



**Freeing up information: response to the NSW  
Ombudsman's Review of Freedom of  
Information Law in NSW**

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**Lizzie Simpson, Solicitor  
With Ee-von Lok and Claire O'Moore, Graduate Interns**



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# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth-State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's expertise in freedom of information Legislation

PIAC has a long-standing interest in the operation of the *Freedom of Information Act 1989* (NSW) (the FOI Act). For over fifteen years PIAC has utilised freedom of information legislation on behalf of clients. PIAC has undertaken a number of test cases under freedom of information legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588.

PIAC has written papers and contributed to debates about freedom of information legislation including making submissions to the Australian Law Reform Commission in respect of its inquiry into the *Freedom of Information Act 1982* (Cth) (the Cth FOI Act) in March and July 1995.

# The NSW Ombudsman's review of the *Freedom of Information Act 1989*

## General Comments

The NSW Ombudsman is to be commended for initiating a review into the FOI Act. The NSW FOI Act has been in force for almost twenty years and has never been the subject of a comprehensive review. Moreover, the NSW Ombudsman is not alone in expressing concern about the whether the existing freedom of information legislation is operating effectively: at a national level the Federal Government has announced its intention to introduce significant reforms to the legislation, and other states including Victoria, Tasmania and Queensland are also evaluating the effectiveness of their freedom of information legislation.

In this submission, PIAC deals with the specific issues about which the Ombudsman, through his discussion paper, has sought comments. However, PIAC has at times gone further than responding to the specific issues raised, making additional suggestions about amendments or changes to the FOI Act. In summary, the main points that PIAC makes in this submission are:

- the objects of the FOI Act should be amended to include a presumption that access is to be provided to information unless its disclosure, on balance, would be contrary to the public interest;
- a public interest test should be incorporated into all of the exemptions;
- consideration should be given to the introduction of an overarching public interest test;
- the right to access and amend one's own information should be removed from the FOI Act and placed in the *Privacy and Personal Information Protection Act 1998* (NSW) (the PPIP Act);
- the position of an independent statutory Information Commissioner should be established with responsibility for monitoring and reporting, providing training, advice and guidance, and undertaking investigations into the operation of the FOI Act.

PIAC hopes that the NSW Government will carefully consider the Ombudsman's review and that it will act promptly to introduce significant reforms to the FOI Act to ensure that it meets its objective of ensuring the rights of the public to access government-held information.

## Changing the Culture

Before providing comments on the specific issues that the NSW Ombudsman has raised, PIAC suggests that the first matter that needs to be addressed and reformed is the attitudes of agencies towards the FOI Act. Without dealing with attitudes, any changes to the FOI Act are unlikely to have a significant impact on the problems that most applicants experience in using the freedom of information legislation. It is essential that any legislative changes are accompanied by a corresponding reworking of the culture of the agencies and their staff in order for the freedom of information process to be more effective.

While the FOI Act is intended to improve individuals' access to NSW Government information, the simple fact is that there is an inherently uneven relationship between freedom of information applicants and agencies. An agency has access to the documents, it is able to see what the documents say, where they are stored and what search terms or phrases would encompass that document. In contrast, an individual may know in general terms what documents are being sought, but very rarely will know the exact title or search

term. Also, when faced with a refusal most applicants—unlike other potential litigants—are not able to assess whether the refusal is fair.

Furthermore, as the Queensland FOI Independent Review Panel (the review panel) noted in its recent report, *The Right to Information – Reviewing Queensland’s FOI Act* (the Solomon report):

[O]nly rarely is the public interest assessment made by an agency challenged by an applicant and may then be checked and possibly corrected by an external review body. How the officer in the agency applies the public interest test is more often than not determinative of the outcome of the application for access to a document.<sup>1</sup>

Thus, the culture and attitude that agencies adopt towards the FOI Act is critical.

While acknowledging that some NSW Government Agencies properly meet their obligations under the FOI Act, in PIAC’s experience many other agencies are slow, unhelpful and even obstructive in responding to freedom of information requests.

PIAC suggests that there are a number of different measures that should be implemented in order to alter and challenge existing attitudes towards freedom of information legislation including the following:

- Introduction of criminal offences and other sanctions for individuals and agencies who destroy or conceal records or wilfully interfere with freedom of information requests.
- Creation of an independent statutory office of an Information Commissioner whose role would be to promote the objects of the FOI Act by providing training, advice and increasing awareness of the FOI Act as well as monitoring and reporting on the operation of the FOI Act.
- Improving the collection and reporting of accurate and comprehensive information about each agency’s performance in respect of freedom of information legislation. This could also include giving annual report cards highlighting good as well as bad performers.
- Encouraging better training and accreditation for freedom of information officers and practitioners.

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<sup>1</sup> FOI Independent Review Panel, *The Right to Information - Reviewing Queensland’s FOI Act* (2008) 141.

# Chapter 1 The objects and presumptions of the FOI Act

## **Issue 1: Should the objects of the FOI Act be amended to emphasise that implementation of the legislation and proper transparency must be understood by the government of the day, Treasury and all agencies to be a core function of government?**

Although PIAC agrees that the implementation of the freedom of information legislation should be regarded as a core function of government, PIAC suggests that rather than simply inserting a provision to this effect within the existing objects provision it would be stronger to also set out the rationale for the proper implementation of the FOI Act within the Act. As the panel noted in the Solomon report:

[T]he Panel is convinced that the Act does not contain a section that specifically answers that question, 'why FOI?'. It should place FOI in context, and explain why and how it is intended to contribute to a healthier democracy and enhance its practice. This is where it is possible to explain how FOI can support the system of representative, democratic government and encourage better public administration.<sup>2</sup>

PIAC submits that the existing objects clause should be retained (although subsections 5(1) and (2) should be amended as set out in response to Issue 3 below) and a new provision should be inserted into the FOI Act under the heading 'Reasons for enactment' setting out the rationale for the legislation. The 'reasons' in the Solomon report are:

- (a) there should be open discussion of public affairs;
- (b) information held by the Government is a public resource;
- (c) the community should be kept informed of government operations, including, in particular the rules and practices followed by government in dealing with members of the community;
- (d) openness in government enhances the accountability of government;
- (e) openness in government can increase the participation of citizens in democratic processes leading to better informed decision-making;
- (f) freedom of information legislation can contribute to a healthier, representative democratic government and enhance its practice;
- (g) freedom of information legislation can improve public administration, and the quality of government decision-making; and
- (h) freedom of information legislation is only one of a number of measures that should be adopted by government to increase the flow of information that the government controls to citizens.<sup>3</sup>

PIAC suggests that these reasons equally apply to NSW freedom of information legislation and consideration should be given to their incorporation into the FOI Act.

