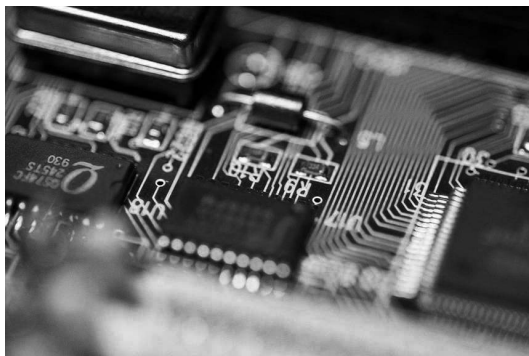
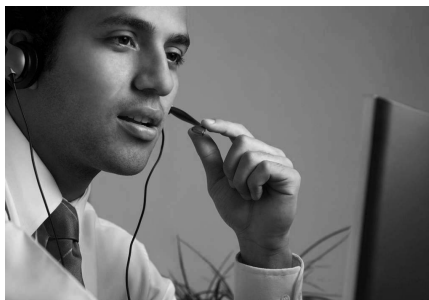


Information Commissioner Bill 2009 & Open Government Information Bill 2009

Submission to the NSW Department of Premier and Cabinet

14 May 2009



Salinger**Privacy**

We know privacy inside out.

This submission is not confidential, and we give permission for this submission to be published by the Department of Premier and Cabinet.

However ***the first attachment to this submission is confidential and not for publication.***

Introduction and overview

We would like to make the following submission in response to the release of the draft Information Commissioner Bill 2009 and the draft Open Govt Information (OGI) Bill 2009.

With this submission we are hoping to influence your thinking when drafting the final version of the Bills, but also assist your Department in planning for critical implementation work in the near future.

We offer our in-principle support for the proposed reforms to the FOI regime in NSW, and the creation of a new, independent Information Commissioner to provide guidance, training and education, advocacy, complaint handling and review of FOI compliance.

Our submission is primarily focussed around the potential guidance, training and education that the new Information Commissioner would develop, to ensure the objectives of the reforms are met. In this respect, this submission mirrors our submission to the Department of Prime Minister and Cabinet on the proposed reforms to the federal FOI Act and the establishment of a federal Information Commissioner.

Given our experience in both local government law and access to information law, we also offer some comments on the interplay between FOI and the Local Government Act.

From our experience as a former privacy regulator, we also offer some comments on the establishment of an independent Information Commissioner.

Implementation will be critical

Law reform will only be effective in achieving a more open and accountable government if cultural change also occurs.

The Cabinet Secretary and Special Minister of State, Senator the Hon John Faulkner, recently spoke to the federal FOI Practitioners Network and made it clear that the federal Government will need the help of FOI practitioners when the law changes:

"I also seek your support today. Those of you handling or advising on FOI applications have a vital role to play in ensuring that changes in FOI law are carried through to changes in FOI practice. We will be relying on you to ensure that these reforms actually deliver more open and more accountable government. I do know that this will not always be easy. It is often a very difficult job to weigh the competing and complex demands of transparency and confidentiality.

I know too that where there is not a clear answer to the issues raised by a FOI request, it will always seem easier and safer to say 'no' rather than 'yes', to chose caution and withhold the document rather than take what may seem to be a risk and release it. It is our hope that these proposed changes will deliver the statutory structure and the processes to make it easier for you, as the decision makers 'at the coal-face' of FOI, to weigh these different factors, and to deliver FOI outcomes that reflect the public interest – and the government's policies – of openness, transparency, and informed discussion and debate."

Our view is that this type of cultural shift towards more open and accountable government can only occur if the FOI practitioner's job is made as easy as possible. Practical guidance, to help them quickly and more accurately "weigh the competing and complex demands of transparency and confidentiality", is in the interests of the applicant, the practitioner and the agency, as well as being in the public interest.

The one-sentence version of our submission on this point is this: That the NSW Government invest significant resources into innovative and genuinely practical tools to assist organisations comply with the new rules under the proposed OGI Act, by way of online decision-assistance.

The one-sentence rationale is this: What we need by way of FOI law is *tough* standards that are nonetheless *easy* to comply with.

You may think we are being premature in focussing on implementation and education while the debate continues about what the Bill itself should look like, but we believe there are two good reasons why this is an issue that the Government should consider now rather than later:

- because if compliance with the new Act is made as straight-forward as possible, the standards set in the Bill can afford to be high, and
- we are suggesting the development of a tool that will require significant resources (although well worth it), and therefore should be considered when assessing the budgetary impact of the Bills.

