LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

FREEDOM OF INFORMATION BILL 2013
EXPOSURE DRAFT

EXPLANATORY STATEMENT

Circulated by
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Introduction

This explanatory statement relates to the Freedom of Information Bill 2013 as presented by Mr Shane Rattenbury MLA in the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must to be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

The Bill recognises that government information is a public resource and seeks to:

- promote public participation in decision making and a culture of openness and transparency in government;
- improve public understanding of government decisions and confidence in government processes; and
- improve government accountability and decision making.

The Bill repeals the existing *Freedom of Information Act 1989* and creates a new modern freedom of information (FOI) scheme. The Bill recognises that a public right to government information is essential for an effective democracy and is designed to make information held by the government much more accessible to the community. The Bill creates a statutory right of access to information held by the Government and sets up a clear framework for determining the public interest in the disclosure or non disclosure of information. Information will only remain confidential where it is on balance contrary to the public interest to release the information; that is there must be a clearly identifiable harm to the public interest from the release of the information that outweighs the public interest in disclosure and necessitates non disclosure.

The Bill shifts the FOI scheme from the current model (taken from the Commonwealth *Freedom of Information Act 1982*), to a new scheme based on the Queensland *Right to Information Act 2009* ('RTI Act') with some important changes to improve the efficacy of the scheme and further increase the availability of government information**.** As further background to the Bill regard should also be had to the *Government Information (Public Access) Act 2009* (NSW) ('GIPA Act'), the *Right to Information Act 2009* (Tas) ('TAS RTI Act') as well as the reports by the FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, 2008 ('Solomon Report') and the NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989*, Special Report to Parliament under s.31 of the *Ombudsman Act 1974* (2009) ('NSW Ombudsman report').

The Bill provides that requests for government information must be determined on the basis of the public interest in relation to the particular information in question. The Bill removes the class based exemptions that exist under the current FOI scheme instead deeming a relatively small number of discrete categories of information to be contrary to the public interest to release.

This approach is broadly consistent with the Standing Committee on Justice and Community Safety recommendation that all exemptions should be subject to a public interest test.[1] It also

[1] Standing Committee on Justice and Community Safety, The *Freedom of Information Act* 1989, Report No 5 of 2011.

recognises that the public interest will very much depend on the circumstances and the nature of the particular information in question rather than the class of information that it happens to be part of. Some information will always be contrary to the public interest to release and schedule 1 to the Bill recognises these discrete categories while avoiding the negative impacts from permanently restricting access to broader classes of information; some of which will inevitably be very much in the public interest to release.

Public interest factors both for and against disclosure are set out in schedule 2 of the Bill however these are not exhaustive and the exact nature of the relevant public interests will depend on the particular information in question.

In addition to revising the scheme for providing information in response to particular requests, the Bill also places a much greater emphasis on the proactive disclosure of information without the need for a formal request for the particular information. Commonly referred to as the 'push model' for the provision of information, the Bill mandates that a range of information including policy documents, details about agency activities and budget as well as certain expert reports and from three years after they are written: incoming minister briefs, question time briefs and estimates and annual reports briefs.

The Bill further imposes an obligation on government agencies to continually consider what additional information they can make proactively available and authorises agencies to provide information in response to informal requests for information to avoid the need to go through the formal FOI process. The intention is that requests for information under the application process in the Bill will become a last resort and that the community will have access to a much larger range of government information without the need for formal requests.

To implement the new requirements and processes created by the Bill the position of 'information officer' for each agency will be created and agencies required to appoint designated information officers who will be required to independently make determinations for publication of and access to government information.

The Bill also recognises the importance of cultural change and the creation of an expectation that information will be disclosed. The Bill requires the Chief Minister to make an annual statement about the Government's aims for improving the operation of the scheme and for ensuring that government information is readily available to the public.

While other jurisdictions have created stand alone statutory information commissioners to oversee the operation of FOI laws, the Bill instead gives this role to the ACT ombudsman, similar to the model operating in South Australia, Tasmania and New Zealand. The ombudsman will play a very important role in the new scheme. The ombudsman is given the responsibility for making legislative instruments under the Bill as well as reviewing decisions and investigating complaints.

The Bill creates a new scheme for the review of decisions. It removes the option for internal review and provides for two avenues for the review of decisions under the Bill; ombudsman review and ACAT review. A person will be able to elect if they would like the decision to be reviewed by the ombudsman or by the ACAT. In addition, a person can apply for review of a decision of the ombudsman to the ACAT, in which case the ACAT must be constituted by three Members. The Bill will expand the ability for people to apply for review of decisions by

allowing any person to make an application for ombudsman review and ACAT review of decisions.

The Bill largely continues the system for the correction of incorrect records by allowing people to apply for amendment of their personal information to ensure that it is accurate, up-to date and not misleading.

The Bill also provides for: clearer timeframes for consideration of requests and disclosure of information; limits the circumstances in which the Minister or an agency is not required to confirm the existence of a document; clarifies that individual circumstances or the reasons that applicants may have for applying for access to information must not be considered by the decision maker; creates a new mechanism for dealing with vexatious and unreasonable requests; limits the scope of fees that can be charged for FOI requests; creates new offence provisions for destroying information and for improperly influencing decisions made under the Bill; updates definitions; and makes other practical changes to improve the efficient provision of government information to the community.

The Bill also clarifies the relationship with the two other main statutory mechanisms for accessing government information; the *Territory Records Act 2002* (TRA Act) and the *Health Records (Privacy and Access) Act 2007*. Typically government information will be accessible through the Bill until the time when the TRA Act requires that records of government information be made publicly available. Health records are deemed to be contrary to the public interest to release in schedule 1 of the Bill and will only available under the *Health Records (Privacy and Access) Act 2007*.

Human Rights

The Bill generally engages the rights to freedom of expression (protected by section 16 of the *Human Rights Act 2004*), to take part in public life (protected by section 17 of the *Human Rights Act 2004*) and to privacy (protected by section 12 of the *Human Rights Act 2004*).

Freedom of Expression and the Right to Take Part in Public Life

It is well accepted that a person cannot meaningfully take part in the conduct of public affairs without access to information about those affairs.[2]

Both internationally and in Australian domestic courts, the right protected by article 19 of the International Covenant on Civil and Political Rights (which is expressed in section 16 of the *Human Rights Act 2004*) has been found to include a right to information held by governments.

Internationally the public right to information is increasingly being explicitly recognised in a range of contexts. For example in 1982 the Indian Supreme Court held that:

> The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression … disclosure of

[2] The United Nations General Assembly resolved in 1946 that "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is concerned". *Calling of an International Conference on Freedom of Information*, GA Res 59(I) (14 December 1946).

> information in regard to the functioning of government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.[3]

In 1998 the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) recognised the right of everyone to receive environmental information that is held by public authorities and the right to participate in environmental decision-making.

In that same year the European Court of Human Rights held that the protected right in article 10 of the European Convention on Human Rights (the corresponding provision to article 19 of the ICCPR and Section 16 of the HRA) includes:

> 'an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment.'[4]

In Australia a person's ability to participate in and influence government decision-making has been recognised as a fundamental right.[5] Justice Bell in *XYZ v Victoria Police*[6] found that, "the human right to freedom of expression incorporates a positive right to obtain access to government-held documents."[7] This view has since been endorsed by the ACT Civil and Administrative Tribunal (ACAT) in *Allatt & ACT Government Health Directorate*.[8]

Consistent with the ACAT and VCAT findings the Bill explicitly provides for the positive right to information. The Bill also provides a much larger scope for the provision of government information without the need for specific requests. The Bill significantly narrows the scope of information that is not required to be made available, restricting the nondisclosure of information to situations where it is not in the public interest to release the information. The Bill does therefore retain some limitations on the information that will be required to be released (note that the Bill at clause 10 explicitly provides that nothing in the Bill prevents or discourages the release of any information).

Right to privacy

In providing greater access to government information, the Bill does potentially limit the right to privacy. There are significant protections restricting the release or publication of personal information within the Bill and anyone whose personal information is the subject of an access request must be consulted and given the opportunity to put their views about the release of the information (see clause 36). Schedule 2 (Factors to be considered when deciding the public interest) contains an explicit recognition of the public interest in protecting the human rights including the right to privacy of individual citizens. Any limitation on a person's right to privacy must be considered by the decision maker and balanced against any relevant public interest

[3] *S.P. Gupta v. President of India and Ors* [1982] AIR (SC) 149, p. 234.
[4] *Guerra and Ors v. Italy* [1998] 7 Eur Court HR at [52].
[5] *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60, 82. The democratic basis of freedom of information legislation has been acknowledged by the Administrative Appeals Tribunal: *Cleary and Dept of the Treasury* (1993) 31 ALD 214, at 217-18; see New South Wales Ombudsman, *Discussion paper: review of the Freedom of Information Act 1989* (NSW Ombudsman 2008) at 27.
[6] *XYZ v Victoria Police* (General) [2010] VCAT 255.
[7] Ibid at [583].
[8] *Allatt & ACT Government Health Directorate* (Administrative Review) [2012] ACAT 67 at [69-70].

factors favouring disclosure. Further discussion of any potential limitation to the right to privacy is discussed below in the notes to the relevant clauses.

Delegation of Legislative Power

The Bill delegates the ability to create additional obligations for the proactive disclosure of government information to the ombudsman. This delegation is appropriate because the ombudsman will effectively be responsible for monitoring the scheme and ensuring that it is being implemented correctly and consistently with the Assembly's intention for the scheme. As such the ombudsman will be well placed to determine if there are additional categories of information that should be routinely published by government.

The scope of the power is well defined in the context of the Assembly's intention to make additional information available to the public as efficiently as possible. It should also be noted that any information is subject to the public interest test for publication and that a declaration is a disallowable instrument; providing a continuing role for the Assembly to ensure that any declaration is consistent with the views of the Assembly.

As part of the regulation making power given to the executive by the Bill, additional open access information that must be routinely published is able to be proscribed by regulation. Logically the executive itself is well placed to understand the types of information that people regularly request or that could be usefully published so that it is available without the need for a specific request. However before the regulation making power can be exercised the executive must consult on its proposed regulation with the ombudsman. As with all regulation making powers a regulation is subject to the disallowance of the Assembly.

The ombudsman is also given a general power to create guidelines for the operation of the Act, these guidelines are not binding. Given the nature of the scheme and the at times difficult decisions that are required to be made under the Bill the guidelines are intended to assist decision makers in exercising their responsibilities under the Act. Whilst not technically a delegation of legislative power the guidelines will nevertheless play an important practical role in the application of the Bill.

Administrative powers created by the Bill

The most significant administrative power given by the Bill is the responsibility for determining whether or not information is on balance contrary to the public interest to release. This decision will be made by the appointed information officers for each agency (see clause 18) and persons directed by the Minister in the case of requests for information held by a Minister. Recognising the significance of the role the Bill provides that agencies must appoint information officers who have specific statutory functions. Those functions must be exercised independently and without direction (with the limited exception that they may be directed by either the Minister or the principal officer of the agency to release information). The Bill puts in place corresponding enforcement provisions to ensure that decisions are made free from interference.

Whilst there is a relatively large discretion in the determination of the public interest, a methodical process is set out in clause 17 that must be followed to make the determination of the public interest. Additionally clause 9 constrains that discretion in favour of disclosure.