## **Issue 2: Should the objects be amended to call on agencies to regularly review and take steps to publicly release as much of their information as possible?**

While this amendment is broadly equivalent to paragraph 5(2)(a) of the FOI Act, PIAC submits that this amendment is more prescriptive: it imposes a positive obligation on agencies to both review and then publish government information.

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<sup>2</sup> Ibid, 75.

<sup>3</sup> FOI Independent Review Panel, above n1, 76-77.

As such, PIAC is supportive of this amendment unless the Ombudsman is minded to adopt the proposal advocating redrafting of the objects and reasons for the FOI Act as set out in response to Issue 1 above.

**Issue 3: Should the objects of the FOI Act be amended to include a presumption for the release of documents that can only be overridden where an exemption clause, read narrowly, clearly applies?**

While PIAC agrees that the FOI Act should be amended to include an express presumption that information should be released, PIAC submits that this presumption should be re-worded to read as follows: 'there is a presumption that access is to be provided to information unless its disclosure, on balance, would be contrary to the public interest'.<sup>4</sup>

PIAC submits that it is not appropriate to include any references to exemptions in the objects of the FOI Act. While PIAC acknowledges that the right to access information under the FOI Act is not absolute, the balance between the public's right to access information and legitimate government concerns about confidentiality is already built into other parts of the FOI Act. This balance should always be approached from the starting point that there is a presumption in favour of disclosure. Thus, PIAC recommends that consideration be given to deleting subsections 5(1) and (2) of the FOI Act and replacing it with them proposed presumption set out above.

**Issue 4: Should the external review functions be amended to place an onus on agencies to demonstrate to both the Ombudsman and the Administrative Decisions Tribunal (ADT) that exemptions claimed clearly apply and that consideration was given to whether release of the documents is in the public interest?**

Although section 61 of the FOI Act currently states that the burden of proof rests with the agency or Minister to show that a determination is justified, PIAC agrees that it would be helpful to clarify that there is an onus on agencies and Ministers to demonstrate how the exemptions claimed apply and that consideration was given as to whether the release of the document was in, or against, the public interest.

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<sup>4</sup> Cf *Trunchon v Commissioner of Police, NSW Police Force Service* [2000] NSWADT 73 at [18]; *Searle Australia Pty Ltd v PIAC & Anor* (1992) 108 ALR 163 (in relation to the Cth FOI Act).

## Chapter 2 Title of the FOI Act and Drafting Style

### **Issues 5 and 6: Should the title of the FOI Act be retained?**

PIAC submits that the existing title of the FOI Act is relatively well known in Australia, is consistent with other jurisdictions and, as such, there would be less confusion if the current title were retained.

### **Issue 7: Should the FOI Act be re-drafted to focus more on principles and less on detailed and legalistic technical provisions?**

PIAC agrees in principle that the FOI Act should be redrafted to focus more on principles. Many of the existing provisions of the FOI Act are overly complex and confusing for applicants. Given that it is a legislative mechanism designed to facilitate the involvement of the public in our democracy, it is inappropriate that applicants effectively cannot navigate through the provisions of the FOI Act without legal advice or assistance.

However, it is unclear what this proposal means in practical terms. As a starting point, the objects of the FOI Act should be amended to include the principle or presumption in favour of disclosure unless disclosure would be contrary to the public interest. PIAC further suggests that there should be a comprehensive review of all of the existing exemptions with a view to rationalisation and simplification. This review should not only involve ensuring that all exemptions are found within the FOI Act itself, and any exemptions that overlap with other exemptions are repealed, but should also entail a more fundamental reconsideration of what was the principle or 'harm' that lead to the inclusion of each of the exemptions and the redrafting of each exemptions to limit it to dealing with that harm or principle. Redrafting the objects of the FOI Act to focus more on principles or presumptions in favour of disclosure is another mechanism for improving the FOI Act. Finally, all amendments should be drafted in plain English.

## Chapter 3 Scope – Documents/Information

### **Issue 8: Should the scope of the FOI Act be broadened to include information not in documentary form?**

The key advantage of broadening the FOI Act to include information not in documentary form is that it would deal with the practice, which PIAC has been told some agencies have adopted to obstruct the operation of the freedom of information legislation, of deliberately avoiding recording significant (but damaging) information.

However, PIAC submits that there may be practical problems with the proposal that the term ‘document’ in section 6 of the FOI Act should be expanded to include information held in the mind of officials. For example, if as a result of a freedom of information request an official had to create documents based on their recollection of matters that may have happened some time before the request was made, this information is likely to be inaccurate and unreliable.<sup>5</sup> Documents created from memory may also be subject to manipulation by officials who wish to justify a particular result.<sup>6</sup> Or if, for example, such a long time had passed that the official was no longer working at the agency, it would simply not be possible to fulfil the request. Furthermore, the scope of information that applicants could request if this proposal were to be adopted could become unmanageable.

Thus, PIAC submits that instead of widening the scope of the FOI Act to counter situations where information is intentionally not recorded by officials to Act’s operation, agencies should instead be made to ensure that the provisions of the *State Records Act 1998* (NSW) (State Records Act) are properly adhered to by their staff, and that the decisions, actions and procedures of their staff are recorded according to the provisions of that Act.

### **Issue 9: Should the FOI Act be amended to include a provision that makes it an offence to destroy or conceal records?**

PIAC agrees that there should be sanctions where a person destroys or conceals records. PIAC also suggests that the sanctions should be available in respect of the conduct of an agency as well as against any individuals who destroy or conceal records.

PIAC considers that sanctions would be a deterrent to breaching the FOI Act, and that these provisions may contribute towards change the culture and attitude of agencies and officials towards the FOI Act.

Any provisions for sanctions would have to be enforced by a body with sufficient capacity and powers to investigate matters even where it had not received any formal complaints. This is particularly important because officers who destroy or conceal records in breach of the FOI Act will be likely to commit these breaches in secret. It is also important that the standard required under these offences should not be set too high, as this will defeat the purpose of having such provisions in the first place. For example, PIAC is aware of only one case in which the criminal sanction provisions of the PPIP Act have been used. PIAC suggests that consideration be given to including provisions for offences in circumstances where

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<sup>5</sup> Australian Law Reform Commission (ALRC), *Open Government: a review of the Federal Freedom of Information Act 1982*, ALRC Report 77 (1995) paragraph (7.3).

