**LEGISLATIVE ASSEMBLY FOR THE**

**AUSTRALIAN CAPITAL TERRITORY**

# FREEDOM OF INFORMATION BILL 2016

# EXPLANATORY STATEMENT

Circulated by
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## Introduction

This explanatory statement relates to the Freedom of Information Bill 2016 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 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:

- provide a public right of access to government information;
- promote public participation in government decision making and increase government accountability;
- promote a culture of openness and transparency in government; and
- improve public understanding of government decisions and confidence in government processes.

The Bill repeals the existing *Freedom of Information Act 1989* and creates a new modern freedom of information (FOI) scheme. Underpinning the Bill is the principle that a public right to government information is essential for an effective democracy. Consequently the Bill is designed to make information held by the Government more accessible to the community than it has ever been before. The Bill creates a statutory right of access to information held by the Government wherever it is not contrary to the public interest for that information to be disclosed and sets up a clear framework for determining the public interest in the disclosure or non disclosure of government 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* ('QLD RTI Act') with some important changes to improve the efficacy of the scheme and further increase the availability of government information**.**

The Bill removes the class based exemptions that exist under the current FOI scheme and recognises that the public interest in the disclosure of information will depend on the nature and circumstances of the particular information in question rather than the class of information that it happens to be part of.

Instead of broad exemptions to the public right to government information the Bill deems a number of discrete categories of information, defined either by reference to specific legislative provisions or by the outcomes which can be expected to occur if it is released, to be contrary to the public interest to disclose. There are only two reasons for information to be deemed contrary to the public interest to release. Firstly where it is necessary to keep the information confidential to protect essential public interests (which may include the protection of individual rights such as the right to privacy) and secondly where the information is held by certain statutory office holders who must decide the release of information under a different statutory scheme and where the information they have obtained from another government agency may be able to be accessed through that agency directly. For example schedule 1 deems information related to audits conducted by the auditor-general to be contrary to the public interest to disclose. Given that the auditor-general is required to make a decision about the publication of information obtained from an agency under the *Auditor-General Act 1996* and the information held by the agency will be available from the agency directly it is not necessary for this information to be available from the auditor-general under the FOI scheme.

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 provides that a range of information including policy documents, details about agency activities and budgeting, certain expert reports and from three years after they are written: incoming minister briefs, question time briefs and estimates and annual reports briefs must be proactively published by agencies unless it is contrary to the public interest to do so.

The Bill 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 set out 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. Agencies will be required to appoint designated information officers who will independently make determinations for the 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. Similar to information commissioners and ombudsmen in other jurisdictions the ACT ombudsman will play a very important role in the new scheme. The ombudsman is given the responsibility for reviewing decisions and investigating complaints as well as making legislative instruments and publishing guidelines on the operation of the scheme.

Consistent with the recognition and importance of the role of information officers as the senior decision maker for information access requests and open access information publication within an agency, the Bill does not include an option for internal review. Applications for review of information officer decisions as well as ministerial decisions can be made to the ombudsman who will have the same jurisdiction as the decision maker to consider the matter and make a determination on the application. Subsequently review of ombudsman decisions will be available in the ACT Civil and Administrative Tribunal (ACAT).

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

The Bill clarifies the relationship with the two other main statutory mechanisms for accessing government information; the *Territory Records Act 2002* (TRA) and the *Health Records (Privacy and Access) Act 2007*. Typically government information will be accessible through the Bill until the time when the TRA 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 consequently are only available under the *Health Records (Privacy and Access) Act 2007*.

The Bill also:

- provides for clearer timeframes for consideration of requests and disclosure of information;
- limits the circumstances in which an agency or Minister 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;
- simplifies the fee arrangements and 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; and
- updates definitions; and makes other practical changes to improve the efficient provision of government information to the community.

## 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*).

<u>Freedom of Expression and the Right to Take Part in Public Life</u>

It is well accepted that a person cannot meaningfully take part in the conduct of public affairs without access to information about those affairs.[1]

Both internationally and in Australian domestic courts and tribunals, 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:

[1] 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).

> 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 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.[2]

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.'[3]

In Australia a person's ability to participate in and influence government decision-making has been recognised as a fundamental right.[4] Justice Bell in *XYZ v Victoria Police*[5] held that, "the human right to freedom of expression incorporates a positive right to obtain access to government-held documents."[6] This view has since been endorsed by the ACT Civil and Administrative Tribunal (ACAT) in *Allatt & ACT Government Health Directorate*.[7]

Consistent with the ACAT and VCAT decisions the Bill explicitly provides for the positive right to access government information and significantly narrows the scope of information that is not required to be made available. The right is restricted only where it is contrary to the public interest to release the information and the public interest test allows for the balancing of important individual rights with the public right to government information.

<u>Right to privacy</u>
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 38). Schedule 1 deems a range of personal information to be contrary to the public interest to release, it also protects the identity of people who have made certain reports or complaints under other statutory schemes, for example the mandatory reporting of suspected child abuse under the *Children and Young People Act 2008* and public interest disclosures under the *Public Interest Disclosure Act 2012* (see clause 1.11 of Schedule 1). Schedule 2 sets out the

[2] *S.P. Gupta v. President of India and Ors* [1982] AIR (SC) 149, p. 234.
[3] *Guerra and Ors v. Italy* [1998] 7 Eur Court HR at [52].
[4] *Re Eccleston and Dept of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 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 also New South Wales Ombudsman, *Discussion paper: review of the Freedom of Information Act 1989* (NSW Ombudsman 2008), p27.
[5] *XYZ v Victoria Police* (General) [2010] VCAT 255.
[6] Ibid at [583].
[7] *Allatt & ACT Government Health Directorate* (Administrative Review) [2012] ACAT 67 at [69-70].

public interest factors that must be considered when determining the public interest and contains an explicit recognition of the public interest in protecting the human rights, including the right to privacy, of individual citizens (see schedule 2 clause 2.2(a)(ii). Any limitation on a person's right to privacy must be considered by the decision maker and balanced against any relevant public interest 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 (see clause 65). Consistent with the intention of the Bill to increase the availability of government information without the need for FOI requests, the ombudsman, as the person responsible for oversight of the scheme and as an independent officer of the Parliament[8] will be best placed to determine whether there are additional categories of information that should be required to be routinely published by government agencies.

The scope of the power is limited and it operates 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 required to be disclosed as open access information is subject to the public interest test for publication. A declaration by the ombudsman 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 may be prescribed by regulation (see clause 23). 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 (unless otherwise specified in an Act) a regulation is subject to the disallowance of the Assembly.[9]

The ombudsman is also given a general power to create non binding guidelines for the operation of the Bill (see clause 66). Whilst not technically a delegation of legislative power the guidelines will nevertheless play an important practical role in the application of the Bill. 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.

**Administrative powers created by the Bill**

Administrative decisions made under the Bill will be made by the appointed information officer for each agency and persons directed by the Minister in the case of requests for information held by a Minister (see clause 33). Recognising the significance of these decisions the Bill provides that agencies must appoint information officers who have specific statutory functions (see clauses 18 and 19). 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 – see clause 20). The Bill puts in place corresponding offences to ensure that decisions are made free from interference (see part 9 of the Bill).

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[8] *Ombudsman Act 1989* s4A.
[9] *Legislation Act 2001* chapter 7.

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. Whilst there is a discretion given to the executive in the determination of the public interest, a methodical process that is as constrained and objective as possible is set out for making the determination of the public interest (see clauses 6, 9 and 17). 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. With the exception of a decision to consult with a third party (see clause 38) all the decisions made by information officers and delegates of a Minister are subject to review by the ombudsman. Subsequently review of decisions made by the ombudsman (with the exception of a decision that an application for review has no reasonable prospects of success (see clause 82)) is then available in 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 (6 months after the Act's notification day) 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 the 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 public interest test that will determine access to government information, the relationship with the 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

The underlying objectives of the Bill are to facilitate public participation in government process and decision making and to provide an accountability mechanism for executive conduct.

The objects listed in the clause set out the values underpinning the Bill as well as the desired outcomes that will be achieved from the increased public availability of government information provided for by the Bill. The objects are intended to remove any uncertainty that may have previously existed in the interpretation of the objects and purposes of FOI Acts and clarify the intention underpinning the Bill.[10] The objects make plain that the purpose of the Bill is to 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 the information such that it would be contrary to the public interest to release it.

[10]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.

The appropriate contents of an FOI objects clause are discussed extensively by both the Queensland Independent Review Panel report, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, 2008 (Solomon Report) and the NSW Ombudsman report, *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 Solomon Report recommendations 17 and 18 deal with the reasons for an FOI scheme and specifics of what should be included in the objects clause.[11] The NSW Ombudsman Report recommended that the objects of an FOI scheme should be:

- to provide the right of access to information held by the NSW Government unless, on balance, it is contrary to the public interest to disclose that information; and
- to enable people to participate in the policy and decision-making processes of government, to open government activities to scrutiny and to increase the accountability of government. [12]

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

<u>Clause 7 Right of access to government information</u>
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 government information 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 (see clause 6).

<u>Clause 8 Informal requests for government information</u>
The Bill is intended to facilitate the provision of information as quickly and as easily as possible and this clause authorises agencies to provide information in response to an informal request. This clause recognises that there will be much information that can simply be provided in response to an informal request rather than having to be subject to an access application and go through the process set out in Part 3.

However the Bill does not mean that officials are free to disclose anything they wish and section 153 of the *Crimes Act 1900* will continue to apply to officials who are not authorised by the agency to release the information on its behalf. Additionally the clause does not authorise the release of information that is the subject of a law that prohibits the disclosure of the information (a secrecy provision). Whilst it will at times be in the public interest for information that is the subject of a secrecy provision to be released, where the Assembly has enacted secrecy provisions to protect certain information, it is not appropriate that the information be released without the

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

proper process for determining access set out in the Bill taking place to ensure that it is not contrary to 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 scheme it is anticipated that this provision will be utilised to avoid the need for the formal information access application process wherever possible. This is consistent with the Solomon Report[13] and also the more recent *Australian Government Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010* (The Hawke Review) recommendation to promote access to information without the need for formal requests.[14]

To assist in the effective use of the clause the ombudsman will be responsible for publishing guidelines to provide further clarity on when information should be released in response to informal requests (see clause 66).

<u>Clause 9 Promoting access to government information</u>

To clarify the Assembly's intention and assist in the application of discretions given to decision makers by other clauses of the Bill this clause requires decision makers to apply the provisions of the Bill with a pro disclosure bias.

When considering whether or not disclosure of information is required under the Bill the decision maker must approach the decision presuming that the information should be released, either as open access information or in response to an access application, and needing to be positively convinced that it is contrary to the public interest to release the information. If 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 this clause will have the effect of requiring that the discretion be exercised in favour of disclosure.

<u>Clause 10 Act not intended to prevent or discourage publication etc</u>

The effect of the Bill is to set out when 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. 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. Notwithstanding that the only basis for the non disclosure of information under the Bill is that it is contrary to the public interest to disclose the information, it may be the case that information that is deemed to be contrary to the public interest to disclose by Schedule 1 should in the circumstances be publicly released.

