



**New South Wales Government**

Department of Premier and Cabinet

## OPEN GOVERNMENT INFORMATION - FOI Reform in New South Wales

### CALL FOR SUBMISSIONS

Open Government Information Bill 2009 (Exposure Draft)  
Information Commissioner Bill 2009 (Exposure Draft)  
Open Government Information (Consequential Amendments and Repeals) Bill  
2009 (Exposure Draft)

May 2009

Submissions close 5 pm Wednesday, 3 June 2009

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## HOW TO MAKE A SUBMISSION

On 6 May 2009, the Premier tabled in Parliament the following exposure draft Bills:

- Ø Open Government Information Bill 2009
- Ø Information Commissioner Bill 2009
- Ø Open Government Information (Consequential Amendments and Repeals) Bill 2009

The Bills are now available on the Department of Premier and Cabinet's website at [www.dpc.nsw.gov.au/FOIreform](http://www.dpc.nsw.gov.au/FOIreform)

The NSW Government is inviting interested persons to provide written submissions on the draft Bills. Submissions must be received by no later than **5pm Wednesday 3 June 2009**.

Please send your submissions by email to:

[FOIreform@dpc.nsw.gov.au](mailto:FOIreform@dpc.nsw.gov.au)

If you do not have access to email, please send submissions to:

FOI Reform - Open Government Information  
Legal Branch  
Department of Premier and Cabinet  
GPO Box 5341  
SYDNEY NSW 2001  
Fax: 02 9228 5542

If you have any questions about making a submission, please email [FOIhelp@dpc.nsw.gov.au](mailto:FOIhelp@dpc.nsw.gov.au) or call (02) 9228 4441.

All submissions received will be made publicly available in due course. If your submission contains information of a personal or confidential nature that you do not want released publicly, you must indicate this clearly in your submission.

Any application from another person to access a submission that contains confidential information will be determined in accordance with the *Freedom of Information Act 1989* (or successor legislation).

Lobbyists wishing to make a submission on behalf of a client are reminded of their obligations under the NSW Lobbyist Code of Conduct. Further details on the Code and the NSW Register of Lobbyists are available on the Department's website at [www.dpc.nsw.gov.au/prem/lobbyist\\_register](http://www.dpc.nsw.gov.au/prem/lobbyist_register)

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## BACKGROUND

The *Freedom of Information Act 1989* (FOI Act) has been in operation for nearly 20 years. It confers a right on any member of the public to apply for access to documents held by NSW government agencies (including local councils and State owned corporations), and creates a presumption that documents should be released unless a specified exemption applies.

It is now universally recognised that the right of the public to access government information is an essential cornerstone of a democratic, open government.

On 5 February 2009, the NSW Ombudsman published a report on a review of the FOI Act.

A copy of the Ombudsman's report is available on the Ombudsman's website at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

In his report, the Ombudsman recommended three major elements of reform of FOI laws in New South Wales:

- Ø a greater emphasis upon the proactive disclosure of government information;
- Ø a new Act, the *Open Government Information Act*, to replace the current *Freedom of Information Act*; and
- Ø robust and effective oversight by an independent Information Commissioner.

Attached is a table setting out each of the Ombudsman's specific recommendations and what the Government will be doing to implement them.

The Premier responded immediately to the Ombudsman's report, embracing the proposed reforms and announcing that the Government would introduce legislation this year.

A copy of the Premier's media release is available on the Department's website at [www.premier.nsw.gov.au/Newsroom/Articles/2009/February/Premier\\_welcomes\\_FOI\\_review.html](http://www.premier.nsw.gov.au/Newsroom/Articles/2009/February/Premier_welcomes_FOI_review.html)

The release of these exposure draft Bills is the next step in the process of implementing these important reforms.

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## A FRESH START

The new legislation will provide a fresh start. The old FOI Act will be scrapped, and replaced with new legislation which provides a clear focus on openness and a greater emphasis on proactive release of information.

Under the current FOI Act, agencies respond reactively, waiting until they receive an access application for a document, and then deciding whether any 'exemptions' can be claimed.

The new legislation does away with this language of 'exemptions'. It also shifts the focus away from 'documents' toward 'information', reflecting the shift away from paper-based records to electronic forms of record keeping.

Most importantly, the new legislation encourages agencies to make more information available proactively or in response to informal requests, without waiting for a formal access application.

Starting with brand new legislation, rather than simply amending the current Act, also sends an important symbolic message that will be critical in driving cultural change throughout the entire NSW public sector toward greater openness in Government.

The legislation makes clear its object to open government information to the public by:

- (a) authorising and encouraging the proactive public release of government information by agencies;
- (b) giving members of the public an enforceable right to access government information; and
- (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

The legislation also states that the intention of Parliament is that the Act should be interpreted and applied so as to further this object, and that all discretions under the Act should be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

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## HIGHLIGHTS

### Proactive disclosure

The new legislation shifts the focus toward greater proactive disclosure.