<sup>6</sup> Ibid.

breaches have occurred inadvertently as well as deliberately or corruptly, with sanctions reflective of the nature and extent of the breach.

PIAC notes that freedom of information officers are usually junior level officers who are more susceptible to pressure from senior level officers. Thus, PIAC submits that the FOI Act should also include sanctions in respect of any person who interferes with the proper administration of the freedom of information process.

## Chapter 4 Role of decision-makers under the FOI Act

### **Issue 10: Should the FOI Act be amended to emphasise the responsibility of decision-makers under the Act to independently and responsibly implement the letter and spirit of the law?**

PIAC agrees that it is essential that decision-makers under the FOI Act be reminded that they must act independently and responsibly when making decisions about the release of government-held information. However, PIAC believes that it will also be more useful to pursue other measures, such as the introduction of offence provisions, improved training and education for freedom of information decision-makers aimed at challenging the existing culture of secrecy.

### **Issue 11: Should offence provisions be introduced to give support to the independent role of freedom of information decision makers?**

PIAC supports the proposal to introduce provisions making it an offence for:

- any person to place undue pressure on freedom of information decision-makers to influence a determination; and
- freedom of information decision-makers to wilfully fail to comply with the requirements of the FOI Act.

In addition to the reasons set out in response to Issue 9 above, PIAC also reiterates its concern that the standard for any proposed offence provisions should not be set too high and that the body with oversight of the FOI Act must be given the capacity and the tools to properly investigate possible breaches.

## Chapter 5 Exemptions

### **Issue 12: Should ‘public interest’ or ‘significant detriment’ tests be introduced into all exemption clauses?**

PIAC submits that a general public interest test should be imposed on all exemptions.

In responding to this issue, PIAC’s starting point is the comments of the Australian Law Reform Commission in its 1995 report, ‘[w]hat distinguishes the approach to disclosure of government information in the FOI Act from approaches taken prior to its enactment is its focus on the public interest.’<sup>7</sup>

PIAC takes the view that one of the key reasons why the FOI Act has failed to sufficiently focus on the public interest is that the focus has instead been on exemptions. There are currently 39 exemptions to the FOI Act. Of these exemptions, some are found in other legislation, some overlap, and many are overly legalistic and complicated. Many of these exemptions do not contain any public interest test and, as a result, if one of the exemptions applies to a document then that document is exempt from release, irrespective of whether public interest considerations may still favour release. In the case of other exemptions, there is a public interest test, although different tests apply to different exemptions.

Furthermore, in practice, as the Solomon report noted in relation to the Queensland experience of freedom of information legislation, many agencies focus on whether an exemption applies and questions of public interest are addressed as an afterthought, if at all. In some cases, applicants are placed in a situation where they effectively have to prove the public interest once an agency determines that an exemption applies.<sup>8</sup>

Thus, PIAC believes that the FOI Act needs to be fundamentally restructured to ensure that the focus is on considerations about whether or not disclosure is in the public interest. As set out in response to Issue 14 below, PIAC advocates that this reconsideration of the exemptions should be substantial; and that an overarching public interest test be adopted.

However, if the existing structure of freestanding exemptions is retained, PIAC submits that the existing exemptions should be rationalised and simplified to limit each to addressing the specific harms identified. A public interest test should also be incorporated into each of the exemptions and an agency should be required to include in its statement of reasons the factors that it took into account in applying the public interest test.

However, irrespective of whether an overarching public interest test is incorporated into the FOI Act or the public interest test is incorporated into each individual exemption, PIAC strongly advocates that a public interest test must be incorporated. While it has been suggested that some exemptions do not need to contain a public interest test because the public interest in applying that particular exemption is so high that no other public interest should be permitted to tip the balance in favour of disclosure, PIAC submits that all exemptions should be subject to a public interest test to enable consideration of the specific circumstances.

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<sup>7</sup> ALRC, above n5, 95.

<sup>8</sup> FOI Independent Review Panel, above n1, 141-142.

### **Issue 13: Should the same public interest test be used in all cases?**

PIAC accepts that the public interest is more likely to favour some documents being withheld than in others. Accordingly, if the existing exemptions are retained in the FOI Act, then PIAC accepts that it would not be appropriate for the same public interest test to be applied in all cases. Depending on the harm or detriment sought to be avoided by an exemption, the appropriate test would either be that the document should be withheld unless disclosure would be in the public interest, or that the document should be disclosed unless disclosure would be contrary to the public interest.

However, retaining different public interest tests in the legislation runs the risk that it will continue to be confusing and overly complicated for agencies to administer as well as for individuals to utilise. Indeed, this is one of the reasons that PIAC supports the adoption an overarching public interest test along the lines proposed in the Solomon report.

### **Issue 14: Should an overarching public interest test be adopted in respect of all information, with a list of factors for and against disclosure provided for in the legislation?**

In the Solomon report, the Review Panel recommended the adoption a single overarching public interest test that 'access is to be provided to matter unless its disclosure, on balance, would be contrary to the public interest'.<sup>9</sup> Under this proposal there would be a right to disclosure unless:

- (a) the matter falls within an exemption; and
- (b) the disclosure of the matter, on balance, would be contrary to the public interest.<sup>10</sup>

To assist with (b), the Solomon report proposes inclusion in the legislation of a list of factors for and against disclosure and a time/harm weighting guide.

While it acknowledges that there are some risks associated with this approach, on balance, PIAC submits that this proposal is more likely to refocus the freedom of information legislation on the principle that providing access to documents is in the public interest. However as discussed in response to Issue 12 above, PIAC does not agree with the proposal in the Solomon report that some exemptions should remain outside the overarching public interest test.

One of PIAC's reservations about adopting this approach in NSW is that setting out a list of 'public interest' factors in the legislation may limit the flexibility of decision-makers to consider public interest considerations on a case-by-case basis. It may also 'freeze' the factors to which a decision-maker will have regard, even if the legislation expressly states that the list is not intended to be exhaustive. Finally, the introduction of a list may lead to a situation where decision-makers simply add up the number of reasons for or against disclosure rather than considering what the different interests at play are in a particular case, whose interests are affected, and the relative weights of the different interests.

On the other hand, it appears that one of the fundamental problems with the existing freedom of information legislation is the concept of public interest is vague and poorly understood. As the High Court said:

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<sup>9</sup> FOI Independent Review Panel, above n1, 147.

<sup>10</sup> Ibid, 66.