Tough standards must be easy to comply with

No doubt you will be inundated with people arguing the pros and cons of the Bills, to a fine level of detail. To grossly oversimplify, organisations to be bound by the OGI Act will likely want the provisions to be 'weak', while those representing the public interest will want them to be 'tough'.

Our view is that the wording or 'toughness' of the standards themselves is almost irrelevant to the practitioner who needs to apply them. (But we also submit that this is not a reason to water down those standards!) What matters to the decision-maker is how quickly and easily the standards can be understood and applied in practice.

In other words, when an individual working for a public sector agency is confronted with an access to information problem, they almost don't care what the answer is – as long as they have a clear answer, quickly.

This observation applies across all the access to information statutes: the FOI/OGI Act, the *Local Government Act 1993* (the LG Act), the *Privacy & Personal Information Protection Act 1998* (PPIP Act) and the *Health Records & Information Privacy Act 2004* (HRIP Act).

Need for a decision-assistance tool

Put yourself in the shoes of Sue, the clerk on duty at the front desk of a small council. An insurance company investigating a personal injury claim has asked to see the personnel file of a council employee; or a police officer in uniform asks for some information about a dog owner; or a ratepayer asks for some information about the owner of a neighbouring property.

Sue doesn't know whether she's allowed to hand over the information requested; she may not even be sure whether she is looking at an FOI or a privacy-related or a s.12 of the Local Government Act request. Her immediate and primary question is: "Can I disclose this information?"

How is she supposed to come up with an answer quickly? She could look up the FOI (or new OGI) Act, and the two privacy Acts, and s.12 of the LG Act, or a plain-language guide to the Acts, or even an annotated guide, but chances are she won't have the time to do this, or the skills to get the answer right. She could ask a lawyer or FOI/privacy adviser, but that's not a practical or affordable solution for every single time she faces requests to access information. (We offer a retainer service called Privacy Helpdesk for NSW Government clients to call or email us with these types of problems for which they want a quick solution, but it's not a service everyone can afford to use all the time.)

So unless Sue has access to a tool which gives her a clear answer quickly, she might guess, based on gut feeling and half-notions about the FOI Act and the privacy rules, and come up with her own answer. This outcome risks two things: unauthorised disclosures, or “because of the Privacy Act / because of an exemption in the FOI Act” refusals which frustrate everyone and give access to information laws a bad name.

Thus our idea is for an online, practical, decision-assistance tool.

The author’s experience, both as a former regulator and a current privacy practitioner, is that privacy problems that need fast answers boil down to one of three questions:

- Can we collect this information?
- Can we use this information?
- Can we disclose (aka ‘provide access to’) this information?

FOI and s.12 of the LG Act questions boil down to the latter question: Can we disclose (aka ‘provide access to’) this information?

To answer this question can often involve a painstaking task of navigating through the FOI Act, the LG Act, privacy principles, exemptions, guidelines, manuals and case law. We would like to see this process of navigation made simpler, by way of a question-and-answer format to guide decision-making.

For example, for a University client involved in research projects, we recently ‘mapped’ the various disclosure rules in NSW privacy law, as they apply to NSW public sector agencies. The resulting four-page flowchart helps to guide our client quickly through a series of questions, to help them reach an answer each time they are presented with a request to disclose information. A copy of the flowchart is attached by way of illustration. **Please note this flowchart is confidential and not for publication.**

Similarly, in a previous role at the Department of Local Government, the author mapped the three regimes applying to councils at the time (FOI, s.12 of the LG Act, and the PPIP Act) into the attached flowchart, which was circulated to local councils in 2001 (DLG Circular 01-14) but is now out of date.

Because these flowcharts have to fit on paper and not become overwhelming for the user, they are by necessity truncated, without additional guidance for nuances such as “am I dealing with ‘health information’ or not?” or “what constitutes consent?”, let alone incorporating the impact of other considerations such as “what if the information includes a unique identifier?” or “what if I am disclosing it overseas?” However in an online environment, this additional support can be incorporated easily.

The next logical step would be to turn flowcharts such as these into a browser-based application. Imagine each one of the boxes on the flowchart has its own

page on a website. Useful background information can be provided, such as links to definitions, the legislation or other guidance documents, or explanation of the pertinent case law. The user is only presented with digestible chunks of questions or information at any given stage of their decision-making, and only ever sees questions that are relevant to their situation – as determined from the answers they have already given.