<u>Clause 11 Relationship with other laws requiring disclosure</u>

The Bill does not affect the operation of any other law that requires the disclosure of government information. Other requirements for the publication of information will continue to provide an important mechanism for the provision of information to the public and will continue to operate as they currently do. This includes for example 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*.

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[13] FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, (2008) chapter 3.

[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).

However, in addition to any other requirements for publication set out in other Acts, information that must be published under another Act will now also be required to be published in the same manner as open access information. 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 relevant agency will also be required to publish the information on the internet (see clause 97).

Clause 12 Relationship with other laws prohibiting disclosure

For the purposes of deciding access to information under the Bill, as opposed to the informal release of information authorised in clause 8, the Bill will override the provisions of any other law that prohibits the disclosure of the information. The effect is that where it is not on balance contrary to the public interest to do so, an agency or Minister will be required to disclose information notwithstanding that it is otherwise subject to a prohibition on disclosure.

Whilst the restriction imposed on disclosure by the secrecy provision will not apply for the determination of access under the Bill, that is the secrecy provision will not operate to prevent the disclosure of the information found not to be contrary to the public interest to release, it will be relevant to the determination of the public interest. In response to an access application for information that is not taken to be contrary to the public interest to disclose in schedule 1, an agency or Minister will be required to assess the public interest in the disclosure of the particular information by applying the public interest test set out in clause 17. The fact that the information is subject to a law prohibiting its disclosure and the reason underpinning the prohibition will be relevant considerations for the decision maker that must be balanced against any other relevant factors favouring disclosure (see Schedule 2 section 2.2(b)(iv)).

It will remain prohibited for information that is subject to a secrecy provision to be released informally without the formal FOI application and decision making processes having been fulfilled.

It is important to note that in addition to overriding other laws prohibiting disclosure it is also the intention of the Bill that it overrides the interpretive presumption set out in section 171 of the *Legislation Act 2001*. The effect of the Bill is that the common law privilege against disclosure know as client legal privilege or legal professional privilege will not apply to prevent the release of government information that is subject to the privilege but otherwise not on balance contrary to the public interest to release.

In effect whilst the fact that the information is subject to client legal privilege will be relevant to the determination of whether or not it is on balance contrary to the public interest to release the information it will not automatically prevent the disclosure of the information. Schedule 2 clause 2.2(b)(ii) of the Bill recognises the public interest in protecting the confidentiality of legal advice and this will be a significant factor in determining whether it is on balance contrary to the public interest to release the information.

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 4.26 of the Bill complement the provisions in this clause; notes to the consequential amendments to the TRA are set out below (see clauses 4.36 – 4.47).

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[15] and that executive records are open to public access on the next Canberra Day after the end of 10 years after the record came into existence.[16]

Under the Bill the FOI and TRA schemes will work harmoniously 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 no longer apply to the information. However, if a declaration has been issued under section 28 or section 31G of the TRA (as amended by the Bill, see clauses 4.40 -4.42) 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."[17] Government information for the purposes of the Bill includes both the information that an agency or Minister holds and information that they are entitled to access.

The definition avoids the issue of actual or constructive possession[18] and ensures 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 primarily responsible for it.

Together with the explicit provision for access to information held by non-government regulators (see clause 99) and entities contracted to provide services (see clause 100) as well as the expansive definition of 'agency', the definition of government information is designed to be as expansive as possible to capture everything that one would ordinarily expect to be considered government information and ensure that the scope of the Bill is as broad as possible.

In relation to information held by a Minister there are two classes of information that are not included within the definition: information relating to the personal or political activities of the Minister and information received as a Member of the Assembly. Consistent with section 9 of the *Territory Records Act 2002* the intention is to capture information that relates to the Ministers role as a member of the Executive and consequently information such as committee papers are not included within the definition.

Clause 15 Meaning of Agency

The clause lists each of the types of entities that exist as part of the ACT Government. Within the definition are territory instrumentalities and territory authorities which are further defined in the dictionary to cover any entity that the Executive or the Assembly might create. The definition is designed to implement the Solomon Report recommendation 24[19] and together with the comprehensive definition of government information in clause 14, the definition of agency is

[15] *Territory Records Act 2002* section 26.
[16] *Territory Records Act 2002* section 31B.
[17] The Macquarie Dictionary Online, www.macquariedictionary.com.au.
[18] See *Beesley v Australian Federal Police* [2001] FCA 836 at [73]-[75].
[19] FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act,* 2008 ('Solomon Report') chapter 7.

designed to ensure that all government entities, and all the information that they hold, are subject to the Bill. [20]

The intention is that while access to some information held by an agency may be restricted by schedule 1, every entity created by the government is covered by the FOI scheme and the only reason access to information is prevented is because that specific information is contrary to the public interest to release. It is also important to note that there is no power for the executive to exclude an entity by regulation.

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 (and it does not show corruption, the commission of an offence by a public official or that a law enforcement investigation has exceeded its lawful limits, in which case the public interest test in clause 17 must be applied) 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.

Clause 17 Public interest test

One of the most important elements of the Bill is that it does not create broad exemptions from the community's right to access, and the Government's obligation to disclose, government information. The Bill does provide that certain limited categories of information are deemed to be contrary to the public interest to disclose in schedule 1. However with the exception of these limited exceptions information must always 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 information is to be assessed. The clause reflects the recommendation of the Solomon Report that there should be a single public interest test and non disclosure based solely on the public interest in keeping information confidential.[21] The new test also responds to the concerns of the Scrutiny Committee that a class based exemption system has the potential for significant abuse.[22]

The concept of "the public interest" can be difficult to attribute a precise meaning to. It has been characterised in a range of different ways and will naturally vary depending upon the context in which it is applied. The expression "the public interest" imports a judgment to be made by reference to the subject, scope and purpose of the Act. [23] The objects of the Bill set out in clause 6 make plain that the purpose of the Bill is to make government information available to the community. To that end the public interest test for releasing information can be applied as the idea of 'civic betterment against official secrecy'.[24]

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[20] Whether or not a particular agency was covered by the RTI scheme was considered in *Davis v City North Infrastructure Pty Ltd* [2011] QSC 285. The intention of the Bill is that such an agency will be covered by the Bill.

[21] FOI Independent Review Panel, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, 2008 ('Solomon Report') recommendation 41.

[22] Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), Scrutiny Report No. 46 (2011) at pp 8 and 9.

[23] *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at [69] citing *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210.

[24] 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].

The Queensland Information Commissioner, in guidelines to the *Right to Information Act 2009* (Qld), characterises the public interest as referring to "considerations affecting the good order and functioning of the community and governmental affairs for the well-being of citizens."[25]

In *DPP v Smith*[26] the Victorian Court of Appeal in an often cited passage, characterised the public interest as:

> The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members.[27]

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,[28] balancing features or facets of the public interest,[29] or the balancing of competing public interest factors[30] (which is the approach adopted by the Bill). There is no substantive difference in these approaches. The task is to identify whether or not the community is best served by a particular course of action.

Whilst the test is characterised as one of balancing, as described by Chief Justice Gleeson and Justice Kirby in *McKinnon v Secretary, Department of Treasury,*[31] the balancing must be undertaken in the context of the objects of the Bill and "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..."[32] The objects of the Bill together with the requirement set out in clause 9 make it clear 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. In the absence of a demonstrable harm to the public interest occurring from the release of the information, information must be released.

In applying the test a decision maker is required to consider an unknown range of public interest factors that will vary significantly depending on the particular information in question.
In identifying the relevant public interest factors both in favour of disclosure and non disclosure schedule 2 sets out a list of the most commonly applicable factors relevant to the decision. However this is not an exhaustive list and there may be other different or overlapping relevant factors, or variations on the listed factors that must also be considered. Additionally 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.

Similarly it is not the case that the simple number of relevant factors for or against disclosure 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

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[25] 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.
[26] [1991]1 VR 63.
[27] [1991] 1 VR 63 at 77.
[28] See for example *Hinch & Macquarie Broadcasting Holdings Ltd v Attorney-General (Vic)* (1987) 164 CLR 15.
[29] See for example *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 (2006) 228 CLR 423.
[30] See for example *Osland v Secretary to the Department of Justice* [2008] HCA 37.
[31] [2006] HCA 45; (2006) 228 CLR 423.
[32] *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423 at [19] (emphasis added).

government information may be sufficient for release in cases where a listed factor favouring non disclosure is relevant.

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 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 54). 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. It must be the case that the particular information being considered is, on balance, contrary to the public interest to disclose.

The scope of what can be considered in evaluating the public interest cannot be exhaustively defined. One expression that the High Court has used to describe the scope of potentially relevant considerations in the application of a public interest test 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.'[33]

This clause also sets out factors that are always irrelevant to the determination of the public interest. Taking any of these factors into account in determining the public interest in the release of the information would undermine the integrity of the test. Irrelevant factors include the much maligned 'Howard factors',[34] such as the seniority of the author of the information. The clause also provides that an applicant's identity, individual circumstances or reasons for making the application are irrelevant to the determination of the public interest. Consistent with the public right to information created by the Bill (see clause 7), no individual 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 to be prevented from accessing that same information. Additionally access given to a person must be unconditional (see clause 48) and publicly disclosed in the disclosure log (see clause 28).

Whilst this is a set of perhaps the most readily identifiable irrelevant factors it is not exhaustive and it may be that other factors are also irrelevant, notwithstanding the broad nature of the public interest test.

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[33] *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.

[34] These factors originated from the AAT decision in *Re Howard and the Treasurer* (1985) 7 ALD 645. For criticism of the factors see generally Simon Murray, *Freedom of Information Reform: Does the new Public Interest Test for Conditionally Exempt Documents Signal the Death of the 'Howard Factors'*, (2012) 31(1) University of Tasmania Law Review 58; Peter Timmins, *Former PM says "FOI his most important legacy"* (Monday, March 26, 2007) < http://foi-privacy.blogspot.com.au/2007/03/former-pm-says-foi-his-most-important.html#.VTlr2mZIc7A>

**Part 3 Information officers**

The Bill creates a new statutory position of information officer. 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 the consistent and effective application of the new scheme across the government and facilitate continuous improvement in the disclosure of government information.

The information officer or information officers for each agency must ensure that the obligation to publish open access information is fulfilled and decide access applications made to the agency. Information officers will be the only decision maker for an agency as there will be no internal review of decisions made by information officers. In recognition of the significance of the role the appointment of an information officer is a notifiable instrument.

Applications to Ministers will continue to be dealt with by the Minister or the person the Minister directs to make the decision.

<u>Clause 18 Information officers-appointment</u>
Information officers will be the central decision makers for the new scheme and therefore particularly important for the integrity and effective operation of the scheme. This clause requires the principal officer of each agency 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*.

