

SUBMISSION ON PROPOSED FOI REFORMS
OPEN GOVERNMENT INFORMATION BILL 2009 (NSW)

Summary

The *Open Government Information Bill 2009 (NSW)* (**the Bill**) has the potential to breathe new life into an otherwise stale and neglected area of the law.

There remain in the Bill, however, some vices of the *Freedom of Information Act 1989 (NSW)* (**the FOI Act**). In particular, the Bill continues to provide for sweeping exemptions in respect of certain functions of agencies instead of taking a balanced approach consistent with the objects of the Bill.

This submission focuses on the inclusion of all 10 public universities in NSW as well as the Department of Education and Training (**DET**) in Schedule 3 of the Bill. The effect of the inclusion of those agencies in that schedule is to exclude from the Bill information relating to the admission of HSC students to tertiary institutions.

Such information includes the procedures and criteria used by the universities to select students for admission and details of the procedures used by the universities to scale and aggregate HSC marks.

It is the opinion of the author that the inclusion of these agencies in Schedule 3 is unnecessary, unjustified and undermines the otherwise commendable approach taken by the Bill.

The proposed exclusions

Section 41(1) of the Bill prohibits access applications from being made to agencies for information relating to any of their functions listed in Schedule 3.

Clause 4 of Schedule 3 provides in relevant part:

4 Personal Information

...

The Department of Education and Training—functions relating to the storing of, reporting on or analysis of information with respect to the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions.

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

The effect of cl 4 of Sch 3 and s 41(1) is to exclude the DET and all 10 public universities from the operation of the Bill in so far as it might otherwise cover information relating to those functions.

The practical operation of the exclusions is considered in more detail later in this submission. In order to appreciate the intended purpose of the exclusions, however, it is necessary to understand how the above agencies came to be listed in Sch 2 of the existing FOI Act.

History of the proposed exclusions

The proposed exclusions are identical to exemptions from Sch 2 of the existing FOI Act:

The Department of Training and Education Co-ordination—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.

These exemptions were inserted by the *Education Reform Amendment Act 1997* (NSW). That Act was the first of a series of amendments based on a Government white paper¹ which itself followed two reports and public consultations by Professor Barry McGaw relating to reform of the HSC.²

The second reading speech given in respect of the Bill for that Act shows that the intention of the legislature was to restrict the public disclosure of individual students' UAls (referred to as tertiary entrance ranks) and to prevent the construction of 'league tables' to rank schools.

This was in part due to controversial media reports defaming Mt Druitt High School in 1996.³

The Minister described the purpose of the exemptions in the following terms:

This gives effect to the decisions in the white paper regarding the use of examination information which were recommended by Professor Barry McGaw following the virtually unanimous view of the education community that the publication of the tertiary entrance rank was educationally harmful, misleading and inaccurate. ...

If decisions and judgments about schools were made on the basis of [the TER] calculation, false claims could be made about some schools being better than others. ...

This Government was elected on a policy to provide more meaningful and honest information to parents about the performance of schools, but specifically promised to do so in a way which did not involve the creation of league tables. ...

This change does not prevent the Government from conducting value-added analysis of the performance of schools. Indeed, it is fully committed to doing so. Such analysis can be based on the HSC results rather than the TER. ... It will also be quite possible to recognise and commend the performance of top students in the HSC. But this can be done on the basis of HSC marks achieved in each subject rather than through the TER. Indeed, the Government has already announced that it will make available the names and schools of students achieving above 90. The case is overwhelming. There is no public interest in releasing the TER results which cannot be satisfied better with alternative measures of performance. And there is the public risk of unnecessarily creating school failure.

¹ DET, "Securing Their Future: The NSW Government's Reforms for the Higher School Certificate" (1997). <http://www.boardofstudies.nsw.edu.au/archives/securing_their_future/contents.html>

² Barry McGaw, "Their Future: Options for Reform of the Higher School Certificate" (1996).

Barry McGaw, "Shaping Their Future: Recommendations for Reform of the Higher School Certificate" (1997).

