covered by this definition, as these things have a meaning. (See also [3.4] below)

3.3.4 Brief notes of telephone conversations written on ‘post-it’ pads, work diary entries, personal work notes, rough notes taken while interviewing job applicants (both during the interviews and in the post-interview discussions), e-mail messages and file notes on disk may all constitute documents under the FOI Act, if they have meaning.

3.3.5 A document does not have to be part of an agency’s official filing system to be considered a ‘document’ for the purposes of the FOI Act, although whether such documents are ‘held’ by the agency at the time an application is received will need to be considered in each case. Further, this does not necessarily mean that such documents must be kept and added to the agency’s filing system. Such issues need to be determined in accordance with the State Records Act and the relevant guidelines on keeping state records.

3.3.6 It is also important to note the provisions of paragraphs (d) and (e) of s.6(2) of the FOI Act which provide that:

“(d) a reference to a document includes a reference to a copy of the document, and
(e) a reference to a document held by an agency includes a reference to a document to which the agency has an immediate right of access and a document that is in the possession, or under the control, of a person in his or her capacity as an officer of the agency.”

3.3.7 The extension of the definition of ‘document’ in s.6(2)(e) will be important in a number of instances. For example, if an agency covered by the FOI Act contracts out a particular function, a question may arise whether documents held by the contractor are documents covered by the FOI Act. Such issues should be addressed in the contractual arrangements between the agency and the contracting party, which should provide that the agency has a right of access to documents in circumstances where it cannot be assumed that routine access would be available in the normal course of events (see Outsourcing and Record Keeping – Guidelines for NSW Public Offices published by State Records in 2001).

3.3.8 Agencies should also be aware of the provisions of the State Records Act 1998 regarding the definition of a State record:

“State record means any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office” (s.3(1)).

3.3.9 Local councils should note that the definition of ‘records’ in clause 196 of the Local Government (General) Regulation 2005 provides a good guide as to the starting point to define a ‘document’ in the local government context.
3.4 Information not contained in a written document and stored electronically

3.4.1 Section 23 of the FOI Act provides that if:

"(a) it appears to an agency that an application relates to information of a kind that is not contained in a written document held by the agency, and

(b) the agency could create a written document containing information of that kind by the use of equipment that is usually available to it for retrieving or collating stored information,

the agency shall deal with the application as if it were an application for a written document so created and shall be taken to hold such a document."

3.4.2 If an application relates to information held by the agency in electronic form, and the agency can produce a written document containing the information by:

‘the use of equipment that is usually available to [the agency]...for retrieving or collating stored information,’

then the agency must treat the application as if it were an application for that written document.

3.4.3 Agencies are also reminded of their obligation under s.14 of the State Records Act 1998, which requires that:

"if a record is in such a form that information can only be produced or made available from it by means of the use of particular equipment or information technology (such as computer software), the public office responsible for the record must take such action as may be necessary to ensure that the information remains able to be produced or made available."

For example, if an agency is upgrading to a new information technology system, the agency may need to consider retaining the existing technology for accessing existing records, migrating existing records to the new technology, or creating copies of the records in such a way that they will outlast technological change.

3.4.4 Rather than printing off a written document from the electronically-stored material, there may be circumstances where the agency might agree with the applicant to make an electronic copy of the information itself available, so the applicant can download and interrogate it. However, processing an FOI application in such a way may present problems. For example, it is comparatively easy to edit a paper based document to remove exempt material, but it may be more difficult to edit databases or CD-ROMS and impossible to edit WORM (write once read many times) disks.

3.4.5 The Ombudsman has advised that it is likely that careful examination will be given to any claims that the creation of a written document pursuant to s.23(b) would involve an unreasonable diversion of resources.
3.5 **Documents ‘held’ by agencies**

3.5.1 A document is an ‘agency’s document’ if it is ‘held’ by the agency, irrespective of whether that agency created it or received it from elsewhere (s.6(1)). This includes documents temporarily held by the agency.

3.5.2 Any documents created by the agency but held by the Archives Authority, the Australian Museum, the Museum of Applied Arts and Sciences, the State Library, and any other prescribed agency (which includes the Ombudsman) are deemed to be held by the agency which created them (s.11(1)).

3.5.3 Section 6(2) of the FOI Act provides that a reference to a document ‘held’ by an agency includes a reference to a document to which the agency has an immediate right of access and a document that is in the possession, or under the control, of a person in his or her capacity as an officer of the agency.

3.5.4 The Ombudsman is of the opinion that all documents created by, in the possession of or under the control of the mayor or other councillors, in their capacity as elected public officials and which concern their civic or council duties under any Act, are subject to the FOI Act and must be identified and given to the general manager or delegate if requested for the purposes of processing of an FOI application.

3.6 **Documents ‘held’ by Ministers**

3.6.1 A Minister’s document means:

"a document which is held by a Minister and… that relates to the affairs of an agency, but does not include an agency’s document" (s.6).

The reference to ‘affairs of an agency’ may include any agency, and not only an agency for which the Minister has responsibility.

3.6.2 Because a ‘Minister’s document’ must relate to the ‘affairs of an agency’, they do not include documents which relate only to:

- the Minister’s capacity as an elected representative;
- a Minister’s membership of a political party;
- a Minister’s personal affairs,

unless they are also related to the affairs of an agency.

3.6.3 The definition of a Minister’s document also excludes an agency’s document (ie where the document is also ‘held’ by an agency – see [3.5] above).

3.6.4 It is sometimes the case that a request is received by a Minister for access to a document which is temporarily held by him or her, but which is normally held by an agency. In those circumstances, if the agency has an ‘immediate right of access’ to the document the document will also be taken to be held by the agency, and so be an ‘agency’s document’ (s.6(2)(e)). If that is the case, then the document is not a ‘Minister’s document’, and the FOI application ought properly to be redirected or transferred to the agency (see [3.7.15-3.7.17 and 3.11]). Where there is doubt as to whether the agency has an ‘immediate right of access’ to the document, the Minister should consider whether the document
should nevertheless be returned to the agency so that it is unambiguously an agency’s document. Given that an applicant has superior rights of review in respect of an application made to an agency rather than a Minister, where possible, preference should be given to ensuring that documents are properly categorised as an agency’s documents rather than a Minister’s documents.

3.7  

Requirements for a valid FOI application

3.7.1 An application for access to an agency’s document must satisfy all the following requirements (s.17). It must:

(1) be in writing;

(2) specify that it is made under the FOI Act;

(3) be accompanied by the agency’s application fee (as to fees and charges see [Chapter 6]);

(4) contain such information as is reasonably necessary to enable the document to be identified;

(5) specify an address in Australia to which notices under the FOI Act should be sent; and

(6) be lodged at an office of the agency.

3.7.2 It is not essential for an application to be made on a special FOI application form. A sample application form covering the above points has been prepared and may be provided by agencies for use by applicants (see [Appendix A - Form 1]). Agencies may use their own FOI application form as long as the form meets the requirements of s.17.

3.7.3 When an application is received it should first be checked to ensure that it meets the requirements of the FOI Act (see [3.7.1]). Applications which can be handled by other means, for instance through documents already available, by making documents available administratively, or by referring to other bodies, eg Commonwealth agencies, should be identified immediately.

3.7.4 A request for access to a Minister’s document must meet the same requirements that apply to applications for an agency’s document.

Incomplete, overly-broad and vague requests

Informal applications

3.7.5 Where a request for a document is made orally or without the application fee, the request has not been made in accordance with the FOI Act and the agency may refuse to process it. However, an agency should take reasonable steps to assist an applicant to make a request that complies with the requirements of the FOI Act.

3.7.6 Reasonable steps might include informing the applicant that the application must be made in writing and about the statutory fee that must be paid before the request can be processed.
Insufficient information to identify documents sought

3.7.7 A reasonable interpretation of the FOI Act would be that a formal application has not been received by the agency until a valid application under s.17 has been received ie sufficient information has been provided to reasonably enable the agency to be in a position to identify the document(s) the subject of the application.

3.7.8 However, agencies must not refuse to accept an application merely because it does not contain sufficient information to enable the document(s) to which it relates to be identified. Rather, the FOI Act requires agencies first to take such steps as are reasonably practicable to assist applicants to provide such information (s.19(1)).

3.7.9 It is common that applicants are unable to describe, in the particular language of the agency, the documents they seek. Agencies should recognise this and make due concessions. In particular, if there is doubt as to whether the applicant wants particular documents, agencies should consult with him or her.

3.7.10 A precise description of the documents sought is not necessary: an applicant need not refer to a file and folio number, nor give precise dates and authors of the documents. In other words, imprecisely expressed requests are not, by definition, invalid requests. However, overly ambiguous or vague requests may not meet the requirements of the FOI Act (s.17). Where ambiguity or uncertainty arises, the agency should take steps that are reasonably practical to assist the applicant to modify the request so that it complies with the FOI Act.

3.7.11 There is no prescribed format for taking reasonable steps to assist the applicant. It will depend on the circumstances of each case. Such assistance may be in writing, by telephone contact or both. If the request is not a proper FOI application, the applicant should be contacted promptly, by telephone if possible, to advise of the deficiencies in the applicant’s application and the steps that would be necessary to overcome them.

3.7.12 After such steps have been taken, if an application still does not contain sufficient information to enable the document to be identified, the agency is entitled to refuse to accept the application (s.19(1)). An agency should fully document the steps taken and attach that documentation to its file on the matter. [policy]

Overly-broad requests

3.7.13 In dealing with ‘broad’ requests that cover a large amount of information eg ‘all documents relating to ..’, the agency should take reasonable steps to make contact with the applicant before commencing the processing of the request. It may be that the applicant does not really seek access to such a broad class of material. An applicant is, however, entitled to make such general requests. Agency staff should give consideration to whether or not an advance deposit should be imposed before the application is processed and should keep applicants up to date as to possible charges (see [6.4]).
3.7.14 In some cases it may also be necessary to consider whether the application would involve an unreasonable diversion of agency resources (see [4.5.6-4.5.18]).

Wrongly directed requests for information
3.7.15 Agencies may re-direct applications to another agency, where that other agency is known to hold the document sought, or where the other agency has functions which make it more appropriate that the application be directed to it.

3.7.16 If an agency cannot deal with an application because the required documents are:

- not held by the agency and the agency knows they are held by another agency; or
- held by the agency but are more closely related to the functions of another agency,

then the agency must take reasonably practicable steps to re-direct the application to the other agency (s.19(2)).

3.7.17 See also [3.11] for the process for transferring applications, which applies where an agency formally accepts an application but subsequently determines that it would be better addressed to another agency.

Assisting applicants during the assessment process
3.7.18 Although the statutory obligation to assist applicants applies only in respect of the receipt of applications (s.19), it is proper that agencies act in accordance with the spirit of that requirement throughout the process of assessing FOI applications. This allows requests to be clarified, potentially time-consuming and expensive requests to be reduced, and possible misunderstandings to be resolved.

3.8 Acknowledging the FOI request
3.8.1 Once an agency (or Minister) establishes that the request qualifies as an FOI request for that agency (or Minister’s office) to handle, the agency (or Minister’s office) should send the applicant an acknowledgment slip or form letter which includes a unique identifying FOI reference number for the request.

3.8.2 The agency (or Minister) should undertake a preliminary assessment of the FOI application in order to:

(1) identify whether consultation with another agency or person will be needed (access must not be granted until the consultation provisions of the FOI Act have been complied with – see [4.3]);

(2) identify whether it could be a very time-consuming request (agencies should estimate the cost and inform the applicant before proceeding); and

(3) identify any other points which will need to be clarified with the applicant.

These steps may be done before or after receipt of the application has been acknowledged. If done after, the agency (or Minister’s office) may need to send
a follow-up letter to the applicant (or contact them by telephone) if the matters in
(2) and (3) are relevant.

3.9  FOI applications that are not in English

3.9.1  If an agency receives correspondence which is in a language other than
English, and it is apparent that it is intended to be an FOI application, then
the agency should take reasonable steps to identify or determine the
substance of the application. [policy] This might include contacting the
applicant by phone, perhaps with the assistance of an interpreter, to confirm the
substance of the request. In some cases it may be appropriate to have the non-
English FOI application translated. For this purpose agencies may wish to utilise
the translation services of the Community Relations Commission For a
Multicultural NSW (the CRC). To arrange translation services (for a fee),
contact the CRC’s Interpreting and Translating Services at Level 8, Stockland
House, 175-183 Castlereagh Street, Sydney NSW 2000, Tel: 1300 651 500
Fax: (02) 8255 6711 TTY: (02) 8255.

3.10  Identification of documents

3.10.1  Clearly, the proper identification of whether or not an agency holds documents
the subject of an FOI application is central to the whole concept of FOI. It
determines whether the FOI legislation will work or not.

3.10.2  The Ombudsman has stated that any conduct of public sector officers, or local
government councillors or staff involving:

(1)  the withholding of any information; and/or

(2)  insufficient participation in helping to identify any document held by them
which may be covered by an FOI application (possibly involving calling in
such a document which is in the possession or under the control of some
other person or body, whether or not in an official capacity),

will be viewed very seriously.

3.10.3  When an agency holds documents containing information which, on a
reasonable interpretation of the terms of the FOI application, could be covered
by those terms, consideration will need to be given as to whether those
documents should be treated as being covered by the application. Before
deciding to include all such documents, the agency will need to consider the
impact on the processing costs of the application for the applicant, and whether
or not the applicant would wish to gain access to such documents. The agency
should consider taking steps to consult the FOI applicant to ascertain whether
he or she seeks access to those particular documents.

3.10.4  An agency is only required to examine documents held by it as at the date that
the request was received (see Radar Investments Pty Ltd and Health Insurance
3.11 Transfer of applications (s.20)

3.11.1 Transfer (rather than re-direction - see [3.7.15-3.7.17] above) of an application would usually occur after the application has been formally accepted by an agency. An acknowledgment letter forwarded to the applicant and/or receipt of the application fee into the agency’s banking system are indicators of formal acceptance. The reasons for transfer may be the same as those for re-directing an application. If an agency cannot deal with the application because the required document:

(1) is not held by the agency and the agency knows it is held by another agency, or

(2) is held by the agency but is more closely related to the functions of another agency,

then, subject to consent being given by or on behalf of the other agency, the application may be transferred to that other agency.

3.11.2 Agencies must bear in mind that:

(1) such a transfer can only be undertaken if consent to the transfer is given by or on behalf of the other agency; and

(2) the transferring agency must identify all its documents covered within the scope of the request and include those in the transfer.

3.11.3 Where consent is not given and the first agency does not hold the document, the applicant should be so advised and advised to apply directly to the other agency. The application fee should be refunded. [policy]

3.11.4 Where consent is not given and the agency does hold the document, even if it is more closely related to the agency which has refused transfer, the application should be processed. [policy]

3.11.5 Where an agency transfers an application to another agency, it must do the following:

(1) if the agency holds a copy of any required document, it must forward a copy together with the application;

(2) the agency must notify the applicant that their application is being transferred;

(3) the notice must specify the date of the transfer and the name of the other agency; and

(4) the agency must transfer the application fee with the application.

3.11.6 A transferred application is taken to have been received by the other agency:

(1) on the day on which it is transferred; or

(2) ten calendar days after the day on which it was received by the original (transferring) agency, whichever is earlier (s.20(6)).
3.11.7 This means that the agency to whom an application has been transferred must deal with the application by the earlier of 31 days after receipt of the application by the original agency, or 21 days after the application was transferred. For that reason, it is important that agencies who propose to transfer an application do so within 10 days of receiving the application, in order to allow the agency to whom the application is to be transferred at least 21 days to assess and determine it.
4 Assessing and determining applications

4.1 Responsibility for assessing and determining FOI applications

4.1.1 An application must be dealt with by the principal officer of the agency, or by an officer of the agency directed by the principal officer. This direction can be a standing direction or it may be for a particular case (s.18(1)).

4.1.2 If the agency is a local authority, the application must be dealt with either by the principal officer or by a delegate authorised by resolution of the authority (s.18(2)).

4.1.3 In the case of a Minister’s Office, either the Minister or an officer directed by the Minister may deal with an application (s37(1)).

4.1.4 Administratively, it is important that directions exist clearly indicating who is responsible for dealing with FOI matters.

4.1.5 If no direction is made, then the principal officer must deal with the application personally. However, this would remove the applicant’s right to an internal review of the agency’s determination (see [7.1.6]). Accordingly, principal officers of agencies should delegate to officers of the agency an approval to make determinations for access or amendment so that applicants are not deprived of the right to an internal review.

4.1.6 There may be certain occasions where this delegation is not possible - for instance, where the documents requested are extremely sensitive - but these occasions should be rare. **The general rule should be that an appropriate officer other than the principal officer should make the initial determination, in order to keep open the right to internal review.** [policy] A direction to an appropriate officer to make FOI determinations may be given as a standing direction in respect of all FOI applications received by the agency, or the officer may be directed to make a determination in respect of a particular application on an application-by-application basis.

4.1.7 Whoever has authority to make the determination should also decide on whether the applicant should be given a reduction in fees and charges. If a reduction is granted, all subsequent fees and charges relating to the application should also be reduced (in this regard see also [6.2]).

Ministerial involvement in decision-making

4.1.8 In some circumstances it may be appropriate for the Minister responsible for the agency to be consulted before a request is determined (eg when access is sought to Ministerial correspondence or Cabinet documents).

4.1.9 The Ombudsman has advised that, if directed to do so by its Minister, it is not unreasonable for an agency to notify its Minister, or the Minister’s office, of the receipt and determination of an FOI application.

4.1.10 It is essential, however, that determinations of FOI applications are made by agencies on their merits, based solely on the criteria set out in the FOI Act and independent of any political influence or considerations. For example, the
identity and motives of an FOI applicant are generally irrelevant considerations in the determination of the application (although in some cases these may be relevant - see 4.9 below). Allegations that agencies took into account irrelevant considerations are matters within the jurisdiction of the Ombudsman. Agencies should ensure that their Ministers, and the staff in their Ministers' offices, are aware of this.

4.2 Time limits in processing FOI matters

Summary of time limits on agencies and Ministers (calendar days)

<table>
<thead>
<tr>
<th>TASKS</th>
<th>AGENCIES</th>
<th>MINISTERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deal with application. (See [4.2.1-4.2.13])</td>
<td>As soon as practicable and in any case within 21 days of receipt (this may be extended to 35 days if consultation required).</td>
<td>As soon as practicable and in any case within 21 days of receipt (this may be extended to 35 days if consultation required).</td>
</tr>
<tr>
<td>Deal with application transferred from another agency. (See [3.11.6])</td>
<td>Within 31 days of receipt of application by the first agency OR within 21 days of receipt by second agency, whichever is the earlier. (Allows maximum of 10 days for transfer). Again, this may be extended by up to 14 days if consultation is required.</td>
<td>Within 31 days of receipt of application by the first agency OR within 21 days of receipt by second agency, whichever is the earlier. (Allows maximum of 10 days for transfer). Again, this may be extended by up to 14 days if consultation is required.</td>
</tr>
<tr>
<td>Deal with application for internal review. (See [7.1.7-7.1.9])</td>
<td>Within 14 days of lodgement.</td>
<td>Not applicable.</td>
</tr>
</tbody>
</table>

Summary of time limits for applicants (calendar days)

<table>
<thead>
<tr>
<th>INTERNAL REVIEW</th>
<th>APPLICATION FOR AN AGENCY’S DOCUMENTS</th>
<th>APPLICATIONS FOR A MINISTER’S DOCUMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lodge application for internal review.</td>
<td>Within 28 days after notice of determination given or after ‘deemed refusal’ (ie if no notice of determination is provided then 49 days after initial application received).</td>
<td>Not applicable.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EXTERNAL REVIEW</th>
<th>APPLICATION FOR AN AGENCY’S DOCUMENTS</th>
<th>APPLICATIONS FOR A MINISTER’S DOCUMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lodge complaint with Ombudsman.</td>
<td>No time limit, but generally within 6 months [policy]. However, to retain the right to appeal to the ADT the complaint must be lodged within 60 days of the notice of determination being given to applicant (or ‘deemed refusal’). A complaint generally cannot be considered by the Ombudsman unless and until any internal review rights have been exercised.</td>
<td>Not applicable.</td>
</tr>
<tr>
<td>File appeal with ADT.</td>
<td>Within 60 days of notice of determination given (or ‘deemed refusal’), or within 60 days of notification of Ombudsman completing action. An appeal cannot be made to the ADT unless and until any internal review rights have been exercised.</td>
<td>Within 60 days after notice of determination given (or ‘deemed refusal’).</td>
</tr>
</tbody>
</table>
Note: Where the last day of a prescribed period of time falls on a weekend or public holiday, the thing may be done on the first day following that is not a weekend or a public holiday. In other words, if the 21 day time limit for processing an application expires on a Saturday, an agency has until the Monday to process the application (s.26, Interpretation Act 1987).

Time limits for determining applications (ss.18(3) and 41(3))

4.2.1 An application must be ‘dealt with’ as soon as practicable and in any event within 21 calendar days after it is received (ss.18(3) and 41(3)).

4.2.2 The obligation under s.18 must be read in conjunction with the requirement in s.24(1)(a) to determine whether access will be granted or refused and s.28 to provide a notice of determination.

4.2.3 The Ombudsman is of the opinion that ‘dealt with’ means actually sent or given to the applicant, and not merely decided or determined. This means that not only must the notice of determination be signed within the prescribed period, but the notice must also have been despatched within that period.

4.2.4 Although the Department of Premier and Cabinet agrees that ‘best practice’ is for the determination to be both signed and despatched within the prescribed period, it acknowledges that the term ‘dealt with’ could be interpreted to mean merely that the decision is made within that period.

4.2.5 Any notice which an agency or Minister is required under the FOI Act to give a person may be served personally or may be posted to the person at that person's address last known to the agency or Minister (s.60). If the notice is served as a letter, it must be taken to have been given to the person at the end of the fifth day after the letter was posted. Thus, for the purposes of calculating time periods within which, say, an internal review may be lodged, the date on which the notice was given to the person is not the date it was despatched in the post but five days after that date.

4.2.6 It is not acceptable for a notice of determination to be signed after the expiration of the statutory 21 day period, but be dated at a time within the period.

Extension of time limit (s.59B)

4.2.7 The person dealing with an application can determine that the special circumstances of the case make it necessary to extend the 21 day period by a further 14 days (s.59B). An applicant must be informed in writing that the period has been so extended as soon as practicable.

4.2.8 The only ‘special circumstances’ that may be relied upon under s.59B to extend the period are:

(1) the necessity to consult any other person or body under Division 2 of Part 3;
(2) the necessity to locate and retrieve the relevant document from archived documents; and

(3) the necessity to locate and retrieve documents from a school where the 21 day period for dealing with the application occurs, wholly or partly, during a school holiday period (clause 9, FOI Regulation).

**Failure to determine within the prescribed time limit**

4.2.9 An agency that fails to determine an application within the prescribed time (see [4.2.1-4.2.6] above) after the application is received is, for the purposes of the FOI Act, taken to have determined the application by refusing access to the document(s) to which it relates (s.24(2)). This is commonly known as a ‘deemed refusal’.

4.2.10 Even if there is a ‘deemed refusal’ an agency may nevertheless decide to release the documents to an applicant after the 21 day period has expired (s24(2A)). If that happens, protection from defamation and criminal liability in ss.64 and 65 of the FOI Act will still apply to the release of those documents.

4.2.11 The FOI Act specifies (s.34 (2)(e)(ii)) that, if an applicant wishes to seek an internal review, the applicant must do so within a specified period, even if the agency does not determine the initial application (ie even where there is a ‘deemed refusal’). This period is 49 days from the date after the application was received by the agency. This period of 49 days can be extended by the principal officer of the agency (s.34(2)(e)(iii)).

**Ombudsman’s Guidance – Deemed Refusals**

It is the Ombudsman’s view that, if an agency has not determined an application within the 21 day period, the agency should immediately advise the applicant of his or her right to seek an internal review. The Ombudsman also considers that an agency should be generous in extending the time period for an applicant to seek an internal review in a situation where the agency has not determined the initial application within the 21 day period.

The Ombudsman will usually advise applicants who complain about ‘deemed refusals’ that their complaint is premature, and that they should either wait for a determination or proceed to internal review. However, if the agency’s delay in dealing with their application was extensive, the Ombudsman may approach the agency concerned for an explanation and urgent action.

**4.3 Consultation**

4.3.1 The FOI Act recognises the need to balance the desire to maximise public access to information in the possession of Government agencies against the need to protect both personal privacy and sensitive information acquired by the Government that relates to business, professional, commercial or financial affairs, inter-governmental relations or research.

4.3.2 The FOI Act does this by providing that the relevant third parties are to be given an opportunity to provide their view as to whether a document should be released. Ultimately, however, the decision to release or not release a document lies with the agency or Minister.

4.3.3 Third parties are also given rights to seek an external review of a decision to release a document against their wishes.
4.3.4 It should be noted that s.59B provides that an additional 14 days may be taken to deal with an application if consultation is required.

4.3.5 The consultation Division (Division 2 of Part 2) of the FOI Act identifies four areas where consultation is required with particular third parties prior to the release of the documents sought. These four areas are discussed below. It is important to note that the requirement to consult arises because of the information contained in the document, and the source of the particular document is irrelevant – ie it does not matter whether the document was obtained from the particular third party or from another source, or was created by the agency itself.

Documents affecting inter-governmental relations (s.30)
4.3.6 This section applies to a document that contains matter concerning the affairs of the Commonwealth Government or of the government of another State. Such documents may be considered exempt documents by virtue of clause 5 of Schedule 1 (see [12.2] for details).

Documents affecting personal affairs (s.31)
4.3.7 This section applies to a document that contains matter concerning the personal affairs of natural persons. Such documents may be considered exempt documents by virtue of clause 6 of Schedule 1 (see [12.3] for details).

Documents affecting business affairs (s.32)
4.3.8 The section applies to a document that contains any of the following matters:

“(a) information concerning the trade secrets of any person, or

(b) information (other than trade secrets) that has a commercial value to any person, or

(c) information (other than trade secrets or information referred to in paragraph (b) concerning the business, professional, commercial or financial affairs of any person.” (s.32(1))

4.3.9 Such documents may be exempt documents by virtue of clause 7 of Schedule 1 (see [12.4] for details).

Documents affecting the conduct of research (s.33)
4.3.10 This section applies to a document that contains information concerning research, which is being, or is intended to be, carried out by or on behalf of any person. This means that the body or person funding research may need to be consulted in some cases rather than, or as well as, the person carrying out the research. It depends on which party is likely to benefit from the research results and, therefore, may potentially suffer injury from its release.

4.3.11 Such documents may be exempt documents by virtue of clause 8 of Schedule 1 (see [12.5] for details).
Consultation procedures

4.3.12 Given the time limit for dealing with applications, it is important to determine as early as possible whether there is a need to consult. The documents sought should be read to identify whether they contain information of the four types referred to in the FOI Act.

4.3.13 There are certain areas where the information may only be understood by persons with specialist knowledge, e.g. medical and psychiatric assessment (in the case of personal affairs), business information, marketing information, and research. As well, agency staff may not be in a position to identify whether some business information and research is sensitive. In these cases it is better to err on the side of caution and consult rather than to assume the material is innocuous.

4.3.14 The FOI Act requires the agency or Minister concerned to take:

"such steps as are reasonably practicable to obtain the views of the person concerned as to whether the document is an exempt document"

by virtue of the relevant clause in Schedule 1 (i.e. clauses 5-8), prior to giving access to the document.

4.3.15 To fulfil the requirement to consult, an agency should do the following things:

- notify the relevant third party in writing (to its registered address (if a corporation), or other publicly available address, or to the last address notified to the agency) that access is sought under FOI to particular named documents which the agency clearly describes, in which information relevant to the person being notified figures; and

- request their view on how disclosure might affect them in terms of the relevant exemption in Schedule 1.

In many cases it will also be appropriate to provide the third party with a copy of the document or a relevant extract from it.

4.3.16 Because many people will be unaware of the FOI provisions, it may be useful also to make telephone contact with the person, to facilitate their understanding of the views which are being sought from them. Agencies are also recommended to provide copies of pamphlets on the consultation process for personal and business affairs, which are produced by the Department of Premier and Cabinet (copies of these are included in Appendix G).
4.3.17 The FOI Act does not require applicants to say why they want access to a particular document. Accordingly, an applicant's name should not be given automatically to the third party. However, in the process of consulting, the third party may request the name of the applicant. Experience has shown that this may assist the third party in effectively responding to an agency's request for their views. The decision to release the name of the applicant to a third party should only be made after considering the following factors:

- would there be an unreasonable disclosure of the applicant's personal affairs if the agency were to give the name of the applicant to the third party?
- are there reasonable grounds for the agency to believe that the applicant may suffer some physical danger/harassment if his/her name were to be given to the third party?

4.3.18 In some cases this decision will be difficult to make, due to an absence of available facts, and it may be that the most appropriate course will be for the agency to ask the applicant for his or her views on the release of this information to the third party.

4.3.19 Once the agency has obtained the views of the third party, agencies need to weigh up those views in the context of determining whether one or more of the relevant exemptions applies to the documents in question.

4.3.20 If the third party tells an agency that the disclosure of a document will expose him or her to some disadvantage, the agency is entitled to ask the person to clarify this claim and to satisfy the agency that there is some substance to the claim. This clarification could be important in the event that the agency decides to withhold the document sought and the applicant subsequently seeks an external review of that decision.

4.3.21 All FOI consultations with the Commonwealth or another State should be directed to the FOI co-ordinator in the relevant agency, rather than to the author of the document. Of course, further action on the request may be taken by another officer in the agency, but initial contact should be made with the responsible FOI co-ordinator.

4.3.22 In the Commonwealth, the FOI Contact Officer within the Commonwealth Attorney General's Department holds a current list of the names and telephone numbers of FOI co-ordinators of Commonwealth agencies. A list is also available on the Commonwealth Attorney-General’s Department web site (www.ag.gov.au).

**Release of disputed documents**

4.3.23 If, after considering the views of a third party who opposes release, the agency nevertheless decides to grant access, it must give that third party a written notice containing the following information:

- the agency's decision to grant access to the document;
- the third party's rights of external review (including the right to complain to the Ombudsman); and
• the procedures for exercising those rights.

This notice should be given at the same time as, or before, the notice of determination is given to the FOI applicant. [policy]

4.3.24 Agencies should also consider providing third parties with the reasons for the rejection of the views of the third party.

4.3.25 The agency cannot give access to the document until after the review periods have expired and, if relevant, after any reviews have been finally disposed of (s.30(3)(d)). See [4.2] for a discussion of relevant time limits.

4.3.26 As always, the general rule is that the agency bears the onus of establishing that a determination is justified (s.61).

4.4 Issues to be determined (s.24)

4.4.1 After considering an application for access to a document (including any necessary third party consultation), an agency must determine:

(1) whether access to the document is to be given (whether immediately or subject to deferral) or refused; and

(2) if access to the document is to be given, any charge payable in respect of the giving of access; and

(3) any charge payable for dealing with the application.

4.4.2 Under FOI, access to a document is either allowed, deferred or refused. No conditions can be set on access or subsequent use.

4.4.3 In contrast, where access is given through administrative means (under systems other than FOI) conditions may be imposed by the agency.

4.4.4 Note: Section 24 does not require an agency to determine an application that the agency has transferred to another agency under s.20 or has refused to deal with, or refused to continue to deal with, under s.22 (see [3.11 and 6.4.5-6.4.6]).

4.5 Refusal of access (s.25)

Grounds for refusal of access (s.25(1))

4.5.1 The grounds on which an agency can refuse access to documents are set out in s.25(1) in the following terms:

“(1) An agency may refuse access to a document:

(a) if it is an exempt document, or

(a1) if the work involved in dealing with the application for access to the document would, if carried out, substantially and unreasonably divert the agency’s resources away from their use by the agency in the exercise of its functions, or

(b) if it is a document that is available for inspection at that or some other agency (whether as part of a public register or otherwise) in accordance with Part 2, or in accordance with a legislative
4.5.2 Agencies may refuse access under FOI if the relevant document is available through a less time-consuming method of public access (s.25(b),(b1),(c) and (d)). In refusing access to documents on these grounds the applicant should be clearly informed of the alternative method of access, ie where and how the document may be obtained. [policy]

Exempt documents (s.25(3)(4))

4.5.3 An agency may refuse access to a document if it is exempt (see Chapter 10). The Ombudsman is of the view that a relevant factor for an agency to consider in deciding whether to exercise this discretion, is whether any good purpose is served by relying on any relevant exemption.

4.5.4 An agency must refuse access to a restricted document which is the subject of a Ministerial certificate (see [4.19]). Ministerial certificates may only be issued by the Premier.

4.5.5 An agency must not refuse access to an exempt document (including a restricted document which is the subject of a Ministerial certificate) where it is practical to delete the exempt material, and where the applicant would wish to be given access to documents with those deletions (s.25(4)) (see [10.3.5]). Although the FOI Act does not require it, the Ombudsman recommends that agencies provide a full statement of reasons when such deletions are made.

Requests which substantially and unreasonably divert an agency's resources (s.25(1)(a1))

4.5.6 An agency may refuse access to a document if it appears that the work involved in dealing with the application would, if carried out, ‘substantially and unreasonably’ divert the agency's resources from being used in the exercise of the agency's functions.

4.5.7 A decision by an agency to refuse access on this ground may be subject to internal and external review.
4.5.8 An agency must not refuse to deal with an application on these grounds without first endeavouring to assist the applicant to amend the application so that it would no longer substantially and unreasonably divert the agency's resources (s.25(5)). This section requires a positive approach by an agency - more than just telling an applicant that his or her application is 'too broad' (see [3.7.13-3.7.14]). Where an agency uses this ground to refuse to deal with an application, the reasons need to be documented and justified.

4.5.9 The ADT recently considered this ground for refusing an application in *Cianfrano v Director General, Premier's Department* [2006] NSWADT 137. In that case the ADT accepted that a request to Premier's Department for documents which it was estimated would involve over 10,000 documents and more than 200 hours of officer time would constitute an unreasonable diversion of resources.

4.5.10 Factors which the ADT considered relevant to an assessment of whether the application might constitute an unreasonable diversion of resources included the following (at 62-64):

(a) the terms of the request, especially whether it is of a global kind or generally expressed request; and in that regard whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort;

(b) the demonstrable importance of the document or documents to the applicant may be a factor in determining what in the particular case is a reasonable time and a reasonable effort;

(c) more generally whether the request is a reasonably manageable one giving due, but not conclusive, regard to the size of the agency and the extent of its resources available for dealing with FOI applications;

(d) the agency's estimate as to the number of documents affected by the request, and by extension the number of pages and the amount of officer-time, and the salary cost;

(e) the timelines binding the agency;

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1 This decision was challenged in *Cianfrano v Director General, Premier's Department* [2006] NSWADTAP 48. The Appeal Panel held that Government policy required the agency to 'negotiate' with the applicant for a longer period of time within which to comply with an application (eg by breaking up the request into a series of smaller requests) before rejecting it on the basis of an unreasonable and substantial diversion of resources. The Appeal Panel found that the agency had not applied this policy. The Appeal Panel’s decision was based on a Premier’s Memorandum issued shortly after the introduction of the FOI Act (Premier’s Memorandum 91-30). The policy embodied in Premier’s Memorandum 90-31 has effectively been superseded by various decisions of the Administrative Decisions Tribunal which have interpreted and applied the unreasonable and substantial diversion of resources provision. Accordingly, Premier’s Memorandum 90-31 has been repealed and is no longer in force. The decision in *Cianfrano v Director General, Premier’s Department* [2006] NSWADTAP 48 is therefore no longer applicable.
(f) the degree of certainty that can be attached to the estimate that is made as to documents affected and hours to be consumed, and in that regard importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and

(g) possibly, the extent to which the applicant is a repeat applicant to the agency in respect of applications of the same kind, or a repeat applicant across government in respect of applications of the same kind, and the extent to which the present application may have been adequately met by those previous applications.

The ADT indicated that these factors are not an exhaustive list of possible considerations.

4.5.11 The ADT also observed that what might constitute an unreasonable diversion of resources may be different depending on the nature and size of the agency in question. In that case, for example, it was observed that an agency such as Premier’s Department could be expected to have substantial bodies of documents that involve important areas of government activity and, as such, the same degree of liberality in relying on s.25(1)(a1) should not be given to those areas as might be appropriate to a very small statutory body with a small staff complement and a very limited capacity to deal with FOI requests of scale (at 60).

4.5.12 The meaning of the Commonwealth equivalent of this section has been considered in several appeals to the Commonwealth Administrative Appeals Tribunal. In Re Shewcroft and Australian Broadcasting Corporation (1985) 2 AAR 496, the Tribunal rejected the applicant's submission that the only factor to be considered was the difficulty of identifying, locating or collating the documents requested. The Tribunal held that there were a number of factors which could be weighed up:

"The first is the complicated nature of the work necessarily involved, being that of the detailed consideration of the massive papers and documents covering the spectrum of the corporation's activities. Such a consideration would appear to involve reference to numerous sections of the Act and their application to highly sensitive commercial, technical, industrial and multifarious property and contractual matters, and possibly even to relations with foreign countries as for example could be involved in a communication satellite's function. The second is the sheer mass of the documentation to be looked at. A third is the work time involved. A fourth is the nature of the resources which are available to the respondent in money, facilities and numbers and qualifications of personnel. Finally, there are the 'other operations' to be thought of." (quoted from Flick Federal Administrative Law (1984))

4.5.13 It is important to note that where an agency receives multiple requests in relation to the same or related matters it may be appropriate to consider them as a single request for the purpose of considering the unreasonable diversion discretion (see Cianfrano v Director General, Premier's Department [2006] NSWADT 137 at 50). The Commonwealth AAT has said that:

"it would appear to make a nonsense of s.24 [the clause similar to s.25(1)(a1) in the NSW Act] if in a case where it could clearly apply for a request for a huge volume of
nominated documents, that the application of s.24 could be avoided by the mere breaking down of such an overall request to a multitude of virtually contemporaneous requests for single documents or parcels of them which would aggregate to the whole”. *(Re Shewcroft and Australian Broadcasting Corporation (1985) 2 AAR 496)*

4.5.14 To date, most of the case law relevant to s.25(1)(a1) relates to FOI applications for extremely large numbers of documents. Having said that, the ADT has accepted that what is ‘unreasonable’ need not necessarily amount to ‘overwhelming’ *(Cianfrano v Director General, Premier’s Department [2006] NSWADT 137 at 65).*

4.5.15 When assessing whether a demand would have an undue impact it is not intended that all of the resources of an agency be taken into account, but rather what is to be considered is the resources reasonably required to deal with an FOI application with attendance to other priorities *(Cianfrano v Director General, Premier’s Department [2006] NSWADT 137 at 55).*

4.5.16 The resources of an agency means the resources that the agency actually has, and does not include the resources that an agency could obtain, unless the absence of resources indicates a deliberate failure to provide resources to respond to FOI applications *(Re AVCAT, unreported, 4 November 1998 at 175; Cianfrano v Director General, Premier’s Department [2006] NSWADT 137 at 56-59).*

4.5.17 The Ombudsman will expect any claim under s.25(1)(a1) to be carefully and fully supported, and will expect good evidence both of a substantial diversion of resources and the unreasonableness of the diversion.

4.6 **Deferral of access (s.26)**

4.6.1 Section 26 provides as follows:

> "An agency may defer access to a document:
> (a) if it is a document that, by or under this Act or by or under some other legislative instrument, is required to be published but is yet to be published, or
> (b) if it is a document 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) if it is a document 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." *(s.26)*
4.6.2 In such cases the agency decides:

(1) to grant access to the documents sought; and
(2) also to defer the actual date of giving access. (It is the date of access, not the decision whether to grant access, which is deferred).

4.6.3 The decision to defer access is discretionary to the agency. The intention of s.26 is to increase general public access to documents where possible, while recognising obligations and courtesy due to:

(1) Parliament, in so far as documents required to be tabled in Parliament should first be tabled before they are given to any third parties;
(2) the public generally, in so far as documents required by legislation to be publicly released should be so released, rather than given on a selective basis first to one or two particular members of the public; and
(3) the person or body for whom a document was prepared, who should be given the document before it is given to any third party.

4.6.4 A decision to defer access should be made by the person who determines the application. That person may need to consult with the agency’s principal officer and, perhaps, the Minister, as the decision to defer access may depend on the sensitivity of the material in question and the protocol involved in the other form of publication or submission referred to in s.26.

4.6.5 Where the document to which access has been granted but deferred is based on a number of other sources or preliminary documents (eg where submissions are made to a committee, from which the committee writes a report which is later presented to Parliament), access to the source documents themselves cannot also be deferred under s.26 (although the internal working documents exemption or some other exemption may apply).

4.6.6 Where possible, agencies should seek to specify in the determination a date or, if this is not possible, an event after which access will become available. [policy]

4.6.7 The Ombudsman advises that he is unlikely to accept as appropriate a deferral which is lengthy, open-ended or for an unspecified period - the dates required by section 28(2)(d)(ii) are to be specified without fail.

4.6.8 The FOI Act prescribes that reasons be given in a notification of deferral, but does not require that findings or sources be provided. However, the Ombudsman is of the opinion that a full statement of reasons, as detailed in s.28(2)(e), should be provided where access is deferred.
4.7 Refusal to confirm or deny the existence of documents

4.7.1 Section 28(3) of the FOI Act states:

"An agency is not required to include in a notice any matter that is of such a nature that its inclusion in the notice would cause the notice to be an exempt document".

4.7.2 The equivalent provision in the Commonwealth FOI Act states that nothing in that Act requires information to be given about the existence or non-existence of documents,

"where information as to the existence or non-existence of that document if included in a document of the agency would cause the last mentioned document to be … exempt".

The section applies only to certain exemptions, ie those relating to law enforcement, national security and relations between States.

4.7.3 The wording of s.28(3) of the NSW Act does not clearly state that an agency may ‘neither confirm nor deny’ the existence of documents. As there is some argument as to the effect of this section, it should only be used where it is clearly warranted.

4.7.4 It should be extremely rare for documents, other than restricted documents, to be affected by this section. It should be noted that the test is not whether the contentious document is itself exempt - it is whether the inclusion of information about the very existence of the document would make the notice of determination exempt.

4.8 Documents which cannot be located

4.8.1 On occasion, there will be applications made for specific documents which were known to exist but can no longer be located, or which are likely or suspected to exist but cannot be found.

4.8.2 If such documents have been destroyed in accordance with approved practices, the applicant should be informed of this and refused access on the grounds that documents are not held by the agency. The details relating to approved destruction of the document should be set out in the notice of determination.

4.8.3 In other instances, documents may not be located because they have been lost or misplaced. In such cases agencies should take reasonable steps to locate the documents. However, where after a reasonable search the documents cannot be found, the agency should advise the applicant that the document cannot be located.

4.8.4 In the case of either destroyed or lost documents, the agency should make a determination refusing the application, to ensure that the applicant will have full rights of review. Only where the agency is sure that it has never held a document should the applicant be advised that the document is not held by the agency under s.28(1)(b). [policy]
4.8.5 In *Cianfrano v Director-General, Department of Commerce (No.2) [2006]* NSWADT 195, the ADT held that advice given by an agency to an applicant that the agency does not hold the document constitutes a ‘determination’ by the agency to ‘refuse’ to grant access to the document in any event. That decision is, however, pending appeal.

### Ombudsman’s Guidance – Complaints about lost documents

The Ombudsman is of the view that the loss or misplacement of documents by agencies could indicate some form of maladministration or possibly administrative misconduct. Where such conduct is the subject of a complaint the Ombudsman may investigate the adequacy of an agency’s systems for the proper retention, management, retrieval and destruction of documents, and whether documents have been wrongly destroyed.

### 4.9 Relevance of the motive, interest or identity of the applicant

#### 4.9.1
In this jurisdiction it is well established that the motive of an applicant can be a relevant consideration in assessing whether several exemption clauses apply to documents sought in an FOI application. Further, the identity and particular interest of the applicant can also be relevant considerations in some circumstances. Relevant cases include: *Commissioner of Police v District Court of NSW (Perrin’s case)* (1993) 31 NSWLR 606, at 645; *Gilling v General Manager, Hawkesbury City Council* [1999] NSW ADT 43, at 53-56; *Gliksman v The Commissioner, Health Care Complaints* [2001] NSW ADT 47, at 23; *Humane Society International Inc. v National Parks and Wildlife Service* [2000] NSW ADT 133, at 26-3, 51, and 53-56; *Latham v Director General, Department of Community Services* [2000] NSW ADT 58, at 53; *Odisho v The Chief Executive, Roads and Traffic Authority* [2001] NSW ADT 49, at 56; *Cerminara v Commissioner of Police and anor* [2001] NSW ADT 95; *Vranic v Director General, Department of Community Services* [2001] NSW ADT 129, at 52; *RT v Commissioner of Police, NSW Police* [2005] NSWADT 270, at 24.

#### 4.9.2
Reference is often made by courts and tribunals to the release of documents under FOI being to ‘the world at large’. This does not mean, however, that agencies are precluded from considering the motive, particular interest or identity of an applicant in appropriate circumstances.

#### 4.9.3
There are various circumstances where the identity or motive of an applicant may be relevant considerations in assessing an FOI application. For example:

1) the **identity** of the applicant is relevant in relation to:
   - applications for documents containing information concerning the applicant (cl.6(2)), cl.7(2) and cl.8(2) and ss.31(2), 32(2) and 33(2));
   - applications for documents containing information of a medical or psychiatric nature concerning the applicant (s.31(4) – in certain circumstances);
   - applications for documents containing information already known to, or held by, the applicant (eg, cl.4 and cl.6 – in some circumstances);
   - applications for documents containing information concerning a relative of the applicant (cl.16 - in some circumstances);
• applications for documents requiring consultation where the person consulted consents to disclosure to a particular applicant for access (cls. 6, 7 and 8 and ss.31(2), 32(2) and 33(2));

• applications on behalf of non-profit organisations that can demonstrate hardship in respect of their entitlement to a 50% reduction in fees and charges (cl.6, FOI (Fees and Charges) Order 1989);

2) the interest of the applicant may be relevant in relation to assessing:

• whether there is a public interest in releasing the document (ie does the applicant have a ‘right to know’ as opposed to mere curiosity);

• whether a 50% reduction in fees and charges would be applicable on the basis that it is in the public interest to make the information available to the applicant (cl.6(e), FOI (Fees and Charges) Order 1989);

3) the motive of the applicant may be relevant in relation to:

• whether any objective test in a relevant exemption clause is met (eg ‘could reasonably be expected...to prejudice’ in cls 4 and 16; ‘to destroy or diminish’ in cls 7(1)(b) and cl. 8(1)(b); ‘to have an unreasonable adverse effect’ in cls 7(1)(c); and ‘to have a substantial adverse effect’ in cls 14 and 15);

• whether disclosure of matter concerning the personal affairs of a third party could be unreasonable (cl. 6(1)).

4.10 Form of advice (notices of determination)

The contents of the notice

4.10.1 A notice of determination is required whenever a determination (in terms of ss.28 and 45) is made. Although no particular form is required, determination notices must contain either a statement of what the decision is or a statement of the fact that the documents are not held by the agency (s.28(1)).

4.10.2 Where a decision has been made all of the following matters must be addressed:

• the date of determination (s.28(2)(a)); and

• the charge for dealing with the application (deducting advance deposits where appropriate) (s.28(2)(f)); and

• the name and designation of the officer making the determination (s.28(2)(g)(i)). Note: if this officer is different to the one signing the notice, the names and designation of both should be made clear; and

• rights of the applicant regarding internal review and/or complaint to the Ombudsman and/or appeal to the ADT (s.28(2)(g)(ii)); and

• the procedures to be followed to exercise the rights set out above (s.28(2)(g)(iii)); and

• the following:
- **if access is to be given**, the amount of any charge for giving access (s.28(2)(b));

- **if access is to be given to documents with exempt matter removed**, which documents are so affected, which exemption is relevant, the reasons for doing so and the findings on any questions of fact underlying those reasons (ie what it is about the parts of the documents which makes them exempt)(s.28(2)(c));

- **if access is to be deferred**, which documents are so affected, the reasons for deferral and when the agency expects the documents to be available (s.28(2)(d));

- **if access is to be refused**, which documents are so affected, which exemption is relevant, the reasons for the refusal, the findings on any material questions of fact underlying those reasons and a reference to the sources of information on which those findings are based (s.28(2)(e));

- **if a third party has been consulted** (as required by Division 2 – Consultation), and a decision has been made to release, despite the objections of the third party, the facts and reasons for this decision. The determination should also include the appeal rights of the third party and the fact that the documents will not be released to the applicant until the expiry date for these appeal rights has elapsed or a decision made on the appeal.

4.10.3 The following box sets out the Ombudsman’s view as to the principles which should be applied when providing reasons. While the principles which underlie this statement provide a useful guide to best practice, agencies should also carefully consider the costs, including the costs to applicants of providing such reasons.

**Ombudsman’s guidance - The importance of giving reasons**

A statement of reasons is required to be included in a notice of determination whenever access to a document, or the amendment of a document, is refused (ss.28(2)(e) and 45(2)(b)).

The Ombudsman takes the view that reasons should also be provided when deletions are made or where access is deferred (see [4. 6 and 10.3.5 ]).

Where, as a result of action taken under ss.30-33, a third party has expressed opposition to the release of a document, the Ombudsman is of the view that he/she should also be given a full statement of reasons where the decision is made to release the document. The FOI Act does not specifically require this, but if the third party is to be enabled to make a meaningful appeal, the reasons for the decision should be made clear.

Where there is a deemed refusal under sections 24(2), 34(6), 43(2) or 47(6), and the Ombudsman conducts an external review, the agency will generally be requested or required to provide a written statement which meets the requirements of section 28(2)(e), given that generally no notice of determination has been created when a deemed refusal exists.

The reasons given for refusing access to documents should be comprehensive.

In the matter of *Raethel v Director-General, Department of Education and Training* [1999] NSW ADT 108, O’Connor J, President, Administrative Appeals Tribunal, noted:
“The scheme of merits review legislation generally, and Freedom of Information legislation in particular, is to place a duty on agencies to articulate their reasons for refusal at an early stage and in reasonable detail. This duty is intended to foster primary decision-making of quality, to promote accountability and to serve wider objectives relating to the relationships between governors and the governed.” (at 6)

In effect, section 28(2)(e) requires an agency to provide a rational explanation of the decision to refuse access to a document. The ability to provide such an explanation is central to a good decision. The applicant is entitled to an explanation of reasonable depth.

The notice should show how the decision has been arrived at, on the basis of the findings of fact, and why the decision-maker reached that decision. Each aspect of the determination may need different supporting statements, as different facts, reasons and findings may apply.

It should show a rational connection, that is, a connection supported by a chain of reasoning, between the findings of fact and the decision to refuse access. A sound decision will always be capable of rational explanation.

A reason for refusal would be that a decision has been made to exercise the discretion under s.25 to deny access to a document which satisfies one of the criteria listed. The most common reason would be that a document is claimed to be exempt because it is covered by one or more of the exemption categories in Schedule 1.

The Ombudsman recommends that where the reason for refusal is that a document is exempt, then the exemption clause or the relevant part of it should be quoted in full. This may assist the applicant to understand why access to exempt documents has been refused. A photocopy of the exemption clause could be provided, instead of paraphrasing the provisions.

If a clear statement is not provided, then the agency has failed in its obligation to the applicant and it is likely that the internal reviewer will have difficulty in responding to a request for internal review. Furthermore, the agency may run the risk of unnecessary appeals. A clear statement of reasons will serve the initial decision maker well. The internal reviewer will not appreciate having to review a decision for which clear reasons have not been given, and neither will the Ombudsman or the ADT.

An applicant must be able to understand why each particular exemption applies to each particular document or part. The statement of reasons must give sufficient detail as to the findings and reasons for a decision to give the applicant a proper understanding of the basis for the decision (see Australian Telecommunications Commission v Barker (1990) 12 AAR 490 at 492 per Davies, Gummow & Hill JJ).

The applicant, on reading the decision, should be able to say:

“I might not agree with it but at least I understand why it went against me, and I am in a position to decide whether there’s an error of fact or law or a mistaken finding which is worth challenging”


The reasons should set out the decision-maker’s understanding of the relevant law, summarising the effect of relevant decisions where this is necessary, in order for the applicant to understand the reasons for refusal of access. While it is important that there be some summary of the law where it is necessary to convey the reasons for a decision to an applicant, the notice does not need to be written by a lawyer and formal legal language should be avoided.

In Simos v Wilkins (unreported, District Court of New South Wales, 15 May 1996), Judge Cooper observed:

“There is no doubt that there is an obligation on the [Agency or Minister] to comply with the terms of section 28(2)(e) of the FOI Act. But the nature and extent of the detail necessary to comply with the requirements of this
sub-section will vary with the nature of the ground of exemption claimed by the Agency or Minister. Thus if exemption were claimed under clause 6 of Schedule 1 (a document containing matter the disclosure of which would involve the unreasonable disclosure of information concerning the affairs of any person), compliance with s 28(2)(e) would necessitate a considerable amount of detail to justify the unreasonableness of the disclosure particularly as the concept of unreasonableness encompasses a value judgement. It would require the setting out of those facts which form the basis of that value judgement in order to comply with the obligation to state ‘the findings on material questions of fact underlying those reasons.” (at 18-19)

The Ombudsman has indicated that the approach of merely repeating the exemption is not sufficient and reasons must be concrete and specific. The following, for example, would not be acceptable:

“The reason for my decision to exempt document 1 is that it contains matter the disclosure of which would disclose information that has a commercial value to this Department and could reasonably be expected to destroy or diminish the commercial value of the information.”

Statements of reasons must reflect the real reasons and the real findings. They must not be an afterthought designed to obscure what has really been done. If, after inquiry, the Ombudsman were to find that the real basis for a decision had not been included in the notice of determination, it is most likely that the Ombudsman would report that fact to at least the Minister, agency and complainant, and possibly to Parliament if the issue were particularly significant.

The applicant should, having read the determination, have a good and true understanding of why access to exempt documents has been refused. Such an understanding cannot come from a mere rearrangement of the wording of the exemption clauses relied upon by the agency.

The notice of determination must address each relevant document, including statements setting out specifically why each is being exempted.

While the requirements of s.28(2)(e) do not apply where deletions are made, as already pointed out above, the Ombudsman is of the opinion that the full requirements of the provision should nevertheless be met.

Stating reasons will usually require a written discussion as to what criteria have been met to establish the exemption, or to establish other bases of refusal in s. 25. This should help the applicant to decide whether to accept the decision or challenge it.

The decision

4.10.4 It is important that the notice clearly states what the decision is and how that decision relates to the details of the application, especially if the application is lengthy or complex. For example:

“Your application for … related to four groups of documents as set out in schedules 1 – 4. My decision is that:

- access is to be granted immediately to the first category of documents requested;
- access is to be granted immediately to all documents in group 2 with the exception of pages 9 and 10 from which exempt matter has been deleted;
- access to one of the documents in group 3 is refused, and
- access to the document in group 4 is deferred until the next session of Parliament commences on [date]”
Identification of the documents in issue

4.10.5 It is important that the notice of determination sets out, where appropriate, the way in which the application has been interpreted. This is a material question of fact and is required to be dealt with in the notice.

4.10.6 The notice must also detail what, and how many, documents are covered by the application.

4.10.7 The notice, therefore, should include a sufficiently detailed description of the documents the subject of the application, to enable the applicant to know what documents are in issue and the nature of the documents. A schedule is the best way to identify and describe each document. The Ombudsman recommends that a schedule always be made where more than a few documents are involved.

4.10.8 The identification of every document and the inclusion of a description of every document in the notice of determination is considered to be important to the process of making specific decisions as to whether or not documents or parts of documents are to be released or amended. Agencies should be mindful that it is necessary to strike a balance between processing costs associated with the making of a notice and compiling a notice which is meaningful to the applicant.

4.10.9 A common practice of agencies is to compile three schedules – one listing those documents where access is to be fully granted, another listing those documents where access is to be part-granted and, finally, a list comprising those documents considered fully exempt. It may also be useful for an agency to maintain in their working papers a schedule of documents which appear related to the application yet in the agency’s view fall outside the scope of the application.

4.10.10 The conduct of both internal and external review benefits from a schedule of documents the subject of the application. It is important for analysis, and for useful and efficient round-table and telephone discussions with agencies, that any document, and any page of any document, be easily found.

4.10.11 The Ombudsman’s view is that a notice of determination will be seriously deficient if it does not properly identify and describe all the documents covered by the application. In this regard, it is suggested that documents should be separately and specifically identified in a schedule based on possible distinctions such as their:

- source;
- author;
- date;
- addressee;
- place of publication; and/or
- nature or contents,

(provided such details are not themselves exempt).
Findings on material questions of fact

4.10.12 The onus is on the decision maker to outline the basis for the decision, including the material questions of fact which led to the conclusion that the document fits the exemption category cited. Where access to a document is refused, the notice of determination is required to specify:

“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” (s.28(2)(e)(ii)).

4.10.13 Material questions of fact are those which are relevant and were taken into account (or, to put it another way, those which were important to the decision reached).

4.10.14 In making a decision there will always be questions as to whether or not a fact is true, whether it is relevant and what conclusion has been made from it. A decision-maker must take all questions of fact into account which are relevant, and must not take into account any which are not relevant.

4.10.15 Agencies might find it useful to consider ‘facts’ as conceptually being of two types – basic (or primary) facts and ultimate facts. Basic facts are those which are explicitly contained in the information before the decision-maker. Ultimate facts are ones which can be inferred from the basic facts. The Commonwealth FOI Memorandum No.26 gives the following example:

“The registry system of an agency does not disclose the existence in the agency of a document. An examination of the relevant files fails to reveal the document. The officers working in the relevant areas have not heard of the document.

These are the primary facts. The conclusion (or ultimate facts) to be drawn from these primary facts will be either that the document is not in the possession of the agency or that the applicant has not sufficiently identified the document in the request. These are findings on material questions of fact”.

4.10.16 Appendix E provides further examples of reasoning from ‘primary’ facts to ‘ultimate’ facts. The examples are designed to emphasise the reasoning processes involved, and they do not necessarily set out all the relevant facts that should be taken into account in the relevant scenarios.

4.10.17 Of course, it is not necessary for agencies to identify in the notice of determination every single fact which is relevant. Some facts will be self-evident, and require no explanation. Nor is it necessary to seek to classify facts as either primary facts or ultimate facts, or to isolate every chain in the reasoning process.

4.10.18 Rather, the notice of determination is required to identify the findings of fact which are ‘material’ to the decision at hand.
4.10.19 The findings of fact which eventually emerge may be expected to bear some similarity to the exemption clause(s) claimed. However, it is not sufficient simply to restate in the notice the part of the clause detailing the adverse effect(s). For example, it would be insufficient to simply state, as the agency’s finding of fact, that ‘release of the document could reasonably be expected to endanger the life or physical safety of a person’ (clause 4(1)(c)). Rather, the specific danger which is expected must be identified, including an assessment both of its nature and degree.

4.10.20 Other findings on material questions of fact which should be referred to in the notice of determination (if relevant) include:

(1) the extent of documentation covered by the application, ie how has the application been interpreted by the agency (see [4.10.5-11]);

(2) the result of consultations with third parties;

(3) the result of consideration under s.25(1)(a1) of facts concerning agency resources and the time estimated to fulfil an application; and/or

(4) other processing matters.

Sources of information on which findings are based

4.10.21 The sources of information, or evidence, on which a finding is based might include:

- the content of the document applied for,
- knowledge the decision-maker has of the agency’s operations or resources,
- letters from third parties,
- legal precedents, or
- any other relevant and credible source of information.

4.10.22 The FOI Act requires a sufficient reference to this material in the notice of determination to indicate that the reasons and findings have adequate foundations. For documentary sources, the notice should include a description of the document (including its author, addressee, date, etc).

4.10.23 It is important that the notice makes clear which facts are derived from which sources.

4.10.24 It is not necessary to set out this primary material in detail. All that is required is a sufficient reference to it to show that there is a proper basis for the findings of fact which have been made.
Details of charges
4.10.25 The notice must also set out the basis for calculating any charges, including a breakdown of the number of hours being charged for, the rate per hour, and the breakdown of the charges (e.g. 1 hour - locating documents, 2 hours - consultation, 0.5 hours - decision-making and 0.5 hours – photocopying, etc) (see Chapter 6).

4.11 When documents should be made available
4.11.1 The FOI Act is silent on when the actual documents sought should be made available, if access is to be granted (but see [4.5] above)).

4.11.2 An agency may refuse to give access to a document unless any charge payable for dealing with or giving access to the document has been paid (s.27(6)).

4.11.3 Depending on the form of access granted (see [4.15.1]), if there are no additional charges to be paid copies of the documents may be included with the notice. If charges are to be paid prior to access being granted, the appropriate procedure would seem to be to have the documents ready for the applicant immediately upon payment of the outstanding charges.

4.11.4 If one or more of the consultation provisions (ss 30-33) apply, and a person consulted has objected to release, then the documents should not be made available until the relevant review period has expired (see [4.3.25]).

4.12 Inadvertent release of exempt documents
4.12.1 Agencies must be careful to ensure that any exempt document it has decided should not be disclosed is not inadvertently released to the FOI applicant.

4.12.2 If an exempt document is inadvertently released, the agency should, in the first instance, contact the applicant and request that the document be returned. **If the document is a Cabinet document the agency must also notify the Policy Manager, Legal Branch of the Department of Premier and Cabinet immediately upon becoming aware of its release.** [policy]

4.12.3 The ADT has held that, if an exempt document is inadvertently disclosed, the ADT has no power to order the applicant to return the documents (Retain Beacon Hill High School Committee Inc v Landcom [2006] NSWADT 108). Depending on the sensitivity of the relevant document and the potential detriment that may arise if it were to become available publicly, agencies in this situation may wish to seek legal advice (see [1.5.17-1.5.19]) on whether any other avenues may exist for recovering the document or limiting its subsequent publication.
4.13 Rights of review

4.13.1 As well as including any general information (such as booklets) about reviews under the FOI Act, the notice should clearly state what rights of review the applicant has in relation to the particular determination. For example, if the determination was made by the agency's principal officer, the notice should state that there is no right of internal review and that only review by the Ombudsman and/or review application to the Administrative Decisions Tribunal are available.

4.13.2 The Commonwealth case of Re Ward and Secretary Department of Industry and Commerce (1985) 5 ALN N 235 reinforces the importance of providing specific information about rights of review.

4.14 Burden of proof

4.14.1 The FOI Act states that the agency or Minister bears the burden of establishing that a determination under the FOI Act is justified (s.61).

4.14.2 There are, however, a number of qualifications to this general proposition:

- In cases where an agency decides to release a document against the wishes of a third party, the third party who applies for a review of that decision bears the evidentiary burden of establishing that the document is an exempt document (see eg Handicapped Children’s Centre, NSW v Director, Department of Ageing, Disability & Homecare [2003] NSWADT 116).

- Where the agency has determined that a document is exempt because it is subject to legal professional privilege (clause 10), an applicant who challenges that determination bears a preliminary evidentiary onus to provide support for the claim that the document is not so privileged (although the agency continues to bear the ultimate legal onus) (McGuirk v University of New South Wales [2005] NSWADT 289).

- Where an agency refuses to amend personal records, the applicant bears a preliminary evidentiary burden to provide support for the application for amendment (although the agency continues to bear the ultimate legal onus) (see [5.6.2-5.6.4]).

4.15 Forms in which access to a document may be given

Forms of access (s.27)

4.15.1 There are various forms in which access may be given to documents under the FOI Act:

"Access to a document may be given to a person:

(a) by giving the person a reasonable opportunity to inspect the document, or
(b) by giving the person a copy of the document, or
(c) in the case of a document from which sounds or visual images are
An applicant must be given access to a document in the form requested unless giving access in that form:

"(a) would unreasonably divert the agency’s resources away from their use by the agency in the exercise of its functions, or

(b) would be detrimental to the preservation of the document or (having regard to the physical nature of the document) would otherwise not be appropriate, or

(c) would involve an infringement of copyright subsisting in matter contained in the document." (s.27(3)).

The agency must provide access in another form if the form requested is refused (s.27(3)).

In practice, the applicant could be allowed to inspect a copy of the document and take his or her own notes if he or she so wishes. If this is not possible, the agency staff should discuss the situation with the applicant and explain the problem with access to see whether a compromise can be reached.

If access is given in a form other than the form requested, the applicant must not be required to pay a charge that is greater than the charge for access in the requested form (s.27(4)).

This does not prevent access to a document being given in any other form agreed between the agency and the applicant (s.27(5)).

Procedures generally

Generally, where access is granted by allowing the applicant to read the relevant documents or files and the application did not seek all documents on the files, agency staff should cull the files to ensure that the applicant is not given access to documents which did not form part of the application.

Steps will also need to be taken to ensure that original files are not damaged or tampered with.
4.16 Access to records containing medical or psychiatric information

4.16.1 Agencies have the option of releasing documents containing information of a medical or psychiatric nature, and relating to the applicant's personal affairs, via a registered medical practitioner of the applicant's choice (s.31(4)).

4.16.2 Agencies should not, however, automatically request the name of a registered medical practitioner simply because the documents concerned contain medical or psychiatric information. Generally, medical and psychiatric information can be given directly to the applicant unless the agency considers the information is likely to have an adverse effect on the mental or physical health of the applicant.

4.16.3 Documents of a medical or psychiatric nature are generally considered to be reports or clinical notes prepared by a registered medical practitioner or by similarly qualified staff of a medical or psychiatric institution. General documents that speculate about the medical or psychiatric condition of a person or reports written by non-medical staff about the applicant’s behaviour should not be considered as falling into this category. A clear link to medical or psychiatric treatment would need to be established before agencies should consider releasing such documents via a registered medical practitioner.

4.16.4 The Commonwealth Department of Veterans Affairs has a policy of first submitting any medical or psychiatric documents that the FOI Officer believes could adversely affect the applicant to its internal medical staff. The written opinions of the internal medical staff are used to determine whether access should be given by means of the applicant’s medical practitioner. Agencies may wish to adopt a similar practice, if appropriate.

4.16.5 Under the Commonwealth FOI legislation, should a registered medical practitioner refuse to give the applicant access to documents, the applicant has a right of internal review. **There is no such right in the NSW legislation.** Agencies should therefore be aware that by providing access to a registered medical practitioner, the applicant may be denied access to the documents if the medical practitioner refuses to make the documents available to the applicant.

4.16.6 If agencies do propose to give access through a registered medical practitioner, the agency should write to the doctor, attaching a copy of the documents concerned. The letter should outline the responsibilities and obligations that the doctor has in the matter. The letter should also state the agency’s view that the documents should be disclosed to the applicant subject to any concerns relating to the effect of disclosure on the mental or physical health of the applicant. The doctor should be asked to supply written reasons to the agency if he or she refuses to provide access.

4.16.7 Any processing fees should be collected by the agency prior to supplying the documents to the registered medical practitioner.

4.16.8 Agencies should be aware that there are specific rights to access certain medical and psychiatric information provided under the Health Records and
Information Privacy Act 2002, the Mental Health Act 1990 and the Private Hospitals Regulation 1996.

4.17 **Difficult applicants and safety of staff**

4.17.1 Aggressive behaviour of some applicants may cause problems for agency staff. Where information is ‘of a medical or psychiatric nature’ and its disclosure may affect the applicant’s physical or mental health, it may be released under s.31(4) of the FOI Act to a medical practitioner (see [4.16]). However, this procedure is intended to protect the applicant's interests, not those of the agency.

4.17.2 If it is considered that disclosure of the information ‘could reasonably be expected to endanger the life or physical safety of any person’, the information may be protected by clause 4(1)(c) of Schedule 1 of the FOI Act.

4.17.3 If agencies intend to withhold material on the basis that life or physical safety may be endangered there must be supporting evidence. There should be a reasonable likelihood that such harm will occur. Agencies cannot assume the worst. The fact that someone has behaved aggressively on a previous occasion does not necessarily mean that release of information to them would endanger physical safety. Thorough documentation on file may assist agencies to assess the situation. See [1.5.16].