The administrative decisions made by agencies and Ministers under the Bill are objective tests that are not conditioned upon the decision makers satisfaction or otherwise of a state of affairs but rather upon the objective criteria or facts that must be established in order to exercise the decision making authority. This is to overcome circumstances such as those in *Chu v Telstra Corporation Limited*[9], where it was held that in the context of the Commonwealth FOI Act the requirement to take 'all reasonable steps' was in fact not intended to take away from the Minister or agency concerned. The judgment went to whether that requirement had been satisfied and that 'the section does not ascribe a jurisdictional character to the all reasonable steps requirement'.[10] This is not the case in the Bill and (with the exception of a decision to consult with a third party, see clause 36) all the decisions made by information officers and delegates of a Minister are subject to review both by the ombudsman and the ACAT.

Notes on Clauses

Part 1 Preliminary

Clauses 1-5

These clauses form Part 1 of the Bill. They are formal clauses setting out the name of the Act and its commencement date (on written notice of the Minister and not later than 6 months after it is passed by the Assembly, see Legislation Act section 79) as well as adopting the dictionary as part of the Act, explaining the status of notes and applying other laws, for example the *Criminal Code* which applies to offences set out in Part 9 of the Bill.

Part 2 Objects and general principles

This Part sets out key elements of the new FOI scheme, including the objects of the Bill, the way the public interest test that will determine access to government information operates and is to be applied, the relationship with the ACTs other information access scheme set out in the *Territory Records Act 2002* and the scope of the information that the Bill will apply to.

Clause 6 Objects of Act

This clause sets out the objects of the new FOI scheme created by the Bill. The objects are intended to put beyond any doubt the Assembly's intention that the scheme promote public access to government information and give effect to the principle that all government information should be made available unless there is a necessity for withholding it such that it would be contrary to the public interest to release the information.

The new objects set out the values underpinning the Bill as well as the desired outcomes that will come about from the increased public availability of information. The objects are intended to remove any confusion that may have previously existed in interpreting the provisions of different FOI schemes. [11] The objects make it unequivocally clear that the Assembly's intention is that there is a bias towards disclosure and that there must be a clear and demonstrable public interest in preventing the release that outweighs the public interest in release for the particular document in question to be withheld from the public. Withholding information should be rare.

The appropriate contents of an FOI objects clause is discussed extensively in the Solomon review; recommendations 17 and 18 deal with the reasons for an FOI scheme and specifics of

[9] *Chu v Telstra Corporation Limited* [2005] FCA 1730.
[10] *Chu v Telstra Corporation Limited* [2005] FCA 1730 at [15-16].
[11] For discussion of the interpretation of FOI objects see generally P Bayne and K Rubinstein, *The Objects of the Freedom of Information (FOI) Acts and their Interpretation*, (1995) 2 Australian Journal of Administrative Law 114.

what should be included in the objects clause. It should be noted that the review ultimately favoured the introduction of a preamble in addition to an objects clause.[12] The NSW Ombudsman report recommends that the objects of an FOI scheme should be:

- to enable people to participate in the policy and decision making process of government;
- to open government activities to scrutiny and to increase accountability of government;
- to enable people to participate in the policy and decision-making processes of government and to place an onus on agencies to proactively release information about their operations.[13]

The objects of the Bill set out in the clause have been incorporated in both the Solomon review and NSW Ombudsman recommendations, and while a preamble has not been included in this Bill, and a more traditional model for an objects clause has been adopted, the concepts and desired outcomes recommended by the Solomon review for the preamble have been integrated in the objects set out for the Bill.

The objects of the Bill can be summarised as:

- to provide a public right of access to information held by government;
- to promote public participation in government and increase government accountability;
- to ensure that information is proactively provided to the public without the need for specific access requests and where specific requests are required they are processed as quickly as possible at the lowest reasonable cost; and
- to ensure that information held by the government is up to date and accurate.

Given that a significant part of the effective operation of any information access scheme is the culture and attitudes of those responsible for applying the scheme it is particularly important that the objects clause is unequivocal about the manner in which the scheme is to be applied.

Clause 7 Right of access to government information

This clause provides a statutory right to government information. The right is enforceable through the provisions of the Bill and is subject to the public interest test (see clause 17) and the deeming of information to be contrary to the public interest to release (see Schedule 1). This right applies to all information held by the government irrespective of when the information was created. The right to information operates as the basic premise of the Bill and is also recognised in the objects of the Bill set out in clause 6 of the Bill.

Clause 8 Informal requests for government information

The Bill is intended to facilitate the provision of information as quickly and as easily as possible. The clause explicitly recognises that rather than having to make an access application and go through the process set out in Part 3 of the Bill, there will be much information that can simply be provided to anyone with an interest in response to an informal request. The clause authorises agencies to provide information in response to an informal request without the need to go through the application process set out in the Bill.

However the Bill does not authorise the release of information that is the subject of a law that prohibits the disclosure of the information (secrecy provisions). Whilst it will at times be in the

[12] FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, 2008 ('Solomon Report') pp 70-77.

[13] NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989*, Special Report to Parliament under s.31 of the Ombudsman Act 1974 (2009) p34.

public interest for information that is the subject of secrecy provisions to be released, the rational for the limitation on informal release is that: where the Assembly has enacted secrecy provisions to protect certain information, it is not appropriate that the information be released without the proper process for determining access set out in the Bill taking place to ensure that it is in the public interest to release the information.

It is important to note that while technically all the clause does is 'authorise' the release of government information in response to informal requests, in the broader context of the Bill and the objectives of the scheme that it creates, it is anticipated that this provision will be utilised to avoid the need for the formal application process wherever possible. The Hawke review recommended the guidance be developed to encourage agencies to develop administrative access schemes to promote access to information without the need for formal requests.[14] Consistent with this recommendation and to assist in the effective use of the clause and provide further clarity on when information should be released in response to informal requests guidelines will be created by the Ombudsman (see clause 65).

Clause 9 Promoting access to government information

The clause sets out that it is the Assembly's intention that the Bill be administered with a pro disclosure bias. The clause will assist in the application of discretions given to decision makers by other clauses of the Bill. The clause provides that where it is unclear where the greater public interest lies and it is reasonably open to a decision maker to exercise a discretion given by the Bill in different ways the discretion must be exercised in favour of disclosure.

The clause can be characterised as requiring that when considering whether or not disclosure of information is required under the Bill the decision maker must approach the decision presuming that the information will be released and needing to be convinced that the information is contrary to the public interest to release. The effect of the clause is to require a high standard to be reached to satisfy a decision maker that it is in fact contrary to the public interest to release the information.

Clause10 Act not intended to prevent or discourage publication etc

The effect of the Bill is to set out where information must be disclosed. This clause clarifies that where information is not required to be disclosed by the Bill this does not mean that the information cannot voluntarily be disclosed otherwise than under the Bill and the fact that the information is not required to be disclosed by the Bill should not be taken to discourage an agency or Minister from releasing the information.

Clause 11 Relationship with other laws requiring disclosure

The Bill does not affect the operation of any other law that requires the disclosure of particular government information. Other requirements for the publication of information will continue to provide an important mechanism for the provision of information to the public. This includes requirements such as the contracts register under Division 3.2 of the *Government Procurement Act 2001* and notification and publication requirements under of the *Planning and Development Act 2008*.

These requirements will continue to operate as they currently do. However, information that is required to be published under another Act is also required by the Bill to be published in the same manner as open access information in addition to any other requirements for publication

[14] Allan Hawke, Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*, (2013) available at http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx, recommendation 21(a).

set out in the other Act itself. For example where the requirement in another Act is to publish the information in a daily newspaper under the Bill that requirement will not change and the agencies will also be required to publish the information of the internet (see clause 90).

Clause 12 Relationship with other laws prohibiting disclosure
For the purposes of deciding access to information under the Bill, as opposed to the authorisation for information release in clause 8, the Bill will override the provision of any other law that prohibits disclosure.

In response to an access application, an agency or Minister must assess the public interest in the disclosure of the particular information and is not prohibited from releasing information that is subject to a secrecy provision if the information is not on balance contrary to the public interest to release under the test set out in clause 17, or deemed by the Assembly to by contrary to the public interest to release in Schedule 1.

Whilst the restriction imposed on disclosure by the secrecy provision will not apply for the determination of access under the Bill, it will be relevant to the determination of the public interest both because of the underlying reason for the secrecy provision to be imposed and by virtue of schedule 2 item 2.2(b)(iv) which recognises that fact that the information is prohibited from disclosure is generally a factor favouring non-disclosure.

As outlined the limitation on the operation of secrecy provisions in the clause does not apply to the authorisation to informally release government information under clause 8 and it will remain prohibited for the information that is subject to those secrecy provisions to be released informally without the processes required in the Bill having been fulfilled.

Clause 13 Relationship with Territory Records Act
This Clause sets out the relationship between the new FOI scheme and the *Territory Records Act 2002* (the TRA). Changes to the TRA set out in Part 4.16 of the Bill complement the provisions in this clause; notes to the consequential amendments to the TRA are set out below at clauses 4.17 – 4.28.

The TRA provides that agency records are open to public access under this Act on the next Canberra Day after the end of 20 years after the record came into existence (section 26) and that executive records are open to public access on the next Canberra Day after the end of 10 years (section 31B) after the record came into existence.

Under the Bill the FOI and TRA schemes will work together so that agency records that are up to 20 years old and executive records that are up to 10 years old are subject to the new FOI scheme. After that time, the information will be able to be accessed under the TRA and the FOI scheme will not apply to the information. However, if a declaration has been issued under section 28 or section 31G of the TRA (as amended, see notes below) applying the FOI provisions for determining disclosure the Bill will continue to apply to the information.

Clause 14 What is *government information*?
The Macquarie dictionary defines information as, "knowledge communicated or received concerning some fact or circumstance; knowledge on various subjects, however acquired."[15]

[15] The Macquarie Dictionary Online, www.macquariedictionary.com.au accessed 19 July 2013.

This clause defines government information for the purposes of the Bill as including both the information that an agency or Minister holds and the information that they are entitled to access. The definition is designed to be as expansive as possible to capture everything that one would ordinarily expect to be considered government information. This is complemented by the expansive definition of agency (see the dictionary) to ensure that the scope of the Bill is as broad as possible.

The inclusion of information that an agency or Minister is entitled to access within the definition ensures that the Bill covers both information held by non-government regulators (see clause 91) and entities contracted to provide services (see clause 92) and information held by ministerial staff.[16]

The definition avoids the issue of actual v constructive possession[17] and ensure that the scope of the information that is subject to the Bill extends to everything that an agency can access irrespective of where it is physically located, how it is stored or who is responsible for it.

Clause 15 Meaning of Agency

This clause defines the meaning of agency for the Bill. Together with the comprehensive definition of government information in clause 14 the definition of agency is designed to ensure that all government entities are subject to the FOI scheme created by the Bill.

The definitions of territory instrumentality and territory authority have been adapted to ensure that they cover any entity that the Government might create and that no entity can be excluded by regulation (see the dictionary). This definition is designed to implement the Solomon review recommendation 24[18] and ensure that the situation considered in *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285 cannot arise in the ACT. The intention is that while access to the information of some entities is restricted by schedule 1, every entity created by the government is covered by the FOI scheme.

It is inconceivable that all the information held by any government entity would be contrary the public interest to release. It is on this basis that the definition in the Bill is as expansive as possible to ensure that the argument can never be about whether or not particular information is covered by the Bill but whether it is in fact in, or contrary to, the public interest to release the information.

Clause 16 What is *contrary to public interest information*?