³ See, eg, the adjudication of the Australian Press Council upholding numerous complaints: [1997] APC 11. <<http://portsea.austlii.edu.au/au/other/APC/1997/11.html>>

ABC Radio National, 'Class Act – No Longer Failures', 2 October 2005. <<http://www.abc.net.au/rn/talks/bbing/stories/s1470367.htm>>

A president of the NSW Administrative Decisions Tribunal described the Minister's speech as being concerned with "the ranking of individual students and individual schools".⁴

The *Education Reform Amendment Act 1997* (NSW) also amended the *Education Act 1990* (NSW) to insert s 18A which permits regulations to be made providing for the extent to which results may be disclosed or must be kept confidential. Regulations made under s 18A are listed in Sch 1 of the proposed Bill as overriding secrecy laws and are considered later in this submission.

Support for exclusions

In accordance with the Ombudsman's recommendations in relation to the proposed Bill, the Department of Premier and Cabinet requested each agency listed in Sch 2 of the existing FOI Act to articulate reasons which, in the agency's opinion, necessitated the continuation of its exclusion.

The DET described the purpose of its exclusion in the following terms:

The purpose of the exemption is to prevent the distortion of reporting of the Higher School Certificate results through an undue focus on tertiary entrance. The exemption also protects the privacy of individuals who may be unduly stigmatised by overly simplistic reporting of tertiary entrance ranks.

...

You may wish to note that the exemption would only apply to a very small sub-set of data about student performance. New South Wales currently has extensive public reporting of student results, including the results of national tests in Years 3, 5, 7 and 9 as well as reporting on School Certificate and the Higher School Certificate.⁵

The NSW Vice-Chancellors' Committee, on behalf of the 10 public universities which have the benefit of the universities exclusion, sought to support that exclusion in a similar way:

As noted in the Reform paper, there is a necessary link between individual student's Higher School Certificate results, and the Universities' processes for offering a placement in a degree program. ... [T]he recommendation made by McGaw that individual results must be treated as confidential and not provided to other parties, is still strongly supported.

The universities are committed to the principles of privacy for their students, and the *Privacy and Personal Information Protection Act, 1998* underpins all universities' policies in this regard. The interests of individual students and their right to confidentiality in matters related to the Higher School Certificate results and their university entrance scores should be maintained. Inclusion of the universities in Schedule 2 will allow the universities to protect this aspect of the right of their students to privacy, in line with the abovementioned Act.⁶

The reasons expounded by the DET and the universities are consistent with the ideals expressed in the Minister's second reading speech in respect of the original enacting legislation. However, neither the terms of the exclusions proposed in the Bill nor the exemptions in Sch 2 of the existing FOI Act accurately reflect those ideals.

⁴ *Raethel v Director General, Department of Education and Training* [1999] NSWADT 108 at [55].

⁵ Michael Coutts-Trotter, Director-General of Education and Training, 4 April 2009.
<http://www.dpc.nsw.gov.au/data/assets/file/0013/45121/DET_1.pdf>

⁶ Frederick G Hilmer, NSW Vice-Chancellors' Committee, 23 April 2009.
<<http://www.dpc.nsw.gov.au/data/assets/file/0005/45149/Universities.pdf>>

Direct effect of the proposed exclusions

For convenience, the terms of the exclusions are reproduced again below:

4 Personal Information

The Department of Education and Training—functions relating to the storing of, reporting on or analysis of information with respect to the ranking or assessment of students who have completed the Higher School Certificate for entrance into tertiary institutions.

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

The exclusions appear under the heading “Personal Information” and the submissions of the DET and the universities make plain their concern for the privacy of students.

The actual terms of the exclusions, however, appear to go far beyond what is necessary for the protection of personal information and privacy. Both exclusions are, notably, prefaced by the words “functions relating to ... information with respect to”.

The words “functions relating to” have been held to be a “broad” expression.⁷ It should be immediately apparent that the breadth of the expression as it is used in the exclusions is excessive, but if authority is needed it may be found in the recent decision of the NSW Administrative Decisions Tribunal in *Chen v University of New South Wales (No 2)* [2009] NSWADT 99.