Online decision-assistance tools have been used successfully in other NSW government contexts, such as for calculating benefits payable; see for example HR eXpert, developed within your own Department, at http://www.dpc.nsw.gov.au/public_employment/hr_expert .

However to our knowledge this technology has not been used to map access to information laws. The benefits of a properly developed online tool is that the user not only receives a fast and accurate answer to their question, but the tool provides an audit trail of their decision-making they can keep for their records, in case of any future complaint or request for review of their decision.

As we have suggested above, we need *tough* standards that are *easy* to comply with. Organisations can afford to be subjected to new FOI provisions, so long as compliance – finding clear answers to real-world problems quickly - is easy.

The more assistance that can be offered to organisations by the Information Commissioner's Office, the better outcomes will be achieved.

Our submission is that to mark the introduction of a reformed FOI regime, the Government should fund the Information Commissioner to develop an online decision-assistance tool, which maps at least the OGI Act (and ideally also s.12 of the LG Act and eventually also the reformed privacy principles) in order to answer the key question "Can we disclose this information?" across all possible outcomes, and that the tool should be made available on the Information Commissioner's website for free.

In our view, a decision-assistance tool that is available online for free would be the most practical educational assistance the Information Commissioner's Office could offer, and should make compliance with the new OGI Act (and eventually the new privacy principles) so much easier for agencies. Such a tool should be seen as an important investment by Government in 'reducing red tape' and thus ensuring open and accountable government – although we would phrase it as 'untangling red tape' rather than reducing it.

We further submit that the cost of providing this type of educational guidance to agencies in their implementation of the OGI Act will ultimately generate cost savings across government, through improved productivity from more efficient decision-making, and through reduced legal costs from more accurate and accountable decision-making leading to fewer appeals.

FOI and local government

For the past thirteen years the author has worked with local councils on access to information issues, from a variety of perspectives: as their solicitor, legal/policy officer, investigator, regulator, and now consultant and trainer.

Our submission is that 'red tape' can be significantly reduced for both councils and members of the public by repealing s.12(6)-(8) of the Local Government Act 1993 (NSW).

The Ombudsman made a similar recommendation in his review of the FOI Act. We understand that the Government has not acted on this recommendation in its entirety, in order to preserve the intention of s.12(6), which was to provide an informal, quick and free alternative to FOI as a means of citizens accessing information held by their local council.

While we applaud the intention behind s.12(6), we do not believe it works successfully in practice.

On the one hand, if s.12(6) is followed properly, it does not necessarily allow information to be handed over 'quickly'. The information still needs to be perused to determine whether the public interest in disclosing the information is not outweighed by other considerations such as privacy or confidentiality.

On the other hand, if s.12(6) is not followed properly – if for example a council tries to meet the spirit of the provision, and/or save time, and therefore hands over information more 'freely' – it can leave the council exposed to legal liability. One such case almost cost Randwick City Council the statutory maximum \$40,000 in compensation for the resulting privacy breach.¹

In practice, for the applicant, s.12 has such weak enforcement mechanisms that it is useless against a recalcitrant council. The applicant cannot go to the Ombudsman or a Tribunal to seek an order to obtain the information sought; they must pose a costly and complex challenge in the Land and Environment Court. Of course the better option is to lodge an FOI request, and seek enforcement through that model. This begs the question – what value is s.12 really adding?

We also submit that s.12 places councils in an unfair position compared with their State government counterparts, which can at least recoup the reasonable cost of complying with access to information requests under the existing FOI regime. Under s.12 councils can face an unreasonable diversion of resources to satisfy the demands of a few; resources that could otherwise be directed towards programs or services to benefit the entire community.

¹ See *NV v Randwick City Council* [2005] NSWADT 45. The council only escaped the compensation order when it was discovered late in the proceedings that the privacy claim had been lodged out of time and therefore the Tribunal had no jurisdiction.

Furthermore, s.12 adds an extra layer of complexity to the decision-making process we have outlined above. Staff at small councils in particular are poorly placed to cope with the complexity of the access to information environment, and tend to just 'muddle through' based on gut feeling, half-remembered rules, what someone else told them, and a pinch of common sense. The author has run training exercises with staff from different councils, in which one access to information scenario will generate multiple possible outcomes – a result of the complexity and confusion in this area.

If the Government is serious about promoting open and accountable government, we submit that agencies should be strongly encouraged to use the new proactive disclosure model provided for in the OGI Bill – which will allow for a process of weighing competing interests such as privacy before releasing information – in order to deliver a free, fast and informal way for citizens to obtain information from local councils and State government agencies alike.