The Bill sets out that the single determinant for the release of information is whether or not it is contrary to the public interest to release the information. Information may be contrary to the public interest to release either because it has been deemed to be contrary to the public interest to release in Schedule 1 or because the information has been assessed under the test set out in clause 17 and determined to be contrary to the public interest to release. Only information that is contrary to public interest information may be kept confidential.

[16] The issue of whether information held by ministerial staff was covered by the Victorian Act was considered in *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79. The intention of the Bill is that this type of information is very clearly covered by the Bill.

[17] See *Beesley v Australian Federal Police* [2001] FCA 836 at [73]-[75].

[18] FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, 2008 ('Solomon Report') chapter 7.

Clause 17 Public interest test

One of the most important elements of the Bill is that it does not create class based exemptions from the requirement for the disclosure of information. The Bill does provide that certain limited categories of information will always be contrary to the public interest to release in schedule 1 but with these limited exceptions the Bill provides that information must be objectively assessed and released unless, on balance it is contrary to the public interest to do so. This clause sets out how the public interest in the release or confidentiality of the information is to be assessed.

This clause reflects recommendation 41 of the Solomon review that there should be a single public interest test and non disclosure based solely on the public interest in keeping information confidential. The new test also responds to the concerns of the Scrutiny Committee that a class based exemption system has the potential for significant abuse.[19]

The public interest can be a difficult concept to attribute a precise meaning. The concept of the public interest has been said to embrace standards of human conduct and government functions and instrumentalities, which work for the good order of society and its members and to involve serving the advancement of the public's welfare.[20] It has also been said that the public interest test for releasing information can be applied as the idea of 'civic betterment against official secrecy'.[21]

The Queensland Information Commissioner in guidelines to the *Right to Information Act 2009* (Qld) characterises the public interest as, "The public interest refers to considerations affecting the good order and functioning of the community and governmental affairs for the well-being of citizens."[22]

The task of determining, or acting in, the public interest is at times characterised in different ways either involving the balancing of competing public interests,[23] balancing features or facets of the public interest,[24] or the balancing of competing public interest factors[25] (which is the approach adopted by the Bill). There is no substantive difference in the approaches. The task is still to identify whether or not the community is best served by a particular course of action.

One distinction between the nature of the public interest test in the Bill, and in other public interest tests in the FOI context for example in the QLD RTI Act and the GIPA Act and other statutory is examples of decision makers being required to act in, or make a decision in, the public interest and that the public interest is the sole element of the test rather than being an additional or optional element of the decision.

In turn the process for determining the public interest is more clearly set out in this clause than is often the case in other statutory provisions.

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[19] Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), Scrutiny Report No. 46 at pp 8 and 9.

[20] See *DPP v Smith* [1991] 1 VR 63; *McKinnon v Department of Treasury* [2005] FCAFC 142.

[21] Thomson Reuters, *The Laws of Australia*, (at 1 June 2011) Use of the phrase "public interest" in legislation has a long history in Australia, 2. Administrative Law [2.3.760].

[22] Office of the Information Commissioner (Queensland) *Right to Information Act 2009 (Qld) Public Interest Test Balancing Guideline*, p5 available at http://www.oic.qld.gov.au/__data/assets/pdf_file/0005/6746/guideline-public-interest-balancing-test_4.pdf accessed 26 June 2013.

[23] See for example *Hinch & Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic)* (1987) 164 CLR 15.

[24] See for example *McKinnon v Secretary, Department of Treasury* [2006] HCA 45.

[25] See for example *Osland v Secretary to the Department of Justice* [2008] HCA 37.

Importantly it must be remembered that the expression "that it is in the public interest" imports a judgment to be made by reference to the subject, scope and purpose of the Act (see clause 6).[26]

Whilst the test is characterised as one of balancing, the observation in *McKinnon v Secretary, Department of Treasury* by Chief Justice Gleeson and Justice Kirby is very important. They said:

> 'the matter of disclosure or non-disclosure is **not** approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other..." (emphasis added). [27]

They continued to make the point that the balancing task must be done in the context of the objects of the Act.

The object and purpose of the Bill is to improve public access to information, together with the requirement set out in clause 9 of the Bill means that the scales begin laden in favour of disclosure. The application of the public interest test begins from the premise that it is in the public interest to release the information, and in the absence of a demonstrable harm to the public interest occurring from the release of the information, information must be released.

Similarly it is not the case that the simple number of relevant factors for or against will be indicative of the outcome required by the test. Even if a specific factor favouring disclosure is not readily identifiable, the general public interest in the accessibility of government information may be sufficient for release in cases where a factor favouring non disclosure is relevant. The balancing test must be applied in the particular circumstances to reach a result.
There may also be significant overlap between the various factors and no weighting is given by the Bill to any individual factor as balancing the competing interests will depend on the particular circumstances surrounding the information in question.

In making a decision on the public interest the decision maker must be able to articulate the harm to the public interest that would occur from release (see clause 55). The fact that the information is part of a category of information that may typically be contrary to the public interest to disclose is not sufficient to deny release. There must be a harm to the public interest that would actually occur from the specific information being released that outweighs the public interest in disclosure.

There will be times when the relevant public interest factors are finely balanced and it is possible to reasonably consider that information both would and would not be contrary to the public interest to release. In such a circumstance clause 9 of the Bill requires that the discretion available must be exercised in favour of release.

In applying the test a decision maker is required to consider an unknown range of factors that will vary significantly depending on the particular information in question. The test recognises that it is not possible for the legislature to foresee all the relevant circumstances or factual matters. In identifying the public interest factors both in favour of disclosure and non disclosure schedule 2 sets out a list of the most commonly applicable factors. This is not an exhaustive list and there may be other relevant factors, or variations on the listed factors, that decision makers are required to consider in relation to the particular information applied for.

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[26] *Hogan v Hinch* [2011] HCA 4 at [69] citing *O'Sullivan v Farrer* (1989) 168 CLR 210.
[27] *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [19].

The scope of what can be considered in evaluating the public interest will always be broad and will vary depending on the particular information in question. One expression that the High Court has used to describe the scope of the application of the public interest is:

> '...the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view'[28]

This clause also sets out factors that are always irrelevant to the determination of the public interest. These include the much maligned 'Howard factors',[29] such as the seniority of the author in an agency. These factors must not be considered by decision-makers in determining the public interest. It may be that other factors are also irrelevant notwithstanding the broad nature of the public interest test.

Considering these issues in determining the public interest in the release of the information would undermine the integrity of the process. For example, at times the argument is put that the 'risk' of FOI inhibits frankness in agency advice to Ministers. The clause specifically prohibits this from being considered by a decision maker on the basis that public servants have an obligation both to keep records under the TRA and to provide robust advice under the *Public Sector Management Act 1994*. As the Hawke review of the Commonwealth *Freedom of Information Act 1982* found, "officials should be happy to publicly defend any advice given to a minister and if not happy should rethink the advice".[30]

The Bill also provides that individual circumstances or reasons that an applicant has for applying for information are irrelevant to the determination of the public interest. Consistent with the public right to information created by the Bill (see clause 7). No member of the community is any more or less entitled to government information and it would be inappropriate for one individual to be able to obtain information and another person prevented from accessing that same information, particularly as access given to a person must be unconditional (see clause 47).

The new clause also notes the discretionary ability of an agency or minister to give access to a document even if access may be refused under this section (see clause 10).

Part 3 Information officers

The Bill creates a new statutory position of information officer; the appointment of an information officer is a notifiable instrument. The creation and formal recognition of the position is designed to recognise the importance of the role, promote independent decision making, allow officers to work collaboratively to help ensure that across the government there is a consistent and effective application of the new scheme and facilitate continuous improvement in the disclosure of government information.

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[28] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaurdon JJ. Quoted in *Osland v Secretary to the Department of Justice* [2010] HCA 24 at 13 per French CJ Gummow and Bell JJ; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31 at [30] per French CJ and Kiefel J.

[29] These factors originated from the AAT decision in *Re Howard and the Treasurer* (1985) 7 ALD 645.

[30] Allan Hawke, Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010* (2013) available at http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx, p48.

Each agency will be required to appoint an information officer who must decide access applications made to the agency. Applications to Ministers will continue to be dealt with by the Minister or the person to whom the decision is delegated by the Minister.

Clause 18 Information officers-appointment
This clause provides for the formal appointment of information officers. The position of information officer will be the central decision maker for the new scheme and therefore particularly important for the integrity and effective operation of the scheme. There will be no internal review of decisions made by information officers and the Bill creates a collective approach between information officers. It is important to promote the role and importance of the position.

The principal officer of each agency is required to appoint an information officer and given the importance of the position, the appointment will be a notifiable instrument similar to the requirement for designated disclosure officers to be notified under section 11(2) of the *Public Interest Disclosure Act 2012*.

Clause 19 Information officers-functions
Information officers have five functions under the Bill. These functions make the agency's information officer the person responsible for dealing with access applications to the agency and for fulfilling the agency's other obligations including meeting its proactive disclosure obligations under the Bill (see Part 4 of the Bill). Additionally an information officer is required to actively consider what additional information the agency can make available to the community.

Clause 20 Information officers not subject to directions
This clause provides that information officers must exercise their functions independently and that they are not subject to the direction of any person, including the principal officer of the agency and the Minister. It is important that the information officers make well considered independent decision free from other influences and offence provisions are set out in part 9 of the Bill to ensure that this is the case.

The clause does have an exception clarifying that a principal officer or the responsible Minister may direct the information officer to disclose information. Consistent with the objects of the Bill it is important that those who are responsible for the agency are able to ensure that information is provided to the community. Whilst access could of course be subsequently provided outside the Bill it is more efficient to simply have the information provided in response to a request or as open access information.

Clause 21 and 22
These clauses are designed to help foster a collaborative approach that both allows resources to be utilised as they are needed and facilitates cooperation and consistency of decision making. The clauses provide that an information officer of one agency may act for another agency so for example if an agency receives a particularly large or complicated request/s or the agency's information officer is on leave, the information officer of another agency may assist in processing the request to ensure that it is completed within the permitted timeframe.

Further at any time in making a decision under the Bill, for example whether information relevant to an access application is, on balance, contrary to the public interest to release, an

information officer may consult with another information officer to assist in making what will at times be difficult balancing decisions. The provision of assistance from other information officers should assist both the quality and consistency of decision making.

Part 4 Open access information

This part is an important new addition to the FOI scheme. This is often referred to as the 'push' model, proactively making information available to the public. The Part sets out the requirements for the proactive release of information without the need for requests for information to be made.

Clause 23 What is *open access information?*
This Clause lists the categories of information that agencies and Ministers will be required to routinely publish without the need for a request. The clause attempts to cover the routinely used categories of information that are useful to the public and that will help avoid the need for access applications to be made. The particular categories include the existing obligations to provide information about the agency as well as additional more substantive information relevant to the agency's operations.

The categories of 'open access information' for an agency are:

- *Functional information.*
  This covers the existing requirement to provide practical information about the functions and operation of the agency.

- *Documents tabled in the Assembly.*
  Information about the work of agencies is routinely tabled in the Assembly by the responsible Minister; this may be in the form of papers presented by Minsters, Ministerial statements, or other information prepared by or relating to an agency that the Assembly orders to be tabled. Often this information is already made available to the public in some way however this requirement will ensure that all information tabled in the Assembly is made generally available to the public.

- *Policy documents.*
  Policy documents are defined in subclause (3). The definition is broad and intended to ensure that information about agency operations is available to the public. The definition includes information that is necessary to understand the operations of an agency and how the Acts and administrative schemes that it is responsible for are applied or enforced and how other agency functions are exercised.