4.17.4 Guidance on dealing with difficult complainants is provided in the Ombudsman’s publication entitled *Dealing with Difficult Complainants* which is available at <www.ombo.nsw.gov.au>

4.18 **Proof of identity**

4.18.1 Where access to personal information is sought by an FOI applicant, the identity of that applicant should be verified (see [1.5.8-1.5.11]).

4.19 **Ministerial Certificates (ss.6, 58A, 58B, 58C and 59)**

*What is a Ministerial certificate?*

4.19.1 A Ministerial certificate is a certificate signed by the Minister responsible for the FOI Act (currently the Premier) that states that a specified document is a restricted document (s.59).

4.19.2 Restricted documents, as set out in Part 1 of Schedule 1 of the FOI Act, are:

1. Cabinet documents;
2. Executive Council documents;
3. documents affecting law enforcement and public safety; and
4. documents affecting counter-terrorism measures.

4.19.3 When issuing a Ministerial certificate, the Minister is required to give reasons and provide particulars to support the claim that the document is a restricted document (s.59(1A)).

4.19.4 Ministerial certificates cannot be issued for the other exempt documents listed in Parts 2 and 3 of Schedule 1.
4.19.5 Ministerial certificates must be taken to be conclusive evidence that a document is a restricted document, except for the purposes of ss.58A, 58B and 58C, which provide for the Supreme Court to consider the grounds on which it is claimed that a document is a restricted document.

4.19.6 The FOI Act does not allow internal review, by implication of the definition (s.59(1)), nor investigation by the Ombudsman (s.52(3)), of a determination relating to a document covered by a Ministerial certificate.

4.19.7 A Ministerial certificate is valid for two years from when it is signed by the Minister, unless he or she withdraws it sooner. The Minister may issue further certificates in respect of the same document.

When should a Ministerial certificate be sought?

4.19.8 Certificates will not be issued unnecessarily and only as a ‘last resort’. In practice, few Ministerial Certificates have been issued since the commencement of the FOI Act.

4.19.9 An agency or Ministerial office should make an initial determination to refuse access to a restricted document by relying on the relevant category of exemption under the FOI Act (Schedule 1, Part 1). An application for a Ministerial Certificate should only be made when a determination to refuse access to a restricted document has resulted in a request for an internal review, a complaint to the Ombudsman or a review application to the ADT and the document contains material of sufficient sensitivity to warrant a certificate. [policy]

4.19.10 The FOI Act also prescribes how an agency should deal with an application for access to a document which is the subject of a Ministerial Certificate (s.25(3) and (4)). In brief, an agency must refuse access to a restricted document which is the subject of a Ministerial Certificate. However, the certificate cannot be used to refuse access to parts of a document which do not contain restricted matters (see Chapter 3 — Applications for access to documents, for details). This could mean that a Ministerial Certificate may apply to only certain parts of a document, with the other parts being released so that people are not deprived of information unnecessarily.

Procedure for obtaining Ministerial certificates

4.19.11 A Ministerial Certificate may only be issued by the Premier (ie the Minister responsible for the FOI Act).

4.19.12 An application for a Ministerial Certificate should be made to the Director-General, the Department of Premier and Cabinet. [policy]

4.19.13 Agencies and Ministerial offices are encouraged to advise the Department of Premier and Cabinet of the possibility of requiring a Ministerial Certificate as early as possible during the processing of an application for access to a restricted document. Since there is only a 14 day time limit on an internal review of an application, a senior officer should initiate contact by telephone, to expedite proceedings. It is vitally important that the
Department of Premier and Cabinet is given as many of the 14 days as possible to process the application and seek the Premier’s approval. [policy]

4.19.14 An application for a Ministerial Certificate should include the following:
(1) a copy of the application for access;
(2) a copy of the application for internal review;
(3) a copy of the relevant notice of determination given to the applicant under s.28;
(4) where necessary, a copy of the document sought; and
(5) any other material relating to the claim of exemption. This should include a statement as the purposes for creating the document concerned. [policy]

4.19.15 Applications should be made by the Minister in the case of a Minister’s document or by the principal officer of the agency in the case of an agency’s document. [policy]

4.19.16 This procedure does not constitute a transfer of the application. The agency or Minister receiving the request maintains responsibility for that request, including any subsequent review proceedings.

Restricted documents and the Supreme Court

4.19.17 Only the Supreme Court may consider an appeal in connection with a restricted document covered by a Ministerial Certificate (s.58A(1)).

4.20 Ministers’ documents

4.20.1 In relation to applications for access to a Minister’s documents, the FOI Act states:

"(1) An application shall be dealt with:
   (a) by the Minister concerned, or
   (b) by such member of that Minister’s staff as that Minister may direct for that purpose, either generally or in a particular case.
(2) An application shall be dealt with as soon as practicable (and, in any case, within 21 days) after it is received." (s.37)

4.20.2 Since there is no right of internal review (s.38), the choice of who determines the application has no effect on the applicant's rights of appeal. Administratively, however, it is important that there is a written direction clearly indicating who is responsible for dealing with FOI matters.

4.20.3 The remaining provisions of Divisions 1 of Part 3 of the FOI Act (ie ss19 to 29, excluding ss16 to 18) :

“(a) apply to an application for access to a Minister’s document in the same way as they apply to an application for access to an agency’s document, and
(b) **apply to a Minister to whom an application is made for access to a Minister's document in the same way as they apply to an agency to which an application is made for access to an agency's document.**” (s.38)

4.20.4 The provisions of Division 2 (Consultation) (ss.30 to 33) also apply fully to Ministers' documents in the same way.

4.20.5 Part 3, Division 3 (Internal review) does not apply to Ministers' documents (s.38).
5 Applications to amend personal records

5.1 Overview

5.1.1 The FOI Act gives people the right to require the amendment of personal information in documents held by agencies and Ministers. It would appear that this right exists to ensure that personal information that may be used by an agency or Minister does not unfairly harm the person referred to, does not misrepresent facts about him or her, and does not give a misleading impression.

5.1.2 A person may only request amendment if:

1. the person has already obtained access, whether under the FOI Act or otherwise, to the relevant document (see [5.2.1-5.2.2]);

2. the document contains information concerning the person’s personal affairs (see [5.2.4-5.2.7]);

3. the information is available for use by the agency or Minister in connection with administrative functions (see [5.2.8-5.2.15]); and

4. the information is, in the person’s opinion, incomplete, incorrect, out of date or misleading (s.39).

5.1.3 No fees or charges are payable in respect to an application to amend personal records.

5.1.4 Section 43 requires the agency to determine the request either by amending its records as requested, or by refusing to amend its records.

5.1.5 A person who is dissatisfied with the agency’s determination is entitled to an internal review by the agency (s.47(1)). There is no right to an internal review where a person is aggrieved by a decision concerning a request to amend a Minister’s records (s.51).

5.1.6 If an agency or Minister refuses to amend its records, the applicant can instead require that the records include a notation setting out the applicant’s views as to why he or she believes the records are incomplete, incorrect, out of date or misleading (s.46).

5.1.7 Agencies should note that the State Records Act 1998 (ss.11 and 21) establishes a regime for the protection of State records, and includes a general prohibition on any person altering a State record (s.21(1)(d)). However, the regulations made under that Act provide an exception from this prohibition for amendments made pursuant to a determination under section 43 of the FOI Act.

5.2 Circumstances in which an amendment request may be made

The person already has access to the relevant document

5.2.1 A person may apply for a document to be amended only if the person already has access to the document. Access to the document does not have to have been obtained under the FOI Act. It is sufficient for access to have been given or obtained under any other arrangement.
5.2.2 Applications for amendments may also in some cases be made on behalf of another person, such as by a parent or guardian on behalf of a minor or disabled person (see [3.2])

The document contains ‘personal affairs’ information

5.2.3 A person may apply for amendment of a document only if, and to the extent that, it contains ‘personal affairs’ information about that person. For a discussion of the meaning of the term ‘personal affairs’ see [12.3.16-12.3.20].

The information concerns ‘administrative functions’ (s.39)

5.2.4 Under s.39, a person can only apply for amendment of an agency’s document if, among other things, the information in the document is available for use by the agency in connection with its ‘administrative functions’.

5.2.5 ‘Administrative functions’ is not defined by the Act. The term should be given a broad meaning. The provisions of the FOI Act dealing with amendment of records are intended to cover the full range of records available in relation to functions of an agency that are part of its day-to-day operations and management. However, as information must concern ‘personal affairs’ it is unlikely that policy documents will be affected.

5.2.6 In the Commonwealth FOI Act, the right to request an agency to amend a record is similarly expressed – ‘being used or available for use by the agency or Minister for an administrative purpose’.

5.2.7 The Commonwealth AAT has also held that the Commonwealth provision is not confined to records of a purely factual nature and may include those containing a professional judgement or opinion, subjective evaluations and information conveyed by innuendo. In Re Leverett (1985) 8 ALN N 135 at N136 the AAT (Cth) said:

"it would defy common sense to suggest that only factually erroneous assertions should be deleted or revised, while opinions based on these assertions must remain unaltered."

The person asserts the information is ‘incomplete, incorrect, out of date or misleading’

5.2.8 A person may request an amendment to information if they believe it to be ‘incomplete, incorrect, out of date or misleading’.

5.2.9 The words ‘incomplete’, ‘incorrect’, ‘out of date’ and ‘misleading’ are used in the Act in their ordinary senses and are to be understood according to their ordinary meanings. For example, in Bennett v University of New England (unreported, District Court, NSW, 8 August 1991, at 14), Dunford J considered that information will be ‘incorrect’ when it ‘is not in accordance with fact or is erroneous or inaccurate’.
5.2.10 The fact that an event happened in the past does not of itself make information about that event out of date. In *Crewdson v Central Sydney AHS* [2002] NSWCA 345, the Court of Appeal stated:

"The fact that information in Departmental records relates to a specific date does not mean that it becomes out-of-date" (at 21).

5.2.11 The word 'misleading' has been the subject of judicial interpretation in other areas of the law. Information can be said to be misleading if the following apply:

1. it could lead a person reading it into error or could, although literally true, convey to a reader another meaning which is untrue (eg if there is insufficient detail to fully explain something); and

2. it does so with respect to those persons who might be expected to use the information. This includes both the wary reader, who may not be misled, and the less wary, who may be. Information may also be misleading where technical terms are used which may be familiar only to specialised readers, if the information is in fact used by people without specialist knowledge.

5.2.12 The section can not be used to authorise or allow decisions of agencies to be changed, or for appeals against agencies' decisions to be made, under the guise of amending records. In other words, an application for amendment of documents should not be made where the sole intent of the application is to obtain an agency's admission that an earlier administrative decision is in error. It was never intended that the FOI Act provisions relating to the amendment of records could be used as an administrative appeals mechanism about the decisions of agencies. It is not intended as a means of reviewing previous determinations with which the applicant is dissatisfied.

5.2.13 For example, in *Re Resch and Department of Veterans Affairs* (Commonwealth AAT, unreported 11/4/1986), the applicant wished to have the description of his disability altered by amending his records. The Tribunal did not allow the amendments sought. Similarly in the case of *Lee v Melbourne College of Advanced Education* (Victorian AAT, unreported 3/5/1989), a person awarded a Diploma of Education after having her degree deferred as 'unsatisfactory on the final round' because of a lack of ability in English sought amendment after the completion of a language course. The applicant sought to amend her academic record to read as 'unfinalised' rather than deferred. This was refused because it sought to re-write a document for the purpose of having a previous administrative decision overturned.

5.2.14 In *Crewdson v Central Sydney AHS* [2002] NSWCA 345, Handley JA, with whom Ipp and Davies AJA agreed, stated:

"The appellant's attempt to use the Act as a vehicle for the collateral review of the merits or validity of official action should be rejected... The Act is concerned with the accuracy of official records, not with the merits or legality of the official action recorded in them" (at 24).
5.2.15 Nor can the application be made simply because the applicant disagrees with an opinion which is genuinely and rationally held. For example, in *Re Warren and the Department of Defence* (AAT, 22 December 1993, File no N92/621, unreported) the AAT made the following observations in relation to opinions about the applicant’s ability made by more senior officers:

“The comments by [the officers] are not what the applicant would desire but they are opinions which were held by those officers at the time. They should not be deleted, neither is there sufficient evidence adduced to persuade the Tribunal that the factual bases for them were incorrect so that some annotation should be made upon the document in question.”

(Although the AAT did criticise comments of a third senior officer, describing them as ‘extraordinary’ and noting that no explanation was given for them.)

5.3 *Formal requirements for an amendment request*

5.3.1 Any person who has obtained access to an agency’s or Minister’s document may apply to have the document amended if it contains information concerning the person’s personal affairs. See Appendix F for procedures for checking the identity of applicants.

5.3.2 Persons acting on behalf of the person concerned are also able to apply for an amendment of that person’s records in the same way as they can lodge an application for access on someone else’s behalf. This could include parents or guardians of minors or disabled people, next of kin, executors acting for deceased people, or professionals (lawyers, doctors, etc). See [3.2] for details on who can apply and for procedures for confirming consent.

5.3.3 A request should be made to the agency or Minister’s office (whichever holds the subject records). Any request must satisfy s.39 (or s.48 if it is a Minister’s document) of the Act and provide all the information required in s.40 (or s.49). A specimen form is included at Appendix A, Form 10.

5.3.4 An application for amendment of records is required to:

"(a) be in writing, and
(b) specify that it is made under this Act, and
(c) contain such information as is reasonably necessary to enable the agency’s document to which the applicant has been given access to be identified, and
(d) specify the respects in which the applicant claims the information contained in the document to be incomplete, incorrect, out of date or misleading, and
(e) if the application specifies that the applicant claims the information contained in the documents to be incomplete or out of date, be accompanied by as much information as the applicant claims is necessary to complete the agency’s records or to bring them up to date, and
(f) specify an address in Australia to which notices under the Act should be sent, and
(g) be lodged at an office of the agency” (s.40).
5.3.5 Section 49 of the Act is in similar terms, but references are to the Minister rather than the agency.

5.3.6 Applicants must provide particulars and, if necessary, documentation in support of their claim that the information they want amended is incomplete, incorrect, out of date or misleading.

5.4 **Fees and Charges**

5.4.1 There are no fees or charges for the lodgement or processing of an application to amend personal records.

5.4.2 **If a person has obtained access to the relevant documents through an FOI application and has paid fees or charges for access (or internal review of access decisions), the FOI charging policy requires that any such fees and charges be refunded if it is found that the applicant’s personal records require significant correction and that the applicant is not responsible for the errors. [policy]** The Minister, principal officer or person delegated by them to determine the application, should decide whether such a refund should be granted (see [6.3.2].)

5.5 **Procedure for dealing with applications**

5.5.1 An application must be dealt with by the principal officer or Minister, or a person directed by the principal officer or Minister to do so (ss41(1)-(2), and 50(1)).

5.5.2 An application must be dealt with as soon as practicable and, in any case, within 21 days of receipt (ss41(3) and 50(2)).

5.5.3 As with applications for access to documents, an agency cannot refuse to accept an application on the grounds that the documents are not sufficiently identified without first taking such steps as are reasonably practicable to assist the applicant to provide such information to identify the documents (s.42). Since applications to amend documents can only be made by applicants who have already had access to the particular document, it seems unlikely that identifying the document for amendment should ordinarily present any problems.

5.5.4 An agency or Minister shall determine an application for an amendment of their records either by:

1. amending their records in accordance with the application, or
2. refusing to amend their records (ss.43 and 51).

5.5.5 If the agency or Minister fails to determine the application within 21 days after receipt of the application, the agency or Minister will be taken to have determined the application by refusing to amend their records in accordance with the request. The applicant to an agency will then have a right to internal review (s.47).
5.5.6 An agency (or Minister) may refuse to amend its records in accordance with an application in the following circumstances:

"(a) if it is satisfied that its records are not incomplete, incorrect, or out-of-date or misleading in a material respect, or

(b) if it is satisfied that the application contains matter that is incorrect or misleading in a material respect, or

(c) if the procedures for amending its records are prescribed by or under the provisions of a legislative instrument other than this Act, whether or not amendment of those records is subject to a fee or charge.” (s.44)

5.5.7 When deciding whether information is, as claimed by the applicant, incomplete, incorrect, misleading or out of date, there are two factors to consider:

(1) the nature of the information in question; and

(2) the evidence presented in support of the request to correct or amend.

Types of information

5.5.8 Personal information (see also [12.3.19]) can be:

(1) factual or routine information, eg date of birth, length of employment, names of dependents, or

(2) opinions or evaluative material such as advice or recommendations of a third party, eg records of interviews, material in personnel records, medical reports.

5.5.9 The type of information to which a request relates will influence the grounds on which the request is made, the type of proof or supporting evidence required to support the request and how the record is amended if the request is agreed to. For example:

(1) factual information in dispute can be substantiated by copies of relevant documents, eg birth certificates, statements of service, statutory declarations; and

(2) where opinion and/or advice is in dispute (on the grounds that the applicant claims it is out of date, inaccurate, incomplete or misleading), the applicant might provide additional third party advice or opinion that is more recent or contrary to the original opinion or details concerning the circumstances of the advice or opinion that qualify the grounds on which the original advice or opinion was based.

The notice of determination (ss 45 and 51)

5.5.10 An agency or Minister is required to give the applicant written notice of the determination of the application.

5.5.11 Where the agency or Minister does not hold the record or records the subject of the application, the agency or Minister is required to notify the applicant in writing of this.
5.5.12 Otherwise, a notice of determination must specify the following details:

(1) the date the determination was made; and

(2) if the determination is to refuse to amend the agency or Minister’s records:
   (a) the name and designation of the officer who made the determination;
   (b) the reasons for refusal;
   (c) 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;
   (d) all the rights of review and appeal and the rights of complaint to the Ombudsman (in relation to determinations made by agencies only); and
   (e) the procedures to be followed in order to exercise those rights (s.45(2)).

5.5.13 An agency is not required to include in a notice any matter which would cause the notice to be an exempt document (s.45(3)) (see [4.10] for further discussion as to the requirement for notices of determination.)

5.5.14 Where a determination is made to amend a record, a copy of the amended record should be enclosed, wherever possible, with the letter of determination.

5.6 Decision-making for amendment of records

5.6.1 When assessing whether to amend records, it is relevant to consider criteria such as:

(1) do the documents contain information relating to the applicant’s personal affairs?
(2) if so, is that information incomplete, incorrect, out of date or misleading?
(3) has the information been used, or is it available for use for an administrative purpose?
(4) have the amendments sought by the applicant been precisely identified?
(5) if all the above questions are answered in the affirmative, should the documents be amended and, if so, in what way? (Toomer and the Department of Primary Industries and Energy (1990) in the Commonwealth AAT).

Burden of proof

5.6.2 It is not the responsibility of an agency to disprove the applicant’s assertion that information is incomplete, incorrect, out of date or misleading. Rather, the obligation rests with the applicant to provide particulars of the matters which he or she contends are incomplete, incorrect, out of date or misleading. If the applicant does not produce supporting evidence when asked to do so, agencies would be justified in refusing to amend the record. To amend the record the decision-maker must be satisfied, on the basis of all the available evidence, that the record was incomplete, incorrect, out of date or misleading.
5.6.3 The ADT has held that the applicant bears an initial or preliminary burden to provide evidence in support of an application for amendment (see Hayward-Brown v CEO Wentworth AHS [2002] ADT 46 (at 38); Morgan v Director General, Department of Education and Training [1999] NSW ADT 91 (at 38-39).

5.6.4 This may be particularly important where the application involves revisiting events that occurred a long time ago. In Re Warren and the Department of Defence (AAT, 22 December 1993, File no N92/621, unreported) the AAT noted it had some difficulty in dealing with such an application:

“The applicant has challenged its factual basis, yet to resolve that question would require a lengthy hearing with witnesses attempting to recollect events some 13 years ago. Clearly the Administrative Appeals Tribunal has neither the time nor the resources to undertake this task, nor should the Respondent [agency] have to come before the Tribunal and be put to the expense of producing witnesses and seeking to rebut the minutiae of events which are peripheral at best and long past.

The best the Tribunal can do is to take a broad brush approach and where incompleteness, error or outdated or misleading information has been demonstrated, act to rectify same”.

**Relevant considerations**

5.6.5 The information sought to be amended could be purely factual, an opinion (either based on facts or unsubstantiated), an advice or a recommendation. The nature of the information may determine the grounds for the amendment and the type of amendment. For example, if the application seeks amendment of purely factual material and the decision-maker concludes that the relevant information in the agency’s document is incorrect, it would be justifiable to amend the record by alteration. However, it may be that the applicant wishes to amend a document containing an opinion, advice or recommendation. Examples of such documents may be medical and other professional reports and examinations. These are generally considered to be specialist opinions which were derived from facts and other information available to the author at the time of writing. Therefore the applicant would need to prove to the agency’s satisfaction that such a document is inaccurate or incomplete before it could be amended (eg by way of more recent reports from equally or better qualified specialists).

5.6.6 While not comprehensive, the ADT (eg Central Sydney Health Service v Crewdson (DG) [2001] NSW ADT AP 44) has indicated the following matters would (among others) be relevant in considering applications to amend a record:

1) factual information in a record should only be amended where the applicant has put forward a rational basis for claiming that the personal information is incomplete, incorrect, out of date or misleading in a material respect (contrary self-serving assertions by the applicant would not be sufficient);

2) opinions generally could be amended where:

- there was no factual basis on which the opinion could have been formed; or
- the facts upon which the assessment was based are shown to be wrong or erroneous (unless it appears that the author of the opinion would have given the same opinion if the author had not relied on the discredited facts);
3) expert/professional opinions could be amended where:

- the facts upon which of the opinions were based are shown to be ‘thoroughly discredited’ through ordinary fact-finding processes; or

- there is credible expert evidence (preferably from an independent expert) that the opinion under challenge was not open to or could not be held by a competent expert (the mere fact that another expert might have taken a different view on the same facts is not enough – see also [5.6.7] below);

4) the object of a record amendment inquiry is the quality of the information in the record itself, not the quality of the processes that gave rise to the information (eg the adequacy or otherwise of the procedures which resulted in the record being made are irrelevant).

5.6.7 In relation to expert opinion, in the Crewdson case Handley JA, with whom Ipp and Davies AJA agreed, stated (at 34):

“Even if the Tribunal accepted other experts who had a different opinion that would not make 'incorrect', for the purposes of s.39(c), an accurate statement of opinion held by [another expert] … The Act is not a vehicle for the determination of disputed questions of expert or other opinion when the recorded opinion was actually held and accurately entered in the official records.”

The position might be different if an expert whose opinion had been accurately recorded recognised later that it was incorrect at the time and withdrew it. However, the proper course would be to add a notation that the opinion had been withdrawn rather than to remove the original opinion … An amendment in the latter form would falsify the records and attempt to rewrite history … Without the original opinion the records would not tell the whole story, and would be misleading.”

5.6.8 There may, however, be particular difficulty with claims that information is ‘out of date’. For example, a medical report or opinion represents a ‘snapshot’ in time describing particular circumstances, symptoms or treatment which were valid and accurate at the time. It may be ‘out of date’ almost immediately but no less valid. It is difficult to envisage circumstances in which a medical report or opinion could be amended on this ground. However, it may be that additional material would be added by way of a notation (see [5.8.4-5.8.7] below).

5.6.9 Alternatively, the applicant may contend that the opinion is wrong, out of date or misleading, after examination of the document indicates that, with the passage of time or events, the opinion is no longer correct or relevant. In making a decision the following factors should be considered:

1) the age of the document - it may be that even though the opinion was correct (at the time it was written) it has since been overtaken by time and events;

2) how the opinion was reached - for example, was it based on facts and did it take account of all the available facts?;

3) whether the author can be contacted - when deciding whether all of the facts were considered etc, it may be useful to discuss the matter with the author. In particular the author should be advised of the applicant’s claims and his or her supporting evidence. This will require a judgement on the statements of both applicant and author based against the age of the document. If, for example,
the author cannot be contacted, an alternative may be to discuss the record with equally expert persons eg doctors or social workers;

(4) the applicant who was the subject of the opinion - a person can only apply for the amendment of a document which contains information about his or her personal affairs;

(5) the evidence the applicant has produced in support of his or her claim - has this evidence been provided by an equally expert person, eg another doctor, specialist etc?;

(6) what form the evidence takes, eg is it a statutory declaration, another medical examination, etc.

5.6.10 It may not always be simple for agencies to determine whether a written opinion about the applicant is incorrect, incomplete, misleading or out of date. It is likely that the opinion concerned will be to the detriment of the applicant, meaning that the applicant may not be seen to be objective in his or her presentation of an application for amendment. In Mann and the Medical Practitioners Board of Victoria (1997) 12 VAR 142, the AAT (Vic) ruled that a document containing a personal opinion could be amended provided that:

- the facts supporting an opinion have been discredited or are inadequate;
- the person forming the opinion was motivated by bias, bad faith, incompetence, lack of balance or lack of necessary experience; or
- the facts supporting the opinion are based upon trivialities or are misapprehended.

5.6.11 In one complaint dealt with by the Ombudsman the applicant had sought amendment of a document containing an allegation that the applicant had harassed a fellow employee. The applicant claimed that the document was misleading and incorrect because, firstly, the agency had made no effort to substantiate the allegation and, secondly, the allegation, for various reasons, could not be substantiated. He also claimed that the document was incomplete as the identity of the person making the allegation was not disclosed. The Ombudsman agreed with the agency that the document was not incorrect or misleading. The Ombudsman decided that, on the facts of the case, just because the agency had not attempted to substantiate the allegation did not mean that the allegation was incorrect or misleading. Further, other evidence obtained by the Ombudsman revealed that the allegation was not made in bad faith or misapprehended. The Ombudsman also found that there was good reason as to why the identity of the person who made the allegation was not detailed in the document. There was also no evidence that the agency had dealt with the allegation in bad faith or in an incompetent manner.

5.7 Method of amendment

5.7.1 The word ‘amend’ is not defined in the FOI Act. It has its ordinary dictionary meaning, which is ‘to alter, to correct, to rectify, to add.’ An amendment can take the form of a removal, an addition to, or a variation of the defective text (Director-General, Department of Community Services v S [2000] NSW ADT AP 27).
Amendment by addition (ie notation)

5.7.2 A record may be amended under s.43 simply by the addition of words to the text – ie a notation.

5.7.3 Amendment of a record by way of a notation should not be confused with a ‘notation’ which is made under s.46 of the Act – s.46 provides that, if the agency has refused to amend the record, the applicant may require a notation to be made specifying his or her claim that the information is incomplete, incorrect, out of date or misleading (see [5.8.4-5.8.7] below). Such a notation is not an ‘amendment’ for the purposes of s.43.

5.7.4 In Director-General, Department of Community Services v S [2000] NSW ADT AP 27 the Appeals Panel noted the following (at 70-73):

- In the case of a plain factual error, an outright substitution of the accurate data in place of the inaccurate date (for example substitution of a new birth date, substitution of accurate income information) would be the obvious form of amendment.
- Where there are different perceptions of a set of events, and the perception recorded by the agency has some foundation, then it may be prudent to leave the matter rest with a notation of the individual’s perception being added to the record.

Amendment by excision or substitution

5.7.5 An amendment can include an excision. That excision could be effected by obliteration of offending text or, more rarely, substitution of new text.

5.7.6 However, as a general rule agencies should not obliterate text from records. If, in rare circumstances, it is necessary to do so, agencies must also include a notation that the record has been ‘amended under FOI’. [policy]

5.7.7 In amending records agencies should generally try to avoid ‘rewriting history’. For that reason, in the case of official records at least, the correct process of amendment will more often than not be the addition of a correcting notation, rather than the deletion of erroneous text – otherwise the amendment ‘would falsify records and attempt to rewrite history’, and,

“without the original opinion the records would not tell the whole story, and would be misleading” (Central Sydney Health Service v Crewdson (GD) [2001] NSW ADT AP 44).

5.7.8 For example, in Re Cox and the Department of Defence [1990] 20 ALD 499 Deputy President Todd, in rejecting the view that ‘defective’ medical opinions should be deleted from a record in favour of subsequent ones, stated:

“Even accepting all of the criticisms made by the applicant of some of the reports, they would at the very least remain part of the story of the handling of the applicant’s situation, and would in all the circumstances need to be in the hands of anyone called on to give a report on the applicant’s medical condition and/or history.”

5.7.9 Having said that, where a record contains observations or opinions, those observations or opinions may be so unfair or misleading that the only proper
course is to remove them from further circulation (Director-General, Department of Community Services v S [2000] NSW ADT AP 27 at 73).

5.7.10 Even in the case of excision, however, there will often be a need to retain a record of the original inaccurate or misleading statement for some purposes (Director-General, Department of Community Services v S [2000] NSW ADT AP 27 at 78). It may be in the positive interests of the person adversely affected by the report that a record of the transaction revising the record be retained; it may also be in the interests of posterity in the event that the circumstances giving rise to the amendment need to be revisited. There may also be a broad historical value in retaining a record of the transaction giving rise to the new record. Agencies need to decide whether these outcomes can be achieved (eg by archiving the original version of the document), while at the same time ensuring that the original version does not continue to circulate in the primary record system of the agency.

5.7.11 Unless an agency has received a direction from the ADT, agencies should consider retaining a copy of the original version of the document which has had text excised from it as a result of an FOI application. Agencies must retain a copy of the original version of the document if the record in question has previously been acted on, or has been relied upon as a basis for any previous decisions. [Policy]

Amendment by striking out defective text

5.7.12 In many cases, a preferable means of deleting defective text will be to cross out the defective information, rather than to excise it entirely.

5.7.13 This action may be combined with the addition of replacement or explanatory information adjacent to the information which has been crossed out. Such side notes could contain the correct information and/or could indicate the nature of the problem with the incorrect, misleading or out of date information.

5.7.14 Any side note should not contain self-justificatory or self-serving statements. It is not a purpose of the amendment provisions of the FOI Act to apportion blame, to make findings about malice or whether officers held genuine concerns (Director-General, Department of Community Services v S [2000] NSW ADT AP 27). If information is defective, the notation should simply explain the reasons for its removal.

Amendment of related documents

5.7.15 Agencies are obliged to amend all records containing the information which has been acknowledged to be incorrect, incomplete, out of date or misleading, and not just the document to which the applicant has had access. [Policy]

5.7.16 Where an agency amends documents other than those specifically referred to in the application, it is important to be aware that those amendments are also made under s.43 of the FOI Act, and therefore they are subject to the requirements of the FOI Act and the policies in this Manual. Generally, as with the specific document the subject of the application, all other documents which are amended as a result of the FOI application should contain a notation that the document has been ‘amended under FOI’.
5.8 **Decisions to refuse amendment**

5.8.1 A decision to refuse a request for amendment to personal records follows the same procedure as that used for a refusal of an application made for access to documents. For example, the agency is still required to provide the applicant with a statement of reasons and to advise about appeal rights, including the right to seek internal review (see [4.10 and 4.13]). The statement must also:

- describe the agency's findings on any material questions of fact underlying the reasons for the decision, and
- contain a reference to the sources of information on which those findings are based, i.e., the material examined while collecting the facts and the reasons for the decision.

5.8.2 In support of a decision to refuse to amend, an agency is not required to prove that the record in question is correct. The agency need only prove that the decision to refuse was justified on the basis of the evidence available to the decision-maker.

5.8.3 If an amendment application is refused, the applicant has the right to require that the document(s) in question include a statement, in the form of a notation, setting out the applicant’s views (s.46 – see [5.8.4] below).

**Notation of documents if agencies or Ministers refuse to amend their records (s.46)**

5.8.4 If an agency or Minister refuses to amend its records, the applicant may, by notice in writing lodged at an office of the agency or Minister, require the agency or Minister to add to those records a notation which specifies the following information (ss.46(1) and 51):

1. the respects in which the applicant claims the records are incomplete, incorrect, out of date or misleading; and
2. if the applicant claims the records are incomplete or out of date, such information as the applicant claims is necessary to complete the records or to bring them up to date (ss.46(1), 51).

5.8.5 **The agency or Minister must comply with the requirements of such a notice and must give the applicant written notice of the nature of the notation (s.46(2)). This should be done within 28 days of receiving the applicant’s request for notation. [policy]**

5.8.6 Amendment involves an agency’s agreement that its records are incomplete, incorrect, out of date or misleading. Notation on the other hand, does not involve any acknowledgement by the agency that its records are defective, and does not require the agency to endorse or adopt the information in the notation.

5.8.7 Consequently, while clearly neither amendment nor notation can occur without some change to an agency’s records, amendment constitutes a much more significant change than notation. In the case of notation, s.46 allows an applicant to specify the content to be added. The agency is only required to decide where to place, and how to present, the information in the notation.
Obligation to inform other agencies

5.8.8 If a notation is made under s.46, then the agency or Minister must also give a statement to any person (including to any other agency or Minister) to whom it has previously disclosed information contained in the part of its records to which such a notation relates. The statement must:

(i) state that the person to whom the information relates claims that the information is incomplete, incorrect, out of date or misleading; and

(ii) set out particulars of the notation added to its records under this section; and

(iii) may include in the statement the reason for the agency’s refusal to amend its records in accordance with the notation. (s.46(3))

5.8.9 Where the applicant, whose request for amendment has been refused, does not seek to have a notation added to the records, there is no obligation on the agency or Minister to indicate the applicant’s request when the records are disclosed to other agencies or Ministers.

Internal review

5.8.10 A person can apply for an internal review of a determination by an agency if he or she is aggrieved by the determination (s.47(1)). In this section a person is ‘aggrieved’ by a determination if the agency refuses to amend its records in accordance with an application made under s.40 (see Chapter 6 for further information).
6 Fees and charges

6.1 Charging for access under the FOI Act

6.1.1 The Freedom of Information (Fees and Charges) Order 1989 (published in the NSW Government Gazette No. 81 of 30 June 1989) sets out the fees and charges to be applied to all FOI applications and binds all agencies.

6.1.2 No fees and charges other than those set out in the Order may be levied for FOI applications. The hourly rate is intended to cover all costs of processing, locating the information, decision-making, consultation (where necessary) and any photocopying. The Act prohibits the charging of fees in respect of time spent in searching for a document that was lost or misplaced.

6.1.3 The initial application fee is intended to cover all costs associated with receiving and commencing to deal with an application, including file registration costs and initial discussion(s) with applicants to clarify the application (including as required by s.19).

6.1.4 It is important that applicants be kept fully informed of fees and charges, especially with large scale requests and/or where advance deposits may be involved. Agencies should avoid circumstances where an applicant is surprised by charges levied by agencies. If agencies adopt this ‘no surprises’ approach, the level of disputation and appeals about charges will be minimised.

6.1.5 Applicants should be made aware that estimates of charges are in fact only best estimates. The exact charge cannot be calculated until the actual time taken to process the application is known.

6.1.6 Fees and charges are summarised below:

<table>
<thead>
<tr>
<th>Nature of Application</th>
<th>Application</th>
<th>Processing Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Access to records by natural person about their personal affairs</td>
<td>$20 - $30¹</td>
<td>$30 per hour after first 20 hours¹</td>
</tr>
<tr>
<td>All other requests</td>
<td>$20 - $30¹</td>
<td>$30 per hour¹</td>
</tr>
<tr>
<td>Internal review³</td>
<td>$20 - $40¹ ²</td>
<td>Nil</td>
</tr>
<tr>
<td>Amendment of records</td>
<td>Nil²</td>
<td>Nil</td>
</tr>
</tbody>
</table>

Notes:

1. Subject to 50% reduction for financial hardship and public interest reasons (see [6.2 – 6.5]). Processing charges should be estimated to the nearest quarter hour according to time taken, whatever the task.

2. Refunds may apply as a result of successful internal reviews and successful applications for amendment of records.

3. No application fees may be charged for internal reviews in relation to amendment of records.
6.1.7 Agencies may choose a level of application and internal review fees within the above range. Once chosen this level should be applied to all applications. An individual rate should not be determined for each application. This will facilitate consistency for applicants as well as administrative and accounting ease.

6.1.8 The fees and charges adopted allow up to 20 hours free processing for requests by a natural person for access to documents relating to his or her personal affairs. Requests by corporations do not attract this reduction.

6.1.9 Agencies may retain income derived from FOI applications to offset their costs. [policy]

6.1.10 It is important that notices requiring advance deposits and notices of determination include reasonable detail of the way in which the costs will be or have been incurred. It is essential that agencies have full back-up documentation on file to validate the final charges.

6.1.11 Whoever has authority to make the determination should also decide whether the applicant should be given a reduction in fees and charges. If a reduction is granted, all subsequent fees and charges relating to the application (eg internal review applications) should also be reduced.

6.2 Grounds for a 50% reduction in fees

6.2.1 A 50% reduction in fees and charges applies in the following circumstances:

1. to an applicant who holds a pensioner health benefit card issued by the Commonwealth, as well as those with an equivalent income who are under financial hardship; or

2. to an applicant who is under the age of 18 years; or

3. to an applicant who is applying on behalf of a non-profit organisation which can demonstrate financial hardship; or

4. to an applicant whose application relates to information that it is in the public interest to make available.

6.2.2 Although an agency has a discretion to waive fees and charges entirely (s.24), if any fees and charges are to be applied the agency is bound by the Freedom of Information (Fees and Charges) Order 1989. This means that if the above criteria apply the agency must apply a discount of 50%, and cannot apply any other discount (eg 25% or 75%). Nor can the agency apply a discount if the above criteria are not met.

Financial hardship criteria for individuals

6.2.3 If applicants seek a reduction in fees and charges, they should indicate this in their application for access to documents. Only one reduction in fees may be given in respect of each application. For example, a young person under the age of 18 years who holds a pensioner health benefit card could not obtain both a 50% reduction for financial hardship and a further 50% reduction for being under the age of 18 years in relation to the one application.
6.2.4 The income level for receipt of the pensioner health benefit card (for low income earners) is adjusted from time to time and is available from Centrelink. If the applicant seeks a reduction because they hold a pensioner health benefit card (ie the Commonwealth Seniors Health Card), the relevant card needs to be sighted. This can be done at regional offices of an agency if necessary. Where the applicant seeks a reduction on the other grounds referred to above, supporting evidence should be submitted with the application. Where financial hardship must be demonstrated, agencies will have to decide this on a case-by-case basis bearing in mind the objects of the Act.

6.2.5 In making decisions about reductions in fees the following factors should be borne in mind:

1. the purpose of the reduction in fees is to minimise any disadvantage caused by financial hardship which might preclude individuals and/or organisations from obtaining access to information held by the Government; and

2. any discretion in granting such reductions should be exercised in a way consistent with the intentions of Parliament as expressed in s.5(3) — that the Act be interpreted and applied so as to further the objects of the Act and that the discretions conferred by the Act be exercised, as far as possible, so as to facilitate and encourage the disclosure of information, promptly and at the lowest reasonable cost.

Financial hardship criteria for non-profit organisations

6.2.6 There is no clear-cut standard which can be used to determine ‘financial hardship’ relating to non-profit organisations. Agencies will have to use their own judgement in assessing whether or not a reduction in fees should be granted. However, the following factors should be taken into account in such an assessment:

1. the purpose of reductions in fees;

2. the manner in which discretion in granting such reductions should be exercised;

3. the nature and size of the organisation’s funding base — for example, the fact that an organisation receives significant government funding may indicate that its finances are strictly limited; that an organisation receives significant government funding may also indicate that it is providing a service in the public interest; and

4. the amount of the normal charges for the application in comparison with the organisation’s financial position, especially its available liquid funds (for example, unless the organisation’s financial position was extremely limited, the payment of normal fees for an application of say $50–$100 would probably not be beyond its means, whereas a larger amount may well be).
Public interest criteria

6.2.7 The *Freedom of Information (Fees and Charges) Order 1989* provides for a fifty percent reduction in fees and charges for applications which relate to information that it is in the public interest to make available. The test is not whether it is in the public interest to reduce fees and charges but rather whether it is in the public interest to make information available.

6.2.8 Agencies that refuse to give a public interest reduction should document and supply reasons supporting their refusal.

6.2.9 In considering this matter, the central question is again whether the benefit to be gained from releasing the document will flow on to either the public at large or a significant section of the public. Each case will have to be considered on its merits.

6.2.10 The Ombudsman cautions that it is an *inappropriate conclusion* that, if the public interest has already been considered in processes such as, for example, consultations about land development, there is then no need to consider public interest issues in deciding FOI charges for dealing with applications for documents concerning those processes.

6.2.11 The following points summarise some of the factors which should be weighed up when making decisions in this context:

1. the purpose of fee reductions in this context is to further the object of extending, as far as possible, the rights of the public to obtain access to information held by the Government by ensuring that information concerning the operations of the Government (including, in particular, information concerning the rules and practices followed by the Government in its dealings with members of the public) is made available to the public;

2. the discretion in granting a public interest reduction should be exercised so as to foster the disclosure of non-exempt information;

3. the applicant's capacity (background, qualifications, experience and expertise) to use the information sought, that is, to what extent will the information (document) be communicated or be made public? [The greater the applicant's capacities in this area, the more likely it is that release will enhance the public interest];

4. whether the applicant has any personal interest in the intended use of the information. [For example, if there is a significant personal or commercial interest or benefit which the applicant may derive from the information, that interest may outweigh any general public interest or benefit];

5. what is the value/benefit/interest to the public of the information? Will the information contribute to the public's understanding of the subject?

6. who is the public? How wide is the section of the public which is likely to be interested? [The wider the section of the public likely to be affected, the greater the likely benefit/interest and the more likely it is that a reduction should be given. However, a narrow section of the public will not necessarily disqualify a claim for public interest consideration — there may
be a significant public interest benefit in the claim of only one member of the community receiving access to documents (for example, whistleblowers); and

(7) whether the information is otherwise available. [If the information is widely available, little additional benefit to the public may accrue from release under FOI.]

6.2.12 The fact that organisations receive government funding will not necessarily be conclusive that there is a ‘public interest’ in disclosure to them, but groups such as social welfare organisations, environmental protection groups, civil liberties and law reform groups may well qualify, depending on the information which they are seeking.

Ombudsman Guidance – Waiver of fees where documents are publicly released

The Ombudsman recommends that fees be waived if, before or at the same time as the notice of determination is sent, the agency or the Minister publicly releases substantially the same information as is contained in the documents that are the subject of the application. Presumably, if the documents are released publicly it is because it is in the interest of the agency or Minister to do so; or it is in the broader public interest. In such circumstances, it may be unreasonable to require the FOI applicant to pay a fee for information that is being made available to others for free.

6.2.13 There is no automatic reduction in charges for Members of Parliament or for journalists — again, the question is whether there is a general public interest in disclosing the information. If release of the information would only benefit the organisation making the request, and no other sector of the community, it is unlikely the reduction would apply.

6.2.14 One circumstance in which it might be appropriate to apply a public interest fee reduction is where, at the time of determining the FOI application, the agency separately decides that the relevant document should be publicly released (ie made available to the public at no cost). The Ombudsman recommends that a full refund be given in those circumstances – see box above. However, the Department of Premier and Cabinet notes that this may not always be appropriate – eg if the FOI applicant has persisted with the application despite the agency having informed him or her that it intends shortly to release the document publicly in any event.

6.3 Grounds for full refunds

6.3.1 The internal review application fee is to be fully refunded where the original determination the subject of the review is significantly altered as a result of the internal review (s.67, FOI Act and the Freedom of Information (Fees and Charges) Order 1989).

6.3.2 Similarly, all fees and charges paid for the original application should be fully refunded where an application for amendment of records results in a significant correction of personal records and where the mistakes were not the fault of the applicant (s.67, FOI Act and the Freedom of Information (Fees and Charges) Order 1989).
6.3.3 Agencies also have a general discretion to fully waive fees and charges in other circumstances (but see [6.2.2]). This may be appropriate, for example, where there has been a significant delay in dealing with an application.

6.4 Advance deposits (s.21)

6.4.1 Where the agency considers that the cost of dealing with an application is likely to exceed the amount of the application fee, the agency may request the applicant to pay an additional amount, by way of an advance deposit, as it may determine. Generally, this provision would need to be used only where the estimated cost of dealing with an application is significant. Agencies are encouraged to explore opportunities for cost reductions and actively canvas them with the applicant. The advance deposit request letter may also include suggestions to reduce the cost of dealing with the application (such as negotiating a reduction of the scope of the documents requested, perhaps by discussing and clarifying the request).

6.4.2 If the agency considers that the cost of dealing with an application is likely to exceed the sum of the application fee and of any advance deposits already paid, the agency may request the applicant to pay a further advance deposit of an amount determined by the agency. The sum of any advance deposits and the application fee must not exceed such amount as the agency considers is necessary to deal with the application.

6.4.3 Requests for advance deposits must be accompanied by a notice setting out the following information:

(1) the basis used to determine the amount of the advance deposit; and
(2) the period of time allowed for the payment of the advance deposit.

6.4.4 Although it is up to the agency to specify this period of time, it should be reasonable, particularly when the amount involved is significant (14 days would seem to be a reasonable minimum time). The period of time between making a request for and the receipt of an advance deposit must not be included in calculating the period of 21 calendar days for dealing with the application. When imposing a time frame for the payment of an advance deposit, due regard should be given to any special circumstances such as public holidays or weekends which fall within the time to be allowed for compliance.

6.4.5 Failure to pay an advance deposit within the time allowed is sufficient reason for an application to be refused (s.22(3)). In this case, the agency must refund to the applicant that part of any previous advance deposit paid which exceeds the costs incurred by the agency in dealing with the application. The agency may retain the remainder (s.22(4)).

6.4.6 An agency that refuses to continue to deal with an application under this section must give the applicant a written notice of determination to this effect (s.22(5)). The form of notice is to comply with s.28 (see [4.10]). The applicant has the right to an internal review under Part 3 of the Act and external review under Part 5 (s.22(6)). Such reviews may be additional to those relating to s.34 (see s.34(8)).
6.5 **Consultation in relation to charges and advance deposits**

6.5.1 There is no specified requirement in the Act or Regulation to consult in relation to advance deposits and charges. However, agencies should bear in mind s.25(5) which provides that an agency is not allowed to refuse access on the basis of a substantial and unreasonable diversion of resources, without first endeavouring to assist the applicant to amend the application (see 4.5.6-4.5.10).

6.5.2 Applicants should always be kept fully up-to-date as to possible charges.

6.5.3 As far as is reasonably practicable, no advance deposit or charge should be imposed if it has not been estimated and the applicant consulted prior to undertaking the work. Thus, no applicant should ever be taken unawares by the level of charges.

6.5.4 The principles which should govern the amount of any charge are that the agency:

1. should not charge for time spent due to inefficiencies in the records-keeping and retrieval systems, or due to any other ineffectiveness in the agency’s FOI procedures or practices; and

2. should do everything it can to reduce the costs to the applicant by devising the cheapest possible procedure for processing the application; and

3. should work with the applicant to narrow potentially expensive applications as far as is acceptable to the applicant; and

4. should think carefully before charging a large amount but supplying only a few documents – if this is the likely outcome of an FOI request, agencies should consider imposing an advance deposit and warning the FOI applicant that the preliminary view of the agency is that few documents will be identified for release. (Before advising an applicant of such a preliminary view, an agency should ensure that it is confident that its preliminary view is likely to be accurate. Even then, it should be made absolutely clear to the applicant that this a preliminary view only, and that, if the matter were pursued to a final determination, it is possible that more documents may be located and/or that more documents may be released, than this preliminary view indicates.)

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**Ombudsman’s guidance – Excessive fees and charges**

The Ombudsman will not view with favour FOI charges in the hundreds or thousands of dollars, unless they can clearly be shown to have been reasonable in the circumstances.

To take a hypothetical example - assume that an FOI applicant is charged $2,000.00 for access, and that the bulk of the charge was incurred by the process of consulting 350 third parties. However, the determination exempts all the material about which the consultations were made on the basis not only of an exemption clause from Part 2 of Schedule 1 (ie relating to documents requiring consultation) but also, in every instance, on the basis of one or more of the exemption clauses from Part 3 of Schedule 1 (ie clauses which do not require consultation). In such circumstances the necessity for the consultation process and thus for the majority of the charge would be highly questionable. Certainly the requirement to undertake consultation in ss30 to 33 is not discretionary where the agency is considering releasing the document.
Paragraphs (b) and (f) of s.28(2) state that the written notice of determination shall specify:

"(b) if the determination is to the effect that access to a document is to be given (whether immediately or subject to deferral) - the amount of any charge payable in respect of the giving of access; ...

(f) the amount of any charge for dealing with the application, together with:

(i) a statement of any amount payable by the applicant; or

(ii) a statement of any amount refundable to the applicant, in relation to the charge, having regard to the sum of any advance deposits paid in respect of the application."

It may not always be possible for agencies to determine precisely the charges for accessing documents in advance of access being provided. For example, if the person is provided with access by way of on-site inspection, it may not be clear in advance how much time will be involved in supervising the person’s on-site access. In this regard it is relevant to note that where access is given to a document by inspection, s.27(1)(a) only requires that an agency give the person a ‘reasonable’ opportunity to inspect the document. This provision does not give an applicant the right to inspect for an unlimited period.

### Cost of photocopies

Photocopies of documents which are provided as attachments to a determination notice are included in the time-based processing charge. A separate photocopy charge is not to be levied irrespective of the number of pages involved.

### GST

Fees and charges payable in respect of FOI applications are imposed pursuant to a legislative requirement (as prescribed by the Freedom of Information (Fees and Charges) Order 1989).

They are not subject to the imposition of the Commonwealth’s Goods and Services Tax. That is, FOI application and processing charges are GST-free.

Ministers and agencies should therefore ensure that FOI application and processing fees do not include a GST component.
7 Internal Review

7.1 Circumstances where an internal review may be required (ss.34 and 47)

Persons ‘aggrieved’ by a determination

7.1.1 A person can apply for an internal review of a determination by an agency under the FOI Act if he or she is ‘aggrieved’ by any determination made, or if no decision has been made by an agency on an FOI application (ss.34 and 47).

7.1.2 An internal review may be conducted in relation to the determination of an application for access to documents (see s.34(7) and s.24(2) of the FOI Act) where:

1. an agency refuses to give the applicant access to a document (including cases of a deemed refused because of the failure of the agency to determine the application within the statutory timeframe (usually 21 days from the date of receipt of the application));
2. access to a document is to be given to the applicant subject to deferral;
3. access to a copy of a document from which exempt matter has been deleted is to be given to the applicant;
4. access to a document is to be given to the applicant subject to a charge for dealing with the application, or for giving access to a document, that the applicant considers to be unreasonable; and
5. a charge for dealing with the application is payable by the applicant, being a charge that the applicant considers to have been uneasonably incurred.

7.1.3 For the purposes of paragraphs (4) and (5) above, an advance deposit is taken to constitute a relevant charge (see Hutchinson v RTA [2004] NSWADT 48). If the determination relates to an application for access to documents and the provisions in the FOI Act on consultation with third parties apply, a relevant third party may apply for an internal review where:

- an agency should have, but has not, taken such steps as are reasonably practicable to obtain the views of the third party as to whether or not the document is an exempt document by virtue of any one or more of the provisions of Part 2 of Schedule 1, or
- an agency should have, and has, taken such steps, but the determination is not in accordance with the views of the third party.

7.1.4 An internal review can be conducted in relation to a determination of an application for amendment of records concerning a person’s personal affairs where:

- an agency refuses to amend its records in accordance with the application, or
- the application is ‘deemed refused’ because the agency has failed to determine it within the statutory timeframe (usually 21 days) (s.47).
7.1.5 A person is not entitled to a review of a determination of an application already made under the same section. This means that there can only be one internal review of a particular determination. However, an application may attract more than one determination and therefore more than one internal review – eg a determination made under s.22 to refuse to continue to deal with an application relating to non-payment of an advance deposit, later followed by a determination under s.34.

7.1.6 A person is also not entitled to a review of a determination which has been made by the principal officer of an agency. For this reason it is advisable to have all initial requests dealt with by officers subordinate to the head of the agency so as not to deny the applicant a right to an internal review. (See [4.1.5].)

**Time limits for applying for internal review**

7.1.7 A person aggrieved by a determination is entitled to ask for an internal review by the agency within 28 days of being advised of the agency’s determination, or, if no determination is made, within 49 days of the date the initial application was received by the agency.

7.1.8 Agencies have a discretion to extend the time period within which an application for internal review may be made (s.34(2)(e)(iii)).

7.1.9 *Note:* In some circumstances an application for internal review may be lodged up to 33 days after the notice of determination was posted to the applicant. This is because the FOI Act allows five (5) days for the applicant to receive a determination sent by post (s.60). The twenty eight (28) day limitation period only applies where the applicant is personally handed the notice of determination. Agencies should also be aware of the provisions of the *Electronic Transactions Act 2000*, which may apply to the electronic dispatch of FOI determinations.

**7.2 Formal requirements for an internal review application (s.34(2))**

7.2.1 An application for an internal review:

"(a) shall be in writing, and
(b) shall be accompanied by such application fee as the agency may determine, and
(c) shall be addressed to the principal officer of the agency, and
(d) shall specify an address in Australia to which notices under this Act should be sent, and
(e) shall be lodged at an office of the agency:
   (i) if notice of the determination was given to the applicant- within 28 days after that notice was given, or
   (ii) if no notice of the determination was given to the applicant- within 49 days after the application was received by the agency, or
7.2.2 A suggested application form is included in the appendices. This form has been widely used to simplify explanations of what is required in an internal review application. (Appendix A, Form 9).

7.3 **Dealing with applications for internal review (ss.34 and 47)**

7.3.1 An application for an internal review of a determination shall be dealt with as if it were an original application under the relevant section (e.g., an application for access to documents under s.17 or an application for amendment of an agency's records under s.40) (see s.34(4) and s.47(4)).

7.3.2 This means that all the procedures relating to determination of applications, notices of determinations, etc. (i.e., ss.16-29 or ss.39-46) apply, with the following two exceptions:

(1) the time limit is 14 not 21 calendar days. As with the initial application, an agency which fails to determine an application to review such a determination within 14 days from when it was received by the agency shall be taken to have made a determination under ss.24 or 43, refusing the application; and

(2) an application for internal review shall not be dealt with by the person who dealt with the original application or by a person who is subordinate to that person.
7.3.3 If the application for internal review is from a person who has or should have been consulted before the determination was made, then access to the document in question must be delayed until the application has been dealt with ss 30(3)(d), 31(3)(d), 32(3)(d), 33(3)(d)).

7.4 Independence of internal reviews

7.4.1 It is important to look at the purpose of the legislative provision that creates the right of internal review. From its terms, it appears that the purpose of section 34 of the FOI Act is to provide for a full review of the merits of the original decision.

7.4.2 The FOI Act requires that the review must be carried out by a person who did not make the original decision and who is not subordinate to the original decision-maker so as to achieve a proper review of the merits of the decision. It is therefore essential that there be appropriate separation between the initial decision-maker and the officer who is likely to conduct the internal review, to ensure that the person conducting the internal review has not been influenced by the views of the initial decision-maker. In this regard, internal reviews must not only be independent, but should be seen to be independent.

7.4.3 This is not to say that it is inappropriate for the initial decision-maker and likely internal reviewer to discuss, in theoretical terms, issues relating to the proper interpretation of particular provisions of the FOI Act or relevant Departmental policies or practices.

7.5 Third party consultation: particular requirements (ss.30-33)

7.5.1 Before making a determination to grant access to documents, agencies or Ministers have to consult with affected third parties in certain circumstances (see [4.3]).

7.5.2 Where the third party, after consultation, disagrees with a determination to give access to documents, the same rights of review apply as for other determinations. The third party may seek an internal review under s.34 of the FOI Act. If, following the internal review, the third party remains aggrieved with the agency’s determination to release the documents, the third party’s external review rights are:

(1) in relation to a determination by an agency — a complaint to the Ombudsman or a review application to the Administrative Decisions Tribunal; or

(2) in relation to a determination concerning a Minister’s documents — a review application to the Administrative Decisions Tribunal.

7.5.3 The agency must defer giving access to the document until after the period in which an internal review can be sought. If an internal review is sought by the third party, and the agency determines to release the document, the agency must defer giving access to the document until any complaint to the Ombudsman or application to the ADT has been disposed of. If no external
review is sought, the agency must release the documents within 60 days of the internal review determination.

7.5.4 Where an agency has refused access to documents concerning a third party’s affairs but has not consulted with the third party, in any internal review requested by the FOI applicant, there is no provision for any extension of time to enable consultation to occur. However, such consultation must still be carried out before the agency gives access to the documents.

7.6 **Ministers’ documents**

7.6.1 The right of internal review does not apply to Ministers’ documents (ss 38 and 51). However, the rights and procedures for seeking an amendment to Ministers’ documents are the same as for agency documents (ss 48-50) (see [5.3]).
8 External Review

8.1 Decisions which may be reviewed externally

External review of an agency’s determination

8.1.1 Any determination made by an agency in relation to access to documents under s.24 or amendment of records under s.43 may be subject to external review.

8.1.2 There are two avenues of external review:

(1) a complaint to the Ombudsman; and

(2) an application for a review by the Administrative Decisions Tribunal (ADT)

A person can apply to both in turn. However, there are time limits on appeals to the ADT (see [8.3.6] below).

A Minister’s determination

8.1.3 Any determination made under the Act by a Minister may be subject to an application for review by the ADT.

8.1.4 The Ombudsman cannot investigate a complaint relating to the determination of applications for access to or for the amendment of a Ministers’ records.

External review cannot be pursued before internal review

8.1.5 Neither the Ombudsman (s.52(2)) nor the ADT (s.53(2)) has jurisdiction to conduct an external review under the Act if any of the following apply:

(1) the determination is subject to a right of internal review under ss34 or 47; or

(2) the determination has been subject to a right of internal review under ss34 or 47 but no application for such a review was made during the available time; or

(3) there are relevant proceedings before the ADT under the Act or a relevant complaint is being investigated by the Ombudsman (whichever applies).

8.1.6 In other words, if the applicant had a right of internal review which was not exercised, or if the matter is before the ADT, then the Ombudsman may not investigate an FOI complaint under the FOI Act relating to that determination. Likewise if a complaint is being formally investigated by the Ombudsman the Tribunal may not deal with a review application relating to the same FOI application.

Applications for external review by third parties

8.1.7 Third parties who have been consulted by an agency and object to an agency’s determination to release documents may lodge a complaint with the Ombudsman or an application for review by the ADT about the agency’s determination. Again, this may not be done unless and until the third party has fully exhausted any right of internal review (ss. 52(2) and 53(2)).
8.1.8 If an agency has decided to release documents but has deferred giving access under ss30(3)(d), 31(3)(d) or 33(3)(d), it is reasonable to release material after 60 days has elapsed (in accordance with s.54) provided the agency has verified with the Ombudsman that no complaint has been lodged and with the ADT Registry that no review application has been lodged.

8.2 **External review by the Ombudsman**

**Circumstances in which a complaint may be made to the Ombudsman (s.52)**

*Note: While reading this section, you may wish to also refer to the Ombudsman Act 1974.*

8.2.1 The FOI Act allows a complaint to be made to the Ombudsman about the conduct of any person or body in relation to a determination made by an agency under the FOI Act. Such conduct may (subject to s.52 of the FOI Act) be investigated by the Ombudsman using the powers under the *Ombudsman Act*.  

8.2.2 In terms of the Ombudsman’s powers to undertake external review, the FOI Act and the *Ombudsman Act* must be read together. In one sense, s.52 of the FOI Act extends the Ombudsman’s jurisdiction, in so far as it confers powers which add to the Ombudsman’s general powers under the *Ombudsman Act*. In another sense, however, s.52 of the FOI Act limits the Ombudsman’s jurisdiction. For example, the Ombudsman cannot undertake an external review of a determination made under the FOI Act unless and until the applicant has exhausted available avenues of internal review.

### Ombudsman’s guidance: Matters that might be subject to a complaint

When dealing with access to information issues, the Ombudsman considers that he has two sources of jurisdiction which co-exist to conduct inquiries and investigations - the FOI Act and the *Ombudsman Act*. These are not inconsistent nor should they be interpreted in a way which unduly restricts the obligations and traditional functions of the Ombudsman (*Botany Council v The Ombudsman* (1995) 37 NSWLR 357).

In addition to the jurisdiction conferred by s.52(1) of the FOI Act, issues relating to access to information may also trigger the Ombudsman’s general jurisdiction under s.12 and Schedule 1 to *the Ombudsman Act*.

The following is a list of some of the allegations which, in the Ombudsman’s view, might be the subject of a complaint and investigation (under either the FOI Act or *the Ombudsman Act*):

- conduct in relation to a determination made under the FOI Act;
- a failure or refusal to deal with and determine an FOI application;
- delay, denial of rights, recordkeeping practices and the like relating to FOI matters;
- a course of conduct or a general approach which is of concern (i.e. where the complaint does not concern any single decision but the sum of those decisions);
- inappropriate interference by Ministerial staff in the determination of applications;
- conflicts of interest of agency staff who assess and/or determine applications;
- delegation of FOI decision-making to a person or organisation external to the agency;

- failures by agencies to inform applicants of their internal review rights (as required by s.28(2)(g)), where the time for an internal review has expired before an applicant became aware that such a right existed;

- refusals by agencies to accept applications for internal reviews on the basis that such applications have been made outside the 28 day statutory period, where the 28 day period has been incorrectly calculated;

- refusals by agencies to allow a further period for an applicant to apply for an internal review (s.34(2)(e)(iii));

- failures by agencies to consult with third parties where the third party only learnt of the failure to consult after the internal review period had expired (per ss34(2)(e) and 7(b)(i));

- delays or failures by agencies to inform third parties of a determination such that the third party is precluded from exercising their right of internal review (per s.34(2)(e) and 7(b)(i));

- where access was refused in part or access was granted subject to a charge (and a right of review under s.34 therefore exists), but the applicant wishes to complain about a matter that is outside the grounds listed in s.34(7) such as:

  - delay by the agency in determining the FOI application (where the eventual determination is to grant access to the documents sought);

  - complaints about bona fides of claims made by an agency that no documents are held by the agency that are covered by the terms of an application (as opposed to claims that documents can not be found), which it could be argued pursuant to ss28(1) and 34(7)(a)(i) does not constitute a determination to refuse access to documents;

  - refusal by an agency to comply with cl 6 of the Freedom of Information (Fees and Charges) Order 1989 in relation to the reduction of application fees by 50% for pensioners, people under 18 years, non profit organisations that can demonstrate financial hardship, or in relation to applications relating to information that it is in the public interest to make available (application fees are not one of the matters listed in s.34(7) as founding a right of review);

  - the reasonableness of any advance deposit already paid by the applicant, which arguably is a matter not covered by s.34(7)(a)(iv) or (v), which on their face, appear to cover situations where charges have not been paid at the time the internal review application is lodged.

Although the FOI Act does not give the Ombudsman jurisdiction to initiate an investigation under the FOI Act of his or her own motion, the Ombudsman is of the view that, if the matter is one which falls within the general jurisdiction conferred by the Ombudsman Act, then the Ombudsman could initiate an investigation under that Act (but not the FOI Act). This was also the view taken in Botany Council v Ombudsman (unreported, proceedings No 30071, 16 June 1995), by Spender J at first instance (at pp 20-21).

### Time limit

**8.2.3** The Ombudsman cannot undertake an external review under the FOI Act until any internal review avenues have been pursued. After that, there is no time limit as to when a person can apply for a review of a determination by the Ombudsman.
8.2.4 However, if an application for external review (either by the Ombudsman or the ADT) is not lodged within 60 calendar days from the date the notice of determination was given to the applicant by the agency, the right to make a review application to the ADT is lost (s.54).

Ombudsman’s guidance: The Ombudsman’s approach to external review

The Ombudsman prefers to see FOI complaints resolved, rather than to undertake formal investigation and reporting under the Ombudsman Act. Where resolution is unlikely to be successful or is inappropriate (e.g. where a complaint raises important issues of principle) the Ombudsman may decide to formally investigate the complaint.

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

The Ombudsman assesses FOI complaints on the basis of:

- a general presumption that agencies should have provided access to all requested documents; and

- the onus being on the agency to justify to the satisfaction of the Ombudsman that any claimed exemption applies and to prove to the satisfaction of the Ombudsman that the procedures specified in the FOI Act were complied with.

The Ombudsman also takes the view that, unless the agency can demonstrate that disclosure would be contrary to the public interest, the agency should generally exercise its discretion under s.25 to release the document, even if it is otherwise exempt.

The approach of the Ombudsman is that where a complaint is made under s.52 of the FOI Act, the relevant agency should be able to justify to the satisfaction of the Ombudsman:

- why each and every individual document or item of information determined to be exempt warrants such exemption from disclosure under the FOI Act; and

- why any disputed procedures and practices followed by the agency were reasonable.

This is a similar onus to that which applies to claims for legal professional privilege where it is up to the person who claims that privilege to prove that the privilege applies. As succinctly stated by Casey J in Commissioner of Police v Ombudsman [1988] 1 NZLR 385 (at p.391):

“In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition.”

The Ombudsman’s policy also accords with the views expressed by His Honour Justice Kirby, the former President of the NSW Court of Appeal, in The Commissioner of Police v The District Court of NSW & Perrin (1993) 31 NSW LR 606 that, prima facie, a document must be disclosed in its entirety, with the onus being on the agency to make out an application for an exemption. In that case Justice Kirby also stated that:

"I tend to favour the view that the Act … must be approached by decision-makers with a general attitude favourable to the provision of the access claimed. It is important that the decision-makers … should not allow their approaches to be influenced by the conventions of secrecy and anonymity which permeated public administration in this country before the enactment of the Act and its equivalents." (p. 627)
While the Ombudsman will assess complaints on the basis that agencies should justify claimed exemptions and the reasonableness of procedures/practices adopted, the Ombudsman will not make formal findings that an error or mistake has occurred unless positively persuaded that such is the case.

The Ombudsman will generally analyse FOI decisions made by agencies on the basis of the policies outlined in this Manual. Where there is a difference of view between the Ombudsman and the Department of Premier and Cabinet, any external review analysis by the Ombudsman will of course be on the basis of the Ombudsman’s view. Whether or not an agency has dealt with an FOI application in accordance with any relevant parts of this Manual will be a significant factor taken into consideration by the Ombudsman in assessing any complaint on its merits.

Matters excluded from investigation by the Ombudsman

Cabinet documents (see also [11.2])

8.2.5 The Ombudsman cannot require any person to:

- give any statement of information;
- produce any document;
- give a copy of any document; or
- answer any question,

which relates to an exempt Cabinet document or to confidential proceedings of Cabinet or any committee of Cabinet (s.22 of the Ombudsman Act).

8.2.6 The Director-General of the Department of Premier and Cabinet may issue a conclusive certificate that a document is a Cabinet document (s.22 of the Ombudsman Act).

8.2.7 Where the Ombudsman has instituted a formal investigation in circumstances where documents are claimed to be exempt Cabinet documents, agencies should first contact the Policy Manager, Legal Branch of the Department of Premier and Cabinet to discuss the possible issue of a s.22 certificate in relation to those Cabinet documents.

8.2.8 The Director-General of the Department of Premier and Cabinet, on advice from the Crown-Solicitor’s office, is unable to issue a s.22 certificate unless the Ombudsman has initiated a formal investigation of an agency’s determination and accordingly a certificate cannot be issued where only preliminary enquiries are being made. The Ombudsman has also now ceased the practice of requesting such certificates during preliminary enquiries. This does not mean, however, that agencies should provide Cabinet documents to the Ombudsman’s office during such inquiries. The principles of responsible government and Cabinet confidentiality require that agencies not disclose Cabinet documents. [policy]

8.2.9 The Ombudsman has indicated that in the future the Ombudsman may move directly to formal investigations where Cabinet document claims are involved. If a preliminary investigation is instigated, however, it will be important to recognise that the Ombudsman’s office will need sufficient information to assess whether a formal investigation is warranted in relation to any application where it is claimed that a document is a Cabinet document and therefore exempt from disclosure under the FOI Act. Agencies should continue to assist
the Ombudsman’s office during any such preliminary enquiry by providing a brief description of the document and the statutory basis on which it is claimed to be a Cabinet document. This descriptive information would be consistent with that which has in the past been provided with s.22 certificates.

Ministers’ documents

8.2.10 The Ombudsman cannot investigate the conduct of a person or a body in relation to any determinations relating to a Minister’s documents (s.52(5)(b)).