The question in that case concerned cl 20(1)(d) of Sch 1 of the FOI Act, which exempted documents containing matter the disclosure of which “would disclose matter relating to a protected disclosure”.

When determining whether the documents sought contained matter “relating to” protected disclosures, Judicial Member Wilson held (at [8]):

... to the extent that [the relevant] documents, inter alia, record the protected disclosures made, discuss those disclosures or deal with them in any way, a disclosure of such material would disclose *matter relating to a protected disclosure*, on a broad reading of the necessary connection. This would include comments in the documents as to how the disclosures were investigated, criticisms of those investigations and recommendations as to outcomes or future steps that ought to be taken, again on a broad reading. The reason for this is that, clearly, it can be well argued that, by reason of the postulated connections, the material recorded in the document is matter *relating to* a protected disclosure.

(Original emphasis.)

Importantly, matter “relating to” protected disclosures was held to include comments, criticisms and recommendations, as well as any other matter which dealt with the disclosures in any way.

The breadth of the proposed exclusions is even greater than that implied by the case above. This is illustrated by the following example which examines the universities’ exclusion.

Section 41(1) provides:

An access application cannot be made to a government agency for access to information that relates to the functions listed in Schedule 3 (Excluded information of particular agencies) in relation to the agency.

⁷ *Raethel v Director General, Department of Education and Training* [1999] NSWADT 108 at [33].

The combined effect of s 41(1) and cl 4 of Sch 3 is to exclude “information that relates to the functions listed in Schedule 3”, being “functions relating to dealing with information with respect to the ranking or assessment of [HSC] students”.

It is one thing to exclude “information relating to student achievement” but it is a very different thing to exclude “information relating to information relating to student achievement”.

In this case, the breadth of the expression “relating to” in cl 4 of Sch 3 is multiplied exponentially by the same expression in s 41(1), creating an absurd task for the decision-maker who has to ascertain whether the information sought “relates to ... functions relating to dealing with information with respect to” student achievement.

The practical significance of the breadth of those terms can be seen from the following observations.

First, it has been held that UAIs, like HSC results, are “information with respect to the ranking or assessment of students who have completed the HSC for entry into tertiary institutions”.⁸

Secondly, functions of universities “relating to dealing with” that information are likely to include the processing of applications for tertiary admission, the analysis of admissions data and the scaling and aggregation of results for tertiary selection.

Thirdly, “information relating to” such functions is likely to include:

- (a) the official admission procedures;
- (b) the criteria used to select students for admission;
- (c) discussion and criticisms of and recommendations made in relation to such criteria;
- (d) patterns of student enrolments in tertiary courses;
- (e) alternative admission procedures that are followed but not published;
- (f) the number of students admitted who had UAIs below the published cut-offs; and
- (g) the procedures used by the universities to scale HSC marks and calculate UAIs.

All of this information would be excluded under the Bill. Much of it has also been the subject of significant public and media concern in recent years.⁹

⁸ *Raethel v Director General, Department of Education and Training* [1999] NSWADT 108 at [31].

⁹ Anna Patty, ‘Elite students exploit uni entry scheme’, *Sydney Morning Herald*, 12 January 2009. <<http://www.smh.com.au/news/national/uni-entry-exploited/2009/01/11/1231608523331.html>>

Anna Patty, ‘Unis are inflating scores’, *Sydney Morning Herald*, 3 September 2008. <<http://www.smh.com.au/news/national/unis-are-inflating-scores/2008/09/02/1220121234420.html>>

George Cooney, ‘University entry system – close to collapse?’ (2007) 3 *Macquarie University News* 11. <http://www.pr.mq.edu.au/macnews/MUN_PDFS/200703.pdf>

Anna Patty, ‘Don’t feel silly, even the man in charge says it’s confusing’, *Sydney Morning Herald*, 20-21 January 2007. <<http://www.smh.com.au/news/national/dont-feel-silly-it-is-confusing/2007/01/19/1169095977185.html>>

Anna Patty & Harriet Alexander, ‘Uni entry system close to collapse’, *Sydney Morning Herald*, 19 January 2007. <<http://www.smh.com.au/frontpage/2007/01/19/frontpage.pdf>>

In my submission disclosure of information falling within the above categories should be determined in accordance with the public interest tests espoused elsewhere in the Bill.