[T]he 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’.<sup>11</sup>

Further, as the Queensland Law Society said in its submission to the Queensland FOI Independent Review Panel, while it is theoretically possible for officers to refer to existing case law about public interest when making determinations, many agencies do not have the time or expertise to examine the existing cases.<sup>12</sup> Another advantage that the Review Panel perceived with its model was that it placed public interest at the core of determinations about rights of access, which is more consistent with the fundamental tenet that the freedom of information legislation is about access to documents.<sup>13</sup>

While it would be far from ideal for decision-makers to limit themselves to only those factors set out in the list, at least this would mean that they (a) were actively considering the public interest as the starting point and central focus for a determination; and (b) would be less likely to make decisions based on extraneous and irrelevant considerations.<sup>14</sup>

Furthermore, PIAC suggests that if this proposal were to be adopted the legislation should make it extremely clear that the list of factors is non-exhaustive and guidelines should be provided that provide a better understanding of the kinds of principles and weighing-up that should form the basis of a determination under the FOI Act.

While acknowledging that there is already guidance in NSW that sets out a number of relevant public interest factors, PIAC submits that this guidance is completely inadequate, particularly when compared to the more detailed and considered factors listed in the Solomon report. Also, unlike the Solomon report, there is absolutely no sense in the existing guidelines as to the relative time/weighting considerations that should also form part of the public interest assessment.

Also, while it is possible that better guidelines about public interest could be produced even if an overarching public interest test is not adopted, the reality is that the approach under the existing freedom of information legislation inevitably results in the focus being on considering whether exemptions apply, with public interest always being a secondary consideration. There is also a significant risk that, if the existing exemptions were to be retained albeit in a simplified form and better reflecting the particular harms, many of the same interests that led to the introduction of such extensive and numerous exemptions would also successfully resist ‘rationalisation’ and that we would be left merely tinkering at the edges.

The advantage of adopting an overarching public interest test is that it is a stronger and simpler proposal that would fundamentally reshape how access requests are considered and determined.

However, if the NSW Ombudsman is not minded to recommend that an overarching public interest test should be adopted, PIAC submits that a number of amendments should be made to the FOI Act including:

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<sup>11</sup> *O’Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson and Gaudron JJ at 217, cited in FOI Independent Review Panel, above n1, 146. The quotation is from *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, per Dixon J at 505.

<sup>12</sup> Queensland Law Society, *Submission to the FOI Independent Review Panel discussion paper*, cited in FOI Independent Review Panel, above n1, 145.

<sup>13</sup> FOI Independent Review Panel, above n1, 147.

<sup>14</sup> *Ibid*, 146.

- amendment of the objects provision to include an express presumption in favour of disclosure;
- rationalisation and simplification of existing exemptions to be limited to only those exemptions that are strictly necessary;
- incorporation of a public interest test to apply to each exemption;
- provision of detailed guidelines by the Ombudsman or an Information Commissioner, including a more detailed list of public interest factors, and explanation of the process that should be applied when considering questions of public interest;
- amendment to section 28 to ensure that the agency must include a statement in the reasons for a determination setting out how the question of the public interest was decided.

**Issue 15: In what circumstances should the public interest test be that disclosure is ‘in’ the public interest rather than disclosure being ‘contrary’ to the public interest?**

See the comments in response to Issues 13 and 14 above.

**Issue 16: Should subsection 59(a) be redrafted to clarify that it applies to the public generally as well as the particular applicant?**

PIAC supports this proposal.

**Issue 17: Should the number of exemptions in the FOI Act be reduced?**

PIAC submits that the large number of exemptions overshadows and to some extent undermines the objectives of the FOI Act. A perusal of the FOI Act gives the impression that the legislators, or the agencies lobbying them, have attempted to cover every contingency by permitting as many grounds for exemption as possible.

Subject to its comments in response to Issue 14 above, PIAC submits that in determining which exemptions should be deleted, the proper approach would be to re-consider each exemption to determine the purpose of that exemption, ie, what harm is the exemption meant to avoid. A number of exemptions are framed more broadly than necessary and others are unnecessary as the harm that they attempt to avoid can easily be avoided by other exemptions.

**Issue 18: What types of information should be automatically made available to the public?**

See the comments in response to Chapter 7 generally.

**Issue 19: Are there classes of documents or functions of agencies that should be exempt from the operation of the FOI Act?**

Agencies should not be automatically exempt from the provisions of the FOI Act merely because they are more likely to create sensitive documents in the course of their duties as a result of the nature of their organisation. PIAC is of the view that while some exemptions may be described in terms of classes of documents or functions of agencies, all exemptions should be subject to a public interest test. This would address in part the present problem of freedom of information officers being encouraged to regard a document as being *prima facie* exempt from the FOI Act, simply because it falls within one of the many

exemptions to the Act.<sup>15</sup> PIAC suggests that while the process of exempting documents places a more onerous duty on the agencies to prove that certain documents should not be disclosed rather than the use of blanket exemptions, such a process may also prove to be an incentive to agencies to start from the position that disclosure of non-personal documents should always be made to the public interest.

While PIAC acknowledges that some documents may genuinely be of a sensitive nature when they are created, and that it would not be in the public interest to release them at that time, the sensitivity of those documents may well decrease as time passes, in which case they should be available for potential disclosure to the public at the appropriate time. PIAC's view is that a Time and Harm Weighting Guide (the Guide) such as that proposed by the FOI Independent Review Panel should also be adopted in NSW in order to guide freedom of information officers in their assessment of the public interest in disclosure.<sup>16</sup> In particular, the Guide would provide both applicants and freedom of information officers with an indication of the various harms that are associated with the exemptions in the FOI Act, and an indication of how significant the harm may be at the time that it is being assessed.<sup>17</sup>

PIAC suggests that the majority of agencies named in Schedule 2 could rely on the other exemptions to the FOI Act where they hold truly sensitive documents that it would be contrary to the public interest to disclose. However, before there is any move to repeal Schedule 2 to the FOI Act, PIAC submits that there should be a thorough consideration on whether the exemptions provide sufficient protection for the documents of agencies where public interest dictates that the documents should be protected from disclosure.

As with the rest of the FOI Act, PIAC reiterates its submission that the exemption provisions should be redrafted in plain language, and that provisions that overlap should be combined or deleted, such as paragraphs 43(1)(a) and (c) of the FOI Act.