The legislation requires that certain “open access information” must be published. This includes details of an agency’s structure and functions, its policy documents, and its register of significant private sector contracts.

In addition, agencies are authorised to release other information unless it is sensitive personal information or there is some other overriding public interest reason why it cannot be disclosed. Otherwise, if information is likely to be of interest to members of the public and can be released without imposing unreasonable cost on the agency, agencies will be encouraged to release it.

Importantly, the new legislation ensures that agencies who do release information proactively or in response to an informal request will be given the same protection as they have when they release information in response to a formal application.

### A powerful, independent Information Commissioner

The *Information Commissioner Bill* creates a new, independent champion of open government in the form of a new office of the Information Commissioner.

The Information Commissioner will have robust investigative powers, including the inquiry powers of a Royal Commission.

The Information Commissioner’s roles will include:

- Ø to review decisions of agencies in relation to access applications;
- Ø to receive and investigate complaints about agencies in relation to their information disclosure obligations;
- Ø to promote open government, and to promote public awareness and understanding of the legislation;
- Ø to provide information, advice, assistance and training to agencies and the public; and
- Ø to make reports and provide recommendations to the Minister about proposals for future legislative and administrative changes to further the object of open government.

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## A single public interest touchstone

The new legislation makes clear that an agency should release information unless there is an overriding public interest against disclosure.

The starting point is that information should be disclosed, because there is always a general public interest in the disclosure of government-held information.

The legislation recognises, however, that in particular cases this, and other considerations in favour of disclosure, may be outweighed by particular public interest considerations against disclosure. These might include, for example, where information contains private and sensitive personal information about a person, such as their medical record.

The legislation includes (in Schedule 1 of the Open Government Information Bill) information for which it is conclusively presumed that there is an overriding public interest against disclosure. In these cases, the public interest against disclosure is considered sufficiently clear that agencies are not required to weigh up the considerations for and against disclosure.

Apart from these prescribed cases, however, the only reason for refusing to release information is if there are public interest considerations against disclosure and, on balance, these outweigh the public interest considerations in favour of disclosure.

This test is not 'at large'. Agencies cannot make up new public interest considerations against disclosure. The legislation (Schedule 2 of the OGI Bill) sets out the only public interest considerations against disclosure that an agency can consider. Of course, the legislation does not limit the considerations that an agency can consider *in favour* of disclosure.

## No more 'secret' secrecy laws

Currently, there are secrecy provisions in over a hundred different Acts. Under the current FOI Act, if a document is subject to one of these secrecy provisions then it is automatically 'exempt'.

Under the new legislation, there is a single, comprehensive list (in Schedule 1 of the Open Government Information Bill) of the secrecy provisions which are conclusively presumed to provide an overriding public interest reason for not releasing information.

These include information which is required to be kept secret under witness protection legislation, information about the identity of jurors, and details on the child protection offenders register.

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If an access application is received for information which is subject to a secrecy provision that is not expressly identified in the Open Government Information Bill, agencies will be required to release the information despite the secrecy provision unless they decide, on a case-by-case basis, that there is an overriding public interest against releasing the particular information in question. The fact that the information is subject to a secrecy provision will be a relevant, but not conclusive, consideration.

And if the agency does decide that the information can be released, then the Open Government Information Bill will override the secrecy provision and ensure that the information can be released under the protection of the law.

## No more Ministerial certificates

The new legislation abolishes Ministerial certificates.

Ministerial certificates are a process by which the Minister can certify that a document is exempt from disclosure under FOI legislation, and the exemption is then unable to be challenged except on limited grounds in the Supreme Court.

In New South Wales, Ministerial certificates could only be issued in respect of a handful of exemptions (Cabinet, Executive Council, law enforcement and terrorism) and, in practice, they were rarely used. Under the new legislation, they will be abolished altogether.

## Streamlined review rights

Currently, a person who is unhappy with an agency's decision about an access application can only seek external review (by the Ombudsman or the Administrative Decisions Tribunal) if they have first applied for Internal Review from the agency itself.

Under the new legislation, Internal Reviews will be optional.

A person who is unhappy with an agency's decision will have the right to:

- Step 1    Apply for Internal Review (that is, have someone more senior in the agency review the decision)
- Step 2    Apply for review by the Information Commissioner
- Step 3    Apply for review by the Administrative Decisions Tribunal (ADT)

Under the Bills, while applicants will be encouraged to raise their concerns with the agency in the first instance, if a person wishes to they will have the right to bypass step 1 and go straight to step 2 (the Information Commissioner), or even directly to step 3 (the ADT).

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Further, under the new legislation, the review rights for all agencies, including Ministers' offices, will be the same. This means that even decisions of Ministers will be subject to review by the Information Commissioner. This is a change from the current FOI Act, under which the Ombudsman has no power to review or investigate complaints about applications for documents held by Ministers and their personal staff.