Documents the subject of a Ministerial Certificate

8.2.11 The Ombudsman’s powers under the Ombudsman Act do not extend to investigating conduct in relation to the issue of a Ministerial Certificate (s.52(5)(a) — for details see 5.6 above). In addition, the Ombudsman cannot exercise powers under ss18, 19 or 20 of the Ombudsman Act in respect of a document which is the subject of a Ministerial Certificate. In normal circumstances these powers allow the Ombudsman, in the course of an investigation to:

(1) require a public authority to (i) provide a statement of information, (ii) produce any document or thing, or (iii) give any copy of any document;

(2) make or hold inquiries;

(3) exercise the powers etc of a commissioner as conferred by the Royal Commissions Act 1923; and

(4) enter on to premises and inspect any document or thing on the premises.

8.2.12 Where the conduct of an agency relates to a document which is the subject of a Ministerial Certificate, the Ombudsman may neither investigate the matter nor use the above-mentioned powers to require the production of evidence and information or the answering of questions before an inquiry.

Previous complaints to the Ombudsman

8.2.13 The powers under the Ombudsman Act do not allow the Ombudsman to investigate the conduct of a person or body:

“(c) in relation to a determination of an application for access to an agency’s document:

(i) if the complainant in respect of the determination has previously been a complainant under the Ombudsman Act 1974 in relation to that agency, and

(ii) if the Ombudsman has had possession of the document, pursuant to the exercise of his or her powers under section 18, 19 or 20 of the Ombudsman Act 1974, in connection with the investigation of the previous complaint, or

(d) in relation to a determination made by the Ombudsman under this Act.” (s.52(5)). (emphasis added)
8.2.14 The authority provided to the Ombudsman under the FOI Act must be exercised subject to the *Ombudsman Act*. The Ombudsman cannot use the existence of the two Acts to investigate a matter pursuant to a complaint made under the FOI Act where the same matter has previously been investigated pursuant to a complaint made under the *Ombudsman Act* (ss52(1) & 52(5)(c)). This does not preclude an investigation on a similar matter when the Ombudsman did not have possession of the document referred to in s.52(5)(c) initially, or when as a result of the FOI Act application new documents are the subject of a complaint to the Ombudsman.

**Ombudsman’s own FOI decisions**

8.2.15 Although the Office of the Ombudsman is an agency for the purposes of the FOI Act (subject to the limitations in s.9 and Schedule 2 of that Act), the Ombudsman cannot investigate a complaint relating to a determination made by his own office under the Act.

8.2.16 In other words, there can be no external review by the Ombudsman of a determination made by the Ombudsman in response to a request for access to, or amendment of, documents held by the Ombudsman. In that situation, the only external review available is a review by the ADT.

**Ombudsman’s exempt functions**

8.2.17 Documents relating to the complaints handling, investigative and reporting functions of the Ombudsman are exempt from the operation of the FOI Act. These functions are set out in Schedule 2 (Exempt bodies and offices) of the FOI Act.

8.2.18 The Ombudsman also cannot make a determination to grant access to documents belonging to another agency, such as those it obtains in the course of an investigation. The Ombudsman is a prescribed agency for the purpose of s.11(1)(e), which means that such documents are regarded as still being held by the agency from which the documents were obtained.

**What effect can an investigation by the Ombudsman have?**

8.2.19 The FOI Act does not confer on the Ombudsman any more authority than is otherwise available under the *Ombudsman Act*. The Ombudsman does not have the power to make a binding order on an agency — he or she can only make recommendations. These recommendations can include that the public authority’s decisions or conduct be reviewed or changed, that reasons be given for decisions or that laws or practices relating to conduct under investigation be changed.

8.2.20 Agencies are able to review particular FOI decisions in accordance with a suggestion or recommendation made by the Ombudsman (s.52A). A redetermination arising from a review made in accordance with a suggestion or recommendation of the Ombudsman is covered by all the protections available under the FOI Act relating to defamation and breach of confidence (ss64–66). The Solicitor-General has advised that an agency is not confined to accepting or rejecting the suggestion of the Ombudsman in full, and may decide to
redetermine any aspect of its determination. The Ombudsman advises that if he remains dissatisfied with the agency’s response to a section 52A suggestion he may decide to investigate the agency’s conduct.

8.2.21 The Ombudsman may recommend that a document be released if the Ombudsman is of the view that it would, on balance, be in the public interest to do so (s.52(6)(a)). In an investigation, the Ombudsman may also recommend that an agency’s general procedures for dealing with applications be changed so that they conform more closely with the FOI Act (s.52(6)(b)).

8.2.22 Where the Ombudsman is of the opinion that a public authority is or may be guilty of misconduct which may warrant an officer’s dismissal or punishment, the Ombudsman must report that opinion to the responsible Minister and the head of the public authority (s.28, Ombudsman Act).

8.2.23 Any public authority that is the subject of an Ombudsman’s report must advise the Ombudsman of the steps it has taken in response to the report. If the Ombudsman is dissatisfied with the steps which have been taken, the Ombudsman may make a report to Parliament.

8.2.24 Section 52(7) of the FOI Act states that any part of an Ombudsman’s report is admissible in evidence in any proceedings before the ADT if it is relevant to that appeal (other than any part of the report on a question of law, or concerning a recommendation referred to in s.52(6)).

8.3 **External review by the Administrative Decisions Tribunal (ADT)**

**Circumstances in which the ADT may review a decision**

8.3.1 Generally, the ADT can only review a determination once an internal review is complete or is taken to be complete (s.53(2)) (see eg *Hutchinson v Roads and Traffic Authority* [2004] NSWADT 48). An application for an external review by the ADT is made by either the applicant for access or amendment, or an interested third party in respect of documents affecting inter-governmental relations, business affairs, personal affairs or the conduct of research.

8.3.2 The time limit for making an application to the Tribunal will normally be 60 days from the date of notification of the determination (s. 54).

**Conditions to be met before a review application can be lodged**

8.3.3 However, such an application may not be made:

- while the determination is subject to a right of internal review under ss34 or 47; or
- if the determination was subject to a right of internal review under these provisions but no application for internal review was made within the time limits specified for such; or
- while any relevant complaint is being investigated by the Ombudsman (s.53(2)).
Applicants must be aggrieved by a determination

8.3.4 A person who is 'aggrieved by a determination' made by an agency or a Minister under s.24 (determination of applications for access) or s.43 (determination of applications for amendment of records) may apply to the ADT for a review of the determination (s.53(1)).

8.3.5 A person is ‘aggrieved by a determination’ in the following circumstances:

(1) in the case of a determination that relates to an application for access to documents made by the person under s.17 (applications for access to an agency’s documents), s.34 (applications for internal review of a determination of an agency) or s.36 (applications for access to a Minister’s documents), if the determination is to the effect that:

- access is refused (including if access is refused because a document cannot be identified or is lost, or has been found positively not to exist: *Beesley v Commissioner of Police, NSW Police Service [2000] NSWADT 52)*;
- access is granted subject to deferral;
- access is granted to a copy of a document with exempt matter deleted;
- access is granted subject to payment of a charge for dealing with the application or for giving access, which the person thinks unreasonable;
- a charge for dealing with the application is payable by the person which the person thinks has been unreasonably incurred;

(2) in the case of a determination that relates to an application for access to documents made by some other person under ss.17, 34 or 36 in respect of a document requiring consultation under Division 2 of Part 3 (documents affecting inter-governmental relations, personal affairs, business affairs or the conduct of research), if:

- the relevant agency or Minister has not taken reasonably practicable steps to obtain the views of the person as to whether the document is exempt from disclosure under Part 2 of Schedule 1 to the FOI Act; or
- such steps have been taken but the person does not agree with the agency or Minister’s determination;

(3) in the case of a determination that relates to an application for amendment of records made by the person under s.40 (application for amendment of an agency’s records), s.47 (application for internal review of an agency’s determination) or s.49 (application for amendment of a Minister’s records), the determination is to the effect that the agency or Minister refuses to amend the records in accordance with the application;

and the determination has been made as a consequence of an internal review under s.34 or s.47 or has not been subject to a right of review under either of those sections (s.53(3)).
Time limits for application for ADT review

8.3.6 An application to the ADT (with payment of the prescribed fee) must be made:
(1) within 60 days after notice of the determination to which it relates is given to the applicant for access; or
(2) if a complaint is made to the Ombudsman in relation to the determination within that 60 day period:
   (a) within 60 days after the complainant is informed that the Ombudsman refuses to investigate or discontinues an investigation of that conduct; or
   (b) within the 60 days after the results of the Ombudsman’s investigation are reported to the complainant (s.54).

8.3.7 There is conflicting authority on the issue of whether the ADT has power to extend the time limit provided for in s.54 (cf s.57 Administrative Decisions Tribunal Act 1997). In Wilmhurst v Macquarie University [2002] NSWADT 196, Britton JM held that, as the FOI Act itself does not provide for this time limit to be extended or for applications to be made out-of-time, the ADT does not have power to accept late applications (see also Cheung v ADT [2000] NSWSC 1062). However, in Canobolas Heritage Railway Society Inc v General Manager, Bathurst Regional Council [2005] NSWADT 61 at [20]-[21] O’Connor DCJ held that s.53(5) of the FOI Act did not disapply s.57 of the Administrative Decisions Tribunal Act 1997, which deals with late applications for external review. Accordingly, his Honour found that the ADT did have jurisdiction to extend the 60 day time limit.

Notifying the Premier / The Department of Premier and Cabinet

8.3.8 The Tribunal will usually request one of the parties to notify the Premier that the Tribunal will be reviewing a determination relating to a claim that a document is a restricted document. If the Tribunal does not do so, the agency that made the determination should notify the Policy Manager, Legal Branch of the Department of Premier and Cabinet (see also [11.2.35-11.2.38]). [policy]

How the ADT deals with an application for review

8.3.9 The ADT must determine an application for review on the merits and, in doing so, is required to apply relevant Government policy.

8.3.10 Review by the ADT is not ‘review’ in the strict sense of that term, but a fresh decision based on the material then before it, applying Government policy. The Second Reading Speech for the Bill which became the ADT Act (Legislative Assembly, 29 May 1997, Hansard p.9602) summarises the principal features of ADT procedure:

“In reviewing administrative decisions the ADT will conduct proceedings with as little formality and technicality and with as much expedition as the requirements of the matter in question permit.

…”
The tribunal will have a discretion to adapt its procedures to the circumstances of the application before it.

It is important that the ADT be both accessible and flexible. The bill gives the tribunal a wide discretion to inform itself as it thinks fit and not be bound by the rules of evidence.

The tribunal has a range of options for resolving matters without the need for formal hearings. For example, through the use of preliminary conferences, assessors, and, where appropriate, mediation.

... Applicants will be entitled to be represented when appearing before the ADT. However the tribunal will be given a discretion to exclude representatives from making oral submissions at hearings, depending on such factors as the type of proceedings, the parties’ capacity to present their case without representation and the complexity of the matter.”

8.3.11 As the review by the ADT is actually a fresh decision, the agency may add, change or withdraw claims for exemption. In addition, if the factual circumstances bearing on detriment caused by the release of a document have changed since the internal review decision was made, the ADT should have regard to the circumstances at the time at which it makes its decision.

8.3.12 Applications for review by the ADT under s.53 of the FOI Act will be determined by a judicial member of the General Division of the Tribunal. The rules of the ADT concerning its practice and procedure are contained in the Administrative Decisions Tribunal Rules (Transitional) Regulation 1998.

Arrangements between ADT and Ombudsman

8.3.13 The ADT and the Ombudsman both have an external review function under the FOI Act. To ensure a co-operative exercise of these overlapping functions, s.39 of the ADT Act makes provision for the President of the ADT and the Ombudsman to enter into arrangements on the following:

- matters that the ADT will refer to the Ombudsman where it considers that the matter can be the subject of action (eg inquiry/investigation) under the Ombudsman Act 1974 and it would be more appropriate for the Ombudsman to deal with it;

- matters that the Ombudsman will refer to the ADT where the Ombudsman considers that the matter can be the subject of an application for review by the ADT and it would be more appropriate for the ADT to deal with it;

- matters that are both the subject of an application to the ADT and action under the Ombudsman Act; and

- the co-operative exercise of the ADT’s and Ombudsman’s functions.
8.3.14 The ADT and the Ombudsman may exercise their functions in conformity with such arrangements (s.39(5), ADT Act), and, without limiting this general power, may take the following actions in consequence of such arrangements:

"(a) the Ombudsman may (despite anything in the Ombudsman Act 1974) decline, discontinue or defer a complaint made under that Act to give effect to an arrangement entered into under this section, and
(b) the Ombudsman may (despite any provision of the Ombudsman Act 1974 but in conformity with this Act) disclose any information to the Tribunal duly obtained by the Ombudsman in relation to any matter referred to the Tribunal to give effect to an arrangement entered into under this section, and
(c) the Tribunal may dismiss, adjourn or stay proceedings for an application for the review of a reviewable decision to give effect to an arrangement entered into under this section, and
(d) the Ombudsman may entertain any complaint under the Ombudsman Act 1974, or the Tribunal may entertain any application for a review of a reviewable decision, duly made by a person on the basis of a referral under arrangements entered into under this section.” (s.39(5), ADT Act).

8.3.15 Arrangements agreed between the ADT and Ombudsman, which were published in the Government Gazette of 5 January 2007, are set out in full in Appendix H.

Merits review / reasonable grounds

8.3.16 In determining an application for review the ADT is generally required to decide what is the correct and preferable decision having regard to the material before it, including any relevant factual material and any applicable written or unwritten law. For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed on the administrator who made the original decision (s.63, ADT Act).

8.3.17 However, in respect of documents claimed to be exempt as restricted documents (ie Cabinet documents, Executive Council documents, law enforcement documents and counter-terrorism documents – see Chapter 11) s.57 of the FOI Act states that the ADT may consider the grounds on which it is claimed that a document is a restricted document and may compel production if it is not satisfied that there are ‘reasonable grounds’ for the claim that the documents are restricted. (The ADT cannot undertake such a review if the document is subject to a Ministerial certificate – see [8.3.57-8.3.62]).

8.3.18 ‘Reasonable grounds’, in this context, means grounds which are not irrational, absurd or ridiculous (Attorney-General v Cockcroft (1986) 10 FCR 180, at 190; McKinnon v Secretary, Department of Treasury [2005] FCAFC 142 at 4).

8.3.19 In light of s.57, there is some uncertainty as to whether, if the ADT is satisfied that there are reasonable grounds for a claim, that is the end of the matter, or whether the ADT may then go on to conduct a full merits review as to whether the decision to claim the exemption is the correct and preferable decision.
8.3.20 Clearly, if the ADT is limited to determining only whether reasonable grounds exist for a determination, then it is less likely to overturn an agency’s determination than it would in the case of a full merits review. Having said that, the ADT has said that where claims for exemption are made under clauses 1 (Cabinet documents) and 2 (Executive Council documents), there may be little difference between the ‘reasonable grounds’ claim and the ‘substantive’ stage of the inquiry. There may well be some difference in claims under clause 4 (documents affecting law enforcement and safety), as these are less capable of simple uncontested factual application (Neary v The Treasury [2002] NSWADT 261, at 26-8).

8.3.21 In BY v Director-General, Attorney General’s Department [2002] NSWADT 79 President O’Connor held that the Tribunal was not limited to satisfying itself that there were reasonable grounds for the decision that a document was restricted, but instead had power to conduct a full merits review of the decision by the agency that the document was restricted. That decision was followed in Fisher v Commissioner of Police, New South Wales Police Service [2002] NSWADT 267. In both cases the Premier intervened in the proceedings, and made submissions to the contrary. The Department of Premier and Cabinet has some continuing doubt as to the correctness of the decision in BY.

8.3.22 In the BY case the Tribunal did accept, however, that where a Ministerial certificate had been issued the power conferred on the Supreme Court (in s.58A FOI Act) is limited to a ‘reasonable grounds’ review.

Government policy

8.3.23 In determining an application for review the ADT must give effect to any relevant Government policy in force at the time the decision was made, except to the extent that the policy is contrary to law or produces an unjust decision in the circumstances of the case.

8.3.24 The Premier or any other Minister may certify in writing, by issuing a certificate, that a particular policy was Government policy in relation to a particular matter. The certificate is evidence of the Government policy concerned and the ADT is to take judicial notice of the contents of that certificate.

8.3.25 The ADT may have regard to any other policy applied by the administrator (the person or body that made, or is taken to have made, the decision under review s.9 ADT Act) in relation to the matter concerned, except to the extent that the policy is contrary to Government policy, or to law, or the policy produces an unjust decision in the circumstances of the case.

8.3.26 ‘Government policy’ means a policy adopted by the Cabinet or the Premier or any other Minister, which is to be applied in the exercise of discretionary powers by the administrator (s.64, ADT Act). This manual is itself contains policy relevant to the ADT’s determination of FOI proceedings (Cianfrano v Department of Commerce [2004] NSWADT 134).
Remitting to administrator
8.3.27 At any stage of determining an application for review, the ADT may remit the decision to the administrator who made it for reconsideration (s.65, ADT Act).

Parties
8.3.28 Parties to the proceedings before the ADT will be the applicant, the administrator, the Attorney General (if the Attorney General decides to intervene under s.69 of the ADT Act), any other interested person who has been made a party by the Tribunal, and any person specified as a party by or under an Act (s.67, ADT Act). An example of the latter circumstance would be the Premier in relation to applications for external review by the ADT of an exemption claimed for a restricted document (see s.57, FOI Act).

Representation of parties
8.3.29 A party to proceedings before the ADT may appear without representation, be represented by an agent or, if the party is incapacitated, by a person appointed by the ADT. Although the ADT has power to order that the parties may not be represented by a particular class of agent for the purpose of making oral submissions (s.71, ADT Act), the practice of the ADT has generally been to allow legal representation in proceedings before it (for a discussion of the utility of agents in FOI matters generally, see Curtin v Vice Chancellor, University of New South Wales [2005] NSWADT 186).

Opportunity to be heard
8.3.30 The ADT must ensure that every party is given a reasonable opportunity to present the party’s case (whether at a hearing or otherwise) and to make submissions in relation to the issues in the proceedings (s.70, ADT Act).

ADT procedure
8.3.31 The ADT may, subject to the ADT Act and the rules of the ADT, determine its own procedure. The ADT is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. The ADT is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

8.3.32 The ADT may require evidence or argument to be presented in writing (ss 73(1)-(3) and (5)(c), ADT Act).

Planning meeting
8.3.33 Before formally commencing to determine an application the ADT may informally confer with, or arrange for a member or assessor to confer informally with, the parties to the proceedings in a planning meeting and make any determination with respect to the proceedings that is agreed to by the parties. With the agreement of the parties such an agreement has effect as a decision of the ADT (s.74(1)-(2), ADT Act).
Public or private hearings

8.3.34 If proceedings before the ADT are to be determined by holding a hearing, the hearing is generally to be open to the public (s.75, ADT Act). However, the ADT has power to make non-publication orders and/or to order that a hearing be held wholly or partly in private, if it is satisfied that such an order is desirable by reason of the confidential nature of evidence or matter, or for any other reason.

8.3.35 If it appears to the ADT that the issues for determination can be adequately determined in the absence of the parties, then the ADT may make such a determination by considering the documents or other material provided to it without holding a hearing (s.76, ADT Act).

8.3.36 In determining a review application, the ADT is to ensure that it does not, in its reasons for decision or otherwise, disclose any exempt matter (s.124, FOI Act). The ADT may receive evidence and hear argument in the absence of the public, the review applicant and/or the applicant’s representative, if the ADT is of the opinion that that is necessary to prevent disclosure of exempt matter (s.75, FOI Act). In *Taylor v Chief Inspector, RSPCA* [1999] NSWADT 23 (19 April 1999) it was held that documents may be disclosed by the ADT after exempt matter had been deleted.

Costs

8.3.37 Subject to the rules of the ADT and any other Act or law, the ADT may award costs of its proceedings, but only if it is satisfied that there are special circumstances which warrant it (s.88, ADT Act).

8.3.38 If the Attorney General intervenes in ADT proceedings he or she may authorise payment by the State of a party’s costs reasonably incurred as a result of that intervention (s.69(2), ADT Act).

8.3.39 On 11 May 2005 the ADT issued a practice note setting out the circumstances in which it would consider awarding costs. The ADT will generally look to the conduct of the parties and consider whether they have conducted the proceedings in a way that has disadvantaged another party, been unreasonable in their conduct of the proceedings or have brought proceedings (including an appeal) that were without merit.

Mediation/neutral evaluation

8.3.40 The ADT may refer a matter arising in proceedings before it for mediation or neutral evaluation if it considers the circumstances are appropriate, the parties consent to the referral and the parties agree as to who is to be the mediator/evaluator (s.102, ADT Act). ‘Mediation’ means a structured negotiation process in which the mediator assists the parties to achieve their own resolution of the dispute. ‘Neutral evaluation’ means a process in which the evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator’s role includes assessing the relative strengths and weaknesses of each party’s case and offering an opinion as to the likely outcome of the proceedings (s.101, ADT Act).
Burden of proof

8.3.41 In proceedings concerning a determination made by an agency or Minister under the FOI Act, the burden of proving that the determination is justified lies on the agency or Minister (s.61, FOI Act).

8.3.42 Where, however, an application is made to amend personal records, the ADT has held that although the ultimate burden of establishing justification for a determination rests with the agency, an applicant who seeks amendment of a record bears an initial or preliminary burden to provide evidence in support of the application for amendment (Hayward-Brown v Wentworth Area Health Service [2000] NSWADT 46; Morgan v DET [1999] NSWADT 91; this approach has been endorsed by the NSW Court of Appeal in Crewdson v CSAHS [2002] NSWACA 345 at 32). (See further [5.6.2-5.6.4].)

What effect can a decision by the ADT have?

8.3.43 The ADT may:

- decide to affirm or vary the reviewable decision, or
- set aside the reviewable decision and substitute its own decision, or
- set aside the reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the ADT (s.63, ADT Act).

8.3.44 Where the ADT decides to vary or substitute a decision on review, the decision of the ADT is to be taken to be the determination of the agency or Minister concerned, and to take effect on and from the date of the previous decision (s.66, ADT Act).

Power of ADT to report improper conduct of officers

8.3.45 If, as a result of a review application, the ADT takes the view that an officer of an agency has failed to exercise a function conferred by the FOI Act in good faith, the ADT may take appropriate measures to bring the matter to the attention of the responsible Minister for the agency (s.58, FOI Act).

Procedures and powers of the ADT in relation to delayed determinations

8.3.46 If an application is made to the ADT to review a deemed refusal of access or a deemed refusal to amend records, the agency or Minister concerned can apply to the ADT for more time in which to deal with the application (s.56, FOI Act). Conditions may be imposed by the ADT, such as waiver or reduction of the charge for access and payment of the applicant’s costs of the review proceedings by the agency or Minister in the event access is granted.

8.3.47 If an application is made to the ADT for review a deemed refusal and, before the ADT has finally determined the matter, the agency or Minister decides to release the documents then the better practice is to ask the ADT to make consent orders providing for the release of the documents, as there is some uncertainty as to whether the protections under ss64 and 65 (ie protections in respect of actions for defamation or breach of confidence, and in respect of certain criminal actions) would apply in those circumstances (see [1.4]).
Power of the ADT in respect of exempt documents

8.3.48 Under s.25 of the FOI Act, agencies are given a discretion whether or not to release documents which are exempt (see [4.5]).

8.3.49 There has been controversy as to whether the ADT, when exercising its external review role, also has this discretion to order the release of exempt documents. The ADT (President O’Connor) had previously held that it does not have such discretion (Neary v The Treasurer, New South Wales [2002] NSW ADT 261). Recently, however, Nicholas J in the Supreme Court held that the ADT may exercise such discretion (University of New South Wales v McGuirk [2006] NSWSC 1362). The Department of Premier and Cabinet has supported the contrary position (as established in Neary’s case). As the Government was not a party to the McGuirk proceedings it was not in a position to appeal that decision. The Government may seek to have this decision reconsidered by the Courts if it is raised in future proceedings.

Powers of the ADT in relation to decisions about restricted documents

8.3.50 The powers of the ADT to review claimed exemptions on the ground that a document is a restricted document under the FOI Act are discussed at [8.3.16-8.3.22]. It is noted there that there is some uncertainty as to whether the ADT is permitted to undertake a full merits review or whether it is confined to determining whether ‘reasonable grounds’ exist for the claim.

8.3.51 In any case, the powers of the ADT to review a claimed exemption from disclosure on the ground that the document is a restricted document can be removed if a Ministerial Certificate in respect of the document has been issued (ss57(1) and 59). Restricted documents are those prescribed in Part 1 of Schedule1 to that Act (see Chapter 11). In brief they are Cabinet and Executive Council documents, documents affecting law enforcement and public safety and counter-terrorism documents. The ADT may not consider an application for review of the grounds for claiming a particular document is a restricted document if the document is subject to a Ministerial Certificate (s.57(1)).

8.3.52 The ADT Act provides that a certificate issued by the Director-General of the Department of Premier and Cabinet is conclusive, for the purposes of an ADT hearing, that a document is a Cabinet document (s.124(4)). Further, this provision provides that such a certificate authorises any person to refuse to disclose or release to the ADT a document that is certified as a Cabinet document.

8.3.53 Otherwise, the ADT may review the claim that a document is a restricted document, although it may not be necessary for the ADT to view the actual document. The agency or Minister concerned, and the Premier as the Minister administering the FOI Act, are parties to the proceedings for the purposes of the challenge to a claimed exemption as a restricted document (s.57(6)). The agency, the Minister or the Premier may first seek to show that there are reasonable grounds for the claim, by affidavit or other evidence, without actually producing the document in evidence to the ADT (s.57(3)).
8.3.54 The agency, the Minister or the Premier may also apply for the ADT to receive evidence and hear argument in the absence of the public, the review applicant and (if necessary to prevent disclosure of exempt matter) the review applicant’s representative (s.57(2)).

8.3.55 If the ADT is not satisfied, by evidence on affidavit or otherwise, that there are reasonable grounds for the claim, it may require the document to be produced in evidence (s.57(3)). If, having considered the document, the ADT is still not satisfied that there are reasonable grounds for the claim, the ADT is to reject the claim, but not unless it has given the Premier a reasonable opportunity to appear and be heard in relation to the matter (s.57(5)).

8.3.56 Section 124 of the ADT Act (discussed at [8.3.73-8.3.75]) also deals generally with the application of the ADT Act to documents claimed to be exempt under the FOI Act. However, it should be noted that s.124 is concerned with situations in which the obligation to disclose exempt matter to the ADT arises under the ADT Act, and not under the FOI Act.

**Powers of the Supreme Court in relation to Ministerial Certificates**

8.3.57 Only the Supreme Court may consider the grounds on which it is claimed that a document is a restricted document where that document is the subject of a Ministerial Certificate. However, the certificate may cease to have effect if the Supreme Court orders that the claim is not reasonable and remits the matter to the ADT, unless, in the case of Cabinet or Executive Council documents, the Premier (as Minister administering the FOI Act) confirms the certificate (see [8.3.61]).

8.3.58 In proceedings before the ADT the applicant for review may apply to the Supreme Court to consider the grounds of a claim that a document is a restricted document, where that document is the subject of a Ministerial Certificate (s.58A(1), FOI Act).

8.3.59 As with proceedings in the ADT under s.57 of the FOI Act, the Supreme Court is required, if the agency, the Minister or the Premier so requests, to receive evidence and hear argument in the absence of the public, the applicant and, if needs be, the applicant's representative (s.58A(2), FOI Act). For the purposes this application to the Court, the Premier is a party to the proceedings (s.58A(3), FOI Act).

8.3.60 If the Court is not satisfied, by evidence on affidavit or otherwise, that there are reasonable grounds for the claim that the document is a restricted document it may require the document to be produced in evidence before it (s.58B(1), FOI Act). If, after considering the document so produced, the Court is still not satisfied the claim is reasonable, and has given the Premier a reasonable opportunity to appear and be heard in relation to the matter, it is to make an order to that effect and remit the matter to the ADT (s.58B(2)-(3), FOI Act).
8.3.61 In these circumstances, a Ministerial Certificate that states that a document is a restricted document ceases to have effect when the Court’s order takes effect or, in the case of a Ministerial Certificate that states that the document is restricted by virtue of being a Cabinet or Executive Council document, ceases to have effect (unless sooner withdrawn) 28 days after the Court order is made unless the certificate is confirmed by the Premier in accordance with s.58C (s.58B(4), FOI Act).

8.3.62 Where the Premier confirms a certificate, the Premier must cause a copy of the confirmation notice to be given to the review applicant and a further copy to be tabled in each house of Parliament within 5 sitting days after giving the notice(s.58C(6)).

Appeals from decisions of the ADT

8.3.63 Decisions of the ADT that can be appealed to the Appeal Panel of the ADT include:

- a decision made on review,
- a decision that a person is not entitled to such review,
- an order that the parties may not be represented by a class of agent, and
- a decision refusing an application for joinder as a party (s.112, ADT Act).

8.3.64 An appeal may be brought from any of these types of decision by the ADT to an Appeal Panel of the ADT (s.113(1), ADT Act). Such an appeal will be on questions of law and may ‘extend to’ merits review (s.113(2), ADT Act).

8.3.65 The normal time limit for an appeal is 28 days from the date the appellant is given written reasons for the decision, but may be extended (s.113(3), ADT Act). The appeal is to be made in the manner prescribed by the ADT rules (s.113(4), ADT Act).

8.3.66 If the appeal is only on questions of law the Appeal Panel can make any orders it thinks appropriate in light of its decision on the appeal, which could include affirming/setting aside the decision of the ADT, remitting the case to be re-heard by the ADT or making an order in substitution for the order at first instance (s.114, ADT Act). Reasons must be given for a decision on an appeal which is only on a question of law (s.117, ADT Act).

8.3.67 If the appeal extends to the merits, the Appeal Panel is to make a fresh decision having regard to the material before it, may exercise all the functions conferred upon the ADT at first instance, and may decide to affirm or vary the decision at first instance or to set it aside and make another decision in substitution (s.115, ADT Act). The practice of the ADT is to only extend an appeal to a review of the merits of a decision if an error of law has already been established.

8.3.68 An appeal to the Appeal Panel will not stay the decision of the ADT at first instance without an interlocutory order (s.116, ADT Act). In the course of proceedings before the Appeal Panel there is provision for reference by the Appeal Panel of questions of law to the Supreme Court for its opinion. Any subsequent decision of the Appeal Panel must be consistent with the opinion of the Supreme Court. (s.118, ADT Act).
Appeals to the Supreme Court

8.3.69 The Supreme Court can:

(1) consider, on the application of the review applicant before the ADT, the ground on which it is claimed that a document the subject of a Ministerial certificate is a restricted document (s.58A FOI Act - see [8.3.57-8.3.62] above); and

(2) hear appeals from decisions of the Appeal Panel on questions of law (s.119(1), ADT Act). Such appeals are to be brought in the time and manner prescribed by the Supreme Court Rules (s.119(3), ADT Act).

8.3.70 On appeal from decisions of the Appeal Panel the Supreme Court has the power to make any orders it thinks appropriate in light of its decision in the matter. Such orders may include an order affirming or setting aside the decision of the Appeal Panel, and an order remitting the matter to the Appeal Panel for re-hearing (s.120, ADT Act).

8.3.71 Subject to an interlocutory order, an appeal to the Supreme Court does not stay the decision of the Appeal Panel (s.121, ADT Act).

8.3.72 Subject to its discretion under s.123 of the ADT Act, to decline to deal with an application for review of a reviewable decision, the Supreme Court also retains its inherent power to judicially review the decisions of the ADT (s.122, ADT Act). The Court has a statutory discretion to refuse to grant an application for review of a reviewable decision if satisfied that adequate provision is made under the ADT Act for the applicant to seek an alternative review of the decision, or if an application has been lodged with an alternative reviewer for a review of the decision (s.123(1)(b)-(c), ADT Act).

Application of the ADT Act to exempt documents under the FOI Act and to privileged documents

8.3.73 The ADT is prohibited by s.55 of the FOI Act from revealing exempt matter. The ADT Act expressly provides that, except as provided by s.124 of the ADT Act, nothing in the ADT Act requires or authorises the disclosure of exempt documents (s.124(1), ADT Act). The FOI Act does not prevent the disclosure of the document to the ADT (s124(3), ADT Act). The ADT is also to do all things necessary to ensure the document is not disclosed to any person other than the ADT members hearing the proceedings, unless the person disclosing the document to the ADT consents to the further disclosure (s.124(3), ADT Act).

8.3.74 The Director-General of the Department of Premier and Cabinet may certify that a document is exempt because it is a Cabinet document. Any such certificate is conclusive of that fact and authorises any person who would otherwise be required under the ADT Act to lodge the document with, or disclose it to, the ADT to refuse to do so (s.124(4), ADT Act).

8.3.75 Similarly, nothing in the ADT Act requires the disclosure of a document if the ADT or the President is satisfied that evidence of the document could not be given in proceedings of a NSW court by reason of certain provisions of the
Evidence Act 1995, including s.10 (Parliamentary privilege) and Pt.3.10 (Privileges) of Ch.3 (s.125, ADT Act).

Offence of publishing names of witnesses, parties etc

8.3.76 It is an offence to publish the name of (or material liable to identify) a witness before the ADT, or the name of (or material liable to identify) a person to whom ADT proceedings relate or who is mentioned or otherwise involved in any such proceedings, without the ADT’s consent. Publication does not include the publication of an official report of the proceedings (s.126, ADT Act).

8.3.77 The circumstances in which the ADT will consent to the publication of the names of parties, witnesses and others involved in Tribunal proceedings were considered by Deputy President Hennessy in Gulliver v General Manager, Maitland City Council [1999] NSWADT 67. The following principles were endorsed:

"- the privacy interests protected by the criminal offence [in s.126, ADT Act] provide the starting point for assessing the competing considerations when deciding whether to give a consent,

- in any proceeding in which consent is sought it is essential to examine the likely publication and the harm which may result to the particular individuals concerned, so as to decide whether a dispensation from the statutory protection would be justified, and

- a decision on giving consent cannot be arrived at by application of the common law principles of open justice which give no protection to privacy, although a public interest in publication may, in appropriate circumstances, be given weight as a consideration competing with privacy values. (Lloyd v TCN Channel Nine Pty Ltd and Another [1999] NSWADTAP 3 144)"

Requirement to notify the Department of Premier and Cabinet

8.3.78 Agencies and Ministers’ offices are to notify the Department of Premier and Cabinet if there is a request for review made to the ADT against any FOI determination made by them. Such notifications are to be made to the FOI Co-ordinator in the Department of Premier and Cabinet as soon as they are notified of the review application. [policy] This procedure is to ensure that the government pursues a consistent interpretation of the Act and that no review application or appeal to the Appeals Panel are pursued unnecessarily. It also ensures that the Premier is given the opportunity to intervene in proceedings, where they may raise important issues of public policy (see eg BY v Director General, Attorney-General’s Department [2002] NSWADT 79).

8.3.79 Agencies should also notify the Policy Manager, Legal Branch of the Department of Premier and Cabinet if the documents in question are Cabinet documents (see [11.2.35-11.2.38]).
9 FOI and employment screening for child protection

9.1 Introduction

9.1.1 The Commission for Children and Young People Act 1998 (the CCYP Act) has expanded the coverage of the FOI Act so that it applies, in limited circumstances, to documents held by the private sector as well as Government agencies (s.43, CCYP Act).

9.1.2 That Act permits a person to make an FOI application to the person’s employer (or a relevant professional or supervisory body) for access to, or correction of, information about ‘relevant employment proceedings’ against the person.

9.1.3 The CCYP Act permits an application to any government agency (which are defined to include any public or local authority) and non-government agencies (which are defined to include any commercial or non-commercial organisation). For the purposes of the CCYP Act (and for this Chapter of the Manual), the term ‘agency’ is taken to include both private-sector and public agencies.

Relevant employment proceedings

9.1.4 ‘Relevant employment proceedings’ means disciplinary proceedings (in New South Wales or elsewhere) against an employee by the employer or by a professional or other body that supervises the professional conduct of the employee, being proceedings involving either ‘reportable conduct’ by the employee, or an act of violence committed by the employee in the course of employment and in the presence of a child (s.33, CCYP Act).

9.1.5 ‘Reportable conduct’ means:

(a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child

(a1) any child pornography offence or misconduct involving child pornography; or

(a2) any child related personal violence offence (as defined in s.33B(3), CCYP Act), or

(a3) an offence under section 21G or 21H of the Summary Offences Act 1988 (filming for indecent purposes) committed against, with or in the presence of a child; or

(b) any assault, ill-treatment or neglect of a child; or

(c) any behaviour that causes psychological harm to a child, whether or not, in any case, with the consent of the child (s. 33, CCYP Act).
9.1.6 However, “reportable conduct” does not extend to:

(a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards; or

(b) the use of physical force that, in all the circumstances, is trivial or negligible (but only if the employer is an agency to which Part 3A of the Ombudsman Act (s 25A) applies and the matter is to be investigated and the result of the investigation recorded under workplace employment procedures); or

(c) conduct of a class or kind that is exempted from being reportable conduct by the guidelines issued under s.35 of the CCYP Act (see [9.1.8] below).

9.1.7 The CCYP Act lists some examples of conduct that would not constitute reportable conduct, namely:

- touching a child in order to attract a child’s attention, to guide a child or to comfort a distressed child;
- a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and
- conduct that is established to be accidental.

9.1.8 Further examples of behaviours that the Commission for Children & Young People has advised are not reportable conduct include:

- providing appropriate medical care to a child who is hurt;
- guiding a child by the shoulders, arms or hands;
- not providing supervision where this was for good reason, and for a short period of time, and where the risk of harm was reasonably perceived at the time to be low; and
- actions found to have been appropriate physical contact in classes such as sport, drama, dance etc.

(Guidelines issued by the Commission for Children and Young People are available on its website at www.kids.nsw.gov.au.)

9.1.9 It should also be noted that the Working With Children Employer Guidelines (Dec 2006) provides at 4.2 that ‘relevant employment proceedings’ do not include proceedings where there has been a finding that the allegation was vexatious (ie the allegation was made without substance and with the intent of being malicious) or misconceived (ie even though the allegation was made in good faith the person making the allegation misunderstood what actually occurred). In addition, the CCYP guidelines (at 5.1.6) state that the Commission is not to be notified where relevant employment proceedings find that an incident was not reportable conduct or was not an act of violence, or that an allegation is false (ie the alleged conduct did not occur). Accordingly, s.43 does not apply to documents relating to those proceedings.
9.2 Access to information under the FOI Act

9.2.1 The CCYP Act provides that where a person has been the subject of any relevant employment proceedings, the person is entitled:

(1) to apply for access under the FOI Act to any documents of an agency containing information about those proceedings (s.43(1), CCYP Act); and

(2) to apply for the amendment of the agency’s records relating to information about relevant employment proceedings, on the basis that the information is, in the person’s opinion, incomplete, incorrect, out of date or misleading (s.43(3), CCYP Act).

9.2.2 The provisions of s. 43 effectively extend FOI to cover all employers that hold information concerning relevant employment proceedings against current or former employees (extending to disciplinary proceedings completed within the period of five years immediately before the commencement of s.39 of the CCYP Act).

9.2.3 Any provision of the FOI Act relating to fees and charges payable by applicants does not apply to applications for access to such documents (s.43(2), CCYP Act).

9.2.4 Where an employer is under a duty to notify the Commission for Children and Young People of the name and other identifying particulars of any employee against whom relevant disciplinary proceedings had been completed by the employer (s.39(1), CCYP Act), the employer is under a further duty to retain records of the information that has been notified. That duty applies despite any other requirement relating to the disposal of records (such as any regulations applying to records of disciplinary proceedings with respect to public sector employees) (s.39(5), CCYP Act).

9.2.5 In assessing applications for access to any documents containing any information about relevant employment proceedings, while the presumption should be that documents the subject of such an FOI application should be released, any of the exemption clauses in Schedule 1 of the FOI Act may apply. Exemption clauses that may be particularly relevant include:

- clause 4 - Documents affecting law enforcement and public safety - in particular subclause (1) paragraphs (a), (b), (c), (e) & (h) (however it is important to note that clause (4)(2)(a)(v) provides that a document is not an exempt document by virtue of subclause (1) if it merely consists of a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation);

- clause 6 - Documents affecting personal affairs - this would generally only be relevant where the documents included information about persons other than the applicant;

- clause 9 - Internal working documents - the exemption under clause 9, however, will generally only be applicable in relation to documents that are relevant to decisions that are yet to be made (see [13.1]);

- clause 10 - Documents subject to legal professional privilege;

- clause 13 - Documents containing confidential material;
• clause 16 - Documents concerning operations of agencies – this would apply where disclosure of a document could reasonably be expected to have a substantial adverse effect on the management or assessment by an agency of the agency’s personnel and would, on balance, be contrary to the public interest; and

• clause 20(d) relating to documents containing matter the disclosure of which would disclose matter relating to a protected disclosure within the meaning of the Protected Disclosures Act 1994.

9.3 Amendment of records under the FOI Act

9.3.1 Amendment of records is discussed in Chapter 5 of this Manual.

9.3.2 It is important to note that where an agency refuses to amend its records in accordance with an application, the notification to the applicant must, among other things, specify the reasons for refusal and 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.

9.3.3 Further, where an agency refuses to amend its records, the applicant is entitled to require the agency to add to those records a notation specifying the respects in which the applicant claims the records to be incomplete, incorrect, out of date or misleading, and, if the applicant claims the records to be incomplete or out of date, setting out such information as the applicant claims is necessary to complete the records or to bring them up to date. Agencies are then required to cause written notice of the nature of the notation to be given to the applicant.

9.3.4 It is also relevant to note that where an agency discloses to any person (including any other agency) any information contained in that part of its records to which such a notice relates, the agency:

(1) is required to ensure that there is given to that person, when the information is disclosed, a statement that the person to whom the information relates claims that the information is incomplete, incorrect, out of date or misleading and setting out particulars of the notation added to its records under this section; and

(2) may include in the statement the reason for the agency’s refusal to amend its record in accordance with the notation (s.46(3), FOI Act).

9.3.5 As a matter of fairness and good practice, where an agency has previously disclosed to any other agency a record that it subsequently agrees to amend, it should inform that agency of the amendment it has made.

9.3.6 Given the requirements of s.39(1)-(2) of the CCYP Act for employers to notify the Commission for Children and Young People and, on request, provide another employer with details of relevant employment proceedings for the purposes of background checking, it may be necessary for applicants wishing to have their records amended to make separate applications to other agencies as well as to the Commission.
9.4 Background checking

9.4.1 The CCYP Act makes background checking mandatory for preferred applicants for primary child-related employment. This obligation applies to all organisations involved with child-related employment (s.37, CCYP Act).

9.4.2 ‘Primary child-related employment’ is defined in s.37(6) of the CCYP Act and includes any paid child-related employment, any child-related employment of a minister of religion or other religious leader, and child related employment involving the fostering of children.

9.4.3 Background checking can include checks for:

- any relevant criminal record of the person (such as offences involving sexual activity, acts of indecency, child abuse or child pornography);
- any relevant apprehended violence orders (AVOs) or child protection prohibition orders made against the person;
- any relevant employment proceedings completed against the person; and
- any other relevant probity check relating to the previous employment or other activities of the person (s.34, CCYP Act).

Mandatory provision of information to persons subject to background checking

9.4.4 The background checking guidelines prepared by the Commission for Children and Young People under s. 35 of the CCYP Act (entitled Working With Children Employer Guidelines) provide that:

- Applicants who are the subject of checks must be advised of any information received through the background check about a relevant criminal record, relevant apprehended violence order or relevant employment proceeding.
- It is the responsibility of the Approved Screening Agency (ie the CCYP or an employer or employer-related body approved by the Minister to conduct employment screening) to contact the person to notify them of any findings. They must be provided the opportunity to verify whether they are the person to whom the information received relates.
- They will be asked to confirm that the information relates to them, advise whether it is factually correct, and if so, make comments in relation to the information and to have those comments placed on their record.


FOI applications relating to background checking

9.4.5 A person the subject of background checking is entitled to make an FOI application to the relevant agency for access to any documents containing information about relevant employment proceedings (see [9.1.4-9.1.10] above).
The person may also make an application to NSW Police for access to any documents concerning the applicant’s criminal record, including any AVO or child protection prohibition orders made against the person on the application of a police officer or other public official (although, presumably, the person would already have been provided with this documentation at the time it was made).

Amendments to the CCYP Act

In 2005 the Government enacted the *Commission for Children and Young People Amendment Act 2005* (CCYP Amendment Act). On 2 January 2007, the CCYP Amendment Act was proclaimed to commence.

The CCYP Amendment Act has amended the CCYP Act in a number of ways, including:

- empowering the CCYP to require the provision of certain information held by Government agencies and other persons relevant to an assessment of whether a person poses a risk to the safety of children;
- empowering the CCYP to require the provision of certain information held by Government agencies or an employer or employer-related body for the purposes of exercising its monitoring or auditing functions;
- incorporating into the CCYP Act the provisions of the *Child Protection (Prohibited Employment) Act 1998* (relating to prohibitions on employment in child-related employment), and to repeal the *Child Protection (Prohibited Employment) Act 1998*;
- changing references to ‘employment screening’ to references to ‘background checking’;
- extending the offences to be checked as part of background checking procedures for employees in child-related employment; and
- providing for recent previous background checks on potential short-term employees to be used to satisfy requirements under the CCYP Act to carry out background checks on such employees.

The CCYP Act and the CCYP Amendment Act are available on the NSW Government’s legislation website ([www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)).
10 Exemptions (Introduction and General Principles)

10.1 Introduction

10.1.1 The overall spirit of the FOI Act is that members of the public should have the ability to access documents held by government agencies or Ministers. However, there is provision in the legislation to withhold documents from disclosure where their release would be harmful to the wider public interest (or to certain private interests which Parliament considers worthy of protection).

10.1.2 This may be done on the grounds that:

- a 'substantial and unreasonable diversion of resources' would be involved (see s.25(1)(a1) of the FOI Act and [4.5.6-4.5.16] of this Manual); or
- the documents are exempt.

10.1.3 An exempt document is:

- a document listed in Schedule 1 of the FOI Act; or
- a document containing information relating to the relevant functions of an exempt agency listed in Schedule 2.

10.2 Signpost to relevant sections of this Manual

<table>
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<td>6</td>
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<td>No (but, in the case of clause 7(1)(c) only, disclosure must not 'reasonably be expected' to have an 'unreasonable adverse effect').</td>
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</table>

**Exempt bodies and offices (Schedule 2)**

| | | | |
| Documents held by certain specified bodies or offices and relating to certain of their functions (listed in Schedule 3). | 14 | No. |
10.3 General approach to interpreting exemptions

10.3.1 Decision-makers must examine each document from the starting-point that access is to be given unless an exemption provision specifically provides for the exemption of information contained in the document. Even then, access should not be refused automatically – agencies have a discretion to release documents which are exempt (see [10.5]).

10.3.2 When considering the exemptions, decision-makers should bear in mind the objects and aims of the FOI Act (see [1.1.2]). The FOI Act states that it is the intention of Parliament that the Act is to be:

“interpreted and applied so as to further the objects of [the] Act, and … discretions conferred by [the] Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.” (s.5(3)).

10.3.3 Where there are ambiguities in the interpretation of provisions of the FOI Act, including the exemptions, it is proper to give them a construction that furthers, rather than hinders, free access to information. This means that the exemptions should be read strictly and given no wider meaning than their ordinary meaning suggests.

More than one exemption may apply

10.3.4 To some extent, the exemptions may overlap, and more than one exemption may apply to the same document. Decision-makers should keep in mind this possibility, and separately identify each exemption which applies.

Exempt information can be deleted from documents

10.3.5 If it is possible to delete material from a copy of a document so that the document is no longer exempt, and if it appears to the agency that the FOI applicant would want to be given access to such a copy, then the agency must delete the exempt material from the copy of the document and release the copy (s.25(4)) see [10.5].

Exemptions are generally applied on a document-by-document basis

10.3.6 With few exceptions (eg most Cabinet and Executive Council documents), exemptions cannot be applied over a general bundle of documents. Each individual document, or part, needs to be examined to ascertain if it contains information that brings it within the scope of a particular exemption.
### 10.3.7 Exemptions are not all framed in the same way. The exemptions in Schedule 1 can be categorised as follows:

<table>
<thead>
<tr>
<th>Category of exemption</th>
<th>Relevant exemptions</th>
<th>Approach to applying exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) Whether the document fits within a 'class of documents'</td>
<td>Clause 1, 2, 4(3), 7(1)(a), 7(1)(a1), 10, 11, 12, 13(a), 17, 18, 19, 20, 21, 22, 23, 24, and 25</td>
<td>When considering clauses which allow exemption by 'class of documents' the only issue is whether the document in question fits the class generally described. There are no other considerations. The grounds for exempting documents under 'class of document' clauses must meet all criteria defining the particular 'class' of documents. The relevant criteria are of a factual kind, such as:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Was the document prepared for submission to Cabinet? (clause 1(1)(a))</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Does it contain an extract from such a document? (clause 1(1)(c))</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Does the document contain matter relating to adoption procedures under the <em>Adoption of Children Act 1965</em>? (clause 20(a))</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Does the document contain matter relating to a protected disclosure within the meaning of the <em>Protected Disclosures Act 1994</em>? (clause 20(d))</td>
</tr>
<tr>
<td>(B) Whether the document fits within a 'class of documents' + overriding public interest test</td>
<td>Clause 9</td>
<td>As for (A), but the document is exempt only if, on balance, disclosure would be contrary to the public interest.</td>
</tr>
<tr>
<td>(C) Whether the document fits within a 'class of documents' + whether disclosure is unreasonable</td>
<td>Clause 6</td>
<td>As for (A), but the document is exempt only if disclosure would involve 'unreasonable disclosure'.</td>
</tr>
<tr>
<td>(D) Whether the document fits within a 'class of documents' + whether disclosure will have a certain adverse effect</td>
<td>Clauses 7(1)(b), 7(1)(c) and 8</td>
<td>As for (A), but the document is exempt only if disclosure would have the effect described. To claim these exemptions, as well as showing that the documents fall within the class described, it must also be established that there is a reasonable expectation that disclosure of the document would cause the adverse effect referred to in the clause.</td>
</tr>
<tr>
<td>(E) Whether disclosure will have a certain adverse effect</td>
<td>Clause 4(1), 4A(2)</td>
<td>It must be shown that there is a reasonable expectation that disclosure of the document would cause the adverse effect referred to in the clause.</td>
</tr>
<tr>
<td>(F) Whether disclosure will have a certain effect + overriding public interest test</td>
<td>Clauses 4A(3), 5, 13(b), 14, 15 and 16.</td>
<td>As for (E), but the document is exempt only if disclosure would, on balance, be contrary to (or in, depending on the wording of the clause), the public interest. The negative effect in the first part of these clauses will, in itself, be part of the public interest considerations which militate against disclosing the document. However, there should be no automatic assumption that because a document satisfies the initial criteria in a particular clause (ie that it would have the negative effect referred to) that its release would necessarily be contrary to the public interest. That factor, together with any other public interest factors against disclosure, needs to be weighed against all of the public interest factors which favour disclosure.</td>
</tr>
</tbody>
</table>
Exemption decisions to be made at a senior level

10.3.8 **Decisions relating to the exemptions should only be made at a senior level.** Agency staff who are required to prepare a briefing to the relevant senior officer in respect of an application should ensure that the briefing includes:

- a statement of the reasons (that meet the requirements of s.28(2)(e)) if a recommendation is made to refuse access;
- evidence regarding any concern about release; and
- identification of the material contained in the document which is the basis of concern.

10.4 The meaning of particular words and phrases

‘Public interest’

10.4.1 The concept of the ‘public interest’ arises in relation to many of the exemptions in the FOI Act, and also in the FOI charging policy.

10.4.2 The public interest is something that is of serious concern or benefit to the public, not merely of individual interest (*British Steel Corporation v Granada Television Ltd* (1980) 3 WLR 774).

10.4.3 In general, a public interest consideration is one which is common to the community as a whole (or a substantial segment of it). The public interest is usually treated as distinct from matters of purely or personal interest. However, there may be public interest considerations in relation to the protection of certain individual rights and benefits. For example, there is a public interest in respecting every individual citizen’s privacy.

10.4.4 The public interest does not mean of interest to the public (in the sense of gratifying curiosity or providing amusement) but rather in the interest of the public (*Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186; *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429; *Dale v The Australian Federal Police* (1997) 47 ALD 417).

10.4.5 A determination that, on balance, disclosure of information is in the public interest (or not contrary to the public interest) will generally require the decision-maker to be satisfied that the benefit to the public resulting from disclosure will outweigh the benefit to the public of withholding the information.

Exemptions to which the public interest test needs to be applied

10.4.6 The exemption clauses in which the public interest provision appears are:

- Clause 4(2) – some documents affecting law enforcement and public safety
- Clause 4A(3) – some documents relating to counter-terrorism measures
- Clause 5 - documents affecting inter-governmental relations
- Clause 9 - internal working documents
• Clause 13(b) - documents containing confidential material
• Clause 14 - documents affecting the economy of the state
• Clause 15 - documents affecting financial or property interests
• Clause 16 - documents concerning operations of agencies

10.4.7 In all these clauses, other than clauses 4(2) and 4A(3), the test for applying an exemption is whether certain conditions are fulfilled and disclosure 'would, on balance, be contrary to the public interest'. In relation to law enforcement and counter-terrorism documents (clauses 4(2) and 4A(3)) the test for applying the exemption is whether certain conditions are fulfilled and disclosure 'would, on balance, be in the public interest'. This means that, in applying the exemptions in clauses 4(2) and 4A(3), the emphasis is on showing why the document should be disclosed, whereas in all of the other exemptions the emphasis is on showing why the document should not be disclosed.

No separate ground for withholding documents in the ‘public interest’

10.4.8 Public interest issues need to be considered in conjunction with specific exemption clauses which expressly include a public interest criterion. There is no separate ground in the FOI Act which simply involves public interest considerations separate from examination of an exemption clause. This means that if none of the specified exemptions applies, the document must be released.

10.4.9 On the other hand, if an exemption does not contain a public interest criterion then the exemption will apply provided the criteria specified in it are met, and there is no requirement to 'read in' a further overarching public interest criteria.

10.4.10 Having said that, agencies do have a discretion to release exempt documents (other than those which are subject to a Ministerial certificate) – see [10.5]. That discretion should be exercised in a manner which furthers the objects of the FOI Act – see [1.1.2].

How the public interest balancing test works

10.4.11 Each exemption clause which requires consideration to be given to the public interest also refers to 'on balance'. This indicates that there will be competing considerations which must be weighed by the decision-maker.

10.4.12 If the basic elements of an exemption are satisfied, then that will be one public interest consideration against disclosure. For example, in clause 14, the fact that the document would disclose matters which could reasonably be expected to have a substantial adverse effect on the economy of the State will itself be a public interest consideration against disclosure of that document.

10.4.13 That consideration, together with any other public interest considerations against disclosure, must be weighed against the public interest considerations which favour disclosure.
10.4.14 One public interest consideration in favour of disclosure will always be the general public interest in the publication of government-held documents, in so far as that is conducive to keeping the community informed and promoting public accountability (Commonwealth v John Fairfax and Sons Ltd (1980) 147 CLR 39 at 51-52; General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84 at 146-151).

10.4.15 All relevant public interest considerations favouring or against disclosure of the particular matter in issue should be identified, and their comparative importance must be weighed against each other to decide whether or not those favouring disclosure outweigh those favouring non-disclosure.

10.4.16 Decision-makers should not assume that their task is complete because they have simply identified one or more aspects of the public interest which favour refusal of access. Drawing on their own knowledge, the submissions of the applicant or other information, they should identify relevant public interest factors favouring disclosure, and balance these fairly against those tending against disclosure before reaching a final decision. In the course of this exercise preliminary views will often change. With the exception of the law enforcement (clause 4(2)) and counter-terrorism (clause 4A(3)) exemptions, the onus on a decision-maker is to show that it would be, on balance, contrary to the public interest for a document to be disclosed.

10.4.17 The notice of determination should show that the decision-maker has considered, in relation to each exemption clause which applies, the matters favouring disclosure as well as those which do not.

Public interest considerations which favour disclosure

10.4.18 There is no fixed list of relevant public interest considerations. The following are some considerations that might tend in favour of disclosure:

- **Accountability** – disclosure of information about how government functions were conducted can enhance the accountability of agencies and individual officers for the performance of their official functions. It is desirable that the business of government should be examinable and the subject of scrutiny, debate and ultimate accountability at the ballot box, and freedom of communication is indispensable (Australian Capital Television Pty Ltd v The Commonwealth (No2) (1992) 66 ALJR 695 at 743).

- **Public participation and debate** – disclosure of information about issues currently being considered by government can lead to more informed debate about the issues. There is a public interest in the public having access to information held by Government to facilitate the public’s ability to discuss, review and criticise government action (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84 at 147)
• **Public awareness** – disclosure of information about issues of general concern can assist individuals to make decisions about their own activities eg information about public health or safety, or issues of relevance to consumers.

• **Justice to an individual** – there may be a public interest in individuals in a particular situation obtaining information of particular relevance to them eg information that would assist a complainant to understand the steps taken by an agency in dealing with his or her complaint; reasons for decisions which affect individuals (*Re Swiss Aluminium v Dept of Trade* (1985) 9 ALD 243).

• **Facilitation of academic or other research**, which may be of benefit to the community.

• **Public understanding of how Government decision-making works.**

**Public interest factors which generally tend against disclosure**

10.4.19 Public interest considerations which might tend against disclosure include:

• **Criteria referred to in the exemptions** – satisfaction of the basic criteria of the exemption (or another exemption) will be a public interest consideration against disclosure (see eg *Re Rae and the Department of Prime Minister and Cabinet* (1986) 12 ALD 589). The weight to be given to the satisfaction of the basic criteria will vary significantly between the exemptions.

• **Interests of third parties** – there is a public interest in maintaining the privacy of information held by the government that is about the private affairs of members of the public or that contains sensitive commercial information.

• **Efficient and effective conduct of government functions** – eg where the release of preliminary documents would impair the integrity and viability of the agency’s decision-making process to a significant or substantial degree or where preliminary documents concern matters that were not settled and recommendations that were not adopted (*Howard v The Treasurer* (1985) 3 AAR 169; *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 567; see also *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 per Heydon and Callinan JJ).

• **Flow of information to law enforcement and regulatory authorities** – it is in the public interest that citizens not be unduly inhibited from providing information that law enforcement and regulatory agencies require to perform their functions.

• **Fair treatment of individuals** – eg if an individual has been subject to unsubstantiated allegations of wrongdoing, there can be a public interest in non-disclosure of information which would adversely affect his or her reputation.
• **Security and international relations** – the likelihood of damage to security or international relations of the Commonwealth may be a relevant public interest consideration (eg *Re Throssell v Department of Foreign Affairs* (1987) 4 ALD 296).

• **Administration of justice** – eg there is a public interest against disclosure where the document might reveal to witnesses the evidence of other witnesses and so expose their evidence to challenge, or might give rise to uninformed public commentary that might affect the right of a person to a fair hearing (*Edlund v Commissioner of Police* [2003] NSWADT 195).

• **Proper records** – a proper record of the process of decision-making and policy formulation can only be maintained if written advice is provided. It may be a public interest consideration against disclosure if officers would be less likely to provide candid, written advice in the future if that advice is likely to be released publicly (see *McKinnon v Secretary, Department of Treasury* [2006] HCA 45) per Heydon and Callinan JJ). The Ombudsman disagrees that this is a relevant consideration.

• **Ill-informed speculation and public confusion** – although the possibility that the applicant him or herself may misunderstand information contained in a document cannot be taken into account (see [10.4.21-10.4.22] below), it may be a relevant consideration that release of the document would mislead the public generally, or otherwise cause general public confusion. This factor is required to be determined by reference to the facts of the particular application, and not merely by reliance on theoretical possibilities which might flow if the disclosed documents were to gain wider release. Further, although the potential of a document to mislead the public may be weighed in the balance of determining whether a document is exempt, so too must the potential for any such misleading impression to be addressed or corrected (eg by the release of additional information or a clarifying statement) (*General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84, at 162-167; see also *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 per Heydon and Callinan JJ).

10.4.20 Additional specific public interest considerations against disclosure which might arise in the case of internal working documents of an agency or Minister are considered at [13.1.21-13.1.41].

**Matters excluded from consideration of the public interest**

10.4.21 Section 59A excludes from consideration, for the purposes of weighing the public interest, the fact that disclosure might lead to embarrassment or loss of confidence in the Government and that information contained in the document might be misunderstood or misinterpreted by the applicant. It is important that agencies do not take those matters into account when seeking to balance public interest considerations. That is, agencies must not take into account:

• The possibility of embarrassment to the Government.

• The potential loss of confidence in the Government.
• The possibility that information may be misinterpreted or misunderstood by an applicant.

10.4.22 If agencies are concerned that a FOI applicant may misunderstand or misinterpret information in documents to be released, it is always open to the agency to include an explanation or to release further information outside the scope of the application.

'Unreasonable'

10.4.23 In several exemptions (eg clauses 6 and 7) the exemption provides for non-disclosure in the event that disclosure is judged to be 'unreasonable'. This requires a judgement about disclosure that takes into account all of the relevant circumstances and a balancing of legitimate interests (see Re Chandra and Minister for Immigration and Ethnic Affairs (1984) 6 ALN N257).

10.4.24 In Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111 the Federal Court held that the question of whether disclosure was unreasonable required consideration of what amounts to a limited public interest test. For example, in the case of 'personal affairs' information one of the factors to be considered is whether there are public interest considerations in favour of disclosure which outweigh the invasion of privacy which would follow disclosure of information relating to a person's personal affairs without their consent.

'Could reasonably be expected to'

10.4.25 The term 'could reasonably be expected', and variations on it, appear in several of the exemptions. The words have their ordinary meaning (Searle Australia Pty Ltd v PIAC (1992) 108 ALR 163).

10.4.26 The test to be applied is an objective one, approached from the view point of the reasonable decision-maker (Neary v State Rail Authority [1999] NSWADT 107).

10.4.27 The word 'reasonable' concerns the expectation – that is, the issue for the decision-maker is not the reasonableness of the claim for exemption, but rather the reasonableness of expecting a particular consequence to flow from disclosure (Searle Australia Pty Ltd v PIAC (1992) 108 ALR 163).

10.4.28 Something which could reasonably be expected is something which is more than a mere possibility, risk or a chance, but it need not be more probable than not (see Cockcroft v Attorney General's Department (1986) 10 FCR 180; News Corporation Limited v National Companies and Securities Commission (1984) 57 ALR 550).

10.4.29 It must, however, be based on real and substantial grounds, and it must not be purely speculative, fanciful, imaginary or contrived (Searle Australia Pty Ltd v PIAC (1992) 108 ALR 163 at 175). Decision-makers cannot simply assume the worst theoretical or imaginable possibility.

10.4.30 To similar effect, in McKinnon v Secretary, Department of Treasury [2006] HCA 45 Hayne J indicated that the word 'reasonable' does not equate to simply 'not
irrational, absurd or ridiculous’. The fact that something is ‘not absurd’ may not be sufficient for it to be ‘reasonable’. Reasonableness must be decided taking into account any relevant evidence that is before the decision-maker and any relevant arguments that have been advanced.

10.4.31 In *Neary v State Rail Authority* [1999] NSWADT 107 O’Connor P stated (at 35):

“The administrator should have reasonable grounds for his or her perception. There must be more than a mere risk. While the key word used in the relevant provision – ‘expect’ – carries a firmer connotation than words such as ‘anticipates’, it is not necessary that the level of risk be such that it be assessed as more probable than not. Nor is it necessary for the administrator to apply a balance of probabilities calculus similar to that used to set the burden of proof in litigation.”

10.4.32 In *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, SJA1143 of 1994 at 44), Owen J held that a conclusion that something could reasonably be expected must be supported in some way. His Honour stated that:

“The support does not have to amount to proof on the balance of probabilities; nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision-maker.”

‘Substantial adverse effect’

10.4.33 A number of exemptions require decision-makers to determine that disclosure will have a ‘substantial adverse effect’ on a specified thing before the exemption criteria are met.

10.4.34 The word ‘substantial’ has been interpreted as meaning ‘severe’, ‘of some gravity’, ‘large or weighty or of considerable amount’, ‘real or of substance’ and ‘not insubstantial or nominal’ (see eg *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236; *Re Dyrenfurth and Department of Social Security* (1987) 12 ALD 577; *Re Bayliss and Department of Health and Family Services* (1997) 48 ALD 443).

10.4.35 The ‘adverse effect’ must be sufficiently serious or significant to cause concern to a properly informed reasonable person (*Re Thies and Department of Aviation* (1986) 9 ALD 454).

10.5 Discretion to release exempt documents

10.5.1 Agencies are generally given a discretion whether to release or refuse access to an exempt document (s.25(1)). In the Ombudsman’s view, s.25(1) requires agencies to ask themselves:

“Is there any good and proper reason why these documents should not be released?”

10.5.2 Agencies should not refuse access to material only because there are technical grounds of exemption available under the FOI Act. If a
document does not contain sensitive information, it may be appropriate to disclose it, even if it falls within an exemption. [policy]

10.5.3 Agencies must not, however, release restricted documents (that is, Cabinet documents, Executive Council documents, documents affecting law enforcement and public safety or documents relating to counter-terrorism measures) if they are the subject of a Ministerial Certificate (s.25(3)). [policy] An agency may, however, release a copy of the document with exempt material deleted in certain circumstances – see [10.3.5].

10.5.4 The release of certain documents may raise special considerations. For example:

- **Cabinet documents (clause 1)** — The principle of responsible government and the centrality of Cabinet confidentiality to the proper administration of Government mean that it will rarely be appropriate for Cabinet documents to be released, and individual agencies may not be in a position adequately to assess the importance and/or relationship of a particular Cabinet document to other documents or to Cabinet processes. **In such cases, if release is being considered agencies must first consult with the Policy Manager, Legal Branch of the Department of Premier and Cabinet [policy]**

- **Counter-terrorism documents (clause 4A)** — The nature of terrorism risk means that individual agencies may not be in a position adequately to assess the importance of maintaining confidentiality in particular documents relating to counter-terrorism measures. Consideration should be given to consulting with the Commissioner of Police before deciding to release documents which may be exempt under clause 4A.
Exemptions (Restricted documents - Schedule 1, Part 1)

Overview

11.1 A ‘restricted document’ is a document referred to in any one or more of the provisions of Part 1 of Schedule 1 of the Act.

11.1.1 These are as follows:

1. Cabinet documents (clause 1);
2. Executive Council documents (clause 2);
3. Documents affecting law enforcement and public safety (clause 4); and
4. Documents relating to counter-terrorism measures (clause 4A).

(Clause 3 has been repealed.)

Clause 1 - Cabinet documents

11.2 Clause 1 of Schedule 1 states:

"(1) A document is an exempt document:

(a) if it is a document that has been prepared for submission to Cabinet (whether or not it has been so submitted), or
(b) if it is a preliminary draft of a document referred to in paragraph (a), or
(c) if it is a document that is a copy of or of part of, or contains an extract from, a document referred to in paragraph (a) or (b), or
(d) if it is an official record of Cabinet, or
(e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.

(2) A document is not an exempt document by virtue of this clause:

(a) if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet, or
(b) if 10 years have passed since the end of the calendar year in which the document came into existence.

(3) Subclause (2) (b) does not apply to a document that came into existence before the commencement of this clause.

(4) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet."


Purpose of the exemption

11.2.2 The confidentiality necessary for effective government requires that the deliberations of Cabinet should be protected from mandatory disclosure under the FOI Act.

11.2.3 The following comments were made in the context of an equivalent Queensland exemption in *Re Hudson and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at 129:

“The essential justification for the existence of the Cabinet matter exemption is to facilitate the process of Cabinet deliberation and decision-making, by providing the optimum conditions in which the highest policy-making body in the executive branch of the government can make informed choices according to its judgment of what the public interest requires.”

11.2.4 The principle of collective ministerial responsibility is central to the functioning of Cabinet. It means that, once all appropriate consultation has taken place between Ministers and advice has been freely given, the Cabinet stands collectively responsible for its decisions, which are binding on all members of the Cabinet.