## **Issue 20: Should the exemption of classes of document or functions of agencies from the operation of the FOI Act be subject to time-specific review or a sunset provision?**

As stated above, PIAC is of the view that consideration should be given to repealing Schedule 2 of the FOI Act. However, where documents have been held to be exempt under the remaining provisions, PIAC submits that they should be subject to a sunset clause that specifies that any exemption granted will only apply to the documents for a limited time, after which it will be subject to a review to determine whether the harm that disclosure would cause or potentially cause at the earlier time is still applicable. This is consistent with PIAC's emphasis on focusing on the harm or detriment that is contemplated within each exemption. PIAC does not propose to set out the relevant sunset clause for each exemption, but would suggest that limitations periods should be a relevant consideration in this evaluation.

## **Issue 21: Should all exemption provisions be contained in Schedule 1 or Schedule 2 to the FOI Act?**

Given that the aim of freedom of information legislation is to improve the accessibility to and transparency of government-held information, the current situation where many exemptions to the FOI Act are found in other legislation is confusing and problematic. Thus, PIAC supports the suggestion that all exemptions to the FOI Act should be contained within the Act itself.

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<sup>15</sup> FOI Independent Review Panel, above n1, 161.

<sup>16</sup> Ibid, 161-166.

<sup>17</sup> Ibid.

## **Issue 22: Should there be a provision in the FOI Act authorising agencies and Ministers to refuse to confirm or deny the existence of certain documents?**

PIAC notes that that section 28 of the FOI Act already enables agencies to omit from a decision notice any matter that, if it were included in the notice, would make the notice an exempt matter. The advantage of replacing this provision with a clause that allows an agency to refuse to confirm or deny that certain documents exist, is that it would be clearer in practice how an agency should respond to a freedom of information request in those limited circumstances where reference to the existence of the document may cause the same harm as disclosure of the document itself.

PIAC also submits that an applicant should be able to seek a review of an agency's decision to neither confirm nor deny that documents exist.

## **Issue 23: To which exemptions should a 'neither confirm, nor deny' provision apply?**

PIAC submits that this provision should be limited to law enforcement and public safety (Schedule 1, clause 4) and protected disclosures (Schedule 1, clause 20(1)(d)).

## **Issue 24: Should the scope of the 'Cabinet documents' exemption be narrowed and/or a public interest test be added?**

The rationale behind the 'Cabinet documents' exemption is the recognition that disclosure of Cabinet documents, particularly documents that reveal Cabinet deliberations, may undermine the fundamental Westminster principle of collective ministerial responsibility. For example, as the Administrative Decisions Tribunal noted in *Cianfrano v Director General, Department of Commerce and Anor*:

This exemption finds its justification in the primacy of Cabinet in the Westminster system of democratic government. It preserves the constitutional convention of collective ministerial responsibility. It seeks to ensure that what is said in Cabinet remains in Cabinet. As with any committee process, there will be a range of views and a wide range of material canvassed before a final decision is reached. Under the Westminster system all Ministers are bound by the final decision, and must speak with one voice in relation to it. These principles are well-known, and find their expression in such terms as 'Cabinet solidarity'.<sup>18</sup>

However, PIAC believes that the 'Cabinet documents' exemption as it is currently drafted—as a class of exemption rather than focused on the consequence or harm resulting from disclosure—is extremely broad and is open to abuse. For example, documents may be prepared as 'Cabinet documents' when there is no intention of submitting them for consideration by Cabinet, but rather to avoid disclosure under the FOI Act. Furthermore, all of the documents in relation to any unit or project that is housed within the NSW Department of Premier and Cabinet are treated as Cabinet documents and as exempt under the FOI Act. These practices distort this exemption, allowing it to be used to exempt documents from disclosure, even though in reality it is unlikely that the release of those documents would damage the confidentiality of Cabinet discussions or decisions.

Thus, PIAC urges that consideration be given to narrowing this test so that it focuses on the consequences of disclosure rather than the class of document.

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<sup>18</sup> *Cianfrano v Director General, Department of Commerce and Anor* [2005] NSWADT 282 at [57]

One example of this approach is section 9 of the *Official Information Act 1982* (NZ) that relevantly provides:

Where this section applies, good reason for withholding official information exists, for the purpose of section 5 of this Act, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available ...

- (f) Maintain the constitutional conventions for the time being which protect—
  - (i) The confidentiality of communications by or with the Sovereign or her representative;
  - (ii) Collective and individual ministerial responsibility;
  - (iii) The political neutrality of officials;
  - (iv) The confidentiality of advice tendered by Ministers of the Crown and officials.

PIAC also submits that the public interest test should be incorporated into the ‘Cabinet documents’ exemption. While PIAC accepts that it is extremely unlikely that the public interest in releasing documents that are properly characterised as ‘cabinet documents’ would ever outweigh the public interest in those documents remaining confidential (see, for example, *Commonwealth v Northern Land Council* (1993) 176 CLR 604<sup>19</sup>), it is more consistent with the objectives of the FOI Act that this exemption contain a public interest test.

### **Issue 25: Given that, in practice NSW Cabinet documents are refused as a matter of principle, would it be more appropriate and less misleading to the public if the ‘Cabinet documents’ exemption provision was moved from Schedule 1 to Schedule 2 of the FOI Act?**

PIAC strongly disagrees with this approach. PIAC is already concerned that the existing ‘Cabinet documents’ exemption is too broad and moving it to Schedule 2 of the FOI Act would strengthen this concern. PIAC submits that consideration should be given to narrowing this exemption and making it subject to a public interest test.

### **Issue 26: Should the ‘Cabinet documents’ exemption be subject to a five-year sunset clause?**

See Issue 19 above in regards to PIAC’s view that consideration should be given to repealing Schedule 2 of the FOI Act.

Any exemption granted under the FOI Act should only have effect for the period of time during which the harm that it seeks to avoid is considered to exist. In relation to this issue, the Solomon report noted:

The Cabinet ‘oyster’ will be well and truly shucked after 10 years as a result of the publication of political memoirs, media reports and work by historians. The need to protect Cabinet confidentiality and Cabinet’s collective responsibility to Parliament ceases to have any force. It could be argued that strictly speaking Cabinet’s accountability ceases with every new parliamentary election – Cabinet can only be responsible to the Parliament in which it holds office as the Government.<sup>20</sup>

PIAC’s concern is that after 10 years have expired, it is likely that the utility of the information contained in the documents will also have expired, for example any limitations periods for bringing civil proceedings in relation to any decisions that may have been made by the Cabinet will have well and truly expired by that

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<sup>19</sup> Cited by the FOI Independent Review Panel, above n1, 115-116.

<sup>20</sup> FOI Independent Review Panel, above n1, 117.

time. If a time is included in the FOI Act, the risk is that this will be treated by agencies as the first date at which release can be considered rather than the maximum date. However, if the Ombudsman is minded to retain a sunset clause, then PIAC prefers the suggestion that Cabinet documents should no longer be exempt after the expiry of a five-year period.