### Independent decision-making and offences for wilful contraventions

The new Act makes it clear that decisions by agencies are to be made independently of political considerations. Among other things, the legislation expressly prohibits decision-makers from taking into account any possible embarrassment to the Government that might arise if information is released.

The new legislation also creates new offences for public officials who deliberately make decisions they know to be in contravention of the legislation. It will also be an offence for any person knowingly to direct or influence a public official to make an unlawful decision.

### No increase in fees or charges

Responding to access applications imposes costs on Government agencies, which, to the extent that they are not recoverable from the access applicant, are ultimately borne by the taxpayers of New South Wales.

The Ombudsman has recommended that fees and charges continue to be imposed, to require applicants to contribute a small proportion of the actual costs incurred by agencies in dealing with applications.

These fees and charges have not increased since 1989, when the FOI Act was first introduced.

Nor are the fees and charges being increased now. In fact, the new Open Government Information Bill will prescribe the fees and charges in the legislation itself, which means that the Government will never be able to increase them except with the approval of Parliament.

The prescribed fees and charges are:

Application Fee:	\$30 (which also covers the first hour)
Processing charges (per hr):	\$30
Internal review:	\$40

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The new legislation also provides for greater consistency and transparency in the imposition of charges, requiring all agencies to comply with the following:

- ∅ persons seeking their own personal information are entitled to up to 20 hours of processing time free;
- ∅ persons suffering financial hardship are entitled to a 50% discount on all fees and charges;
- ∅ applications for information for which there is a special public benefit are entitled to a 50% discount on all fees and charges;
- ∅ in addition, individual agencies can decide to waive, refund or discount fees whenever they consider it appropriate to do so;
- ∅ agencies cannot impose advance deposits for more than 50% of the estimated processing charges;
- ∅ all fees and charges must be refunded if an agency fails to determine an application within the required time (even if the agency then proceeds to make a late decision); and
- ∅ there will be no fee for internal review in respect of a 'deemed refusal' (that is, where the agency is taken to have refused an application by not dealing with it within the required time).

### **Firm but realistic time periods for dealing with applications**

The new legislation implements the Ombudsman's recommendations to provide that the time frames for dealing with access applications should be 20 working days for an application and 15 working days for an Internal Review.

There is also clear guidance to agencies and applicants as to when time periods can be suspended or extended, including allowing for extension with the agreement of the applicant. All extensions will be required to be notified formally to the applicant.

The legislation provides that the failure of an agency to decide an application within the required time will be taken to be a refusal to deal with the application. This will trigger the applicant's review rights. The applicant will also be entitled to a full refund of the application fee and any advance deposit already paid.

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## Excluded agencies and protections for classified information

There are certain agencies to which an access application cannot currently be made in respect of some of their functions. These include courts, to which an application for information cannot be made in respect of their judicial functions (although applications can be made in respect of their administrative functions).

In accordance with the Ombudsman's recommendations, the Department of Premier and Cabinet has consulted with relevant agencies to request that they articulate the reasons why it is necessary for these exclusions to continue to apply. Their responses will be made available on the Department's website at [www.dpc.nsw.gov.au/FOIreform](http://www.dpc.nsw.gov.au/FOIreform)

There are also a number of other agencies that deal with a small number of particularly sensitive categories of information, for which the legislation conclusively presumes there to be an overriding public interest against disclosure.

Agencies affected by these provisions have also been asked to articulate the reasons why these provisions are necessary. Their responses will also be made available on the Department's website at [www.dpc.nsw.gov.au/FOIreform](http://www.dpc.nsw.gov.au/FOIreform)

## Review of privacy laws

In his review of the FOI Act, the Ombudsman raised issues concerning the intersection between open government information and privacy protection.

The New South Wales Law Reform Commission is currently involved in a more comprehensive review of privacy laws in New South Wales. The specific recommendations made by the Ombudsman concerning privacy will therefore be considered by the Government in the context of the Law Review Commission's review, once it has been completed.

In the meantime, the exposure draft bills ensure that, where government agencies hold personal information about individuals, the protection of individual privacy is to be maintained.

The legislation also preserves the rights of individuals to apply to Government agencies for access to, and correction of, their own personal information. Pending the outcome of the Law Reform Commission's review and the implementation of any reforms arising from it, the provisions of the FOI Act which currently deal with rights of amendment to personal information will be re-located, without amendment, to the *Privacy and Personal Information Protection Act*.