11.2.5 The convention of Cabinet confidentiality supports the principle of collective responsibility. The strict observance of secrecy in relation to Cabinet deliberations enables full and frank discussions to be had before Ministers arrive at agreement.

Applying the exemption

11.2.6 This exemption is unusual in that the ‘title’ refers to a class of documents rather than to the type of information contained in an individual document. In addition, all the subsections of the exemptions (except clause 1(1)(e)) refer to classes of documents.

11.2.7 The exemption operates to protect documents prepared for submission to Cabinet, and drafts of those documents, documents containing extracts of those documents, official records of Cabinet and any other documents which may disclose information concerning Cabinet deliberations or decisions.

11.2.8 The following types of documents are included under this exemption:

- Bills before Cabinet;
- Cabinet agendas;
- Cabinet minutes; and
- documents intended as attachments to Cabinet Minutes or other submissions, and other documents, whether or not actually attached, which have been brought into existence for the purpose of submission to Cabinet.
11.2.9 Also covered by this exemption are:

- preliminary drafts of the above;
- documents containing copies of, or copies of parts of, or extracts of the above documents; and
- documents containing copies of, or copies of parts of, or extracts from preliminary drafts of the above documents.

The meaning of ‘Cabinet’

11.2.10 ‘Cabinet’ is not defined in the FOI Act. Cabinet has no legal status or executive power. It is essentially the deliberative body by which the legislative and executive policy of the Government is determined. It is a pattern of deliberations which forms the process by which the Government makes decisions on major policy issues. It includes the processes under which a Minute submitted by a Minister is circulated to Ministers for consideration and advice. A ‘full’ Cabinet meeting may be the culmination of this process, but ‘Cabinet’ does not refer only to a meeting of all of the Ministers.

11.2.11 The term ‘Cabinet’ also includes Cabinet committees and Cabinet sub-committees (clause 1(4)).

11.2.12 While Cabinet includes the principal organ of Government decision-making and Ministerial deliberation (the Cabinet) as well as its immediate subordinate institutions, in Cianfrano v Director General, Department of Commerce & anor [2005] NSWADT 282 President O’Connor held that an inter-agency committee established by a Cabinet sub-committee but which comprised only public servants (and not Ministers) was not itself part of ‘Cabinet’. (Note: This does not mean that documents created by such a committee might not be exempt as Cabinet documents. For example, if the committee creates a document for submission to Cabinet or a Cabinet committee or sub-committee, then the document will be exempt under clause 1(1)(a). The exemption in clause 9 (internal working documents) would also need to be considered.)

Documents prepared for submission to Cabinet (clause 1(1)(a))

11.2.13 Clause 1(1)(a) provides that a document is exempt if it was prepared for submission to Cabinet, irrespective of whether it was ever submitted.

11.2.14 This is a question of fact about the purpose of creating the document.

11.2.15 The purpose of submitting the document to Cabinet does not, however, need to be the sole purpose of its creation. If the document was, in fact, prepared for submission to Cabinet it does not matter that there may have been other purposes (Simos v Wilkins, unreported, NSW District Ct, 15 May 1996, at 10 per Cooper J; see also Cianfrano v Director-General, NSW Treasury [2005] NSWADT 7 at 35)). As long as one of the purposes of creating a document is for making a submission and as long as that purpose is something more than
a “peripheral” purpose, the exemption will operate (Herald & Weekly Times v Victorian Curriculum & Assessment Authority [2004] VCAT 924; see also Mc Guirk v Director-General, The Cabinet Office [2007] NSW ADT9).

11.2.16 A document should not be described as a Cabinet document under this paragraph if a decision was taken to submit it to Cabinet only after it was created. Such a document may be exempt because it reveals the deliberations or decisions of Cabinet (clause 1(1)(e) – see [11.2.21-11.2.29] below), but it will not be exempt under clause 1(1)(a) if it was not created with the intention of submitting it to Cabinet.

11.2.17 Whether a document has been prepared for submission to Cabinet will turn on the evidence as to the background of its preparation, which is to be ascertained at the time the document was created. This means that it is important for agencies to ensure that, before making any claim under clause 1(1)(a), there is sufficient information available about the provenance of a document. It may be difficult to support a claim under clause 1(1)(a) if the purposes for which the document was created are unclear.

11.2.18 For the purposes of clause 1(1)(a), the purpose for which the document was prepared is the only issue, not the actual information contained in the document.

Official records (clause 1(1)(d))

11.2.19 ‘Official records’ of Cabinet, exempt under clause 1(1)(d), include the following:

- Cabinet and Cabinet Committee agendas;
- Cabinet and Cabinet Committee minutes; and
- lists, registers or schedules maintained by the Secretary of Cabinet of submissions, decisions or unresolved Cabinet business.

11.2.20 An ‘official record’ has the following three qualities (Toomer v Department of Agriculture, Fisheries and Forestry [2003] AATA 1301, at 74):

- It must contain certain matters, in the sense of relating or telling or setting down those certain matters.
- It must do so in a form that is meant to preserve that relating, telling or setting down for an appreciable time. This means that it may take the form of a paper document, but it also means that it may be maintained on a computer or in some other medium which preserves it.
- The certain matters that are related, told or set down must relate to Cabinet and its functions, and not to matters extraneous to those functions.
11.2.21 Documents which contain matter ‘the disclosure of which would disclose information concerning any deliberation or decision of Cabinet’, are exempt under clause 1(1)(e), include documents produced before or after a Cabinet decision, although they only fall within the exemption once deliberations have taken place or a decision has been made.

11.2.22 These may include the following:

- briefing notes on Cabinet submissions prepared by or for Ministers;
- briefing notes prepared by the Department of Premier and Cabinet for the Premier in his capacity as the head of Cabinet;
- departmental notes containing details of proposals in Cabinet submissions and decisions; and
- correspondence between Ministers, between Ministers and Departments, or between Departments on Cabinet submissions, deliberations or decisions or matters which Cabinet has considered without receiving formal submissions.

11.2.23 In Toomer and Department of Agriculture [2003] AATA 1301 (18 December 2003) the Commonwealth Administrative Appeals Tribunal discussed the meaning of the words ‘deliberation’ and ‘decision’ in the context of the Commonwealth Cabinet exemption:

“[the exemption covers] information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information about a matter or discussed strategies. In short, its deliberations are its thinking processes be they directed to gathering information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached. Its decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed……The documents must be examined to determine whether they do in fact disclose deliberations or decisions of Cabinet. Whether they were prepared before or after the meeting of Cabinet at which they were discussed is not determinative of the issue.”

11.2.24 In the context of a public interest immunity claim the Federal Court has held that inspection of a Cabinet submission would reveal the deliberations of Cabinet, as would inspection of a brief for a Minister’s use in Cabinet (see National Tertiary Education Industry Union v Commonwealth (2002) 117 FCR 114). Likewise, the NSW Supreme Court has accepted (in deciding a public interest immunity claim) that a Cabinet Minute would reveal the deliberations of Cabinet and should not be disclosed (see Egan v Chadwick (1999) 46 NSWLR 563).
11.2.25 By protecting “information concerning any deliberation or decision of Cabinet”, the New South Wales provision is potentially broader in scope than that of the Commonwealth (which protects ‘any deliberation or decision of Cabinet’).

11.2.26 Recently, there has been some debate as to whether the exemption in clause 1(1)(e) may apply to documents created before Cabinet’s consideration of an issue, or whether it can only apply to documents created after such consideration.

11.2.27 The Crown Solicitor has advised that it is not essential that the document have been created during or after Cabinet’s consideration in order to attract a ‘deliberation or decision’ claim. Although Deputy President Hennessey expressed a contrary view in National Parks Association of NSW Inc v Department of Lands [2005] NSWADT 124, the Crown Solicitor’s advice is consistent with the AAT, Federal Court of Australia and Supreme Court decisions referred to above. The Crown Solicitor’s view has recently been endorsed by the ADT in McGuirk v Director-General, The Cabinet Office [2007] NSW ADT9 (at [35]-[37]). Agencies required to comply with Premier’s Memorandum should follow the Crown Solicitor’s advice and the decision in McGuirk v Director-General, The Cabinet Office until otherwise directed. [policy]

11.2.28 It is the Government’s position that there are many instances of documents created prior to Cabinet’s consideration of an issue, that reveal the deliberations of Cabinet. Mostly, this is because such documents foreshadow and reveal the position taken later in Cabinet by Ministers, the disclosure of which would undermine the principles of collective ministerial responsibility. It is also sometimes the case that documents created before Cabinet considers an issue (but not necessarily created with the intention of being submitted to Cabinet) fall within this exemption because they are ultimately submitted to and deliberated upon by Cabinet.

11.2.29 The Crown Solicitor has, however, advised that simply because the subject matter of a document is considered by Cabinet does not, without more, mean that disclosure of the document would disclose ‘information concerning any deliberation or decision of Cabinet’. Whether this test is met will be a question of fact in each case. Decision-makers will need to consider the available evidence in order to be satisfied that a document in fact concerns any deliberation or decision of Cabinet.

Cabinet documents not covered

Factual or statistical material

11.2.30 A document is not exempt under the clause,

"if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet" (clause 1(2)(a)).
11.2.31 In *Simos v Wilkins* (unreported, NSW District Court, 15 May 1996) it was held that a document which contained 'factual matters' was nevertheless an exempt Cabinet document because it 'went further and drew conclusions and gave advice' (at 13-14). Projections of future revenue or expenditure are also more than merely factual or statistical (see the decision of the Administrative Appeals Tribunal in *Re Waterford and Treasurer (No 1)* (1985) 8 ALN N37).

**Ombudsman’s Guidance – Redacting Cabinet and Executive Council documents**

In the Ombudsman's view, the combined effect of clause 1(2)(a) and s.25(4) (and the equivalent provision in clause 2) is that no claim for exemption of a document under clause 1 or 2 should be made without first considering the possibility of making a copy of the relevant document and deleting any exempt material – that is, deleting the information which does not merely consist of factual or statistical material.

Agencies should consider whether such a copy of the document, albeit containing only 'factual matters', would nevertheless continue to disclose 'information concerning any deliberation or decision of Cabinet'.

**The ten year rule**

11.2.32 A document is also not exempt under clause 1:

“if 10 years have passed since the end of the calendar year in which the document came into existence” (clause 1(2)(b)).

However, this applies only to documents created after the Act came into operation – that is, from 1 July 1989 (clause 1(3)).

11.2.33 It is important to note that the 10 year rule applies from the end of the calendar year in which the document was created. This means, for example, that a document created on 31 July 1997 will cease to be exempt under clause 1 from 1 January 2008. Other exemptions may, however, continue to apply.

**Decisions to be taken at a senior level**

11.2.34 **Given the importance of the principle of collective ministerial responsibility, the decision-maker for any FOI application involving possible Cabinet documents should be a senior and experienced officer of an agency.** Senior management also may need to be made aware of any potential Cabinet document exemption which may be claimed, given the potential for cross-agency implications. [*policy*]

**Consultation with the Legal Branch of the Department of Premier and Cabinet**

11.2.35 The Legal Branch of the Department of Premier and Cabinet is available to provide advice to agencies in deciding whether to make an exemption claim under clause 1. It should be remembered, though, that agencies are often in
the best position to understand the origins, purposes and potential impact of a document that has not been formally submitted to Cabinet.

11.2.36 The Department of Premier and Cabinet is also available to provide advice to agencies in preparing any descriptive information about Cabinet documents for the Ombudsman’s Office during a preliminary investigation.

11.2.37 **If the Ombudsman decides to institute a formal investigation and requires the production of documents, agencies must first contact the Policy Manager, Legal Branch of the Department of Premier and Cabinet to discuss the possible issue of a certificate under s.22 of the Ombudsman Act in relation to any Cabinet documents that might be covered by the claim.** [policy] (see [4.19-11 - 4.19.16, 8.2.5 - 8.2.9, 10.4.5]

11.2.38 Separately, if the Ombudsman requests a s.22 certificate, agencies must immediately contact the Policy Manager, Legal Branch of the Department of Premier and Cabinet. [policy]

11.3 **Clause 2 - Executive Council documents**

11.3.1 Clause 2 of Schedule 1 states:

"(1) A document is an exempt document:

(a) if it is a document that has been prepared for submission to the Executive Council (whether or not it has been so submitted), or

(b) if it is a preliminary draft of a document referred to in paragraph (a), or

(c) if it is a document that is a copy of or of part of, or contains an extract from, a document referred to in paragraph (a) or (b), or

(d) if it is an official record of the Executive Council, or

(e) if it contains matter the disclosure of which would disclose information concerning any deliberation or advice of the Executive Council.

(2) A document is not an exempt document by virtue of this clause:

(a) if it merely consists of:

(i) matter that appears in an instrument that has been made or approved by the Governor and that has been officially published (whether in the Gazette or elsewhere), or

(ii) factual or statistical material that does not disclose information concerning any deliberation or advice of the Executive Council, or

(b) if 10 years have passed since the end of the calendar year in which the document came into existence."
Subclause 2(b) does not apply to documents that came into existence before the commencement of this clause.

Purpose of the exemption

11.3.2 Like the Cabinet document exemption, this clause is aimed at protecting documents the confidentiality of which is necessary for the effective functioning of government.

Applying the exemption

11.3.3 With few exceptions, the exemptions for Executive Council documents are worded in exactly the same way as those for Cabinet documents as discussed in the previous section. One exception is that there is no reference to committees or sub-committees of the Executive Council, as no such committees exist. Another is that this clause refers to ‘advice’ of the Executive Council whereas clause 1 refers to ‘decisions’ of Cabinet.

11.3.4 As with Cabinet documents, from 1 January 2000, Executive Council documents created after 1 July 1989, which are at least 10 years old, no longer qualify for exempt status under the Executive Council exemption (clause 2(2)(b) and 2(3)).

11.4 Clause 3 (repealed)

11.4.1 There is no clause 3.

11.5 Clause 4 - Documents affecting law enforcement and public safety

11.5.1 Clause 4 of Schedule 1 states:

(1) A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:

(a) to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case, or

(b) to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained, or

(c) to endanger the life or physical safety of any person, or

(d) to prejudice the fair trial of any person or the impartial adjudication of any case, or
(e) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law), or

(f) to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety, or

(g) to endanger the security of any building, structure or vehicle, or

(h) to prejudice any system or procedure for the protection of persons or property, or

(i) to facilitate the escape from lawful custody of any person

(2) A document is not an exempt document by virtue of subclause (1):

(a) if it merely consists of:

(i) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law, or

(ii) a document containing a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law, or

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law, or

(iv) a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law), or

(v) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation, and

(b) if disclosure of the document would, on balance, be in the public interest.

(3) A document is an exempt document if it is a document that has been created by:

(a) the former Information and Intelligence Centre of the Police Service, the former State Intelligence Group, or

(b) the Counter Terrorism Co-ordination Command, the former Protective Security Group at the Police Service [NSW Police Force], the former Special Branch of the Police Service [NSW Police Force] or the former Bureau of Criminal Intelligence.
(3A) A document is an exempt document if it is a document that has been created by the State Crime Command of NSW Police [Force] in the exercise of its functions concerning the collection, analysis or dissemination of intelligence.

(3B) A document is an exempt document if it is a document that has been 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.

(4) In this clause, a reference to the law includes a reference to the law of the Commonwealth, the law of another State and the law of another country.”

11.5.2 It should be noted that in certain circumstances an agency may be able to ‘refuse to confirm or deny the existence of documents’ which fall within this exemption (see discussion at [4.7]).

Purpose of exemption

11.5.3 The purpose of this exemption is to ensure that confidential documents and information should not be released where such release would have an adverse effect on the ability of public authorities to carry out law enforcement functions, or may compromise the safety of any person. The clause also recognises that certain documents may be exempt if their release may prejudice the process of justice or lead to damage to personal or public property.

Applying the exemption

11.5.4 Applying this exemption requires particular sensitivity because of the need to balance concern that individuals may be endangered against the need to ensure that the exemption is not used unnecessarily.

‘Law’

11.5.5 In this exemption, the term ‘law’ is used in a broad sense and is not limited to criminal law only. It extends to laws of many kinds, including civil and regulatory laws. Child welfare laws, taxation laws, public health and safety legislation, and laws regulating business fall within the definition of ‘law’.

11.5.6 The exemptions in clause 4 may apply to documents resulting not only from the detection and punishment of violations of the law, including criminal proceedings, but also documents relating to the prevention of violations of the law or enforcement of the law through civil or regulatory proceedings.

11.5.7 Having said that, the term ‘enforcement or administration of law’ in clause 4(2)(b) is not so broad as to encompass all activities of government. Recent cases in the NSW ADT suggest that the term ‘enforcement or administration of law’ in clause 4(1)(b) is a composite term and should be
construed narrowly. In particular, it has been said that it is those activities which pertain to the ‘policing of criminal law or civil obligations’ (see eg Watkins v Chief Executive, Road Traffic Authority [2000] NSW ADT 11 (at [37-39) and BY v Director-General, Attorney-General’s Department (No 2) [2003] NSW ADT 37 at 43-51). For further discussion of the meaning of ‘enforcement or administration of law’ see [11.5.25-11.5.31] below.

11.5.8 The 'law' can be a law of the Commonwealth, of a State or Territory (including New South Wales), or a law of another country.

‘Could reasonably be expected’

11.5.9 The meaning of the phrase ‘could reasonably be expected’ is considered in general terms at [10.4.25-10.4.32].

Prejudice to investigation (clause 4(1)(a))

11.5.10 A document is exempt if it contains matter the disclosure of which could reasonably be expected:

"to prejudice the investigation of any contravention or possible contravention of the law (including any revenue law) whether generally or in a particular case" (clause 4(1)(a)).

11.5.11 In Mauger v General Manager, Wingecarribee Shire Council [1999] NSW ADT 35, the President of the ADT, O'Connor DCJ, noted:

"It is critical that investigations be conducted in a confidential way until any charges are laid and evidence in support produced publicly. Up to that point those who give information to law enforcement authorities are entitled to assume the confidentiality of the process. Strict confidentiality during the investigative process offers protection both to witnesses and persons adversely implicated by allegations. Breaches of the confidentiality of the process can cause great harm to the reputations of those named and adversely affect the conduct of any legal proceedings." (at 45)

11.5.12 ‘Prejudice’ is not a term of legal art, and means ‘to impede or derogate from’ (Sobh v Police Force of Victoria [1994] 1 VR 41 at 324).

11.5.13 Paragraph (a) may apply where the release of documents would result in a premature and unnecessary end to an investigation of a breach, or possible breach, of the law, or if disclosure would forewarn a suspect of the direction of the investigation and the evidence available against them (eg Case T66 (1986) 86 ATC 1,001). It is not necessary to be able to point to any actual breach of the law - it is enough that some breach may have occurred.

11.5.14 The fact that this exemption applies both ‘generally’ and ‘in a particular case’ means that it could apply to unspecified contraventions, which have occurred or may occur in the future. The fact that criminal charges are not pending in respect of certain people named in the documents is not relevant if there is evidence that the material may well be relied on by the agency in a future

11.5.15 In News Corporation Ltd v National Companies and Securities Commission (1984) 5 FCR 88 at 100, Woodward J indicated that it was necessary for an agency to present evidence of the status of an investigation (current, completed or dormant),

“to enable a proper assessment of whether or not the prejudice claimed is reasonable as opposed to being speculative, that is, irrational, absurd and ridiculous”.

11.5.16 It is unlikely that the exemption can apply if the investigation has closed. However, if the investigation is merely suspended or dormant rather than closed, the exemption may apply provided the expectation that the investigation may revive is more than speculative or theoretical (see eg Doulman and CEO of Customs [2003] AATA 883).

Examples

• A document disclosing the existence of evidence on which the police propose to rely would be exempt if disclosure of the document could lead to the evidence being destroyed by the offender - an act which would prejudice the investigation.

• If it can be shown that release of documents to a person in relation to an agency’s investigation of that person may result in the destruction of vital evidence or the person leaving the jurisdiction, such documents would be exempt under paragraph (a).

• A file disclosing the making of an audit check on a person to whom a grant of Commonwealth or State funds has been made and who is suspected of misusing those funds would also be exempt, if there were a reasonable belief that disclosure would prejudice the investigation.

• These are not, of course, the only possible examples.

Existence or identity of a confidential source of information (clause 4(1)(b))

11.5.17 A document is exempt where it contains matter the disclosure of which could reasonably be expected,

"to enable the existence or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be ascertained" (cl 4(1)(b)).

11.5.18 Paragraph (b) may be used if it could reasonably be expected that the release of documents would result in either a confidential source of information being ascertained or the identity of the person supplying the information being confirmed.
11.5.19 In *Schultz & ors v Commissioner of Police, NSW Police Service* [2003] NSW ADT 86, Robinson MA stated (at 23):

“I accept that the clear purpose of the sub-paragraph is to maintain a public willingness to provide government agencies who have a law enforcement function with relevant information, without, at the same time creating in those informants a fear of unwanted disclosure of their identity or of reprisals for supplying information (*Ingram v General Manager, Sutherland Shire Council* [2000] NSW ADT 69 at 27) and that the exemption is directed towards protecting the flow of information from the public rather than in relation to the contents of the document (*BY v Director General, Attorney General’s Department (No. 2)* [2003] NSW ADT 37 at 37).”

11.5.20 In *Mauger v General Manager, Wingecarribee Shire Council* [1999] NSW ADT 35, the President of the ADT, O’Connor DC, noted that:

“[e]xternal review tribunals and Commissioners in other jurisdictions have consistently supported an interpretation of the law enforcement exemption which protects the identity of informants” (at 34).

‘confidential source of information’

11.5.21 A source of information is confidential if information is provided under an express or implied pledge of confidentiality (*Department of Health v Jephcott* (1985) 62 ALR 421).

11.5.22 NSW Police may assume that information given to them by informants is given on a confidential basis (*Fisher v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 267 (at 34).

11.5.23 Generally, whether information was supplied on an implicit understanding of confidentiality requires an evaluation of the relevant circumstances, including:

- the nature of the information conveyed;
- the relationship of the informant to the person informed upon;
- whether the informant stands in a position analogous to that of a police informer;
- whether it could reasonably have been understood by the informant and the recipient that the appropriate action could be taken in respect of the information conveyed while still preserving the confidentiality of its source;
- whether there is any real (as opposed to fanciful) risk that the informant may be subject to harassment or other retributive action or could otherwise suffer detriment if the informant’s identity were to be disclosed; and
- any indications on the part of the informant to keep his or her identity confidential (*Re McEneiry and Medical Board of Queensland* (1994) 1 QAR 349, at 371).
11.5.24 Whether the applicant already knows the identity of the informant is irrelevant, since release under the FOI Act is publication to the world (DZ v Commissioner of Police, New South Wales Police Service [2002] NSWADT 274).

‘enforcement or administration of the law’

11.5.25 This clause covers not only police informants but may also apply where individuals supply confidential information to other government agencies involved in law enforcement (eg Taylor v Chief Inspector, RSPCA [1999] NSWADT 23).

11.5.26 It is unclear, however, the extent to which the clause extends beyond the enforcement of criminal law. Although ‘law’ has generally been taken to have a broad meaning (see [11.5.5-11.5.8] above) there are competing views as to the ambit of what constitutes ‘enforcement or administration of the law’. If an FOI application is made to an agency and there is doubt as to whether this exemption might apply with respect to its particular functions, then it may be appropriate for that agency to seek specific legal advice.

11.5.27 In Forbutt v Centrelink [2005] AATA 814, the AAT accepted that the meaning of enforcement or administration of law extended to allegations about unlawful receipt of Centrelink benefits.

11.5.28 In Watkins v Chief Executive Roads and Traffic Authority (2000) NSWADT 11, the ADT held that the reference to ‘enforcement or administration of the law’ should be given a narrow meaning which requires the documents to ‘be concerned with the process of the enforcement of legal rights or duties’. This means that paragraph 4(1)(b) can only be applied to information that pertains to the activities of agencies that relate to law enforcement. The ADT provided the following comments:

“The language of the exemption is directed at establishing for FOI purposes an exemption comparable with the ‘police informer’ privilege in courts, with the reference to ‘or administration of the law’ reflecting the extension of the privilege to informers not only to police agencies, but also in some analogous situations... A further reason for reading the elements of clause 4(1)(b) as being directed at documents which have a connection with the activities of agencies by way of ‘law enforcement’ is to give a rational operation to clause 4(2)(a)(iv) and (v) and (b).”

11.5.29 Similarly, in BY v Director General, Attorney General’s Department (No 2) [2003] NSW ADT 37, President O’Connor indicated that cl 4(1)(b) was directed toward the ‘protection of criminal justice and emergency services functions’. That case concerned the Legal Practitioners Admissions Board, which was held to be ‘more like a licensing authority...[than]...a body set up to engage in active investigation’, and the exemption did not apply there (at 52).
11.5.30 Royal Commissions and other commissions of inquiry may concern the ‘administration of law’ (see eg Re Gold and Australian Federal Police and National Crime Authority (1994) 37 ALD 168 in which it was held that a Royal Commission concerned the administration of law, for the purposes of Commonwealth FOI legislation).

11.5.31 The exemption may not apply to subsequent documents created from information obtained from a confidential informant and used for other purposes, if it has no bearing on law enforcement issues.

‘identity or existence’

11.5.32 In some cases, keeping confidential the fact of the existence of a confidential source may be as important as maintaining confidentiality in the identity of the source to whom anonymity has been promised (see Department of Health v Jephcott (1985) 62 ALR 421).

11.5.33 In relation to identity, the exemption applies only if there is a reasonable expectation that the identity of the confidential source will be ascertainable from the contents of the document.

11.5.34 This may be because the information in question could only have been obtained from one person, or from a very small group of people, even if the document does not otherwise name or otherwise contain identifying information about the informant.

11.5.35 On the other hand, if the informant’s identity is not apparent on the face of the document and the information is of a general nature, then it is unlikely to lead to the identification of the source (Re Bartlett and Secretary, Department of Social Security [1998] AATA 717).

11.5.36 Whether information could reasonably be expected to result in the identification of an informant may depend upon the relevant pool of potential persons to whom such general information might apply. So, for example, disclosing the gender of an informant would, by itself, be unlikely to result in his or her identification. On the other hand, in Re Bartlett and Secretary, Department of Social Security [1998] AATA 717 it was held that identifying the organisation with which an informant was associated had an ‘even chance’ of resulting in the identification of the informant, given that it was already known that the informant was from Launceston and ‘Launceston is such a small place’ (at 12).

11.5.37 Decision-makers may also take into account the potential ‘mosaic effect’ of information from various documents. In Saleam v Commissioner of Police, New South Wales [2002] NSWADT 40, the ADT held that the exemption could apply where the applicant (together or with others) undertakes a systematic approach to the making of a number of FOI applications with the ultimate aim of putting the pieces together and discovering the identity of a source, even though the identity is not ascertainable from any single
11.5.38 Decision-makers must also bear in mind that a person’s identity can in some circumstances be ascertained from their handwriting, or from the document’s letterhead or other features.

11.5.39 It is important to note that this exemption aims to protect the source of the information, rather than the information itself. This means that the exemption may continue to apply even if the information supplied is out of date or incorrect, or even if the informant has been untruthful.

“the legislation is clearly designed to protect the identity of informers and does not differentiate between the good, the bad or the indifferent” (Re Richardson and Commissioner for Corporate Affairs (1987) 2 VAR 51).

11.5.40 There is, however, some dispute as to whether the exemption will continue to apply if the agency is satisfied that the informant has acted maliciously in giving false information (Odisho v Chief Executive, Roads and Traffic Authority [2001] NSWADT 49). Until that issue is authoritatively resolved, agencies should assume that the fact that an informant may have been motivated by malice is irrelevant, and the exemption still applies.

[policy] Agencies should bear in mind, however, that (in the absence of a Ministerial Certificate) they have discretion as to whether they refuse access to exempt documents (see [10.5]).

Example:

• Documents which may identify the identity of a person providing information to an agency about illegal drug transactions would be exempt under clause 4(1)(b).

Endangerment of life or physical safety (clause 4(1)(c))

11.5.41 A document is exempt where it contains matter the disclosure of which could reasonably be expected ‘to endanger the life or physical safety of any person’ (clause 4(1)(c)).

11.5.42 If agencies intend to withhold material on the basis that life or physical safety may be endangered there must be a reasonable apprehension that such harm is likely to occur (State Electoral Office v McCabe [2003] NSWADTAP 28).

11.5.43 The test to be applied is an objective one (Centrelink v Dykstra [2002] FCA 1442). However, while a person’s subjective fear of harm is not of itself decisive, the Victorian Tribunal has held that if the person’s fear is both genuinely and reasonably held then the exemption will apply (O’Sullivan v Victoria Police [2005] VCAT 532).
11.5.44 In *Ward v Australian Federal Police* (unreported, AAT, Cth, V85/414, 20 Feb 1987 D165), the Tribunal refused access to a document on a prisoner's police file as it contained information relating to a narcotics agent. The AAT said that there was a substantial risk that the applicant's fellow prisoners might gain access to the information if it were released and that violent action might follow.

11.5.45 The reference to 'any person' includes members of government agencies.

11.5.46 The fact that a person feels aggrieved at the behaviour of government officials (whether that grievance is reasonable or not) and is prone to intemperate verbal abuse does not of itself mean that there is a reasonable expectation that the person would commit acts that would endanger the physical safety of those government officials (*State of Queensland v Albietz* (1996) 1 QdR 215). In *Re Toren* (unreported, AAT, 6 March 1995), the Commonwealth AAT observed that bad relationships between people 'are not inevitably accompanied by physical harm'.

Example

- A document identifying a complainant to a public authority may be exempt under clause 4(1)(c) if the person who has been complained about has a record of or reputation for violence.

**Prejudice of fair trial or adjudication of a case (clause 4(1)(d))**

11.5.47 A document is exempt where it contains matter the disclosure of which could reasonably be expected 'to prejudice the fair trial of any person or the impartial adjudication of any case' (clause 4(1)(d)).

11.5.48 The reference to 'trial' suggests a criminal trial, or possibly civil proceedings before a court. The use of the word 'adjudication', however, broadens the provision to include other hearings. Arguably, this clause applies to hearings of a tribunal and not just to court proceedings.

11.5.49 Documents to which this exemption applies might also be exempt under clause 17 (see [13.9]).

Example

- A document containing information that a person standing trial is suspected of having committed other offences may, if revealed, prejudice the fair trial of that person.

**Prejudice to investigative etc procedures (clause 4(1)(e))**

11.5.50 A document is exempt if its disclosure could reasonably be expected, "to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue law)" (clause 4(1)(e)).
11.5.51 This exemption applies where an agency is of the view that disclosing documents may mean that its procedures and strategies for detecting possible breaches of the law may become less effective or ineffective, for example by alerting applicants to possible means of frustrating relevant methods or procedures (eg Re Murphy and Australian Electoral Commission (1994) 33 ALD 718, where the equivalent Commonwealth exemption was held to apply to exempt internal guidelines setting out what would be considered a valid and sufficient reason for not voting).

11.5.52 As to the meaning of ‘prejudice’ see [11.5.11-11.5.12] above.

11.5.53 As to the meaning of ‘law’ see [11.5.5-11.5.8]. The breaches of the law being detected do not need to lead to criminal enforcement (Re T and Queensland Health [1994] QAR 386 at 391) - although see also the discussion at [11.5.25-11.5.36].

11.5.54 In Re Michelberg and Australian Federal Police (1984) 6 ALN N176 access to documents on police files was refused on the basis that it would disclose methods and procedures used by State and Commonwealth Police Forces.

11.5.55 The exemption does not necessarily require that the procedure be covert or secret. However, prejudice is less likely to occur by disclosure where the effectiveness of the procedures does not depend upon them remaining secret, for example where they are ‘the obvious course of action’ or are otherwise overt (Re T and Queensland Health [1994] QAR 386).

Examples

- The effectiveness of the procedures used by the police for locating random breath testing stations may be affected if documents containing information on proposed survey locations were disclosed prior to the proposed surveys being conducted.

- The effectiveness of procedures for facilitating traffic surveillance, by way of ‘red light’ cameras at various intersections, may be reduced if details of these procedures were to be disclosed.

- The effectiveness of procedures for monitoring standards of cleanliness in shops and restaurants etc may be affected if documents containing information on the procedures to be adopted (not the standards themselves) were disclosed.

Prejudice to public safety methods (clause 4(1)(f))

11.5.56 A document is exempt if its disclosure could reasonably be expected,

  “to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety” (clause 4(1)(f)).

11.5.57 Considerations similar to those related to ‘prejudice to investigative etc procedures’ (see [11.5.50-11.5.55]) are involved here.
11.5.58 The question of what might fall within the concept of ‘public safety’ measures for the purposes of the exemption has not been authoritatively considered in the New South Wales.

11.5.59 In relation to the analogous Commonwealth provision, the AAT has stated:

“‘public safety’…does not extend beyond safety from actual violations of the law and breaches of the peace. It does not extend to air travel safety, except to the extent that might be put at risk by such violations or breaches.” (Re Thies and Department of Aviation (1986) 9 ALD 454).

However, that view may be too narrow. In a later decision, the AAT said:

“In our view the words ‘public safety' ought not to be confined to any particular situation. They would certainly not be confined to what might be described as civil emergencies, such as bushfires or floods…” (Re Parisi and Australian Federal Police; Queensland (1987) 14 ALD 11 at 25).

Endangerment of security

11.5.60 A document is exempt if its disclosure could reasonably be expected, “to endanger the security of any building, structure or vehicle” (clause 4(1)(g)).

Example

- The release of documents dealing with out-of-hours security procedures relating to government offices may jeopardise the security of that building, particularly if threats have been made against staff of the relevant agency.

Prejudice to systems to protect persons/property

11.5.61 A document is exempt if its disclosure could reasonably be expected, “to prejudice any system or procedure for the protection of persons or property” (clause 4(1)(h)).

11.5.62 This provision largely overlaps with clause 4(1)(f).

Facilitation of escape from lawful custody

11.5.63 A document is exempt if its disclosure could reasonably be expected, “to facilitate the escape from lawful custody of any person” (clause 4(1)(i)).

Limitations on the exemption

11.5.64 Clause 4(2) lists certain situations where the exemptions in clause 4(1) do not apply. This is where:

(1) the document consists of one of the five categories of documents described in clause 4(2)(a); and
(2) the public interest in disclosure outweighs the public interest in non-disclosure.

11.5.65 Only if the documents fall within one of the categories in clause 4(2)(a) does the public interest test arise – a public interest test does not otherwise apply to documents falling within the scope of clause 4(1).

11.5.66 The wording of this public interest test is different to the wording of the public interest tests in other clauses of Schedule 1. The test in clause 4(2) requires that the documents not be released unless the decision-maker is satisfied that release is in the public interest. In contrast, the public interest tests in other clauses of Schedule 1 require that the documents be released unless the decision-maker is satisfied that release is contrary to the public interest.

11.5.67 For how to apply the ‘public interest’ test see [10.4.1-10.4.22].

11.5.68 The five categories of documents which may not be exempt (subject to the public interest test) are those which consist merely of:

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“(i) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law, or

(ii) a document containing a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law, or

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law, or

(iv) a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law), or

(v) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation.”
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11.5.69 These five categories deal with situations where the information is of a kind such that its release would be unlikely to cause any prejudice to the investigatory functions of an agency, or which reveals that an agency has itself breached the law in its investigation.

Example:

- An example of clause 4(2)(a)(iii) would be a document containing a report which states that the number of drivers apprehended by random breath testing patrols had increased over the last year.
11.5.70 All documents created by:
   • the Counter Terrorism Co-ordination Command;
   • the former Information and Intelligence Centre;
   • the former State Intelligence Group;
   • the former Protective Security Group;
   • the former Special Branch (but see [11.5.73] below); and
   • the former Bureau of Criminal Intelligence,

are exempt from mandatory disclosure, regardless of their content.

11.5.71 This protection also extends to documents created by those agencies which are in the possession of some other agency or Minister (cl.4(3)).

11.5.72 However, this exemption does not cover all documents held by the above agencies. It only applies to those documents which have been created by them.

11.5.73 The Commissioner of Police has decided that this clause will not be relied upon to refuse access to documents held by the former Special Branch. In March 1999, the Premier announced publicly that a 50% reduction in fees and charges would apply to applications under the FOI Act for files of the former Special Branch which relate to an applicant’s own personal affairs.

11.5.74 A document is an exempt document if it is a document that has been 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 (clause 4(3A)).

11.5.75 A document is an exempt document if it is a document that has been 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 (cl.4(3B)).
Dealing with complaints against third parties

Agencies throughout New South Wales from time to time receive complaints from members of the public about other members of the public. Such complaints, which can vary extensively in both their content and force of objection, typically relate to alleged breaches of noise, health or environmental regulations, building standards, the terms and conditions of building approvals or development consents, or proposed building or development applications and plans. For a discussion of complaints against development approvals, see [12.3.32].

It is not uncommon that the subject of the complaint will want to know not only what has been said about him or her, but also the identity of the person who has made the complaint.

Department of Premier and Cabinet takes the view that FOI applications for such information need to be considered on a case-by-case basis, having regard, for example, to the exemptions in clause 4 (documents affecting law enforcement and public safety) – see [11.5]), clause 6 (documents affecting personal affairs) – see [12.3], clause 13 (confidential information) or clause 16 (documents concerning operations of agencies, and especially 16(a)(iv), documents which have a substantial adverse effect on the effective performance by an agency of the agency’s functions) – see [13.8]. Agencies must also be aware of the exemption in clause 20(1)(d), in respect of protected disclosures within the meaning of the Protected Disclosures Act 1994 – see [13.12.7-13.12.8].

Ombudsman’s Guidance

The following guidance sets out the general approach that the Ombudsman considers appropriate when agencies receive FOI applications seeking details of complaints made to the agency against the applicant by another person.

Guidance in relation to complaints about development applications, and complaints alleging sexual harassment, are addressed in the section of this Manual which deals with the personal affairs exemption (see [12.3.32] and [12.3.45] respectively).

The approach to the release of copies or details of complaints varies amongst agencies and according to the type of complaint. Some local councils maintain an open access policy and will nearly always allow access to letters or details of complaints without even the need to make an FOI application. Other agencies refuse to disclose not only the identity of a complainant but also what has been said about third parties the subject of the complaint, even in response to FOI applications.

Procedural fairness (otherwise known as natural justice) generally requires that a person should be informed of any allegations of wrong-doing or adverse comment made about him or her, where this is the basis of any action by an administrative decision-maker which could result in an adverse effect on the rights, interests, status or reputation of the person.

When a person writes to an agency complaining of the actions of another person, eg a neighbour, the complaint is often made on the basis that the complainant believes that a legal requirement is being breached and that the agency should take action. Any action taken by the agency in such circumstances could often affect the rights, interest, status or reputation of the person about whom the complaint was made. The Ombudsman is of the view that in such circumstances procedural fairness would require that, where explanations are sought from the person who has been complained about, information should have been or be given to that person, at least as to the substance of the complaint.
Where the person complained about makes an FOI application for the letter or record of complaint it may be appropriate for the agency to disclose it. At the same time, the letter or record of complaint may disclose matters personal to the complainant or his or her family or other residents from which the identity of a complainant is apparent. Depending on the circumstances, such a disclosure may amount to an unreasonable disclosure of personal affairs.

Where the documents applied for contain information concerning the personal affairs of a person, s. 31 of the Act requires the agency to consult with the complainant or other person before such information is released. It would generally be appropriate to disclose the letter of complaint to an FOI applicant where it is possible to do so without prejudicing the supply of information about breaches of the law to the agency, detailing the identity or the personal affairs of the complainant or any other person, or incurring a risk to the complainant or any other person.

It is a separate, and more contentious, question as to whether or not information disclosing the identity of the complainant should be obliterated or disclosed to the person the subject of the complaint. The rights of the person the subject of the complaint to receive information under the FOI Act which identifies the complainant has to be balanced against such things as whether disclosure would:

- prejudice the future supply to the agency of information identifying breaches of the law; or
- endanger the life or physical safety of the complainant or any other person; or
- amount to an unreasonable disclosure of personal information about the complainant or any other person.

Where the disclosure would involve the disclosure of personal affairs information, or where there is uncertainty as to any of the above possibilities, the agency should seek the views of the complainant under s.31.

The ADT has indicated in a number of decisions that it is open to agencies responsible for enforcing the law to withhold information relating to the identity of informants (eg Mauger v General Manager, Wingecarribee Shire Council [1999] NSW ADT 35 – see [11.5.20]and BY v Director- General, Attorney General’s Department (No 2) [2003] NSW ADT 37 – see [11.5.29]).

Generally speaking, the Ombudsman is of the view that a strong argument can be made out for the non-disclosure of the identity of a complainant where:

- the complaint was clearly made in good faith and discloses a contravention or possible contravention of the law, for the purpose of enabling or assisting the agency to enforce or administer the law (clause 4(1)(a) and (b) of Schedule 1); OR
- it is clear that the life or physical safety of the complainant could reasonably be expected to be endangered (clause 4(1)(c) of Schedule 1); OR
- there are facts in relation to the complainant, other than the mere fact that a particular person has made a complaint, which would amount to an unreasonable disclosure of information concerning personal affairs (as discussed at [12.3.21-12.3.28]).

However, the Ombudsman believes that disclosure of information that identifies a complainant may be appropriate in certain circumstances, particularly where:

- the agency has a public policy of disclosing the identity of complainants; or
• the agency is of the opinion that the identity of a complainant should be disclosed in the particular circumstances that apply; or
• the identity of the complainant has already been disclosed in a publicly available document, such as a council business paper or the minutes of a council meeting; or
• the complaint is merely an objection to council about a development application [12.2.56]; or
• the complaint does not relate to the enforcement or administration of the law; or
• the complaint is clearly malicious or not made in good faith (a view endorsed by the ADT in Mauger v General Manager, Wingecarribee Shire Council); or
• the complaintant was notified at the time of making the complaint that the identity of complainants is routinely disclosed on request, or to FOI applicants; or
• the complaintant was consulted about the FOI application and did not object; or
• there are no facts disclosed in the complaint, or notified by the complainant, which would amount to an unreasonable disclosure of personal affairs, other than the fact that a particular person has made a complaint.

Child protection information

Government agencies that have any responsibility for the overall protection of children often receive complaints or reports concerning the welfare of children.

There is clearly a pre-eminent public interest in the mental and physical protection of children. Therefore, while it is still essential that each application under the FOI Act is considered on its merits, the Ombudsman’s view is that it would generally not be unreasonable to claim, given the high priority which must be given to encouraging the receipt by the appropriate government agencies of such information, that the information was given in an implicit (if not explicit) relationship of confidentiality, that the information if disclosed could reasonably be expected to prejudice its future supply and that its disclosure would on balance be contrary to the public interest. Therefore, such information will generally be considered by the Ombudsman as being covered by clause 13, either (a) or (b), of Schedule 1 of the FOI Act.

For example, the Ombudsman would take the view that the Departments of Community Services and Education & Training should not be hindered from receiving information about children who are, or may be, at risk at home or elsewhere, or whose psychological or physical welfare is threatened in school or school-related situations. Consequently, the Ombudsman accepts that complaints made or information given about such incidents should generally be considered as being made in confidence. The identity of complainants/informants would also usually be covered by the exemption.

This issue was addressed by the Administrative Decisions Tribunal in Vranic v Director General, Department of Community Services [2001] NSW ADT 129 at 51 in the following terms:

* It is abundantly clear that the decision to deny the applicant access to the document(s), which would have identified the person(s) who complained to the Department, was the correct and preferable decision.

If for no other reason, it was correct because the source of the information given to the Department was given confidentially, and related to the enforcement and administration of child welfare legislation.

[Schedule 1, clause 4(1)(b).]
The decision is akin to a claim of ‘public interest immunity’ at common law in court proceedings. The state has a significant interest in ensuring that confidential information flows to law enforcement and administrative agencies. In relation to criminal law enforcement and child welfare law enforcement, informants will frequently require anonymity before they will divulge information of crucial importance to the authorities. Confidential informers are, almost by definition, persons who have the confidence of or insider knowledge about the person(s) concerning whom they are able to give information. If identified as the source of information to the authorities not only is their capacity to garner information likely to be diminished or destroyed, but they may face retribution, even serious violence.

Law enforcement and child protection agencies are dependent to a large degree upon the resources and assistance of the community to maintain the peace and to ensure the safety of individual members of the community. Were persons who are willing to give information confidentially to the authorities to become aware that such information was made available to the subjects themselves, it would inevitably lead to a drying-up of the flow of information to agencies. This in turn would lead to the jeopardising of the welfare of individuals and the community as a whole.

The mere fact that information is given does not, of itself, make it confidential. There must be an express or implied promise of confidentiality. As previously indicated, I infer from all the circumstances that it was on the basis of a pledge of confidentiality that the information concerning Mrs Vranic’s children was supplied to the Department.

This is a case where the public interest in maintaining the confidentiality of the informant’s identity outweighs the applicant’s personal interest in that information. For that reason, if for no other, the application must fail.”

Information notifying government agencies of possible or definite instances of sexual, physical or psychological abuse of children may also be covered by the secrecy provisions of the agencies’ own statute/s (e.g., ss. 29 and 254 of the Children & Young Persons (Care and Protection) Act 1998) and, therefore, possibly also by clause 12 of Schedule 1 of the FOI Act.

Where it is abundantly clear that information has been submitted in bad faith, that is, where information was clearly false and was known by the informant to be false at the time he/she provided it, it may be that the weight of public interest would swing towards disclosure of, at least, the informant’s identity. If so, clause 13(b)(iii) would not be met, or, if clause 12 were relied upon by an agency to exempt such information, the Ombudsman may choose to rely upon s. 52(6)(a) to recommend its release.

11.6 Clause 4A - Documents affecting counter-terrorism measures

11.6.1 Clause 4A of Schedule 1 states:

“(1) In this clause:

terrorist act has the same meaning as in the Terrorism (Police Powers) Act 2002.

(2) A document is an exempt document if it contains matter the disclosure of which could reasonably be expected:

(a) to facilitate the commission of a terrorist act, or

(b) to prejudice the prevention of, preparedness against, response to, or recovery from, the commission of a terrorist act.
(3) A document is not an exempt document:
   (a) if it merely consists of:
       (i) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law, or
       (ii) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation, and
   (b) if disclosure of the document would, on balance, be in the public interest.
(4) In this clause, a reference to the law includes a reference to the law of the Commonwealth, the law of another State and the law of another country.”

11.6.2 ‘Terrorist act’ is defined in the Terrorism (Police Powers) Act 2002, as follows:

“(1) General

In this Act, terrorist act means an action where:
   (a) the action falls within subsection (2) and does not fall within subsection (3), and
   (b) the action is done with the intention of advancing a political, religious or ideological cause, and
   (c) the action is done with the intention of:
       (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country, or
       (ii) intimidating the public or a section of the public.

(2) Action included

Action falls within this subsection if it:
   (a) causes serious harm that is physical harm to a person, or
   (b) causes serious damage to property, or
   (c) causes a person’s death, or
   (d) endangers a person’s life, other than the life of the person taking the action, or
   (e) creates a serious risk to the health or safety of the public or a section of the public, or
   (f) seriously interferes with, seriously disrupts, or destroys, an
electronic system including, but not limited to:

(i) an information system, or
(ii) a telecommunications system, or
(iii) a financial system, or
(iv) a system used for the delivery of essential government services, or
(v) a system used for, or by, an essential public utility, or
(vi) a system used for, or by, a transport system.

(3) Action excluded
Action falls within this subsection if it:

(a) is advocacy, protest, dissent or industrial action, and
(b) is not intended:

(i) to cause serious harm that is physical harm to a person, or
(ii) to cause a person’s death, or
(iii) to endanger the life of a person, other than the person taking the action, or
(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) Application
In this section:

A reference to any person or property is a reference to any person or property wherever situated, within or outside the State (including within or outside Australia).

A reference to the public includes a reference to the public of another State or Territory or of a country other than Australia.”

Applying the exemption

11.6.3 When applying this exemption, Ministers and agencies will need to consider whether the release of the documents ‘could reasonably be expected’ to facilitate the commission of a terrorist act, or to prejudice terrorism prevention, preparedness, response or recovery.

11.6.4 As to the meaning of ‘could reasonably be expected [10.4.45-10.4.32].
11.6.5 In considering whether documents are covered by this exemption, Ministers and agencies will also need to keep in mind that information released under the FOI Act is free to be disseminated to the public at large. Release of information under FOI cannot be restricted to the particular applicant.

11.6.6 To rely on this exemption it is not necessary to show that a specific terrorist attack is suspected or feared. In *Hutchinson v Roads and Traffic Authority of NSW* [2006] NSWADT 147 it was held that photographs showing structural details of the Sydney Harbour Bridge could reasonably be expected to facilitate a terrorist attack and were therefore exempt under clause 4A.

11.6.7 There is no requirement to apply a public interest test unless the document merely consists of a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law, or a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation (clause 4A(3)). This public interest test would be applied in the same manner as the public interest test in clause 4(2) (see [10.4.1-10.2.23]).
12 Exemptions (Documents requiring consultation - Schedule 1, Part 2)

12.1 Overview

12.1.1 Consultation with the relevant third party is required before access is provided to:

- documents affecting inter-governmental relations (clause 5);
- documents affecting personal affairs (clause 6);
- documents affecting business affairs (clause 7); and
- documents affecting the conduct of research (clause 8).

After such consultation takes place, a decision must be made by the agency or Minister’s office as to whether the criteria set out in the exemption are satisfied.

12.1.2 Consultation is not required if an agency determines that the documents should not be released because the criteria in the exemption clause have been met and that it would be inappropriate to release the documents irrespective of the views of the third party. Having said that, even if an agency forms such a view, it may be appropriate still to consult in order to obtain further evidence to justify the exemption (see further [4.3]).

12.1.3 If the agency decides that the document is not exempt (and therefore should be released) and this is contrary to the third party’s views, then the third party must be advised of his/her rights to appeal against or seek a review of the agency’s decision.

12.1.4 This part of the manual should be read in conjunction with ss30-33 of the Act (‘Documents requiring consultation’). The procedures for consultation are discussed in Chapter 4 (see [4.3]).

12.2 Clause 5 - Documents affecting inter-governmental relations

12.2.1 Clause 5 of Schedule 1 states:

“A document is an exempt document if it contains matter:

(a) the disclosure of which:

(i) could reasonably be expected to cause damage to relations between the Government of New South Wales and the Government of the Commonwealth or of another State, or

(ii) would divulge information communicated in confidence by or on behalf of the Government of the Commonwealth or of another State to the Government of New South Wales or to an agency or other person or body receiving the communication on behalf of the Government of New South Wales, and

(b) the disclosure of which would, on balance, be contrary to the public interest.”
Purpose of exemption

12.2.2 This exemption recognises the importance of good relations between the Commonwealth and the States in a federal system. It allows for intergovernmental documents to be protected, and requires consultation before a decision is made to allow access to documents where interstate interests may be adversely affected.

Applying the exemption

12.2.3 Some of the situations in which this exemption may apply to a document include the following:

- a document which originated in another State or in the Commonwealth;
- a document which contains extracts from a document which originated in another State or in the Commonwealth; or
- a document which was created by an agency or a Minister and contains confidential information about or received from another State or the Commonwealth.

12.2.4 As with FOI requests generally, the relevant documents affected are those in the possession or custody of an agency at the time a request for access is received. It does not matter if the documents originated from another person or agency.

12.2.5 This clause should be read in conjunction with s.30 of the Act, which specifies that documents affecting inter-governmental relations should be subject to consultation procedures (see [4.3]).

12.2.6 Similar provisions exist in both the Commonwealth and Victorian FOI Acts.

'Could reasonably be expected'

12.2.7 The meaning of 'could reasonably be expected' is discussed at [10.4.25-10.4.32] above.

'Cause damage to relations'

12.2.8 The phrase 'cause damage to relations' should be understood in its ordinary meaning of 'harm' or 'cause detriment to'.

12.2.9 To decide whether disclosure could reasonably be expected to cause damage to Commonwealth/State or State/State relations, consideration should be given to whether disclosure would, for example:

- create difficulty in the conduct of relations between NSW and the Commonwealth or another State;
- disclose negotiating positions; or
- substantially impair good working relationships between NSW and another State or the Commonwealth. This might be the case if disclosure would prejudice the future flow of information required:
- for the proper administration of Commonwealth/State projects or programs;
- for the development of future programs; or
- for the proper administration of laws or programs.

12.2.10 In *Re Anderson and Department of Special Minister of State* (1984) 7 ALN N155 the equivalent Commonwealth exemption was held to apply to prevent access to documents containing information supplied by a police force of a State to the Commonwealth. The need to allow full and free exchange of information, and yet preserve its confidentiality, was seen as essential.

12.2.11 It has been held, in relation to the equivalent provision in the Commonwealth legislation, that ‘relations between the Commonwealth and a State’ refers to the totality of relations including the need for a close working relationship over a wide spectrum of matters and at various levels between representatives of each government (*Arnold v Queensland* (1987) 73 ALR 607).

Information ‘communicated in confidence’

12.2.12 It has been held that the phrase ‘communicated in confidence’ in an equivalent section of the Commonwealth Act is not meant to be interpreted in the sense that it is used at common law (*Re Angel and Department of Arts, Heritage and the Environment*) (1985) 9 ALD 113). Therefore, there is no requirement that the information be of a sort whose disclosure would found an action for breach of confidence (*Re Cosco Holdings Pty Limited and Department of Treasury* (1998) 51 ALD 140).

12.2.13 If there is an express agreement, confidentiality will be clear. However, a course of conduct whereby information is held in confidence over a period of time may be sufficient to establish that information was in fact communicated in confidence. It must also have been communicated in the reasonable expectation that it would not be divulged to anyone else without the express consent of the government making the information available.

12.2.14 The manner in which the document was communicated and the expectations of the other State or Commonwealth government are important.

Public interest considerations

12.2.15 The concept of the ‘public interest’ is discussed more fully in Chapter 10 – see [10.4.1-10.4.22].

12.2.16 In relation to intergovernmental relations, a free flow of matters of public interest between NSW and other States or the Commonwealth must be maintained. Ministers and their advisers should be able to meet and
12.2.17 If the initial criteria in clause 5 are satisfied (that is, the document was communicated in confidence and its disclosure is expected to cause damage to intergovernmental relations) then there will be a presumption that disclosure would be contrary to the public interest, unless there are strong countervailing public interest considerations to justify disclosure (*Re Mann and Australian Tax Office* (1985) 7 ALD 698; *Arnold v State of Queensland* (1987) 73 ALR 607).

12.2.18 In refusing access, a Minister or agency must advise the applicant in the written determination of both the public interest considerations concerning disclosure, including the material questions of fact which show why disclosure would prejudice inter-governmental relations or divulge information communicated in confidence.

12.2.19 Although earlier decisions of the AAT suggested that the views of the government from which the document originated would in many cases amount to a de facto veto, the full Court of the Federal Court has held that the views of that government,

"should be given considerable weight but should not be treated as determinative" (*Arnold v State of Queensland* (1987) 73 ALR 607).

**FOI requests made to the Commonwealth for documents provided by State Government agencies**

12.2.20 FOI requests received by Commonwealth agencies for access to documents which originated from the State government are governed by the Commonwealth FOI Act. Such documents may be exempt under s.33a (‘Documents affecting relations with States’) of the Commonwealth Act.

12.2.21 If a request is made to a Commonwealth agency, it is required to consult with the relevant State government. State Government agencies must advise the Commonwealth if, and why, release could reasonably be expected to cause damage to relations between the Commonwealth and the State and whether disclosure would divulge information or matter which was communicated in confidence.

12.2.22 Any evidence or material to be provided as part of the consultation process will need to be carefully considered. In particular, agencies should bear in mind that any such material will, once given to the Commonwealth, also potentially become subject to the Commonwealth FOI regime.

12.2.23 The decision to release or exempt is made by the relevant Commonwealth agency.

12.2.24 As with the other forms of exemption where consultation is required, a State government agency would have the right of review and appeal rights of a third party if the Commonwealth government agency decided
to release the documents against the wishes of the State government agency. However, in this case, the review application would be made to the Commonwealth Administrative Appeals Tribunal (http://www.aat.gov.au).

12.3 Clause 6 - Documents affecting personal affairs
12.3.1 Clause 6 of Schedule 1 states:

"(1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (whether living or deceased).

(2) A document is not an exempt document by virtue of this clause merely because it contains information concerning the person by or on whose behalf an application for access to the document is being made."

Purpose of exemption

12.3.2 This exemption is designed to protect the privacy of individuals. It sets in place controls to prevent the indiscriminate release of information about individuals. These controls include prior consultation with the person whose personal affairs are the subject of the FOI application.

12.3.3 Deputy President Hennessey of the ADT has commented:

“The purpose of the personal affairs exemption is to allow the public interest in personal privacy to be balanced against the public interest in people having open access to information held by government. Privacy is an important right enshrined in various international human rights instruments including the International Covenant on Civil and Political Rights, Article 17. Access to information held by government, reflected in the principles of openness, accountability and responsibility of government, is also a fundamental principle which the FOI Act seeks to enshrine” (Gilling v Hawkesbury City Council (1999) NSWADT 43 at 33).

12.3.4 An important aspect of the right to privacy is the right to control information concerning oneself. The Act recognises this by stating that the exemption cannot be used to stop an applicant obtaining information about himself or herself (clause 6(2)).

12.3.5 The former President of the NSW Court of Appeal, Justice Kirby has stated that:

“The general object of the clause is to protect private information of third parties who may be referred to in agency documents but who may be unaware that their private affairs stand subject to exposure by a claim for access made under the Act” (Commissioner of Police v District Court of NSW and Perrin (1993) 31 NSWLR 606).
Applying the exemption

12.3.6 The following two criteria must be fulfilled to fall within this exemption:

(1) the documents must contain information concerning a person’s ‘personal affairs’, and

(2) the disclosure of that information must involve ‘unreasonable’ disclosure of that information.

12.3.7 If the person whose personal affairs are involved does not consent to the documents being released, then that is one factor which suggests that it would be unreasonable to disclose the documents (see [12.3.23] below).

12.3.8 However, there may be matters of public interest tending in favour of disclosure which outweigh the invasion of privacy concerned, so as to make it reasonable to release the documents without the person’s consent.

12.3.9 If a decision is made to release the document, the person must be told of that decision and advised of his/her rights to internal and external review. The document must not be released until after such review, or after the expiration of the time period for conducting such review has passed.

12.3.10 The Personnel Handbook published by the Department of Premier and Cabinet contains guidelines on the release of personnel information to people employed under the Public Sector Employment and Management Act 2002 (at 5-3.3, 5-3.4.3 – 5.3.4.5 & 5-3.4.9).

Requirement to consult

12.3.11 An agency must not decide to release documents until after it has taken such steps as are reasonably practicable to obtain the views of the person about whose personal affairs information is contained in the documents the subject of the FOI application (s.31).

12.3.12 Where the person is deceased, the agency must consult with the person’s closest living relative who is at least 18 years of age (s.31(5)). How the closest living relative may be identified is discussed at [3.2.20].

12.3.13 Where an agency believes that disclosure of documents containing information relating to a person’s personal affairs is clearly unreasonable, then there is no requirement to consult. However, even if the determining agency is of that view, it is not precluded from obtaining and taking into account the views of the person concerned and in this regard s.31 could be seen as ensuring procedural fairness. Such consultations may also provide further weight to the agency’s view that disclosure is unreasonable. This approach needs to be balanced against the time available for decision-making and extra processing costs to the applicant.

12.3.14 In rare cases disclosure may be unreasonable even if the relevant person consents to it. For example, in Akers v Victoria Police [2003] VCAT 398, the applicant sought documents from the police concerning
allegations that he had assaulted his wife. Although his wife consented to the release of the documents, it was held that disclosure would be ‘unreasonable’ as it may impair the ability of the police to provide assistance in future cases of domestic violence.

12.3.15 The requirements for consultation are set out in more detail in chapter 4.

‘Personal affairs’

12.3.16 The term ‘personal affairs’ cannot be precisely or exhaustively defined. Several cases have applied its ordinary dictionary meaning of ‘matters of private concern to an individual’ (Re Williams and Registrar of Federal Court of Australia (1985) 8 ALD 219, at 221-222; Young v Wicks (1986) 13 FCR 85, at 89). This, however, may be too narrow, and in Perrin’s case Kirby P held that, “[i]n its context, ‘personal affairs’ means the composite collection of activities personal to the individual concerned” (applied by Deputy President Hennessy in Gulliver v General Manager, Maitland City Council (1999) NSWADT No.67 at 24).

12.3.17 In determining whether information concerns a person’s ‘personal affairs’ the source of the information is not relevant. It does not matter whether the information was obtained from the person concerned or from any other source.

12.3.18 It also does not matter whether the information is secret or confidential. ‘Personal’ does not mean ‘private’ (Colakovski v Australian Telecommunications Corporation (1991) 29 FCR 429). Even if the information is widely known or rumoured in the press or otherwise, this does not affect its status as being information concerning a person’s ‘personal affairs’ (although it may be relevant to the second limb of the test, as to whether the release of the information would constitute ‘unreasonable disclosure’).

12.3.19 Without attempting to set out a comprehensive list of relevant matters, in assessing FOI applications it can be assumed that, in the absence of special circumstances to the contrary, information concerning the following matters could constitute the ‘personal affairs’ of a person in terms of the first part of the test in clause 6:

Identification

(1) Information about a natural person from which, or by use of which, the person can be identified.

(2) Name and former name. Although a person’s name, in isolation, is not generally part of their personal affairs (Commissioner of Police v District Court of NSW and Perrin (1993) 31 NSWLR 606) the ADT has held that it is a question of fact in every case as to whether the name of a person, in the context in which it appears, amounts to their personal affairs (Hennesssey DP in Dawson v Commissioner,

(3) Private address and telephone number, particularly when linked with the person’s name (eg Gilling v Hawkesbury City Council [1999] NSWADT 43; Thompson v The Lord Howe Island Board [2003] NSWADT 193) (but not necessarily where the address of a place to which a statutory licence relates happens also to be the licensee’s residential address, without more – see Humane Society International Inc v National Parks and Wildlife Service and ors [2000] NSWADT 133).

(4) Date and place of birth.

Family


Health

(6) Medical condition, medical and psychiatric history, diagnoses and treatment (eg Department of Social Security v Dyrenfurth (1988) 80 ALR 533).

(7) Hospital records concerning a patient.

Social

(8) Private behaviour, personality, reputation (eg Re Toomer v Department of Primary Industries and Energy (1990) 20 ALD 275).

Financial


(10) Income, bank balances, financial history or activities (eg Re Lower Burdekin Newspaper Co and Lower Burdekin Shire Council (2004) 6 QAR 328).

(11) Credit worthiness.

(12) Property and other assets.

(13) Superannuation contributions or applicable benefits.

(14) Taxation arrangements and personal income tax returns.

(15) Social welfare benefits.

Employment (see [12.3.33-12.3.65] for a detailed discussion on this issue)

(16) Employment applications.

(17) Reports relating to a person’s promotional prospects.
(18) Personal records of employees, for example sick leave, staff transfers, higher duties, promotions, annual leave, and so on.

(19) Disciplinary investigations or proceedings, particularly where disciplinary action was taken.

(20) Salary records.

**Education** (see also clause 16, discussed at [13.8.27-13.8.30] for a discussion of FOI requests for exams and test results)

(21) Reports generated by educational institutions concerning the academic progress of a student, test scores, including scores of aptitude or vocational tests, or counselling reports.

**Criminal records**

(22) Criminal records and certain police records about an individual.

12.3.20 Information concerning the following matters would ordinarily not concern the personal affairs of a person (but may still be exempt under some other clause of Schedule 1):

(1) The affairs of a corporation. Although the *Interpretation Act 1987* provides that a reference to a ‘person’ includes a reference to a corporation (s.21), it appears that a corporation cannot have ‘personal affairs’ for the purposes of the FOI Act. This is suggested by the use of the words ‘living or dead’ in s.31 and clause 6, and the use of the words ‘his or her’ in, for example, s.5. This is also the case under the Commonwealth and Victorian FOI legislation: *News Corporation Ltd v National Companies and Securities Commission* (1984) 52 ALR 277; *The University of Melbourne v Robinson* [1993] 2 VR 177.

(2) Information kept in statistical or anonymous form, from which information relating to a particular person could not be isolated or the person identified.

(3) A person’s name where it appears in a normal routine agency document – that is, where the names of public officials appear in documents which contain nothing of a nature personal to them, but are documents that concern the performance of their duties and responsibilities and the affairs disclosed are properly characterised as those of the agency concerned (see *Commissioner of Police v District Court of NSW and Perrin* (1993) 31 NSWLR 606 and *University of Melbourne v Robinson* (1993) 2 VR 177 at 187). Deputy President Hennessy in *Gulliver v General Manager, Maitland City Council* (1999) NSWADT 67 at 24 stated:

“What matters is the nature of the information interpreted in its context. The information in question [in this case] does not relate to their family or personal relationships, their financial or health status or any other matter personal to them. It relates to their identity and
competence as a professional person. For these reasons the information does not concern their personal affairs”.

Unreasonable disclosure

12.3.21 After a decision has been made that the information sought concerns a person’s personal affairs, it must then be decided by the agency whether the disclosure of the information would involve ‘unreasonable disclosure’ of that information.

12.3.22 If the person about whose personal affairs information is contained in the document does not consent to its disclosure then it is more likely that it will be unreasonable to disclose the document.

12.3.23 The mere fact that a person does not consent to the release of personal affairs information is itself a factor which will tend against disclosure, having regard to the public interest in every individual’s right to privacy. Any particular reasons given by the person (or which are otherwise apparent to the agency) as to why he or she objects to the disclosure must also be taken into account.

Countervailing public interest considerations

12.3.24 Even if a person does not consent to disclosure, the release of the document may not be unreasonable if the provision of access to the community of information held by government (the applicant’s right to know) so outweighs the protection of individual privacy that it would not be unreasonable to disclose the information even against the relevant person’s wishes.

12.3.25 For a discussion of the way in which public interest considerations are relevant to determining whether disclosure may be ‘unreasonable’, see [10.4.23-10.4.24].

12.3.26 In undertaking this assessment, agencies should consider the comments of Judge Cooper in the NSW District Court:

“Thus, if exemption were claimed under Clause 6 of Schedule 1 (a document containing matter the disclosure of which would involve the unreasonable disclosure of information concerning the affairs of any person), compliance with section 28(2)(e) would necessitate a considerable amount of detail to justify the unreasonableness of the disclosure particularly as the concept of unreasonableness encompasses a value judgement. It would require the setting out of those facts which form the basis of that value judgement in order to comply with the obligation to state ‘The findings on material questions of fact underlying those reasons.’” (Simos v Wilkins, per Cooper J, unreported, NSW District Court, No.187 of 1996.)

12.3.27 The assessment must be based on an objective evaluation of all relevant circumstances including, first and foremost, the views of the person whose ‘personal affairs’ would be disclosed, and then:

(1) the nature of the information that would be disclosed;
(2) the circumstances in which, or the basis on which, the information was obtained by the agency;

(3) whether the information has any demonstrable relevance to the affairs of government;

(4) whether the information has any current relevance;

(5) whether the disclosure of the information would only serve to excite or satisfy the curiosity of the applicant about the person whose ‘personal affairs’ would be disclosed (in Director of Public Prosecutions v Smith (1991) 1 VR 51 the Court noted that the public interest does not mean ‘that which gratifies curiosity or merely provides information or amusement’, drawing a distinction between ‘what is in the public interest and what is of interest to know’);

(6) the damage likely to be suffered by the person whose ‘personal affairs’ would be disclosed, including whether the disclosure of the information would result in some particular unfairness, embarrassment or hardship to a person;

(7) the relationship between the applicant and the person whose personal affairs may be disclosed (where relevant);

(8) whether, and if so the degree to which, the information affects or concerns the applicant;

(9) the applicant's motives or intentions in relation to the application, including whether the applicant intends to use the information for purposes that are illegal, malicious or otherwise not in the public interest (see for example, BW v Registrar, New South Wales Medical Board [2002] NSW ADT 76 – at [46]);

(10) whether or not the information is already in the public arena (although the fact that information is in the public arena and no longer private or confidential does not prevent the information from still being categorised as the ‘personal affairs’ of an individual but may be relevant to determining whether the disclosure of the information is unreasonable).