- *Budgetary information.*
  The requirement to publish budgetary information includes details of the outputs for the agency and should include greater detail than what is presented in the budget papers accompanying an appropriation Bill.

  However information that would place the agency at a competitive disadvantage by publishing an amount to be spent on a particular project before the tender process has been conducted where publishing that amount may adversely affect the value for money able to be achieved by the agency would not typically be required to be published under this clause.

Note that the *Government Procurement Act 2001* requires notifiable contracts to be made publicly available and also that information about particular agency expenditure is available in agency annual reports.

- *Information about government grants administered by the agency.*
  Similar to the contracts register under the *Government Procurement Act 2001* information about, not necessarily the entire details of, government grants will be required to be published.

- *The disclosure log of access applications made to the agency.*
  Clause 27 requires agency to keep a disclosure log of all information that is released as a result of an FOI application together with other information that an agency chooses to include when information has been released in response to informal requests. Consistent with the creation to the public right to information the disclosure log must be published as open access information to ensure that everyone can equally access the information. This information must be published between 3-10 working days from the date the decision notice is given to the applicant (see clause 27).

- *Information relating to all boards, councils committees, panels and other bodies established by the agency.*
  Agencies have a range of advisory bodies that provide additional advice or operational assistance to agencies. Agencies will be required to publish a statement listing the bodies as well as the minutes of any meetings they hold and any report or recommendation prepared by the entity.

- *A report or study on scientific or technical matters.*
  Agencies frequently engage experts to do discrete pieces of work that inform their decisions. Information prepared by experts for the use of agencies and the executive will be required to be published. The Bill provides four examples for what this might include. The public should, as a matter of course, have access to this information so they can participate in the public debate and understand the basis for decisions and expert views on the issues.

- *From three years after they were created, incoming ministerial briefs, parliamentary estimates briefs, annual reports briefs, question time briefs.*
  This was originally a recommendation of the Solomon review that was inadvertently omitted during the printing of the report.[31]

  It is reasonable to say that at the time they are written, these briefs may be contrary to the public interest to publish and therefore, even though sometimes they will be in the public interest to release, (and access applications can be made for this information) it is not appropriate that they be listed as open access information until a period of time has elapsed. A person can still apply for this information at the time it is produced and the normal process for access application for information will be applied to it. However after three years has passed it is far less likely that it will be contrary to the public interest to release the information so agencies will be required to publish it and avoid the need for access applications.

[31] David Solomon, *FOI Reform or Political Window Dressing?* (2010) 62 AIAL Forum 3.

- *Agency publication undertakings.*
  These undertakings are made under clause 28 and are a mechanism for agencies to identify particular classes of information that they hold they should be made routinely available to the public. It is anticipated that this information will typically be information that is unique to the particular agency and therefore not proscribed within the general classes of open access information.

- *Ombudsman declarations*.
  These declarations are designed to allow the scheme to respond to experience and allow the ombudsman to make declarations requiring information that the ombudsman considers should be made routinely available to the public to be published to avoid the need for access requests (see clause 64).

- *Information proscribed by regulation.*
  The Bill delegates to the executive the ability to make regulations declaring additional categories of information to be open access information. This relatively minor delegation of power is appropriate because it will allow the executive to set out particular information that it considers should also be made available to the public and cannot be used to reduce the availability of information to the community. It is anticipated that this will be used for categories of information that are regularly requested and can be more easily made available as open access information.

In addition to the open access information listed in the Bill other Acts also require agencies to publish information. For example the contracts register under the *Government Procurement Act 2001* and requirements for publication under the *Planning and Development Act 2008*. The Bill deals with the publication of this information at clause 91.

In addition to the proactive publication requirements for agencies the clauses also requires that Ministers publish certain information as open access information. Minsters must publish:

– *The disclosure log of access applications made to the Minister.*
  As with the requirement for agencies, Ministers must also publish the disclosure log of access applications made to the Minister (see clause 27).

– *Ministerial travel expenses.*
  This includes information about all travel and hospitality expenses incurred by the Minister and the Minister's staff.

– *A copy of the Minister's diary*
  The Minister's diary must include all the appointments that the Minister has had in relation to ministerial responsibilities. The intention is that the public should be able to see who the Minister engages with and how. The obligation includes everything that is related to the Minister's functions as a Minister.

In addition to the information that each Minister must publish the Chief Minster must also publish a summary of cabinet decisions and a copy of the corresponding triple bottom line assessments for the decisions. Some information relating to cabinet decisions is currently published at http://www.cmd.act.gov.au/open_government/inform/cabinet. The requirement in the Bill will expand the amount of information made available about cabinet decisions and improve the timeliness in which it is provided to the community.

Clause 24 Availability of open access information

This clause applies the public interest test set out in clause 17 to the provision of open access information. The clause recognises that at times particular information that is listed as open access information that is required to be published will not be in the public interest to disclose. For example, a particular cabinet decision may be commercially sensitive and it may not be appropriate to publish the information until a later point in time.

If an agency or Minster does determine that information is contrary to the public interest to release, they must publish a description of the information and a statement of reasons for the decision that the information is, on balance, contrary to the public interest to disclose. The statement of reasons is the same as is required where an access application for the information is rejected (see clause 55).

Additionally a reviewable decision notice must also be published with the decision not to disclose the information as any person can apply for a review of the decision (see Part 8 (Review).

Clause 25 Open access information-quality of information

This clause requires that open access information must be accurate, complete and up to date. This ensures that the obligation on minsters and agencies is ongoing and that the information they are required to publish must continually be updated and actively monitored to ensure that the requirement is met. As information is created or comes into their possession, agencies must consider whether they are obliged to publish and if so publish in a reasonable timeframe.

Additionally where information has not been published because at the time it was determined that, on balance, the information was contrary to the public interest to disclose that does not mean that an agency or Minister need never think about it again. Over time to fulfil the requirement of open access information being accurate, complete and up to date Ministers and agencies will need to continue to monitor if the information is no longer contrary to the public interest to release and if so publish the information.

Note also that clause 91 sets out the practical requirements for the publication of government information.

Clause 26 Open access information-effect of policy documents not being available

Clause 24(1)(c) sets out the requirement to publish policy documents. This clause ensures that a person suffers no disadvantage because a policy document was not made available to them and that people are able to rely on the information that is available to them. In the event that information is not made available, a person cannot be left worse off when they could otherwise have used the information to act differently.

Clause 27 Requirement for disclosure log

An important part of the ‘push model’ for the availability of government information is ensuring that information obtained by a person in response to an access request is also available to the public more generally.

This clause requires information, other than personal information, to be kept (and published under clause 23) in an agency’s or Minister’s disclosure log. The disclosure log must include the access application submitted by the applicant, the notice of the decision from the agency or

Minister and any information provided in response to the request. If the agency does not hold the information this must be set out in the decision notice (see clause 52). If the agency or Minster refuses to confirm or deny the existence of the information a statement of reasons for the decision must be included (see clause 55). If the Agency or Minister decides not to provide any relevant information in response to the application, the statement of reasons given to the applicant under clause 53. If the agency or Minister decides not to deal with the application the disclosure log must also include the statement required under clause 54.

If information is not provided to the applicant the disclosure log must also include a reviewable decision notice setting out that who can apply for review of the decision must also be published (see schedule 3).

The disclosure log must also include for each application a statement of the amount of fees paid or waived in relation to the application and the amount of time spent dealing with the application. This improves the transparency of the scheme, allows the public to understand the resources involved in operating the scheme and makes agencies and Minister's accountable for how efficient they are in processing the applications.

The clause also provides that the information must not be published within three days from the time it is released to the applicant. This allows the applicant the opportunity to use the information first, for example it gives a journalist the chance to publish the material before it is available to everyone else. The clause requires that the information must be published within 10 working days.

Clause 8 provides for the informal release of information. Information released in response to an informal request is not required to be published in the disclosure log however it may be included. Typically this would be appropriate where the information may be useful to others in the community as well as the person who requested the information.

To protect personal privacy, personal information and requests for personal information must not be included in the disclosure log.

Clause 28 Agency publication undertakings

This clause creates a mechanism for agencies to undertake to publish additional information as part of their open access information requirements. The categories of open access information set out in clause 24 apply to all agencies, and publication undertakings are a mechanism for agencies to routinely publish additional information that they hold.

Agency undertakings should allow for the customisation of the open access information system to each agency and the information that the particular agency holds. An agency must comply with a publication undertaking that has made. Additionally an agency must review its publication undertakings each 12 months and consider whether additional information could be included as a publication undertaking.

Part 5 Access applications

This part sets out the process for applying for access to government information. The Bill aims to reduce the need for formal applications for information and ensure that as much information as possible is made readily available to the public, either as open access information or in response to informal requests so that access applications are a last resort.

Nevertheless access applications will continue to be a vital part of the scheme. This part sets out the process for making and determining access applications for government information. It includes positive obligations on agencies and Ministers to assist people to make applications that meet the requirements and to consult with relevant third parties where they may have a concern about the release of certain information.

Clauses 29 - 31
The clauses set out the requirements for making an access application and the assistance and notice of receipt that agencies and Ministers must provide to applicants.

Applications for access to information must be in writing and may be made either by email or by post. The requirements for an application are essentially unchanged however, clause 29(4) explicitly recognises the ability for applicants to include their views (which under clause 35 decision makers must consider the applicants views on the public interest) on the public interest in the release of the information.

This may include a view of what the relevant public interest factors are or how competing factors should be balanced. An applicant is not required to include their view on the public interest but the inclusion of the provision is intended to encourage applicants to provide their views on the public interest in the release of the information to assist in the decision making process.

Agencies and Ministers will have an obligation to provide assistance to ensure that an application meets the requirements and to provide written notice, either by post or electronically, of the date the agency or Minister received the application. This must be done no later than five working days after the application was received.

The notice must also include the date by which the application must be decided; ordinarily within 20 working days (see clause 38) subject to: the recipient being required to consult with a third party (see clause 36); the applicant agreeing to a request to extend the time to decide the application (see clause 39); or the recipient being given additional time by the ombudsman (see clause 40).

Clause 32 Who deals with access applications
An access application must be dealt with by the information officer for the agency (see Part 3) or if the application is to a Minister by the person the Minister directs.

Clause 33 Deciding access-identifying information within scope of request
If an agency or Minister receives an access application they must take reasonable steps to identify all the relevant information. This would include using all electronic mechanisms available that facilitate the retrieval of information stored electronically and well as undertaking a manual search of physical records.

In considering whether reasonable steps have been taken regard should be had to:
- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)

- the agency's practices and procedures (including but not exclusive to its information management approach); and
- other factors reasonably inferred from information supplied by the applicant including:
    - the nature and age of the requested document/s; and
    - the nature of the government activity the request relates to.[32]

Note that there is no fee for the amount of time an agency takes to process an application (fees are levied for the amount of information provided, see clause 96) and agencies should process the request and identify the information as quickly and efficiently as possible.

Clause 34 Deciding Access – how applications are decided

The clause sets out the five ways in which an application can be decided. Where a respondent decides to refuse to deal with an application this must be done under clause 43. A respondent may only decide that it does not have the information requested if it has taken reasonable steps to find all relevant information as required by clause 33.

The existence of information may only be withheld from an applicant in two circumstances; if to confirm its existence would, or could reasonably be expected to endanger the life or physical safety of a person or be an unreasonable limit on a person's rights under the *Human Rights Act 2004*.