### **Issue 27: Should the scope of the ‘working documents’ exemption clause be narrowed?**

The rationale behind this exemption is that, for government decision-making to be as well-informed as possible, measures are required that ensure that officials can give frank advice as part of the policy development process in the knowledge that their advice will be treated as confidential.<sup>21</sup> This rationale could equally apply to the deliberations and consultations surrounding the development of a government policy. Thus, PIAC does not agree that the scope of the ‘working documents’ exemption should be narrowed in this way.

However, PIAC submits that this exemption should be subject to a public interest test that in many cases may lead to the release of working documents, particularly once a final decision based on those documents has been released.

### **Issue 28: Should a provision be introduced that requires agencies, where the ‘working documents’ exemption is relied on, to provide a summary of the policy under development?**

PIAC is unconvinced about the practicality and/or value of agencies providing a ‘summary’ of a policy that is under development in those cases where they rely on the ‘working documents’ exemption.

### **Issue 29: Should the FOI Act be amended to clarify that the ‘working documents’ exemption cannot be relied on once a final position or decision has been reached or the information requested in the document is no longer relevant to any on-going consideration?**

PIAC submits that, rather than amending the ‘working documents’ exemption in this way, if a public interest test were incorporated into this provision, once a final decision was made it is less likely that this exemption would outweigh public interest factors in favour of disclosure. This would be even clearer if an overarching public interest test were to be adopted, in which the ‘working documents exemption’ would be reworked as a ‘harm factor’ and the guidance would make it clear that the weight to be given to this harm should drop away once a final decision had been made.

### **Issue 30: Should the scope of the ‘business affairs’ exemption be amended?**

PIAC has brought a number of test cases in which this exemption or the equivalent Commonwealth provisions were relied on by the agency. For example, in the case of *Re Organon*<sup>22</sup>, health and safety data had been supplied to the Government in the course of an application for a marketing license. PIAC argued that there should not be any guarantee of confidentiality in such a situation, as information is provided to agencies on the understanding that agencies have an obligation to act in the public interest. Further, the only way that safety and efficacy data provided by applicants could have a commercial value would be if a

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<sup>21</sup> See, for example, *McKinnon v Secretary, Department of Treasury* [2006] HC 45.

<sup>22</sup> *Re Organon (Australia) Pty Ltd and Department of Community Services and Health (1987)* 13 ALD 588.

competitor were seeking to market an identical drug at the same time. If this situation arose, the applicant could rely on the protection of the patent regulations. PIAC's view on such information is that although the information may have commercial value because of the high cost of obtaining the data, it would not have exchange value as competitors would not be able to use that specific data. Where the data shows that the drug is unsafe or non-efficacious, it would not have any commercial value anyway and so should be open to being disclosed. PIAC argued that the effect of this is that manufacturers that are not able to sustain the safety and efficacy of their products will be dissuaded from marketing such products in Australia.

PIAC believes that many of the phrases in the existing exemption including 'trade secrets' and phrase 'unreasonably and adversely affects business affairs' are unpredictable and problematic. For example, it is still not clear whether information about the safety of products amounts to a trade secret (contrast guidelines provided by the Administrative Appeals Tribunal in *Re Organon*<sup>23</sup> with the decision of the Full Federal Court in *Searle Australia Pty Ltd v PIAC*<sup>24</sup>).

In the cases cited above, one of the arguments commonly advanced by the agencies was that the information had been given freely by companies in the course of making their marketing applications, and that the companies generally gave more information than was required in order to ensure the success of the application. They argued that if the information provided by the companies is not protected from disclosure, the companies would be less likely to provide such information freely in the future. PIAC acknowledges the importance of confidentiality, but stresses that most of the information provided to the agencies in those cases was already a requirement of the application process.

Thus, PIAC is firmly of the view that this exemption should include a public interest test. PIAC also suggests that (b) and (c) could be combined and this exemption could be amended to include the commercial activities of government agencies as this may remove the need for some agencies to be included in Schedule 2, such as the Axiom Funds Management Corporation and the SAS Trustee Corporation in respect of their investment functions.

### **Issue 31: Should the commercial functions of State-owned corporations be exempt from the operation of the FOI Act and, if such an exemption is included in the Act, whether it should be subject to a five-year sunset clause?**

PIAC is of the view that where public funds have been invested in a corporation, it should result in a corresponding onus of public accountability for the use of those funds being placed on the corporation. Therefore, PIAC does not agree that the commercial functions of State-owned corporations should be automatically exempt under Schedule 2 of the FOI Act.

As the English Privacy Council said in the case of *Mercury Energy v. Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521:

A state enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate. The defendant carries on its business in the interests of the public. Decisions made in the public interest by the corporation, a body established by statute, may adversely affect the rights and liberties of private individuals without offering them any redress.<sup>25</sup>

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<sup>23</sup> Ibid.

<sup>24</sup> *Searle Pty Ltd v PIAC* (1992) 102 ALR 163

<sup>25</sup> Cited in M Taggart, 'Corporatisation, contracting and the courts' (1994) *Public Law*, Autumn, 353.

Furthermore, irrespective of the Government's push to make all State-owned corporations compete independently as single entities, they do benefit from their status and are not private bodies as a matter of fact. For example, even though State-owned corporations might be regulated by the Australian Competition and Consumer Commission and/or the Australian Securities and Investment Commission, they will not be subject to the requirements of the Australian Stock Exchange and will not be subject to the discipline that their commercial lenders might impose on other corporations that do not have their ability to tap into government funding.<sup>26</sup> PIAC agrees with the observation of the FOI Independent Review Panel that a completely level playing field may not be achievable for State-owned corporations.<sup>27</sup>

PIAC therefore recommends that all State-owned corporations be subject to the FOI Act, irrespective of whether they operate in a virtually monopoly market or otherwise. Where the documents held by State-owned corporations are genuinely sensitive, PIAC submits that they will be able to rely on existing exemptions, particular clauses 14 and 15 of Schedule 1 of the FOI Act in respect of those documents.

### **Issue 32: Should the FOI Act be extended to non-government and private sector bodies that carry out public functions on behalf of a public sector agency or receive significant public funding?**

In light of the NSW Government's recent move to increase privatisation of services such as superannuation administration and electricity, PIAC considers that the extension of the FOI Act proposed in Issue 32 would be warranted in most cases, but recognises that this is a complex issue.