12.3.28 It is important that the matters referred to in s.59A not be taken into account in determining whether this exemption applies. That is, it does not impinge on the reasonableness or otherwise of disclosure that the documents may cause embarrassment to, or a loss of confidence in, the Government, or that they may be misunderstood or misinterpreted by the applicant.

Deleting exempt matter

12.3.29 It should always be remembered that even if a document contains personal information the disclosure of which would be unreasonable, it may be possible to disclose the document with the personal information deleted.
12.3.30 Access to a document in full cannot be denied merely because it contains information about an individual's personal affairs. Instead, if possible, material that is exempt under clause 6 can be deleted and access given to the remainder of the document, in accordance with s.25(4)(a).

12.3.31 In *Re Simons and the Victorian Egg Marketing Board (No. 1) (1985) 1 VAR 54*, the Tribunal said that the expression 'unreasonable disclosure' requires an examination of all the circumstances, and an assessment of whether:

"after taking into account and balancing all interests involved, there would be disclosure of a person's personal affairs which is properly to be characterised as unreasonable. In this connection what might be called the censorship power under Section 25 may be of great importance. Quite clearly where invasion of privacy is concerned, deletion of names and other identifying particulars or references might quite simply render the document no longer privacy invasive."

The 'censorship power' referred to is the power to release documents with information deleted so that privacy is no longer invaded (s.25(4)(a)).

**Consultation**

12.3.32 This clause should be read in conjunction with s.31 (consultation procedures are discussed at 4.3.12-4.3.22)

**Ombudsman’s Guidance - Objections to Development Applications (DAs)**

In relation to objections lodged with councils to DAs, copies should generally be released by councils on request, without resort to the FOI Act. Both the substance of the objection and the identity of an objector to DAs should generally be disclosed (in this regard see the judgment in *Gilling v General Manager, Hawkesbury Shire Council* [1999] NSW ADT 94). This unrestricted 'open access' policy is based on the belief that it is in the public interest that submissions on DAs should be made in good faith and be based only on the merits of the proposal. Such a policy of 'open access' would discourage objectors from lodging submissions in bad faith or which contain undesirable malicious, gratuitous or personally spiteful comments about the building or development applicant.

The rationale behind this view is that, provided councils adequately inform residents that confidentiality will not be available, there is seldom any good reason to restrict access to such documents. It is relevant to note that the names and addresses of objectors, and details of their objections must be included in reports to decision-makers if those objections are to be properly assessed by councils, committees, or council staff under delegated authority. Where applications are determined by councils themselves, the business papers for the meeting, as well as the Minutes, are required to be publicly available under section 10 of the *Local Government Act 1993*. Where such assessments are carried out by staff under delegated authority, the reports that form the basis for such decisions would be available under the FOI Act. There are no grounds that would justify a different approach being adopted in relation to the name, address and details of objections lodged depending on whether applications are to be determined by the governing body of a council or by a committee or member of staff acting under delegated authority.
This issue was considered by the ADT in *Gilling v General Manager, Hawkesbury Shire Council* [1999] NSW ADT 94. The Tribunal took the view that an applicant should be able to find out what information was taken into account by a local council in determining an application (which would include by staff acting under delegation) so that the decision is transparent and the council is accountable for it. The Tribunal also stated that councils should take all opportunities to inform residents that confidentiality will generally not be available for objections to DAs (at p 7).

Another factor that is relevant is the sheer volume of objections received by many councils each year. Added to this is the amount of work involved in processing FOI applications for access to such objections, including notifying persons who have made objections under section 31 of the FOI Act, the assessment of their responses, and the preparation of notices of determination.

Councils should take all available opportunities to inform residents that confidentiality will generally not be available, for example:

- in notices to adjoining owners concerning development or building applications made to the council;
- in advertisements in local papers seeking comments on proposals;
- on public notice boards located within the area of the council;
- in notices located in conspicuous places within the council offices, libraries and other buildings; and
- on council websites.

The Ombudsman acknowledges that there may be situations where an objector not only holds a genuine concern about the disclosure of his/her identity beyond council, but can show good reason for that concern. In such a case, confidentiality would generally be appropriate.

**Example – Employment-Related Records**

12.3.33 One area in which the ‘personal affairs’ exemption has caused some difficulties in the past has been where agencies have received requests under the FOI Act for access to, or amendment of, employment-related records. Typically, such requests are received from agency staff or unsuccessful applicants for a position with the agency.

12.3.34 The extent to which employment-related records may concern ‘personal affairs’ depends, in part, on the nature of the records to which access or amendment is sought. These can be broadly categorized as follows:

**Work performance records**

12.3.35 Work performance records are those which concern the work performance of agency staff or potential staff (ie ‘outside’ applicants for positions).

12.3.36 The starting point when considering work performance records is that the legally enforceable right to be given access to an agency’s documents established under the FOI Act (s.16) applies to all persons, whether internal or external to the agency concerned. The exemption clause for
documents affecting personal affairs (clause 6) is also equally applicable to all persons, whether internal or external to the agency.

12.3.37 There is as yet no case law in New South Wales which has settled the question of whether and what documents relating to a person's work performance constitute part of a person's personal affairs. Nor has any clear consensus emerged from case law in other jurisdictions, notably the Commonwealth and Victoria.

12.3.38 Given the differences in court interpretations, it is the Department of Premier and Cabinet's advice that it is generally appropriate to presume that documents concerning a person's work capacity or performance do concern the 'personal affairs' of that person (including for the purposes of ss31 and 39). [policy] Such documents would include those normally found on a person's departmental personnel file, in selection committee papers and reports and in relation to disciplinary matters. Where an FOI application is made for such documents the person concerned should be consulted in accordance with s.31(2).

12.3.39 Although all documents to do with a person's work performance should be regarded as pertaining to his or her personal affairs, their release would not necessarily constitute 'unreasonable disclosure' in terms of clause 6 of Schedule 1.

12.3.40 As mentioned in 12.3.18, in determining whether documents contain information concerning a person's personal affairs, it is irrelevant whether the information is or is not private or confidential to the person concerned (Colakovski v Australian Telecommunications Corporation (1991) 100 ALR 111 at 118). Whether or not the information is private or confidential may, however, be relevant to the issue of whether disclosure of that information would be 'unreasonable'.

12.3.41 When considering applications for documents which contain information concerning the person by or on whose behalf an application for access to the document is being made, it is important to consider any relevant provisions of applicable personnel policies that provide that employees have a right to peruse their personnel records (see for example the NSW Government Personnel Handbook, the Department of Premier and Cabinet, Section 5-3 Administering Employee Records with particular reference to 5-3.4.4 Access by employees and 5-3.4.5 Access by former employees) Where such provisions apply, access to the documents which concern the applicant should be provided on request, without the need for a formal FOI application. [policy]

Documents concerning disciplinary matters

12.3.42 In considering what might amount to an 'unreasonable disclosure' of 'personal affairs' in the context of disciplinary proceedings, the following matters may be relevant:
• the extent to which the behaviour being investigated was public knowledge;
• the applicant's interest in the matter - was the applicant involved in some way (an informant, the subject of alleged disciplinary breaches, etc);
• whether the investigation is complete; and
• the outcome of the investigation - no disciplinary action taken or disciplinary action taken, the results of which would be widely known within the agency or otherwise made public.

12.3.43 It would generally be open to the subject of a disciplinary investigation to argue that the release of disciplinary material would constitute 'unreasonable disclosure of his/her personal affairs', particularly if no action had been taken against him/her.

12.3.44 In terms of an application received from the subject of the disciplinary investigation him or herself, it has been said that a person should, "be able to fully discover and understand the process by which he or she has been seriously disadvantaged in their [sic] employment" (emphasis added) (Connelly v Chief Executive, Roads and Traffic Authority [2000] NSW ADT 64).

12.3.45 Under procedural guidelines issued by the Public Employment Office under the Public Sector Employment and Management Act 2002, prior to making a finding of misconduct, all relevant documents containing allegations against an employee must be provided to the employee in the interests of natural justice. This must occur after the investigation but before the making of a finding. The only exception is protected disclosures (which would be exempt from disclosure under FOI under clause 16 and/or clause 20(d) – see [13.8 and 13.12]).

Ombudsman’s Guidance – Complaints about sexual harassment

When a complaint is made to an agency alleging sexual harassment by one of its staff, it is reasonable for the person the subject of the complaint to be given a copy of the complaint as an integral part of the grievance resolution procedure, with the possible deletion of material relating to third parties. This approach is based on the principle of natural justice that the respondent should have full knowledge of the allegations made against him/her, and be given a reasonable opportunity to answer them.

Confidentiality is recognised widely (including in publications of ODEOPE, the ADB and the Industrial Authority) as an essential requirement for dealing with any workplace grievances. Its application, however, is not meant to restrict access to, and the flow of, information to those directly involved in the grievance and its resolution. It is meant to prevent, or to reduce as far as possible, gossip and innuendo, and all discussion about the complaint within and outside the workplace except for that which is essential for the complaint to be resolved. It is not meant to prevent the respondent from being fully informed of the complaint made against him or her. If a respondent were not told who made a complaint, it may be difficult to resolve the complaint and might prevent the respondent from exercising a reasonable right of reply.
Furthermore, a total assurance and practice of confidentiality would make any action upon a complaint impossible. Clearly information concerning a complaint has to have some distribution. It is a question of how much and to whom. On the basis of the principles of natural justice, the withholding of a written complaint from the respondent would generally not be an appropriate application of the confidentiality principle.

It may be that some complaints may not be made if details of the complaint cannot be guaranteed confidentiality. The alternative, however, is a lack of natural justice.

For that reason, the Ombudsman’s view is that this kind of information should always be released without an FOI request, but even if an FOI request is lodged, the Ombudsman is unlikely to consider disclosure an unreasonable disclosure of personal affairs.

**Job applications and selection records**

12.3.46 It is reasonable to assume that information in selection records that sets out details about applicants for a position (such as their experience, qualifications, performance at interview or information obtained from referees) concerns the ‘personal affairs’ of those applicants.

12.3.47 As previously stated, when applications are received seeking access to such documents, it is incumbent on agencies to consider whether the disclosure of documents containing such information would involve the ‘unreasonable disclosure’ of the information for the purposes of clause 6.

12.3.48 In making such an assessment, agencies are obliged to consider whether it is practicable to delete exempt matter (s. 25(4)(a)). In the context of selection records, this may involve deleting the names and other identifying information in relation to the applicants for a position. Where it is practicable to remove any ‘personal affairs’ information from the document, no question arises as to whether disclosure would be unreasonable for the purposes of clause 6. It should be noted, however, that simply deleting a person’s name in the context of a job application may not always be enough to ensure that the person is not identified, particularly as the positions held at a particular time may allow a person to be identified.

12.3.49 The Ombudsman has expressed the view that, for the purposes of procedural fairness (i.e. natural justice), and in order for unsuccessful job applicants to be satisfied that a job selection process has been fair and unbiased, it may be in the public interest that certain information relating to a successful job applicant be released on request.

12.3.50 For example, release to an unsuccessful applicant (or to anyone else) of the job application of, and the selection committee discussion about, the successful applicant (excluding any clearly ‘personal affairs’ information, such as referee reports) for a position would probably not constitute ‘unreasonable disclosure of that person's personal affairs’. The information itself is not likely to be very private, it is public knowledge that the person was successful in his or her application for the job, and
release of such information is not likely to prejudice the successful applicant’s reputation.

12.3.51 However, the release of mere personal details of the successful applicant, such as their address or age, would be unlikely to be covered by such public interest considerations.

12.3.52 Different considerations may apply in respect of the same material about an unsuccessful applicant. In that case disclosure may be ‘unreasonable’, for example if the public release of the very fact that a person had applied for a position could be damaging to that person. Similarly, making public a negative assessment could also prejudice that person’s reputation. In Williams and Registrar of the Federal Court of Australia (1985) 8 ALD 219, the AAT decided that documents detailing the identity of unsuccessful applicants for positions were properly exempt.

12.3.53 In the case of Dyki v Commissioner of Taxation (1990) 22 ALD 124, the AAT held that the documents involved in the successful job applicant’s application were not exempt either under ‘documents affecting the operations of agencies’ or as ‘documents received in confidence’. However, it did hold that the application from the unsuccessful applicant was exempt under the personal affairs exemption.

12.3.54 In general terms, it would be open for an agency to take the view that it would not be unreasonable to release the following categories of documents to unsuccessful job applicants (with any clearly personal details deleted as necessary):

- the application for the position which was lodged by the FOI applicant him or herself;
- culling sheets (with names deleted, other than the name of the FOI applicant) (however, this may not be appropriate if there were a small number of applicants, or if the identify of the applicants was otherwise publicly-known);
- interview question sheets;
- interview score sheets (with names of unsuccessful applicants (and, if appropriate, the successful applicant) deleted, other than the name of the FOI applicant);
- the convenor’s report (with names of unsuccessful applicants (and, if appropriate, the successful applicant) deleted, other than the name of the FOI applicant);
- any minority report by panel members (with the names of unsuccessful applicants (and, if appropriate, the successful applicant) deleted, other than the name of the FOI applicant);
- documents evidencing approval or rejection of the convenors report by persons authorised to make the appointment to the position (with appropriate deletions); and
• offers of appointment/employment to the successful applicant.

12.3.55 There is a public interest in employers receiving full and frank assessments from referees. Referees are often supervisors, colleagues and/or personal friends of the applicant. In many cases they are more likely to give full and frank assessments about the character, skill and ability of the applicant if the selection committee member seeking the reference undertakes to treat the report as having been given and received in confidence.

12.3.56 Where an FOI application is subsequently made, on balance the public interest in an agency taking a position of confidentiality in relation to such comments may outweigh the public interest in their disclosure, particularly if the referee’s report contains negative comments about the applicant and/or if the position in question involves sensitive work.

Remuneration of public officials

12.3.57 In general terms, it is reasonable to assume that the remuneration paid to a public official is information concerning the ‘personal affairs’ of that person.

12.3.58 In considering whether disclosure of documents containing such information would involve ‘unreasonable disclosure’ for the purposes of clause 6, however, it is relevant to note that, in one way or another, such information is generally already in the public domain.

12.3.59 Information about the remuneration levels or ranges applicable to any position in the public sector is generally available through publicly available awards, determinations of remuneration tribunals published in the Government Gazette, Public Sector Notices, job advertisements, annual reports and so on.

12.3.60 At the same time, it would seldom be the case that reasons would exist to keep the following information confidential:

• the grade or level of the position held by any public official; or
• the name of a public official holding any particular position in the public sector.

12.3.61 As a general principle, then, information about the remuneration paid to a public official should not be treated as if it were a matter of complete secrecy. This is not to say, however, that the information made available needs necessarily to be precise - for example, while it may be reasonable to disclose the salary range applicable to public officials of a particular grade or level, it may, depending on the circumstances, be unreasonable to disclose the exact remuneration paid to the particular public official.

Contracts of employment

12.3.62 The terms and conditions on which public officials are employed are generally set out in relevant legislation, regulations or awards. Such
information is generally publicly available. However, some public officials employed for fixed terms are employed pursuant to a written contract.

12.3.63 The Department of Premier and Cabinet advises agencies to consider applications in respect of such contracts on a case-by-case basis.

12.3.64 Circumstances in which it may not be appropriate to disclose the contents of, or possibly even the existence of, a contract of employment would include where the operational requirements of the position would be compromised - for example, employees of law enforcement bodies whose duties require that their identity and/or existence must be secret. (Also of relevance here is clause 4 – see [11.5].)

12.3.65 It may also be unreasonable to disclose certain purely personal information which may be contained in a contract, such as the official’s residential address.

Ombudsman’s Guidance – Contracts of employment

The Ombudsman is of the view that, although contracts of employment of public officials may contain ‘personal affairs’ information, disclosing them would seldom constitute ‘unreasonable disclosure’. In this regard the Ombudsman believes that, other than in exceptional circumstances, it should be possible for an interested member of the public to ascertain, for example:

- whether any other benefits or advantages are being provided, pursuant to the contract, over and above the stated remuneration for a position;
- any criteria on the basis of which the public official’s performance is to be measured;
- the term of employment or appointment and any circumstances in which the employment or appointment can be terminated prior to this date by the employer; or
- any express undertakings entered into by the public official or prohibitions or other requirements imposed by the employer, relevant to the performance of the public official’s functions, that may be set out in the contract.

12.4 Clause 7 - Documents affecting business affairs

12.4.1 Clause 7 of Schedule 1 states:

"(1) A document is an exempt document:

(a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person, or

(a1) if it contains matter the disclosure of which would disclose the commercial-in-confidence provisions of a government contract (within the meaning of section 15A), or

(b) if it contains matter the disclosure of which:

(i) would disclose information (other than trade secrets or commercial-in-confidence provisions) that has a commercial value to any agency or any other person, and
(ii) could reasonably be expected to destroy or diminish the commercial value of the information, or

(c) if it contains matter the disclosure of which:

(i) would disclose information (other than trade secrets, commercial-in-confidence provisions or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or of any other person, and

(ii) could reasonably be expected to have an unreasonable adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency.

(2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is being made.”

Purpose of the exemption

12.4.2. The main purpose of this exemption is to avoid disclosing confidential information provided by the business community to government and exposing businesses to commercial disadvantage. This protection also applies to the business affairs of agencies.

12.4.3 In relation to the corresponding provision in the Commonwealth FOI Act (s. 43), the Commonwealth AAT has stated:

“The intention of the legislature, in enacting s.43, is to protect information concerning business affairs which might either affect a business adversely or which could prejudice the future supply of information to the Commonwealth or an agency.” (Re Ralkon Agricultural Co Pty Ltd and Aboriginal Development Commission (1986) 10 ALD 380, at 399-400).

Applying the exemption

12.4.4. The four alternative bases on which a document may be exempted from release under this clause can be summarised as follows:

(1) if it would disclose trade secrets; or

(2) if it would disclose the commercial-in-confidence provisions of a government contract; or

(3) if:

(a) it would disclose information that has a commercial value; and

(b) the disclosure could reasonably be expected to destroy or diminish the commercial value of the information; or
(4) if:

(a) it would disclose information concerning the business, professional, commercial or financial affairs of an agency or person; and

(b) the disclosure could reasonably be expected:

(i) to have an unreasonable adverse effect on those affairs; or

(ii) to prejudice the future supply of such information to the Government or to an agency.

12.4.5 The alternative grounds for an exemption under this clause should be read disjunctively. This means that any one of the four alternative grounds of exemption is sufficient to render the document exempt.

12.4.6 Under the fourth ground (but not the ‘trade secrets’, ‘commercial-in-confidence provision of a government contract’ or ‘destruction of commercial value’ grounds) one of the criteria is that disclosure will have an ‘unreasonable adverse effect’. As to the meaning of that term generally, see [10.4.23-10.4.24 and 10.4.33-10.4.35].

12.4.7 This requirement incorporates a limited ‘public interest’ test of ‘unreasonableness’. In the case of information about the business affairs of private sector organisations, opposition to disclosure by the relevant person will be a strong factor tending against disclosure. However, the agency must consider whether there are any considerations which outweigh the invasion of privacy concerned.

12.4.8 Given the objects of the Act, it is inappropriate for decision-makers to adopt a presumption that disclosure of information about the business affairs of a government agency would automatically be unreasonable or subject to this exemption. Decision-makers should consider the application of this exemption to each case on its merits.

Ombudsman’s guidance – Applying clause 7 to agency’s own businesses

The main purpose of this exemption is to avoid prematurely disclosing information provided by the business community to government and exposing businesses to commercial disadvantage.

The Ombudsman takes the view that government agencies must apply a higher threshold to consideration of the application of this clause to documents they themselves created than to documents supplied to them by the private sector.

12.4.9 As with the exemption relating to personal affairs, this exemption cannot be used to deny access to a document which deals with the affairs of the applicant (clause 7(2)).

12.4.10 The information may have been obtained from any source - the exemption is not limited to documents obtained from the person, business or agency concerned.
Consultation

12.4.11 This clause should be read in conjunction with s.32 concerning consultation in relation to documents affecting business affairs (consultation procedures are discussed in Chapter [4.3.12-4.3.22]).

‘Trade secrets’ (clause 7(1)(a))

12.4.12 Trade secrets are not limited to production processes or information of a technical character, but can refer to other secrets which are used or are useable in the trade.

12.4.13 The essence of a trade secret is that it must be secret and not available to the general public (Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163).

12.4.14 Some of the factors that may be relevant in determining whether particular information constitutes a trade secret were identified by the AAT in Re Organon (Australia) Pty Ltd and Department of Community Services and Health (1987) 13 ALD 588 at 593-594, including:

"(b) the extent to which the information is known outside the business of the owner of that information;

(c) the extent to which the information is known by persons engaged in the owner’s business;

(d) measures taken by the owner to guard the secrecy of the information;

(e) the value of the information to the owner and to his competitors;

(f) the effort and money spent by the owner in developing the information; and

(g) the ease or difficulty with which others might acquire or duplicate the secret.”

12.4.15 In Gill v the Department of Industry Technology and Resources and Others (1985) 1 VAR 97 the Victorian AAT said that the words ‘trade secrets’ in the equivalent section of the Victorian legislation are ‘not confined to patentable processes and the like but also embrace the broader concept of commercial confidences’. The phrase refers to the protection which the courts will give to commercial information when in all the circumstances it is equitable to do so.

12.4.16 In Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163 the Full Federal Court decided that the term ‘trade secrets’ in the Commonwealth legislation did not have a technical legal meaning: it is an ordinary term of the English language well known in Australia. It should be given its ordinary meaning not the meaning that had been given to it in the context of United States FOI decisions.

12.4.17 Whether or not particular information in documents constitutes a trade secret is a question of fact to be determined in each case. To constitute a trade secret, the information must:
• be of a secret character;
• be of advantage to trade rivals to obtain it; and
• be used or useable in the trade for the benefit of the owner’s business.

12.4.18 The Court in Searle’s case said that there can be trade secrets in respect of medical or health products as much as for other products. These could include formulae for products as well as customer information. Earlier Commonwealth cases had suggested that the term ‘trade secret’ only applied to information that had a technical or scientific character.

**Example:**

A trade secret could include such things as a specific, readily identifiable creation, whether a mechanical invention, an original financial scheme, a chemical compound, a unique method of manufacture, or the like.

**Commercial-in-confidence provisions of a government contract (clause 7(1)(a1))**

12.4.18A A document is exempt if the disclosure of it would disclose ‘commercial-in-confidence provisions’ of a ‘government contract’, within the meaning of s.15A of the Act.

12.4.18B A ‘government contract’ means:

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“(a) a contact between an agency and a private sector entity under which the agency or private sector entity agrees:
   (i) to undertake a specific project (such as a construction, infrastructure or property development project); or
   (ii) to provide specific goods or services (such as information technology services), or
   (iii) to transfer real property to the other party to the contract,
   (b) a lease of real property where the parties to the lease are an agency and a private sector entity,
   but does not include a contract of employment." (s.15A(14)).
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12.4.18C ‘Commercial-in-confidence provisions, in relation to a government 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 whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether present or in the future.” (s.15A(14)).

For further information concerning the disclosure of information about government contracts see [12.4 – 12.4] and Appendix C.

Destruction or diminution of the ‘commercial value’ of information (clause 7(1)(b))

12.4.19 To claim this exemption it is necessary that two criteria be met:

(1) the information has a ‘commercial value’; and

(2) it could reasonably be expected that the disclosure of the information would destroy or diminish its commercial value.

12.4.20 As to the meaning of ‘could reasonably be expected’ see [10.4.25-10.4.32].

12.4.21 Information of a commercial value need not necessarily be information of a ‘business’ or ‘financial’ nature, but its value must be clearly demonstrated. The fact that information relates to commercial matters is insufficient.

12.4.22 Information has a commercial value to a person if it is valuable for the purposes of carrying on the commercial activity in which the person is, or proposes to be, engaged. The information may be valuable because it is important or essential to the profitability or the viability of a continuing business operation (Re Cannon and Australian Quality Egg Farms (1994) 1 QAR at 491).

12.4.23 The commercial value of information may be indicated by the fact that the information ‘resulted from the investment of significant research and time and effort by a business organisation’ (Neary v State Rail Authority [1999] NSWADT 107 at 42), the fact that ‘a genuine, arms-length buyer is prepared to pay to obtain that information’ (Re Cannon and Australian Quality Egg Farms (1994) 1 QAR at 491) or the fact that the information, if disclosed, could assist a competitor to compete more effectively against the owner (or supplier) of the information or otherwise provide a commercial advantage over another.

12.4.24 Whether the exemption applies will also depend on whether disclosure can reasonably be expected to destroy or diminish the commercial value of the information to the owner or supplier of the information.
12.4.25 Information which has a commercial value may suffer a diminution of this value if disclosed to the public at large, including competitors. As information released under FOI is disclosed to the world at large (see [12.4.25]), it can be presumed by the agency that a document released under FOI will effectively be released to a third party’s competitors.

12.4.26 There will ordinarily be no expectation of a diminution of commercial value if the relevant information is already publicly available. However, if the information consists of a compilation of information which is already publicly available, the exemption may still apply if the compilation of that information involved considerable time, money or expertise. There are numerous situations where information that is in the public domain is compiled to produce a document of considerable value. The value is added to the information by the process of locating relevant information, identifying parts of information to be extracted, the ordering or categorisation of the information, and so on.

Business, professional, commercial and financial affairs (clause 7(1)(c))

12.4.27 To claim the exemption for documents containing information concerning the business, professional, commercial or financial affairs of an agency or person two criteria must be met:

(1) the document must contain information concerning such affairs of any agency or person; and

(2) it could reasonably be expected that the disclosure of the information would:

   (a) have an unreasonable adverse effect on those affairs; or

   (b) prejudice the future supply of such information to the Government or to an agency.

‘Concerning’ business, professional, commercial or financial affairs

12.4.28 This exemption is not intended to apply to all documents held by an agency merely on the basis that they somehow relate to business, professional, commercial or financial affairs. While the word ‘concerning’ can have a wide meaning equivalent to ‘relating to’, in the context of clause 7(1)(c)(i) the word should probably be interpreted more narrowly as ‘about’ or ‘regarding’.

12.4.29 ‘Business affairs’ are those relating to the conduct of a business – that is, an operation carried on in an organised way (whether it be full time or intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained) (Re Stewart and Department of Transport (1993) 1 QAR 227; Re Cannon and Australian Quality Egg Farms Ltd (1994) 1 QAR 491).

12.4.30 In Cockcroft v Attorney-General’s Department (1985) 12 ALD 462 it was stated:
“A matter does not need to be on the boardroom agenda to concern businesses. Employees are essential to the operation of the business and commercial activities of [the company]...the totality of, and each and every part of the activities of employees are part of, and touch upon, the business, commercial and financial affairs of the company.”

In that case, the AAT held that documents of the Committee on Discrimination in Employment and Occupation concerned the ‘business affairs’ of the respondent agency.

12.4.31 The words ‘commercial’ and ‘financial’ affairs extend the application of the exemption. For example, the term ‘financial affairs’ would cover government agencies which do not carry on a business of supplying goods and services on a commercial basis.

12.4.32 ‘Professional affairs’ are those relating to a profession or vocation. What is considered to constitute a ‘profession’ is not ‘rigid or static’ (Young v Wicks (1986) 79 ALR 448). However, there is authority that the ‘professional affairs’ exemption cannot be relied upon to exempt documents concerning the performance of salaried professionals performing duties in the service of the public sector (Harris v Australian Broadcasting Corporation (1983) 78 FLR 236).

‘Could reasonably be expected’

12.4.33 The meaning of ‘could reasonably be expected’ is discussed at [10.4.25-10.4.32].

‘Unreasonable adverse effect’

12.4.34 The meaning of ‘unreasonable adverse effect’ is discussed generally at [10.4.23-10.4.24 and 10.4.33-10.4.35].

12.4.35 It is clear from Victorian and Commonwealth FOI decisions that in using such phrases as ‘adverse effect’ in this context the legislature should generally be taken to be referring to the competitive position of the business concerned.

12.4.36 In Actors Equity v Australian Broadcasting Tribunal (1985) 7 ALD 584, the Tribunal discussed the broadly equivalent term ‘competitive disadvantage’ and stated:

"In this case the danger for the business in the disclosure of the information was .... very much one of cumulative effect. One item from ABT-12 (in essence a profit and loss statement) from one licence for one year may not lead to a reasonable expectation of unreasonable adverse effect. But in a commercial field where competition is exceptionally fierce the gradual accumulation of small pieces of evidence about competitors could, on the evidence, ultimately have a very significant adverse effect".

12.4.37 If the information is common knowledge in the relevant industry or is otherwise in the public domain, it is highly unlikely that disclosure of the information by the release of a document under FOI would have a
relevant adverse effect on the relevant affairs of the agency or person concerned.

12.4.38 Even if the disclosure would have an ‘adverse effect’ on a person’s business, professional, commercial and financial affairs, the exemption applies only if that is ‘unreasonable’.

12.4.39 This may differ depending on whether the information relates to a private or public sector organisation. Usually, little of a public interest nature will be gained by the disclosure of information relating to the business affairs of a private organisation. This is unless those affairs have had a detrimental impact upon the public interest. However, a different range of considerations may apply if the business affairs are those of a public organisation. The Act has made it clear that disclosure of information about the operations of Government is a prime objective of the Act.

12.4.40 If information does relate to the business, professional, commercial and financial affairs of a private or public organisation the Act clearly indicates that there should be no disclosure without prior consultation. In judging whether disclosure might have an unreasonable adverse effect, the views of the organisation consulted will be one factor to be taken into account. For a discussion of the consultation process, see Chapter [4.3].

12.4.41 Disclosure may not have an unreasonable adverse effect if there are compelling reasons of public interest in favour of disclosure, for example, if the information reveals criminal business conduct, hazardous work practices or products posing a threat to public safety (see Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 108 ALR 163; Re Maher and Attorney-General’s Department (No 2) (1985) 4 AAR 266, at 273).

12.4.42 It is sometimes argued that disclosure of information may give rise to a risk of litigation against the person concerned, and that this is an unreasonable adverse effect. Agencies must consider such claims carefully. While the risk of litigation in respect of business, professional, commercial or financial affairs will ordinarily constitute an adverse effect on those affairs, there remains the test as to whether that is ‘unreasonable’. There may be strong public interest considerations favouring disclosure of such information, for example to assist persons to determine whether they have legal rights which may be effectively aired through the courts (see eg Cairns Port Authority and Department of Lands and Cairns Shelf Co No16 Pty Ltd (Queensland Information Commissioner, S111 of 1993, Decision No.94017). These public interest considerations should be taken into account when determining whether the adverse effect of the release of the information would be ‘unreasonable’.
Examples

- In *Actors Equity v Australian Broadcasting Tribunal* (1985) 7 ALD 584 the applicant asked for copies of annual reports supplied by TV stations to the Australian Broadcasting Tribunal under a statutory requirement. The reports contained audited balance sheets and profit and loss accounts for companies, information on costs of production for Australian programs, and information about revenue earned from resale of Australian television rights. The Commonwealth AAT held that these documents contained information concerning the business, commercial or financial affairs of an organisation. The Tribunal also decided that disclosure of the information could reasonably be expected to unreasonably affect that organisation's lawful business, commercial, or financial affairs.

- In *Maher v the Attorney-General's Department* (No. 2) (1986) 4 AAR 266 the Tribunal refused access to documents on the basis of this exemption. The documents sought from the Department related to anti-trust proceedings against certain businesses, and included minutes of meetings, minor memoranda and documents setting out discussions about strategies, commercial implications, draft settlement agreements and draft press releases.

- In *Moloney v Torrens* (as Principal Officer of the State Bank of Victoria) (unreported decision of the Victorian County Court, 1983) operating manuals of the Bank’s automatic teller machines were held to be exempt under a similar Victorian provision.

- In *Retain Beacon Hill High School Committee Inc v NSW Department of Commerce* [2006] NSWADT 129 it was held that information relating to the contract of sale for the former Beacon Hill High School site and Landcom’s estimated costs of development were exempt. The reason was that the sale of the site could yet fall through, which would mean that the Government would need to find another purchaser for the land. Even if the sale proceeded, Landcom would need to call for tenders in order to develop the land. It was held that the documents were exempt under clause 7 because disclosure would damage the commercial affairs of the department and Landcom. (It was also held that disclosure would have a substantial adverse affect on the financial affairs of those agencies under clause 15 – see [13.7]). The ADT’s decision was upheld on appeal by the Appeal Panel - *Retain Beacon Hill High School Committee Inc v Department of Commerce* (GD) [2006] NSWADTAP 58.

Prejudice the future supply of information

12.4.43 In relation to whether the disclosure of information ‘could reasonably be expected’ to prejudice the future supply of information, see the discussion at [10.4.25-10.4.32] above.
12.4.44 To attract this exemption, it must be shown that the agency has a reasonable expectation that disclosure of the information may prejudice the future supply of information to that agency. This may be more readily demonstrated if the information has been voluntarily provided to the agency, if it can be shown that it would be substantially more difficult for the agency to attempt to obtain such information by law and if the information is reasonably required by the agency for the conduct of its business.

Disclosure of tender/contract information

12.4.45 Section 15A of the FOI Act requires the disclosure of certain government contracts. Those requirements are supplemented by Appendix C of this Manual, which provides agencies with guidelines as to what information and documents contained in government procurement contracts with the private sector should be disclosed and what matters should remain confidential. The guidelines in Appendix C must be followed by all State government agencies (other than State-owned corporations) and are aimed at achieving a uniform approach across government in relation to the disclosure of procurement contract information.

[policy] Local government agencies may also be assisted by adopting the guidelines in the Memorandum.

12.4.46 Appendix C also provides that information held by agencies about an unsuccessful tender is to be treated as commercial-in-confidence and should not be disclosed unless required by law.

12.4.47 The provisions of Appendix C provide assistance to agencies in dealing with both informal requests and formal FOI applications for access to government contract documents. Agencies may release information without the need for a person to lodge an FOI application for documents relating to government contracts in accordance with the Appendix. In dealing with requests for information about government contracts, agencies should closely examine Appendix C and contact the Department of Commerce for further information if needed.

12.5 Clause 8 - Documents affecting the conduct of research

12.5.1 Clause 8 of Schedule 1 states:

”(1) A document is an exempt document if it contains matter the disclosure of which:

(a) would disclose the purpose or results of research (including research that is yet to be commenced or yet to be completed), and

(b) could reasonably be expected to have an unreasonable adverse effect on the agency or other person by or on whose behalf the research is being, or is intended to be, carried out.”
A document is not an exempt document by virtue of this clause merely because it contains matter concerning research that is being, or is intended to be, carried out by the agency or other person by or on whose behalf an application for access to the document is being made.

Purpose of exemption

12.5.2 The Second Reading Speech for the FOI Act indicates that this clause is aimed to ensure that FOI, “does not provide a means for poaching or plagiarising sensitive and confidential research proposals”.

The clause was moved away from its position in the business affairs exemption in the original Bill to ensure that pure and applied research was exempt regardless of its commercial or business value (or lack of it).

Applying the exemption

12.5.3 There has been little judicial consideration of this exemption.

12.5.4 It is important to note that this is not a ‘class of documents’ exemption. Each document must be considered, and the criteria applied, separately. This includes the requirement to show ‘unreasonable adverse effect’.

12.5.5 Where documents were created, and by whom, is of no direct relevance to the interpretation or implementation of this clause. For example, it is irrelevant whether the documents were created by a researcher external to the agency such as a consultant, or by an agency employee.

12.5.6 The words of clause 8(1)(a) do not limit the section to research of a particular kind. However, it is necessary for there to be a reasonable expectation of an unreasonable adverse effect on the agency or the person commissioning or engaged in research before the exemption applies.

‘Could reasonably be expected’

12.5.7 The meaning of ‘could reasonably be expected’ is discussed at [10.4.25-10.4.32].

‘Unreasonable adverse effect’

12.5.8 The meaning of ‘unreasonable adverse effect’ is discussed at [10.4.23-10.4.24 and 10.4.33-10.4.35].
Ombudsman’s guidance – documents relating to research

It is the Ombudsman’s view that agencies should not rely on clause 8 if there has been publication of the purpose or results of the research (as relevant), whether by the agency or by any other person, or if the purpose or results of the research (as relevant) have been relied upon or cross-referenced in agency publications. In the Ombudsman’s opinion, in those circumstances it would be unlikely that there could be a reasonable expectation that disclosure would have an unreasonable adverse effect on either the agency or the researcher.

The Ombudsman also requires that the reasons given in support of the exemption be based on the specific content of the requested documents and not, for example, on a general argument that the document ‘relates to research’.

Application by the person whose research is protected

12.5.9 As with the personal affairs and business affairs exemptions, this exemption cannot be used to deny access to the person whose interests are being protected by the exemption (that is, the person whose research is the ‘subject’ of the document) (s.8(2)).

Consultation

12.5.10 This clause should be read in conjunction with s.33 of the Act (consultation procedures are discussed at [4.3]).

Example

- If it can be demonstrated that a consultant who put together a set of raw data would refuse to work for the agency in the future if the raw data were released, that the data would disclose the purpose or results of research, and that the consultant’s continuing to work for the agency was important to the agency’s work, then a reasonable expectation of unreasonable adverse effect may exist, and an exemption may be appropriate.

- In addition, if the release of the information would breach a legally-binding confidentiality undertaking owed by the agency to a consultant then the exemption may also apply, particularly if it can be shown that the consultant relied on the undertaking in agreeing to work for the agency and would not have done so in the absence of such an undertaking.

- It may be more difficult in the absence of other factors, however, to support applying the exemption, particularly if the consultant’s main source of work is with that agency.
13 Exemptions (Other documents (Schedule 1, Part 3))

13.1 Clause 9 - Internal working documents

13.1.1 Clause 9 of Schedule 1 states:

(1) A document is an exempt document if it contains matter the disclosure of which:
   (a) would disclose:
       (i) any opinion, advice or recommendation that has been obtained, prepared or recorded, or
       (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making function of the Government, a Minister or an agency, and
   (b) would, on balance, be contrary to the public interest.

(2) A document is not an exempt document by virtue of this clause if it merely consists of:
   (a) matter that appears in an agency’s policy document, or
   (b) factual or statistical material”.

Purpose of exemption

13.1.2 The purpose of the exemption is to protect documents concerning the decision-making and policy-making functions of an agency, if their disclosure would be contrary to the public interest. The exemption should not be used as grounds for denying access to documents which relate purely to the administrative functions of an agency.

13.1.3 There is a clearly recognised need for governments to have some degree of confidentiality in order to function smoothly and efficiently. As Gibbs J stated:

“It is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No Minister or senior public servant can effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind.” (Sankey v Whitlam (1978) 142 CLR 1)

13.1.4 The provision is designed to protect the pre-decisional processes – those leading to a decision – but only if, on balance, it is contrary to
the public interest to release the information. It is not designed to protect pre-decisional processes regarding purely administrative decisions, or the basis for those decisions.

13.1.5 A document need not necessarily be of a high policy level to attract this exemption.

Applying the exemption

The test

13.1.6 For an agency to claim that documents are exempt under clause 9, all provisions of the clause must be met. That is:

(1) the document must disclose:

(a) an opinion, advice or recommendation that has been obtained, prepared or recorded, or

(b) a consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making function of the Government, a Minister or an agency; and

(2) there must be a public interest in non-disclosure which outweighs the public interest in disclosure; and

(3) the document must not merely consist of matter that appears in an agency’s policy document or comprises factual or statistical material.

Scope of the exemption

13.1.7 The need to maintain some degree of confidentiality is generally recognised. The issues frequently in dispute are the degree of confidentiality which should be applied and the length of time that the exemption in clause 9 should apply to documents.

13.1.8 Clause 9(1) contains descriptive terms which are particularly wide and will normally incorporate a vast range of documents consisting of information which is opinion, advice or recommendations, or documents which record consultations or deliberations leading to or for the purpose of decision-making functions.

13.1.9 The provisions of paragraph (a) of clause 9(1) are fairly self-explanatory in describing the nature of the information which may be exempt under the clause. Clearly, the decision-making functions of many agencies are the significant and, in some cases, predominant activities in terms of their overall roles and objectives. It is likely, therefore, that the question as to whether documents
may be covered by clause 9 will arise quite often in an agency’s consideration of FOI applications.

13.1.10 It should be noted, however, that it is unlikely that documents concerning the mere internal administrative decisions of an agency, such as documents recording an agency’s housekeeping and day-to-day functioning, would be covered by clause 9(1)(a). It is documents relating to the decisions made by the agency, in performing the functions for which it was created, that are the target of the first part of clause 9.

13.1.11 The exemption should not be used as a class to cover all such documents. Judge Smyth, in the first District Court hearing of an FOI case, *Wilson v Department of Education*, stated that:

"It is clear to me that there would be certain documents within clause 9 which would contain matter which would be against the public interest to disclose, and in my view where a claim is made under clause 9 the obligation on the Court is to consider each such document and to make a value judgement as to whether that particular document is one which would be against the public interest to disclose." (emphasis added)

13.1.12 Clause 9 is intended to protect the decision-making functions of the government, a Minister, or an agency where effective administration would be impeded by the loss of confidentiality.

13.1.13 It should be noted that a document may be an ‘internal’ working document even if it was created by someone outside of the agency, such as an external consultant (*General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84).

**Matter in the nature of opinion etc**

13.1.14 A document which records ‘opinions, advice or recommendations’ may be exempt under clause 9.

13.1.15 See [13.1.41] below for a discussion of the public interest considerations surrounding the desirability of ensuring ‘frank and candid’ opinions, advice and recommendations.

**Decision-making functions**

13.1.16 The reference to ‘decision-making functions’ appears to be a reference to those functions which an agency has been established to perform.
13.1.17 The equivalent sections in Victoria and Commonwealth legislation refer to ‘deliberative’ rather than decision-making functions. In *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236; 50 ALR 551, Beaumont J indicated that the term ‘deliberation’ suggested not only collective discussion but also collective acquisition and exchange of facts prior to the ultimate decision. This can be contrasted with purely administrative processes.

13.1.18 In *Re Waterford and Department of the Treasury* (No. 2) (1984) AAR 1 the Tribunal expressed the view that the expression ‘deliberative process’ is wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. The deliberative processes would therefore be its thinking processes, eg the processes of reflection on the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters would come within this description.

13.1.19 Decision-making and policy-making processes are also protected. This would include keeping secure advice and recommendations which help the deliberative process occur (such as documents relating to the ‘leaking of documents from the Department of Prime Minister and Cabinet’ - *Re Toohey and Department of Prime Minister and Cabinet* (1985) 9 ALN 94).

13.1.20 The following documents have been held to be covered by the exemption:

- notes and draft answers prepared by officials for a Minister to answer a Parliamentary question (*Re Peters and Department of Prime Minister and Cabinet* (No.2) (1983) 5 ALN 218);
- reports of external assessors about applications for research funds (*Re Wertheim and Department of Health* (1984) 7 ALD 121); and

**Public interest**

13.1.21 See [10.4.1-10.4.22] for a discussion of the meaning of the ‘public interest’.

13.1.22 In the case of clause 9 there should be no presumption that just because a document fits the description in clause 9(1) disclosure of it would necessarily be contrary to the public interest under clause 9(2), although this will be one factor which will need to be considered in balancing the public interest. Such an interpretation
would be inconsistent with the strong public interest in disclosure about government decision-making processes which derive from s.5 and the second reading speech.

13.1.23 In *Shopping Centre and ACCC* [2004] AATA 119, the Administrative Appeals Tribunal held that it was not in the public interest to disclose the tentative views of officers of an agency expressed during the course of the deliberative process. This was not because disclosure would cause confusion or misunderstanding, but because of the deliberative nature of the communications:

“Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest: Shopping Centre of Australia citing Re Howard and Treasurer with approval.”

13.1.24 Similarly, the AAT has held that there is a strong public interest in protecting documents that may not fall within the Cabinet document exemption, but which reveal the thinking processes of officers who advise Ministers and who are engaged in formulating recommendation and opinions for the use of Ministers in their Cabinet discussions (*Toomer v Department of Agriculture* [2003] AATA 1301).

13.1.25 Most recently, the High Court of Australia accepted that the desirability of preserving confidentiality of intra-governmental communications prior to making a decision may be one facet of the public interest (eg *McKinnon v Secretary, Department of Treasury* [2006] HCA 45).

13.1.26 It should be noted that it is possible that a document which contains preliminary advice concerning an agency’s decision-making functions, and which is appropriately exempt in accordance with clause 9, may cease to attract that exemption after a final decision on the matter at hand has been made.

13.1.27 The fact that the decision-making process is still on foot is a public interest factor against disclosure (*Law Society of NSW v General Manager, WorkCover Authority of NSW* (No 2) [2005] ADTAP 33; affirmed in *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84. See also *Simpson v Department of Education and Training* [2000] NSWADTAP 134; *Department of Community Services v Latham* [2000] NSWADTAP 21; *Tunchon v NSW Police Service* [2000] NSWADT 73).

13.1.28 In many cases, however, the public interest against disclosure of preliminary decision-making processes will fall away once a final
decision has been made (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84; see also the High Court’s decision in Sankey v Whitlam and also the Federal AAT in Lianos’ v Department of Social Security (1985) 2 AAR 503, both cases concerning public interest immunity rather than FOI).

13.1.29 According to the Ombudsman, before a final decision on a matter has been made, documents recording preliminary advice relating to the ultimate decision may well be exempt in accordance with clause 9, depending on the circumstances of the case. However, once the final decision has been made, it is unlikely that such documents should continue to be exempt unless special circumstances exist.

13.1.30 That said, there may be cases in which the public interest in confidentiality will continue after a decision has been made. If, however, a final decision has been made, and an agency wishes to continue invoking clause 9 on relevant documents, the agency will need to provide clear and compelling reasons as to why it is contrary to the public interest to release such documents.

13.1.31 Whether documents providing preliminary advice concerning an agency’s decision-making functions are exempt in accordance with clause 9 would include an assessment of various factors, for example:

- the level of importance of, or public interest in, the decision to be made;
- the amount of time that has been taken by the agency or the Government to reach a decision; and
- the public interest factors which require non-disclosure eg how will the administration of Government be adversely affected by a loss of confidentiality?

13.1.32 The application of the internal working documents exemption sometimes arises where a person with whom the agency is in negotiations seeks access to documents relevant to the agency’s decision-making in those negotiations. ‘Informational imbalance’ (ie the fact that only government agencies are subject to FOI) is not by itself a basis for withholding documents. If, however, having regard to the particular circumstances, it is the case that disclosure of the documents would give the relevant third party an unfair advantage in the negotiations to the detriment of the agency (and therefore the public interest objectives which the agency is attempting to secure in the negotiations), then it may be in the public interest that the
document be withheld (see General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84).

13.1.33 Agencies should note, however, that where the relevant negotiations have concluded, it is less likely that it would remain contrary to the public interest to disclose the documents. An argument that it is necessary for the documents to remain confidential in order to preserve a general ongoing relationship or dialogue with the particular third party will be carefully scrutinised and would need to be established ‘as a factual rather than a theoretical proposition’ (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84).

13.1.34 The question of when a relevant negotiation or decision-making process has been concluded is a question of fact and degree. Where there is a process of ongoing negotiation or continuous policy formulation, it may be that a particular matter can be considered to be complete once a point of ‘intermediate conclusion’ has been reached, at which stage the documents in question are no longer relevant to the agency’s deliberations or current thinking processes in ongoing negotiations (Law Society of NSW v General Manager, WorkCover Authority of NSW (No 2) [2005] ADTAP 33, affirmed in General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84).

13.1.35 Agencies have on a number of occasions exempted documents on the basis of clause 9 arguing that to release documents containing opinions, views and advice of agency staff would adversely affect open and frank advice provided by agency personnel. This is based on the assumption that such personnel would be reluctant to furnish such frank views if their opinions were to be made public.

13.1.36 In other contexts, the argument that government documents should be given special protection (ie public interest immunity) on the grounds that government employees may be less candid with their advice in the future should documents disclosing their opinions be released has in recent times been held to be largely untenable (eg Sunderland v Department of Defence (1986) 11 ALD 258; VXF v Human Rights and Equal Opportunity Commission (1989) 17 ALD 491; Fenster v Department of Prime Minister and Cabinet (No 2) (1987) 13 ALD 139).

13.1.37 The ADT, in a number of decisions, has also given short shrift to the frankness and candour argument (Simpson v Director-General, Department of Education and Training [2000] NSWADT 134 at 8); Bennett v Vice Chancellor University of New England [2000]
NSWADT 8 and 63). The exception may be in the context of a bona fide operational communications in the course of police investigations (DZ v Commissioner of Police, NSW Police Service [2002] NSWADT 274).

13.1.38 On the other hand, in Wallace v DPP [2003] AATA 119 (7 February 2003), the Administrative Appeals Tribunal held that there is a strong public interest in the authors of internal working documents being able to express their opinions, advice or recommendations with frankness and candour.

13.1.39 In a recent decision in the High Court, it was accepted that a proper record of the process of decision-making and policy formulation can only be maintained if written advice is provided. Therefore, if the effect of disclosure would be that officers in the future would be reticent to provide candid, written advice on matters on which they would provide oral advice, then that may be a public interest factor against disclosing the documents (McKinnon v Secretary, Department of Treasury [2006] HCA 45).

13.1.40 In the same case, it was accepted that there may be public interest factors against disclosing documents prepared for possible responses to questions in Parliament, because their release would be contrary to the Westminster-style system of responsible government (McKinnon v Secretary, Department of Treasury [2006] HC 45).

13.1.41 Given the aims of the FOI Act, the Department of Premier and Cabinet recommends that agencies be circumspect in respect of any possible claim that ‘frankness and candour’ grounds require the withholding of documents. Although the need to ensure the flow of uninhibited and candid advice is a matter which the Department of Premier and Cabinet believes to be in the public interest, agencies must be satisfied, in each particular case, that such advice would in reality be inhibited by the disclosure of the document, and that the public interest in ‘frank and candid’ advice outweighs all other public interest considerations that tend in favour of disclosure.

Ombudsman’s Guidance – Making and Keeping Proper Records

The Ombudsman reminds agencies of their record-keeping obligations under the State Records Act 1989. In particular, agencies should be aware of s. 12 of the State Records Act, which requires that public offices make full and accurate records of the activities of the office. Section 10 imposes an obligation on agencies’ chief executives to ensure compliance with the Act.
Ombudsman’s Guidance – ‘Frankness and Candour’

The box at the end of this Chapter sets out the Ombudsman’s attitude and approach to external review in circumstances where agencies cite ‘frankness and candour’ grounds for withholding documents. In brief, the Ombudsman is of the view that arguments based on the need to ensure frankness and candour in the provision of advice is, in most cases, unlikely to provide a reasonable basis for the withholding of documents.

Policies and factual or statistical material

13.1.42 Documents merely containing material in an agency's policy document or factual or statistical material are not covered by the exemption (clause 9(2)).

13.1.43 Under clause 9(2), an agency cannot exempt any part of a document under this clause if it consists of matter that appears in the agency’s policy document. A policy document is defined in section 6(1) of the FOI Act as:

“(a) a document containing interpretations, rules, guidelines, statements of policy, practices or precedents, or
(b) a document containing particulars of any administrative scheme, or
(c) a document containing a statement of the manner, or intended manner, of administration of any legislative instrument or administrative scheme, or
(d) a document describing the procedures to be followed in investigating any contravention or possible contravention of any legislative instrument or administrative scheme, or
(e) any other document of a similar kind, that is used by the agency in connection with the exercise of such of its functions as 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.”

13.1.44 The exception set out in clause 9(2) is self-explanatory. The intention of the clause is that a document cannot be held exempt in whole or in part if the information concerned is numerical data or summaries, conclusions or decisions which do not contain statements of opinion. Similarly, such exemption does not extend to documents where the information can be found in one or more of the agency's policy documents as defined in s.6(1).
13.1.45 Exceptions to the exemption clause will generally include such material as:

- accounting records,
- statistical data,
- studies, surveys and other factual reports,
- technical studies, and
- product tests and reports on equipment.

13.1.46 As to the circumstances in which summaries, conclusions and decisions may be considered factual material (see *Harris v Australian Broadcasting Corporation and Others* (1984) 5 ALD 564 and *Toomer and Department of Agriculture* [2003] AATA 1301).

**Unauthorised disclosure**

13.1.47 The fact that a document has been ‘leaked’ does not of itself affect an application for access to it under FOI. Release of the document, by confirming the authenticity of the 'leak' may itself cause damage. On the other hand, where a leaked document has been widely publicised, there may be little point in denying access if authenticity is not in doubt. Whether the document would still be exempt would probably depend on the nature of the information contained in the document.

13.2 **Clause 10 - Documents subject to legal professional privilege**

13.2.1 Clause 10 of Schedule 1 states:

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(1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document is not an exempt document by virtue of this clause merely because it contains matter that appears in an agency's policy document.
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**Purpose of the exemption**

13.2.2 The purpose of this exemption is to ensure that a document, which would be protected in legal proceedings, cannot be obtained under FOI.

13.2.3 In the case of *Grant v Downs* (1976) 135 CLR 674, the majority of the High Court provided an authoritative interpretation of the concept of legal professional privilege:
“The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and to seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interest of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.”

13.2.4 Legal professional privilege applies to executive government in the same way as it does for other clients and their legal representatives. This privilege is based on the public interest in government officials being able to seek confidential advice and legal representation about their powers, functions and duties (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84).

Applying the exemption

Summary

13.2.5 Legal professional privilege can be claimed in relation to communications:

(1) between a client (or a client’s agent) and a lawyer which:
   (a) are confidential in nature; and
   (b) were brought into existence for the dominant purpose of either:
      (i) enabling the client to obtain, or a lawyer to give, legal advice; or
      (ii) for use in litigation which is either pending or within the reasonable contemplation of the client; or

(2) between a client (or a client’s agent, including a lawyer) and a third party (for example a specialist or technical expert) which were brought into existence for the dominant purpose of obtaining legal advice for use in litigation which is either pending or within the reasonable contemplation of the client at the time the communication was brought into existence; and
(3) there has been no express or implied waiver of the privilege.

13.2.6 The privilege referred to in subparagraph (b)(i) above is often referred to as ‘advice privilege’ and that referred to in subparagraph (b)(ii) is often referred to as ‘litigation privilege’ (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84 at 76).

13.2.7 In the context of advice privilege, the practical emphasis is on the purpose of the retainer with the relevant adviser. If the dominant purpose of the retainer is the obtaining and giving of legal advice then, although it is theoretically possible that individual communications made under that retainer may fall outside that privileged purpose, in practice this is unlikely and so it is likely that all communications under the retainer will be privileged. If, on the other hand, the dominant purpose of the retainer is some other purpose (eg the provision of business or policy advice), then communications made under that retainer will usually not be privileged unless, exceptionally, some legal advice is requested or given under that broader retainer, in which case the specific legal advice communications will be privileged: DSE (Holdings) Pty Limited v InterTan Inc (2003) 135 FCR 151 at 160; General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84 at 83 and 84.

13.2.8 The privilege is not to be undermined by an overly narrow or technical approach to the questions involved: DSE (Holdings) Pty Limited v InterTan Inc (2003) 135 FCR 151 at 163.

Communications

13.2.9 Documents containing information that would be protected from being produced in legal proceedings under legal professional privilege can be withheld under this exemption.

13.2.10 Legal professional privilege is concerned with communications, which may be oral or written, in paper or electronic form. The communications in question relate to,

"communications brought into existence by a government department for the purpose of seeking or giving legal advice as to the nature, extent and manner in which the powers, functions, and duties of government officers are required to be exercised or performed" (per Brennan J in Waterford v The Commonwealth (1987) 163 CLR 54, at 74).

The privilege also applies to such communications brought into existence by external legal advisers to government agencies.
13.2.11 The mere fact that a document has been signed by a lawyer or includes a claim to being subject to ‘legal professional privilege’ does not make it privileged. The purpose of the communication and the content of the document are crucial considerations (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84).

The relevant test

13.2.12 Legal professional privilege, for the purposes of the FOI Act, is governed by common law rather than by the provisions of the Evidence Act 1995: Director-General, Attorney-General’s Department v Cianfrano (GD) [2006] NSWADTAP 26. The relevant test is the ‘dominant purpose’ for which the communication was made or document prepared (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84).

13.2.13 The ‘dominant purpose’ test refers to:

“a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice, or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect... the fact that the person... had in mind other uses of the document will not preclude that document being accorded privilege, if it were produced with the requisite dominant purpose.” (Barwick CJ in Grant v Downs)

13.2.14 For legal professional privilege to apply under the ‘dominant purpose’ test, a communication must have been created or brought into existence, ie made, drawn up, written, or prepared, for the ‘dominant’ purpose of either:

(1) obtaining or giving legal advice (advice privilege); or
(2) in connection with pending or reasonably contemplated or apprehended legal proceedings (litigation privilege).

13.2.15 A copy created for a privileged purpose is privileged, even if the original document is not (Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501).

13.2.16 The purpose for which a document was created may be inferred from the factual background giving rise to the creation of the document. The apparent purpose for which a document was created may be discovered from an examination of the content of the document.
13.2.17 The onus of proving that the privilege can be claimed in relation to a communication is on the party who makes the claim.

13.2.18 Documents may contain both legal advice and extraneous matters, such as matters relating to operational, administrative or policy advice. If it is the case that the document was created for the dominant purpose of legal advice or legal proceedings, then the document is wholly privileged (including any extraneous matters contained in it) (General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84). On the other hand, a document whose dominant purpose was not legal advice or legal proceedings is not privileged, even if it does contain some legal matters.

Lawyers

13.2.19 Where the privilege relates to communications with lawyers, 'lawyers' can include:

• 'in-house' lawyers if:
  - the communication was sent to or received by the in-house lawyer as a professional legal adviser and not in some other capacity;
  - the communication is made or given pursuant to or in the course of a relationship of lawyer and client; and
  - the lawyer is entitled to practice as a lawyer (although the holding of a current practising certificate is not necessarily a prerequisite – Cth & Air Marshall McCormack, Chief of Air Force v Vance [2005] ACTCA 35).

• the Crown Solicitor and lawyers attached to that Office;

• the Director of Public Prosecutions and lawyers attached to that Office;

• Parliamentary Counsel;

• solicitors in private practice; and

• barristers.

13.2.20 What is required is a relationship involving the provision of independent professional legal advice. The mere fact that one party to a communication is a lawyer and the other is a client is insufficient.
Clients

13.2.21 This privilege is that of the client and can therefore only be waived by the client (generally the agency itself).

Third parties

13.2.22 An agency may have in its possession a document where legal professional privilege belongs to a third party outside of government. For example a company seeking a grant under a legislative scheme may lodge with the agency concerned, on a confidential basis, advice provided by its solicitor in support of its view that it is entitled to the grant.

13.2.23 This information would probably fall within the exemption (provided there has been no waiver of privilege) but in most instances other exemptions could be relied on, for instance, confidential material (clause 13).

Confidentiality

13.2.24 Communications in relation to which the privilege is claimed must have been, and remain, confidential. Any disclosure of the communications prior to the FOI determination must have been made in circumstances which did not detract from the confidential nature of those communications.

13.2.25 Legal professional privilege attaches to confidential professional communications between legal advisers and clients undertaken for the dominant purpose of seeking or giving legal advice or in connection with anticipated or pending litigation. The privilege can extend to documents created by others apart from lawyers if brought into existence for the dominant purpose of likely or pending litigation.

Pending or contemplated litigation

13.2.26 For legal professional privilege to apply in relation to pending or contemplated litigation, the communication or document must relate to actual or ‘anticipated’ proceedings. In Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd and others (1998) 153 ALR 393, Goldberg J in the Federal Court of Australia held that, in determining whether proceedings are anticipated, regard must be had to objective criteria "and not simply by reference to the subjective statements of a participant in the relevant information gathering or litigation preparing process":

...
“[W]hether legal proceedings are reasonably anticipated requires a consideration of the existing state of facts taken in conjunction with the subject matter which gives rise to the context in which the document comes into existence or the communication is made...” (at 424)

“[W]here legal proceedings are anticipated one needs more than speculation as to the possibility of such proceedings, one needs a probability or likelihood that such proceedings will commence....It is sufficient that the moving party...has made a decision, for example, that subject to being satisfied as to the strength of the case, proceedings be issued or that, short of such decision, it can be reasonably anticipated on the facts as known, that legal proceedings are likely. The concept of anticipated proceedings involves the notion that there is a reasonable probability or likelihood that such proceedings will be commenced – not that they will not be, rather that more probably than not they will be.” (at 425)

**Waiver**

13.2.27 Waiver should be implied where it would be unfair or misleading to allow an agency to refer to or use material and at the same time assert that the material, or other material associated with it, is privileged.

13.2.28 The claim to legal professional privilege can be waived by express or implied conduct (for example through disclosure); or waiver may be imputed from conduct as a matter of fairness (Drinkwater v Director General, Department of Health [2002] NSW ADT 35 at 28).

13.2.29 A knowing and voluntary disclosure of the contents of the document by the agency to someone other than:

1. its lawyer,
2. another party with whom it has a common interest in the proceedings, or
3. an employee or agent of the agency or the lawyer when those agents are not authorised to disclose the contents of the document,

will ordinarily result in a court finding that privilege has been waived by the client (Bennett v Vice Chancellor, University of New England [2002] NSW ADT 175 at 22).

13.2.30 In Goldberg v Ng (1995) 69 ALJR 919 the High Court described the following kind of imputed waiver (at 925):

“Waiver of legal professional privilege by imputation or implication of law is based on notions of fairness. It occurs in circumstances where
a person has used privileged material in such a way that it would be unfair for him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage. Thus ordinary notions of fairness required that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance upon legal professional privilege.”

13.2.31 An agency that expressly relies on legal advice to justify a decision may be imputed to have waived legal professional privilege (see eg Queensland Law Society v Albietz & Anor [1998] QSC 231).

13.2.32 In Attorney-General for the NT v Maurice (1986) 161 CLR 475, Mason and Brennan JJ stated:

“The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication … fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter…”

13.2.33 It can, however, often be a very difficult question to determine whether a disclosure by an agency that it has received legal advice constitutes a waiver of legal professional privilege in respect of that advice. In considering that question, guidance may be found in the judgment of Rolfe J in Ampolex Limited v Perpetual Trustee Co (Canberra) Limited (1996) 40 NSWLR 12.

Discretion to release

13.2.34 There is no public interest test specified in this exemption. This means that provided the document is subject to legal professional privilege, it attracts the exemption.

13.2.35 Agencies do, however, have discretion to release a privileged document (that is, to waive privilege). In addition, where a privileged document also contains information extraneous to the dominant purpose for which the document was created, the agency should consider deleting those parts of the document containing the exempt information for the purpose of allowing access to the remainder (applying s.25(4)).

13.2.36 Even when there are public interest factors in favour of releasing a privileged document, there is always a countervailing public interest in full, frank and confidential communication between agencies and
their legal advisers, which the legal professional privilege exemption aims to protect (see eg Waterford v The Commonwealth of Australia (1987) 163 CLR 54 (at 62 per Mason and Wilson JJ)). Agencies should also be aware that releasing documents under FOI will usually constitute a waiver of the privilege, such that the document will lose the protection of legal professional privilege against the whole world, and not merely in respect of the person to whom the document was released.

Ombudsman’s guidance – The public interest in disclosing legally privileged documents

In the Ombudsman’s opinion, in general terms (and particularly in the absence of anticipated litigation), it is unlikely to be contrary to the public interest to allow legal advice relating to an agency’s affairs to be inspected if:

• it contains information likely to contribute to positive and informed debate about issues of serious public interest,
• it reveals significant reasoning behind an agency’s decisions that affect or will affect a significant number of people,
• it shows the pathway by which agency policy was created,
• it will significantly contribute towards the public accountability of an agency,
• it will assist or allow inquiry into possible deficiencies in an agency’s conduct (for example, by removing suspicion of significant impropriety or exposing significant impropriety),
• it consists of information that is legally in the public domain,
• it relates to the affairs of the individual who requested the right to inspect the document,
• it shows how an agency has dealt with a person’s complaint and the outcome of the complaint,
• it is innocuous by reason of its stale or trivial content, or
• it will overcome any special disadvantages facing persons making claims against an agency.

13.2.37 Notwithstanding the views of the Ombudsman expressed in the box above, the Department of Premier and Cabinet suggests that no general rules can usefully be set down to determine when it may be appropriate to exercise the discretion to release documents which are the subject of legal professional privilege. **Agencies should consider each document on a case-by-case basis.** [policy]

Agencies may also consider obtaining legal advice if they have any doubts about whether it is appropriate to release a document which may be subject to legal professional privilege (see [1.5.17]). [policy]

Exceptions

13.2.38 Legal professional privilege would not cover communications such as:

(1) documents which constitute or evidence completed transactions, eg contracts or conveyances;

(2) documents containing information that is also contained in an agency’s publicly-available policy documents;
(3) documents containing advice given by a government employee, who happens to be a lawyer, which relates purely to policy or administrative issues and was not created for the dominant purpose of giving or receiving legal advice or in use in litigation;

(4) unprivileged documents merely supplied to or addressed to a lawyer for one of the privileged purposes;

(5) documents evidencing communications made for a criminal or fraudulent purpose (ie the communication was a step in the commission of the crime or fraud);

(6) documents made to further a deliberate abuse of statutory power; and

(7) documents in relation to which privilege has previously been waived, either expressly or by implication.

**Examples**

Examples of records and communications which could, depending on the circumstances, qualify for a claim of legal professional privilege include:

- advice given by Parliamentary Counsel in relation to the preparation and drafting of Bills (*General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at 74);

- confidential letters from an agency (in its capacity as a client) to a legal adviser drafted for the dominant purpose of seeking legal advice, whether in relation to current or potential litigation, legal liability, policy formulation or for an internal administrative purpose;

- confidential letters or opinions provided to an agency (in its capacity as a client) from a legal adviser (in the capacity of professional legal adviser to the agency), prepared for the dominant purpose of providing legal advice, whether by a sole practitioner, a law firm, the Crown Solicitor’s Office, an ‘in-house’ lawyer (where the necessary requirements are met), or a barrister;

- confidential documents of all sorts created for the dominant purpose of pending or reasonably contemplated litigation, whether or not so used;
confidential documents such as file notes, memoranda, minutes or other records, prepared by an agency or a legal adviser of an agency, of verbal communications which:

- are themselves privileged (e.g., telephone conversations or conferences); or
- relate to information sought by the legal adviser to enable the legal adviser to advise the agency or to conduct litigation on behalf of the agency;

confidential communications between an agency’s legal adviser and a third party (for example a specialist or technical expert) made for the dominant purpose of obtaining advice for, or otherwise for the dominant purpose of, legal proceedings that are underway, pending or reasonably contemplated; and

photocopies of any documents that are privileged.

13.3 Clause 11 - Documents relating to judicial functions etc

13.3.1 Clause 11 of Schedule 1 states:

"A document is an exempt document if it contains matter the disclosure of which would disclose:"

(a) matter relating to the judicial functions of a court or tribunal, or

(b) matter prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal, or

(c) matter prepared by or on behalf of a court or tribunal (including any order or judgment made or given by the court or tribunal) in relation to proceedings that are being heard or have been heard before the court or tribunal."

Purpose of the exemption

13.3.2 The purpose of the exemption is to ensure that the smooth functioning of courts or tribunals is not compromised. It helps to ensure the finality of decisions reached and to ensure that neither party to a dispute is given an unfair advantage.

Applying the exemption

13.3.3 This exemption relates to the judicial functions of, and proceedings before, courts or tribunals.
13.3.4 The exemptions should be considered in the context also of s.10 of the Act, which excludes the application of the Act to the judicial functions of courts and tribunals. Section 10 provides:

"(1) For the purposes of this Act:

(a) neither a court nor a person who is the holder of an office pertaining to a court shall, in relation to the court’s judicial functions, be taken to be, or to be included in, an agency; and

(b) neither a registry or other office of a court nor the members of staff of such a registry or other office shall, in relation to those matters that relate to the court’s judicial functions, be taken to be, or to be included in, an agency.