<u>Clause 19 Information officers-functions</u>
Information officers have five functions under the Bill. Each agency's information officer will be the person responsible for dealing with access applications made to the agency and for fulfilling the agency's proactive disclosure obligations under the Bill (see Part 4). Information officers may also deal with access applications made to other government agencies if requested to do so by another government agency (see clause 21).

Information officers also have a general obligation to actively consider whether public access may be given to other government information and if so how access can be provided. Information officers are not permitted to delegate their functions.

<u>Clause 20 Information officers not subject to directions</u>
This clause provides that information officers must exercise their functions independently. In discharging their functions under the Bill information officers are not subject to the direction of any person, including the principal officer of the agency or the responsible Minister. Giving a direction (other than a direction by a principal officer or the responsible Minister to disclose information under subsection (2)) is an offence (see clause 90).

Whilst non disclosure directions are prohibited, 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 provided outside the formal process set out in the Bill it may be more efficient to simply provide the information in response to an access request or as open access information.

Clause 21 and 22

*Information officer collaboration*

These clauses are designed to help foster a collaborative approach that 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. For example if an agency receives a particularly large or complicated request or the agency's information officer is on leave, the information officer of another agency may fulfil the role of that agency's information officer to ensure that access applications are decided within the permitted timeframe.

At any time in making a decision under the Bill, for example when deciding whether information subject 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 very difficult decisions. The provision of assistance from other information officers is intended to assist both the quality and consistency of decision making.

## Part 4 Open access information

This Part sets out the requirements for the proactive release of government information without the need for access applications to be made by members of the public. Often referred to as the "push model" for the provision of government information, this part of the Bill is an important new addition to the FOI scheme. The part requires government agencies and Ministers to make the defined government information publicly available and is intended to promote accountability and reduce the need for access applications.

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 categories of information that are useful to the public and that will help avoid the need for access applications to be made.

Whilst this clause relates primarily to the publication of information ordinarily created as part of an agency's or Minister's operations it also requires agencies to provide a statement setting out functional information about the agency (this is currently required by section 7 of the *Freedom of Information Act 1989*) and a statement listing all boards, councils, committees, panels and other bodies that have been established by the agency for the purpose of advising the agency or the Minister responsible for the agency.

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 publicly available, and in any case as a consequence of being tabled becomes public information. This requirement will ensure that all information tabled in the Assembly is made readily available to the public.

- *Policy documents.*
  Policy documents are defined in subclause (2). 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 the agency is responsible for are applied or enforced and how other agency functions are exercised.

- *Budgetary information.*
  The obligation to publish budgetary papers extends only to finalised outputs for which appropriations are made. Agencies will be required to publish details of the outputs which will mean that greater detail than what is presented in the budget papers accompanying an appropriation Bill will be available to the community. There are already a number of requirements to publish details of agency expenditure, for example 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. The requirement to publish budgetary papers is intended to build on existing obligations, ensure consistency across agencies and further enhance public accountability for the expenditure of public money.

- *Information about government grants administered by the agency*.
  Similar to the contracts register under the *Government Procurement Act 2001* information about government grants will be required to be published. Consistent with the requirement to publish information in the contract register and the requirement to disclose further budgetary information under the Bill the requirement to publish information about government grants is intended to promote accountability for the expenditure of public money.

- *The disclosure log of access applications made to the agency*.
  Clause 28 requires agencies 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. To further the public right to information created by the Bill the disclosure log will be required to be published as open access information to ensure that everyone can access information provided in response to an access request. This information must be included in the disclosure log not earlier that 3 and not later than 10 working days after the date the decision notice is given to the applicant (see clause 28). The rules for calculating periods of time are set out in section 151 of the *Legislation Act 2001.*

- *Information relating to all boards, councils committees, panels and other bodies established by the agency*.
  Agencies have a range of advisory bodies that provide 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, reports or recommendations of the entity. These bodies often play an important part in the operations of an agency and the formulation of government policy and may also at times involve the expenditure of considerable sums

of public money. Making this information publicly accessible is intended to help improve public understanding of bureaucratic process and promote government accountability and public engagement in public policy matters that are being considered by agencies.

- *A report or study on scientific or technical matters*.
  Agencies frequently engage experts to do discrete pieces of work that inform their decisions, examples of these reports are included in the Bill. Information prepared by experts for the use of agencies and the executive to inform decision making should ordinarily also be available to the public so that citizens can make an informed contribution to the debate and participate in the decision making process.

- *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 Report that was inadvertently omitted during the printing of the report.[35]

  It is reasonable to say that at the time they are written, these briefs may contain information that is contrary to the public interest to release and therefore, even though sometimes they will be in the public interest to release, it is not appropriate that they be listed as open access information until a period of time has elapsed. A person can make an access application at any time and the normal process for determining access applications 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. Given the public interest in the substantive matters contained in the incoming briefs and in the performance of a Minister in relation to those matters it is appropriate that this information is ordinarily proactively published to avoid the need for access applications.

- *Agency publication undertakings*.
  These undertakings are made under clause 29 and are a mechanism for agencies to identify particular classes of information that they hold that 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 able to be prescribed within the general classes of open access information set out in the clause.

- *Ombudsman declarations*.
  These declarations are designed to allow the scheme to respond to experience. As the person responsible for general oversight of the scheme, the ombudsman will be well placed to make declarations requiring information that the ombudsman considers should be made routinely available to the public to be published (see clause 65).

- *Information prescribed by regulation*.
  The Bill also delegates to the executive the ability to make regulations declaring additional categories of information to be open access information. This 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.

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

The open access information scheme also requires Minsters to 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 28).

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

- *A copy of the Minister's diary*
  The Minister's diary published as open access information must include all the appointments and meetings that relate to the Minister's ministerial responsibilities. The intention is to give the public a greater understanding of who Ministers engage with and how.

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 creates the obligation to publish open access information. An agency must publish open access information unless it is contrary to the public interest information (see clause 16). The clause recognises that at times particular information that is open access information and would ordinarily be required to be published will be contrary to the public interest to disclose and should therefore remain confidential. 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 decides that information is contrary to the public interest to disclose, they must publish a description of the information, a statement of reasons for the decision that the information is, on balance, contrary to the public interest to disclose and a statement setting out how a person may seek review of the decision. The only exception to this is where publishing a description of the information would, or could reasonably be expected to: endanger the life or physical safety of a person, unreasonably limit a person's rights under the *Human Rights Act 2004* or significantly prejudice an ongoing criminal investigation. This is the same test as where an agency decides to neither confirm or deny the existence of information in response to an information access application (see clause 35(1)(e)).

If a description of the information and reasons for the decision are not published under subclause (2)(a), the agency or Minister making the decision must notify the ombudsman of the decision. This is intended to ensure that there is some accountability for the decision as without the requirement to tell the ombudsman no one would know that the decision had been made. Further the number of decisions made not to disclose information under this clause must also be reported in the agency's or Minister's annual report (see clause 96).

The requirement for the statement of reasons is the same as is required where an access application for information is refused (see clause 54). Where it is possible to do so an agency or Minister must redact contrary to the public interest information and publish the balance of the information that it is not contrary to the public interest to disclose (see clause 26).

The practical requirements and minimum standards for the publication of government information are also set out by the Bill (see clause 97).

Clause 25 Open access information-quality of information

Open access information must be accurate, up to date and complete. The obligation on agencies and minsters to publish information is ongoing and the information they are required to publish must continually be updated and actively monitored to ensure that the requirement is met.

In order for agencies and Ministers to fulfil the requirement for information to be up to date agencies and Ministers must consider whether they are obliged to publish the information as the information is created or when comes into their possession and if so, to publish the information within a reasonable time.

The requirement that information must be complete means not only that, subject to it not being contrary to the public interest to de so, the entirety of the prescribed information must be published but also that 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 reconsider it. To fulfil the requirement for completeness agencies and Ministers will need to continue to monitor whether the information is no longer contrary to the public interest to release and if so to publish the information.

Note also that complaints can be made to the ombudsman where a person believes that an agency or Minister has not complied with their obligations (see clause 69) and the ombudsman may also publish guidelines to assist agencies and Ministers in meeting their obligations (see clause 66).

Clause 26 Open access information – deletion of contrary to the public interest information

Where open access information is not contrary to the public interest information the agency must publish that information. This clause clarifies that where open access information contains information that is contrary to the public interest to disclose and information that is not contrary to the public interest to disclose the agency or Minister, where it is practicable to do so, must redact the contrary to the public interest information and publish the balance of the information. This requirement is the same as the redaction requirement that applies to requests for information containing contrary to the public interest information (see clause 50).

Clause 27 Open access information - effect of policy documents not being available

Policy documents must ordinarily be published as open access information (see clause 23). 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 made available. In the event that information is not made available, a person cannot be left worse off when they could otherwise have used the information that should have be published to act differently.

Clause 28 Requirement for disclosure log

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

Access applications, other than applications for personal information, and government information disclosed in response to access applications together with the decision notice for the application must be kept in an agency’s or Minister’s disclosure log. A disclosure log is open access information that must be published by the agency or Minister (see clauses 23 and 24). If information is not provided to the applicant the disclosure log must also include a statement setting out who can apply for review of the decision (the persons who can apply for review of decisions are set out in 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 Ministers accountable for how efficient they are in processing applications.

The disclosure log must also include the details of any decision made by the ombudsman or ACAT in relation to the application. This includes decisions to extend the time to decide the application made by the ombudsman, as well as decisions on ombudsman or ACAT review. The disclosure log must also include any further information that the ombudsman or ACAT decides to release following their review and any further information provided to the applicant following a direction to undertake further searches made by either the ACAT or ombudsman. Note that the ombudsman is also required to publish reasons for a decision on an ombudsman review (see clause 82(5)).

The clause 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, requests for personal information must not be included in the disclosure log.

Clause 29 Agency publication undertakings

This clause creates a mechanism for agencies to formally undertake to publish additional information as part of their open access information obligations. The prescribed categories of open access information (see clause 23) apply to all agencies, and publication undertakings are intended to be a mechanism for agencies to routinely publish additional government 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 it 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.

<u>Clauses 30 – 32</u>
*Making access applications*
These clauses set out the requirements for access applications and the assistance and notice of receipt of an application that agencies and Ministers must provide to applicants.

Applications for access to information must be in writing and may be made either electronically or by post. The requirements for an application are essentially unchanged from the current FOI scheme however, the Bill also explicitly provides for applicants to include their views on the public interest, for example what the relevant public interest factors are or how competing factors should be balanced, and decision makers must consider any submissions the applicant has made (see clauses 30(4) and 37).

Agencies and Ministers will have an obligation to provide assistance to applicants to ensure that an application meets the requirements set out in clause 30 and to provide written notice, either electronically or by post, 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 40) subject to: the respondent being required to consult with a third party (see clause 38); the applicant agreeing to a request to extend the time to decide the application (see clause 41); or the respondent being given additional time by the ombudsman (see clause 42).