The standard of being expected to endanger the life or physical safety is taken from the existing requirement for a document to be covered by the exemption in the current FOI Act section 37(1)(c). If it is the case that confirming the existence of a document would, or could reasonably be expected to, endanger the life or physical safety of a person the action that an agency must take remains unchanged.

Alternatively an agency or Minister may refuse to confirm or deny the existence of information if knowledge of the existence of the information would mean an unreasonable limitation on a person's protected rights under the *Human Rights Act 2004*.

This may for example be because knowledge of the existence of information itself reveals something that is an unreasonable limitation on a person's right to privacy, or their right to a fair trial or on the rights of a child.

Circumstances where this may be relevant may include where applicants are trying to work out a complainant's identity such as through applications for information about child protection matters. In this context it may also be appropriate that an agency refuse to confirm or deny the existence of documents even when no documents are held as if applications are framed in particular ways knowledge of the absence of particular information could be used to rule in or out certain things.

Note also that schedule 1 deems information relating to a number of investigative mechanisms to be contrary to the public interest to release and that an agency or Minister may refuse to process certain applications for this information (see clause 45).

The clause also provides for circumstances where additional information that is relevant to the application is found after the application is decided. If this occurs the respondent must either

[32] Nash and Queensland Police Service [2012] QICmr 45 at [15-16].

make a further decision about the disclosure of the additional information or tell the applicant that there is additional information and ask the applicant if they would like to make an application for it.

If the applicant does wish to make an application for the additional information no fee is payable for the application for the additional information but a fee may be charged for the provision of the information itself. This will mean that the cost is the same as if the information had been located and processed as part of the original application and the applicant is not required to pay an additional fee because the agency or Minister failed to find the information.

Clause 35 Deciding access – considering applicant's views on public interest
This clause requires the decision maker to consider any views about the public interest in disclosing the information that the applicant may have included in there access application. A decision maker must give genuine and real consideration of the views provided by the applicant.[33] No adverse inference can be drawn where an applicant has not provided any views about the public interest in release by the applicant; a decision maker must identify the all the relevant public interest factors.

Clause 36 Deciding access – relevant third parties
This clause covers circumstances where government information includes information that concerns third parties. The clause applies if a decision maker considers that the information that is subject to an access application is not contrary to the public interest to release but expects that the information may reasonably be of concern to a third party.

In contrast to other discretions given by the Bill, the requirement for consultation is conditional on the decision maker considering certain things to be the case.

The reason for this is that, as this is an interlocutory decision in the process of determining the public interest in the release of the information, and without having the views of a relevant third party to consider in the application of the clause 17 public interest test, the requirement can only be applied in the context of the information the decision-maker has available at the time, and what the decision maker considers to be the case at that point in time.

Further as the decision maker is only required to consult on information that in the absence of an objection by the relevant third party they believe to be in the public interest to release, the decision maker is not required to consult on information that should remain confidential from the third party.

In applying the discretion as to whether or not the information may reasonably be expected to be of concern to a third party sub clause (3) sets out the circumstances where for the purposes of the consultation requirement information may be considered to be of concern to a relevant third party. These are if the information is personal information about the person, concerns the commercial interests or research of an individual or entity, or relates to the affairs of another Australian government.

Currently decision makers are required to consult on information that may affect a third party even when that information it may well be that the information not be released for another reason. This causes unnecessary delays and the clause is designed to ensure that only

[33] *SZEJF v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 724; *Williams v Minister for the Environment and Heritage* [2003] FCA 535.

information that might be released is consulted on to avoid unnecessary delays in the process. Equally where elements of the request are relevant to the third party and others are not, only the information that is of concern to the third party and may otherwise be disclosed need be consulted on and processing of any other information can continue while the consultation process is being undertaken.

In circumstances where the decision maker is required to consult with a third party a slightly shorter period of extension for making the decision than is currently available is available under the Bill. The additional 15 working day period that is permitted in these circumstances takes the total period for making the decision to 7 full weeks and of course the consultation should begin as early as possible in that timeframe.
In many cases consultation will be able to occur concurrently with other the processing of other elements of the request. This timeframe should be sufficient for other jurisdictions, businesses or individuals to be able to respond and have a reasonable opportunity to put their views on the public interest to the decision maker.

The clause requires that the respondent must take reasonable steps to consult with a relevant third party. In circumstances where the respondent does not respond or cannot be contacted, the Queensland Information Commissioner's Guidelines provide:

> When a third party does not respond to a consultation under section 37, it may be for a number of reasons. The last known contact used by the agency may no longer be correct, or the person may be absent from their address for an extended period of time. In the case of a company, that organisation may no longer be in existence, or may have moved location.
> In any event, when the decision maker receives no response to an attempt to consult, a decision must be made without the benefit of input from the third party. The decision maker should not automatically decide in favour of release, but must make the decision based on the information and facts before them.
> Once the decision regarding access has been made, the decision will not have been made contrary to a view expressed by a consulted third party if all reasonably practicable steps were taken by the decision maker to contact the third party. When the applicant has been advised of the decision, there is no reason to delay providing access to the documents.[34]

This is similarly the way the scheme is intended to operate under the Bill.

The clause also requires that where a Minister or an agency is required to consult with a person they must inform them that if the information is disclosed to the applicant it will also be published in the 'disclosure log'.

Where a decision maker determines that it is in the public interest to release the information, but a third party who has been consulted with objects to the release of the information, the third party must be informed of the review processes available for the review of the decision.
Note that a third party must tell the agency or Minister of an application for review, (see clause 70) and the information may not be published until either:

- the third party agrees to the disclosure; or

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[34] Queensland Information Commissioner Guideline, *Providing access to documents*, available at http://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/accessing-documents/providing-access-to-documents (accessed 8 October 2013).

- period for making a application for review is over; or
- the review is decided.

Sub clause (6)(b) clarifies that it is only the particular information that the third party objected to that must not be provided to the applicant. Parts of the application that were not objected to by the third party can still be provided to the applicant.

If access to information is deferred because a relevant third party has objected to release the notice of the decision to the applicant must include a statement that access to the information is deferred because a relevant third party objected (see clause 52(2)(a)).

Where the information is person information and a person who has died, the clause requires that the respondent must consult with an eligible family member of the deceased.

Clause 37 Deciding access—decision not made in time taken to be refusal to give access
If an agency or Minister fails to decide an access application within the permitted time they are deemed to have refused to give access to the information. If a decision has not been made within time and this clause applies the respondent must refund the fee paid and notify the ombudsman of the failure to make a decision within time.

While the respondent may continue to process the application, an applicant can apply for review of the decision and no fee is payable for the application for review (see clause 97).

Clauses 38 - 40 Time for deciding access applications
These clauses set out the permitted timeframe for making decisions on access applications. Ordinarily a decision must be made within 20 working days. This is substantially the same as in the current FOI Act however it is expressed in working days rather than calendar days to ensure that there is a reasonable period for deciding requests.

The timeframe may be extended either because consultation with a third party is required (see clauses 36 and 38(2)), the applicant does not object to an extension (see clause 39), or the ombudsman grants an extension of time (see clause 40).

An agency or Minister may make an application to the ombudsman for additional time to decide an application if the respondent has not agreed to additional time. There are defined circumstances where the ombudsman may allow additional time. Nevertheless within those circumstances there remains a significant level of discretion to be exercised by the ombudsman as to whether or not it is reasonable to process the request within the ordinary timeframe. A decision to provide an extension of time is not subject to ACAT review. Given the nature of the decision it would simply not be appropriate or realistically possible to have ACAT review the decision in a timeframe that could be beneficial to the applicant, who would typically want the timeframe for making the decision to be as short as possible.

Clauses 41-45
Refusing to deal with applications
There are six circumstances when it may be appropriate for an agency or Minster to refuse to process an application. A decision to refuse to deal with an application is a reviewable decision.

A decision a whether or not to refuse to process an application must be applied in the context of a scheme designed to implement a public right to information and specific direction that there is

a bias towards disclosure which is also relevant to the determination of whether or not to process a request (see clause 9).

In determining to refuse to process the request, an agency or Minister may consider related applications as one application if they are made by the same person or by people acting in concert together. This means that a person cannot split up an application into many multiple parts to avoid a ground for refusal.

To be considered together applications must be related; if a person makes multiple applications for unrelated information an agency or Minister is not permitted to consider the applications together. Whether or not applications are related for the purposes of deciding to refuse to deal with an application will very much depend on the particular applications and the nature of the information that they are seeking.

For example two separate applications for information about different elements of a decision, making process could be considered related applications. Similarly, information relating to a particular incident and information relating to the process for dealing with that type of incident generally could be related. Information about separate and discrete operations or outputs of the same agency are less likely to be related, however applications for a class of information across agency outputs may be related, for example a request about complaints across particular areas.

The grounds for refusal are:

- *The application would require an unreasonable use of resources.*

  For this ground of refusal to be satisfied, the respondent's resources required to be used in the process of dealing with the application,(including consideration of the public interest in the release of the material and not simply in locating the material,[35]) must mean that the agency is substantially inhibited from fulfilling its functions. This must be balanced against the extent to which the public interest would be advanced by the processing of the claim.

  That is, where the subject of the application is of significant importance to the public, (for example where the information was relied on to make particularly controversial decisions or the information is important for the protection of human rights or the environment) then it would be appropriate for more time to be spent dealing with the request than would be the case of the matter is relatively trivial or of little consequence.

  In considering whether the use of what might otherwise be an unreasonable level of resources the decision maker must assess the extent to which the public interest would be advanced 'in granting' the request. That is if the information were to be granted to the community to what degree would the public interest be advanced and is that proportionate to the level of public resources that would need to be invested in processing the request.

[35] The issue of the scope of this ground was considered in *Australian Capital Territory (Chief Minister's Department) v Coe* [2007] ACTSC 15. Subsequent to that case section 23 of the current Act was amendment (2007-5) to clarify that it include the time taken to consider the information involved. The clause includes the consideration of the material, not just the time required to identify it.

It must also be remembered that at this stage in the process where all the information has not been identified it is neither required nor possible to apply a full clause 17 analysis of the public interest. The question to be resolved is a broader one about the potential advancement of the public interest in granting the information referred to in the request against the level of resources required to process the request.

Before refusing a request on this ground the respondent must notify the applicant of an intention to refuse to deal with the application and give the applicant the opportunity to amend their application to avoid the ground of refusal and have the agency or Minster process the request.

- *The application is frivolous or vexatious.*
  Typically whether or not an application is frivolous or vexatious will depend on the context in which it is made and what the scheme involved is designed to achieve. An application may also be vexatious because it must fail.[36] In the context of this scheme the bar is very high for that to be achieved.

  Currently both the QLD RTI and the Cth FOI Acts have provision for their respective information commissioners to make declarations about vexatious applicants. These relate to applicants rather than particular applications. The Bill focuses on the particular application which must be considered independently of previous requests and does not have the effect of a declaration which may act to limit what might be legitimate requests in future.

  Before refusing to deal with an application the agency or Minister must notify the applicant of an intention to refuse to deal with the application and give the applicant the opportunity to amend their application to avoid the ground and have the agency or Minster process the request.

- *The application involves an abuse of process.*
  Subclause 41(4) defines an abuse of process to include, harassment or intimidation of a person or an unreasonable request for personal information about another person.

- *The information is already available to the applicant.*
  Where information is already publicly available and there is no need for the application to be processed an agency or Minister may refuse to deal with the application but must tell the applicant how they can access the information (see clause 55).