(2) For the purposes of this Act:

(a) neither a tribunal nor a person who is the holder of an office pertaining to a tribunal shall, in relation to the tribunal’s judicial functions, be taken to be, or to be included in, an agency; and

(b) neither a registry or other office of a tribunal nor the members of staff of such a registry or other office shall, in relation to those matters that relate to the tribunal’s judicial functions, be taken to be, or to be included in, an agency."

13.3.5 Section 10 serves a different purpose to clause 11. Section 10 takes the court or tribunal outside the FOI Act so that it does not need to make a determination in relation to the documents. It needs merely to note that the documents fall within its judicial functions and therefore the FOI Act does not apply.

‘Tribunal’
13.3.6 ‘Tribunal’ is not defined in the FOI Act. In N (No. 2) v Director General, Attorney General's Department [2002] ADT 33, O'Connor K – DCJ (President) commented that:

" In my view the following are some, at least, of the characteristics that a body called a 'tribunal' would be expected to possess. The body would –

• Be impartial and detached from the ordinary processes of executive government

• Have a defined jurisdiction
- Receive claims or applications
- Determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof
- Use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law
- Make a final order that is binding.

The term ‘tribunal’ is used in contradistinction to the term ‘court’ to convey, I consider, that [that] body has functions analogous to a court, but operates in a more informal way than a court and may have special procedures; and members that may differ in qualifications and expertise from judge." (at 16-17)

13.3.7 The Department of Premier and Cabinet takes the view that the factors set out by the ADT (above) are merely some of the indicators which should be considered in determining whether a body is, in fact, a ‘tribunal’. Those factors should not be treated as a definitive checklist. It may be that a body may still properly be considered a tribunal even if it does not have every single one of those characteristics.

13.3.8 Agencies should be aware that the Ombudsman tends to adopt a narrow interpretation of ‘tribunal’. In the Ombudsman’s view, ‘tribunal’ should be construed as referring only to bodies having functions analogous to courts and would not, for example, include bodies of an essentially investigative or law enforcement nature. The Ombudsman believes that this narrow interpretation is supported by the terms of clause 11 where reference is made to the ‘judicial functions’ of a court or tribunal, ‘proceedings’ heard before a court or tribunal, and any ‘order or judgment’ made or given by a court or tribunal.

‘Judicial functions’

13.3.9 The Act defines ‘judicial functions’ as follows:

"Judicial functions, in relation to a court or tribunal, means such of the functions of the court or tribunal 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." (s.6)
13.3.10 The definition of ‘judicial functions’ in the Act as ‘such functions of the court or tribunal as relate to the hearing or determination of proceedings before it’. would suggest that not all of the functions of a court or tribunal are covered by the exemption. Given the provisions of s.10 and clause 11, and the fact that courts or tribunals are not bodies specified or described in Schedule 2 (which exempts bodies or officers, or specified functions of bodies or officers, from the operation of the Act), the Act clearly contemplates a distinction between the judicial and administrative functions of courts and tribunals.

13.3.11 It is reasonable to assume that the intention of s.10 and clause 11 is to ensure that the operation of the Act does not unduly interfere with the proper administration of justice. In this regard it does not appear that s.10 or clause 11 would have been intended to cover purely administrative matters, such as court or tribunal lists or documents evidencing the time taken to finalise activities undertaken or functions performed by court or tribunal staff or judicial officers.

13.3.12 While the definition of ‘judicial functions’ in s.6(1) of the Act is in quite broad terms, in interpreting this provision consideration must be given to s.5 of the Act. This section makes clear the intention of the Legislature that the Act be interpreted and applied so as to further its objects. This necessarily implies that provisions limiting the coverage of the Act are to be construed strictly.

13.3.13 The scope of clause 11 is wider, however, than just the information about judicial functions. It also covers applications, affidavits and submissions which are used by a court or tribunal in the exercising of its judicial functions. Documents which are created as a direct result of a court or tribunal exercising its judicial functions, such as warrants, are likely to be covered by the exemption.

13.3.14 Once a document has been presented to a court or tribunal, it could be argued that all the information in the document is automatically exempt, simply because the document as a whole has been presented for the purpose of a decision by the court or tribunal and, therefore, becomes a matter relating to the court’s judicial function. Of course, it would still be open to an agency, at its discretion, to release the document under s.25(1).

13.3.15 In relation to whether the consideration of an application for the issue of a warrant is a judicial function, there are court precedents to suggest that such decisions are judicial. In this regard the fact
that the authorising judge must consider, on the basis of the information before him or her, whether or not a warrant is justified, implies the exercise of his or her judgement and the consideration of the matter and decision are judicial in character. Further, as the courts have a statutory discretion to, for example, decide that a Judge in Chambers may perform a certain function, then that Judge in Chambers is a ‘court’ for the purposes of the exemption.

13.3.16 It has been held by courts that a decision of a Justice of the Peace to issue a search warrant is not a decision of an administrative character as the discretion should be exercised in a judicial manner.

13.3.17 Even though a document may validly fall within the exemption provided by clause 11, consideration should be given to releasing the document where disclosure would not, for example:

- prejudice the enforcement or proper administration of the law;
- have a substantially detrimental effect on the proper and efficient conduct or smooth functioning of a court or tribunal; and
- where such disclosure would not give either party to a dispute an unfair advantage.

Examples

13.3.18 Examples of courts and tribunals that would clearly fall within the scope of clause 11 would include the:

- High, Federal, Supreme, District and Local courts;
- Administrative Decisions Tribunal;
- Land and Environment Court;
- Victims Compensation Tribunal;
- Dust Diseases Tribunal;
- Consumer, Trader and Tenancy Tribunal;
- Residential Tribunal; and
- Industrial Relations Commission (eg as the Industrial Court of New South Wales).

Media inspection of court documents

13.3.19 The media is generally entitled (without the need to make an FOI application) to inspect documents held by a Court relating to criminal proceedings so as to enable the compilation of a fair report of the proceedings in accordance with the provisions of s.314 of the Criminal Procedure Act 1986. This provision only applies during the...
proceedings and up to 2 working days after the proceedings are finally disposed of.

13.3.20 Court files in respect of other proceedings are generally not available except with the leave of the Court (see eg Supreme Court Practice Note SC Gen 2).

13.4 **Clause 12 - Documents the subject of secrecy provisions**

13.4.1 Clause 12 of Schedule 1 states:

> "(1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act, whether or not the provision that creates the offence is subject to specified qualifications or exceptions.

> (2) A document is not an exempt document by virtue of this clause unless disclosure of the matter contained in the document, to the person by or on whose behalf an application for access to the document is being made, would constitute such an offence."

**Purpose of the exemption**

13.4.2 This exemption is intended to preserve the operation of specific secrecy provisions in other legislation. If a document is specifically protected from disclosure by secrecy provisions, it would be inappropriate for information to be obtained through alternative means such as FOI legislation. As the then Minister said in the Second Reading Speech to the Freedom of Information Bill (No 2) 1988,

> "Freedom of information legislation is not an appropriate vehicle for striking down specific secrecy provisions in other legislation."

**Applying the exemption**

13.4.3 The manner in which this clause is to be interpreted and applied was the subject of considerable uncertainty.

**'offence under an Act’**

13.4.4 The first issue is: what is meant by ‘an offence under an Act’. Where a penalty is provided in legislation for disclosure of information, then an offence is clearly committed if disclosure occurs. However, it is not necessary for there to be a penalty if the relevant Act clearly states that ‘an offence is committed if ...’

13.4.5 The more difficult question arises where the relevant Act contains a prohibition on disclosure but does not expressly state that a
contravention constitutes an ‘offence’ or is subject to a penalty. In those circumstances, the Department of Premier and Cabinet and the Ombudsman agree that disclosure of information would probably not be covered by clause 12.

13.4.6 Another question is whether ‘offence against an Act’ includes an offence specified in a regulation. The Department of Premier and Cabinet takes the view that an offence specified in a regulation is an offence against an Act, given that the power to make the regulation is conferred by the Act, which will usually expressly refer to the making of offence or penalty provisions.

‘whether or not the provision that creates the offence is subject to specific qualifications or exceptions’

13.4.7 The second issue is the manner in which sub-clauses 12(1) and 12(2) are to be read together.

13.4.8 The better view is that clause 12(1) is a general provision, which must be read subject to the more specific provision in clause 12(2). This means that clause 12 only applies if the proposed disclosure of the document would, in fact, constitute an offence under the relevant secrecy provision. If disclosure of the document would fall within an exception to the secrecy provision, then disclosure would not constitute an offence, and the document is therefore not exempt under clause 12 (see General Manager, WorkCover Authority of NSW v Law Society of New South Wales [2006] NSWCA 84).

13.4.9 It is important to note, however, that where there is a qualification stating, for instance, that no offence is committed if information is disclosed under the Protected Disclosures Act or ‘with the Minister’s consent’, then it is probably necessary for the disclosure to in fact be a protected disclosure or for consent to actually have been obtained, otherwise an offence will be committed and the secrecy exemption will operate. As the former Deputy Crown Solicitor has stated:

"the qualification or exception must in fact be satisfied and it is not enough that there exists a possibility of satisfying it."

13.4.10 The Department of Premier and Cabinet considered that there is some uncertainty as to the possible application of clause 12 in circumstances where the relevant secrecy provision of another Act is subject to a general ‘lawful excuse’ exception.

13.4.11 In General Manager, WorkCover Authority of NSW v Law Society of New South Wales [2006] NSWCA 84 at 176-181 the Court of Appeal held that certain documents were not exempt under clause
12 because the relevant secrecy offence contained a ‘lawful excuse’ exception.

13.4.12 The result of this decision appears to be that the clause 12 exemption can not be invoked if there is a ‘lawful excuse’ exception in the relevant secrecy provision. This is the Ombudsman’s view.

13.4.13 The Department of Premier and Cabinet considers that this may need to be clarified in future litigation. If this interpretation of the decision is correct, then it would follow that effectiveness of any secrecy provision with a ‘lawful excuse’ exception can be destroyed by the simple expedient of an FOI application being made. This would seem an odd result given that, by implementing such a secrecy provision, the legislature has clearly intended that as a general rule the relevant information should not be disclosed, subject only to specific exemptions. It may also be relevant that in many Acts the secrecy provision includes both a ‘lawful excuse’ exception and an express exception for release under the FOI Act, which would seem to suggest that, where the legislature intends that release under the FOI Act should be permitted, it will say so expressly.

13.4.14 In light of this paradox, the ADT Appeal Panel took a purposive approach to interpreting clause 12, and held that the effect of a general secrecy provision with a ‘lawful excuse’ exception was that some, but not necessarily all, of the documents of the agency may still fall within the ambit of clause 12. Whether a particular document would fall within the exemption would depend on whether its ‘nature’ was such that disclosure would constitute an offence, and this in turn would depend upon consideration of the following factors:

- the degree of direction given by the legislation to the agency as to how the particular kind of information is to be managed and divulged;
- the breadth of any powers given to the agency to release the particular kind of information;
- the intrinsic sensitivity of the particular information; and
- the likelihood that information of this kind would ever be released to the applicant having regard to the wider circumstances of the relationship between the applicant and the agency, to the extent that they are known (at 144).
13.4.15 Whether the Court of Appeal decision should be interpreted as having overruled this aspect of the Appeal Panel decision may need to be clarified in future litigation.

**General FOI public policy objectives**

13.4.16 Another issue of uncertainty in respect of the application of clause 12 is whether, if a secrecy provision in another Act does in fact apply, it is still necessary to consider the general public policy objectives of the FOI Act. The Appeal Panel of the ADT in *N (No 4) v Commissioner of Police* [2002] NSWADTAP 10 held that it was not necessary to do so:

“In the context of documents which are exempt by virtue of Clause 12, the general public policy objectives of the FOI Act, for example, to promote open, accountable and democratic government, have been overridden by parliament. Clause 12 creates a class of exempt document with no provision for weighing up the public interest considerations for or against disclosure”.

13.4.17 The Department of Premier and Cabinet advises agencies to adopt the approach indicated by the decision of the Appeal Panel in *N (No 4) v Commissioner of Police* [2002] NSWADTAP 10. [policy] That is, if disclosure of the document would constitute an offence under the relevant secrecy provision then the document is exempt and that is the end of the matter. There is no requirement to undertake a further public interest analysis.

13.4.18 Although it is arguable that the discretion under s.25(4) remains, the fact that the agency would be committing an offence under the other Act by releasing the document means that it would be most unlikely for it to be appropriate for the agency to exercise that discretion to release the document.

**Deletion of secret material**

13.4.19 Another issue is whether an agency is required to apply s.25(4) of the FOI Act to documents covered by clause 12 - that is, whether the agency must consider deleting matters which fall within the secrecy provision in the other Act if it is practicable to do so and if it appears to the agency that the applicant would wish to be given access to a copy of the document with those matters deleted. The Ombudsman and the Department of Premier and Cabinet agree that agencies should consider the potential for deletion of material from documents in accordance with s.25(4) where this is feasible.
Ombudsman’s guidance – Inappropriate use of clause 12

From experience, the Ombudsman is concerned that clause 12 provides the opportunity for agencies to exempt a document based on a ‘class of documents’ argument where it is claimed that the clause allows agencies to exempt a document based on the type of document it is rather than what it contains.

The Ombudsman has indicated that it adopts a narrow interpretation of clause 12 and will closely examine the way in which it is used by agencies. If clause 12 is to be used to exempt documents, the Ombudsman is of the opinion that the agency should have regard to the contents of the document and should not make its determination merely on a ‘class of documents’ basis. Where relevant, it is open to the Ombudsman to use his or her powers under section 52(6)(a) of the FOI Act to recommend the release of a document in the public interest, even where it is considered the document has been appropriately exempted under clause 12.

Provisions which disapply the FOI Act altogether

13.4.20 As a final matter it should be noted that, on the proper construction of the relevant secrecy provisions, it may be that the relevant document is excluded from the operation of the FOI Act altogether and is not merely exempt under clause 12. If that is the case, then issues relating to discretion to release (s.25(1)) and discretion to delete exempt material (s.25(4)) will not be relevant. For example, s.148 of the Casino Control Act provides that,

"(1) A person who acquires information in the exercise of functions under this Act must not, directly or indirectly, make a record of information or devolve the information to another person, except in the exercise of functions under this Act ..."

(7) This section does not prevent a person being given access to a document in accordance with the Freedom of Information Act 1989, unless the document:

(a) contains matter the disclosure of which could reasonably be expected to [result in specific things], or

(b) is a document the disclosure of which would disclose [certain specified information].

13.4.21 In Casino Control Authority v Preston [2003] NSWADTAP 64, the Appeal Panel held that the effect of s.148 was to wholly exclude any documents to which it applied from the scope of the FOI Act, as opposed to merely bringing them within clause 12 as ‘exempt documents’.
Examples

Some of the legislative provisions which have been held to fall within the clause 12(1) exemption include:

- Section 254 of the *Children and Young Persons (Care and Protection) Act 1988* (*Saleam v Department of Community Services* [2004] NSWADT 41).

- Section 56 of the *Police Integrity Commission Act 1996* (*N (No4) v NSW Police Service* [2002] NSW ADTAP 10).

- Section 148(7)(b) of the *Casino Control Act 1992* (*St Vincent Welch v Casino Control Authority* [2001] NSWADT 89; but see *Casino Control Authority v Preston* [2003] NSWADTAP 64, where the Appeal Panel held that s.148(7)(b)(iii) wholly excluded any documents to which it applied from the scope of the FOI Act as opposed to merely bringing them within clause 12).


13.5 Clause 13 - Documents containing confidential material

13.5.1 Clause 13 of Schedule 1 states:

"*A document is an exempt document:*

(a) if it contains matter the disclosure of which would found an action for breach of confidence, or

(b) if it contains matter the disclosure of which:

(i) would otherwise disclose information obtained in confidence, and

(ii) could reasonably be expected to prejudice the future supply of such information to the Government or to an agency, and

(iii) would, on balance, be contrary to the public interest."

Purpose of the exemption

13.5.2 The purpose of this exemption is to protect the flow of confidential information to government agencies. Individuals and organisations who provide information to government on a genuinely confidential basis can then be assured that the information will go no further.
Applying the exemption

13.5.3 There are two situations where a document falls into the confidential material exemption:

(1) where disclosure would found a legal action for breach of confidence; and

(2) where disclosure would not give rise to a legal action, but which otherwise satisfies a number of conditions.

Disclosure which would found an action for breach of confidence (clause 13(a))

13.5.4 The words ‘found an action for breach’ refer to a legal action brought in relation to one or more of the following causes of action:

- breach of a contractual obligation of confidence;
- breach of an equitable duty of confidence; or
- breach of a fiduciary duty of confidence and fidelity.

(Re B and Brisbane North Regional Health Authority (1994) 1 QAR 279 at 296; Public Service Assn and Professional Officers Assn, Amalgamated Union of NSW v Director-General, Premier’s Department [2002] NSWADT 277.)

13.5.5 It is important to note that the word ‘found’ suggests ‘establish’. It is not necessary for the agency to go so far as to prove that an action would necessarily be brought or, if it were, that it would succeed. There is some uncertainty in the case law as to whether agencies are required to take into account the possibility of defences to an action in determining whether such an action could be ‘founded’. In Taylor v WorkCover Authority [2003] NSWADT 186, at 40, it was said:

"Arguably the words used in cl 13(a) exclude from view the possible defences that might be available to the hypothetical action for breach of confidence. The exemption is expressed to be available to be invoked where the threatened disclosure (here under FOI) would ‘found’ an action for breach of confidence."

(But contra Re B and Brisbane North Regional Health Authority (1994) 1 QAR 279.)

Contractual obligations of confidence

13.5.6 An action for breach of a contractual obligation of confidence will be established if there is an express or implied duty of confidence imposed on the recipient of the information under the terms of a contract. This requires an evaluation of the terms of the contract.
13.5.7 However, a contractual obligation is different from a 'mere promise to keep certain information secret'. A promise, unsupported by consideration, does not give rise to a contractual obligation (See Re B and Brisbane North Regional Health Authority (1994) 1 QAR 279.)

13.5.8 If a contractual obligation of confidence exists then an equitable duty of confidence will also exist (but not necessarily vice versa), and actions for both may be brought.

13.5.9 Generally, in the context of the FOI Act, it is expected that agencies will generally be dealing with information that has been provided in the absence of a contract. Accordingly, it is likely that the issue most commonly faced by agencies will be whether an equitable obligation of confidence has arisen in the absence of a contractual duty of confidence.

Ombudsman’s guidance - Contractual obligations of confidence

The need for parties signing contracts to adhere to some degree of confidentiality regarding the terms of those contracts is clearly recognised in contract law. However, when public authorities enter into contractual agreements with private corporations, private individuals or indeed other public authorities, the nature and scope of the confidentiality required must be carefully considered. This should take into account that the public authority represents the public interest, and is using public funds and public resources. The overriding consideration is that public authorities are accountable to the public in the exercise of their duties. Additionally, public authorities that are subject to the provisions of the FOI Act must comply with the letter and spirit of the FOI Act.

In relation to contractual obligations of confidentiality, in Wyatt Co (NZ) Ltd v Queenstown - Lakes District Council [1991] 2 NZLR 180, in the New Zealand High Court, Jeffries J said:

“Confidentiality is not an absolute concept admitting of no exceptions ... It is an implied term of any contract between individuals that the promises of their contract will be subject to statutory obligations.” (at 191)

In this regard, a claim for confidentiality is subject to any obligations on the agency to perform functions under a relevant statutory scheme, and to any use to which the ‘agency must reasonably be expected to put that information in order to discharge its functions’ (see Re “B” and Brisbane North Regional Health Authority (1949) 1 QAR 279 at 93).

Equitable action for breach of confidence

13.5.10 Five elements are necessary to found an action of breach of confidence in equity:

(1) the information said to be confidential can be identified with specificity;
(2) the information has the necessary quality of being inherently confidential;

(3) the information was received by the defendant in such circumstances as to import an obligation of confidence (ie a confidential relationship);

(4) there is actual or threatened misuse or unauthorised use of the information; and

(5) disclosure is likely to cause detriment to the confider if disclosed.

(Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) (1987) 14 FCR 434 per Gummow J; applied in Re B and Brisbane North Regional Health Authority (1994) 1 QAR 279; Public Service Assn and Professional Officers Assn, Amalgamated Union of NSW v Director-General, Premier’s Department [2002] NSWADT 277.)

Specific

13.5.11 The information to which the exemption is to apply must be able to be identified with specificity, and not merely in global terms.

Inherently confidential

13.5.12 Information is inherently confidential if it is not in the public domain. The wider and more diverse the group of people who know the information, the less likely it is to be confidential.

13.5.13 An example of information that is not normally in the public domain is information about personal and family affairs, including financial, marital, educational and medical information. While such information may be known, for social or economic reasons, to persons close to the individual to whom it relates, the circle of those who know is unlikely to be very wide. If the circle is wide, the information may not be inherently confidential. This remains a question of judgement in each case.

13.5.14 Certain types of information concerning the business, professional, commercial, or financial affairs of a person or organisation may also be inherently confidential.

Covered by a confidential relationship

13.5.15 Whether a communication took place in confidence will depend on all the circumstances, including the relationship between the parties and the subject matter of the communication.

13.5.16 Marking a document as ‘personal and confidential’ will not of itself conclusively establish the document’s confidentiality. All the
circumstances under which a document was received and retained need to be taken into account.

13.5.17 Where the person supplying the information specifically requests that the information not be further disclosed, and the person receiving the information agrees that the information will not be disclosed, then an obligation of confidence arises to keep the information confidential. For this condition to be fulfilled, however, it must be understood on both sides that the information is being supplied on the basis that it will be kept secret and the recipient must receive it on that basis. It is not sufficient for the supplier of the information merely to request that it be treated as confidential.

13.5.18 The existence of a confidential relationship need not be expressly stated, but may be inferred from all the circumstances.

13.5.19 In deciding whether a confidential relationship exists between the supplying party and the receiving party it will be necessary to examine the surrounding circumstances in which the information was given to the agency. Important factors will be the wishes of the supplier and his or her interest in requiring confidence. The supplier's wishes in this regard may be explicit or implied. An agency's need to ensure that the future supply of information is not prejudiced by fear of disclosure will also be an important consideration.

13.5.20 Confidentiality may be readily implied in certain cases where a professional relationship exists - for example, doctor-patient, social worker-client or lawyer-client relationships. Where there is a provision in a contract between an agency and a supplier of information covering confidentiality, or where there is a statutory requirement that the information is supplied on a confidential basis, then a confidential relationship is explicit. Also, an officer dealing with staff grievances could be said to have confidential relationships with staff presenting grievances.

13.5.21 In *Low v Department of Defence* (1984) 2 AAR 142 it was said that the section of the Commonwealth FOI Act, which deals with information supplied in confidence:

"is concerned with information which would not have been disclosed but for the existence of a confidential relationship. Such a situation is readily seen when a person dealing with an agency conveys to the agency information which the person is not bound to disclose and does so on the understanding on both sides that such information will be kept confidential."
13.5.22 In a significant judgment concerning the Federal FOI equivalent of clause 13(a), it was observed that the clause:

"covers documents the disclosure of which would constitute a breach of confidence where that confidence was reposed and received not on the faith of a legal duty to respect that confidence but on the faith of a voluntary undertaking or understanding to respect it either in a specific case or as part of a tradition of dealing" (Witherford v Department of Foreign Affairs (1983) 5 ALD 534 at 542).

13.5.23 In Public Service Association and Professional Officers Association v Premier’s Department [2002] NSWADT 277 the Premier’s Department had obtained information from employees including date of birth, earning, superannuation contributions and leave under an undertaking to keep the information confidential under a Privacy Code of Conduct. It was held that the undertaking imposed an enforceable obligation of confidentiality upon the Department.

**Actual or threatened misuse**

13.5.24 Disclosure of documents under FOI will, in most cases, constitute unauthorised use if the above conditions are satisfied. However, it may not be sufficient for an agency to claim that if an obligation of confidence is established, any disclosure of the information under FOI must necessarily be a ‘misuse’ or ‘unauthorised use’. Whether disclosure in response to the particular FOI application will constitute a misuse or unauthorised use will need to be considered having regard to the particular confidential information and confidential relationship concerned.

**Detriment**

13.5.25 To found an action for breach of confidence the disclosing party would need to have an interest in maintaining confidentiality, such that he or she would suffer detriment if the information were disclosed. In commercial situations this will usually be considered in terms of financial loss, but if the person would be exposed to public criticism, embarrassment or some other detriment then that may suffice.

13.5.26 Mere suspicion that the supplier has an interest is not sufficient. Agencies must provide a clear statement of the facts on which it is concluded that an interest exists.

13.5.27 For an exemption under clause 13(a) to be claimed, the documents would usually contain information in which the author has invested substantial time, finance, original creative input and/or physical and emotional energy (eg original mechanical designs or financial ideas).
or where substantial profits may otherwise be at risk. It is the
disclosure of this type of information that usually leads to actions for
breach of confidence.

Relevance of public interest considerations to clause 13(a)

13.5.28 Although there is no express public interest test in clause 13(a),
there is some uncertainty in the case law as to whether, and the
extent to which, public interest considerations may be required to
be taken into account.

13.5.29 In particular, it has been suggested that the fifth criteria (detriment)
may, at least where the hypothetical plaintiff is a government
agency, require that disclosure be shown to be detrimental to the
public interest (Esso Australia Resources Ltd v Plowman (1995)
183 CLR 10; Taylor v WorkCover Authority [2003] NSWADT 186).

13.5.30 Also, some cases have suggested that disclosure in the public
interest may be a general defence to an action for breach of
confidence (see eg Taylor v WorkCover Authority [2003] NSWADT
186, at 41 and 52; but Gummow J’s judgment in Corrs Pavey
Whiting and Byrne v Collector of Customs (Vic) (1987) 14 FCR 434
is authority to the contrary). Even if such a defence exists, there is a
threshold issue as to whether the availability of a defence is
relevant to a consideration of whether an action could be ‘founded’
(see [13.5.5]).

Application of clause 13(a) to internal documents

13.5.31 Although there is some uncertainty as to whether clause 13(a) was
intended by the Parliament to apply to intra-agency documents (see
Re B and Brisbane North Regional Health Authority (1994) 1 QAR
279), where information is sought and given in confidence between
employees of a government agency it appears that a duty of
confidence may still arise, and therefore, the exemption in clause
13(a) may apply. An obligation of confidentiality may conceivably
arise even where both the discloser and the recipient are
employees of a government agency and the information relates to
their work.

Other confidential information (clause 13(b))

13.5.32 To satisfy the requirements for confidentiality in terms of clause
13(b), a document must meet each of the three specified criteria.
This test is broader than the one for actionable breach of
confidence.
13.5.33 The confidential status of information may change over time. Information may have been confidential at one time but might not be confidential at the time of an FOI request. It is the confidentiality of information at the time of the request that needs to be determined.

13.5.34 While it appears that clause 13 (b) has a broader application than clause 13 (a), the Ombudsman has raised concerns that clause 13(b), like clause 13(a), has been so widely used by agencies to refuse access to information. Agencies should of course ensure that there is a proper and legitimate basis for the making of any claim.

**Information obtained in confidence (clause 13(b)(i))**

13.5.35 For clause 13(b) to apply it must first be established that the information concerned was obtained (given and received) in confidence. Similar considerations to those referred to above will apply. Although a confidential relationship may be implicit, the nature of the relationship will be more easily established if there are express undertakings of confidentiality.

13.5.36 In determining the existence and scope of confidentiality, many factors may be relevant, including the following:

- whether the information was supplied gratuitously or for a consideration (although it is not uncommon for confidential information to be supplied without payment);
- whether there is any past practice of such a kind as to give rise to an understanding;
- how sensitive the information is; and
- whether the discloser expressly warned the recipient against a particular disclosure or use of the information.

*(Smith Kline and French Laboratories (Aust) Ltd v Department of Community Services and Health (1991) FCR 291 at 302 - 303).*

13.5.37 The Queensland FOI Act contains a provision similar to clause 13(b) in Schedule 1 to the NSW FOI Act. The Queensland FOI Act refers to matter that has been 'communicated in confidence' whereas the NSW FOI legislation, in sub-clause (i), contains the phrase 'obtained in confidence'. In considering the equivalent phrase in the Queensland FOI Act, the Queensland Information Commissioner in *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 provided the following interpretation:
"I consider that the phrase 'communicated in confidence' is used in this context to convey a requirement that there be mutual expectations that the information is to be treated in confidence. One is looking then for evidence to be found in an analysis of all the relevant circumstances that would justify a finding that there was a common implicit understanding as to preserving the confidentiality of the information imparted."

13.5.38 In *Ward v Legal Aid Commission* (1987) 2 VAR 22, medical reports written by doctors were held to be exempt as they were held to have been communicated confidentially to the applicant's legal representative. Pre-court reports prepared by a social worker were not exempt, however, as there was no evidence that they had been communicated in confidence.

**Could reasonably be expected to prejudice the future supply of information (clause 13(b)(ii))**

13.5.39 For clause 13(b) to apply it must secondly be established that the future supply of such information could reasonably be expected to be prejudiced.

13.5.40 The meaning of 'could reasonably be expected' is discussed at [10.4.25-10.4.32].

13.5.41 In relation to the word 'prejudice' in *Re Maher and the Attorney General's Department (No 2)* (1986) 4 AAR 266, the Commonwealth AAT found that the word should be given its common, dictionary meaning – ie 'to cause detriment or disadvantage'. In *Re Saxon* (unreported, AAT, 19 June 1995) the AAT held that a finding of prejudice requires a judgment as to whether persons who might supply information to an agency might not do so if the information is to be disclosed.

13.5.42 In some cases it may not be enough to show that disclosure might deter the particular person who provided the information from doing so in the future if, for example, there are other suitably qualified persons from whom the agency could obtain such information. If, however, disclosure would be likely deter all relevantly qualified persons from providing such information to an agency in the future, then the information will be more likely to be protected.

13.5.43 This will be a matter of judgment. For example, if an agency were to disclose psychiatric assessments received from a particular doctor under FOI and this would deter all doctors in a region from supplying such reports to the agency, then it is likely that the information will be protected. In some cases, it may not be
sufficient to rely on the fact that the particular doctor would refuse to supply psychiatric assessments in the future, if there are many other suitably qualified doctors who would still be willing to do so.

**Contrary to the public interest**

13.5.44 For clause 13(b) to apply it must thirdly be established that the public interest test has been met. It must be established that release of the information 'would, on balance, be contrary to the public interest' (the issue of public interest is discussed more fully in 10.4).

13.5.45 In relation to the 'public interest' requirement in clause 13, the fact that the initial criteria of the clause have been met (ie the information was received in confidence and disclosure would prejudice future supply) is one consideration to be taken into account in determining the public interest. For example, the Administrative Decisions Tribunal has found that it is in the public interest for an agency to be able to receive information in confidence from employees about the conduct or performance of other employees (see *Keriakes v Chief Executive Officer, State Rail Authority* [2003] NSWADT 191).

13.5.46 Agencies must also take into account public interest considerations which favour disclosure, and balance these against those which tend against disclosure. Where there is some evidence of illegality, or danger to public health or safety, it is more likely that the disclosure of the information would not be contrary to the overall public interest.

**Waiver**

13.5.47 It is always open to the original discloser to waive any obligations of confidence owed to him or her, either generally or in relation to a particular applicant for access.

**Examples**

- See 12.3.33-12.3.65 in relation to employment related records.
- Neighbourhood complaints are often received ‘confidentially’ by local councils, though actual practice varies considerably from council to council. Given the subject matter and level of importance of much of the information received (eg about barking dogs and disputed fences etc) and the way in which the material is dealt with (eg relatively wide access to the documents within council), it could well be difficult to meet the criteria involved in this exemption. Unless it could be established that disclosure would be likely to lead to significant complaints
not being given to council (or some other important consequence), it is unlikely that the criteria for this exemption would be satisfied.

- It may be in the public interest that licensing authorities be able to receive information that goes to the character and reputation of an applicant in confidence (see eg **BY v Director-General, Attorney General’s Department** (No 2) [2003] NSW ADT 37, which concerned the Legal Practitioners’ Admission Board).

- An example of a document, or part of a document, which was held to be exempt under clause 13(b), was a complaint provided to the RTA in good faith that a person did not have the ability to drive safely, even though they held a licence. This complaint was seen to have been provided in confidence, whether implicitly or explicitly. It was clearly in the public interest that the RTA continued to receive complaints made in good faith about people who were allegedly dangerous drivers. The exemption was upheld by the ADT.

- Referees’ reports sought by universities in relation to job applications have, on various occasions, have not been considered exempt by the Ombudsman under either paragraph (a) or (b) of clause 13 (see also [12.3.46-12.3.56]).

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**Ombudsman’s guidance – Over-use of the confidentiality exemption**

The Ombudsman is of the view that this clause has in the past been over-used by agencies and that its terms should be interpreted more narrowly than has often been the case to date.

The Ombudsman does not condone express statements, undertakings, obligations or commitments by public authorities that purport, or indicate an intention, to predetermine the exemption of documents that may at a later date be the subject of applications under the FOI Act. Such an approach could be interpreted as an intention to fetter discretion. Further, such an approach is contrary to the legislative intention of the FOI Act, as highlighted in s.5(3) of that Act, this Manual (at 10.3.1.-10.3.3) and good administrative practice.

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**13.6 Clause 14 - Documents affecting the economy of the State**

13.6.1 Clause 14 of Schedule 1 states:

“A document is an exempt document if it contains matter the disclosure of which:

(a) could reasonably be expected:

(l) to have a substantial adverse effect on the ability of the
Government or an agency to manage the economy of the State, or

(ii) to expose any person or class of persons to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Parliament, the Government or an agency in the course of, or for the purpose of, managing the economy of the State; and

(b) would, on balance, be contrary to public interest."

Purpose of the exemption

13.6.2 This exemption protects documents concerned with the management of the economy (clause 14(a)(i)) and it provides additional protection by exempting information about government affairs, the disclosure of which may lead to unfair advantage or disadvantage (clause 14(a)(ii)).

Applying the exemption

13.6.3 There may be some overlap between the two parts of this exemption (ie clauses 14(a)(i) and 14(a)(ii)). For instance, information covered by clause 14(a)(ii) may, if prematurely disclosed, have an adverse effect on the ability of the Government to manage the economy of the State. This would depend on the nature of the information, whether it related to decisions already made and the external circumstances.

13.6.4 Disclosure of information which hinders or defeats the Government’s economic policies or which makes it more difficult to put those policies into effect, or to continue with those policies, would fall within clause 14(a)(i). The exemption may apply to information of a purely factual character as well as information dealing with plans or policies.

13.6.5 In the Commonwealth legislation, the following types of documents are specified as examples of those which would fall within the equivalent of clause 14(a)(i):

- currency or exchange rates;
- interest rates;
- taxes, including duties of custom or excise;
- the regulation or supervision of banking, insurance and other financial institutions;
• proposals for expenditure;
• foreign investment in Australia; or
• borrowings by the Commonwealth, a State or an authority of the Commonwealth or a State.

13.6.6 Premature disclosure of such information might, if disclosed to someone in a position to take advantage of it, give that person an unfair advantage over others who have not obtained such access under FOI or otherwise. However, not all of these examples would necessarily fall under the exemption; it would instead depend on the consequence that disclosure would have.

13.6.7 The meaning of ‘could reasonably be expected’ is discussed at [10.4.25-10.4.32].

13.6.8 The meaning of ‘substantial adverse effect’ is discussed at [10.4.33-10.4.35].

13.6.9 The meaning of ‘public interest’ is discussed at [10.4.1-10.4.22].

13.6.10 Where a document is considered for exemption under this clause, it is likely that the interests of more than one agency will be concerned. It is therefore of considerable importance to the proper working of the government's economic policies that, before a decision is taken to release a document which might be exempt under this clause, there is effective consultation with other agencies having interests likely to be affected by the release of the document. [policy]

13.6.11 Agencies should note that a number of NSW State bodies, which deal with economic matters, are automatically exempt (in relation to certain functions) under Schedule 2 to the Act. For example, the Treasury Corporation is exempt in relation to its borrowing, investment, liability and asset management functions.

13.7 Clause 15 - Documents affecting financial or property interests

13.7.1 Clause 15 of Schedule 1 states:

"A document is an exempt document if it contains matter the disclosure of which:

(a) could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency, and

(b) would, on balance, be contrary to the public interest."
Purpose of the exemption

13.7.2 The exemption aims to allow the Government and agencies to engage in candid and uninhibited discussions and dealings about financial interests and activities, without the concern that opinions, plans or recommendations relating to financial activities will be published prematurely, resulting in serious financial consequences for the agency.

Applying the exemption

13.7.3 This exemption provides that a document is exempt if disclosure could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency.

13.7.4 For an agency to claim that documents are exempt under clause 15, both sub-paragraphs will have to be satisfied. That is, both parts of the test in this clause must be met for an exemption to be valid. There must be both:

- a **reasonable expectation** of a substantial adverse effect on the relevant financial and property interests; and
- a **public interest** in non-disclosure which outweighs the public interest in disclosure.

13.7.5 For the meaning of ‘could reasonably be expected’ see [10.4.25-10.4.32].

13.7.6 For the meaning of ‘substantial adverse effect’ see [10.4.33-10.4.35].

13.7.7 For the meaning of ‘public interest’ see [10.4.1-10.4.22].

13.7.8 The term ‘financial or property interests’ is not limited to matters relating to buildings and land. It may apply, for example, to an agency's debt collection practices. For example, if an agency has decided that it will not recover debts below a certain value, then disclosure of that figure may have an adverse effect on the agency's revenue collection. It may also apply where the Government is considering the privatisation of an agency or part of an agency.

13.7.9 In *Wilson v Department of Education* the Court held that the disclosure of information about,

"values of properties anticipated to be disposed of and the cost of resumption of other properties, costs of works to be carried out as a consequence of the policy being adopted by the Department"
could reasonably be expected to have a substantial adverse effect on the property interests of the State or an agency and that disclosure was contrary to the public interest.

Examples:

13.7.10 Examples of documents which may be exempt under this clause (subject to satisfaction of the ‘substantial adverse effect’ and ‘public interest’ tests referred to above), are documents containing the following types of information:

- Documents that disclose instructions for audit checks on the expenditure of public money.
- Documents relating to proposals for the acquisition or sale of land, which if disclosed might have the effect on the price of the land (see Retain Beacon Hill High School Committee Inc v NSW Department of Commerce [2006] NSWADT 129, discussed further at [12.4.45]).
- Documents that disclose an agency’s negotiating limits for the purchase of property.
- Documents relating to a credit organisation, that an agency intends to set up, where preliminary disclosure of such information may severely inhibit investment in the agency by external authorities.
- Documents that reveal the monetary level at which an agency will not seek to recover a debt. The publication in documents of such a level may adversely affect the agency’s revenue collection.
- Documents containing strategies for the security of buildings.
- Documents relating to a Government process for the privatisation or contracting out of agency functions.

13.8 Clause 16 - Documents concerning operations of agencies

13.8.1 Clause 16 of Schedule 1 states:
A document is an exempt document if it contains matter the disclosure of which:

(a) could reasonably be expected:

(i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency, or

(ii) to prejudice the attainment of the objects of any test, examination or audit conducted by an agency; or

(iii) to have a substantial adverse effect on the management or assessment by an agency of the agency’s personnel, or

(iv) to have a substantial adverse effect on the effective performance by an agency of the agency’s functions, or

(v) to have a substantial adverse effect on the conduct of industrial relations by an agency, and

(b) would, on balance, be contrary to the public interest.

Purpose of the exemption

13.8.2 The purpose of the exemption is to protect information concerning specific agency operations relating to tests, examinations, audits, management or assessment of agency personnel, effective performance of the agency’s functions and an agency’s conduct of industrial relations. Protection exists where disclosure of the information would create a reasonable expectation of prejudice to, or a substantial adverse effect on, those operations and would, on balance, be contrary to the public interest.

Applying the exemption

Subclauses (a) (i) & (ii)

13.8.3 That information relates to tests, examinations or audits is not sufficient to make out the exemption. The two criteria in this test must be met for an exemption under this clause to be valid. There must be both:

- a reasonable expectation of prejudice either to the effectiveness of the procedures or methods for the conduct of those tests, examinations or audits, or to the attainment of their objects; and

- a public interest in non-disclosure that outweighs the public interest in disclosure.
Subclauses (a) (iii), (iv) & (v)

13.8.4 Parts (iii), (iv) and (v) of paragraph (a) to this clause require a reasonable expectation of substantial adverse effect. In this context the meaning that should be given to ‘substantial’ and ‘substantial adverse effect’ is discussed in [10.4.33-10.4.35]. Combined with the public interest requirement in this clause, it creates a test which requires the existence of a significant degree of gravity, seriousness or significance. For a document to be validly exempted from disclosure under this clause, there must be a reasonably held expectation of a clearly adverse effect that would be substantial. Further, the public interest in non-disclosure must outweigh the public interest in disclosure.

Subclause (b)

13.8.5 In relation to the ‘public interest’ requirement in this clause, what is required is a balancing of interests for and against disclosure (see [10.4.1-10.4.22]).

13.8.6 The Administrative Appeals Tribunal has held, in relation to the similarly worded Commonwealth provision, that the grounds enumerated in the first part of the exemption should ordinarily be enough to make the document an exempt document on the basis that satisfaction of these grounds would make disclosure prima facie contrary to the public interest (see Hazeltine and Australian National Parks and Wildlife Service No A86/74 (11.2.87) and Re Mann and the Australian Tax Office (1985) 3 AAR 261). In some circumstances, it may not be enough for the applicant to rely on the general right of access and the objectives of the Act (see Hazeltine).

Ombudsman’s Guidance – The ‘Public Interest’ under clause 16(b)

Notwithstanding the decision of the AAT in Hazeltine, the Ombudsman is of the view that the wording of the public interest test in paragraph (b) (ie whether it is, on balance, contrary to the public interest to exempt a document) implies that public interest considerations will favour disclosure of a document unless compelling reasons can be offered as to why a document should be exempt. Such a view is in line with the view that the FOI Act favours disclosure of documents. It is also in accordance with a decision of the Office of the Queensland Information Commissioner in Re Eccleston and The Department of Family Services and Aboriginal and Islander Affairs (Decision No 93002, 30 June 1993; (1993) 1 QAR 60). The possibility of criticism of an agency’s actions or decisions is not a relevant consideration as to whether documents should be withheld from release.
13.8.7 The specific part of clause 16, which is relied upon, must be referred to in the determination. Further, it is not sufficient to briefly state that there is a public interest argument against disclosure - the notice of determination must show both sides of the argument, and show why disclosure would 'on balance' be contrary to the public interest.

**General principles**

13.8.8 'Tests' would include all kinds of personnel tests including intelligence, aptitude, psychological and personality tests. 'Examinations' would include academic examinations of all kinds and also professional, technical and trade examinations conducted by agencies.

13.8.9 It is not clear whether physical examinations (eg public searches of bags at sporting grounds) would be covered under this exemption, although they may well be covered by other exemptions such as those relating to law enforcement.

13.8.10 Guidelines and standards for carrying out tests and examinations of physical substances or of machinery and equipment would be exempt where prior knowledge or procedures for testing would defeat the objects or purposes of the tests.

13.8.11 The term 'audits', although used primarily for financial audits, could also cover examinations of non-financial aspects of an organisation’s activities eg compliance or efficiency audits. See the decision of the Appeal Panel of the ADT in *Director General, Department of Education and Training v Mullett and Randazo (No.2)* [2002] NSWADTAP 29.

13.8.12 The Department of Premier and Cabinet is of the view that audit reports of external consultants should be released unless disclosure would be contrary to the public interest.

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**Ombudsman’s Guidance – Audit Reviews conducted by external consultants** *(Note: this guidance only applies to external consultants and different considerations may apply to internal audits)*

The Ombudsman is of the view that reports of audit reviews of an agency carried out by external consultants should generally be released. The Ombudsman is of the view that the release of such documents would not result in responsible consultants refusing contracts for such reviews, or future reviews suffering from such disclosure. There is a strong public interest in reports prepared by outside consultants being tendered to a public authority with the knowledge that the authority may be obliged to release the document under FOI. The Ombudsman does not believe that, with such knowledge, a responsible and professional consultant would be deterred from providing full, free and factual reports to the employing authority.
Documents received by auditors containing submissions and statements from staff as to the abilities of other personnel may validly be exempted from release in appropriate circumstances. The opinions of staff can be crucial in the assessment and management of personnel. For example, in one external review the Ombudsman accepted that the evidence supported, to some degree, that individuals were concerned for their physical safety. This contributed to a reasonable expectation that staff would be less frank in their expressed views in future if disclosure occurred. This was seen to lead to a reasonable expectation of substantial adverse effect on the assessment of the authority’s personnel. The public interest in the particular case was also seen to be balanced against disclosure.

Could reasonably be expected

13.8.13 To satisfy the exemption, disclosure of information in the above cases must be ‘reasonably expected to prejudice the effectiveness of such tests’, and be ‘contrary to the public interest’. The meaning of ‘could reasonably be expected’ is discussed at [10.4.25-10.4.32].

Substantial adverse effect

13.8.14 This exemption applies only where disclosure of documents would have a ‘substantial adverse effect’ on the management or assessment of personnel, the effective performance of functions or the conduct of industrial relations. The meaning of ‘substantial adverse effect’ is discussed at [10.4.33-10.4.35].

‘Prejudice’

13.8.15 The word ‘prejudice’ has been considered in various Federal Court and tribunal decisions. It is similar to, but imposes a lower threshold than, the words ‘substantial adverse effect’ (James and Australian National University (1984) 2 AAR 327 at 341).

Management or assessment of personnel

13.8.16 This exemption in clause 16(a)(iii) may apply where, for instance, it is necessary to obtain candid comments from officers of an agency on their work and on their colleagues. As it may be unlikely that honest comments would be provided if confidentiality cannot be assured, the exemption is aimed at protecting such disclosures.

13.8.17 If disclosure is likely to adversely impact upon an agency’s ability to manage its staff or make it particularly difficult for an agency to appropriately implement or draft its policies, then the exemption may apply. The public interest test may be used, however, to argue that information should be released in order to demonstrate that there was no discrimination or bias in appointments and that the merit principle was applied in selection procedures.
13.8.18 Some of the situations in which the disclosure could be seen to impede good public administration are mentioned below.

13.8.19 Staff reports, ie reports prepared in the course of staff reporting and assessment schemes, and documents such as selection committee reports are often made available to those who are the subject of reports and assessment under existing procedures (this issue is also discussed in regard to clause 6 - the ‘personal affairs’ exemption - see [12.3.33-12.3.65]). Similarly, existing procedures generally allow staff access to their personnel files. The FOI Act expressly provides that it is not intended to cut down the availability of information under any other administrative scheme or Act (s.5(4)).

13.8.20 However, in certain cases, public disclosure of information contained in staff reports involving assessment of, or comment on, the subjects of the report may have an adverse effect on staff management interests and would therefore be exempt under this section. For example, the deliberations involved in the ranking of applicants may depend on opinions expressed by members of Selection Committees or referees, and to disclose those opinions may prejudice the selection process.

13.8.21 A staff report that is exempt under these provisions is exempt even in relation to the person who is the subject of the report. He or she would probably not be entitled to access under FOI.

13.8.22 In Re Hazeltine and Australian National Parks and Wildlife Service No A86/74 (11.2.87), the applicant was given access to all selection documentation regarding the person who had obtained a position for which he (Hazeltine) had applied. He then applied for all documents relating to that applicant’s work capacity and performance going back to 1975. The AAT held that the latter request was correctly refused. The Tribunal had no hesitation in finding that disclosure of the information sought would have the sufficiently serious adverse effect.

13.8.23 Staff reports that contain information about the personal affairs of another person (ie a selection committee report on a number of candidates) may also be exempt on the basis that to disclose it would involve an unreasonable disclosure of the personal affairs of another person (see [12.3.21-12.3.28]). However, as with any other exemption, material can be deleted to make the document not exempt and, therefore, available. For instance, factual material in a staff report need not be withheld.
Industrial relations

13.8.24 The conduct of industrial relations negotiations may often require a substantial amount of confidentiality, to enable parties to industrial negotiations to canvass options for settlement of disputes without precipitating a more public discussion.

13.8.25 In *Re McCarthy and Australian Telecommunications Commission* (1987) 3 ALD 1 the Tribunal considered whether certain documents were exempt on the grounds that their disclosure may have a ‘substantial adverse effect on the conduct of industrial relations’. The documents, referred to as ‘bids’ from district managers, were considered by Telecom as part of its decision about the allocation of staff resources. The Tribunal held that, although disclosure of the documents to the union might increase the level of industrial disputation or decrease the ability of Telecom to reach its desired goal in a dispute, release of the documents would not have a ‘substantial adverse effect’ on the conduct of such industrial relations by Telecom.

Example - Examinations and tests

13.8.26 Exam papers, candidates’ answers to exam questions, raw marks (ie those written directly on exam papers or answer booklets), documents generated in scaling processes and other such documents have traditionally been withheld under clauses 16(a)(i) and (ii) and (b) of Schedule 1 to the Act.

13.8.27 Whether or not such exemptions apply will depend, to a large extent, on an assessment as to whether, and the degree to which, the disclosure of such material could be expected to prejudice the future conduct of examinations. The Department of Premier and Cabinet advises that it is necessary to consider this question on a case-by-case basis, having regard to the nature of the examination and the documents to which access is being sought.

13.8.28 The Department of Premier and Cabinet notes that, particularly given the pervasiveness of the internet, the prospect of prejudice to future examinations by releasing documents relating to past examinations may, depending upon the particular circumstances, be significant.

13.8.29 Where tests have been prepared or conducted by an external body, it will also be necessary to consider any agreements between the agency and the external body, including as to the existence of intellectual property rights (such as copyright) in examination material. It may also be necessary to consult with that body under s.32, and to consider the potential application of clause 7.
Ombudsman’s guidance – Examinations

The Ombudsman takes the view that, where applicants seek copies of their own answers, examiner’s comments and marks given, it will generally be unlikely that clauses 16(a)(i) and (ii) and (b) would apply:

(a) First, the Ombudsman believes that it is unlikely that methods or processes for the conduct of tests or examinations (clause 16(a)(i)) already completed will be prejudiced. Likewise, it is unlikely that the attainment of the objects of any test or examination (clause 16(a)(ii)) will be prejudiced once the tests or examinations are completed and the results published. Realistically then, only tests or examinations to be conducted in the future are likely to be affected by the disclosure of documents;

(b) Second, the Ombudsman believes that it is highly unlikely that the conduct of, and the attainment of the objects of future tests and examinations, will be affected by disclosure to a past candidate of his or her own answers and marks.

The Ombudsman recommends that there be a presumption that a candidate has a right to know the details of the assessment of his or her own work.

Raw scores

The Ombudsman is of the view that raw examination scores would not be exempt under this clause, once final results have been published. After an exam is over, the publication of the information upon which the results were based could not prejudice the conduct or attainment of the objects of an exam. The differentials between raw scores and final marks may be misunderstood leading to adverse publicity, but s.59A precludes misunderstanding or embarrassment as criteria in determining the public interest.

Scaling processes

Where marks written on an exam paper or answer booklet are then processed by means of scaling procedures, it has been argued that disclosure of the raw mark, or the marks arrived at in the various stages of scaling, would bring about the effects in clause 16(a)(i) and (ii). Again, there is little chance of the methods, procedures and objects surrounding future tests or examinations being affected by any complaints about the fairness of scaled marks when compared to raw marks of past tests or examinations. Such complaints may cause inconvenience for the agency concerned, but any such inconvenience would arise directly from the complaints received and the resources having to be allocated to the complaints process.

In the Ombudsman’s view it would be unreasonable for an agency to argue that the diversion of resources required to deal with complaints arising from the disclosure of information about tests and examinations was the cause of prejudice to future tests and examinations. Any inconvenience could not be reasonably linked to the disclosure of documents and therefore could not be said to bring about the effects described in clause 16(a)(i) and (ii).

It is unlikely any exemption clause containing a public interest test will apply where an agency’s reluctance to disclose exam papers, answer booklets, marks, scaling processes and calculations etc is based solely upon:

1. a desire to avoid embarrassment or loss of confidence; or
2. a desire to avoid an FOI applicant misinterpreting or misunderstanding the information contained in the
document (such as how the various marks within a scaling process were arrived at).

Section 59A of the Act specifically disallows the above-mentioned considerations for the purpose of deciding whether the disclosure of documents would be contrary to the public interest.

**Repeated use of exam questions**

When exam papers or questions from exam papers, whether or not they are papers upon which candidates have written answers, are used or intended to be used again and again, there is clearly a stronger case for prejudice to future tests and examinations to occur by their disclosure, as there would be the distinct possibility future candidates would know in advance the content of an examination. The deletion of exempt material, which may be the exam questions, may be appropriate in such instances. The answers on such papers would be less likely to be exempt, but they may be if it could reasonably be said that it was possible to reconstruct the questions from the answers. Marks awarded would probably not be capable of exemption for the reasons given earlier. It is unlikely that disclosure of answer booklets which merely contain essay answers to questions on a separate exam sheet, or such exam sheets, could reasonably be argued as revealing future exam content because generally exam papers based on essay questions are made available to future candidates.

**Written comments of examiners**

Examiners may not wish the marks or remarks they have written on candidates’ papers to be disclosed. The principles of open government enshrined in the Act, and of procedural fairness, would generally suggest candidates should be able to see what has been written about their answers.

It may be appropriate, however, for an agency to exempt written comments of assessors when they are made during assessment interviews for entry to a course of study. Assessment interviews may be based upon criteria which the agency intends to use in future assessments. The release of notes which were used and/or created by past interviewers, and which contain, or could be used to deduce, the criteria may provide potential candidates with the opportunity to fabricate answers during their assessments. Likewise, the disclosure to failed candidates of documents disclosing the written comments made about their interviews may enable them to tailor their responses to their advantage in a future attempt to gain entry to the course. First time applicants, not having the same information, may thus be placed at a disadvantage. These effects of disclosure could prejudice the agency’s ability to determine those candidates who are genuinely best suited to enter the course and, being unfair, may well be contrary to the public interest. If so, clause 16(a)(i) and (b) may apply. The Ombudsman has found that such exemption was appropriate in relation to written assessments of candidates seeking to study a particular university course.

**Exams conducted by external providers**

A number of issues are raised by tests and examinations devised and conducted for an agency by a non-government body (generally of the multiple choice type). They may be subject to copyright. Section 27(3)(c) permits an agency to refuse to give access to a document in the form requested if to do so would involve an infringement of copyright. In this case, however, access must be given in another form. The only exception to this would be if an exemption clause in Schedule 1, such as clause 7, applied to the document.

There may also be the question of whether the agency has an immediate right of access to the documents if held by the external body and the agency does not hold copies.

In the Ombudsman’s view, ideally this question will not arise. The Ombudsman’s opinion is that, where public money is spent buying services for the public, in the absence of compelling reasons to the contrary, there should always be
arrangements in contracts allowing the purchasing agency full and immediate rights of access to documents held by the external body relevant to the services being purchased. Such arrangements remove any ambiguity about an agency’s right to make decisions on access under the FOI Act.

The Ombudsman believes that agencies should ensure that decisions on access to tests, examinations and related documents are always capable of being made under the FOI Act, by ensuring that they have immediate rights of access to all such documents. The effect on people’s lives of the results of tests and examinations conducted by or on behalf of government agencies has the potential to be very significant, and the public interest in the disclosure of as much information as possible in relation to those tests and examinations will usually be strong.

If the documents are on premises of the agency, consultation may have to occur under s.32, subject to any disclosure agreements between the agency and the external body.

Confidential reports of assessors regarding candidates for higher degrees

While confidential reports of assessors regarding candidates for higher degrees may be exempted from release if it can be shown that the usefulness or efficacy of those reports depends on assessors being assured of their confidentiality, the public interest requirement may be difficult to meet. Accordingly, the Ombudsman will not accept such claims lightly.

The Ombudsman is of the opinion that the starting point for any such assessment is a presumption that a candidate has a right to know the details of the assessment of his or her work. Where assessment is a professional duty, or there exists an expectation that professionals will assess the work of aspiring members of that profession, such claims often arise more from academic tradition than from the reality of any adverse effect.

13.9 Clause 17 - Documents subject to contempt

13.9.1 Clause 17 of Schedule 1 states:

"A document is an exempt document if it contains matter 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."

Purpose of the exemption

13.9.2 This clause exempts from mandatory disclosure under the Act documents that have traditionally been protected from public disclosure by the Parliament and courts under their power to regulate their own proceedings. It also protects documents, which under an order of a Royal Commission, are prohibited from being published.
13.9.3 Parliament and the Courts both have powers to regulate their own proceedings. These powers have traditionally been regarded as a necessary incident to their functions. The law of contempt of court and the law protecting parliamentary privilege ensure that the power to regulate proceedings and to operate without interference or obstruction is effective.

13.9.4 Similar powers have also been given to bodies such as Royal Commissions and to tribunals. The FOI Act is not intended to override these exemptions. Where publication is prohibited by a court order, it is not appropriate for the information to be made available under FOI.

Applying the exemption

Public disclosure

13.9.5 This exemption refers to documents the public disclosure of which would have certain consequences, whereas other exemptions refer only to disclosure (by implication, disclosure under the Act. However, there is not much practical difference between the two phrases since information released under the Act is in fact free to be disclosed to the public at large.

Contempt of court

13.9.6 It is contempt of court to publish any material that a court has ordered not to be published. For instance, a court may order that the following types of information not be published or not be published except to specified persons:

- names of witnesses appearing before a court;
- evidence given by a witness to a court;
- a transcript of proceedings; or
- the names of parties to an action before a court.

13.9.7 Any document containing information identified in this way would therefore be exempt under this section.

Orders of bodies having power to receive evidence on oath

13.9.8 A Royal Commission, established under the Royal Commissions Act 1923, may direct that evidence given before it or the contents of any documents produced at an inquiry shall not be published in New South Wales (s.6D(3)). Similar powers have been given to other bodies, including Special Commissions (s.31, Special Commissions of Inquiry Act 1983), the Independent Commission Against Corruption (s.112, Independent Commission Against
Corruption Act 1988), and the Police Integrity Commission (s.52, Police Integrity Commission Act 1996)). If public disclosure of a document would contravene such an order, the document is exempt from disclosure under the FOI Act.

The privilege of Parliament

13.9.9 Some parliamentary committees have statutory power to prohibit or restrict the publication of evidence given before them. Parliament has claimed for itself the privilege to decide if and when documents or evidence presented to a parliamentary committee may be published. It is therefore a breach of privilege to disclose publicly documents which have been submitted to a parliamentary committee, or documents recording the proceedings of a parliamentary committee, before the committee has authorised publication of the material. These documents would also be exempt from disclosure under the FOI Act.

13.10 Clause 18 - Documents arising out of companies and securities legislation

13.10.1 Clause 18 of Schedule 1 states:

“(1) A document is an exempt document if it contains matter that appears in:

(a) a document for the purposes of the Ministerial Council for Companies and Securities that has been prepared by, or received by an agency or Minister from, the Commonwealth or another State, or

(b) a document the disclosure of which would disclose the deliberations or decisions of the Ministerial Council for Companies and Securities, other than a document by which a decision of the Council has been officially published, or

(c) a document that has been furnished to the National Companies and Securities Commission by the Commonwealth, or by this or any other State, and that relates solely to the functions of the Commission in relation to a law of the Commonwealth or the law of this or any other State, or

(d) a document (other than a document referred to in paragraph (c)) that is held by the National Companies and Securities Commission and that relates solely to the exercise of the functions of the Commission under the law of the Commonwealth or the law of this or any other State.”
(2) A document is an exempt document if it contains matter that appears in:

(a) a document for the purposes of the Ministerial Council for Corporations that has been prepared by, or received by an agency or Minister from, the Commonwealth or another State, or

(b) a document the disclosure of which would disclose the deliberations or decisions of the Ministerial Council for Corporations, other than a document by which a decision of the Council has been officially published, or

(c) a document that has been furnished to the Australian Securities and Investments Commission by the Commonwealth, or by this or any other State, and that relates solely to the functions of the Commission in relation to a law of the Commonwealth or the law of this or any other State, or

(d) a document (other than a document referred to in paragraph (c)) that is held by the Australian Securities and Investments Commission and that relates solely to the exercise of the functions of the Commission under the law of the Commonwealth or the law of this or any other State."

Purpose of the exemption

13.10.2 This exemption exists to enable candid discussions between Ministers of the States and the Commonwealth at meetings of the Ministerial Council for Corporations (formerly the Ministerial Council for Companies and Securities), and the Australian Securities and Investments Commission (formerly the National Companies and Securities Commission).

Applying the exemption

13.10.3 This exemption operates to protect documents prepared for or furnished to the Ministerial Council for Corporations, as well as documents which would disclose the Council's deliberations. The exemption also protects documents furnished to the Australian Securities and Investment Commission. An equivalent exemption exists in the Victorian, ACT and Commonwealth legislation.
13.11 Clause 19 - Private documents in public library collections

13.11.1 Clause 19 of Schedule 1 states:

"(1) A document is an exempt document:

(a) if it has been created otherwise than by an agency, or otherwise than by a Minister, in relation to the functions of an agency, and

(b) if it is held in a public library subject to a condition imposed by the person or body (not being an agency or Minister) by whom it has been placed in the possession of the library:

(i) prohibiting its disclosure to members of the public generally or to certain members of the public; or

(ii) restricting its disclosure to certain members of the public.

(2) In this clause, a reference to a public library includes a reference to:

(a) an agency referred to in section 11(1)(a) - (e), and

(b) a library that forms part of a university, college of advanced education or college of technical and further education."

Purpose of the exemption

13.11.2 This exemption protects documents that have been placed in certain public library collections subject to restrictions on their disclosure.

Applying the exemption

13.11.3 If the author of a certain document donates it to a library on the understanding that it will not be disclosed to certain individuals, then it is not appropriate for it to be disclosed to the general public under FOI. For example, a report concerning aspects of the lives of certain Aboriginal women may be lent to a public library with the stipulation that it is only to be read by other Aboriginal women.

13.11.4 This exemption does not apply to documents created by an agency or a Minister.

13.11.5 Libraries prescribed under s.11(1)(a) to (e) include State Records Authority (formerly the Archives Authority), the Australian Museum, the Museum of Applied Arts and Sciences and the State Library. Other agencies may be prescribed by regulation, as has been the Office of the Ombudsman. Libraries of universities, colleges of
advanced education and TAFE colleges are also covered by the exemption.

13.12 Clause 20 - Miscellaneous documents

13.12.1 Clause 20 of Schedule 1 states:

“(1) A document is an exempt document if it contains matter the disclosure of which would disclose:

(a) matter relating to adoption procedures under the Adoption Act 2000, or

(b) information contained in the Register of Interests kept by the Premier pursuant to the Code of Conduct for Ministers of the Crown adopted by Cabinet, or

(c) matter relating to the receipt of an amended or original birth certificate or of prescribed information under the Adoption Act 2000, or

(d) matter relating to a protected disclosure within the meaning of the Protected Disclosures Act 1994, or

(e) a write-off policy referred to in section 101 of the Fines Act 1996, or

(f) matter relating to an inquiry into a railway accident or incident under s66 or 67 of the Railway Safety Act 2002, or

(g) matter relating to an inquiry into a transport accident or incident under s46B of the Passenger Transport Act 1990.

(2) Despite subclause (1) (f), a document containing matter referred to in that paragraph ceases to be an exempt document:

(a) in the case of a document containing matter 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 a document containing matter 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.
Information covered by the Adoption Act 2000

13.12.2 Information covered by the adoption provisions under the Adoption Act 2000 is of a very sensitive nature, and that Act itself states that the information should not be generally available. However, it has been recognised that persons affected by the adoption process have certain rights and these are detailed in the Adoption Act.

13.12.3 The exemption is intended to ensure that there is one system only for the provision of this sensitive information, namely the system established under the Adoption Act, which has specially built in safeguards.

13.12.4 The Adoption Act includes as one of its objects to allow access to certain information relating to adoption. Access to adoption information is dealt with in Part 8 of the Adoption Act. For more information visit www.community.nsw.gov.au/html/adoption/you_rights.htm

Register of Interests

13.12.5 This Register of Interests contains records of property and financial interests held by Ministers of the Crown and by their spouses and families.

13.12.6 The Register is held by the Premier as a confidential document. It is not intended that it should be generally available to the public.

The Protected Disclosures Act

13.12.7 One of the main protections that may be available to a whistleblower is confidentiality. The purpose of this exemption is to ensure that the FOI Act is not used to discover or disclose information identifying a whistleblower who has made a disclosure under the Protected Disclosures Act 1994.

13.12.8 The Administrative Decisions Tribunal has adopted a broad interpretation of this exemption, holding that,

“the exemption extends to any document that, either directly or indirectly, identifies the subject matter of the disclosure” (see Pettit v Department of Education and Training [2004] NSWADT 86 and
Robinson v Director-General, Department of Health [2002] NSWADT 222).

Write-off policy under the Fines Act 1996

13.12.9 A document is an exempt document if it contains matter the disclosure of which would disclose guidelines with respect to the writing off of unpaid fines. The Minister may issue guidelines with respect to the writing off of unpaid fines by the State Debt Recovery Office. Under s.120 of the Fines Act 1996, the Minister is not required to make these guidelines public.

Railway accident inquiries

13.12.10 A document is an exempt document if it contains matter the disclosure of which would disclose matter relating to an inquiry into a railway accident or incident under ss66, 67 or 67B of the Rail Safety Act 2002 (before the report of such inquiry has been tabled before both Houses of Parliament).

13.12.11 Under s.66, a railway operator must inquire into, and report to the Chief Investigator on, any railway accident or incident that may affect the safe carrying out of railway operations for which the person is responsible.

13.12.12 Under s.67, the Chief Investigator may investigate any railway accident or incident that may affect the safe carrying out of railway operations.

13.12.13 Under s.67B, the Minister may constitute one or more persons as a Board of Inquiry to conduct a rail safety inquiry into any railway accident or incident or any other event, occurrence, practice or matter that may affect the safe carrying out of railway operations.

13.12.14 The phrase 'matters relating to an inquiry into a railway accident or incident' is capable of applying to a broad range of documents.

Transport accident inquiries

13.12.15 A document is an exempt document if its disclosure would disclose matter relating to an inquiry into a transport accident or incident under s.46B of the Passenger Transport Act 1990 (before the report of such inquiry has been tabled before both Houses of Parliament).

13.12.16 Under s.46B, the Independent Transport Safety and Reliability Regulator or the Chairperson of the Independent Transport Safety and Reliability Advisory Board may inquire into any transport accident or incident that may affect the safe provision of public passenger services carried on by means of buses or ferries.
13.12.17 The phrase ‘matter relating to an inquiry into a transport accident or incident’ is capable of applying to a broad range of documents.

13.13 Clause 21 - Exempt documents under interstate FOI legislation

13.13.1 Clause 21 of Schedule 1 states:

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“(1) A document is an exempt document:
   (a) if it contains matter the disclosure of which would disclose information communicated to the Government of New South Wales by the Government of the Commonwealth or of another State, and
   (b) if notice has been received from the Government of the Commonwealth or of the other State 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) the Freedom of Information Act 1982 of Victoria."
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Purpose of the exemption

13.13.2 This exemption recognises the importance of communications between governments. Where a government considers that information originating in its own jurisdiction would be protected within that jurisdiction, it is not appropriate for that information to be made available under FOI in New South Wales.

Applying the exemption

13.13.3 This section applies where notice has been received from the Commonwealth or Victorian governments that information in the possession of a NSW agency would be exempt under the respective Freedom of Information Acts in these jurisdictions.

13.13.4 The information in question must also have been communicated by either of those governments to the NSW agency. By the word ‘government’ is meant a recognised arm of the Executive, such as a Minister, Department Head or a Government Department.

13.13.5 It will generally be sufficient to accept the word of the Commonwealth or Victorian agency that the information is exempt.
Where it is questionable whether the information is exempt, or where the information was not communicated by an agency of another jurisdiction, then either the exemption clause should not be used or, if appropriate, the exemption covering ‘documents affecting inter-governmental relations’ may be relevant.

13.13.6 The Commonwealth FOI Act has no corresponding exemption and therefore documents exempt under the NSW FOI Act are not automatically exempt under the Commonwealth FOI Act if they are the subject of a request to a Commonwealth agency.