Section 12 of the LG Act was introduced as a short-hand way for citizens to avoid the failings of the FOI Act. We hope that the new OGI Act will provide a more permanent solution. We submit that section 12(6)-(8) of the Local Government Act can and should therefore now be repealed.

Information Commissioner model

We strongly support the need for an independent 'champion' of open government, in order to ensure that the reforms are implemented smoothly, and that the objectives of the reforms are met over time.

The Information Commissioner should be well resourced, especially in the implementation phase, in order to allow for comprehensive and innovative education and guidance activities, such as the one we have suggested above.

In order to ensure the independence of the Information Commissioner, we also strongly support those provisions of the Bill which relate to the Government's decision *not* to sit the Information Commissioner within the Ombudsman's Office, for four reasons.

First, the Information Commissioner should be proactively involved in providing advice, education and assistance to government agencies (and indeed the public) on the intention and application of the new law. They should in this sense be responsible for the proactive implementation of the policy objectives of the OGI Act. The Information Commissioner should not be constrained by the typical (and appropriate) Ombudsman's perspective of remaining aloof from the implementation of policy, in order to conduct their investigative function in a neutral fashion.

Second, separation of the roles and offices will provide an important check and balance, promoting public accountability. The Information Commissioner should

be able to investigate an FOI (or potentially privacy, see below) complaint against the Ombudsman, and the Ombudsman should be able to investigate a complaint of maladministration against the Information Commissioner.

Third, the Information Commissioner should be independent in their decision-making about the best allocation of their resources. The model originally proposed by the Ombudsman would see staff potentially shifted around between FOI and other Ombudsman functions. This would potentially leave the Information Commissioner poorly or inconsistently resourced; effectively, this undermines their independence. FOI (and potentially privacy, see below) could easily become 'lost' or put on the back burner as the Ombudsman shifts resources to respond to the demands of 'bigger' issues of the day.

Fourth, the Information Commissioner may one day in the near future regulate the private sector – a role inappropriate for an Ombudsman. It is entirely possible, depending on the outcome of the NSW Law Reform Commission's review of privacy laws, that the Information Commissioner will expand their functions to incorporate those of the Privacy Commissioner, as is proposed in the federal reform model. The NSW Privacy Commissioner already has responsibility for regulating the private sector, both in the conciliation of complaints about violation of or interference with privacy under s.45 of the PPIP Act, and advice and compliance matters arising from the handling of health information under the HRIP Act².

We disagree with the Ombudsman's suggestion that the likely small size of the Information Commissioner's office dictates that it could not feasibly 'stand alone'. There are multiple examples of small agencies which can maintain their functional independence while relying on shared corporate services from other agencies. We therefore strongly support Part 2 of the Information Commissioner Bill.

Having said that, we reiterate the need for adequate resourcing of the Information Commissioner. We also strongly support the notion that the budget-setting and oversight functions of the Information Commissioner should be held by a bipartisan Parliamentary Committee, rather than budget and staffing being controlled by an agency over which the Information Commissioner has regulatory power.³

We submit that the cost of resourcing the Office of the Information Commissioner, and of providing educational guidance to agencies in their implementation of the OGI Act, will generate cost savings across the government in terms of improved productivity through better and more efficient decision-making. Resourcing the Office of the Information Commissioner should in this sense be seen as an investment by Government, not a cost.

² Education about privacy laws could also include statutes such as the Workplace Surveillance Act and the Surveillance Devices Act, and possibly a future statutory tort of privacy; the role of the Privacy Commissioner should also therefore be seen as including advice to the private sector on these issues.

³ In our view, the independence of the Office of the NSW Privacy Commissioner is tempered by the fact that their budget is set by the Attorney General's Department, and at least in the past the organisational structure was determined by the Attorney General's Department.

About the author

This submission has been prepared by Anna Johnston, Director, Salinger Privacy.

Ms Johnston was previously the Deputy Privacy Commissioner of NSW. Prior to that role she held various legal, policy and research positions in the NSW public service, including Principal Legal Officer with the Department of Local Government. She began her career in private practice, specialising in local government and planning law.

Anna holds a first class honours degree in Law, a Masters of Public Policy with honours, a Graduate Certificate in Management, a Graduate Diploma of Legal Practice, and a Bachelor of Arts. Ms Johnston was admitted as a Solicitor of the Supreme Court of NSW in 1996, and is an accredited mediator.

Salinger Privacy offers specialist privacy consulting and training services, including Privacy Impact Assessments and privacy audits, privacy awareness training and in-house executive briefings, and the development of privacy policies and notices.

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