- *The application relates only to information that is taken to be contrary to the public interest to disclose under schedule 1.*
  For an application to be refused on this ground all the information that is relevant to the request must be taken to be contrary to the public interest to disclose. If this is the case, a decision maker is not required to identify all the information that is relevant to the request. For example: if a person makes an access application to the auditor-general for all information relevant to a particular performance audit, the relevant information officer need not identify all the information relating to the audit before refusing to deal with the request, as schedule 1 at paragraph 1.5 provides that the information is taken to be contrary to the public interest to disclose.

[36] *Dey v Victorian Railways Commissioners* [1949] HCA 1.

- *An earlier access application has been refused.*
  It is important to note that for refusal under 42(1)(f) an access application as defined in the dictionary means an application under clause 30. This definition does not include previous applications under the current FOI Act. An applicant who has had an access application made under section 14 of the current FOI Act refused may apply for access to the information under the Bill and such an application cannot be refused on the ground set out in 42(1)(f).

Clauses 46 – 49

Giving access to information

Once it has been decided that it is not, on balance, contrary to the public interest to disclose information access will ordinarily be either provided as an electronic copy or a hard copy of the information. In certain circumstances alternative forms of access may be provided.[37] Any electronic information provided must be provided in a way that complies with the web content accessibility guidelines level AA and that provides the user of the information with at least the same range of functions as were available to the agency itself. For example in an unsecured format that is able to be electronically searched and have text copied and pasted. This is the same as the requirement for publication of other government information set out in clause 90.

Where information is given in response to an access application the access must be unconditional and the recipient of the information is free to publish, reproduce or otherwise use that information.

An agency or Minister may defer providing access to government information that is in the public interest to release if the information is intended to be made public either to the Assembly or the media within a reasonable time and not longer than 3 months. For example if a person makes an application for information relating to a particular issue that was the subject of an Assembly Committee inquiry, part of the response to the request would include the Government response to the recommendations of the Committee.

It is reasonable that the Government be allowed to present this information to the Assembly following the normal process rather than releasing it to an access applicant beforehand. Where access is deferred the notice of the decision given to the applicant must set out the period for which access is deferred (see clause 52(2)(c)).

Where information being provided in response to a request contains both contrary to the public interest information and other information that is not contrary to the public interest to release, clause 49 provides for the deletion of the contrary to the public interest information. The agency or Minister may delete the contrary to the public interest information in order to provide access to the remaining information.

This is the only basis on which information can be deleted from the information disclosed to applicants. That is information may not be deleted because it is 'irrelevant' to the access request unless the information is also contrary to the public interest to release.

[37] This may be by providing a transcript of an interview or by providing information that is not in a readily understandable written form in a written document using equipment usually available. For consideration of what is equipment that is usually available see *Collection Point Pty Ltd v Commissioner of Taxation* [2013] FCAFC 67.

However where a respondent refuses to confirm or deny existence of the information under clause 35(1)(e) they are not required to provide a copy of any information.

Clause 50 Notice of decision to be given
This clause requires an agency or Minister that has received an access application to provide the applicant written notice of the decision made about the application. The substantive requirements are set out in the subsequent clauses and explained in the notes below.

Clause 51 Content of Notice – access to information given
This clause applies where the agency or Minister decides to give access to the information sought in the access application. In most cases the information must be provided with the notice of the decision on the application unless a relevant third party has told the respondent that it considers that the release of the information is contrary to the public interest. if that is the case and clause 37(6) applies that notice must indicate that access to the information will be deferred until either the relevant third party indicates in writing that it will not apply for review of the decision, or the review period, 15 working days, or the review is concluded.

If access is deferred because the information is to be presented to the Assembly or the Media within a reasonable time the notice must indicate this and the date that the information will be made available.

Clause 52 content of notice – information not held by respondent
After having completed the search required under clause 34 if the Minister or agency does not have any information relevant to the request the Minister or agency must provide notice to the applicant that it does not have any relevant information.

Clause 53 Content of Notice – refusing to give access to information.
This clause applies if a Minister or agency decides to refuse to give access to information in response to an access application.

If the information is not to be released because it is deemed to be contrary to the public interest under schedule 1, the provision in the schedule which relates to the information must be included in the notice. If the disclosure of information would, on balance, be contrary to the public interest under the test set out in clause 17, the notice must include a statement of reasons that are in addition to the requirement for a statement of reasons set out in subclause (b)(i), which mimic the content requirements for a statement of reasons generally, as set out in the *Legislation Act 2001* section 179.

The statement must set out all the relevant factors relevant to determining the public interest and how the factors were balanced to determine that the information is on balance contrary to the public interest.

Clause 54 Content of notice – refusal to deal with application
If the respondent decides to refuse to deal with an application the notice must set out the grounds under clause 42(1) under which the agency or minister decided to refuse to deal with the application.

Clause 55 Content of notice – refusing to confirm or deny the existence of information
Where an agency or Minister refuses to confirm or deny the existence of information the notice of the decision must include a statement of reasons for the decision.

Clause 56 Transfer of access applications
This clause allows applications to be transferred between agencies to ensure that the correct agency deals with the application and the relevant information is provided to the applicant as efficiently as possible.

Clause 57 Access applications if two or more agencies or Ministers have relevant information
This clause covers situation where multiple agencies hold information that is relevant to the request. The clause facilitates the cooperation of agencies in responding to request and attempts to make it as easy as possible for agencies to respond and get the information to applicants as quickly as possible.

Part 6 Amendment of personal information
This part allows people to correct their personal information held by the government. A person who has access to government information that is personal information about them may apply to the government agency or Minster that holds the information to update or correct the information if they believe that the information is incomplete, incorrect, out of date or misleading.

Clauses 58 Requesting amendment of personal information
This clause sets out the process for making an application for the correction of personal information. If a person considers that information about them is incorrect, out of date or misleading they may make an application to an agency or Minister. The application must include the changes that the person would like to see made to correct the information. For example: where a record said that a person had been recognised with an award or certificate or been the recipient of a particular government assistance payment, but in fact the person had been given a different award or they were the recipient of a different type of government assistance payment, they must provide the correct award or payment type that they would like the government information to reflect in their application for the change.

Clauses 59 - 62
An application for the amendment of the information must be considered by an information officer for an agency or a person directed by a Minister for information held by a Minister, within 20 working days. The decision maker must amend the information if the information is incomplete, incorrect, out of date or misleading. If the information is amended the decision maker must provide a copy of the amended information to the applicant and if the decision maker refuses to amend the information a statement of reasons for the decision must be provided to the applicant. A decision not to amend the information is a reviewable decision (see schedule 3 item 6).

However before refusing to amend the information the agency or Minister must tell the applicant of their intention to refuse the application and give the applicant the opportunity to provide any additional formation.

Part 7 Role of Ombudsman
This part sets out the role of the Ombudsman in the new FOI scheme. The Ombudsman will be the independent oversight of the scheme and perform a central role in ensuring its effectiveness.

Clause 63 Functions of ombudsman
The functions of the ombudsman in the new scheme are to:

- Review decisions;

- Monitor government compliance with the scheme, including the publication of open access information, compliance with guidelines issued by the ombudsman, as well as the more general application of the scheme including compliance with the expectations set out by the Chief Minister in the annual statement required by clause 89).
- Report on the operation of the scheme.

Clause 64 Open access information declarations
This clause provides for the ombudsman to issue declarations that information is open access information which an agency is obliged to publish (see clause 24(1)(m)). In making a declaration the ombudsman must consult with the information officers of relevant agencies so that agencies have an opportunity to participate in the process and provide their views on the feasibility and usefulness of requiring the information to be published. A declaration is a disallowable instrument, which effectively ensures that the Assembly concurs with the declaration.

Clause 65 Guidelines for Act
This clause provides for the ombudsman to issue guidelines to assist with the implementation of the new scheme. The guidelines are not binding but will assist agencies with decision making. The clause sets out specific areas where guidelines will be particularly useful. These are typically areas where other jurisdictions with similar arrangements have issued guidelines to assist decision makers, however guidelines may be issued for any element of the Bill.

Clause 66 Annual report on operation of Act
The annual report on the operation of the Act will be very important for understanding the success and shortcomings of the scheme. This will compliment the separate reporting obligations of agencies (see clause 90) and give the Assembly a holistic picture of the operation of the scheme from the oversight body responsible for the review of decisions and who is in a position to analyse the application of the scheme across the whole ACT Government.

Clause 67 Access to information for ombudsman review
If a person applies for ombudsman review of a decision of an agency or Minister the agency or Minister must provide the information that is the subject of the review to the ombudsman.
Note section 256 of the Legislation Act provides for the production of information held electronically to an authority in a form that can be understood by the authority.

Clause 68 Complaints to ombudsman
The complaint handling function set out in this clause is substantially the same as the ombudsman fulfils for complaints about administration across the government. Complaints may be about the time taken to make decisions, conflicts of interest in decision making etc.
It is the case that the ombudsman will at times be asked to review a decision as well as investigate a complaint about the making of the decision. The exercise of these two functions is entirely compatible and it is important that both roles remain.

Part 8 Notification and review of decisions
The Bill significantly changes the process for the review of FOI decisions. The Bill removes the internal review process and creates two options for the review of decisions. Importantly any person will be able to apply for the review of access decisions.

Given the nature of the new information officer role, and to help promote the quality of initial decisions, it is appropriate that there only be a single decision from agencies and Ministers. If a

person is not satisfied with a decision they receive on an access application they can apply to either the ombudsman or to ACAT for review of the decision.

A review by the ombudsman may also then be review by ACAT, however where ACAT is reviewing a decision of the ombudsman it must be constituted by three members. Both of these bodies will exercise full merits review of decisions and a mechanism is created to ensure that for decision where any person can apply for the review of a decision, where there are multiple applications for review these are initially considered by the ombudsman.

Clauses 69 Definitions – pt 8
These are signpost definitions to adopt the requirements for review set out in schedule 3 of the Bill.

Clause 70 Reviewable decision notices
As a result of the open standing requirements for many of the decisions made under the Bill this clause clarifies when and to whom a decision maker is required to give a reviewable decision notice. The ombudsman must also give reviewable decision notices to participants in the review as these decisions may be reviewed by three members of ACAT (see clause 79).

Clause 71 Applicant for review to tell decision-maker of application
A person who makes an application for review must notify the agency or Minister who made the decision of their review application. This is to ensure that where relevant third parties apply for review of a decision and therefore the information cannot be disclosed to an applicant (see clause 36) that the agency or Minister is aware of the application and of their consequent obligation not to release the information until the review is completed.

Additionally this requirement will ensure that as any person can apply for review to two different review bodies there cannot be competing reviews of the same decision (see clause 81).

Clause 72 Onus
In all applications for review the onus in that review is placed on the party seeking to prevent the disclosure of information to establish that it is contrary to the public interest to release the information. Consistent with the way that initial decision makers must approach the determination of the public interest test in clause 17, the objects of the Bill set out in clause 6 and the mandated bias towards disclosure set out in clause 9 the review equally begins with the scales laden in favour of disclosure.

The party seeking to prevent the disclosure, whether that is an agency or Minister or a relevant third party, must be able to demonstrate that the harms to the community would outweigh the benefits and therefore that on balance it would be contrary to the public interest to disclose the information.

Clauses 73-74 Ombudsman review
The ability to apply for review of decision has been significantly expanded and for most decisions made under the Bill (eligibility to make an application is set out in schedule 3) any person will be able to apply to the ombudsman for review of a reviewable decision within 20 working days of the decision being made.