<u>Clause 33 Who deals with access applications</u>
An access application must be dealt with by the respondent agency's information officer (see Part 3) or if the application is to a Minister by the person the Minister directs. It is an important feature of the scheme that agencies must appoint designated information officers, who cannot delegate their functions but who can seek the assistance of other information officers (see clause 22). The aim of the clause and the requirement that the only decision maker/s for access requests made to the agency are the designated information officers, who must make decisions

independently (see clause 20), is to improve the quality and consistency of decision making in response to access applications.

Clause 34 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. The scope of what is required will depend on the nature and subject matter of the request. What amounts to reasonable steps may vary in different circumstances however it would invariably 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 to identify all relevant information some relevant factors outlined by the Queensland Information Commissioner include:

- the administrative arrangements of government;
- the agency's 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.[36]

These considerations are not exhaustive but should assist agencies and Ministers meet their responsibility to find all relevant information.

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 104) and agencies and Ministers should process the request and identify the information as quickly and efficiently as possible. Where an agency's or Minister's searches have been deficient or inadequate the ombudsman and ACAT may direct that further searches be undertaken (see clauses 80 and 86).

The clause also provides that an agency or Minister may contact the applicant to clarify the scope of the request. As applicants may be unaware of exactly what information they want and therefore cast applications relatively broadly, the intention is to assist the responding agency or Minister to identify exactly what information the applicant wants so that they can decide the request as quickly and efficiently as possible. Note that an application must contain enough information to enable the respondent agency or Minister to identify the government information applied for in order for it to be a valid application, contacting an applicant under this clause does not impact on the timeframe for making a decision and an applicant is not required to adjust their request in response to contact from the agency or Minister.

Clause 35 Deciding Access – how applications are decided

The clause sets out the five ways in which an application can be decided. If a precondition set out in clause 43 is satisfied an agency or Minister may refuse to deal with an application. An agency or Minister may only decide that it does not have the information requested if it has taken reasonable steps to find all relevant information (see clause 34). Alternatively the responding agency or Minister must decide to either provide the information to the applicant or

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

to refuse to disclose the information to the applicant because it would be contrary to the public interest to do so.

The clause also provides that in certain circumstances an agency or Minister may refuse to confirm or deny the existence of certain information. This applies where the agency or Minister has determined that the information is contrary to the public interest information and that the public disclosure of the mere existence of the information (and not just the substance of the information) would or could reasonably be expected to: endanger the life or physical safety of a person, unreasonably limit a person's rights under the *Human Rights Act 2004* or significantly prejudice an ongoing criminal investigation.

An example of an unreasonable limitation on a person's protected rights under the *Human Rights Act 2004* may include where releasing the mere existence of the information would show that a particular child had been in a particular care arrangement or facility or had been the subject of a report or investigation.

The requirement that a decision 'could reasonably be expected to' have a particular consequence is used in determining when it is appropriate that the existence of information not be disclosed, in the application of the various public interest factors set out in schedule 1 and in the new section 28 of the *Territory Records Act 2002* (see clause 4.40). In each context what is meant by 'could reasonably be expected to' is the same. This standard or precondition is commonly used in FOI schemes across Australia. In *Attorney-General's Department v Cockcroft*[37] Bowen CJ and Beaumont J said:

> To construe [the expression 'could reasonably be expected to'] as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based (references omitted).[38]

The intention is that the ordinary meaning of the words is applied[39] and there must be a sound basis for expecting that a particular consequence will actually occur and not merely that it is a theoretical possibility.

<u>Clause 36 Deciding access – additional information</u>
This clause provides for circumstances where additional information that is within the scope of the application is found after the application is decided. If this occurs the respondent must either 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.

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[37] (1986) 10 FCR 180.
[38] (1986) 10 FCR 180 at 190; For subsequent consideration of *Cockcroft* see *Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241; *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, at [61] per Hayne J; *Re Lobo and Department of Immigration and Citizenship* 92011) [2011] AATA 705 at [62] to [64] and [74]; *Nature Conservation Council v Department of Trade and Investment, Regional Infrastructure and Services (NSW)* [2012] NSWADT 195 at [146], *Hurst v Wagga Wagga City Council* [2011] NSWADT 307, at [56] and [57] and *Woodhouse v City of Sydney Council* [2012] NSWADT 95 at [32] to [34]; *Australians for Sustainable Development Inc v Barangaroo Delivery Authority* [2013] NSWADT 252 at [56-61].
[39] The Macquarie Dictionary online defines 'expect' as, "to regard as likely to happen; to anticipate the occurrence or the coming of; to look for with reason or justification", see www.macquariedictionary.com.au.

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 37 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 their access application (see clause 30). A decision maker must give genuine and real consideration of the views provided by the applicant[40] and no adverse inference can be drawn where an applicant has not provided any views about the public interest in release. Where the decision maker is required to apply the clause 17 public interest test the decision maker must identify and consider all the relevant public interest factors and not just any factors that may have been articulated by the applicant in support of their application.

Clause 38 Deciding access – relevant third parties

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

In contrast to other decisions to be made by agencies and Ministers under the Bill, the requirement for consultation is conditional on the decision maker considering that, on the material available to the decision maker at that point in time, the information subject to the request is not contrary to the public interest to release. As this is an interlocutory decision in the process of determining the public interest in the release of the information, the requirement can only be applied in the context of the decision-maker's view on the matter at that point in time. It is not a final decision on the public interest in relation to the release of the information and merits review of this decision is not available.

Currently decision makers are required to consult on information that may affect a third party even when that information may well be information that will not be released for another reason. To avoid unnecessary delays in the decision making process, a decision maker is only required to consult on information that they believe may be in the public interest to release. 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. The processing of any other information that is not expected to be of concern to a third party can continue while the consultation process is being undertaken.

A decision maker is not required to consult on information that should remain confidential from the third party.

Where a third party is consulted they have 15 working days to make any submission to the agency or Minister deciding the request. Consequently where consultation with a third party is required the agency or Minister deciding the application is given an additional 15 working days to make the decision.

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

The clause requires the respondent agency or Minister to 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 to the corresponding QLD RTI Act provision 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.[41]

The third party consultation requirement under the Bill is intended to operate in the same way as outlined by the Queensland Information Commissioner in this regard.

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 and the information must not be disclosed until either:

- the third party agrees to the disclosure; or
- period for making an application for review is over; or
- the review is decided.

If a third party does object, it is only the particular information that the third party objected to that must not be provided to the applicant. Any other information requested in the application that was 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 its 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 has objected to its release (see clause 52(2)(a)).

In the event that following the initial decision no application for review is made or that the decision is not been varied by the ombudsman or ACAT, the agency or Minister must then give the applicant notice that release is no longer deferred and provide the information to the applicant.

[41] 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>.

Clause 39 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 the permitted time the agency or Minister must refund the fee paid by the applicant and notify the ombudsman of the failure to make a decision within time. An applicant can then apply for review of the decision and no fee is payable for the application for review (see clause 105).

Notwithstanding that the agency or Minister has failed to decide the request in time, the agency or Minister may continue to consider and decide the request. If the agency or Minister is still considering the application and an application for review is made, the agency or Minister may apply to the ombudsman for additional time to decide the request and the ombudsman may direct that the agency decide the application within a further given time (see clause 78).

As an accountability measure for agencies and Ministers responding to access applications the clause also provides that in the event that a decision is not made within the permitted time, the respondent agency or Minister must tell the ombudsman that a decision was not made within time. The Minister must also notify the Assembly of the failure to decide an application either by an agency that the Minister is responsible for or by the Minister themselves if they have failed to decide an access request within time.

Clauses 40 - 42
*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 (see clause 40). This is substantially the same as the current FOI Act however it is expressed in working days rather than calendar days to ensure that the effective period for deciding requests remains constant.

The timeframe may be extended either because consultation with a third party is required (see clause 38), the applicant does not object to an extension (see clause 41), or the ombudsman grants an extension of time (see clause 42).

An agency or Minister may make an application to the ombudsman for additional time to decide an application if the applicant has not agreed to the request for additional time made under clause 41. There are two defined circumstances where the ombudsman may allow additional time, however 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.

In assessing whether those circumstances are satisfied it is important to note that the maximum time permitted by the Bill is the maximum time that it should take an agency or Minister to decide an access application. Consistent with the stated aim of the Bill to provide information promptly (see clause 6(f)) it will only be in exceptional circumstances that this timeframe should be extended by the ombudsman.

A decision to provide an extension of time is not subject to ACAT review. Given the nature of the decision it would not be appropriate and would not realistically be possible to have ACAT review the decision in a timeframe that could be beneficial to the applicant.

Consequences for failure to comply with the statutory timeframe are set out in clause 39.

Clauses 43-46

*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. It is important to note that a decision on whether or not to refuse to process an application must be made in the context of the objects of the Bill and the pro disclosure bias that is required of decision makers (see clause 9). Notwithstanding that one of the preconditions for a decision to refuse to decide the application has been satisfied the agency or Minister may still deal with the application and determine whether or not the information should be disclosed to the applicant.

Where an agency or Minister does decide to refuse to deal with the application of the basis that the application:

- would involve an unreasonable and substantial diversion of resources;
- is frivolous or vexatious or an abuse of process; or
- is for a particular kind of government information all of which is deemed to be contrary to the public interest under schedule 1

that will be the end of the process and the agency or Minister is not required to identify all of the information within the scope of the request.

However where an agency or Minister decides to refuse to deal with the application of the basis that the information is already available to the public, the agency or Minister must have identified all the information relevant to the request so as to tell the applicant how they can access the information. Similarly where the application is for the same government information the disclosure of which had previously been refused in the previous 12 months, the agency or Minister must have identified the relevant information so as to be able to say that it is the same information as had previously been applied for. A decision to refuse to deal with an application is a reviewable decision.

In deciding whether to refuse to process an application, an agency or Minister may consider related applications as one application if they are made by the same person or by people acting together in concert. The intention is to prevent applicants splitting up applications into multiple parts to avoid a ground for refusal. To be considered together applications must be related; the mere fact that a person makes multiple applications for information is not sufficient for an agency or Minister to consider the applications together to satisfy a ground for refusing to process the applications.

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 in some circumstances two separate applications for information about different elements of a decision making process could be considered related applications, however equally it may be that where there was some significant difference in the nature of what is being requested it may well be that the applications should be considered separately. Another example of where two separate applications may be related is where the application requests information relating to a particular incident and information relating to the process for dealing with that type of incident. 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, such as a requests about complaints across particular areas, may be related. These are examples of various circumstances given to illustrate how the requirement may be applied however each application must be considered on its own particular facts.

The grounds for refusal are:

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

For this ground of refusal to be satisfied, the resources required to be used in the process of dealing with the application, including the consideration of the public interest in the release of the material and not simply in locating the material,[42] must mean that the agency or Minister is substantially inhibited from fulfilling their functions. This must be balanced against the extent to which the public interest would be advanced by the processing of the claim.

Where the subject of the application is of significant importance to the public it is appropriate that additional resources are used to make government held information about the matter available to the public. Example of where this may be the case include:

- where the information was relied on to make particularly controversial decisions for example a significant change in government expenditure on a particular service or services;
- where the information was a reason for a change in the law; or
- where the information relates to government action that adversely affected a person's human rights or significantly damaged the environment.