Indirect effect of the proposed exclusions

The proposed exclusions may also have the indirect effect of excluding other agencies who are responsible for dealing with such information – for example, the Board of Studies NSW.

Section 14(1) of the Bill provides:

14 Public interest considerations against disclosure

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

Schedule 1 enumerates various categories of protected information—for example, overriding secrecy laws, cabinet information and information protected by legal professional privilege. Clause 6 of that schedule describes the following information:

6 Information about functions of particular government agencies

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

Schedule 3 lists the universities and the DET in the terms previously considered. It will be recalled that the DET's "functions relating to the reporting of, storing 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" are excluded.

The combined effect of s 14, cl 6 of Sch 1 and cl 4 of Sch 3 is that it must be "conclusively presumed" by decision-makers that there is an "overriding public interest" (s 14) against disclosure of "information that relates to" (cl 6, Sch 1) "functions relating to the reporting of, storing or analysis of information with respect to the ranking or assessment of [HSC] students" (cl 4, Sch 3).

Again, the breadth of the original expression is multiplied exponentially, creating an absurd task for the decision-maker who has to ascertain whether the information sought "relates to ... functions relating to ... analysis of information with respect to" student achievement.

The logical process becomes so contorted that it is difficult for both the applicant and the decision-maker to engage properly with the real issues at hand. Premises that are technically legitimate can be used to reach conclusions that, on their face, are very problematic.

For example, a decision-maker could legitimately assert that HSC statistics relate to the functions of the DET relating to the reporting of HSC results and would thereby be obliged to conclude that there is an overriding public interest against disclosure of HSC statistics.

Moreover, as the HSC results themselves relate to the functions of the DET relating to the reporting of HSC results, in the event that a student seeks access to her own results, the decision-maker would not only be entitled to conclude that there is an overriding public interest against disclosure but by reason of s 14 would be statutorily obliged to do so.

Indeed, in a submission to the NSW Ombudsman, the General Manager of the Office of the Board of Studies NSW expressed the view that the existing FOI Act already permits applications to be denied on precisely that basis.¹⁰

This construction of the existing Act has been used to deny students access to their own results¹¹ and the handling of those applications is currently being reviewed by the NSW Ombudsman.¹²

Other legislation

The *Education Reform Amendment Act 1997* (NSW) also amended the *Education Act 1990* (NSW) to insert s 18A which permits regulations to be made providing for the extent to which results may be disclosed or must be kept confidential.

Regulations made under that section are listed in Sch 1 of the Bill as overriding secrecy laws.

The only such regulation is the *Education Regulation 2007* (NSW). Clause 4 of that regulation, which has not been relevantly amended since the *Education Regulation 1997* (NSW), provides in part:

4 Publication of results and other matters

(1) This clause applies to the following results:

...

(b) results of School Certificate and Higher School Certificate examinations and related assessments,

...

(3) Results to which this clause applies must not be publicly revealed if the results relating to particular students are revealed.

...

(5) Results to which this clause applies must not be publicly revealed in a way that ranks or otherwise compares the results of particular schools.

It can be seen that cl 4(3) of the *Education Regulation 2007* (NSW) protects the HSC results (including UAI) of particular students, and cl 4(5) protects HSC results (including UAI) relating to particular schools.