## Attachment - Ombudsman's recommendations

	Recommendation	Relevant provisions of the legislation
	<b>Proactive disclosure and release of information</b>	
1.	The government should continue to actively encourage and require greater proactive disclosure of information by agencies.	<p>Clauses 6 to 11 Open Government Information Bill (OGI Bill).</p> <p>Part 3 OGI Bill.</p> <p>Clauses 108 to 110 OGI Bill.</p> <p><i>(Note: The Premier has already issued Premier's Memoranda requiring Ministers to work with their agencies to identify and release, as soon as practicable, information which can be made available to the public at minimal cost and without compromising the public interest.)</i></p>
2.	The new Act should require agencies to produce and maintain some form of publications scheme or reading room, similar to those operating in the United Kingdom and the United States.	<p>Clause 6 OGI Bill</p> <p>Clause 18 OGI Bill.</p> <p>Clauses 20 to 22 OGI Bill.</p>
3.	The new Act should require agencies to produce and maintain disclosure logs, similar to those in the United Kingdom.	<p>Clause 6 OGI Bill.</p> <p>Clause 18 OGI Bill.</p> <p>Clauses 23 and 24 OGI Bill.</p>
4.	The new Act should require all publications schemes and disclosure logs to be approved and regularly reviewed by the Information Commissioner.	<p>Clause 17 OGI Bill.</p> <p>Clause 22 OGI Bill.</p> <p><i>(Note: The Information Commissioner will be given the right to be consulted in relation to publication schemes and otherwise to issue guidelines in relation to their preparation.)</i></p>
5.	Agencies should no longer be required to produce either Statements or Summaries of Affairs. The new Act should require that the information formerly included in these documents forms part of an agency's publication scheme.	<p>Clause 20 OGI Bill</p>
6.	The new Act should include state-owned corporations and local authorities in the definition of 'agencies' that are required to disclose contracts they have entered into.	<p>Clauses 25 to 38 OGI Bill.</p> <p><i>(Note: SOCs will now only be excluded from the requirement to disclose details of contracts in relation to their competitive businesses – see clause 37 OGI Bill.)</i></p>

	<b>Access Schemes</b>	
7.	Access and amendment rights for personal information should be moved from the FOI Act to the Privacy and Personal Information Protection Act.	<p>Schedule 1 Open Government Information (Consequential Amendments and Repeals) Bill</p> <p><i>(Note: The Ombudsman's recommendations concerning personal information and the intersection between FOI laws and privacy legislation will be considered in the context of the Government's consideration of the reviews being conducted by the New South Wales Law Reform Commission into privacy.</i></p> <p>In the interim, the current provisions of the FOI Act are to be relocated, without amendment, to the <i>Privacy and Personal Information Protection Act</i>. Applications for amendments to personal information will continue to be able to be made under these provisions.)</p>
8.	<p>The Health Records and Information Privacy Act should be repealed and either:</p> <p>a. the Privacy and Personal Information Protection Act is amended to cover the issues dealt with in the Health Records and Information Privacy Act</p> <p>or</p> <p>b. the Privacy and Personal Information Protection Act is amended to provide the Privacy Act (Commonwealth) applies to health records in NSW or the NSW health records jurisdiction is vested in the Commonwealth.</p>	The Ombudsman's recommendations concerning personal information and the intersection between FOI laws and privacy legislation will be considered in the context of the Government's consideration of the reviews being conducted by the New South Wales Law Reform Commission into privacy.
9.	The new Act should focus on access rights to non-personal information.	The Ombudsman's recommendations concerning personal information and the intersection between FOI laws and privacy legislation will be considered in the context of the Government's consideration of the reviews being conducted by the New South Wales Law Reform Commission into privacy.
10.	The term 'personal information' should be used in both the new Act and Privacy and Personal Information Protection Act and should have the same definition. This definition should reflect the decision in <i>Commissioner of Police v District</i>	<p>See clause 4 Schedule 5 OGI Bill.</p> <p><i>(Note: The Ombudsman's recommendations concerning personal information and the intersection between FOI laws and privacy legislation will be considered in the context of the</i></p>

	<i>Court of NSW and Perrin.</i>	Government's consideration of the reviews being conducted by the New South Wales Law Reform Commission into privacy.)
11.	Section 12(1) of the Local Government Act should be retained and section 12(6) repealed.	Schedule 2.26 Open Government Information (Consequential Amendments and Repeals) Bill  (Note: Both section 12(1) and section 12(6) of the <i>Local Government Act</i> are to be retained. Section 12(6) enables members of the public to access documents free of charge from local councils. The provisions are to be amended to ensure that a consistent set of public interest considerations applies regardless of whether documents are sought under the <i>Local Government Act</i> or the OGI Bill)
12.	A limitation should be placed on the right to add a notation to information to the effect that an agency does not have to accept a notation if it considers it defamatory or unreasonably voluminous.	The Ombudsman's recommendations concerning personal information and the intersection between FOI laws and privacy legislation will be considered in the context of the Government's consideration of the reviews being conducted by the New South Wales Law Reform Commission into privacy.
	<b>How do we make it work: objects and intentions of the Act</b>	
13.	The FOI Act 1989 should be replaced by a new Act called the Open Government Information Act.	Clause 1 OGI Bill.
14.	The new Act should be drafted in plain English.	Whole Bills.
15.	The objects of the new Act should be: a. to provide the right of access to information held by the NSW Government unless, on balance, it is contrary to the public interest to disclose that information b. to enable people to participate in the policy and decision-making processes of government, to open government activities to scrutiny and to increase the accountability of government.	Clause 3 OGI Bill.
16.	In the new Act discretionary matters should be drafted in terms of principle	Whole Bills. (See eg., clause 13 and Schedule 2 OGI Bill).