However, the ombudsman does have a broad discretion to extend the time for making an application for ombudsman review. A decision by the ombudsman to permit or refuse an out of

time application for review is not subject to review as a person seeking to review has the option of making that application to the ACAT which also has a discretion to allow an out of time application (see clause 79).

Clause 75 Notice to give information or attend ombudsman review
This clause complements the requirement in clause 66 to ensure that the ombudsman has all the relevant information available for deciding applications for ombudsman review.
The ombudsman will be able to compel a person to give additional information relevant to the review either in writing or by attending a place to answer questions from the ombudsman.

Clause 76 Participation in ombudsman review
This clause allows for other parties who may have an interest in a review to participate in an ombudsman review. Government information will often be relevant to a number of people or groups in the community and other individuals and entities will be able to participate in the review process to ensure that all the arguments and relevant factors relating to the public interest in the information are thoroughly considered by the review.

Clause 77 Mediation for applications
This clause provides that the Ombudsman may refer a matter to mediation if the ombudsman considers that mediation is like to resolve the matter. It may be that mediation can help to clarify the particular information that an applicant wants access to, which at the very least will narrow the scope of what is at issue for the review.

Alternatively the additional opportunity for the parties to consider the appropriate balancing of the public interest may resolve the dispute and either generate an agreement for some additional information to be provided or an agreement that it is on balance contrary to the public interest to release the information. Determining when it is appropriate to send the matter to mediation will very much depend on the particular circumstances, including the nature of the information in question, the nature of the decision of the agency or Minister and any material provided by the applicant.

Clause 78 Ombudsman review
If a matter is not resolved by mediation or remitted to the original decision maker for further consideration, the ombudsman must review the decision and either confirm, vary or set aside the decision. The ombudsman must undertake a full merits review of the decision and may exercise any function given to the original agency or minister for making the decision.

The ombudsman may decline to review a decision if sufficient information is not provided to the ombudsman to allow for the review or the ombudsman considers that there are no reasonable prospects that the original decision may be varied or set aside. The ‘no reasonable prospects’ test applies to the outcome of the review, that is whether or not there is any prospect that the application for review will result in additional information being made available (or being prevented from being made available) and must be considered in the context of the scheme being created by the Bill. In further considering the application of this test it is important to note that:

> No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content. Nor can the expression usefully be understood by the creation of some antinomy intended to capture most or all of the cases in which it cannot be said that there is “no reasonable prospect”. The judicial creation of a lexicon of words or phrases

intended to capture the operation of a particular statutory phrase like "no reasonable prospect" is to be avoided.[38]

The intention of the provision is to avoid the need to undertake futile reviews that have 'no reasonable prospect' that the ombudsman may come to a different decision than that reached by the original decision maker.

In contrast to the Commonwealth and Queensland schemes which do not impose fees for information commissioner reviews, in this Bill a fee may be charged for ombudsman review (see clause 96). Where the applicant for the review is to an extent successful in the ombudsman review the ombudsman may direct that the application fee be refunded. The ombudsman is given discretion about when a fee should be refunded to allow for the scope of decisions that may be made.

If for example the applicant was given access to all the information that had been refused by the respondent then it is anticipated that the fee will be refunded as it is not appropriate to make a person pay an additional charge for information that they should have been provided in response to the application. However, where an application involves the partial release of the information requested and an ombudsman review only allows for a very small amount of additional information it may be that it is not appropriate to refund the fee. It most instances where additional information is provided it is anticipated that a refund will be given.

Similar to the information commissioners for the Commonwealth and Queensland, the ombudsman must publish the reasons for a decision on an FOI review.[39]

Clause 79 Questions of law to ACAT

This clause allows the ombudsman to refer a question of law to the ACAT, which must be constituted by 3 members. If the ACAT decides the question of law the ombudsman is then bound to apply that decision is deciding the review.

Clause 80 Review of decisions by ACAT

Where a person is dissatisfied with the decision either of an agency or Minister or of the ombudsman on an ombudsman review the person may apply to ACAT for a review of that decision. This is an important feature of the Bill, as it allows for different mechanisms of review to be selected by the person seeking review of a decision.

In most instances, it is anticipated that a person would first apply for ombudsman review however, there may be situations where the matter is particularly important or contentious or because of the likely timeframe for decision and resolution of the dispute and the person may want the matter to be resolved by the ACAT directly. If the ombudsman decision on an ombudsman review is the subject of the application the ACAT must be constituted by 3 members.

An application for ACAT review must be made within 20 working days after the decision is made or a longer period permitted by ACAT.

[38] *Spencer v Commonwealth of Australia* [2010] HCA 28 at [58].

[39] The decisions of Commonwealth Information Commissioner can be found at http://www.austlii.edu.au/au/cases/cth/AICmr/; the decisions of the Queensland Information Commissioner can be found at http://www.austlii.edu.au/au/cases/qld/QICmr/.

Where an applicant for review is successful the ACAT may order the agency or Minister to pay the reasonable costs of the applicant arising from the application (see schedule 4 clause 4.1)

Clause 81 Participation in ACAT Reviews
This clause allows for the other parties who may have an interest in a review to participate in an ACAT review. Government information will often be relevant to a number of people or groups in the community and other individuals and entities will be able to participate in the review process to ensure that all the arguments relating to the review and the public interest in the information are thoroughly considered by the review.

Clause 82 Remitting applications to ACAT for consideration by ombudsman
In order to ensure that the dual review mechanisms can work concurrently this clause ensures that where competing applications for review are made by different people that the review is first heard by the ombudsman.

Clause 83 Costs of appeal to Supreme Court
This clause prevents a cost order being made against a person if they have been successful in an ACAT review of a decision and the government agency or Minister continues to oppose release of the information. Costs may still be awarded to the respondent if the court considers that is appropriate exercising its normal discretion on the award of costs.

If a third party has applied for review to prevent disclosure of information and has been successful and the government wishes to release the information under the Bill, it may apply for review of the issue to the Supreme Court. Similarly, costs will not be available if the third party is unsuccessful in the Supreme Court.

Part 9 Offences
This part sets out a range of offences to protect the integrity of the scheme and ensure that decisions are made correctly without improper influence, consistent with clause 20 and to protect the integrity of government records.

Clause 84-88
Each of these offence provisions is necessary to protect the integrity of the scheme and ensure that people act honestly in fulfilling their functions or alternatively that they are free to exercise their function free from interference by others. Clause 20 sets out the independence of the information officers and the offence provisions set out in clauses 84 and 85 will assist in the enforcement of that independence.

Part 10 Miscellaneous
This part sets out a range of miscellaneous provisions that will assist in the implementation of the scheme. Some of these provisions could be characterised as of a general administrative nature to ensure the overall operation of the scheme and others form vital parts of the framework to ensure that government information is available to the community.

Clause 89 Annual statements by Chief Minister
At the Commencement of the RTI Act in Queensland the then Premier circulated throughout the public service a “Statement of Information Principles for the Queensland Public Service”. The statement reads:

"Information is the lifeblood of democracy. To reach its full potential, a State like Queensland needs citizens who are informed and a government that is open and responsive...

At the heart of these reforms will be a public service that conducts itself in the most open and transparent way possible, because that openness and transparency are fundamental to good government. The processes of government should operate on a presumption of disclosure, with a clear regard for the public interest in accessing government information. The Queensland public service should act promptly and in a spirit of cooperation to carry out their work based on this presumption...

It is the Queensland Government's expectation that the Queensland public service recognises and respects that Government is the custodian of information that belongs to the community and will:

- Maximise the public's access to government information by administratively releasing information where ever possible, so that recourse to the *Right to Information Act 2009* and the *Information Privacy Act 2009* is a matter of last resort.

and

- Act to process requests for information rapidly and fairly, rendering all possible assistance to the community in responding to their requests for information."[40]

Recognising the importance of the approach taken to the implementation of the Bill, and the need for whole of government leadership to properly implement the reforms, this clause requires that the Chief Minister make an annual statement about the expectations placed on agencies for the release of information, and how the government proposes to improve the pubic accessibility of government held information.

This will help to demonstrate that there is a commitment to reform and also that particular areas of the reform can be continually refined and then evaluated to ensure that progress continues to be made in efficiently providing government information to citizens.

Clause 90 Annual reports to Legislative Assembly

This clause requires each agency to include in its annual report details about the agency's handling of FOI requests. This will be an important accountability measure for agencies and will complement the ombudsman reports required by clause 67.

Clause 91 How government information to be published

This clause applies both to open access information (see clause 23) and other information required to be published by the government under another Territory law. Currently there is a variety of publication and notification requirements, harmonising them here in a manner more consistent with contemporary expectations should address some of the existing shortcomings across the different requirements in different laws. For example if another law requires the information to be published in a newspaper that must be done in addition to the requirement for publication under this clause.

The clause sets out the requirement for publishing open access information. An agency must make the information available on their website and they must make a hard copy available for inspection if requested.

[40] See David Solomon, *FOI Reform or Political Window Dressing?* (2010) 62 AIAL Forum 1.

In publishing the information on a website the agency must publish the information in a way that complies with the web content accessibility guidelines level AA. The abstract to the guidelines states:

> Web Content Accessibility Guidelines (WCAG) 2.0 covers a wide range of recommendations for making Web content more accessible. Following these guidelines will make content accessible to a wider range of people with disabilities, including blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these. Following these guidelines will also often make your Web content more usable to users in general.[41]

Additionally the information must be published in a manner that provides user of the information with the same range of functions as were available to the agency itself. For example in an unsecured format that is able to be searched, copied and pasted and used by the public.

Clause 92 Administrative unit entitled to access to information of entity performing regulatory function

This clause entitles the agency responsible for an entity to access the information of that entity where the entity exercises a regulatory function. The principle is that where an entity exercises a statutory function for a public purpose it should be subject to the same requirements as a public body that would otherwise exercise the role.

Clause 93 Government contracting obligations

Increasingly governments contract private operators to perform services traditionally provided by government. This clause will ensure that wherever a service is provided by a private entity under a contract that the agency must ensure that it can access information relevant to the provision of the services. In turn this means that the general public can also access (subject to the public interest test) the information and the Bill will apply to the information.

Clauses 94 and 95 Government information of abolished agencies and transfers of Ministerial responsibility

These clauses set out the processes to ensure that when administrative arrangements, for either a government agency or a Minster, there is a mechanism in place so that the information held by the agency or Minister continues to be available to the public.

Clause 96 Protection from liability

Where an official acts honestly and without recklessness they are protected from civil or criminal liability in the exercise of their functions under the Bill. For example where an information officer releases information that they honestly believe not to be contrary to the public interest to release they will not be liable for any loss or damage that may come about from that release.

Clause 97 Determination of Fees

This clause provides that the only variable upon which a fee may be determined is the amount of information provided to the applicant. This issue is referred to in both the Solomon Review and

[41] Available at http://www.w3.org/TR/WCAG/.

the ALRC Review.[42] The clause attempts to strike a balance between recognising the right to information and the costs that are inevitably incurred in retrieving that information.

Ensuring that there is no fee for processing time encourages agencies to be efficient. At the same time changing for the volume of material provided in response to the request recognises the relative workload associated with the application.

The Bill does allow for application fees to be charged, however it also provides that the first 50 pages of information must be provided with no additional change.

Clauses 98 and 99 No fees for certain matters and fee estimates
These clause sets out the circumstances where fees must not be charged and also the process for agencies or Ministers to tell applicants of the potential fees involved for processing requests.

Clause 100 Fee waiver
A person who has made an access application can also apply for a waiver of fees associated with the request, either at the time of making the request or later when they are told of the cost of the request. There are certain circumstances where fees must be waived and otherwise a fee may be waived where the application or information being disclosed is of special benefit to the public generally.