¹⁰ John Bennett, General Manager of the Office of the Board of Studies, 30 October 2008, at 2.
<http://www.ombo.nsw.gov.au/foi_review_submissions/Office_of_the_Board_of_Studies.pdf>

¹¹ Matthew Thompson, 'Students raw scores seen as threat to HSC', *Sydney Morning Herald*, 12 March 2005.
<<http://www.smh.com.au/news/National/Students-raw-scores-seen-as-threat-to-HSC/2005/03/11/1110417692293.html>>

Justin Norrie, 'Students battle to learn raw HSC marks', *Sydney Morning Herald*, 20 December 2005.
<<http://www.smh.com.au/news/national/students-battle-to-learn-hsc-raw-marks/2005/12/20/1135032020203.html>>

¹² Anna Patty, 'Ombudsman in Board of Studies enquiry', *Sydney Morning Herald*, 27 May 2008.
<<http://www.smh.com.au/news/national/ombudsman-in-board-of-studies-inquiry/2008/05/26/1211653939170.html>>

Schedule 1 of the Bill includes the following:

1 **Overriding secrecy laws**

Information the disclosure of which is prohibited by any of the following laws (which are referred to in this Act as **overriding secrecy laws**), whether or not the prohibition is subject to specified qualifications or exceptions and whether or not a breach of the prohibition constitutes an offence:

...

Education Act 1990—regulations under section 18A (Publication of results of certain tests and other matters)

It will be recalled that s 14(1) of the Bill provides:

14 **Public interest considerations against disclosure**

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

It follows that information the disclosure of which is prohibited by the *Education Regulation 2007* (NSW), including the HSC results and UAI of particular students or particular schools, cannot be disclosed under the Bill.

In those circumstances, the proposed exclusions in Sch 3 are redundant.

Recommendation

This submission provides an example of the intersection between government and personal information and highlights the need for a proper interface between information and privacy legislation as flagged by the NSW Ombudsman and the NSW Law Reform Commission.

The DET and the universities have provided submissions in support of their exclusions. The submission by the DET that its exemption “would only apply to a very small sub-set of data about student performance” cannot be supported by the terms of the exclusion.

I respectfully approve and adopt the observation made by the NSW Ombudsman in respect of the general approach that has apparently been taken to such submissions:

I am aware that each of the agencies in Schedule 2 of the FOI Act has been asked to provide a submission on whether they should be excluded from the new legalisation. Having read the submissions that have been posted on the web, from the limited argument in some of them, it does not appear there has been any critical assessment of those submissions before their inclusion in Schedule 3 of the Bill.¹³

I appreciate the agencies’ concerns, as well as those raised by the McGaw Review and referred to by the Minister in the second reading speech. Nothing in this submission should be read as supporting the view that UAIs of individual students or schools should be publicly available.

¹³ Bruce Barbour, NSW Ombudsman, undated, at 1-2.

<http://www.ombo.nsw.gov.au/foi_review_submissions/Ombudsman’s_submission_re_Open_Government_Information_Bill_and_Information_Commissioner_Bill.pdf>

In my submission, however, the concerns of the DET, the universities and Professor McGaw are adequately addressed if the results of individual students and individual schools are protected.

Clauses 3(a) and 3(f) of Sch 2 of the Bill provide ample protection for personal information, and in so far as Sch 1 of the Bill excludes information the disclosure of which is prohibited by cl 4(3) and 4(5) of the *Education Regulation 2007* (NSW), protection is expressly provided for students and schools.

In relation to school results, the efficacy of cl 4(5) of that regulation has already been upheld by the NSW Administrative Decisions Tribunal: *Raethel v Director General, Department of Education and Training* [2000] NSWADT 14. While the applicant later consented to those orders being set aside by the appeal panel, the reasoning of O'Connor DCJ at first instance remains sound.

In so far as the results of students are concerned, the following observations should be kept in mind.

The stated object of the Bill is to “maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective ... by authorising and encouraging the proactive public release of government information by agencies”.

The UAI is the aspect of the HSC that is attended by the greatest focus and the least understanding.

For many students, the UAI is the sole criterion by which the universities determine whether to offer the student a publicly-funded place in their institution. For other students, the procedures by which they are granted admission are often not widely known and in some cases have not been published.

Having regard to the public and media concerns relating to tertiary admission and HSC results, details concerning the production of the UAI and access to tertiary education should be amenable to access applications under the Bill. In my submission, the question of disclosure should be determined by reference to the public interest.

The proposed exclusions should be omitted from the Bill.

JAMES KING

3 June 2009