For example, many organisations that are recipients of government funds are independent, not-for-profit charitable organisations that rely on volunteers to carry out their objectives. One of the main reasons that they have sought—and been granted—government funding is that they are carrying out community service obligations or achieving community objectives, the pursuit of which are generally unprofitable. While these organisations may assist the NSW Government to fulfil its public functions, for example, the Non-English Speaking House For Women is a shelter for non-English speaking women and children that is fully funded by the Department of Community Services to provide independent programmes and services, these programs and services are additional to the services provided by the Government.

These types of organisations can be contrasted with privately owned companies or corporations that supply essential public services such as water, energy, telecommunications and transport infrastructure. PIAC submits that the latter type of non-government bodies should be subject to the FOI Act precisely because they are providing essential services to the community. The public interest in keeping these bodies accountable and ensuring that their practices are up to standard far outweighs any commercial disadvantage that they would suffer. In particular, where they are providing functions or services (including regulatory ones such as the Law Society) that would otherwise be carried out by the Government, they should be subject to the FOI Act. Such bodies will also be able to rely on the exemptions in the FOI Act for those documents that relate to any competitive commercial activities.

If the Government is not minded to implement the approach proposed here, PIAC submits that as a bare minimum, the Government should implement requirements that:

- (a) agencies include provisions in contracts requiring that contractors record and provide adequate information to the agency and to allow Parliamentary scrutiny as well as public access rights;

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<sup>26</sup> FOI Independent Review Panel, above n1, 83.

<sup>27</sup> Ibid.

- (b) complaint procedures be adequate and not lost or diminished as a result of a service being provided by a contractor rather than the government; and
- (c) contractors' documents that directly relate to the performance of contractual obligations be deemed to be in the possession of the relevant agency.<sup>28</sup>

### **Issue 33: Should a public interest test be included in the 'legal professional privilege' exemption?**

For the reasons set out in response to Issue 13 above, PIAC submits that the legal professional privilege clause should include a public interest test.

### **Issue 34: Should the 'legal professional privilege' exemption be restricted to cases of actual or anticipated proceedings?**

At common law it is an accepted that the concept of legal professional privilege not only covers documents that were brought into existence in respect of contemplated or pending legal proceedings but also covers communications between a legal adviser and his/her client for the purpose of obtaining legal advice. The public interest in legal professional privilege was summarised by Dawson J in the case of *Baker v Campbell* as:

[I]ts justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purposes of giving or receiving advice... The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself.<sup>29</sup>

PIAC believes that this public interest applies equally to protecting communications for the purposes of giving legal advice as much as documents created in anticipation of or during legal proceedings.

Thus, PIAC believes that both limbs should be covered by the legal professional privilege exemption in the FOI Act.

### **Issue 35: Should the 'personal affairs' exemption be amended?**

PIAC supports the proposal that the term 'personal affairs' be replaced with 'personal information' to ensure consistency between the PPIP Act and the FOI Act.

### **Issue 36: Do you have further comments on any other exemptions in the FOI Act not discussed in detailed in the Ombudsman's discussion paper?**

PIAC does not seek to comment on any other specific exemptions.

### **Issue 37: Should bodies or functions be added to or removed from Schedule 2 of the FOI Act?**

Refer to PIAC's comments above in response to Issue 19.

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<sup>28</sup> Australia's Right to Know, *Submission to the FOI Independent Review Panel discussion paper* (2008) 9, cited in the FOI Independent Review Panel, above n1, 93

<sup>29</sup> *Baker v Campbell* (1983) 153 CLR 52 per Dawson J at 128.

**Issue 38: Should the FOI Act be amended to make more explicit the internal/external review rights for decisions that documents relate to functions covered by Schedule 2?**

As noted above, PIAC does not accept that Schedule 2 in its current form should be retained. However, if Schedule 2 is retained PIAC agrees that the internal/external review rights should be made more explicit or subsections 47(7) and 53(3) of the FOI Act be re-drafted in more general terms.

**Issue 39: Should the FOI Act be amended to require that applicants be formally notified of decisions by agencies that documents requested relate to functions covered by Schedule 2, and informing them of their internal/external review rights**

PIAC does not accept that Schedule 2 should be retained, but if it is retained, PIAC agrees with this proposal.

**Issue 40: What are the appropriate criteria for functions to be included in or excluded from Schedule 2?**

See the response to Issue 19 above.

**Issue 41: Should the coverage of the FOI Act be extended to include the Houses of Parliament?**

In general, PIAC considers that all aspects of government should be covered by the FOI Act, subject to limited exemptions aimed at balancing the rights of the public to access government-held information against the need to protect legitimate government and public interests in certain documents remaining confidential.

PIAC notes that Houses of Parliament fall within the scope of freedom of information legislation in many other jurisdictions including the United Kingdom, Ireland and South Africa.

While it is sometimes suggested that if Members of Parliament were subject to the FOI Act they would not be able to do their job effectively, or represent their constituents, PIAC takes the view that the exemptions should be sufficient to meet those concerns. For example, material provided to Members of Parliament by their local constituents may fall within the existing exemptions including documents containing confidential material (clause 13, Schedule 1) and personal affairs (clause 6, Schedule 1).

**Issue 42: Should there be repeal of section 10 of the FOI Act that provides that judicial functions of courts and tribunals are not subject to the Act?**

The key distinction between clause 11 of Schedule 1 and section 10 of the FOI Act is that the latter excludes courts and tribunals from the definition of agency and puts them outside the scope of the Act. As a result, not only are their documents exempt, but they are not required to comply with the publication requirements set out in Part 2 of the FOI Act nor make a determination pursuant to section 24 of the FOI Act. PIAC cannot see any harm in courts and tribunals complying with Part 2 of the FOI Act nor in them being required to make a determination and notify an applicant of that determination, and therefore recommends that section 10 be repealed.

## Chapter 6 Machinery Provisions

### **Issue 43: Are the provisions of the State Records Act adequate to ensure access to superceded documents?**

PIAC does not have any comments to make about the adequacy of record keeping obligations imposed on agencies under the *State Records Act 1998* (NSW) or the State Record Authority's *Standard on Recordkeeping in the Electronic Business Environment*.

### **Issue 44: How should access rights apply to information held in electronic form?**

PIAC agrees with proposals (b) and (c) as set out in the Ombudsman's discussion paper.

Section 23 of the FOI Act should be amended to provide that agencies must produce records for applicants where they can be produced using the computer hardware and software and technical expertise available to the agency, but PIAC does not agree that this provision should only be apply where the production of records would not interfere unreasonably with the operations of the agency (as this is already covered by subsection 25(a1) of the FOI Act).

