

# Government & Probity NewsFlash

December 2009

## Upcoming Changes to Freedom of Information Legislation

In early 2010 the *Government Information (Public Access) Act* (NSW) 2009 (**the Act**) will replace the current *Freedom of Information Act* (NSW) 1989 (**FOI Act**). The new legislation will introduce a number of changes which will need to be adopted by Ministers, Minister's Offices and Agencies.

The key differences between the current and upcoming legislation include:

- New Proactive Disclosure by Agencies

The Act authorises and encourages proactive public release of government information by Agencies. Additionally, certain "open access information" must be published free of charge on the relevant Agency's website.

- Decreased Formality in Handling Applications for Access to Government Information

Agencies will be authorised to release government information in response to informal requests, but will not be required to do so. Applicants for information will also be entitled to amend or withdraw applications.

- A Single "Public Interest" Restriction on Disclosure

Under the new legislation, there will be a presumption in favour of disclosure. Only where an "overriding public interest" against disclosure outweighs public interest considerations in favour of disclosure will documentation be withheld. This Section appears

to consolidate existing common law principles evaluating public interest factors in disclosure, most notably outlined in *WorkCover Authority of NSW v Law Society of NSW* (2006).

Unlike in the current FOI Act, there are no other exemptions on providing government information in the new Act, and the Act abolishes Ministerial Certificates which previously allowed Ministers to declare certain documents exempt from disclosure. However, Schedule 2 of the Act contains a list of circumstances where there is an automatic presumption of an overriding public interest against disclosure. This list is largely identical to the current restrictions contained in Schedule 1 of the FOI Act, and therefore many of the exemptions currently in place will continue under the new Act.

- New Time Frames for Dealing with Applications

Applications will need to be decided by Agencies within 20 business days.

- New and Altered Review Mechanisms

Internal review will be optional, and review by the new Information Commissioner and the Australian Appeals Tribunal will be available.

- New Penalties

The Act establishes that it will be an offence to knowingly make a decision in contravention of the legislation.



The *Government Information (Information Commissioner) Act 2009* will establish the independent office of the Information Commissioner, effectively replacing the Ombudsman's review role. The Commissioner will deal with complaints about Agencies in relation to their obligations under the Act, and will be entitled to investigate and report on the conduct of an Agency exercising its powers under the Act. The Commissioner may require Agencies to provide statements of information and produce records where required, and will have numerous powers to prevent the contravention of any requirements of the Act.

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Significantly, Agencies must also notify the Commissioner of the adoption of, or any alteration of, publication guides.

## Agencies under the *Freedom of Information Act 1989 (NSW)*

In the meantime, the Agencies must continue observing the current FOI legislation.

The Premier issued a memorandum on 7 August 2009 entitled "M2009-18 Agency Responsibility for FOI Determinations", reminding Agencies of their obligations under the current *Freedom of Information Act 1989 (NSW)*. Determinations under this Act must be made by Ministers, Minister's Offices and Agencies based on their merits and in accordance with criteria set out in the Act.

In particular, the Memorandum confirms that Agencies are not subject to Ministerial control in determining applications for information and that Agencies must not provide draft determinations to Minister's and their Offices. Additionally, Agencies may not seek advice or comments from Minister's or Minister's Offices regarding pending applications. Exceptions apply only where information concerns a Minister's personal affairs, or where the application cannot be understood without clarification from the Minister or Minister's Office.

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