Clause 65 provides for guidelines on the application of this test to be developed by the ombudsman. The central point is that where the processing of a request and the information subsequently released is particularly important to the public generally, or a group of the community, it is more appropriate that the government rather than a particular individual bear the cost of providing that information.

The NSW Information Commissioner describes the application of the special benefit to the public generally test as:

> There is no prescriptive definition of "special benefit to the public generally". However, as a general guide, information that better informs the public about government or concerns a publicly significant issue would be of special benefit or special interest to the public generally.
>
> For example, if the information would inform public debate about an issue, increase public understanding about government functions, or contribute to the public's understanding of an issue of public significance (such as the environment, health, safety, civil liberties, social welfare, or public funds), then this would have a special benefit. Information that could be viewed as satisfying public curiosity would not ordinarily satisfy the special benefit ground.[43]

The NSW guidelines also set out the following questions to assist in making the determination:

(a) Does the information relate to an issue of public debate?
(b) Does the information relate to an issue of public significance (for example, the environment, health, safety, civil liberties, social welfare, public funds, etc)?

[42] See Report by the FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, 2008 chapter 14; Australian Law Reform Commission Report No 77, *Open Government - A Review of the Federal Freedom of Information Act 1982* chapter 14.
[43] Office of the Information Commissioner NSW, *Guideline 2: Discounting charges – special benefit to the public generally*, March 2011, p6.

(c) Does it interest or benefit the public in some other way? (for example by assisting public understanding about government functions)?
(d) Would release of the information likely result in further analysis or research?
(e) Would the information add to the public's knowledge of the issues of public interest?[44]

Similarly in the context of this Bill (which aims to *inter alia* "facilitate and promote, promptly and at the lowest reasonable cost) the disclosure of the maximum amount of government information" (see clause 6) the intention of this clause is to allow for fees to be waived in circumstances where there is a particular benefit to the public such that there should not be a charge imposed.

Clause 101 and 102 Approved forms and Regulation making power
This clause delegates the ability to approve forms for the Bill and delegates legislative power to the executive to make regulations for the Bill. The exercise of this power is conditioned on consultation with the ombudsman.

The regulation may not reduce the scope of the Act or potentially narrow the availability of information to the community as doing so would be inconsistent with the objects and purpose of the Bill.

Clause 103 Review of Act
The Bill represents a significant change in the way information is made available to the community. The clause requires that an independent entity undertake a review of the scheme following its first three years of operation. This is to ensure that an objective analysis of all aspects of the new scheme can be undertaken and used to consider whether changes should be made to the scheme with the benefit of the first three years of its operation to consider.

Part 11 Repeals and consequential amendments
This part repeals the current FOI Act and FOI regulation and formally provides for the consequential amendments set out in schedule 4.

Part 12 Transitional
This part sets out the transitional arrangements and provides that where a request for information has been made under the current FOI Act section 14 before the commencement of the Bill and the request hasn't been decided it must continue to be processed under the current FOI Act.

However a request decided under the current FOI Act is not considered to be a previous request for section 41(1)(f). In effect this means that where a person receives a decision under the current FOI Act that they believe involves a failure to disclose information where it is not on balance contrary to the public interest to disclose the information they may make a new application for the information under the Bill. Rather than applying for review of a decision they are dissatisfied with they can make a new application under the new scheme however the option to review the decision under the current FOI Act will nevertheless continue.

Schedule 1 Information deemed to be contrary to the public interest to release
Schedule 1 sets out the categories of information that the Assembly has determined are, on balance, contrary to the public interest to release. These are the categories of information that the Assembly considers are always contrary to the public interest to release and where it will never

[44] Office of the Information Commissioner NSW, *Guideline 2: Discounting charges – special benefit to the public generally*, March 2011, Appendix A.

be the case that there may be another factor that could make release in the public interest. Some of the information in schedule 1 replicates existing exemptions provisions in the current FOI Act however as much as possible it is cast a more narrowly and relates to specific information that would actually be harmful to the public interest to release rather than broad category based exemptions.

Schedule 2
The factors for and against the disclosure of information listed in the proposed schedule 2 have been adapted from the provisions in the QLD RTI Act. The list of factors is not exhaustive and a decision maker is required to take into account all relevant factors in the circumstances of the application.

The factors themselves are relatively self explanatory and the way in which they apply to specific information and decisions will depend on the particular context of the decision and the nature of the information.

Schedule 3 Reviewable decisions
Schedule 3 sets out the decisions that are subject to merits review and who can make applications for review. Generally any person can make an application for review. Where a decision essentially affects only the applicant review is restricted, otherwise anyone can have a decision reviewed by either the ombudsman or ACAT (see Part 8).

As information is a public resource and everyone has a right to access the information subject to the Bill it is necessary to allow anyone to apply for review. To do otherwise would be to allow a person who had applied to monopolise what then happened when they have no greater interest in the information than anyone else. If the general right to information provided in clause 7 was not sufficient to create an interest in the decision others would then have to go through an unnecessary process of applying for the information and arguing the merits of a refusal to process rather than just dealing with the information itself.

Schedule 4 Consequential Amendments

Part 4.1 ACT Civil and Administrative Tribunal Act 2008
Clause 4.1 New section 48A
Section 76 of the current FOI Act provides that ACAT may make a recommendation that an agency pay the costs of a successful or substantially successful applicant. This clause goes a step further and provides for the ACAT to make orders for costs in relation to FOI decision review.

Parts 4.2 – 4.8
These clauses make minor changes to the *Children and Young People Act 2008, Construction Occupations (Licensing) Act 2004, Crimes (Restorative Justice) Act 2004, Election Commitments Costing Act 2012, Gene Technology Act 2003, Government Procurement Act 2001* and *Health (National Health Funding Pool and Administration) Act 2013* to make the references to the FOI Act currently in those Acts consistent with the Bill.

Part 4.9 Housing Assistance Act 2007
Clause 4.9 Section 29
This clause omits section 29 of the *Housing Assistance Act 2007* (HAA) which currently sets out that protected information under that Act is exempt information for the purposes of the FOI Act.

This provision is no longer necessary as item 1.3 of schedule 1 declares that protected information under section 28 of the HAA is contrary to the public interest information.

Part 4.10 Independent Competition and Regulatory Commission Act 1997

Clause 4.10 Dictionary, definition of confidential information, paragraph (b)

This clause makes a minor change to the dictionary of the ICRC Act to make the reference to the FOI Act consistent with the Bill.

Part 4.11 Ombudsman Act 1989

Clause 4.11 and 4.12

These clauses amend the *Ombudsman Act 1989* to recognise the new role that the ombudsman will have under the Bill.

Parts 4.12 – 4.15

These clauses make minor changes to the *Planning and Development Act 2007, Road Transport (General) Act 1999, Road Transport (Public Passenger Services) Act 2004* and *Road Transport (Vehicle Registration) Act 1999* to make the references to the FOI Act currently in those Acts consistent with the Bill.

Part 4.16 Territory Records Act 2002

Clauses 4.17 and 4.18

These clauses make minor changes to the TRA to make references to the FOI Act consistent with the changes created by the Bill and update a note.

Clause 4.19 Section 7

This clause replaces the definition of Agency in the TRA. The new definition of agency in the Bill (see the Dictionary) removes the concept of prescribed authority, consistent with that change this clause updates the definition in used in the TRA. The clause adds in a reference to a territory-owned corporation or a subsidiary of a territory-owned corporation as these were previously proscribed authorities (and therefore agencies) under the current FOI Act.

Clause 4.20 Section 8

This clause harmonises the meaning of 'principle officer' with the definition for the FOI scheme created by the Bill.

Clause 4.21 Section 21 (2) and note

This clause makes a minor change to update the section to reflect the new FOI scheme created by the Bill.

Clause 4.22 Section 28

This clause sets out the basis on which the director may issue a declaration applying the provisions of the new FOI scheme. After a period of 20 years has expired since the creation of the information will no longer be subject to the FOI scheme and instead is available to the public under the TRA unless a declaration is issued by the director.

This clause sets out the circumstances where a declaration may be issued. Effectively it means that if a declaration is issued, then the public interest test set out in the Bill (see clause 17) must be applied to determine if the public can access the information, or that it will continue to be

deemed to be contrary to the public interest to release if it is information listed in schedule 1 of the Bill.

Clause 4.23 and 4.24
Similar to the mechanisms put in place for the release of government records in clause 4.22, these clauses amend the mechanism for preventing the release of executive records if the release of the records would, or could reasonably be expected to, endanger the life or physical safety of a person, prejudice law enforcement, unreasonably disclose personal information about any person (including a deceased person). The current scheme for the later release of the information in these circumstances remains unchanged.

Clauses 4.25-4.28
These clauses make minor amendments to the TRA to make references to the FOI Act consistent with the Bill.

Utilities Act 2000
Clause 4.1X Section 51(3)
This clause makes a minor change to *Utilities Act* to make the reference to the FOI Act consistent with the Bill.

Dictionary
The dictionary sets out the meaning of certain terms used in the Bill. These are largely self explanatory however 2 particular changes are worth noting.

Agency
The definition of agency is a broad as possible to ensure the maximum amount of government information is covered by the Bill. The definition includes government directorates as well as a range of other government entities including the Office of the Legislative Assembly. This means that all the information held by the Office is subject to the requirements of the Bill.

The definition ensures that every entity that might be created (in the absence of exemption by an Act) will be subject to the Bill. Other jurisdictions have had difficulty ion this area and the Bill is very clear that in the absence of the Assembly legislating otherwise there can be no government body that is not covered by the FOI scheme.

This issue has been discussed in a number of FOI reviews. The Australian Law Reform Commission in their review of the Commonwealth FOI Act said:

> "[T]o prevent loss of accountability because information relating to the provision of a service is in the possession of a private sector body and not a government agency. This issue needs to be addressed to ensure that all information necessary for government accountability purposes is available to the public."[45]

[45] Australian Law Reform Commission, Report 77, *Open government: a review of the federal Freedom of Information Act 1982* (1995), [15.10].

The Administrative Review Council recommended that, "The *Freedom of Information Act 1982* should be further amended to require contractors to provide these documents to the government agency when an FOI request is made."[46]

The Solomon report recommended that "The definition of 'public authority... should be extended to include bodies established for a public purpose under an enactment of Queensland, the Commonwealth or another State or Territory."[47]

This issue was the subject of *Davis v City North Infrastructure* [2011] QSC 285. In that case the court concluded that in the absence of a change to the statutory language used in the RTI Act, City North Infrastructure Pty Ltd which was responsible for the procurement of the Airport Link and Northern Busway Projects and associated works and the contract management of the Airport Roundabout Project, was not subject to the RTI Act.

This definition of agency used in the Bill is designed to prevent the problem highlighted in *Davis* and ensure that all government entities, including incorporated entities under the *Corporations Act 2001* (Cth) are covered by the Bill.

Territory authority and territory instrumentality

These definitions are largely the same as currently set out in the Legislation Act however there is an important distinction. The current definition is the legislation Act provides the capacity for regulations to declare that an entity that would otherwise be within the definition to be excluded. This capacity has been removed from the definition in the bill so that any entity that fulfils the criteria of x and y is within the definition of the agency and subject to the scheme created by the Bill.

[46] Administrative Review Council, Report no. 42, The Contracting out of Government Services (1998), recommendation 16.

[47] FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, 2008 ('Solomon Report'), recommendation 24, p90.