In circumstances such as these it may be appropriate for more time to be spent dealing with the request than would be the case if the matter was relatively trivial or of little consequence.

In considering whether the use of what might otherwise be an unreasonable level of resources is justified, 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?

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 whether the potential advancement of the public interest in granting the information referred to in the request justifies the level of resources required to process the request.

Before refusing a request on this ground 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 consult with the agency or Minister, provide any additional information relevant to the request and if the applicant wishes to amend their application to avoid the ground of refusal (see clause 46). An agency must consider any submissions made or information provided by the applicant during the consultation period before deciding to refuse the request.

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[42] 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 (see *Freedom of Information Amendment Act 2007*) to clarify that it includes the time taken to consider the information involved. Consistent with the current Act the clause includes the consideration of the material, not just the time required to identify it.

- *The application is frivolous or vexatious.*

Whether or not an application is frivolous or vexatious will depend on the content of the request. An application may be frivolous or vexatious for a variety of reasons including because the application must fail.[43] The frivolous or vexatious ground may also overlap with the abuse of process ground.[44] In determining whether an application is frivolous or vexatious in the context of the Bill the standard required to conclude that there is simply no merit in the application whatsoever is relatively high.

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

While the determination of whether or not the application is frivolous or vexatious occurs prior to the application of the public interest test where the decision maker is not permitted to consider the applicant's identity, circumstances or reasons for the application (see clause 17(2)(g)) an application that is frivolous or vexatious will be so irrespective of who made the application.

Before refusing a request on this ground the agency or Minister must notify the applicant of the intention to refuse to deal with the application and give the applicant the opportunity to consult with the agency and provide any additional information relevant to the request and, if the applicant wishes, to amend their application to avoid the ground of refusal (see clause 46). An agency must consider any submissions made, or information provided, by the applicant during the consultation period before deciding to refuse the request.

- *The application involves an abuse of process.*

In the context of the FOI scheme created by the Bill what amounts to an abuse of process is not capable of precise definition. In general an abuse of process includes applications that have been made for an improper purpose and that are without any merit. Subclause 43(4) defines an abuse of process to include, harassment or intimidation of a person or an unreasonable request for personal information about another person. For example this may include an application for personal or other information about a public official who the applicant has a grievance with.

Under the Bill the applicant's purpose in making the application cannot be considered when deciding if dealing with the application would involve an unreasonable use of resources (see clause 44) or in the application of the public interest test (see clause 17(2)(g)). Notwithstanding that the motivations of an applicant may be able to be considered in the determination of whether the application is an abuse of process it remains an objective standard that operates in the context of a scheme designed to facilitate public access to government information where no person has a greater right or ability to access government information than anyone else.

Before refusing a request on this ground 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 consult

[43] *Dey v Victorian Railways Commissioners* [1949] HCA 1; see also *Phillip Morris Ltd v Attorney-General* [2006] VSCA 21.
[44] See generally *Knight v Corrections Victoria* [2010] VSC 338.

with the agency, provide any additional information relevant to the request and if the applicant wishes, to amend their application to avoid the ground of refusal (see clause 46). An agency must consider any submissions or information made or provided by the applicant during the consultation period before deciding to refuse the request.

- *The information is already available to the applicant.*

Where information is already publicly available there is necessarily no need for the application to be processed. Consequently an agency or Minister may refuse to deal with the application, however they 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.*

An agency or Minister may refuse to deal with an application on this basis if two criteria are satisfied. Firstly the access application must state that the applicant is seeking a particular kind of information with sufficient specificity such that it is possible to define the scope and nature of the information requested.[45] Secondly it must actually be the case that all the government information of that kind is within a category of information deemed to be contrary to the public interest to release by schedule 1.

For example if a person makes an access application to the Community Services Directorate for a care and protection report about a child, the relevant information officer need not identify all the information forming part of the report before refusing to deal with the request, because the scope of the information relevant to the request can be clearly identified and all the information within that scope of the request is taken to be contrary to the public interest to disclose under clause 1.6 of schedule 1.

The general operation of the clause was articulated in the context of a similar provision of the *Freedom of Information Act 1982* (Vic):

> ...where it is objectively apparent from the face of the request that the documents, as described, are exempt in nature and it would not be reasonably practicable for access to be given to edited copies of documents of that nature... Where all of the documents fall into this category, the agency can categorically refuse the request without doing more. Under the legislation, this power is not available if any of the documents are not exempt in nature as described in the request or it is reasonably practicable to give a willing applicant access to copies of any of them in edited form. To ascertain the nature of the documents requested, the agency is confined to the description in the request. It cannot go behind that description.[46]

This is essentially the same as how this clause is intended to operate however note that under the Bill an agency or Minister is required to give a copy of a redacted version of the information wherever it contains information that is not contrary to the public interest information and it is reasonably practicable to do so (see clause 50).

- *An earlier access application has been refused.*

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[45] See generally *Cannon and Department of Police* [2011] QICmr 50; *Together Queensland, Industrial Union of Employees and Department of Transport and Main Roads* [2013] QICmr 2.
[46] *Knight v Corrections Victoria* [2010] VSC 338 at [124].

Where an application for the same government information has been refused in the preceding 12 months because it is contrary to the public interest information and the relevant public interest factors are materially the same, an agency or Minister is not required to process the application again.

The requirement that the relevant public interest factors are materially the same means that where a relevant public interest factor was not considered at the time of the previous decision even though it was a relevant consideration at the time (as opposed to a new public interest factor having since come to light that did not exist at the time) the agency or Minister cannot refuse to deal with the application under this ground.

It is also important to note that for refusal under clause 43(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 an agency or Minister cannot refuse to deal with the application on the ground set out in clause 42(1)(f).

<u>Clauses 47 – 50</u>
*Giving access to information*
Once it has been decided that it is not, on balance, contrary to the public interest to disclose information the applicant may be provided with either an electronic copy or a printed hard copy of the information. In certain circumstances alternative forms of access may be provided.[47] Any electronic information provided must, whenever practicable, 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 this means that where the agency or Minister has a Microsoft Word copy of the information the Microsoft Word version must be provided. This is the same as the requirement for the publication of other government information set out in clause 97.

It is anticipated that whenever the applicant has provided an email address that an electronic version of the information will be provided. Alternatively where a large volume of information has been requested this should be provided on a CD or USB.

Clause 47(3) provides the executive with a regulation making power to prescribe an alternative publication standard to web content accessibility guidelines level AA. This is so that the standard can evolve with contemporary expectations and is not left behind with what will eventually become an obsolete standard as technology evolves.

Where information is given in response to an access application, access must be unconditional and the recipient of the information is free to publish, reproduce or otherwise use that information subject to any other lawful constraints that may exist.

An agency or Minister may, but is not required to, defer providing access to government information that is not contrary to the public interest to release if the information is intended to be made public either to the Assembly or the media within 3 months. For example if a person makes an application for information relating to a particular issue that was the subject of an

[47] 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.

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(3)).

Where information that is the subject of an application contains both contrary to the public interest information and other information that is not contrary to the public interest to disclose, clause 51 requires the agency or Minister responding to the request to delete the contrary to the public interest information that they have decided not to provide to the applicant in order to provide access to the remaining information. The only exception to this is where an agency or Minister has decided to neither confirm nor deny the existence of information under clause 35(1)(e). In those circumstances an agency or Minister is not required to provide a copy of any information, redacted or otherwise, where doing so would confirm the existence of the information.

<u>Clause 51 Notice of decision to be given</u>
This clause requires an agency or Minister that has received an access application to provide the applicant written notice of the decision on the application made under clause 35. The substantive requirements of the notice are set out in the subsequent clauses and explained in the notes below.

Where an agency or Minister makes a subsequent decision in response to the application, for example as a result of ombudsman ordered mediation (see clause 81), the agency or Minister must provide a formal notice of the decision to the applicant which must also then be included in the agency's or Minister's disclosure log together with any further information provided to the applicant.

<u>Clause 52 Content of Notice – access to information given</u>
Where an agency or Minister decides to give access to the information sought in an access application the decision notice must include an itemisation of the fees payable and must tell the applicant that the information will be included in the agency's or Minister's disclosure log. If the information has had contrary to the public interest information deleted the notice must also state that the record of the information has had information that is contrary to the public interest to disclose deleted from it.

Ordinarily the information must be provided with the notice of decision on the application. There are two circumstances where this may not be the case. Firstly, because a relevant third party has told the agency or Minister that it objects to the disclosure of the information. If that is the case and clause 38(6) applies, the notice must indicate that a third party has objected to disclosure and 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, the period for applying for review has ended (20 working days following publication of the decision, see clause 74) or the review of the decision has concluded.

Secondly access may be deferred because the information is to be presented to the Assembly or the Media within a reasonable time and less than three months (see clause 49). If this is the case the notice must indicate the reason for the deferral and the date that the information will be made available.

<u>Clause 53 content of notice – information not held by respondent</u>

After having completed the required search (see clause 34) if the agency or Minister does not have any information within the scope of the request the agency or Minister must provide notice to the applicant that it does not have any relevant information.

Clause 54 Content of Notice – refusing to give access to information.
Where the agency or Minister decides to refuse to give access to information in response to an access application because the information is deemed to be contrary to the public interest under schedule 1, the notice of decision must include a description of the information, the ground under schedule 1 for the refusal and a statement of reasons for the decision. The reason why information is within a category of information listed in schedule 1 may be as simple as, the information forms part of a heath record of a person because it is held by a heath service provider and contains personal heath information about the person. Alternatively the reasons why the information is deemed to be contrary to the public interest may be more detailed, for example where the disclosure of information would be a contempt of court or infringe a privilege of the Assembly it will be necessary to explain the basis on which this will occur.

Where the agency or Minister decides to refuse to give access to information in response to an access application because disclosure of the 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 sets out:

- A description of the information
- the findings on any material questions of fact, referring to the material on which the findings were based;
- the relevant factors favouring disclosure;
- the relevant factors favouring nondisclosure;
- how the factors were balanced; and
- the harm to the public interest that can be reasonably expected to occur from disclosure.

The statement of reasons should articulate the reasons for the non disclosure of each piece of information that is not disclosed.

Clause 55 Content of notice – refusal to deal with application
If an agency or Minister decides to refuse to deal with an application the notice of the decision must state the grounds for the refusal (see clause 43) and the reasons for the decision. For example the reasons explaining why processing the request would be an unreasonable and substantial burden on agency resources that is not justified by the extent to which the public interest would be advanced from the release of the information.

Clause 56 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 setting out why, if the agency or Minister did hold the information, it would be contrary to the public interest information and why the mere confirmation of the existence of the information would have a result set out in clause 35(1)(e)(ii).[48] In order to protect the integrity of the refusal to confirm or deny the existence of the information the requirement is to some extent abstract and naturally

[48] The requirements for a statement of reasons are set out in *Legislation Act 2001* section 179. Subsection (2) relevantly provides:

> *The document giving the reasons must also set out the findings on material questions of fact and refer to the evidence or other material on which the findings were based.*

nothing is required to be included in the statement that may actually confirm or deny the existence of the information.