	and policy rather than prescriptive detail.	
17.	The new Act should emphasise that the implementation of the legislation and ensuring proper transparency must be considered by the government of the day and all agencies as a core function of government.	Whole Bills. <i>(Note: For example, the OGI Bill creates new offences for knowingly contravening the legislation – see clause 111)</i>
18.	The new Act should place an onus on agencies to proactively release information about their operations.	Clause 5 to 8 OGI Bill.
19.	The new Act should state there is a presumption that agencies will release documents on application unless a reason for refusal, read narrowly, clearly applies.	Clause 3(2) OGI Bill. Clause 5 OGI Bill. Clause 9(1) OGI Bill. See also clauses 12 to 15 OGI Bill.
20.	The new Act should place an onus on agencies to demonstrate to any external reviewer that all reasons for refusal clearly apply.	Clauses 92 and 100 OGI Bill
21.	The CEO of each agency should designate one or more positions as Information Officers with delegated authority to determine applications.	Clause 9(3) OGI Bill. See also clauses 7(5) and 8(6) OGI Bill.
22.	The new Act should state that Information Officers must perform their functions impartially and independently.	See clause 9(2) OGI Bill. See also clauses 111 to 113 OGI Bill.
23.	Information officers should be required to attend training on their appointment which is provided or certified by the Information Commissioner.	Agreed (does not require legislation).
24.	The following offence provisions should be included in the new Act: a. for any person to place undue pressure on decision-makers to influence a determination b. for decision-makers to wilfully fail to comply with the requirements of the Act.	Clauses 111-113 OGI Bill.
25.	To ensure the independence of staff, consideration should be given to where they are located both in the organisational structure of an agency and their physical work location.	Agreed (does not require legislation).
26.	The Premier should issue a memorandum to all Ministers:	Agreed (does not require legislation).

	<p>a. making clear that determinations are to be made by agencies on their merits, based solely on the criteria set out in the new Act and independent of any political influence or considerations</p> <p>b. requiring them to ensure CEOs within their portfolio are aware of the obligation to implement the letter and spirit of the new Act.</p>	
	<b>Scope of the new Act</b>	
27.	<p>The new Act should give a right of access:</p> <p>a. to any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means</p> <p>b. provided, where the records are in electronic form, they can be produced using the computer hardware and software and technical expertise usually available to the agency, and producing them would not interfere unreasonably with the operations of the agency.</p>	<p>Clause 9(1) OGI Bill.</p> <p>See the definition of <b>record</b> in clause 9 of Schedule 5 OGI Bill and the definition of <b>government information</b> in clause 4 OGI Bill.</p> <p>See also clause 50(3) OGI Bill.</p>
28.	<p>The new Act should extend to records held by non-government and private sector bodies which relate directly to contracted out services performed on behalf of a public sector agency.</p>	<p>Consultation with affected non-government agencies and private sector contractors is to be undertaken before this recommendation is progressed.</p>
29.	<p>The Legislative Council and Legislative Assembly should be included in the ambit of the new Act.</p>	<p>Not agreed at this time.</p>
30.	<p>The judicial, but not administrative, functions of courts and tribunals should be excluded from the scope of the new Act.</p>	<p>Clause 1 Schedule 3 OGI Bill.</p>
31.	<p>We recommend the Information Commissioner, State Records and, where appropriate, the Chief Information Officer consider what further assistance and support is necessary to improve agency management of paper and electronic documents and information across the NSW public sector.</p>	<p>Agreed (does not require legislation).</p>
32.	<p>Consideration should be given to a more robust audit process to ensure agencies are complying with the State Records</p>	<p>Agreed (does not require legislation).</p>

	Act and associated standards.	
33.	The Information Commissioner and State Records should have ongoing dialogue about issues associated with record-keeping and the management of records, particularly electronic document management systems.	Agreed (does not require legislation).
34.	The Information Commissioner should produce guidance for practitioners about searching electronic records including those which are 'held' by an agency for the purposes of the new Act but, appropriately, not stored in official records systems.	Agreed (does not require legislation).
35.	A provision should be included in the new Act or in guidance from the Information Commissioner that where an agency has culled records in accordance with an appropriate document disposal schedule it is not required to go to its backup systems to recover the culled documents in response to an application.	Clause 50(4) OGI Bill.
36.	A provision should be included in the new Act that it is an offence to destroy or conceal records.	Clause 115 OGI Bill. ( <i>Note: see also the existing requirements under the State Records Act</i> )
	<b>Reasons for refusing access</b>	
37.	The new Act should contain a clear statement that the public interest is a central consideration in determining any application.	Clause 3(1) OGI Bill Clause 5 OGI Bill. Clause 12 to 15 OGI Bill.
38.	The new Act should refer to 'reasons for refusal' not 'exemptions'.	Whole OGI Bill. ( <i>Note: see especially clause 13 OGI Bill (Public interest test) and clause 57 OGI Bill (Decision to refuse to deal with application)</i> )
39.	The Information Commissioner should develop a list of factors to assist agencies when they are assessing the public interest.	Clause 12(3) and 14(3) OGI Bill. Clause 17 OGI Bill. ( <i>Note: The Bill limits the public interest considerations that may be taken into account against disclosure to those set out in Schedules 1 and 2. See also clause 15 (Principles that apply to public interest determination.)</i> )