13.14 **Clause 22 - Documents containing information confidential to Olympic Committees**

13.14.1 Clause 22 of Schedule 1 states:

> "A document is an exempt document if it has been prepared by or received by the Sydney Organising Committee for the Olympic Games, the Olympic Co-ordination Authority or the Olympic Roads and Transport Authority and contains matter that is confidential to the International Olympic Committee or the Australian Olympic Committee".

**Purpose of the exemption**

13.14.2 The purpose of the exemption is to ensure that the private affairs of the Australian Olympic Committee (AOC) and the International Olympic Committee (IOC), including the sensitive international security arrangements of the IOC, were not inadvertently exposed to the public because of the closeness with which they worked with the Sydney Organising Committee for the Olympic Games (SOCOG).

**Applying the exemption**

13.14.3 The elements of the exemption which must be satisfied are:

1. the document has been prepared by or received by the SOCOG, or the OCA; and
2. it contains matter that is confidential to the IOC or the AOC.

13.15 **Clause 22A – Documents containing information confidential to International Masters Games Association**

13.15.1 Clause 22A of Schedule 1 states:

> "A document is an exempt document if it has been prepared by or received by the Sydney 2009 World Masters Games Organising"
Committee and contains matter that is confidential to the International Masters Games Association”.

**Purpose of the exemption**

13.15.2 The purpose of the exemption is to ensure that the private affairs of the International Masters Games Association are not inadvertently exposed to the public because of the closeness with which they work with the Sydney 2009 World Masters Games Organising Committee.

**Applying the exemption**

13.15.3 The elements of the exemption which must be satisfied are:

- the document has been prepared by or received by Sydney 2009 World Masters Games Organising Committee; and
- it contains matter that is confidential to the International Masters Games Association.

13.16 **Clause 23 - Documents containing information relating to threatened species, Aboriginal objects and Aboriginal places**

13.16.1 Clause 23 of Schedule 1 states:

“A document is an exempt document if it is the subject of a declaration referred to in section 161 of the National Parks and Wildlife Act 1974.”

**Purpose of the exemption**

13.16.2 The purpose of the exemption is to protect threatened species, populations or ecological communities, or Aboriginal objects, or the cultural values of an Aboriginal place or Aboriginal object.

**Applying the exemption**

13.16.3 Under s.161, the Director-General of the Department of Environment and Conservation may, by notice in writing, advise the Minister for the Environment that the Director-General is of the opinion that specified documents in the possession of the National Parks and Wildlife Service relating to:

1. the location of threatened species, populations or ecological communities or Aboriginal objects, or
2. the cultural values of an Aboriginal place or Aboriginal object, should be withheld in the public interest.
13.16.4 In addition, the Director-General may declare in the notice that the documents concerned are exempt documents within the meaning of the FOI Act.

13.16.5 The Director-General must not give a notice under s.161 unless the Director-General has consulted with the Aboriginal people who the Director-General is aware have an interest in the documents concerned.


13.17 Clause 24 - Documents relating to threatened species conservation

13.17.1 Clause 24 of Schedule 1 states:

“(1) A document is an exempt document if it contains matter that the Director-General of the Department of Environment and Conservation has determined should not be disclosed to the public under s.146 of the Threatened Species Conservation Act 1995.

(2) A document is an exempt document if it contains 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.”

Purpose of the exemption

13.17.2 The purpose of the exemption is to protect the critical habitats of threatened species, populations or ecological communities, and to protect the safety and welfare of individuals who nominate, or make a submission in respect of, any proposed listing of a vulnerable, endangered or presumed extinct species, or endangered population or ecological community.

Applying the exemption

Section 146, Threatened Species Conservation Act 1995

13.17.3 Under s.146, the Director-General may, by notice in writing, determine that any matter in any document in the possession of the National Parks and Wildlife Service that may identify the location of critical habitat or any area or areas of land proposed to be identified as critical habitat should not be disclosed to the public.
13.17.4 Critical habits are areas declared as such under Part 3 of the Threatened Species Conservation Act 1995.

13.17.5 The Director-General may make this determination only if:

(1) the Director-General is of the opinion that:
   (a) not to exercise the function would be likely to expose the critical habitat (or the proposed critical habitat) and the endangered species, population or ecological community that occupies it to a significant threat, and
   (b) the public interest requires the function to be exercised, and

(2) each landholder of land concerned has requested or is agreeable to the exercise of the function.

Notwithstanding a determination under s.146, the Director-General may still disclose the location of critical habitat to:

(1) landholders or other persons having any legal or equitable estate, interest, easement, servitude, privilege or right in or over the land, or

(2) public authorities exercising functions in relation to the land, or

(3) any other person entitled by or under this or any other Act or law to notice of the declaration of critical habitat or the existence of interests in or proposals affecting the land (s146(3)).

Section 146A, Threatened Species Conservation Act 1995

13.17.6 Under s146A the Scientific Committee may recommend that the following information not be disclosed:

(a) information provided to the Scientific Committee relating to the location of threatened species, populations or ecological communities,

(b) information provided to the Scientific Committee that may identify any individual who made a nomination under Part 2 of that Act for the listing of any vulnerable, endangered or presumed extinct species, or endangered population or ecological community or made a submission in respect of a nomination.

13.17.7 The Minister may accept a recommendation for information referred to in (a) not to be disclosed only if the Minister is of the opinion that the public interest requires that the matter not be disclosed.
13.17.8 The Minister may accept a recommendation referred to in (b) not to be disclosed only if the Minister is of the opinion that the matter should not be disclosed:

(1) in the interests of safety or welfare of the individual who might otherwise be identified, or

(2) to protect that individual against intimidation, harassment or other unwarranted reprisals in connection with the nomination or submission.

13.18 Clause 25 - Plans of management containing information relating to places or items of Aboriginal significance

13.18.1 Clause 25 of Schedule 1 states:

“A plan of management, and a 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 is an exempt document if it is the subject of a resolution of confidentiality referred to in section 36DA (2) of that Act.”

Purpose of the exemption

13.18.2 The purpose of the exemption is to protect places or items of Aboriginal significance, the nature or location of which might otherwise be disclosed in a plan of management or draft plan of management for an area of community land.

Applying the exemption

13.18.3 A plan of management, and a 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 is an exempt document if it is the subject of a resolution of confidentiality referred to in s.36DA(2) of that Act.

13.18.4 Section 36DA(2) provides that a local council may resolve (at the request of any Aboriginal person traditionally associated with the land concerned or on the council’s own initiative) to keep confidential such parts of a draft or adopted plan of management as would disclose the nature and location of a place or an item of Aboriginal significance.

13.18.5 Councillors and council employees are not permitted to disclose that part of a draft or adopted plan of management that is the subject of a resolution of confidentiality, except with the consent of the council (see s.36DA(3)).
13.18.6 A council proposing to prepare a draft plan of management to which a resolution of confidentiality may apply must (in accordance with the regulations) consult with the appropriate Aboriginal communities regarding public access to, and use of, information concerning any places or items of Aboriginal significance on the land concerned.

13.19 **Clause 26 – Documents relating to complaints under health legislation**

13.19.1 Clause 26 of Schedule 1 states:

“A document provided by the Health Care Complaints Commission to a registration authority (within the meaning of the Health Care Complaints Act 1993) relating to a particular complaint is an exempt document.”

**Purpose of the exemption**

13.19.2 The purpose of the exemption is to ensure that complaints made against health service providers to the Health Care Complaints Commission are dealt with, and only disclosed, in accordance with the specific provisions of the *Health Care Complaints Act 1993* (HCCA).

**Applying the exemption**

13.19.3 The HCCA provides a mechanism for complaints against health service providers to be made to the Health Care Complaints Commission (s.7(2), HCCA)

13.19.4 The Health Care Complaints Commission is an independent body with responsibility for dealing with complaints under the HCCA, with particular emphasis on the investigation and prosecution of serious complaints in consultation with relevant registration authorities (s.3A, HCCA).

13.19.5 In respect of its complaints handling, investigative, complaints resolution and reporting functions, the Commission is exempt from the operation of the FOI Act (schedule 2 – see Chapter 14).

13.19.6 However, complaints received by the Commission must be notified to the relevant regulation authority if the complaint involves a health provider registered under a health registration Act (s.10, HCCA). Clause 26 of the FOI Act ensures that such notices remain exempt when received by the registration authority.
Frankness and candour

Ombudsman's guidance – Frankness and candour

This box sets out the approach and attitude of the Ombudsman in respect of the conduct of external reviews in cases where ‘frankness and candour’ is being argued as one of the grounds upon which documents are being withheld. It does not necessarily represent the views of the Department of Premier and Cabinet (as to which see [13.14.1] above).

On occasion agencies have used the ‘frankness and candour’ argument as the basis for refusing to provide access to documents under the FOI Act.

The argument put forward has been that the public interest would not be served by releasing the documents because the relevant personnel within the agency would be inhibited in their creation of records by the prospect of potential disclosure. It has also been argued that people will be more guarded about what they say if they are aware that the information could be released to others as they may be concerned about the consequences of public embarrassment or the threat of legal action.

This ‘frankness and candour’ argument has been raised in relation to such exemption clauses as:

- clause 9 – internal working documents;
- clause 16 – documents concerning operations of agencies.

Essentially, to be frank and candid is to be honest, open and sincere. It is not only to tell the truth, but to tell the whole truth. The dictionary definitions of ‘frank’, ‘frankness’, ‘candid’ and ‘candour’ emphasise being open, unreserved, outspoken, sincere, honest, straightforward, blunt and undisguised.

There is no specific reference in the FOI Act to the ‘frankness and candour’ argument, or to any equivalent argument. The Ombudsman is of the view that public officials should always be full and frank in expressing and recording their views, irrespective of whether there may be a risk that documents may disclosed under FOI. The Ombudsman is also of the view that opinions expressed by public officials should not attract long-term exemption, unless special circumstances exist. In particular, in the Ombudsman’s view, the specific circumstances where the exemption might validly be claimed are where documents concern high-level decision-making and policy-making – probably limited to Ministerial decision-making and policy-making. In all cases, the Ombudsman requires that there be supporting evidence to show that there will be a loss of candour in similar deliberative processes if disclosure is made in respect of the particular document in question.

Prior to the introduction of the FOI Act, the only method of access (in the absence of consent) to governmental documents was by subpoena or other compulsory court process. In those days, where a government wished to oppose the production of documents, it was able to rely on the doctrine of ‘Crown privilege’, or as it became known ‘public interest immunity’. As part of that doctrine, an argument was developed that there was a need to permit ‘frankness and candour’ in the preparation of documents otherwise the efficient workings of government would be disrupted.

This approach to the meaning of the public interest had its high water mark in the judgment of the Commonwealth Administrative Appeals Tribunal in the decision of Re Howard and the Treasurer of the Commonwealth (1985) 3 AAR 169 at 177-178. In that case the Tribunal noted that arguments available for refusing disclosed documents would include:

- “the higher the office of the persons between whom the communications pass and the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed...”
- “disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest...”
- “disclosure of documents which do not fully disclose the reasons for a decision subsequently taken may be...”
unfair to a decision-maker and may prejudice the integrity of the decision-making process.”

The argument that transparency inhibits frankness and candour in decision-making has been considered in numerous judicial and tribunal decisions in a range of relevant jurisdictions.

This argument was considered by the High Court of Australia in Sankey v Whitlam and ors (1978) 142 CLR 1. In that case, Stephen J said:

“Sometimes class claims are supported by reference to the need to encourage candour on the part of public servants in their advice to ministers, the immunity from subsequent disclosure which privilege affords being said to promote such candour... Recent authorities have disposed of this ground as a tenable basis for privilege” (at p 62-63).

In that same case, Mason J (as he then was) said:

“...the possibility that premature disclosure will result in want to candour in Cabinet discussions or an advice given by public servants is so slight that it may be ignored, ...I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient” (at p 97).

In the NSW District Court case of Helen Hamilton v Environmental Protection Authority [1998], Her Honour Judge Ainsley Wallace noted:

“It seems to me, ... to be an untenable position to say that the quality of advice given by public servants and indeed the quality of their suggestions on particular issues would be impaired if those advices and suggestions could become public.”

Her Honour held that the frankness and candour argument

“must be limited to instances in which there is particular evidence which supports the contention that there will be a loss of candour in similar future deliberative processes.”

The issue has also been considered by the NSW Administrative Decisions Tribunal in Bennett v Vice Chancellor of the University of New England [2000] NSW ADT 8. In that case it was held that for it to succeed there needed to be clear, specific and credible evidence to establish that the inhibition of candour and frankness would diminish the efficiency and quality of the deliberative process to such an extent that it is contrary to the public interest. Deputy President Hennessy stated:

“... even if some diminution in candour and frankness is conceded the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent that is contrary to the public interest ... in the absence of clear and specific and credible evidence I would not be prepared to accept that the substance or quality of advice prepared by professional public servants could be materially altered for the worse by the threat of disclosure under the FOI Act.”

In the subsequent case of Bennett v Vice Chancellor, University of New England [2002] NSW ADT 175, Brittan, A – Judicial Member, stated:

“58 It is argued by the university that the document is also exempt pursuant to cl.13(b) because, in summary, to fail to protect confidential academic commentary would have what has been called a ‘chilling effect’: academics would be reluctant to express their honest and independent opinions on significant matters within the university if students and others could gain access to the documents. Quite frankly, I have greater confidence in the Australian academic community than that. In any event, there is also a significant public interest in enabling the subjects of government and agency records to correct those records if they are incorrect.”

As in the Helen Hamilton case, various decisions in the Federal sphere have limited the frankness and candour argument to high level decision-making and to policy-making (see for example Murtagh v Federal Commissioner of Taxation (1984) 54 ALR 313; Walker v Federal Commissioner of Taxation (1994) 95 ATC 2001; Waterford & The
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Treasurer (Cth) (No 1) (unreported, AAT: Dep Pres Todd, 16 May 1985). In this regard in Re Whitford and Department of Foreign Affairs [1983] 5 ALD 534, the Commonwealth Administrative Appeals Tribunal said that the fact that a writer of a document would not have put his comments in such frank terms as he did if he had thought that they would be disclosed, is scarcely, of itself, a sufficient ground for a finding that disclosure of the documents would be contrary to the public interest.

In Re Eccleston and the Department of Family Services and Aboriginal and Island Affairs [1993] QAR 60 the Queensland Information Commissioner stated that the frankness and candour argument ought to be disregarded unless there was a ‘very particular factual basis for the claim that disclosure will inhibit frankness and candour … and that tangible harm to the public interest will result from that inhibition’ (at p 107).

The issue has also been looked at in various English cases. For example in Conway v Rimmer [1968] AC 901, Upjohn LJ stated:

“I cannot believe that any Minister or any high level military or civil servant would feel in the least degree inhibited in expressing his honest views in the course of his duty on some subject, such as even the personal qualifications and delinquencies of some colleague, by the thought that his observations might one day see the light of day. His worst fear might be libel and there he has the defence of qualified privilege like everyone else in every walk of professional, industrial and commercial life who every day has to express views on topics indistinguishable in substance from those of the servants of the Crown.”

In that case, Lord Morris of Borth-y-Gest said:

“If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated. The law is ample in its protection of those who are honest in recording opinions which they are under a duty to express” (at 36).

In the same case Lord Hodson noted:

“It is strange that civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied other fellow subjects.”

Lord Pearce noted:

“There are countless teachers at schools and universities, countless employers of labour, who write candid reports, unworried by the outside chance of disclosure, but deeply concerned, as no doubt the police are likewise, lest their criticism may be doing less than justice to the subject of their report.”

In the Glasgow Corporation v Central Land Board (1956) SC (HL), Lord Radcliffe remarked that he would have supposed Crown servants to be ‘made of sterner stuff’ (at p 20), and in Rogers v Home Secretary (1973) ACT 413, Lord Salmon spoke of the ‘candour’ argument as ‘the old fallacy’.

As can be seen from the cases above even prior to the introduction of the FOI Act, the ‘frankness and candour’ argument was not thought to weigh heavily in the relevant balancing process in relation to the preservation of the public interest.

From the cases it appears that the frankness and candour argument is insufficient by itself to justify refusal to disclose documents under the FOI Act, unless the documents are ‘high level’ documents, probably only relating to Cabinet documents and Ministerial decision-making and policy documents.

The common law

There is a common law obligation of fidelity on all employees. In this regard there is an implied duty in every contract of employment that the employee will act in good faith and will assist the employer by supplying information known to the employee and concerning the business and operation of the employer’s business. The common law duty to obey the lawful orders of employers includes an obligation to answer questions about how an employee has done his or her
work or what they have done during working hours. This seems to imply that honest, open and sincere communication is also required under the common law.

The circumstances in which the frankness and candour argument has been held to apply

There are some limited circumstances in which the Ombudsman may accept the ‘frankness and candour’ argument. In these circumstances it may be reasonable for public officials to expect the protection of confidentiality or secrecy as a pre-condition to being frank and candid.

**High level decision-making**

One of the specific circumstances where it could be validly claimed that the frankness and candour argument would be sufficient by itself to justify non-disclosure of information concerns high level decision-making and policy-making, probably limited to Ministerial decision-making and policy-making. However, the courts and tribunals have emphasised that there needs to be supporting evidence that there will be a loss of candour in similar deliberative processes.

In relation to Cabinet documents, there are a variety of arguments that have been put forward in support of confidentiality, particularly in relation to documents disclosing the actual deliberations of Cabinet, not the least of which is the importance of collective Ministerial responsibility in relation to Cabinet decisions (in this regard see the decision of the NSW Court of Appeal in *Egan v Chadwick & Ors* [1999] NSW CA 176 (eg at 43, 56-57).

**Legal professional privilege**

Another significant exception that has been held to apply relates to legal professional privilege (see the discussion at [13.2]). The rationale for legal professional privilege is that it serves the public interest in the administration of justice by inducing a client to retain a solicitor and seek his/her advice and encouraging full and frank disclosure by clients to their lawyers (ie fostering trust and candour between client and lawyer).

**Internal working documents**

A possible exception, although generally by itself insufficient to justify complete non-disclosure, relates to internal working document (see the discussion in this Manual at [13.1]).

Even if it is assumed that giving access to the content of internal working documents prior to a final decision being made may inhibit the free flow of ideas and options, as noted by Deputy President Hennessy in *Latham v Department of Community Services* (2000) NSW ADT:

“... once a decision becomes final or operative it would be much more difficult to establish that disclosure would be contrary to the public interest” (at p 58).

**Conclusion**

The public is entitled to expect public officials to act in the public interest. As has been clearly enunciated by the courts and relevant tribunals, as well as in codes of conduct, this means that public officials are expected to be frank and candid in the performance of their official duties. However, it also means that they are expected to be transparent and accountable.

The only exceptions to these rules relate to high level decision-making and policy-making, legal professional privilege and, to a limited extent, internal working documents. Even then, a pre-condition is that a detrimental effect can be reasonably anticipated in similar deliberative processes. In relation to Cabinet documents, particularly those that disclose the actual deliberations of Cabinet, it does not appear that this pre-condition has been held to apply.

The proposition that, in the absence of secrecy, public officials cannot generally be expected to be frank and candid in the giving of advice as part of their official functions is an untenable argument. In the Ombudsman’s view, where such a claim is made by public officials, it is likely to be indicative of a lack of proper understanding by them of their official roles and duties.
14 **Exemptions (Exempt Bodies and Offices - Schedule 2)**

14.1.1 Section 9 of the FOI Act provides that,

> any body or office described in Schedule 2 [of the Act] is, in relation to such of the functions of the body or office as are so specified or described, exempt from the operation of the Act.

14.1.2 If a Schedule 2 body receives an FOI application in relation to its exempt functions, it does not need to make a determination under s.24 and, accordingly, it is not required to give a notice of determination under s.28. Rather, it is sufficient if the relevant body simply advises the applicant that the documents that he or she seeks are documents relating to functions specified in Schedule 2 of the FOI Act and therefore those documents are unable to be accessed under the FOI Act: *Independent Commission Against Corruption v McGuirk* [2007] NSWSC 147; *Waite v Director-General, Attorney-General’s Department* [2000] NSWADT 109.

14.1.3 Even though it has not made a determination under the FOI Act as such, it appears that the decision by a Schedule 2 body that a particular FOI application relates to its exempt functions could still be the subject of a challenge in the ADT: see *Independent Commission Against Corruption v McGuirk* [2007] NSWSC 147 at [20]. Whilst the avenue of external review is at present unclear, it may be that if the body’s decision is, in fact, wrong (ie., if in fact the application relates to the body’s non-exempt functions) then the body is not exempt from the FOI Act in respect of that particular application and therefore the body should have made a determination under s.24. Its failure to do so will therefore constitute a deemed refusal under s.24(2), which may be the subject of internal and external review.

14.1.4 If another agency holds a document relating to the exempt functions of a Schedule 2 body, then the document is an exempt document for the purposes of the Act. Section 6 of the Act provides that a document is exempt if it is,

> a document that contains matter relating to functions in relation to which a body or office is by virtue of section 9, exempt from the operation of this Act.

14.1.5 For example, if the NSW Police Force receives a FOI application calling for it to release documents it holds about the prosecuting function of the Director of Public Prosecutions, then those documents will be exempt, and the NSW Police Force will have a discretion to make a determination refusing access to those documents under s.25.

**Fully exempt body**

14.1.6 Only the Child Death Review Team is totally exempt from the operation of FOI legislation under this Schedule.
Partially exempt bodies

14.1.7 The following are exempt in relation to certain specified functions:

- The office of Auditor-General—investigative, audit and report functions.
- The office of Director of Public Prosecutions—prosecuting 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 Public Trustee—functions exercised in the Public Trustee’s capacity as executor, administrator or trustee.
- The Treasury Corporation—borrowing, investment and liability and asset management functions.
- The office of Ombudsman—the complaint handling, investigative and reporting functions of that office.
- 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).
- 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 FSS Trustee Corporation—investment functions.
- The SAS Trustee Corporation—investment functions.
- The Axiom Funds Management Corporation—investment functions exercised on behalf of trustees of superannuation funds.
- The Department of Education and Training1—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.
- 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 NECA (the company established under the Corporations Law under the corporate name National Electricity Code Administrator Limited (ACN 073 942 775) or NEMMCO (the company established under the Corporations Law under the corporate name National

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1 The reference in the FOI Act to the Department of Training and Education Co-ordination is taken, by operation of Public Sector Management (Department of Education and Training) Order 1997, to be a reference to the Department of Education and Training.
Electricity Market Management Company Limited (ACN 072 010 327))—those functions.

- The office of Privacy Commissioner—the complaint handling, investigative and reporting functions of that office.
- 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 Independent Pricing and Regulatory Tribunal—complaint handling, investigative and reporting functions of the Tribunal in relation to competitive neutrality complaints.
- The State Contracts Control Board—complaint handling, investigative and reporting functions of the Board in relation to competitive neutrality complaints.
- The New South Wales Crime Commission—investigative and reporting functions.
- The President of the Anti-Discrimination Board—complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the President.
- The 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.
- 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.

14.1.8 In relation to each of the above partially-exempt bodies, documents relating to their administrative functions would not be exempt.
Appendix A - Forms and letters

1. Application for access s.17 & s.35

2. Notice to applicant - FOI request forwarded to another agency (s.20)

3. Determination - notification of access approved in different form (s.27(3))

4. Documents affecting intergovernmental relations - consultation (s.30)

5. Documents affecting intergovernmental relations - letter informing of access being granted contrary to objections (s.30(3))

6. Documents affecting personal affairs, business affairs or conduct of research – initial consultation (s.31)

7. Documents affecting personal affairs, business affairs, conduct of research – exemption granted (s.31)

8. Documents affecting personal affairs, business affairs, conduct of research - determination to grant access (s.31(a))

9. Application for internal review of determination (s.34 & s.47)

10. Application for amendment of personal records (s.40)
FORM NO. 1
APPLICATION FOR ACCESS UNDER THE FREEDOM OF INFORMATION ACT 1989

DETAILS OF APPLICANT

Surname: ............................................................................................................................................................

Given Names: ..................................................................................................................................................

Title (Mr/s etc): .............................................................................................................................................

Postal Address: ..................................................................................................................................................

............................................................................................................................................................. Postcode:………………………………………………

Telephone number(s): ..........................................................................................................................................

DETAILS OF APPLICATION

I request access to the following documents:

...............................................................................................................................................................................

...............................................................................................................................................................................

...............................................................................................................................................................................

...............................................................................................................................................................................

...............................................................................................................................................................................

These documents do / do not contain information about my personal affairs. (Please cross out whichever does
not apply.)

NAME OF AGENCY/MINISTER HOLDING DOCUMENT:

...............................................................................................................................................................................

FORM OF ACCESS Please place a tick in appropriate box

I wish to inspect the document(s) [ ] Yes [ ] No

I require a copy of the document(s) [ ] Yes [ ] No

I require access in another form [ ] Yes [ ] No Specify: ………………………………………………………

FEES AND CHARGES

Attached is a cheque/money order/cash to the amount of $30 to cover the application fee. (Please do not send
cash through the mail.) I understand that I may be required to pay processing charges in respect of this request
and that I will be supplied with a statement of charges if appropriate.

Note: In certain cases a 50% reduction in fees and charges may apply - see the section on fees and charges. If
you consider you are entitled to a reduction, make your request with copies of supporting documents with this
form.

I am requesting a reduction in fees and charges [ ] Yes [ ] No (Please place a tick in the appropriate box)

APPLICANT’S SIGNATURE: ..................................................................................................................................

Date: .................................................................................................................................................................
Appendix A - Forms and letters

SEND APPLICATION TO THE AGENCY OR MINISTER’S OFFICE WHICH HOLDS THE DOCUMENTS TO WHICH YOU SEEK ACCESS.

Requests for access to an agency’s or Minister’s documents

- Applicants need to provide sufficient information to enable the correct document/s to be identified, though agencies are obliged to help you with your application.
- On receiving an FOI application, an agency may assist the applicant to direct the application to another agency or transfer the application to another agency as appropriate.
- If you are seeking documents relating to your personal affairs the agency may request proof of your identity.
- If you are seeking a document(s) on behalf of another person relating to their personal affairs, the agency may ask you to submit a consent form signed by that person.
- A request will be dealt with as soon as practicable (and, in any case, within 21 days) after it is received.

Forms of access

Various forms of access are available depending on the form in which the information is stored. They include:

- inspection of documents;
- copy of documents;
- hearing and/or viewing audio and/or video tapes;
- transcript of recorded document;
- transcript of words recorded in shorthand or encoded form; or
- produce document from computerised information.

You may be given access in a different form from the form you have requested.

Application fees and processing charges

The application fee is $30. A cheque / money order / cash (no cash in the post) for the appropriate amount must be forwarded to the Agency/Minister with the request for access. Processing charges may also apply for dealing with the application. For personal requests no processing charges will be payable for the first 20 hours. For non-personal requests processing charges of up to $30 per hour will apply from the very first hour. A schedule of fees and charges will be provided by the agency holding the document(s) you require access to.

A 50% reduction in fees will be granted to holders of Pensioner Health Benefit Cards or those with equivalent incomes and to children. Non-profit organisations may also be able to demonstrate financial hardship and receive a similar reduction. In addition, where a demonstrated public interest is involved a similar reduction may apply.

Where significant correction of a personal record(s) results from an FOI request, provided the error was not due to the person’s fault, a 100% refund of all fees and charges will be granted.

Refusal to process requests

Sections 22, 25 & 26 of the Freedom of Information Act explain the circumstances under which an agency may refuse or defer access to information. An agency may refuse to continue processing an application if a request for payment of processing charges is not made within a specified time set by the agency.

For further information

Most Government agencies have an FOI officer who can help you with your enquiries. If you are unsure about the agency concerned, contact the Department of Premier and Cabinet FOI Coordinator on (02) 9228 4441 or Fax (02) 9228 4421.
Appendix A - Forms and letters

FORM NO.2

NOTICE TO APPLICANT – FOI REQUEST FORWARDED TO ANOTHER AGENCY (s.20)

FOI Ref No.

[applicant address]

Dear [applicant]

I refer to your recent Freedom of Information application dated ……………………………. requesting access to documents concerning ……………………………………………………………

These documents are not held by this agency. I understand that the documents are held by …………………. [name of agency]. I have therefore transferred your application to that agency on ………………………… [date] for consideration and reply direct to you.

The contact officer in that agency is Mr/s ………….. and may be contacted on ……………………. [telephone number] should you require further information.

For the purposes of section 20(4) of the Act, your application was received in ……………… [name of agency] on …………………………… [date application received] and transferred on the ………………………….. [date application was sent].

OR

While this agency possesses a copy of the document you requested, its subject matter is more closely associated with the functions of …………………. Therefore I have transferred your application to that agency on …./…./….. for consideration and reply direct to you.

The contact officer in that agency is Mr/s …………….. and may be contacted …………………….. [telephone number] should you require further information.

For the purposes of section 20(4) of the Act, your application was received in …………………………….. [name of agency] on ……………………………[date application received] and transferred on the ………………………… [date application was sent].

Yours sincerely

[delegated officer]

NB: You should liaise with the agency to which you are transferring this request before you advise the applicant.
Appendix A - Forms and letters

FORM NO.3

DETERMINATION – NOTIFICATION OF ACCESS APPROVED IN DIFFERENT FORM(s.20)

FOI Ref No.

[applicant address]

Dear [applicant]

I refer to your Freedom of Information application dated……………….….. seeking access to documents concerning ……………………………………………………………………………………

On ……… [date] it was determined that you may have access to these documents. I cannot however grant access in the requested form as it would:

• involve the unreasonable diversion of the agency’s resources

[state facts and reasons]]. …………………

OR

• involve an infringement of copyright

[state facts and reasons].

OR

• be detrimental to the preservation of the document

[state facts and reasons].

I can however, arrange for ……………… (you to inspect the documents or other alternatives).

I have determined on ………………….. [date] the charge for access will be $….. This amount must be paid prior to access being provided.

The charge was calculated on the basis of processing costs of:

$30 per hour for ….. hours (give full details) – (less 50% reduction where applicable). *

If you are not satisfied with the determination to grant access in a different form or the costs incurred, you are entitled to exercise rights of review and appeal and rights of complaint to the Ombudsman conferred by the Freedom of Information Act 1989 and Ombudsman Act 1974 and to the Administrative Decisions Tribunal. The rights and the procedures to be followed are detailed in the attached brochure.

Please contact me on ……………………… [telephone number] by………… [date] ** to advise if you still wish to proceed with your access request so that the appropriate arrangements can be made. If I have not heard from you by that date I will assume that you no longer require access to the document(s).

Yours sincerely

[delegated officer]

* Section 27(3) provides that the applicant will not be required to pay a charge for access greater than the charge applicable if access had been given in the requested form.

**An appropriate amount of time is 14 days, however the agency may determine to allow more or less.
1. INTERNAL REVIEW

Under s.34 and s.47 of the Freedom of Information Act 1989, if you are dissatisfied or “aggrieved” with certain decisions or “determinations” of an agency you can apply to the agency concerned for an internal review of its determination.

A person is aggrieved by a determination on an application for access to records if any of the following apply:

- an agency refuses to give the applicant access to a document;
- access to a document is to be given to the applicant subject to deferral;
- access to a copy of a document from which exempt matter has been deleted is to be given to the applicant;
- access to a document is to be given to the applicant subject to a charge for dealing with the application, or for giving access to a document, that the applicant considers to be unreasonable;
- a charge for dealing with the application is payable by the applicant, being a charge that the applicant considers to have been unreasonably incurred;
- an agency should have, and has not, taken such steps as are reasonably practicable to obtain with the views of a third party as to whether or not the document is an exempt document;
- an agency should have, and has, taken such steps to obtain the views of a third party but the determination is not in accordance with the views of the person; or
- an agency refuses to amend its records in accordance with the application.

To apply for an internal review of a determination you must lodge an internal review application form or write to the same agency as made the determination. This must be done within 28 days of being given the determination with the accompanying application fee. This is $40 or $20 if you received a reduction in your application fees for the original application. If the determination has been posted, it is deemed to have been given to you on the fifth day after the letter was posted.

There is no right to an internal review of a determination regarding a Minister's document.

2. INVESTIGATION BY THE OMBUDSMAN

If, after an internal review has been completed, you are still dissatisfied with the agency's determination you can make a complaint to the Ombudsman of the determination. The Ombudsman is empowered to investigate the conduct of any person or body in relation to a determination made by an agency under this Act. Provided you have had an internal review, you can apply for an investigation by the Ombudsman at any time. However, if you wish to keep open the option of later making a review application to the Administrative Decisions Tribunal, you must apply to the Ombudsman within 60 days of receiving the determination from your internal review.

Complaints to the Ombudsman must be in writing, an application form is not required. Investigations by the Ombudsman are free. You can ring the Ombudsman at any time during working hours on 9286 1000 to discuss any issue regarding a current or proposed FOI application.

There is no right to an investigation by the Ombudsman of a Minister's determination under the Freedom of Information Act or in relation to the issue of a Ministerial certificate by the Premier.

3. REVIEW APPLICATIONS TO THE ADMINISTRATIVE DECISIONS TRIBUNAL (ADT)

If you are aggrieved with a determination by an agency after internal review or after review by the Ombudsman, you can make a review application to the ADT. Similarly, if you are aggrieved with a determination by a Minister, you can make a review application direct to the ADT. The definitions of what "aggrieved" means under the FOI Act are the same as those which allow you to apply for an internal review (see above).

Review applications must be made within 60 days after the relevant determination was given to you or, if you have sought an investigation by the Ombudsman, within 60 days after the results of the Ombudsman's investigation of the complaint were reported to you.

You do not have to complain to the Ombudsman first, before you can make a review application to the ADT. You must, however, ask for an internal review by the agency within the specified time frame. The procedures relating to review applications to the ADT are established by the Tribunal, telephone (02) 9228 7777.
FORM NO.4

DOCUMENTS AFFECTING INTERGOVERNMENTAL RELATIONS – CONSULTATION LETTER s.30

FOI Ref No.

[Delegated officer]

Dear ………………………

This Department has received an application under the Freedom of Information Act 1989 (“the Act”) for
documents concerning ……………………………………………

The documents requested concern the affairs of your Department. Therefore, before deciding on whether or not
to grant access to these documents, I seek your Department’s view as to whether or not the document is an
exempt document by virtue of clause 5 of Schedule 1 of the Act. A copy of that part of Schedule 1 is attached.

I would appreciate receiving your response by ……....... [date].

Should you require further information about this matter, please contact ………………… (FOI Coordinator) on
…………… [insert phone number and email address]

Yours sincerely

[Delegated officer]
FORM NO.5

DOCUMENTS AFFECTING INTERGOVERNMENTAL RELATIONS LETTER INFORMING OF ACCESS BEING GRANTED CONTRARY TO OBJECTIONS (s.30(3))

FOI Ref No.

[Delegated officer]

Dear ……………

I refer to your letter dated …………. concerning an FOI application for documents which affect your Department’s affairs.

The Department notes your view that the requested documents are exempt by virtue of clause 5 of Schedule 1 of the *Freedom of Information Act 1989* (NSW). However, I consider that, for the following reasons, access to the documents listed below should be granted.

[document list]

[detailed reasoning for release of documents, and why clause 5 exemption does not apply]

Accordingly, I have [or name of determining officer] determined that the applicant should be given access to the document. The Freedom of Information Act gives you certain rights of review and appeal relating to this determination. These rights and how to apply are detailed in the attached brochure.

A fee of $40 must be forwarded with an internal review application. Please advise ……………….. [name] by ……………………… [date] * if your Department intends to exercise these rights. If this Department has not received your response by this date it will proceed to make the document available to the applicant.

Yours sincerely

Delegated officer

*This date is 28 days from the date of this letter.*
Appendix A - Forms and letters

YOUR RIGHTS TO EXTERNAL REVIEW

1. INTERNAL REVIEW

Under s.34 and s.47 of the Freedom of Information Act 1989 (NSW), if you are dissatisfied or "aggrieved" with certain decisions or "determinations" of an agency you can apply to the agency concerned for an internal review of its determination.

A person is aggrieved by a determination on an application for access to records if any of the following apply:

- an agency refuses to give the applicant access to a document;
- access to a document is to be given to the applicant subject to deferral;
- access to a copy of a document from which exempt matter has been deleted is to be given to the applicant;
- access to a document is to be given to the applicant subject to a charge for dealing with the application, or for giving access to a document, that the applicant considers to be unreasonable;
- a charge for dealing with the application is payable by the applicant, being a charge that the applicant considers to have been unreasonably incurred;
- an agency should have, and has not, taken such steps as are reasonably practicable to obtain with the views of a third party as to whether or not the document is an exempt document;
- an agency should have, and has, taken such steps to obtain the views of a third party but the determination is not in accordance with the views of the person; or
- an agency refuses to amend its records in accordance with the application.

To apply for an internal review of a determination you must lodge an internal review application form or write to the same agency as made the determination. This must be done within 28 days of being given the determination with the accompanying application fee. This is $40 or $20 if you received a reduction in your application fees for the original application. If the determination has been posted, it is deemed to have been given to you on the fifth day after the letter was posted.

There is no right to an internal review of a determination regarding a Minister's document.

2. INVESTIGATION BY THE OMBUDSMAN

If, after an internal review has been completed, you are still dissatisfied with the agency's determination you can make a complaint to the Ombudsman of the determination. The Ombudsman is empowered to investigate the conduct of any person or body in relation to a determination made by an agency under this Act. Provided you have had an internal review, you can apply for an investigation by the Ombudsman at any time. However, if you wish to keep open the option of later making a review application to the Administrative Decisions Tribunal, you must apply to the Ombudsman within 60 days of receiving the determination from your internal review.

Complaints to the Ombudsman must be in writing, an application form is not required. Investigations by the Ombudsman are free. You can ring the Ombudsman at any time during working hours on 9286 1000 to discuss any issue regarding a current or proposed FOI application.

There is no right to an investigation by the Ombudsman of a Minister's determination under the Freedom of Information Act or in relation to the issue of a Ministerial certificate by the Preimer.

3. REVIEW APPLICATIONS TO THE ADMINISTRATIVE DECISIONS TRIBUNAL (ADT)

If you are aggrieved with a determination by an agency after internal review or after review by the Ombudsman, you can make a review application to the ADT. Similarly, if you are aggrieved with a determination by a Minister, you can make a review application direct to the ADT. The definitions of what "aggrieved" means under the FOI Act are the same as those which allow you to apply for an internal review (see above).

Review applications must be made within 60 days after the relevant determination was given to you or, if you have sought an investigation by the Ombudsman, within 60 days after the results of the Ombudsman's investigation of the complaint were reported to you.

You do not have to complain to the Ombudsman first, before you can make a review application to the ADT. You must, however, ask for an internal review by the agency within the specified time frame. The procedures relating to review applications to the ADT are established by the Tribunal, telephone (02) 9228 7777.
FORM NO.6

DOCUMENTS AFFECTING PERSONAL AFFAIRS, BUSINESS AFFAIRS, CONDUCT OF RESEARCH (s.31)

FOI Ref No.

[address of 3rd party]

Dear ………………

The Department has received an application under the Freedom of Information Act 1989 for access to documents which contain information concerning your personal/business/research/ affairs.

I have attached the relevant documents [or sections of documents] *

The FOI Act provides that before access is given to these documents you have a right to state whether or not the document is an exempt document by virtue of clause 6 of Schedule 1 of the Act.

For your information and assistance, I have enclosed a pamphlet explaining this clause for you. Also detailed are your rights and what information would be of assistance to us in this matter.

Please forward written advise to ……………… [name] by …………………… [date] indicating whether you consider the documents concerning your personal/business/research affairs are exempt documents and therefore should not be made available and the relevant reasons.

If you wish to discuss this matter contact ……………… [name] on ……………… [telephone number and email address]. FOI ref No:…… should be quoted when writing to or contacting the Department on this matter.

Yours sincerely

[Delegated officer]

* You may need to delete information about other parties in the documents you provide to ensure that confidential or sensitive matters or the personal affairs of any other person are not divulged.
FORM NO.7

DOCUMENTS AFFECTING PERSONAL/BUSINESS/RESEARCH AFFAIRS EXEMPTION GRANTED s.31

FOI Ref No.

[address of 3rd party]

Dear .................

I refer to our previous correspondence to you concerning a request for access to departmental documents which affect your personal/business/research affairs.

After considering your views, the Department has made the decision that these documents are exempt and that access should not be granted.

The applicant has a right to appeal against this decision. If an appeal is lodged I will write to you again.

Thank you for your co-operation in this matter.

Yours sincerely

[Delegated officer]
FORM NO.8

DOCUMENTS AFFECTING PERSONAL/BUSINESS/RESEARCH AFFAIRS LETTER INFORMING OF Access Being Granted Contrary to Objections s.31(a)

FOI Ref No.

[applicant address]

Dear [applicant]

I refer to our previous correspondence concerning an application for access to documents which affect your personal/business/research affairs.

The Department notes your view that the requested documents are exempt by virtue of clause 6 [OR 7 OR 8] of Schedule 1 of the Freedom of Information Act 1989. However, I consider that for the following reasons access to the documents listed below should be granted.

[document list]

[detailed reasoning for release of documents, and why clause 6 OR 7 OR 8 exemption does not apply]

Accordingly, I have determined that the applicant should be given access to the document. The Freedom of Information Act gives you certain rights of review and appeal relating to this determination. These rights and how to apply are detailed in the attached brochure.

If you wish to apply for an internal review of this decision, a fee of $40 must be forwarded with your application. Please advise ...................... [name] by ......................... [date] * if you intend to exercise these rights. If this Department has not received your response by this date it will proceed to make the document available to the applicant.

Yours sincerely

[Delegated officer]

* This date is 28 days from the date of this letter.
Appendix A - Forms and letters

YOUR RIGHTS TO EXTERNAL REVIEW

1. INTERNAL REVIEW
Under s.34 and s.47 of the Freedom of Information Act 1989, if you are dissatisfied or "aggrieved" with certain decisions or "determinations" of an agency you can apply to the agency concerned for an internal review of its determination.

A person is aggrieved by a determination on an application for access to records if any of the following apply:

- an agency refuses to give the applicant access to a document;
- access to a document is to be given to the applicant subject to deferral;
- access to a copy of a document from which exempt matter has been deleted is to be given to the applicant;
- access to a document is to be given to the applicant subject to a charge for dealing with the application, or for giving access to a document, that the applicant considers to be unreasonable;
- a charge for dealing with the application is payable by the applicant, being a charge that the applicant considers to have been unreasonably incurred;
- an agency should have, and has not, taken such steps as are reasonably practicable to obtain with the views of a third party as to whether or not the document is an exempt document;
- an agency should have, and has, taken such steps to obtain the views of a third party but the determination is not in accordance with the views of the person; or
- an agency refuses to amend its records in accordance with the application.

To apply for an internal review of a determination you must lodge an internal review application form or write to the same agency as made the determination. This must be done within 28 days of being given the determination with the accompanying application fee. This is $40 or $20 if you received a reduction in your application fees for the original application. If the determination has been posted, it is deemed to have been given to you on the fifth day after the letter was posted.

There is no right to an internal review of a determination regarding a Minister's document.

2. INVESTIGATION BY THE OMBUDSMAN
If, after an internal review has been completed, you are still dissatisfied with the agency's determination you can make a complaint to the Ombudsman of the determination. The Ombudsman is empowered to investigate the conduct of any person or body in relation to a determination made by an agency under this Act. Provided you have had an internal review, you can apply for an investigation by the Ombudsman at any time. However, if you wish to keep open the option of later making a review application to the Administrative Decisions Tribunal, you must apply to the Ombudsman within 60 days of receiving the determination from your internal review.

Complaints to the Ombudsman must be in writing, an application form is not required. Investigations by the Ombudsman are free. You can ring the Ombudsman at any time during working hours on 9286 1000 to discuss any issue regarding a current or proposed FOI application.

There is no right to an investigation by the Ombudsman of a Minister's determination under the Freedom of Information Act or in relation to the issue of a Ministerial certificate by the Premier.

3. REVIEW APPLICATIONS TO THE ADMINISTRATIVE DECISIONS TRIBUNAL (ADT)
If you are aggrieved with a determination by an agency after internal review or after review by the Ombudsman, you can make a review application to the ADT. Similarly, if you are aggrieved with a determination by a Minister, you can make a review application direct to the ADT. The definitions of what "aggrieved" means under the FOI Act are the same as those which allow you to apply for an internal review (see above).

Review applications must be made within 60 days after the relevant determination was given to you or, if you have sought an investigation by the Ombudsman, within 60 days after the results of the Ombudsman's investigation of the complaint were reported to you.

You do not have to complain to the Ombudsman first, before you can make a review application to the ADT. You must, however, ask for an internal review by the agency within the specified time frame. The procedures relating to review applications to the ADT are established by the Tribunal, telephone (02) 9228 7777.
FORM NO. 9

APPLICATION FOR INTERNAL REVIEW OF DETERMINATION: FREEDOM OF INFORMATION ACT 1989

DETAILS OF APPLICANT

Surname: ...........................................................................................................................................................

Given Names: ...................................................... Title: (Mr/s etc)....................................................................

Postal Address:
...........................................................................................................................................................
...........................................................................................................................................................

Postal Address: ................................................................................................................................. Postcode: ..............................................................

Telephone Number(s): (w) .................................................. (h) ...................................................(m) ........................................

FOI Reference Number: ............................................................................................................................

I have submitted an application requesting access to documents in accordance with the Freedom of Information Act. I am unhappy with the determination made by your agency and therefore seek a review of this determination because (Please tick the appropriate box):

[ ] I have been refused access to a document
[ ] I have been refused access to part of a document
[ ] I have been refused a request to amend a personal document
[ ] I have been given access to a document but access has been deferred
[ ] I believe I have been charged too much in the
[ ] I am a third party specified in the documents but have not been appropriately consulted about giving access to another person

[ ] I have been consulted but disagree with a decision to release the documents

COMMENTS

Your agency did / did not grant me a 50% reduction in fees and charges when I applied for access to documents. (Please cross out whichever does not apply.) If yes, there is a $20 fee. If no, there is a $40 fee.

NOTE: The above fee must be submitted with the completed application form.

LODGEMENT OF APPLICATION This application must be addressed to the Principal Officer of the agency and lodged at one of the offices of the agency within 28 days of the date of the agency’s determination which is the subject of review.

ADVICE OF DETERMINATION

The agency will undertake its internal review and advise you of its decision within 14 days of receipt of this application.

APPLICANT'S SIGNATURE: ............................................................... DATE: ........................................
1. INTERNAL REVIEW

Under s.34 and s.47 of the *Freedom of Information Act 1989*, if you are dissatisfied or “aggrieved” with certain decisions or “determinations” of an agency you can apply to the agency concerned for an internal review of its determination.

A person is aggrieved by a determination on an application for access to records if any of the following apply:

- an agency refuses to give the applicant access to a document;
- access to a document is to be given to the applicant subject to deferral;
- access to a copy of a document from which exempt matter has been deleted is to be given to the applicant;
- access to a document is to be given to the applicant subject to a charge for dealing with the application, or for giving access to a document, that the applicant considers to be unreasonable;
- a charge for dealing with the application is payable by the applicant, being a charge that the applicant considers to have been unreasonably incurred;
- an agency should have, and has not, taken such steps as are reasonably practicable to obtain with the views of a third party as to whether or not the document is an exempt document;
- an agency should have, and has, taken such steps to obtain the views of a third party but the determination is not in accordance with the views of the person; or
- an agency refuses to amend its records in accordance with the application.

To apply for an internal review of a determination you must lodge an internal review application form or write to the same agency as made the determination. This must be done within 28 days of being given the determination with the accompanying application fee. This is $40 or $20 if you received a reduction in your application fees for the original application. If the determination has been posted, it is deemed to have been given to you on the fifth day after the letter was posted.

There is no right to an internal review of a determination regarding a Minister’s document.

2. INVESTIGATION BY THE OMBUDSMAN

If, after an internal review has been completed, you are still dissatisfied with the agency's determination you can make a complaint to the Ombudsman of the determination. The Ombudsman is empowered to investigate the conduct of any person or body in relation to a determination made by an agency under this Act. Provided you have had an internal review, you can apply for an investigation by the Ombudsman at any time. However, if you wish to keep open the option of later making a review application to the Administrative Decisions Tribunal, you must apply to the Ombudsman within 60 days of receiving the determination from your internal review.

Complaints to the Ombudsman must be in writing, an application form is not required. Investigations by the Ombudsman are free. You can ring the Ombudsman at any time during working hours on 9286 1000 to discuss any issue regarding a current or proposed FOI application.

There is no right to an investigation by the Ombudsman of a Minister’s determination under the Freedom of Information Act or in relation to the issue of a ministerial certificate.

3. REVIEW APPLICATIONS TO THE ADMINISTRATIVE DECISIONS TRIBUNAL (ADT)

If you are aggrieved with a determination by an agency after internal review or after review by the Ombudsman, you can make a review application to the ADT. Similarly, if you are aggrieved with a determination by a Minister, you can make a review application direct to the ADT. The definitions of what "aggrieved" means under the FOI Act are the same as those which allow you to apply for an internal review (see above).

Review applications must be made within 60 days after the relevant determination was given to you or, if you have sought an investigation by the Ombudsman, within 60 days after the results of the Ombudsman’s investigation of the complaint were reported to you.

You do not have to complain to the Ombudsman first, before you can make a review application to the ADT. You must, however, ask for an internal review by the agency within the specified time frame. The procedures relating to review applications to the ADT are established by the Tribunal, telephone (02) 9228 7777.
Appendix A - Forms and letters

FORM NO. 10

APPLICATION FOR AMENDMENT OF PERSONAL RECORDS – FREEDOM OF INFORMATION ACT 1989

DETAILS OF APPLICANT

Surname: ..........................................................................................................................................................

Given Names: .................................................................................................................................................

(Mrs etc) ......................................................................................................................................................

Postal Address:

........................................................................................................................................................................

........................................................................................................................................................................

Postcode: .......................................................................................................................................................

Telephone Number(s): (w) ..............................................................................................................................

(h) .................................................................................................................................................................

(m) .................................................................................................................................................................

FOI Reference Number: ....................................................................................................................................

DETAILS OF APPLICATION

In accordance with section 40 of the Freedom of Information Act 1989 (NSW), I seek amendment of personal
records held by ................................................................................................................................................

(name of agency holding the documents) I claim that the document(s) described below, contain(s) information relating to my personal affairs that is:

Please place a tick in the appropriate box

[ ] incomplete

[ ] incorrect

[ ] out of date

[ ] misleading

I also claim that the information has been, is being used or is available for use, by you for an administrative
purpose.

The document(s) containing the information is/are:

........................................................................................................................................................................

The information which needs changing is:

........................................................................................................................................................................

The reasons why I claim the information is incomplete, incorrect, out of date or misleading are:

........................................................................................................................................................................

(Please attach any documentation which would support your claim and indicate which, if any, documents should
be returned to you.)

The records should be amended to indicate the following:

........................................................................................................................................................................

If there is insufficient space on this form, please attach separate sheets.

FEES/CHARGES

There are no fees or charges for the lodgement or processing of this application. Where there is a significant
correction of personal records and the mistakes were not the applicant’s fault, all fees and charges paid for the
original application and, where applicable an internal review, will be fully refunded.

LODGERMENT OF APPLICATION

This application must be addressed to the agency holding the documents.

APPLICANT’S SIGNATURE: ......................................................................................................................... Date: ..................................................
APPENDIX B – STATISTICAL REPORTS

Agencies and Ministers’ offices are required to report annually on their administration of FOI. Agencies should report in their own annual reports and Ministers’ offices should forward their reports to the Department of Premier and Cabinet for inclusion in the Department’s Annual Report.

Chapter 2 discusses these requirements further.

The following pages describe the data required to be kept for reporting purposes.

Agencies which receive less than 10 FOI applications during the reporting year may provide the data in narrative form. Where no applications have been received for the period a “nil return” must be indicated instead of the statistical tables.

*Note:* Except as otherwise stated, the sections below require agencies to identify the relevant number of FOI applications, rather than the number of documents sought by the application.

**SECTION A – NEW FOI APPLICATIONS**

| How many FOI applications were received, discontinued or completed? | NUMBER OF FOI APPLICATIONS |
|---|---|---|---|---|---|
| | PERSONAL | OTHER | TOTAL |
| | (previous year) | (current year) | (previous year) | (current year) | (previous year) | (current year) |
| A1 New | | | | | |
| A2 Brought forward | | | | | |
| A3 Total to be processed | | | | | |
| A4 Completed | | | | | |
| A5 Discontinued | | | | | |
| A6 Total processed | | | | | |
| A7 Unfinished (carried forward) | | | | | |
APPENDIX B – STATISTICAL REPORTS

SECTION B – DISCONTINUED APPLICATIONS

<table>
<thead>
<tr>
<th>Why were FOI applications discontinued?</th>
<th>NUMBER OF DISCONTINUED FOI APPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>B1 Request transferred out to another agency (s.20)</td>
<td></td>
</tr>
<tr>
<td>B2 Applicant withdrew request</td>
<td></td>
</tr>
<tr>
<td>B3 Applicant failed to pay advance deposit (s.22)</td>
<td></td>
</tr>
<tr>
<td>B4 Applicant failed to amend a request that would have been an unreasonable diversion of resources to complete (s.25(1)(a1))</td>
<td></td>
</tr>
<tr>
<td>B5 Total discontinued</td>
<td></td>
</tr>
</tbody>
</table>

Note: If request discontinued for more than one reason, select the reason first occurring in the above table. The figures in B5 should correspond to those in A5.

SECTION C – COMPLETED APPLICATIONS

<table>
<thead>
<tr>
<th>What happened to completed FOI applications?</th>
<th>NUMBER OF COMPLETED FOI APPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>C1 Granted or otherwise available in full</td>
<td></td>
</tr>
<tr>
<td>C2 Granted or otherwise available in part</td>
<td></td>
</tr>
<tr>
<td>C3 Refused</td>
<td></td>
</tr>
<tr>
<td>C4 No documents held</td>
<td></td>
</tr>
<tr>
<td>C5 Total completed</td>
<td></td>
</tr>
</tbody>
</table>

Note: A request is granted or otherwise available in full if all documents requested are either provided to the applicant (or the applicant’s medical practitioner) or are otherwise publicly available. The figures in C5 should correspond to those in A4.
### APPENDIX B – STATISTICAL REPORTS

#### SECTION D – APPLICATIONS GRANTED OR OTHERWISE AVAILABLE IN FULL

<table>
<thead>
<tr>
<th>How were the documents made available to the applicant?</th>
<th>NUMBER OF FOI APPLICATIONS (GRANTED OR OTHERWISE AVAILABLE IN FULL)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td>(previous year)</td>
<td>(current year)</td>
</tr>
<tr>
<td><strong>All documents requested were:</strong></td>
<td></td>
</tr>
<tr>
<td>D1 Provided to the applicant</td>
<td></td>
</tr>
<tr>
<td>D2 Provided to the applicant’s medical Practitioner</td>
<td></td>
</tr>
<tr>
<td>D3 Available for inspection</td>
<td></td>
</tr>
<tr>
<td>D4 Available for purchase</td>
<td></td>
</tr>
<tr>
<td>D5 Library material</td>
<td></td>
</tr>
<tr>
<td>D6 Subject to deferred access</td>
<td></td>
</tr>
<tr>
<td>D7 Available by a combination of any of the reasons listed in D1-D6 above</td>
<td></td>
</tr>
<tr>
<td>D8 Total granted or otherwise available in full</td>
<td></td>
</tr>
</tbody>
</table>

*Note: The figures in D8 should correspond to those in C1.*
### APPENDIX B – STATISTICAL REPORTS

#### SECTION E – APPLICATIONS GRANTED OR OTHERWISE AVAILABLE IN PART

<table>
<thead>
<tr>
<th>How were the documents made available to the applicant?</th>
<th>NUMBER OF FOI APPLICATIONS (GRANTED OR OTHERWISE AVAILABLE IN PART)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>Documents made available were:</td>
<td></td>
</tr>
<tr>
<td>E1 Provided to the applicant</td>
<td></td>
</tr>
<tr>
<td>E2 Provided to the applicant’s medical Practitioner</td>
<td></td>
</tr>
<tr>
<td>E3 Available for inspection</td>
<td></td>
</tr>
<tr>
<td>E4 Available for purchase</td>
<td></td>
</tr>
<tr>
<td>E5 Library material</td>
<td></td>
</tr>
<tr>
<td>E6 Subject to deferred access</td>
<td></td>
</tr>
<tr>
<td>E7 Available by a combination of any of the reasons listed in E1-E6 above</td>
<td></td>
</tr>
<tr>
<td>E8 Total granted or otherwise available in part</td>
<td></td>
</tr>
</tbody>
</table>

Note: The figures in E8 should correspond to those in C2.

#### SECTION F – REFUSED FOI APPLICATIONS

<table>
<thead>
<tr>
<th>Why was access to the documents refused?</th>
<th>NUMBER OF REFUSED FOI APPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>F1 Exempt</td>
<td></td>
</tr>
<tr>
<td>F2 Deemed refused</td>
<td></td>
</tr>
<tr>
<td>F3 Total refused</td>
<td></td>
</tr>
</tbody>
</table>

Note: The figures in F3 should correspond with those in C3.
## APPENDIX B – STATISTICAL REPORTS

### SECTION G – EXEMPT DOCUMENTS

<table>
<thead>
<tr>
<th>Why were the documents classified as exempt? (identify one reason only)</th>
<th>NUMBER OF FOI APPLICATIONS (REFUSED OR ACCESS GRANTED OR OTHERWISE AVAILABLE IN PART ONLY)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td><strong>Restricted documents:</strong></td>
<td></td>
</tr>
<tr>
<td>G1 Cabinet documents (Clause 1)</td>
<td></td>
</tr>
<tr>
<td>G2 Executive Council documents (Clause 2)</td>
<td></td>
</tr>
<tr>
<td>G3 Documents affecting law enforcement and public safety (Clause 4)</td>
<td></td>
</tr>
<tr>
<td>G4 Documents affecting counter terrorism measures (Clause 4A)</td>
<td></td>
</tr>
<tr>
<td><strong>Documents requiring consultation:</strong></td>
<td></td>
</tr>
<tr>
<td>G5 Documents affecting intergovernmental relations (Clause 5)</td>
<td></td>
</tr>
<tr>
<td>G6 Documents affecting personal affairs (Clause 6)</td>
<td></td>
</tr>
<tr>
<td>G7 Documents affecting business affairs (Clause 7)</td>
<td></td>
</tr>
<tr>
<td>G8 Documents affecting the conduct of research (Clause 8)</td>
<td></td>
</tr>
<tr>
<td><strong>Documents otherwise exempt:</strong></td>
<td></td>
</tr>
<tr>
<td>G9 Schedule 2 exempt agency</td>
<td></td>
</tr>
<tr>
<td>G10 Documents containing information confidential to Olympic Committees (Clause 22)</td>
<td></td>
</tr>
<tr>
<td>G11 Documents relating to threatened species, Aboriginal objects or Aboriginal places (Clause 23)</td>
<td></td>
</tr>
<tr>
<td>G12 Documents relating to threatened species conservation (Clause 24)</td>
<td></td>
</tr>
<tr>
<td>G13 Plans of management containing information of Aboriginal significance (Clause 25)</td>
<td></td>
</tr>
</tbody>
</table>
## APPENDIX B – STATISTICAL REPORTS

<table>
<thead>
<tr>
<th>G14</th>
<th>Private documents in public library collections (Clause 19)</th>
</tr>
</thead>
<tbody>
<tr>
<td>G15</td>
<td>Documents relating to judicial functions (Clause 11)</td>
</tr>
<tr>
<td>G16</td>
<td>Documents subject to contempt (Clause 17)</td>
</tr>
<tr>
<td>G17</td>
<td>Documents arising out of companies and securities legislation (Clause 18)</td>
</tr>
<tr>
<td>G18</td>
<td>Exempt documents under interstate FOI Legislation (Clause 21)</td>
</tr>
<tr>
<td>G19</td>
<td>Documents subject to legal professional privilege (Clause 10)</td>
</tr>
<tr>
<td>G20</td>
<td>Documents containing confidential material (Clause 13)</td>
</tr>
<tr>
<td>G21</td>
<td>Documents subject to secrecy provisions (Clause 12)</td>
</tr>
<tr>
<td>G22</td>
<td>Documents affecting the economy of the State (Clause 14)</td>
</tr>
<tr>
<td>G23</td>
<td>Documents affecting financial or property Interests of the State or an agency (Clause 15)</td>
</tr>
<tr>
<td>G24</td>
<td>Documents concerning operations of agencies (Clause 16)</td>
</tr>
<tr>
<td>G25</td>
<td>Internal working documents (Clause 9)</td>
</tr>
<tr>
<td>G26</td>
<td>Other exemptions (eg., Clauses 20, 22A and 26)</td>
</tr>
</tbody>
</table>

**Note:** Where more than one exemption applies to a request select the exemption category first occurring in the above table. The figures in G27 should correspond to the sum of the figures in C2 and F1.
APPENDIX B – STATISTICAL REPORTS

SECTION H – MINISTERIAL CERTIFICATES (S.59)

<table>
<thead>
<tr>
<th>How many Ministerial Certificates were issued?</th>
<th>NUMBER OF MINISTERIAL CERTIFICATES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>H1 Ministerial Certificates issued</td>
<td></td>
</tr>
</tbody>
</table>

SECTION I – FORMAL CONSULTATIONS

<table>
<thead>
<tr>
<th>How many formal consultations were conducted?</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>I1 Number of applications requiring formal consultation</td>
<td></td>
</tr>
<tr>
<td>I2 Number of persons formally consulted</td>
<td></td>
</tr>
</tbody>
</table>

Note: Include all formal offers to consult issued irrespective of whether a response was received.

SECTION J – AMENDMENT OF PERSONAL RECORDS

<table>
<thead>
<tr>
<th>How many applications for amendment of personal records were agreed or refused?</th>
<th>NUMBER OF APPLICATIONS FOR AMENDMENT OF PERSONAL RECORDS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>J1 Agreed in full</td>
<td></td>
</tr>
<tr>
<td>J2 Agreed in part</td>
<td></td>
</tr>
<tr>
<td>J3 Refused</td>
<td></td>
</tr>
<tr>
<td>J4 Total</td>
<td></td>
</tr>
</tbody>
</table>

SECTION K – NOTATION OF PERSONAL RECORDS

<table>
<thead>
<tr>
<th>How many applications for notation of personal records were made (s.46)?</th>
<th>NUMBER OF APPLICATIONS FOR NOTATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>K1 Applications for notation</td>
<td></td>
</tr>
</tbody>
</table>
### APPENDIX B – STATISTICAL REPORTS

#### SECTION L – FEES AND COSTS

<table>
<thead>
<tr>
<th>What fees were assessed and received for FOI applications processed (excluding applications transferred out)?</th>
<th>ASSESSED COSTS</th>
<th>FEES RECEIVED</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(previous year)</td>
<td>(current year)</td>
</tr>
<tr>
<td>L1 All completed applications</td>
<td>$</td>
<td>$</td>
</tr>
</tbody>
</table>

#### SECTION M – FEE DISCOUNTS

<table>
<thead>
<tr>
<th>How many fee waivers or discounts were allowed and why?</th>
<th>NUMBER OF FOI APPLICATIONS (WHERE FEES WERE WAIVED OR DISCOUNTED)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>M1 Processing fees waived in full</td>
<td></td>
</tr>
<tr>
<td>M2 Public interest discounts</td>
<td></td>
</tr>
<tr>
<td>M3 Financial hardship discounts – pensioner or child</td>
<td></td>
</tr>
<tr>
<td>M4 Financial hardship discounts – non profit organisation</td>
<td></td>
</tr>
<tr>
<td>M5 Total</td>
<td></td>
</tr>
</tbody>
</table>

#### SECTION N – FEE REFUNDS

<table>
<thead>
<tr>
<th>How many fee refunds were granted as a result of significant correction of personal records?</th>
<th>NUMBER OF REFUNDS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>N1 Number of fee refunds granted as a result of significant correction of personal records</td>
<td></td>
</tr>
</tbody>
</table>
## APPENDIX B – STATISTICAL REPORTS

### SECTION O – DAYS TAKEN TO COMPLETE REQUEST

<table>
<thead>
<tr>
<th>How long did it take to process completed applications? (Note: calendar days)</th>
<th>NUMBER OF COMPLETED FOI APPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>O1 0-21 days – statutory determination period</td>
<td></td>
</tr>
<tr>
<td>O2 22-35 days – extended statutory determination period for consultation or retrieval of archived records (S.59B)</td>
<td></td>
</tr>
<tr>
<td>O3 Over 21 days – deemed refusal where no extended determination period applies</td>
<td></td>
</tr>
<tr>
<td>O4 Over 35 days – deemed refusal where extended determination period applies</td>
<td></td>
</tr>
<tr>
<td>O5 Total</td>
<td></td>
</tr>
</tbody>
</table>

*Note: Figures in O5 should correspond to figures in A4.*

### SECTION P – PROCESSING TIME: HOURS

<table>
<thead>
<tr>
<th>How long did it take to process completed applications?</th>
<th>NUMBER OF COMPLETED FOI APPLICATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>P1 0-10 hours</td>
<td></td>
</tr>
<tr>
<td>P2 11-20 hours</td>
<td></td>
</tr>
<tr>
<td>P3 21-40 hours</td>
<td></td>
</tr>
<tr>
<td>P4 Over 40 hours</td>
<td></td>
</tr>
<tr>
<td>P5 Total</td>
<td></td>
</tr>
</tbody>
</table>

*Note: Figures in P5 should correspond to figures in A4.*
### APPENDIX B – STATISTICAL REPORTS

#### SECTION Q – NUMBER OF REVIEWS

<table>
<thead>
<tr>
<th>How many reviews were finalised?</th>
<th>NUMBER OF COMPLETED REVIEWS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(previous year)</td>
</tr>
<tr>
<td>Q1  Internal reviews</td>
<td></td>
</tr>
<tr>
<td>Q2  Ombudsman reviews</td>
<td></td>
</tr>
<tr>
<td>Q3  ADT reviews</td>
<td></td>
</tr>
</tbody>
</table>

#### SECTION R – RESULTS OF INTERNAL REVIEWS

What were the results of internal reviews finalised?

<table>
<thead>
<tr>
<th>GROUNDS ON WHICH THE INTERNAL REVIEW WAS REQUESTED</th>
<th>NUMBER OF INTERNAL REVIEWS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PERSONAL</td>
</tr>
<tr>
<td></td>
<td>Original Agency Decision</td>
</tr>
<tr>
<td></td>
<td>Upheld</td>
</tr>
<tr>
<td>R1  Access refused</td>
<td></td>
</tr>
<tr>
<td>R2  Access deferred</td>
<td></td>
</tr>
<tr>
<td>R3  Exempt matter deleted from documents</td>
<td></td>
</tr>
<tr>
<td>R4  Unreasonable charges</td>
<td></td>
</tr>
<tr>
<td>R5  Failure to consult with third parties</td>
<td></td>
</tr>
<tr>
<td>R6  Third parties views disregarded</td>
<td></td>
</tr>
<tr>
<td>R7  Amendment of personal records refused</td>
<td></td>
</tr>
<tr>
<td>R8  Total</td>
<td></td>
</tr>
</tbody>
</table>

Note: Figures in R8 should correspond to figures in A4.
APPENDIX C – PUBLIC DISCLOSURE OF INFORMATION ARISING FROM GOVERNMENT TENDERS AND CONTRACTS

This Appendix sets out guidelines to provide NSW government agencies with a practical model to determine what, how and when specific information arising from government tenders and contracts (including project deeds and other forms of agreements) with the private sector should be publicly disclosed and what information should remain confidential.

The purpose of the guidelines is to:
- set out the requirements for disclosing tender information;
- describe the new contract disclosure obligations in section 15A of the Freedom of Information Act 1989 (FOI Act); and
- outline how requests for contract information, over and above that which is required to be disclosed under section 15A of the FOI Act, should be dealt with by agencies.