Clause 57 Transfer of access applications
This clause provides for applications to be transferred between agencies and Ministers to ensure that the correct agency or Minister deals with the application and that any relevant information held by the Government is provided to the applicant as efficiently as possible.

Where an agency or Minister does not hold any information that relates to the application but believes that information that relates to the application is held by another agency or Minister, they must ask that other agency or Minister if they may hold information that relates to the application. If the other agency or Minister agrees that it may hold the information the application must be transferred to that agency or Minister.

Where applications are transferred between agencies and Ministers the effect is that the agency or Minister receiving the application will deal with the application as if it had been the recipient of the access application. The agency or Minister must notify the applicant of the applicable timeframes for making the decision and must decide the application as if it had been made directly to the agency or Minister.

Clause 58 Access applications if two or more agencies or Ministers have relevant information
This clause applies where multiple agencies hold information that is within the scope of the request. The clause facilitates the cooperation of agencies and Ministers when responding to applications and attempts to make it as easy as possible for agencies and Ministers to respond and get the information to applicants as quickly as possible.

Where another agency or Minister also becomes a respondent to the request under subclause (4) the additional respondent is under the same obligations to notify the applicant of the timeframes that apply and to decide the request in the way set out under Part 5 of the Bill.

**Part 6 Amendment of personal information**
This part allows people to access and if necessary 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 59-63
*Applications for and amendment of personal information*
These clauses set 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 to amend the information. 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 a particular qualification or that they had been the recipient of particular government assistance, but in fact the person had a different qualification or they were the recipient of a different type of government assistance, they must state the correct qualification or assistance type that they would like the government information to reflect in their application for the change.

An application for the amendment of 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.

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 make any submissions on the proposed decision and provide any additional formation. If the decision maker decides to refuse to amend the information following consultation with the applicant, the applicant must be provided with a statement of reasons for the decision. A decision not to amend the information is a reviewable decision (see schedule 3 item 7).

**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. This includes reviewing decisions by agencies and Ministers and investigating complaints as well as issuing guidelines on the operation of various elements of the scheme and providing an annual report to the Assembly on the operation and effectiveness of the scheme.

<u>Clause 64 Functions of ombudsman</u>

This clause sets out the functions of the ombudsman under the new scheme which are provided for by other clauses of the Bill. The ombudsman's functions can be summarised as to:

- review decisions;
- publish open access declarations and publish guidelines to assist agency and ministerial decision making under the Bill;
- monitor government compliance with the scheme, including with the requirement for the publication of open access information;
- investigate complaints about agency or ministerial implementation of the scheme; and
- report on the overall operation of the scheme.

<u>Clause 65 Open access information declarations</u>

This clause provides for the ombudsman to issue declarations that particular information is open access information which an agency or Minister is obliged to publish (see clauses 23 and 24). In making a declaration for information held by government agencies the ombudsman must consult with agency information officers 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. Similarly where the information is information held by a Minister the ombudsman must consult with each Minister. A declaration is a disallowable instrument.

<u>Clause 66 Guidelines for Act</u>

This clause provides for the ombudsman to issue guidelines to assist with the implementation of the new scheme. The guidelines are intended to assist agencies with decision making. They are not binding and the normal requirements for the application of guidelines in administrative decision making apply.[49] The clause sets out specific decisions where guidelines will be

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[49] For example the requirement for a proper, genuine and realistic consideration of the particular facts rather than relying on the guidelines alone, see generally *Davison v Commissioner for Corrective Services* (NSW) [2011] NSWSC 699, McCallum J at [36]; *Foster v Secretary of Department of Education & Early Childhood Development* [2008] VSC 504, Kyrou J at [60]; *Khan v Minister for Immigration and Citizenship* [2011] FCAFC 21.

particularly useful, however guidelines may be issued for any element of the Bill. These will be the more common and more difficult decisions where guidelines will be of most assistance to decision makers.

Clause 67 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 complement the separate reporting obligations of agencies (see clause 96) and is intended to 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 68 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 all the information that is the subject of the review to the ombudsman.[50] This ensures that the ombudsman is in a position to independently evaluate whether or not the release of the information is on balance contrary to the public interest.

Clause 69 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 although in relation to conduct under the Bill it will also include complaints about Ministers. Complaints may be about the time taken to make decisions, conflicts of interest in decision making or any other element of an agency or Minister's conduct in implementing the scheme.

It is possible that at times the ombudsman will be asked to review a decision as well as to investigate a complaint about the making of the decision. The exercise of these two functions concurrently will not in any way undermine fulfilment of either function. For example it is possible that the ombudsman will be required to review a decision not to release information and at the same time investigate a complaint that the decision maker had a conflict of interest in making the decision or that an officer did not adequately search for the relevant information. There is no reason that these functions cannot be exercised concurrently and the responsibility for both should assist the ombudsman present a complete picture of the operation of the scheme in the ombudsman's annual report to the Assembly (see clause 67).

**Part 8 Notification and review of decisions**

The Bill significantly changes the process for the review of FOI decisions. Given the nature of the new information officer role, and to help promote the quality of initial decisions, the Bill removes the internal review process and there will only be one decision maker for agencies and Ministers. In the event that an error is made or the agency or Minister wishes to revise their decision they may do this pursuant to section 180 of the *Legislation Act 2001* without the need for a formal internal review process.

If a person is not satisfied with a decision they receive on an access application from the agency or Minister they can apply to the ombudsman for review of that decision. Subsequently if a person does not believe that the ombudsman has made the correct decision a further application for review can be made to ACAT. Where ACAT is reviewing a decision of the ombudsman it must be constituted by three members.

[50] Note the *Legislation Act 2001* section 256 provides for the production of information held electronically to an authority in a form that can be understood by the authority.

A further significant change is that the new scheme will allow any person to apply for the review of a decision not to provide access to information either in response to a particular application or under the open access information publication requirements. Providing for review of decisions on the publication of open access information removes the need for a person to apply for the same information and have the application rejected before they can seek review of the decision.

Clause 70 Definitions – pt 8
This clause defines two important terms for the operation of the part; "decision maker" and "reviewable decision".

The decision maker for a reviewable decision is the agency or Minister making the decision. The effect of this definition is to ensure that it is the agency or Minister that is the respondent to any review application in the ACAT and that the ombudsman is not a party to a review application for review of an ombudsman decision.

Clause 71 FOI reviewable decision notices and reviewable decision notices
This clause clarifies when and to whom a decision maker, either the agency or Minister making the first decision or the ombudsman for a review decision, is required to give a reviewable decision notice. The required content of a reviewable decision notice is set out in section 67A of the *ACT Civil and Administrative Tribunal Act 2008.*

Clause 72 Onus
Consistent with ordinary merits review, the role of the ombudsman and the ACAT in reviewing a decision made under the Bill is to stand in the shoes of the decision maker and re make the decision. The task of the ombudsman and ACAT is not to decide whether the decision that was made was open to the decision maker or whether that decision should be set aside because of a particular error. Rather the ombudsman and ACAT must make the decision afresh and reach a conclusion that the reviewer believes to be most consistent with the Act and the intention of the Legislative Assembly.

As a general rule the concept of a burden of proof in administrative review proceedings “should be approached with great caution”.[51] However it has also been recognised that a party seeking to secure a particular outcome must, as a matter of practicality, adduce evidence in support of their claim.[52] This clause reverses this expectation and clarifies that the sole obligation is on the party seeking to prevent disclosure. Whilst no doubt parties applying to ACAT for review of a decision not to release information will adduce evidence and put arguments in support of their claim, this clause is intended to make it clear that they are not required to. Consistent with the objects of the Bill and the requirement in clause 9 as they apply to the original decision maker, the ombudsman and ACAT similarly must approach the decision making task with a bias in favour of disclosure and needing to be positively convinced by the person seeking to prevent disclosure that the information is in fact contrary to the public interest information.

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[51] *McDonald v Director-General of Social Security* (1984) 1 FCR 354; note also that the the rules of evidence do not apply to ACAT (see *ACT Civil and Administrative Tribunal Act 2008* s8) or the ombudsman in undertaking the review of a decision.
[52] See *Evans v Secretary of Department of Families, Housing, Community Services & Indigenous Affairs* [2012] FCAFC 81 at [18]; *Chand v RailCorp* [2011] NSWCA 79, Hodgson JA at [67]; *Laidlaw v Queensland Building Services Authority* [2010] QCAT 70 at [23]; *McDonald v Guardianship and Administration Board* [1993] 1 VR 521; *Re Pinesales Pty Ltd and Commissioner of State Revenue* [2006] WASAT 202 at [46].

Clauses 73-74

*Applications for ombudsman review*

The ombudsman will be able to review almost all decisions of agencies and Ministers under the Bill. The ability to apply for review of decisions about the disclosure of information has been significantly expanded and for most decisions made under the Bill any person will be able to apply to the ombudsman for review of a reviewable decision within 20 working days of the decision notice being published in the disclosure log (see schedule 3 and clause 28). However, where an application for review is made out of time the ombudsman will have a broad discretion to extend the time for making an application for ombudsman review.

Clause 75 Notice of ombudsman review

The ombudsman must notify the relevant agency or Minister that a review application has been made.

Clause 76 Decision maker to tell relevant third party

Where an agency or Minister is told of a review application in relation to a decision of the agency or Minister and the information subject to that decision may reasonably be of concern to a third party, the agency or Minister must notify the third party to ensure that they have the opportunity to participate in the review process if they wish. This includes both third parties who were consulted under clause 38 and any other third party who the information may reasonably be expected to be of concern to but who was not consulted under clause 38 because the decision maker already considered that the information was contrary to the public interest information.

Clause 77 Participation in ombudsman review

Government information will often be relevant to a number of people or groups in the community beyond just the particular applicant for the information. The clause gives the ombudsman a discretion to allow others to participate in the review where the ombudsman believes that it is appropriate to do so. The intention is to ensure that all the arguments and relevant public interest factors relating to the information are thoroughly considered by the review. For example an applicant concerned about an environmentally harmful activity may apply for information and the subsequent review of the decision and it may be appropriate to allow a community organisation whose objects include the protection of the environment to participate in the review to ensure that all the relevant impacts are properly understood and all the relevant public interest factors are considered.

Clause 78 Ombudsman Review – extension of time when decision not made in time

Ordinarily an agency or Minister must decide an access application within 20 working days (see clause 40) if they fail to do so they are deemed to have made a decision to refuse to grant access to the information. The applicant may then seek a review of that decision by the ombudsman. This clause provides a mechanism for the ombudsman to allow an agency some additional time to decide the request.

The clause does not set out the conditions or criteria which the ombudsman must apply but leaves the ombudsman with a broad discretion as to when additional time should be granted. Whilst a broad discretion is given this must be exercised consistently with the broader objects of the scheme to ensure that information is disclosed quickly and at the lowest reasonable cost to the applicant (see clause 6). Further the maximum amount of time that the ombudsman can grant is 15 working days. Where an agency believes that it can decide the request in a relatively short period of time it may well be more efficient to have the agency decide the application and avoid the need for a review or at least narrow the issues in dispute.