40.	Reasons for refusing access in the new Act should be based on a recognisable detriment or harm which could reasonably be expected to be caused if particular information is released.	Schedule 2 OGI Bill.
41.	Reasons for refusing access should be included in the body of the new Act, not a separate schedule.	See clauses 12 to 15 and Schedule 2 OGI Bill.  (Note: Schedule 2 OGI Bill is not "separate" from the Bill and, in particular, cannot be amended except by an Act of Parliament)
42.	Cabinet documents: a. The Premier should identify Cabinet material which can be proactively released on a regular basis.	See clause 2 Schedule 1 OGI Bill.  (Note: The OGI Bill authorises the Premier to release Cabinet information. Further consideration will be given to this recommendation.)
	b. The definition of Cabinet documents in the new Act should be narrowed to documents brought into existence for the purpose of consideration by the Cabinet.	Clause 2 Schedule 1 OGI Bill.
	c. The reason for refusing access to Cabinet, and Executive Council, documents should be based on the nature of the detriment or harm which could be caused by release and should focus on detrimental impact on the collective ministerial responsibility of Cabinet.	See clause 2(1)(d), 2(1)(e) and 2(5) Schedule 1 OGI Bill.  See clause 3(1)(c) and 3(4) Schedule 1 OGI Bill.  See also clause 1(a) Schedule 2 OGI Bill.
43.	Law enforcement, public safety and counterterrorism: a. These reasons for refusal should be included in the new Act and be clearly drafted, focusing on the public purpose and impacts of release.	Clause 2 Schedule 2 OGI Bill.  See also clause 7 Schedule 1 OGI Bill.
	b. Consideration should be given to including as a reason for refusal of release the reasonable expectation that a person could be subjected to a serious act of harassment or intimidation.	Clause 3(e) Schedule 2 OGI Bill
44.	The reason for refusing access to documents concerning business affairs should be based on the reasonable expectation release would have a substantial adverse impact on an agency's commercial business interests.	Clause 4 Schedule 2 OGI Bill.

45.	<p>Secrecy provisions:</p> <p>a. The new Act should provide that an agency may refuse access to information if the disclosure of that information is prohibited under certain prescribed legislation.</p>	<p>Clause 14(1) OGI Bill.</p> <p>Clause 1 Schedule 1 OGI Bill</p>
	<p>b. The government should review the various secrecy provisions in NSW legislation for the purpose of listing them in a schedule in the new Act.</p>	<p>Clause 1 Schedule 1 OGI Bill.</p>
	<p>c. Such a schedule's use should be reviewed in the first review of the new Act.</p>	<p>Clause 124 and 125 OGI Bill.</p>
46.	<p>The views of those directly affected by the 'Olympic' and other miscellaneous exemptions clauses should be sought and considered before deciding if provision should be made in the new Act for any of the detriments or harms they contemplate.</p>	<p>Completed (submissions provided by agencies will be made available on the Department of Premier and Cabinet's website).</p>
47.	<p>Each agency with functions listed in Schedule 2 of the current Act should be required to provide reasons for those functions to remain in a similar schedule in the new Act. These reasons should be made public.</p>	<p>Completed (submissions provided by agencies will be made available on the Department of Premier and Cabinet's website).</p>
48.	<p>The new Act should provide review and appeal rights in relation to whether the documents applied for relate to a function which is listed in Schedule 2. Agencies should be required to provide applicants for such documents with a written decision on their request, which sets out their rights of internal and external review.</p>	<p>Clause 76(a) OGI Bill.</p> <p>See also clauses 41, 48 and 49 OGI Bill.</p>
49.	<p>The new Act should provide that an agency can neither confirm nor deny the existence of documents in certain situations.</p>	<p>Clause 55(f) OGI Bill.</p>
50.	<p>There should be no provision in the new Act for the issue of ministerial certificates.</p>	<p>Agreed.</p>
51.	<p>The Information Commissioner should be consulted about future amendments to the new Act and amending instruments should include the name of the new Act.</p>	<p>Agreed.</p> <p>See clause 17(h) OGI Bill.</p> <p>See also clauses 123(3) and 124(2) OGI Bill</p>