The guidelines are designed to provide greater consistency and transparency in government contracting. The guidelines apply to a wide range of contracts between the Government and the private sector including contracts relating to construction, infrastructure, property development, property transfers, goods and services, information technology, and leases. They apply irrespective of the method of tendering or negotiation, and include contracts awarded to suppliers from established standing offer panels and contracts for privately financed projects.

The requirements of these guidelines are to be implemented by all agencies including Government Trading Enterprises, but excluding State Owned Corporations and Department of State and Regional Development contracts which involve industry support.

Under section 15A of the FOI Act and these guidelines, agencies must place the tender and contract information which is required to be routinely disclosed on the government tendering website www.tenders.nsw.gov.au, in addition to any other location agencies choose to use.

The contract disclosure requirements contained in section 15A of the FOI Act apply to contracts entered into by an agency on or after the commencement of those provisions on 1 January 2007. The requirements of these guidelines, which set out the additional contract information required to be disclosed on request, apply to contracts entered into by an agency on or after the date of this Memorandum. Prior contracts remain subject to Premier’s Memorandum No. 2000-11 which is superseded by this Memorandum.

For disclosure of tender information (involving tender call details, details of respondents and details of shortlisted entities in multi-stage tender processes), agencies are to be fully compliant by 31 March 2007.

An information kit with guidance on implementing the FOI Act provisions and these guidelines is available on www.tenders.nsw.gov.au/guidelines/. Agencies need to refer to this information kit without delay to achieve the above compliance timeframes.

State Owned Corporations are encouraged to give consideration to voluntarily adopting the guidelines.
GUIDELINES FOR THE PUBLIC DISCLOSURE OF INFORMATION ARISING FROM NSW GOVERNMENT TENDERS AND CONTRACTS

The purpose of these guidelines is to provide NSW government agencies with a practical model to determine what, how and when specific information arising from government tenders and contracts (including project deeds and other forms of agreements) with the private sector should be publicly disclosed and what information should remain confidential.

The guidelines:
- set out the requirements for disclosing tender information;
- describe the new contract disclosure obligations which are contained in section 15A of the Freedom of Information Act 1989 (FOI Act); and
- outline how requests for contract information, over and above that which is required to be disclosed under section 15A of the FOI Act, should be dealt with by agencies.

The requirements of these guidelines:
- are to be implemented by all agencies including Government Trading Enterprises (but excluding State Owned Corporations and Department of State and Regional Development contracts which involve industry support). Shareholding Ministers and boards of State Owned Corporations may give consideration to voluntarily adopting the guidelines;
- apply to all government contracts, as defined; and
- apply irrespective of the method of tendering or negotiation, and include contracts awarded to suppliers from established standing offer panels.

In these guidelines a reference to a 'government contract' or 'contract' has the same meaning as set out in section 15A of the FOI Act, being:

(a) a contract between an agency and a private sector entity under which the agency or private sector entity agrees:
   (i) to undertake a specific project (such as a construction, infrastructure or property development project), or
   (ii) to provide specific goods or services (such as information technology services), or
   (iii) to transfer real property to the other party to the contract,
(b) a lease of real property where the parties to the lease are an agency and a private sector entity,

but does not include a contract of employment.

In addition to the requirements in these guidelines, contracts for privately financed projects also need to comply with additional disclosure requirements set out in the “Working with Government - Guidelines for Privately Financed Projects” (see www.treasury.nsw.gov.au).
APPENDIX C – PUBLIC DISCLOSURE OF INFORMATION ARISING FROM GOVERNMENT TENDERS AND CONTRACTS

The description in these guidelines of the main obligations in the new FOI Act provisions is intended to assist agencies to implement those provisions and should not be taken to replace those legislative obligations. Agencies should be familiar with the precise requirements of the new FOI Act provisions and should, at all times, comply with those requirements.

Method of disclosure:

Tender call documents are to contain advice that there are public disclosure requirements associated with the tender process and contracts that are awarded and where those requirements can be accessed.

Tender and contract information required to be routinely disclosed is to be posted on the government website www.tenders.nsw.gov.au operated by the Department of Commerce in addition to any other location agencies choose to use. An Information Kit with contact details is available at www.tenders.nsw.gov.au/guidelines/ to assist agencies in implementing the requirements of these guidelines.

Tender information shall remain posted on the website until the tender call process has been concluded and a contract either awarded or decision made not to award any contract. Contract information shall remain posted on the website for at least 30 days or until all work or services under the contract are completed, and/or all goods under the contract are supplied, whichever is the greater period.

Where a request is made for contract information which is not required to be routinely disclosed under section 15A of the FOI Act and which is not confidential, the agency, in consultation with the person making the request, shall determine the most suitable method of providing that information.

Tender information disclosure requirements

Agencies must ensure that information is disclosed as follows:

<table>
<thead>
<tr>
<th>Tender Type</th>
<th>Level of disclosure</th>
<th>Basis of disclosure</th>
</tr>
</thead>
<tbody>
<tr>
<td>For all public calls for tender, expressions of interest or other such public calls which may result in a contract with the private sector.</td>
<td>As a minimum: • a concise description of the proposed works, goods or services the subject of the tender call; • the date responses to the tender call close and where responses are lodged; and • location of the tender call documents. The names and addresses of all entities which submit responses.</td>
<td>Routine public disclosure at the time tender calls are advertised. Routine public disclosure within 7 days of the date tender calls closed.</td>
</tr>
<tr>
<td>In a multi-stage tender process.</td>
<td>The names and addresses of the shortlisted entities, except where such disclosure is likely to compromise the competitiveness of the subsequent tender process.</td>
<td>Routine public disclosure within 7 days of these entities being advised of their shortlisting.</td>
</tr>
</tbody>
</table>
APPENDIX C – PUBLIC DISCLOSURE OF INFORMATION ARISING FROM GOVERNMENT TENDERS AND CONTRACTS

Contract information disclosure requirements

The FOI Act requires the routine disclosure of contract information as follows:

<table>
<thead>
<tr>
<th>Contract size and type</th>
<th>Level of disclosure</th>
<th>Basis of disclosure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Class 1 contracts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All government contracts with estimated</td>
<td>The information set out in schedule 1.</td>
<td>Routine public disclosure within 60 days after the contract becomes effective.</td>
</tr>
<tr>
<td>value $150,000 or above)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Class 2 contracts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class 1 contracts (i.e government contracts with estimated value $150,000 or above) which also:</td>
<td>The information set out in schedules 1 and 2.</td>
<td>Routine public disclosure within 60 days after the contract becomes effective.</td>
</tr>
<tr>
<td>- result from a direct negotiation where there has not been a tender process; or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- have been the subject of a tender process and where the final contract terms and conditions are substantially negotiated with the successful tenderer (this includes alliance type contracts); or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- involve operation or maintenance obligations for 10 years or longer; or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- involve a privately financed project as defined by relevant Treasury guidelines; or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- involve a transfer of land or other asset to a party in exchange for the transfer of land or other asset to an agency.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Class 3 contracts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class 2 contracts where the estimated value of the government contract is $5 million or more.</td>
<td>The information set out in schedules 1 and 2 and the complete contract, less confidential information. Note: if some or all of a class 3 contract is not disclosed for reasons of confidentiality, the agency is to disclose:</td>
<td>Routine public disclosure within 60 days after the contract becomes effective.</td>
</tr>
<tr>
<td>- the reasons for not publishing the contract or provisions;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- a statement as to whether the contract or provisions will be published and, if so, when; and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- where some but not all of the provisions of the contract have been disclosed, a general description of the types of provisions that have not been published.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX C – PUBLIC DISCLOSURE OF INFORMATION ARISING FROM GOVERNMENT TENDERS AND CONTRACTS

Requests for disclosure of additional contract information

A person may make a specific request to an agency for any item of contract information contained in schedules 1 or 2, or for a copy of a contract, which is not required to be routinely disclosed under section 15A of the FOI Act. The agency must provide the requested contract information or the requested copy of the contract to the requesting person (less any confidential information) within 60 days of receiving the request.

Where a copy of a contract has been requested and some or all of the contract is not provided for reasons of confidentiality, the agency should disclose:

- the reasons for not providing;
- a statement as to whether the contract or provisions will be provided and, if so, when; and
- where some but not all of the provisions of the contract have been provided, a general description of the types of provisions that have not been provided.

Disclosure of amendments or variations to contract information under the FOI Act

The FOI Act requires that, if there is an amendment to the contract terms or a material variation made under the contract that changes information already routinely disclosed under the FOI Act, the agency must ensure that the information concerning the change is routinely disclosed within 60 days after such amendment or variation becomes effective, less any confidential information. In the case of class 3 contracts, the full amendment or material variation, less any confidential information, must be disclosed within the 60 day timeframe.

Confidential information

None of the disclosure obligations contained in the FOI Act, or the requirements for disclosing tender information or a copy of a contract or information in relation to a contract under these guidelines, require the disclosure of:

- the commercial-in-confidence provisions of a contract (as defined in schedule 3);
- details of any unsuccessful tender;
- any matter that could reasonably be expected to affect public safety or security; or
- information which would be exempt from disclosure if it were the subject of an application under the FOI Act.

Where such confidential information is withheld, the agency must inform the requesting person that access to that information may be sought in accordance with the FOI Act. This will enable a person seeking the information to have the appeal rights available under the FOI Act.
APPENDIX C – PUBLIC DISCLOSURE OF INFORMATION ARISING FROM GOVERNMENT TENDERS AND CONTRACTS

Tenderers are to be invited to nominate items they consider are confidential and why.

In the event of disagreement between an agency and the tenderer or a requesting person or other member of the public as to what should be disclosed with regard to contract information (for example, if there is some disagreement as to what constitutes intellectual property) the agency is to obtain the opinion of:

The Chairman
State Contracts Control Board
Level 22 McKell Building
2-24 Rawson Place
Sydney NSW 2000
Email: sccb@commerce.nsw.gov.au
Tel no: 9372 8910

Fees for disclosure:

All tender and contract information required to be routinely disclosed under the FOI Act is to be provided by an agency free of charge.

For contracts valued at less than $150,000, Schedule 1 information, if requested, is also to be provided free of charge.

In other cases, where a copy of a contract or information in relation to a contract is requested which is not required to be routinely disclosed under the FOI Act but which is required to be provided under these guidelines, the cost of providing such information may be recovered from the person making the request on an equivalent basis to FOI Act requests.

SCHEDULES OF DISCLOSURE FOR CONTRACTS

SCHEDULE 1 - (Section 15A(2) FOI Act)

The schedule 1 information required to be disclosed is as follows:

(a) The name and business address of the contractor;
(b) Particulars of any related body corporate (within the meaning of the Corporations Act 2001 of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor’s obligations under the contract or will receive a benefit under the contract;
(c) The date on which the contract became effective and the duration of the contract;
(d) Particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract;
(e) The estimated amount payable to the contractor under the contract;
(f) A description of any provisions under which the amount payable to the contractor may be varied;
APPENDIX C – PUBLIC DISCLOSURE OF INFORMATION ARISING FROM GOVERNMENT TENDERS AND CONTRACTS

(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; and
(i) A description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.

SCHEDULE 2 - (Section 15A(3) FOI Act)

The schedule 2 information required to be disclosed is as follows:

(a) Particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer;
(b) Particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer;
(c) The results of any cost-benefit analysis of the contract conducted by the agency;
(d) The components and quantum of the public sector comparator if used;
(e) 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; and
(h) Particulars of any other key elements of the contract.

SCHEDULE 3 - (Definition of ‘commercial-in confidence’ provisions in section 15A(14), FOI Act)

Commercial-in-confidence information which is not to be disclosed is as follows:
- The contractor’s financing arrangements;
- The contractor’s cost structure or profit margins;
- The contractor’s full base case financial model;
- Any intellectual property in which the contractor has an interest; or

Any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.
Appendix D – Statement of Affairs and Summary of Affairs

1. STRUCTURE AND FUNCTIONS OF THE AGENCY

Example A – XXX Department

The organisational chart sets out the structure of the Department. There are three Divisions: Corporate, Operations and Policy.

The agency is responsible for providing administrative support to the public sector and such administrative services as required to fulfill general public sector commitments. The XXX Department has a staff of 100.

There are 20 employees in the Corporate Division, 60 employees in the Operations Division and 20 employees in the Policy unit. The Freedom of Information Officer is part of the Policy Division.

The Operations Division provides administrative support services to other government departments and agencies in the public sector. The Division provides direct services through the central office and 8 regional offices. The Policy Division is divided into Planning and Legislative Compliance. The planning unit looks at how services and support can be anticipated and the appropriate resources that need to be allocated to the task. The Legislative Compliance Unit ensures that operations remain in accordance with Legislation and government memoranda. The Corporate Division provides Human Resources, IT and Finance services for the Department.

The Department is responsible for administering the following legislation:
- XXX Act 1987;
- LMN Administration Act 1988; and
- XYZ Services Act 1968.

A corporate plan is available at www.xxxdept.com. This corporate plan guides planning in the areas of administrative support and services and provides details of how the Department’s performance is to be measured.
2. THE WAY THE AGENCY’S FUNCTIONS AFFECT THE PUBLIC

Example B – Corrective Services

The Department is responsible for the administration of the following Acts:

- Crimes (Administration of Sentences) Act 1999
- International Transfer of Prisoners (New South Wales) Act 1997
- Parole Orders (Transfer) Act 1983
- Prisoners (Interstate Transfer) Act 1982
- Crimes (Interstate Transfer of Community Based Sentences) Act 2004


The Department protects the community by containing, managing and supervising offenders. Information on how the Department contains, manages and supervises offenders is within the Department’s Annual Report.

The Department’s Board of Management makes the Department’s major management, financial and policy decisions. Membership of the Board is set out in the Department’s Annual Report.

Decisions regarding the functions of the Department are made at various levels, usually under delegation from the Commissioner.

The Department’s Restorative Justice Unit provides conferencing and mediation services, including victim-offender conferencing, family group conferencing, and victim-offender mediation.

Section 256 of the Crimes (Administration of Sentences) Act 1999 provides for a Victims’ Register. The Department’s Restorative Justice Unit maintains this Register. Section 256(2) of the same Act provides that the Victims’ Register is to record the “names of victims of offenders who have requested that they be given notice of the possible parole of the offender concerned”.

The State Parole Authority, which is a statutory authority, decides which offenders, who are eligible to be released to parole, will be released to parole and the conditions of their parole orders. The Authority also makes decisions regarding the revocation of parole orders, and determines matters with respect to the revocation of periodic detention orders and home detention orders. The Constitution and functions of the Authority are discussed in Part 8 and Schedule 7 of the Crimes (Administration of Sentences) Act 1999.

The Serious Offenders Review Council, which is a statutory authority, provides advice or makes recommendations regarding serious offenders to the Commissioner of Corrective Services, the Minister for Justice, the State Parole Authority and the Supreme Court. The constitution and functions of the Council are principally contained in the statutory provisions falling within Part 9 of the Crimes (Administration of Sentences) Act 1999 as supplemented by Schedule 2 of that Act.
Appendix D – Statement of Affairs and Summary of Affairs

3. HOW THE PUBLIC MAY PARTICIPATE IN THE AGENCY POLICY DEVELOPMENT

Example C – Department of Environment and Conservation

The health of the environment depends on community commitment and involvement at all levels from policy development to everyday business, recreation or domestic activities. This includes all sectors: business, industry, environment groups, individuals, state, local and federal government bodies. DEC works with all of these to implement an integrated environment protection framework for NSW.

The community participates in policy formulation through the various consultative bodies described elsewhere in this Annual Report. DEC also seeks public submissions when developing and reviewing policies, plans and programs. DEC’s website regularly features calls for public comment and describes how to make submissions on its proposals.

- National Parks and Wildlife Advisory Council
- National Parks and Wildlife Regional Committees

- Blue Mountains Region, Central Coast Hunter Range Region, Far South Coast Region, Far West Region, Hartley Historic Site, Hunter Region, Mid North Coast Region, North Coast Region, Northern Plains Region, Northern Rivers Region, Northern Tablelands Region, Snowy Mountains Region, South Coast Region, South West Slopes Region, Sydney Region, Sydney North Region, Sydney South Region, Upper Darling Region and Western Rivers Region
Appendix D – Statement of Affairs and Summary of Affairs

4. KINDS OF DOCUMENTS THE AGENCY HOLDS

Example D – Department of Housing

The following is a list of publications released in 2004-05. They are all available from the Department of Housing website (www.housing.nsw.gov.au) or by request at any Department of Housing Office.

Dates in brackets indicate version released in 2004-05.

Corporate Publications
- Annual Report 2003-04 (11/04)

Reports
- Rent and Sales Report No 68 (07/04)
- Rent and Sales Report No 69 (11/04)
- Rent and Sales Report No 70 (04/05)
- Rent and Sales Report No 71 (06/05)

Information Sheets
- Antisocial Behaviour – The Residential Tenancies Amendment (Public Housing) Bill 2004 (07/04)
- Improvement Standards (07/04)
- Swimming Pools (07/04)
- Income Confirmation Scheme (08/04)
- Public Housing – Update with rental subsidy policy (08/04)
- Rental Subsidy Policy (08/04)
- Transfers (08/04)
- Priority Housing (08/04)
- Antisocial Behaviour Strategy Fact Sheet (04/05)
- Information Sheet – Residential Tenancies Amendment (Public Housing) Bill (07/04)
- The Facts on Pets (01/05)
- Rights and Responsibilities of Department of Housing Tenants (01/05)
- Smoke Alarms (01/05)
- Smoke Free Areas in Public Housing (01/05)
- Bonnyrigg Living Communities Project – Frequently Asked Questions: English, Arabic, Chinese, Khmer, Spanish, Vietnamese (12/04)
- Bonnyrigg Living Communities Project – Tenants’ Frequently Asked Questions: No 2 (04/04)
- Public Private Partnerships (12/04)
- Bonnyrigg Living Communities Project – Letter to Tenants: English, Arabic, Chinese, Khmer, Spanish, Vietnamese (12/04)
- Changes to tenure for Public Housing – English, Arabic, Chinese, Russian, Spanish and Vietnamese (04/05)
- Who is eligible for Public Housing? – English, Arabic, Chinese, Russian, Spanish and Vietnamese (04/05)
- Changes to Rent Subsidy – English, Arabic, Chinese, Russian, Spanish and Vietnamese (04/05)
- Cost of Water Usage – English, Arabic, Chinese, Russian, Spanish and Vietnamese (04/05)
- Market Rent Review – English, Arabic, Chinese, Russian, Spanish and Vietnamese (04/05)
- New Maintenance Regime – English, Arabic, Chinese, Russian, Spanish and Vietnamese (04/05)

Newsletters
- Your Home: A Newsletter for Public Housing Tenants: Issue 27 (08/04), Issue 28 (11/04), Issue 29 (02/05), Issue 30 (05/05)
- Public Housing Customer Council News: Issue 7 (07/04), Issue 8 (11/04)
- Bonnyrigg Living Communities Newsletter: Issue 1 (12/04), Issue 2 (03/05), Issue 3 (06/05)

Home Purchase Assistance Branch
- Home Purchase Assistance for Public Housing Tenants – Fact Sheet (09/04)
- Application for Mortgage Assistance (03/05)
Appendix D – Statement of Affairs and Summary of Affairs

Other Printed Material

- Aboriginal Enquiry Line – business card, magnet and poster (11/04)
- After Hours Temporary Accommodation Line – brochure and promotional card (June 04)
- Local Government Affordable Housing Awards – Guidelines and brochure (10/04)
- Seniors Achievement Awards Nomination Form (02/05)
- National Affordable Housing Conference – Brochure (06/05)

Office of Community Housing

- Community Housing Bulletin (09/04)
- Performance Based Registration System:
  • PBRS Procedure 1, Registration Assessment Methodology (11/04)
  • PBRS Procedures 2, Ongoing Performance Methodology (01/05)
  • PBRS Procedure 5, Temporary Registration (06/05)
  • Guide to collecting data for Quarterly and Annual (Data) Returns (06/05)
- Accreditation:
  • Accreditation News No 7 (07/04)
  • Accreditation News No 8 (01/05)
- Facts Sheets:
  • National Community Housing Standards and Accreditation System (06/05)
  • Performance Based Registration System for NSW Non-Government Housing Providers (06/05)
- Other:
  • Office of Community Housing – A Profile (06/05)
Appendix D – Statement of Affairs and Summary of Affairs

5. ACCESS ARRANGEMENTS, PROCEDURES AND POINTS OF CONTACT

Example E – Department of Health

Departmental

Office of the Director-General
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9040
8.30am to 5.30pm
Monday to Friday

Health System Support Division

Asset & Contract Services
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9354
9.00am to 5.00pm
Monday to Friday

Media & Communications
Publications Coordinator
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9121
8.30am to 5.30pm
Monday to Friday

Corporate Personnel Services
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9504
8.30am to 5.30pm
Monday to Friday

Shared Services Centre
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9422
8.30am to 5.30pm
Monday to Friday

Employee Relations
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9357
9.00am to 5.00pm
Monday to Friday

Executive Support Unit
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9642
8.30am to 5.30pm
Monday to Friday

Finance and Business Management
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9177
9.00am to 5.00pm
Monday to Friday

Legal and Legislative Services
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9605
8.30am to 5.30pm
Monday to Friday

Nursing and Midwifery Office
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9529
8.30am to 5.00pm
Monday to Friday

Workforce Development and Leadership
NSW Department of Health
Locked Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9649
8.30am to 5.30pm
Monday to Friday
### Appendix D – Statement of Affairs and Summary of Affairs

#### Strategic Development Division

<table>
<thead>
<tr>
<th>Division</th>
<th>Telephone</th>
<th>Operating Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Centre for Mental Health</td>
<td>(02) 9391 9307</td>
<td>9.00am to 5.00pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inter-Government and Funding Strategies</td>
<td>(02) 9391 9533</td>
<td>9.00am to 5.00pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Primary Health and Community Partnerships</td>
<td>(02) 9391 9184</td>
<td>8.30am to 5.30pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
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<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statewide Services Development</td>
<td>(02) 9391 9491</td>
<td>8.30am to 5.30pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
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<tr>
<td>Locked Mail Bag 961</td>
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<tr>
<td>NORTH SYDNEY NSW 2059</td>
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</tbody>
</table>

#### Population Health Division

<table>
<thead>
<tr>
<th>Division</th>
<th>Telephone</th>
<th>Operating Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aboriginal Health Branch</td>
<td>(02) 9391 9502</td>
<td>9am to 5pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AIDS and Infectious Diseases Unit</td>
<td>(02) 9391 9250</td>
<td>8.30am to 5.30pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
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<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clinical Policy Unit</td>
<td>(02) 9391 9188</td>
<td>9.00am to 5.00pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
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<td></td>
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<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Human Tissue Inquiry Line</td>
<td>1800 225 822</td>
<td>9.00am to 5.00pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
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<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Centre for Epidemiology and Research</td>
<td>(02) 9391 9224</td>
<td>8.30am to 5.30pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
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<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Centre for Health Protection</td>
<td>(02) 9391 9934</td>
<td>9.00am to 5.00pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Communicable Diseases Branch</td>
<td>(02) 9391 9250</td>
<td>9.00am to 5.00pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
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<tr>
<td>NORTH SYDNEY NSW 2059</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Centre for Drugs &amp; Alcohol</td>
<td>(02) 9391 9259</td>
<td>9.00am to 5.00pm</td>
</tr>
<tr>
<td>NSW Department of Health</td>
<td></td>
<td>Monday to Friday</td>
</tr>
<tr>
<td>Locked Mail Bag 961</td>
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<tr>
<td>NORTH SYDNEY NSW 2059</td>
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<td></td>
</tr>
</tbody>
</table>
Appendix D – Statement of Affairs and Summary of Affairs

Environmental Health Unit
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9816 0373
9.00am to 5.00pm
Monday to Friday

Strategies and Setting Branch
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9123
8.30am to 5.30pm
Monday to Friday

Nutrition and Physical Activity Branch
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9661
8.30am to 5.30pm
Monday to Friday

Pharmaceutical Services Branch
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9879 3214
8.30am to 5.30pm
Monday to Friday

Tobacco and Health Branch
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9111
8.30am to 5.30pm
Monday to Friday

Health System Performance

Strategic Information Management Branch
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9689
9:00am to 5.00pm
Monday to Friday

Quality and Safety Branch
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9200
8.30am to 5.30pm
Monday to Friday

Health Service Performance Improvement Branch
NSW Department of Health
Locked Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9823
9:00am to 5.00pm
Monday to Friday

Demand & Performance Evaluation
NSW Department of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone: (02) 9391 9714
8.30am to 5.30pm
Monday to Friday

Clinical Services Redesign Unit
NSW Department Of Health
Locked Mail Bag 961
NORTH SYDNEY NSW 2059
Telephone (02) 9391 9878
8.30am to 5.30pm
Monday to Friday

Health Professionals Registration Boards

Health Professional Registration Boards brochures, information and/or access to documents may be made between the listed times from the Registrars/Secretaries of the Boards at 28-36 Foveaux Street, Surry Hills:

Health Professionals Registration Boards
Telephone: (02) 9219 0201
8.30am to 4.30pm
Monday to Friday

Optometrists Registration Board
Telephone: (02) 9219 0233
8.30am to 4.30pm
Monday to Friday
Appendix D – Statement of Affairs and Summary of Affairs

Chiropractors Registration Board
TelephoneNumber: (02) 9219 0277
8.30am to 4.30pm
Monday to Friday

Dental Board
TelephoneNumber: (02) 9281 0835
9.00am to 4.30pm
Monday to Friday

Dental Technicians Registration Board
TelephoneNumber: (02) 9219 0233
8.30am to 4.30pm
Monday to Friday

Nurses & Midwives Reg. Board
TelephoneNumber: (02) 9219 0226
8.30am to 4.30pm
Monday to Friday

Optical Dispensers Licensing Board
TelephoneNumber: (02) 9219 0204
8.30am to 4.30pm
Monday to Friday

Osteopaths Registration Board
TelephoneNumber: (02) 9219 0233
8.30am to 4.30pm
Monday to Friday

Pharmacy Board of NSW
TelephoneNumber: (02) 9281 7736
9.00am to 4.30pm
Monday to Friday

Physiotherapists Registration Board
TelephoneNumber: (02) 9219 0255
8.30am to 4.30pm
Monday to Friday

Podiatrists Registration Board
TelephoneNumber: (02) 9219 0277
8.30am to 4.30pm
Monday to Friday

Psychiatrists Registration Board
TelephoneNumber: (02) 9219 0204
8.30am to 4.30pm
Monday to Friday

Area Health Services

Greater Southern Area Health Service
Chief Executive
61 24 9850 (ph)
61 24 9885 (fx)
PO Box 1845
QUEANBEYAN NSW 2620

Sydney South West Area Health Service
Chief Executive
9828 5700 (ph)
9828 5704 (fx)
Locked Bag 7017
LIVERPOOL BC 1871

Greater Western Area Health Service
Chief Executive
68 41 2217 (ph)
68 41 2236 (fx)
PO Box 4061
DUBBO NSW 2830

Sydney West Area Health Service
Chief Executive
4734 2120 (ph)
4734 3734 (fx)
PO Box 63
PENRITH NSW 2751

Hunter & New England Area Health Service
Chief Executive
49 21 4922 (ph)
49 21 4939 (fx)
Locked Bag 1
NEW LAMBTON NSW 2305

South Eastern Sydney & Illawarra Area Health Service
Chief Executive
42 53 4861 (ph)
4253 4878 (fx)
Level 8 Block C
Wollongong Hospital
Locked Mail Bag 8808
SOUTH COAST MAIL CENTRE NSW 2521

North Coast Area Health Service
Chief Executive
6620 2899 (ph)
6620 2166 (fx)
Locked Bag 11
LISMORE NSW 2480

Northern Sydney & Central Coast Area Health Service
Chief Executive
4320 2333 (ph)
4320 2477 (fx)
Locked Bag 2915
CENTRAL COAST BUSINESS CENTRE 2252
Appendix D – Statement of Affairs and Summary of Affairs

Statewide Health Services

Ambulance Service of NSW
State Headquarters
PO Box 105
ROZELLE NSW 2039
Ph: (02) 9320 7601
Fax: (02) 9320 7802

Chief Executive
The Children’s Hospital at Westmead
Locked Bag 4001
WESTMEAD NSW 2145
Ph: (02) 9845 3327
Fax: (02) 9845 0510

Justice Health Service
PO Box 150
MATRAVILLE NSW 2036
Ph: (02) 9289 2977
Fax: (02) 9311 3005
### Appendix E

**Reasoning from primary facts to ultimate facts – Examples**

**Example 1:** Application for a contract between a department and a private company for the construction of a large infrastructure development.

<table>
<thead>
<tr>
<th>Primary Facts</th>
<th>Ultimate Facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>The contract contains information about the extent of the company’s investment, financial commitments and ongoing obligations to the department, and profit expectations in the long term.</td>
<td>On the basis of the primary facts, the decision-maker draws the conclusions of ultimate fact that disclosure of parts of the contract could reasonably be expected to significantly diminish the commercial value of the contract, and that disclosure of the remainder could reasonably be expected to have an unreasonable adverse effect on the company’s business affairs.</td>
</tr>
<tr>
<td>The contract contains many unique provisions developed at significant cost to both the department and the company.</td>
<td>The decision maker notes that in other circumstances the result could be different, referring to the comment in <em>Searle Australia Pty Ltd v Public Interest Advocacy Centre</em> (1992) 108 ALR 163 that even a serious ‘adverse effect’ may be reasonable in some circumstances.</td>
</tr>
<tr>
<td>The private company asks that the contract be kept secret, as knowledge of it in the market place could, in revealing the company’s financial position, expose it to unfair competition in relation to other projects for which it may wish to tender.</td>
<td></td>
</tr>
<tr>
<td>The agency has independent information which supports the company’s claim.</td>
<td></td>
</tr>
<tr>
<td>The agency’s lawyer has provided evidence to the FOI decision-maker to support the view that the contract is in many respects unique, and thus constitutes a trade secret.</td>
<td></td>
</tr>
<tr>
<td>The decision-maker determines that all these are material (primary) facts, sets them out in full in the notice of determination, referring to the material on which the findings are based, and indicates the weight given to each in the final decision.</td>
<td></td>
</tr>
</tbody>
</table>

**Example 2:** Request for a document containing an interview conducted by an officer for the purpose of preliminary investigations into a sexual harassment allegation.

<table>
<thead>
<tr>
<th>Primary Facts</th>
<th>Ultimate Facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>The interview was conducted on the basis that the actual record of interview would be kept confidential.</td>
<td>On the basis of these primary facts, the agency draws the conclusions of ultimate fact that:</td>
</tr>
<tr>
<td>The applicant states that he requires the document for use in compensation proceedings and that release would be in the public interest.</td>
<td>(a) it could reasonably be expected that disclosure under the FOI Act of the interview material would have a substantial adverse effect on the management of personnel (clause16(a)(iii)), and</td>
</tr>
<tr>
<td>The interviewee does not consent to the release of any part of the document.</td>
<td>(b) that, on balance, it would be contrary to the public interest to disclose the material on the grounds that disclosure could lead to victimisation of an interviewee and could make it difficult to obtain similar information in the future (clause 16(b)).</td>
</tr>
<tr>
<td>The agency is aware from other investigations that officers complaining of sexual harassment are reluctant to speak up unless their actual interview is kept confidential.</td>
<td></td>
</tr>
</tbody>
</table>
The agency takes account of the general public interest in the widest possible access to government held information, in individuals having access to information concerning them and to the general fact that amendment of personal records under section 39 depends on an applicant being given access to the records. Nonetheless, it concludes that, at this date, the degree of harm to its sexual harassment procedures far outweighs any public interest that would flow from disclosure. [The applicant's specific intention to use the report in compensation proceedings is not relevant since disclosure under FOI is, in effect, to the world at large.]

Example 3: Application for a copy of a document arising from an audit by a private firm of accountants of a non-government charity.

<table>
<thead>
<tr>
<th>Primary Facts</th>
<th>Ultimate Facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>The decision maker finds as material (primary) facts that statements in the document were obtained from the accountants on the express basis that the information would not be disclosed except where absolutely necessary, and that the agency has carefully limited internal access to such information and shares it on a confidential basis only with those parties involved in consideration of the audit.</td>
<td>On the basis of these findings of fact, the agency concludes as (ultimate) facts that the information is and remains of a confidential character, was communicated and received in confidence and that to release it other than to the narrow range of people involved in considering the audit would be unauthorised. The further finding of (ultimate) fact is, therefore, that disclosure under the Act would found an action for breach of confidence (clause 13(a)).</td>
</tr>
</tbody>
</table>
Appendix F – Identification Procedures

When an FOI applicant seeks access to personal information it is important that the identity of that applicant be verified. This requires that the applicant furnish documentary evidence of proof of identity.

The stringency of verification procedures will vary according to the nature of the document requested by the applicant. Some assessment must be made as to the sensitivity of the personal information recorded on the document. The greater the sensitivity of the document requested, the more stringent should be the identification verification procedure adopted.

As a guide, such matters as political and religious affiliations, sexual activities, criminal record, medical history, racial origin and financial details are generally considered to be the most sensitive of data.

Different documents will carry different weights in terms of being more or less reliable as evidence of a person's identity. For example, a document such as a passport that has been issued by a government agency through a process that involves some testing of claims (eg., checking a register of births), features a photograph and is tamper-resistant should be considered more reliable as evidence of identity than a document without those attributes (eg., a bill from a telephone company).

The documents considered by most agencies as being of the highest reliability as identification documents are:

- original full birth certificate;
- original citizenship certificate; and
- current Australian passport.

Any combination of identification documents may be required as proof of identity. Although ‘primary’ identification documents (such as a current Australian passport) should be considered to carry the greatest weight as proof of identity, other combinations of less reliable ‘secondary’ identification documents may be sufficient depending upon the sensitivity of the information sought.

To illustrate, agencies may have regard to the following examples:

**Example 1 (Tax File Number proof-of-identity requirements)**

The Tax File Number (TFN) is considered very sensitive, and its use is heavily protected by legislation. In order for an individual to be issued with a TFN, the Tax Office requires applicants to provide one document from category A and two documents from category B.
### Appendix F – Identification Procedures

<table>
<thead>
<tr>
<th>Category A</th>
<th>Category B</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Australian full birth certificate.</td>
<td>• Australian passport</td>
</tr>
<tr>
<td>• Australian citizenship certificate/Extract from Register of Citizen by Descent</td>
<td>• Australian driver’s licence with photo, signature and current address</td>
</tr>
<tr>
<td>• Overseas passport with evidence of Australian immigration status</td>
<td>• Australian learner driver’s permit with photo, signature and current address</td>
</tr>
<tr>
<td></td>
<td>• Medicare card</td>
</tr>
<tr>
<td></td>
<td>• Australian bank, credit union or building society account statement less than one year old with name and current address (credit card statements are not acceptable)</td>
</tr>
<tr>
<td></td>
<td>• Firearm licence</td>
</tr>
<tr>
<td></td>
<td>• Tertiary student ID card with photo and signature issued by an Australian government accredited education authority</td>
</tr>
<tr>
<td></td>
<td>• Secondary student ID card with photo and signature issued from an Australian government accredited education authority</td>
</tr>
<tr>
<td>For under 16-year-olds only:</td>
<td>• Secondary examination certificate</td>
</tr>
<tr>
<td>• Secondary examination certificate</td>
<td>• Record of achievement</td>
</tr>
<tr>
<td></td>
<td>• Examination report</td>
</tr>
</tbody>
</table>

#### Example 2 (“100-points” scheme)

The Cash Transaction Reports Agency was established to minimise tax evasion and to prevent money laundering. For proof of identity purposes, the CTRA adopts the “100-points” scheme established under the *Financial Transaction Reports Act 1988* (Cth).

Under that scheme, each identifying document is assigned a number of points, and an applicant must provide documentation which adds up to at least 100 points. Assignment of points reflects the ‘authority’ of the individual document.

The 100-points scheme has been frequently adopted in areas other than for the purposes of tagging money flows. For example, the Commonwealth government uses it in respect of certain social security payments.
**Appendix F – Identification Procedures**

The weighting of points is as follows:

<table>
<thead>
<tr>
<th>Primary documents</th>
<th>Secondary documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>For 70 points:</td>
<td>For 40 points (with use of only one document within the category and an exact match of names):</td>
</tr>
<tr>
<td>• Birth Certificate (extract, original or certified copy)</td>
<td>• Australian government licence or permit (eg., driver's licence)</td>
</tr>
<tr>
<td>• Citizenship Certificate (original or certified copy)</td>
<td>• Australian public employee identification card</td>
</tr>
<tr>
<td>• Australian passport or corresponding International Travel Document</td>
<td>• Australian federal or state/territory government identification card of entitlement to a financial benefit</td>
</tr>
<tr>
<td>Only one primary document can be used in establishing an individual's identity, eg a potential bank customer would be required to provide a passport plus a medicare card plus a rates notice.</td>
<td>• a photographic student identification card issued by a tertiary institution</td>
</tr>
<tr>
<td></td>
<td>For 35 points (with use of only one document within the category):</td>
</tr>
<tr>
<td></td>
<td>• local government property rates notice</td>
</tr>
<tr>
<td></td>
<td>• financial security documents held by another financial institution</td>
</tr>
<tr>
<td></td>
<td>• credit reference report</td>
</tr>
<tr>
<td></td>
<td>• Employment Check</td>
</tr>
<tr>
<td></td>
<td>• certificates of title (eg., deed to residential or other land)</td>
</tr>
<tr>
<td>For 25 points (with use of only one document within the category):</td>
<td>For 25 points (with use of only one document within the category):</td>
</tr>
<tr>
<td>• Electoral Roll Check</td>
<td>• Medicare Card</td>
</tr>
<tr>
<td>• public utility notice (eg electricity bill)</td>
<td>• 'acceptable reference' who has known customer for less than 12 months</td>
</tr>
<tr>
<td>• letter from landlord, real estate agent or owner of rented premises</td>
<td>For 25 points (with use of only one document within the category):</td>
</tr>
<tr>
<td>• legal records not relating to land titles</td>
<td>• credit card, debit card or financial institution passbook</td>
</tr>
<tr>
<td>For 25 points (with use of only one document within the category):</td>
<td>• 'proof of age' card</td>
</tr>
</tbody>
</table>
Appendix F – Identification Procedures

The 100-points regime makes some allowance for special circumstances, eg., a written reference from two 'acceptable referees' in relation to an 'Isolated Area' Indigenous person (who would not be expected to have ready access to a passport, birth certificate or driver's licence) and a signed 'letter of introduction' from a Centrelink manager may be acceptable.

Example 3 (RTA standard proof-of-identity requirements)

In New South Wales, when establishing or transferring a vehicle registration the Roads and Traffic Authority requires the applicant to establish proof of identity by providing at least one document from List 1 and one document from List 2.

The List 1 document must show the applicant’s day, month and year of birth. One of the documents must show the applicant’s signature and address. The name must be the same on both documents.

<table>
<thead>
<tr>
<th>List 1</th>
<th>List 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>• An Australian full birth certificate showing parental details, or a</td>
<td>• A current Medicare card, Pensioner Concession Card, Department of</td>
</tr>
<tr>
<td>current photo birth card issued by the NSW Registry of Births, Deaths</td>
<td>Veterans’ Affairs entitlement card or any other current entitlement</td>
</tr>
<tr>
<td>and Marriages.</td>
<td>card issued by the Commonwealth Government.</td>
</tr>
<tr>
<td>• An overseas birth certificate showing parental details provided a</td>
<td>• A current credit card, that shows your name, or account card from</td>
</tr>
<tr>
<td>passport or an official Australian travel document is also shown.</td>
<td>a bank, building society or credit union, or a passbook or account</td>
</tr>
<tr>
<td>• A current Document of Identity issued by the Australian Passport</td>
<td>statement up to one year old.</td>
</tr>
<tr>
<td>Office.</td>
<td>• A telephone, gas or electricity bill up to one year old.</td>
</tr>
<tr>
<td>• A current Australian passport or one that expired within the last</td>
<td>• A water rates, council rates or land valuation notice up to two</td>
</tr>
<tr>
<td>two years.</td>
<td>years old.</td>
</tr>
<tr>
<td>• A current overseas passport.</td>
<td>• An electoral enrolment card or other evidence of enrolment not more</td>
</tr>
<tr>
<td>• An Australian naturalisation or citizenship document or immigration</td>
<td>than two years old.</td>
</tr>
<tr>
<td>papers issued by the Commonwealth Department of Immigration and</td>
<td>• An armed services discharge document up to two years old.</td>
</tr>
<tr>
<td>Multicultural and Indigenous Affairs.</td>
<td>• A current student identity card or a certificate or statement of</td>
</tr>
<tr>
<td>• An RTA issued NSW photo driver licence that expired more than two</td>
<td>enrolment up to two years old from an educational institution.</td>
</tr>
<tr>
<td>years ago.</td>
<td>• A current plastic ‘licence-style’ Mobility Parking Scheme (MPS)</td>
</tr>
<tr>
<td>• A current driver’s photo licence from another Australian State or</td>
<td>card, with or without a photo</td>
</tr>
<tr>
<td>Territory or one that expired within the last two years.</td>
<td></td>
</tr>
<tr>
<td>• A current RTA issued NSW photo firearms or security industry licence</td>
<td></td>
</tr>
<tr>
<td>or one that expired within the last two years.</td>
<td></td>
</tr>
<tr>
<td>• A current photo identity card for NSW police force officer or Australian defence force, excluding civilian staff or family.</td>
<td></td>
</tr>
<tr>
<td>• A current consular photo identity card issued by the Department of</td>
<td></td>
</tr>
<tr>
<td>Foreign Affairs and Trade.</td>
<td></td>
</tr>
<tr>
<td>• A current NSW Photo Card or one that expired within the last two</td>
<td></td>
</tr>
<tr>
<td>years.</td>
<td></td>
</tr>
</tbody>
</table>
Example 4 (Australian passport proof-of-identity requirements)

To establish proof of identity for the purposes of applying for an Australian Passport, applicants must provide originals of one of the following three combinations of documents.

Combination 1

- One document from category A, and
- One document from category B.
  (If neither of these documents shows the applicant’s current address, another document from category C that shows the current address is required.)

Combination 2 (if the applicant cannot provide combination 1)

- Two documents from category B, and
- One official document that includes the applicant’s photograph.
  (If neither of these documents shows the applicant’s current address, another document from category C that shows the current address is required.)

Combination 3 (if the applicant cannot provide combination 1 or combination 2)

- At least three documents from category C that show the applicant’s name and current address, and
- One official document that includes the applicant’s photograph and signature.
  (These documents must be no more than 12 months old. If this combination is chosen, applications may take longer to process.)

<table>
<thead>
<tr>
<th>Category A</th>
<th>Category B</th>
<th>Category C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current driving licence issued by an Australian state or territory.</td>
<td>Medicare card issued by the Health Insurance Commission.</td>
<td>Motor vehicle registration or insurance papers.</td>
</tr>
<tr>
<td>Birth card issued by the Registrar of Births, Deaths and Marriages.</td>
<td>Centrelink card issued by Centrelink.</td>
<td>Property rates notice.</td>
</tr>
<tr>
<td></td>
<td>Department of Veterans’ Affairs (DVA) card issued by DVA.</td>
<td>Property lease agreement.</td>
</tr>
<tr>
<td></td>
<td>Credit card or account card issued by a financial institution in Australia.</td>
<td>Home insurance papers.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Utilities bills e.g. telephone, electricity or gas.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Bank statements showing your residential address.</td>
</tr>
</tbody>
</table>
Appendix F – Identification Procedures

Points to remember:

- The greater the sensitivity of the document requested, the more stringent should be the identification procedure.

- The verification model in example 3 above may be an appropriate minimum standard for less sensitive personal information.

- Some staff training in the recognition of types of identification documents may be necessary.

- Advice may be sought from NSW Privacy on particular cases.

Agencies are reminded that where they collect personal information (such as documents going to proof of identity) they must comply with their obligations under the *Privacy and Personal Information Protection Act 1998*. For further details of those obligations, see [1.5.12-1.5.13] of the Manual, or contact NSW Privacy.
Appendix G – Pamphlets for Consultation with Third Parties

Freedom of Information Act 1989

Business Affairs – Consultation with Third Party

The purpose of this leaflet is to explain to individuals and organisations how and why you have been consulted and what your rights are under the Freedom of Information Act 1989 (NSW) (“the FOI Act”).

You have received this letter and pamphlet because an application under the FOI Act has been received for documents that may affect your business, professional, commercial or financial affairs.

We need your views to help us make the best decision possible about whether or not to release all or part of these documents. This leaflet is not legal advice and should not be construed as such or relied upon as legal advice. You should always consult a solicitor in the event of needing legal advice on the FOI Act.

What is the Freedom of Information Act 1989?

The FOI Act confers a legally enforceable right of access to documents held by NSW State Government “agencies”, e.g. departments, authorities and local councils. Similar laws apply in both the Commonwealth and other State/Territory jurisdictions.

The FOI Act does not, however, allow access to all documents at all times. An agency may refuse access to a document if an “exemption” applies. Exemptions can include documents that affect business affairs.

What are the consultation requirements?

Where an FOI request is received for documents concerning the business affairs of a Third Party (that is, someone other than the Applicant or the agency that received the application), then the agency is required to take all reasonable steps to consult with the Third Party to obtain their views. This requirement exists so that documents containing sensitive business information of Third Parties are not unduly released without proper consultation and careful consideration.

What is the process?

The agency is generally required to give access to documents that it holds and that are not subject to the application of exemptions. When access to documents is refused under FOI, the Applicant must be advised of the reasons why the exemptions have been applied.

What should I tell the agency?

Clause 7 of the FOI Act states:

(1) A document is an exempt document:
   (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person, or
   (b) if it contains matter the disclosure of which:
      (i) would disclose information (other than trade secrets) that has a commercial value to any agency or any other person, and
      (ii) could reasonably be expected to destroy or diminish the commercial value of the information, or
Appendix G – Pamphlets for Consultation with Third Parties

(c) if it contains matter the disclosure of which:
   (i) would disclose information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person, and
   (ii) could reasonably be expected to have an unreasonable adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency.

The agency would appreciate your views about how disclosure of the information would affect your business. It may be that you do not object to the information in question being disclosed. Not all business information held by government is sensitive. The FOI Act also has provision for the routine disclosure of Government contracts with private sector suppliers. In addition, some names and prices of successful tenderers are available routinely under other legislation, or is reproduced in Annual Reports to shareholders. If, however, you have doubts about the release of the documents in question, the more information you can give the better.

What if I object to the release of information?

You will need to advise the agency in writing about:
- which documents, if any, may be released by the agency;
- which documents you are most concerned about releasing;
- whether the information is available through other means;
- whether the documents contain trade secrets;
- if you object to release, in what way would disclosure have a substantial adverse effect on your business;
- in what way could it be said that the information has a commercial value; and
- how could disclosure destroy or diminish the commercial value of the information.

Does the agency have to accept my views?

The agency must take into account your views in making its final decision – but the final decision on release remains that of the agency.

What if I object, but the agency decides to disclose anyway?

If it is your view that the information should not be released, but the agency proposes to grant access despite your objections, then you must be informed of this decision by the agency.

You will have 28 days in which to appeal this decision by lodging an Internal Review with the agency. An officer not subordinate to the officer making the decision on release will review the matter internally. If you are still dissatisfied with the Internal Review, you have further avenues of complaint to the Ombudsman and/or a review application to the Administrative Decisions Tribunal.

You should also be aware that if the agency agrees with you and denies access to the information, then the FOI Applicant has similar Internal and External review rights. Fees and charge apply to these review processes.

Where can I get further information?

If you have internet access, you can visit the Department of Premier and Cabinet website at www.premiers.nsw.gov.au and follow the Freedom of Information links. You can also call the Department’s FOI Hotline on (02) 9228 4441.
Appendix G – Pamphlets for Consultation with Third Parties

Freedom of Information Act 1989

Personal Affairs – Consultation with Third Party

The purpose of this leaflet is to explain to individuals how and why you have been consulted and what your rights are under the Freedom of Information Act 1989 (NSW) (“the FOI Act”).

You have received this letter and pamphlet because an application under the FOI Act has been received for documents that may affect your personal affairs.

We need your views to help us make the best decision possible about whether or not to release all or part of these documents. This leaflet is not legal advice and should not be construed as such or relied upon as legal advice. You should always consult a solicitor in the event of needing legal advice on the FOI Act.

What is the Freedom of Information Act 1989?

The FOI Act confers a legally enforceable right of access to documents held by NSW State Government "agencies", e.g. departments, authorities and local councils. Similar laws apply in both the Commonwealth and other State/Territory jurisdictions.

The FOI Act does not, however, allow access to all documents at all times. An agency may refuse access to a document if an “exemption” applies. Exemptions can include documents that affect personal affairs.

What are the consultation requirements?

Where an FOI request is received for documents concerning the personal affairs of a Third Party (that is, someone other than the Applicant or the agency that received the application), then the agency is required to take all reasonable steps to consult with the Third Party to obtain their views. This requirement exists so that documents containing sensitive personal information of Third Parties are not unduly released without proper consultation and careful consideration.

What is the process?

The agency is generally required to give access to documents that it possesses and that are not subject to the application of exemptions. When access to documents is refused under FOI, the Applicants must be advised of the reasons why the exemptions have been applied.

What should I tell the agency?

Clause 6 of the FOI states:

A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (whether living or deceased).
Appendix G – Pamphlets for Consultation with Third Parties

The purpose of this exemption is to protect the personal information of individuals. The agency would appreciate your views about how disclosure of the information would affect your right to protect that information from disclosure. It may be that you do not object to the information in question being disclosed. Not all personal information held by government is sensitive and some (names and addresses, for example) may be available from other sources. If, however, you have doubts about the release of the documents in question, the more information you can give the better.

**What if I object to the release of information?**

You will need to advise the agency in writing about:
- which documents, if any, can be released under FOI;
- which documents, or parts of documents, you object to release under FOI;
- whether this information concerning yourself is available by other means; and
- if you object to release, in what way, would disclosure of the information be an *unreasonable disclosure* of your personal affairs.

**Does the agency have to accept my views?**

The agency must take into account your views in making its final decision – but the final decision on release remains that of the agency.

**What if I object, but the agency decides to disclose anyway?**

If it is your view that the information not be released, but the agency proposes to grant access despite your objections, then you must be informed of this decision by the agency.

You will have 28 days in which to appeal this decision by lodging an Internal Review with the agency. An officer not subordinate to the officer making the decision on release will review the matter internally. If you are still dissatisfied with the Internal Review, you have further avenues of complaint to the Ombudsman and/or a review application to the Administrative Decisions Tribunal.

You should also be aware that if the agency agrees with you and denies access to the information, then the FOI Applicant has similar Internal and External review rights. Fees and charge apply to these review processes.

**Where can I get further information?**

If you have internet access, you can visit the Department of Premier and Cabinet website at [www.preiers.nsw.gov.au](http://www.preiers.nsw.gov.au) and follow the Freedom of Information links. You can also call the Department’s FOI Hotline on (02) 9228 4441.
ADMINISTRATIVE DECISIONS TRIBUNAL ACT 1997

SECTION 39

ARRANGEMENTS BETWEEN ADMINISTRATIVE DECISIONS TRIBUNAL OF NEW SOUTH WALES AND THE NSW OMBUDSMAN

The Administrative Decisions Tribunal Act 1997, s.39(1) permits the President of the Tribunal and the Ombudsman to make arrangements for the transfer of matters between the Tribunal and the Ombudsman where the other body is considered more appropriate to deal with the matter the subject of complaint or application. The following arrangements have been made:

Arrangements within the Ombudsman's Office

(i) Assisting the complainant to lodge application for review

Where the Ombudsman is considering a matter that also lies within the jurisdiction of the Tribunal, in considering whether the Tribunal is the more appropriate body to deal with the matter, the Ombudsman will have regard to relevant circumstances which may include:

(a) the nature of the redress sought

(b) the personal circumstances of the complainant that are relevant to the complainant's ability to initiate and conduct a case before the Tribunal (eg. place of residence, language, cultural background, age, health, disability, likely cost to complainant and their means, etc)

(c) whether the complaint incorporates related matters that are not likely to be reviewed by the Tribunal but raise an issue of:

(i) maladministration, or

(ii) public safety or public interest in relation to the provision, failure to provide, withdrawal, variation or administration of a community service, or

(iii) the appropriate care or treatment of a person by a service provider as defined by section 4 of the Community Services (Complaints, Reviews and Monitoring) Act 1993

that warrants investigation

(d) the resources available to the Ombudsman for investigating the complaint and the priority to be given to the complaint in relation to other matters before the Ombudsman

(e) whether an application to the Tribunal would be out of time and if so, the likelihood of the Tribunal accepting an application out of time

(f) the urgency of the redress sought, and

(g) the most appropriate form of review in all the circumstances.
The Ombudsman will, where appropriate, consult with the Registrar on whether the Tribunal has jurisdiction to review the decision(s) the subject of complaint and whether the Tribunal may be the appropriate body to conduct the review.

Where the Ombudsman forms the view that a matter may be more appropriately dealt with by the Tribunal, the Ombudsman will inform the complainant and may decline to investigate the matter or discontinue or defer inquiries or an investigation for the purposes of the complainant making an application to the Tribunal.

In such circumstances, the Ombudsman will provide advice to the complainant about how to make an application for review and the time limits that must be observed as appropriate.

If the complainant subsequently lodges an application with the Tribunal, the Ombudsman, either at the request of the complainant or the Tribunal, will provide the Tribunal with any information obtained by the Ombudsman in relation to the matter referred to the Tribunal.

(ii) **Formal referral to the Tribunal**

The Ombudsman will only formally refer a matter to the Tribunal pursuant to s.39(1)(b) of the *Administrative Decisions Tribunal Act 1997* with the consent of the complainant.

Where the Ombudsman refers a complaint to the Tribunal, the Tribunal will advise the Ombudsman expeditiously if there are any reasons why the matter is not able to be dealt with by the Tribunal.

The types of matters that may be referred to the Tribunal include:

- matters where a new question of law or matter of significant public interest is raised
- matters where the Ombudsman has made a suggestion (but no formal recommendation) as to an appropriate course of conduct but one or both of the parties have indicated an intention not to follow the suggestion, and
- matters where a stay order may be required to preserve the rights of a party.

**Arrangements within the Tribunal**

(i) **Assisting the applicant to make a complaint to the Ombudsman**

Where the Tribunal receives an application or where aspects of an application or matters arising from an application come to light that it considers could be more appropriately dealt with by the Ombudsman, whether or not it is within the jurisdiction of the Tribunal, and whether or not it forms that opinion during the course of a hearing or a preliminary conference, the Tribunal will inform the applicant and draw their attention to the powers of the Ombudsman to review the matter.

The Tribunal will advise an applicant of the powers of the Ombudsman to review and investigate any matter of maladministration related to a reviewable decision that it becomes aware of and which it is not able to deal with. The Tribunal will also advise an applicant of the powers of the Ombudsman under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* to review and investigate the conduct of a service provider with respect to the provision, failure to provide, withdrawal, variation or administration of a community service in respect of a particular person or group of people.

MOU - ADT & Ombudsman - November 2006
The Tribunal will consider any application for an adjournment of a preliminary conference or a proceeding to enable an applicant to lodge a complaint or make appropriate inquiries of the Ombudsman and to consider their position.

The Tribunal may, where appropriate and at any time, consult with the Ombudsman on whether the Ombudsman has jurisdiction to review or investigate the decisions or conduct related to the subject of the application and whether the Ombudsman may be the appropriate body to conduct the review and the likelihood of the Ombudsman conducting such a review.

Where the Tribunal decides any application or conduct related to a reviewable decision would be better dealt with by the Ombudsman and expresses such a view, the Tribunal will forward a copy of its expression of view to the Ombudsman.

i)  *Formal referral to the Ombudsman*

The Tribunal will only formally refer a matter to the Ombudsman pursuant to s.39(1)(a) of the *Administrative Decisions Tribunal Act 1997* with the consent of the applicant and the Ombudsman.

The types of matters that may be referred to the Ombudsman include:

- matters where the application relates to the administrative behaviour of an organisation
- matters where the application relates to the provision, failure to provide, withdrawal, variation or administration of a community service in respect of a particular person or group of people
- matters that raise a significant issue of public safety or public interest in relation to a community service
- matters that raise a significant question as to the appropriate care or treatment of a person by a community service provider
- matters where the means of the applicant indicate that the Ombudsman may be able to deal with the matter more satisfactorily
- matters where the issue could be resolved more rapidly by the Ombudsman by informal means
- matters which can be more appropriately resolved by an investigation by the Ombudsman in the absence of the public
- Freedom of Information matters where there is a denial of the existence of documents by an agency and the Ombudsman could rely on its search and investigative powers (including claims that documents have been lost, destroyed or never existed), and
- matters where a Freedom of Information application is part of an on-going dispute between the parties that will not be resolved by the resolution of the FOI matters.

Where the Tribunal refers an applicant to the Ombudsman, the Ombudsman will advise the Tribunal expeditiously if there are any reasons why the matter is not able to be dealt with in a satisfactory manner by the Ombudsman.
Other matters

Timeliness

The Tribunal and the Ombudsman agree to make referrals expeditiously.

Information for public

The Tribunal and the Ombudsman agree to make available to applicants and members of the public information about the review powers of the other.

President

Administrative Decision Tribunal

Date

Ombudsman

Date

MOU - ADT & Ombudsman - November 2006
## Appendix I

### Alternative regimes for accessing personal information

<table>
<thead>
<tr>
<th>To what do people have a right of access?</th>
<th>Freedom of Information Act 1989</th>
<th>Privacy and Personal Information Protection Act 1998</th>
<th>Local Government Act 1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documents held by agencies and Ministers</td>
<td>Personal information about the applicant held by public sector agencies (i.e., information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion).</td>
<td>Documents held by local governments.</td>
<td></td>
</tr>
</tbody>
</table>

- ‘Exempt’ documents (listed in Schedule 1) (s.25(1)(a)) – see Chapter 10 of this Manual.
- Documents relating to certain functions of certain agencies listed in Schedule 2 (s.9)
- Documents relating to judicial functions of courts and tribunals (s.10)
- Documents which are the subject of a Ministerial Certificate (s.25(3))
- Information which would not be able to be obtained under the FOI Act (see previous column) (s.20(5))
- Information which does not comprise personal information of the particular applicant (s.4(3))
- Information relating to courts and tribunals exercising judicial functions, and royal commissions (s.6)
- Information held by ICAC, NSW Police Force, the Police Integrity Commission and the NSW Crime Commission, in respect of certain functions (listed in s.27)
- Information concerning law enforcement and related matters (s.23)
- Information concerning certain functions of investigative agencies (s.24)
- Correspondence and reports relating to a matter received or discussed at, or laid on the table or submitted to, a meeting when closed to the public (s.11(2)) [this probably overrides s.12(1) & 12(6)]
- Correspondence or reports relating to a matter laid on the table or submitted to a meeting open to the public where the council or committee resolves that they are to be treated as confidential (s.11(3))
- Business papers for matters considered when part of a meeting is closed to the public (s.12(1))
- Minutes of any parts of a council or committee meeting closed to the public (other than resolutions and recommendations) (s.12(1))

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1 This table only concerns applications for access to information about the applicant’s own personal affairs. The table is meant to provide indicative guidance only, and is not exhaustive.
<table>
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<tbody>
<tr>
<td></td>
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<td>- Certain parts of DAs or other applications for approval to erect a building (s.12(1A))</td>
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<td>- The documents contain personnel matters concerning particular individuals (s.12(7))</td>
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<tr>
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<td></td>
<td>- The documents contain information about personal hardship of any resident or ratepayer (s.12(7))</td>
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<tr>
<td></td>
<td></td>
<td>- The documents contain trade secrets (s.12(7))</td>
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<td></td>
<td></td>
<td>- The documents contain matter the disclosure of which would: – constitute an offence against an Act; or – found an action for breach of confidence (s.12(7))</td>
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<td></td>
<td></td>
<td>- The documents contain information disclosing a person’s place of living, and disclosure would place the personal safety of the person or family at risk (s.739 &amp; cl.284 and Form 1 in Sch.11, Local Government (General) Regulation 2005)</td>
</tr>
</tbody>
</table>
| **On what other bases can access be refused?** | • Processing the application would result in a substantial and unreasonable diversion of agency resources (s.25(1)(a1))  
• The documents are otherwise available for inspection or purchase (s.25(1)(b1), (c))  
• An advance deposit is required but has not been paid (s.22) | • The information is otherwise available for inspection or purchase (s.20(5))  
• Refusal to provide access is lawfully authorised or required (s.25)  
• Refusal to provide access is otherwise permitted under any Act or law (s.25)  
• Providing access would prejudice the individual concerned (s.26)  
• Other exemptions (s.28) | • Allowing inspection would be contrary to the public interest (s.12(6)) |
| **When will consultation with third parties be required?** | Consultation is required prior to releasing documents affecting personal affairs of persons other than the applicant (s.31). Consultation is also required in respect of documents containing information about other people’s business affairs, the conduct of research and inter-governmental relations (ss30, 32, 33) | Same as under the FOI Act (e.g., consultation is required prior to providing access to information affecting personal affairs of persons other than the applicant [s.31, FOI Act]) (s.20(5)) | No consultation required |
| **What documentation is required?** | • Applications must be in writing (ss.17 & 36)  
• Determinations must be in writing (s.28) | • Applications need not be in writing  
• Determinations need not be in writing | • Applications need not be in writing  
• Determinations need not be in writing |
### In what form can access be provided?

| In what form can access be provided? | Applicant **can** generally choose the form of access (s.27) | Applicant **cannot** choose the form of access | **•** Applicant **cannot** choose the form of access  
**•** Inspection must be provided free of charge (s.12(1)-(3))  
**•** Copies can be made or obtained from the council (ss.9(2), 12B) [except for electoral rolls, candidate information sheets and building certificates] |

### What fees apply?

| What fees apply? | Fees and advance deposits for access applications can be required or charged subject to the regulations (ss.21, 22 & 67) | Fees can be charged for giving an individual a copy of, allowing inspection and copying of, or amending, “health information”. | No provision [other than a reasonable copying charge for documents to be taken away (s.12B(3))] |

### What legal protections are afforded to agencies and staff on releasing documents/information?

| What legal protections are afforded to agencies and staff on releasing documents/information? | **•** Protection in respect of actions for defamation or breach of confidence (s.64)  
**•** Protection in respect of certain criminal actions (s.65)  
**•** Protection in relation to personal liability (s.66) | Protection against all civil actions for acts done in good faith (eg., defamation, breach of confidence), (s.66A) | Protection in respect of actions, liabilities, claims or demands if matters or things done in good faith for the purpose of executing any Act (s.731) |
### What procedures apply for dealing with applications for access to and amendments of records?

<table>
<thead>
<tr>
<th>Procedure</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications (s.17)</td>
<td>Consultation [s.30-33, FOI Act] (s.20(5))</td>
</tr>
<tr>
<td>Persons who are to deal with applications (s.18)</td>
<td>No procedures for dealing with applications for access to documents [other than reasons being given to council and public for refusal of access (s.12A)]</td>
</tr>
<tr>
<td>Incomplete or wrongly directed applications (s.19)</td>
<td>No provision in the Act for the amendment of documents [other than for amendment of particulars in electoral rolls – s.303]</td>
</tr>
<tr>
<td>Transfer of applications (s.20)</td>
<td></td>
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<tr>
<td>Advance deposits (ss.21-22)</td>
<td></td>
</tr>
<tr>
<td>Information stored in computer systems (s.23)</td>
<td></td>
</tr>
<tr>
<td>Determination of applications (s.24)</td>
<td></td>
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<tr>
<td>Refusal of access (s.25)</td>
<td></td>
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<tr>
<td>Deferral of access (s.26)</td>
<td></td>
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<tr>
<td>Forms of access (s.27)</td>
<td></td>
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<tr>
<td>Notices of determination (s.28)</td>
<td></td>
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<tr>
<td>Consultation (ss.30-33)</td>
<td></td>
</tr>
<tr>
<td>Applications for amendment of records (s.40)</td>
<td></td>
</tr>
<tr>
<td>Persons who are to deal with such applications (s.41)</td>
<td></td>
</tr>
<tr>
<td>Incomplete applications (s.42)</td>
<td></td>
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<tr>
<td>Determination of applications (s.43)</td>
<td></td>
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<tr>
<td>Refusal to amend records (s.44)</td>
<td></td>
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<tr>
<td>Notices of determination (s.45)</td>
<td></td>
</tr>
<tr>
<td>Notations to be added to records (s.46)</td>
<td></td>
</tr>
<tr>
<td><strong>What limits apply on the release of documents about a person’s personal affairs/personal information to third parties?</strong></td>
<td><strong>Disclosure</strong> is required unless:</td>
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</tbody>
</table>
| − disclosure would involve the unreasonable disclosure of information concerning the personal affairs of any person (cl.6, Schedule 1); or  
− the document is otherwise exempt under a clause of Schedule 1 | − disclosure is directly related to the purpose for which the information was collected and there is no reason to believe that the individual concerned would object to the disclosure; or  
− personal information requested by the applicant includes information about a 3rd person: and  
  * the 3rd person is or is reasonably likely to be aware that information of that kind is usually disclosed to other persons; or  
  * the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned, or another person (section 18) | − personnel matters; or  
− personal hardship of any resident or ratepayer (s.12(6), (7)) |
<table>
<thead>
<tr>
<th><strong>If access is refused, do reasons for have to be provided?</strong></th>
<th>Reasons for refusal of access <strong>must</strong> be given to applicant (s.28(2)(e))</th>
<th>No reasons required (unless there is a subsequent appeal to the ADT)</th>
<th>No reasons required to be given directly to applicant [reasons for refusal of access <strong>must</strong> be given to the council and made publicly available (s.12A)]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>In what circumstances will there a deemed refusal?</strong></td>
<td>• Initial applications – if a decision is not made within 21 days (s.24(2)) [subject to extension in certain circumstances – s.59B] • Internal reviews – if a decision is not made within 14 days (s.34(6))</td>
<td>• Initial applications – no provision • Internal reviews – if a decision is not made within 60 days (s.53(6))</td>
<td>Requests – no provision</td>
</tr>
<tr>
<td><strong>To whom may complaints be directed?</strong></td>
<td>• The agency itself. • NSW Ombudsman (ss.52 - 52A)</td>
<td>• The agency itself. • Privacy NSW (ss.45 - 51)</td>
<td>• The council itself • NSW Ombudsman (ss.12&amp;13, Ombudsman Act) • Department of Local Government (ss.429-434A, Local Government Act 1993)</td>
</tr>
<tr>
<td><strong>What rights do applicants have to apply for a merits review (ie to appeal)?</strong></td>
<td>• Application for external merits may be made to the ADT (ss.52B - 58) • Onus of proof on respondent (s.61)</td>
<td>• Application for external merits may be made to the ADT (s.55) • Onus of proof on applicant</td>
<td>• No provision for merit review by external body • Council must review any restriction on access to information within 3 months and then every subsequent 3 months on request (s.12A) • Persons may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act (s.674)</td>
</tr>
</tbody>
</table>
## Table of Cases

### A

- **Actors Equity v Australian Broadcasting Tribunal**, 12.4.36, 12.4.42
- **Ainsworth v Burden**, 1.4.4
- **Akers v Victoria Police**, 12.3.14
- **Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd**, 13.2.33
- **Anderson and Department of Special Minister of State**, 12.2.10
- **Angel and Department of Arts, Heritage and the Environment**, 12.2.12
- **Arnold v Queensland**, 12.2.11, 12.2.17, 12.2.19
- **Attorney-General for the NT v Maurice**, 13.2.32
- **Attorney-General v Cockcroft**, 8.3.18
- **Australian Capital Television Pty Ltd v Commonwealth (No 2)**, 10.4.18
- **Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd**, 13.2.26

### B

- **B and Brisbane North Regional Health Authority, Re**, 13.5.4, 13.5.5, 13.5.7, 13.5.10, 13.5.31, 13.5.36
- **Bartlett and Secretary, Department of Social Security, Re**, 11.5.35, 11.5.36
- **Bayliss and Department of Health and Family Services, Re**, 10.4.34
- **Beesley v Commissioner of Police, NSW Police Service**, 8.3.5
- **Bennett v University of New England (1991)**, 1.6.23, 5.2.9
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