Clause 79 Notice to give information or attend ombudsman review
In addition to the requirement that the ombudsman be provided with all the information that is subject to the review under clause 69 this clause provides for the ombudsman to seek further information relevant to the determination of the application for ombudsman review.

The ombudsman will be able to compel a person to give additional information relevant to the review either by providing information in writing or by answering questions from the ombudsman in person.

Clause 80 Ombudsman direction to conduct further searches
Where an applicant for a review believes that an agency or Minister has not identified all the information within the scope of the application the applicant may apply to the ombudsman for a direction that further searches be undertaken. Similarly if the ombudsman is of the view that not all the information within the scope of the application has been identified the ombudsman, on the ombudsman's own initiative, may direct that further searches be undertaken.

Following further searches if additional information is identified the relevant agency or Minister must deal with the additional information under clause 36. If the review application related to a decision made about information previously identified that review can continue and then further review can be sought of the subsequent decision on the additional information if required. In these circumstances it would not be appropriate for an applicant to pay a further fee for the review of a decision because the respondent agency or Minister had initially failed to identify the information.

Clause 81 Mediation for applications
This clause provides that the ombudsman may refer a matter to mediation if the ombudsman considers that mediation is likely to resolve the matter. It may be that mediation can help the parties to reach an agreement for some additional information to be provided or to agree that it is on balance contrary to the public interest to release some or all of the requested information. Alternatively it may clarify the particular information that an applicant wants access to and narrow the scope of what is at issue in the review. If the matter is resolved and the original decision is changed in any way the agency or Minister involved must issue a further decision notice which together with any additional information provided to the applicant must be published in the agency or Minister's disclosure log.

Determining when it is appropriate to send the matter to mediation will depend on the particular circumstances of the matter, including for example the nature of the information in question, the nature of the decision of the agency or Minister and any material provided by the applicant or the respondent. Unless the ombudsman directs otherwise the agency or Minister must pay the costs of the mediation.

Ordinarily it will be appropriate for the agency or Minister to pay the costs of the mediation. However there may be some circumstances where this is not the case and fairness dictates that at least some of the cost should be born by the applicant. An example might be where an agency is defending a decision to release information and a relevant third party is seeking review of that decision because of the alleged commercial impacts and in the circumstances it is fair that they bear the cost of the mediation.

Clause 82 Ombudsman review

If a matter is not resolved by mediation (see clause 81) the ombudsman must review the decision and either confirm, vary or set aside the decision. The ombudsman's role in undertaking the review is to "consider the relevant facts proved on the evidence before it and to decide on the basis of those facts what was the correct or preferable decision."[53] In making a decision on the review the ombudsman 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 if there is no reasonable prospect that the original decision may be varied or set aside. The 'no reasonable prospect' test is used in a range of legislative contexts and the importance of considering that context has been repeatedly emphasised by the courts.[54] The ombudsman must consider the specific facts and recognising the importance of the availability of administrative review of executive decisions come to a conclusion about whether or not there is a reasonable prospect that the original decision may be varied or set aside.

The intention of the provision is to avoid the need to undertake futile reviews where it is plain from the information available that the ombudsman will not come to a different decision than that reached by the original decision maker. Merits review of a decision by the ombudsman not to review an agency or Minister's decision because there is no reasonable prospect that the decision would be varied or set aside is not available.

In contrast to the Commonwealth and Queensland schemes that do not impose fees for information commissioner reviews, the Bill provides that a fee may be charged for ombudsman review (see clause 104). Where the applicant for the review is at least partially successful in the ombudsman review the ombudsman may direct that the application fee be refunded. In circumstances where the original decision maker has made an incorrect decision it will ordinarily not be appropriate for the applicant to have to pay a fee for review to correct the error and the intention is that the ombudsman will exercise the discretion to ensure fairness in the particular circumstances.

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 a decision involved only the partial release of information that was of relatively little consequence and the ombudsman's decision substantially upheld the agency's or Minister's decision it may be that it is not appropriate to refund the fee.

Similar to the information commissioners for the Commonwealth and Queensland, the ombudsman must publish the reasons for a decision on an FOI review.[55]

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[53] *Federal Commissioner of Taxation v Swift and Others* [1989] FCA 413; *Environment Protection Authority v Rashleigh* [2005] ACTCA 42.

[54] See for example *Spencer v Commonwealth of Australia* [2010] HCA 28.

[55] 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/.

Clause 83 Questions of law to ACAT
This clause provides that the ombudsman may refer a question of law to the ACAT, which must be constituted by 3 members made up of presidential members and senior members who have been a lawyer for at least five years. If the ACAT decides the question of law the ombudsman is then bound to apply that decision in deciding the review.

Clause 84 Review of decisions by ACAT
Where a person is dissatisfied with the decision of the ombudsman on an ombudsman review the person may apply to the ACAT for a review of the decision. An application for ACAT review must be made within 20 working days after the decision is published or any longer period permitted by ACAT.

In reviewing the decision of the ombudsman the ACAT must be constituted by 3 members who are presidential and senior members. As with ombudsman review, the ACAT is required to consider the decision afresh and make what it considers to be the correct or preferable decision.[56]

Where an applicant for review is successful in obtaining additional information 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 85 Participants in review of decision by ACAT
The participants in an ACAT review are the applicant for review and the agency or Minster that made the decision.[57] Additionally the ACAT may allow others 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 where appropriate be able to apply to participate in the review process to ensure that all the arguments relating to the correctness of the decision and the public interest in disclosure or non disclosure of the information are thoroughly considered by the review.

Clause 86 ACAT direction to conduct further searches
Similar to the power given to the ombudsman by clause 81 the ACAT may also direct the agency or Minister to undertake further searches either on the application of a party to the review or on the ACAT's own initiative.

Clause 87 Costs of ACAT review
Where the respondent agency or Minister applies for review of an ombudsman decision to give access to information that the agency or Minister had refused to give access to, the agency or Minister will be required to pay the reasonable costs of the respondent to the review (ie the applicant for the information). Where the ombudsman supports disclosure it is not fair or consistent with the objects of the Bill that an individual should have to pay the costs of defending a decision to disclose government information. This is the case notwithstanding that the onus is on the agency or Minister seeking review (see clause 72).

Clause 88 Costs of appeal to Supreme Court
Similar to clause 87 where a respondent agency or Minister wishes to challenge a decision of the ACAT to give access to information that the agency or Minister had refused to give access to,

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[56] *Federal Commissioner of Taxation v Swift and Others* [1989] FCA 413; *Environment Protection Authority v Rashleigh* [2005] ACTCA 42.
[57] The ombudsman will not ordinarily be a participant in ACAT review; see generally *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

the agency or Minister must pay the reasonable costs of the respondent to the appeal. As with applications to ACAT and consistent with the intention to promote public access to information it is unreasonable that an additional cost be placed on a person wishing to access information that it has been found by the ACAT not to be contrary to the public interest to disclose. This requirement is consistent with judicial decisions in other jurisdictions that have recognised that it is appropriate that the agency or Minister pay the costs of the litigation in these circumstances.[58]

**Part 9 Offences**

The offences set out in this Part are an important part of protecting the public right to information recognised in the Bill and ensuring that subject to the Bill, government information is made available to the public proactively and in response to specific requests. Consistent with the obligation under section 14 of the *Territory Records Act 2002* which provides that agencies must make and keep full and accurate records of their activities each of the offences set out in Part 9 is necessary to protect the integrity of the scheme.

The offences are intended to ensure both that officials act with integrity in fulfilling their functions and that they are free to exercise their functions without improper interference by others. The offences are designed to combat practices that have occurred in different jurisdictions to avoid the public disclosure of information and ensure that the public can have confidence in the administration of the Act. Each of the six offences requires knowledge or intention as well as the prohibited conduct to be proven. A maximum 100 penalty unit penalty is set for each offence.

<u>Clause 89 Making decision contrary to Act</u>
This clause makes it an offence to knowingly make a decision that is contrary to the requirements of the Bill.

<u>Clause 90 Giving direction to act contrary to Act etc</u>
This clause makes it an offence to knowingly give a direction to engage in conduct that is contrary to the requirements of the Bill to a person required to exercise a function under the Bill. For example the prohibited direction may be to an information officer making a decision about whether to disclose information or equally may be to a person required to locate information that is subject to an access application.

The intention of the provision is to ensure the integrity of the requirements and process set out in the Bill and consequently the practical application of the public right to information.

Subclause (2) and clauses 91 and 92 provide for complementary offences for conduct that is intended to frustrate the disclosure requirements of the Bill even when the conduct is not directly related to an application for the particular information. For example when a direction is given not to make a record of information that would otherwise be made or when a direction to destroy information is given to a person in order to prevent the disclosure of the information.

Importantly all that matters for the commission of the offence is that the person intended to prevent the release of information that may have been required to be released under the Bill. It

[58] See for example *The Secretary of the Department of Primary Industries v Environment Victoria Inc.* [2013] VSC 300.

does not matter whether the information would in fact have ultimately been required to be released.

Clause 91 Preventing disclosure of information

Consistent with clause 90(2) this clause makes it an offence for a person to engage in conduct with the intention of preventing the disclosure of information. This includes for example destroying or deliberately not recording information that should be recorded as well as taking other measures to convey information in a way that makes it easy to prevent its public disclosure. For example by using ‘post it’ notes to communicate notations on documents with the intention that they simply be removed rather than annotating the document and making a permanent record that can later be disclosed publicly.

Importantly all that matters for the commission of the offence is that the person intended to prevent the release of information that may have been required to be released under the Bill. It does not matter whether the information would in fact have ultimately been required to be released.

Clause 92 Failing to identify information

This clause makes it an offence to deliberately fail to identify government information that is within the scope of an access application. In any FOI scheme there is a degree of reliance placed on public servants and ministerial staff to properly identify the relevant information within the scope of an application. This clause is intended to prevent officials and staff from knowingly failing to identify information and to ensure that all relevant information is considered when deciding an access application.

Clause 93 Improperly influencing exercise of function

Consistent with clauses 90 and 91 this clause is intended to prevent people from intentionally influencing others to exercise functions or engage in conduct that is contrary to the requirements of the Bill. The offence ensures that information officers and others required to exercise a function under the Bill are free from improper influence and genuinely apply the terms of the Bill to the circumstances at hand.

Clause 94 Gaining unlawful access to government information

This clause recognises that while there is a need to ensure that those responsible for the administration of the scheme act honestly it is also necessary to prohibit deceptive conduct from those wishing to access information to ensure the proper functioning of the Bill. The clause provides that it is an offence to intentionally deceive or mislead a person exercising a function with the intention of gaining access to information.

**Part 10 Miscellaneous**

This part sets out a range of miscellaneous provisions that will assist in the implementation of the scheme and promote the effectiveness of the public right to access government held information.