	<b>Machinery provisions</b>	
52.	In the new Act, the time period for dealing with initial applications should be 20 working days and 15 working days for internal reviews.	Clause 54 OGI Bill.
53.	The new Act should contain a provision that the time period for dealing with an initial application can be extended by agreement between the agency and the applicant.	Clause 54(4) OGI Bill.
54.	The new Act should include a requirement that agencies acknowledge receipt of all applications within five working days of receipt and this should be accompanied by information about deemed refusal timeframes and rights of review.	Clause 48 OGI Bill. Clause 120 OGI Bill.
55.	The new Act should provide that if the timeframe for determining an initial determination is extended by agreement, the agency must confirm the new timeframe in writing within five working days of the agreement, along with advice about new dates for deemed refusal timeframes and rights of review.	Clause 54 OGI Bill. Clause 120 OGI Bill.
56.	The new Act should provide that a deemed refusal occurs if the agency fails to determine an initial application within 20 working days or the longer agreed timeframe and an internal review within 15 working days.	Clauses 60 OGI Bill. Clause 81(5) OGI Bill.
57.	The new Act should give the ADT discretion to accept an external review application out of time.	Clause 96 OGI Bill.
58.	The new Act should provide that where an agency fails to comply with the required timeframes for dealing with an initial application, the fee for the initial application must be refunded and there should be no fee for an internal review.	Clause 60 OGI Bill. Clause 68(2) OGI Bill. Clause 80(2) OGI Bill.
59.	The new Act should provide that where an agency fails to comply with the required timeframes for dealing with an internal review application, the fee for the internal review must be refunded.	Clause 81(5) OGI Bill.
60.	The new Act should make clear that consultation is only required where the	Clause 51(1) OGI Bill.

	release of information contained in a document, whether or not the document is proposed to be released in full or with identifying information removed, could reasonably be expected to be of substantial concern to a third party.	
61.	The new Act should provide an agency with discretion in circumstances where it has properly determined to refuse to release a document to provide access to view the document.	See clause 69 OGI Bill.
62.	<p>Concurrent use of FOI and subpoena should be managed as follows:</p> <p>a. the earlier disclosure of documents in response to a subpoena should be grounds for declining to accept an application for identical documentation on the basis that the information has already been made available by other means</p> <p>b. where an applicant has already obtained documentation in response to an application that is subsequently requested under a subpoena, the return of subpoena can rely on the fact that the documentation has already been produced under FOI</p> <p>c. where a subpoena and FOI application are received simultaneously for the same documents, an agency may decline to accept the FOI application on the basis it is handling the request by way of the subpoena.</p>	<p>Clause 57(1)(d) OGI Bill.</p> <p>Clause 75 OGI Bill.</p>
	<b>Resources</b>	
63.	Fees and charges for initial applications and internal reviews should remain the same.	<p>Clause 39(1)(c) OGI Bill.</p> <p>Clause 61 OGI Bill.</p> <p>Clause 80(1) OGI Bill.</p>
64.	There should continue to be a reduction in fees and charges of up to 50% for demonstrated financial hardship and public interest applications.	<p>Clause 62 OGI Bill.</p> <p>Clause 63 OGI Bill.</p>
65.	The new Act should include a provision that an agency can accept an application without an application fee.	<p>Clause 121 OGI Bill.</p> <p>See also clause 49(4) OGI Bill.</p>
66.	The new Act should include a provision for an applicant to seek an internal or external review of a request for an	<p>Clause 76(i) OGI Bill.</p> <p>See also Note to clause 65(1) OGI Bill.</p>

	advance deposit without the need to wait for the period specified in the request for the deposit to expire and for the agency to decide to refuse to continue dealing with the application.	
67.	Agencies should only be able to charge up to 50% of the estimated total cost as an advance deposit.	Clause 66 OGI Bill.
68.	The Information Commissioner should produce guidelines on the information an agency is required to provide to an applicant to explain how an advance deposit has been calculated.	Agreed. See clause 17(d) OGI Bill.
69.	The new Act should specify the minimum time an applicant can be given to pay an advance deposit, that a longer period can be given and that the period can be extended by agreement between the parties.	Clause 65 OGI Bill.
70.	The new Act should provide that an advance deposit should be refunded if the agency fails to determine the application and provide access to the documents identified for release within the statutory or agreed timeframe.	Clause 68(2) OGI Bill.
71.	Where an agency includes information in its disclosure log at the same time as releasing that information to an applicant, any fees and charges paid by the applicant should be refunded.	Clause 63(2) OGI Bill.
72.	Guidance should be provided in the new Act or in guidelines produced by the Information Commissioner: a. as to the circumstances in which disclosure of information is in the public interest	Agreed. See clause 12 OGI Bill. See also clauses 14(3) and 17(d) OGI Bill.
	b. that in assessing whether it is in the public interest to release information the relevant test is the likely outcome of release, not the possible motives of the applicant.	Clause 52 OGI Bill.
73.	The factors set out by the ADT to guide an agency in assessing whether an application might constitute an unreasonable diversion of resources should be included in guidelines produced by the Information Commissioner. Such guidelines should	Agreed (does not require legislation)