Clause 95 Annual statements by Chief Minister

At the Commencement of the QLD RTI Act the then Premier of Queensland circulated throughout the public service a “Statement of Information Principles for the Queensland Public Service”. The statement reads in part:

> 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.[59]

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

The intention is to provide a mechanism to drive cultural change and demonstrate that there is a commitment to reform. Over time this can be focused on particular areas of the reforms that can be continually refined and then evaluated to ensure that progress continues to be made in efficiently providing government information to citizens.

<u>Clause 96 Annual reports to Legislative Assembly</u>

This clause requires each agency and each Minster to prepare an annual report on the operation of the Bill as it applies to them. This will be an important accountability measure for agencies and Ministers and will complement the annual ombudsman reports on the overall operation of the Bill (see clause 67). It is anticipated that agency annual reports will be included within the existing annual reports and that Ministers will concurrently provide their annual reports to the Assembly.

Annual reports are required to detail decisions made by each agency or Minister both in respect of open access information and access applications as well as the details of any review of those decisions by the ombudsman and the ACAT. Note that in relation to paragraph (3)(e) all that is required to be stated is whether the information was amended or the application was refused, no details of any amendments should be included in the annual report.

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

Clause 97 How government information to be published

This clause applies both to open access information (see Part 4) and to other information required to be published or made available by the Government under another Territory law. Currently there are a variety of publication and notification requirements, harmonising them here in a manner more consistent with contemporary expectations is intended to 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.

When publishing open access information under the Bill or other government information under another Act, an agency or Minister must make the information available on the internet and they must make a hard copy available for inspection if requested.

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.[60]

Additionally the information must be published in a manner that provides the 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.

The clause also includes a regulation making power to prescribe an alternative publication standard to the web content accessibility guidelines level AA. This is done so that the standards can evolve with contemporary expectations and are not bound to what will eventually become an obsolete standard as technology evolves.

Clause 98 Access applications taken not to include application for access to metadata

This clause provides that access applications for government information will be taken not to include an application for the metadata associated with the electronic records of that information unless the applicant explicitly states that it does. In effect this means that where an agency or Minister provides a hard copy of the information they are not required to also provide a separate copy of the metadata about any electronic records that they have printed in response to the request. Where an access application is made electronically and the information provided in response is provided electronically then the metadata for those files will ordinarily automatically be provided with those files and the clause creates no expectation for agencies or Ministers to remove it.

If an applicant wishes to have the metadata included in the response to the application they can specifically request this and unless it is not reasonably practicable to do so the respondent agency or Minister will be required to provide it. Note also that an agency or Minister may refuse to deal an application where it would involve an unreasonable and substantial diversion of

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

resources (see clauses 43 and 44). Ordinarily there will be no additional burden placed on an agency in simply providing the electronic files containing the information.

Clause 99 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. 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 and consequently this clause is required to ensure that subject to the public interest test the information is available to the public.

Clause 100 Agency entitled to access information about government contracts
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 the relevant agency 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 101 and 102
*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 change, there is a mechanism in place so that the information held by the former agency or Minister continues to be available to the public.

Clause 103 Protection from liability
Where an official acts honestly and without recklessness they are protected from civil or criminal liability for 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 104 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 Report and the ALRC Review.[61] 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 charging 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.

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[61] 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.

Clauses 105 and 106

*No fees for certain matters and fee estimates*

These clauses set 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 access applications.

Clause 107 Fee waiver

A person who has made an access application can also apply for a waiver of fees associated with the application, either at the time of making the application or later when they are told of the cost of the request.

Where an application is made the clause prescribes the circumstances where fees must be waived. Circumstances where fees must be waived include where the applicant is a concession card holder who demonstrates a connection with the information requested or a community organisation and the application relates to the objects or purposes of the organisation. For example fees would be required to be waived where an organisation whose objects included the protection of human rights applied for information about an alleged breach of a person's human rights.

Fees must also be waived where the information that is subject to the request is of special benefit to the public generally. Clause 66 provides for guidelines on the application of this test to be developed by the ombudsman. In circumstances where there is a special benefit to the public generally it is more appropriate that the government rather than a particular individual bear the cost of making the information available to the wider community.

The NSW Information Commissioner describes the application of the special benefit to the public generally test under the NSW *Government Information (Public Access) Act 2009* as follows:

> 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.[62]

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)?
(c) Does it interest or benefit the public in some other way? (for example by assisting public understanding about government functions)?

[62] Office of the Information Commissioner NSW, *Guideline 2: Discounting charges – special benefit to the public generally*, March 2011, p6.

(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?[63]

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 require fees to be waived in circumstances where there is a particular benefit to the public such that there should not be a charge imposed on a particular individual.

The clause also requires that where information was not publicly available but is made publicly available within three days of the request the fee for the provision of the information, and not any application fee, must be refunded. This ensure that applicants are not required to pay for information that was being released anyway or that if the information is released more broadly as a result of the application the individual is not required to pay for it.

Clause 108 Approved forms
This clause authorises the Minister to approve forms for the Bill. Where a form has been prescribed the form must be used for that purpose and a person competing the form must substantially comply with the form. See section 255 of the *Legislation Act* 2001 for the complete requirements in relation to forms.

Clause 109  Regulation-making power
This clause 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 procedural requirements for the making of regulations by the Executive are set out in section 41 of the *Legislation Act 2001*.

Clause 110 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 five 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 Regulations 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 section 14 of the current FOI Act 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 under clause 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

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

application for the information under the Bill. Rather than applying for review of a decision under the current FOI Act a person will be able to make a fresh 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 contrary to the public interest to release. Some of the information prescribed in schedule 1 as contrary to the public interest information replicates existing exemptions in the current FOI Act. However the classifications are generally narrower and as much as possible articulate specific information or outcomes that would actually be harmful to the public interest.

The determination of whether information comes within the prescribed categories set out in the schedule is also subject to clause 9. This means that where it is possible to conclude that the information is not within a particular category listed in the schedule the schedule will not apply and the public interest test set out in clause 17 must be applied to the information.

Additionally the scope of the schedule is limited so that it does not apply to information that identifies corruption or the commission of an offence by a public official or to information that would reveal that the scope of a law enforcement investigation has exceeded the limits imposed by law. In these circumstances the public interest test will be required to be applied to the information (see clause 17).

**Schedule 2 Factors to be considered when deciding the public interest**
The factors for and against the disclosure of information listed in schedule 2 have been adapted from the provisions in the QLD RTI Act. The factors set out in the schedule are the most commonly applicable factors to the determination of whether government information is on balance contrary to the public interest to release. The schedule is not an exhaustive list of relevant factors and a decision maker is required to take into account all relevant the factors in the circumstances of the application (see clause 17).

**Schedule 3 Reviewable decisions**
Schedule 3 sets out the decisions that are subject to merits review by the ombudsman and ACAT and who can make an application for review for each decision. Where a decision essentially affects only the applicant, review is restricted to the applicant. Otherwise, consistent with the public right to government information that all citizens enjoy equally, anyone can make an application for review of a decision by the ombudsman and subsequently the ACAT (see Part 8).

As information is a public resource and everyone has an equal right to access government information it is necessary to allow anyone to apply for review. To do otherwise would be to allow the person who had applied for the information to monopolise what then happened when they may well have no greater interest in the information than anyone else.

**Schedule 4 Consequential Amendments**
With the exception of changes to the *Territory Records Act 2002* to harmonise the two schemes the changes made to other Acts do not involve any significant policy changes. They are simply consequential changes to ensure consistency with the Bill.

**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 that where the ACAT decides to disclose information that the relevant agency or Minister had decided not to disclose the ACAT may make an order that the agency or Minister pay the reasonable costs of the application.

Clauses 4.2 – 4.3

*Appealing decisions of the ACAT to the Supreme Court*

When reviewing an ombudsman decision under the Bill the ACAT must be constituted by three members who are presidential and senior members (see clause 84). In undertaking the review the Tribunal is effectively operating as an appeal tribunal. These clauses simply clarify the subsequent review mechanism so that a review of the Tribunal's decision is undertaken by the Supreme Court.

**Parts 4.2 – 4.15**

These clauses make minor consequential changes to the: *Children and Young People Act 2008, Construction Occupations (Licensing) Act 2004, Crimes (Assumed Identities) Act 2009, Crimes (Controlled Operations) Act 2008, Crimes (Protection of Witness Identity) Act 2011, Crimes (Restorative Justice) Act 2010, Crimes (Surveillance Devices) Act 2010, Education and Care Services National Law (ACT) Act 2011, Election Commitments Costing Act 2012, Gene Technology Act 2003, Government Procurement Act 2001* and *Health (National Health Funding Pool and Administration) Act 2013, Health Practitioner Regulation National Law (ACT) Act* and *Heavy Vehicle National Law (ACT) Act 2013*.

**Part 4.16 Housing Assistance Act 2007**

Clause 4.19 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 clause 1.14 of schedule 1 declares that protected information under section 28 of the HAA is contrary to the public interest information.

**Part 4.17 – Part 4.25**

These clauses make minor consequential changes to the: *Independent Competition and Regulatory Commission Act 1997, Information Privacy Act 2014, Ombudsman Act 1989, Planning and Development Act 2007, Rail Saftey National Law (ACT) Act 2014, Road Transport (Driver Licensing) Act 1999, Road Transport (General) Act 1999, Road Transport (Public Passenger Services) Act 2004* and *Road Transport (Vehicle Registration) Act 1999.*

**Part 4.26 Territory Records Act 2002**

Clauses 4.36 and 4.37

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 4.38 Sections 7 and 8

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 a prescribed authority, consistent with that change this clause updates the definition 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 prescribed authorities (and therefore agencies) under the current FOI Act. The clause also harmonises the meaning of ‘principal officer’ with the definition for the FOI scheme created by the Bill.

<u>Clause 4.39 Section 21 (2) and note</u>
This clause makes a minor change to update the section to reflect the new FOI scheme created by the Bill.

<u>Clause 4.40 Section 28</u>
After a period of 20 years has expired since the creation of the information it will no longer be subject to the FOI scheme and instead will be available to the public under the TRA unless a declaration is issued by the director. A declaration may be issued 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).

This clause sets out the basis on which the director may issue a declaration applying the provisions of the new FOI scheme. 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.

<u>Clause 4.41 and 4.42</u>
Similar to the mechanisms put in place for the release of government records in clause 4.40, these clauses amend the mechanism for preventing the release of executive records.

<u>Clauses 4.43-4.47</u>
These clauses make minor amendments to the TRA to make them consistent with the Bill.

**Part 4.27 Territory Records Regulation 2009**
<u>Clause 4.48</u>
This clause makes a minor amendment to the *Territory Records Regulation 2009* to make it consistent with the Bill.

**Part 4.28 Utilities Act 2000**
<u>Clauses 4.49-4.50</u>
These clauses make minor consequential changes to the *Utilities Act* to make it consistent with the Bill.

**Dictionary**
The dictionary sets out the meaning of certain significant terms used in the Bill.