	also include details of other measures an agency should consider when dealing with applications for voluminous documents such as providing a list of documents within the scope of the application to the applicant or arranging for an applicant to view the documents.	
74.	The new Act should contain provision for the ADT to make orders along the lines of civil restraint orders in the UK Civil Procedure Rules concerning applications which are totally without merit or would result in an unreasonable diversion of resources.	Clause 105 OGI Bill
	<b>Reviews of decisions</b>	
75.	The right to an internal review should be retained in the new Act but it should be optional.	Clause 84(2) OGI Bill. See also Note to clause 95 OGI Bill.
76.	External reviews should be carried out by both the Information Commissioner and ADT.	Part 5, Divisions 3 and 4 OGI Bill
77.	The Information Commissioner should have the power to:	Clauses 84 to 94 OGI Bill.
	a. conduct reviews looking at merit issues	
	b. refer a matter back to an agency for an internal review	Clause 88 OGI Bill.
	c. investigate complaints about any conduct of an agency or its staff in relation to an application, including sufficiency of search issues	Clause 16 Information Commissioner Bill (IC Bill). See also clause 76 (and particularly clause 76(e)) OGI Bill.
	d. make recommendations and suggestions in relation to these matters, including suggesting an agency redetermine an application.	Clause 87 to 90 OGI Bill
78.	The ADT should continue with its current role and responsibilities conducting determinative external reviews.	Clauses 95 to 107 OGI Bill
79.	The ADT should be able to refer an administrative issue which it considers may have systemic implications to the Information Commissioner.	Clause 106 OGI Bill.
80.	The Information Commissioner should	Clause 94 OGI Bill.

	be able to refer a matter to the ADT.	
81.	The Information Commissioner should have the right to appear and be heard in any proceedings in the ADT in relation to an external review of an application.	Clause 99(1) OGI Bill.
82.	The new Act should give the Information Commissioner appropriate investigation, search and scrutiny powers.	Part 3 IC Bill.
	<b>Oversight and accountability</b>	
83.	A statutory position of Information Commissioner should be created in NSW.	Clause 4 IC Bill.
84.	The Information Commissioner should be established in the Office of the Ombudsman.	Not agreed.
85.	<p>The Information Commissioner's statutory functions should include but not be limited to:</p> <ul style="list-style-type: none"> <li>a. investigating: <ul style="list-style-type: none"> <li>i. complaints from applicants about determinations</li> <li>ii. alleged breaches of the Act by agencies</li> <li>iii. alleged attempts to improperly pressure decision-makers in relation to the performance of their functions under the Act</li> <li>iv. alleged detrimental action taken against decision-makers arising out of the performance of their duties under the Act</li> </ul> </li> <li>b. approving and regularly reviewing agencies' publication schemes and disclosure logs</li> <li>c. keeping under scrutiny agencies' systems for disclosure of information, including both systems for the proactive release of information and in response to applications</li> <li>d. developing/approving templates for agencies' publication schemes</li> <li>e. auditing records of agencies that relate to applications for information</li> <li>f. auditing determinations of applications by agencies</li> </ul>	<p>Clause 13 IC Bill.  Clause 17 OGI Bill.  Clause 36 IC Bill.</p> <p>(Note: Reviews of the legislation will be the responsibility of the Minister, who will be required to consult with the Information Commissioner – see clause 124 OGI Bill)</p>

	<p>g. publishing guidelines for the implementation of the Act</p> <p>h. publishing a regular digest of developments in the area</p> <p>i. providing training in the system and/or certifying training</p> <p>j. collecting and reporting on statistics from agencies relating to the implementation of the Act</p> <p>k. supporting practitioners including through the FOI and Privacy Practitioners' Network</p> <p>l. seeking court orders requiring agencies to rectify breaches of the Act or requiring compliance with provisions of the Act</p> <p>m. conducting regular reviews of the Act (say five yearly) to determine whether it continues to achieve its objectives</p> <p>n. reporting to Parliament on:</p> <p>i. implementation of the Act (annually)</p> <p>ii. the operations of the Information Commissioner (annually)</p> <p>iii. special issues (from time to time as appropriate)</p> <p>iv. reviews of the Act (five yearly)</p> <p>o. promoting community awareness of how to access government information that is proactively released and how to request information.</p>	
86.	Consideration should be given to making the Information Commissioner responsible for the oversight of privacy as well as FOI.	The Ombudsman's recommendations concerning personal information and the intersection between FOI laws and privacy legislation will be considered in the context of the Government's consideration of the reviews being conducted by the New South Wales Law Reform Commission into privacy.
87.	The Information Commissioner should be subject to oversight by a Parliamentary Committee.	Clause 43 IC Bill. See also clause 5 IC Bill.
88.	Arrangements should be made to involve the Information Commissioner in the process of transition to the new system from the start.	Agreed (does not require legislation)