Consideration should also be given to providing applicants with access to the relevant facilities to ensure access to those applicants who would not otherwise be able to access the material electronically, for example, because they do not have access to the Internet or a computer. PIAC stresses that the form in which information is delivered to the applicant should always be the applicant's choice, and where the agency is not able to provide information in the form requested, it should provide a suitably accessible alternative.

In addition, PIAC considers it mandatory that in order for agencies to ensure that they do not discriminate against people with a disability in the provision of documents under the FOI Act, (the provision being a 'service' for the purpose of discrimination law), they must take into account a person's disability and make their best endeavours to provide information in a form that is accessible to the person. For example, the agency should ensure that where electronic information is provided to a person who is vision impaired, it is in a format that is readable by the person.<sup>30</sup>

When information is provided in electronic format, the agency should also ensure that there is an option included that enables the file to be printed. This is necessary to ensure consistency with the principle that once information is released under freedom of information legislation, it is released to the world at large.

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<sup>30</sup> See information from the European Blind Union's website at <http://www.euroblind.org/fichiersGB/policy.htm> on how to make information accessible to people with vision impairments. Please note, however, the person should be asked what format is suitable for them rather than relying on general advice of this sort.

**Issue 45: Should agencies be required to design their information systems to allow for a report to be produced, even where the report has no operational benefit to the agency?**

PIAC supports this proposal on the basis that it seeks to maximise access to government-held information by encouraging agencies to design their information systems so that they can produce reports in response to freedom of information requests. The fact that such reports would not have any operational benefit to the agency should not be a reason for an agency to refuse to provide the information or report.

**Issue 46: Should agencies be required to configure their messaging systems—such as e-mail—to ensure that attachments to messages can be searched electronically?**

PIAC supports this proposal, as it would enable agencies to speed up the processing of freedom of information requests and ensure that the applicant is presented with all information relevant to their request.

**Issue 47: Should agencies be required to ensure that there is a ‘print’ function for all electronic databases so that paper documents can be ‘created’ for disclosure?**

PIAC agrees with this proposal. This measure would allow agencies to provide applicants with the option of accessing the information in a range of forms.

**Issue 48: Should agencies be required to give freedom of information officers access to all agency databases, systems and equipment to enable them to conduct an adequate search for relevant digital/electronic records including the means and authorisation to access all hardware and digital records and the training or expert assistance to conduct adequate searches?**

PIAC agrees that freedom of information officers should be given broad powers to access all agency databases, systems and equipment to enable them to conduct adequate searches for records that are relevant to the freedom of information requests they receive. This will avoid the concealment of documents and ensure that as thorough a search as possible is made for the documents that have been requested.

Further, if a provision is included in the FOI Act for freedom of information officers to have broader search powers, it may be an incentive for agencies to ensure that more importance is given to freedom of information and to employ more senior officials to fill the freedom of information positions. This would contribute to a positive change in agencies’ attitudes towards freedom of information, and ensure that agencies take their responsibilities under the legislation more seriously.

PIAC also agrees that training and expert assistance should be given to freedom of information officers on how to conduct searches on digital and electronic records, as the terms that are used in that system may well be different from those used in a paper-based system. This would complement freedom of information officers’ additional powers and allow them to make rigorous searches for documents subject to freedom of information legislation that have been requested.

**Issue 49: Where a freedom of information officer is searching for documents, should they consult the applicant about the search criteria to be used?**

PIAC does not think that it would be particularly beneficial for the applicant to be consulted about the search criteria to be used, as in most cases the applicant will not be privy to the particular terms that the agency uses in its record-keeping systems. Further, the freedom of information officer should, as a result of training, be more attuned to the types of search criteria that should be used to ascertain where the relevant documents are located.

PIAC considers that it would be more helpful for freedom of information officers to inform and discuss with the applicant what search terms may be appropriate for the request, and to take into account any relevant suggestions that may be made by the applicant before proceeding with the search, rather than to impose an onus on applicants to come up with the search terms themselves.

**Issue 50: Should freedom of information practitioners be given guidance about searching digital/ electronic records and retaining search records?**

PIAC agrees that freedom of information officers need to be given guidance on how to search e-mail streams, whether all digital/ electronic versions of a document should be considered where an application includes a request for drafts and whether any records should be retained of the search criteria used in each case. This will ensure that the practices of all the freedom of information practitioners in the various agencies are carried out consistently. Currently, the practices of agencies vary across the board and there is no proper guidance to the agencies on such matters.

PIAC considers that such guidance should be included in reviewable guidelines rather than in the legislation. Such guidelines would most appropriately be drafted by an Information Commissioner and annually reviewed, amended if necessary, and re-issued to all agencies. It would also be beneficial for the initial guidelines to be prepared after a review of existing practices. These guidelines should be published on the Information Commissioner's website to ensure that the public and other interested parties are also able to access the guidelines.

The Information Commissioner should make it clear that the guidelines are non-exhaustive and that any action that is not covered by the guidelines should nonetheless be taken in the spirit of the overriding principle of the FOI Act, which is to uphold the right to access to information.

**Issue 51: Should agencies advise staff that all messages—whether official or personal—sent or received on agency hardware may be subject to a freedom of information request?**

Public officials should already be wary of conducting their personal business using agency equipment (including software) as a result of the promulgation of the *Workplace Surveillance Act 2005* (NSW). However, there should remain an onus on agencies to warn their employees that all material received or sent using agency equipment may be subject to review by freedom of information officers and disclosure under the FOI Act.

PIAC is not aware of any policy in New South Wales Government that corresponds with the Queensland's *Information Standard 38* (IS38) that sets out the ways in which government-owned information computer technology (ICT) facilities and devices may be used by government employees.<sup>31</sup>

IS38 requires agencies to develop and implement clear policies and guidelines relating to employee use of ICT facilities, agency monitoring, the collection of employee personal information in the course of e-mail interception and the purposes for which the information will be used. If there are no equivalent guidelines in New South Wales, the Information Commissioner should issue appropriate guidelines using the Information Standard as a model. These guidelines should be widely published by the agencies, and regularly brought to the attention of agency staff that use government-supplied equipment such as computers and software enabling access to e-mail and the Internet.<sup>32</sup>

### **Issue 52: Should applicants be given the option of either paper-based or electronic records?**

PIAC support the proposal that applicants should be given the option of either paper-based or electronic records. Where electronic records are available, applicants should also be able to choose the format in which the information is provided to them based on which format is more suitable for their use. This option will be particularly useful for people with a disability who may only be able to access information in one particular form.

Agencies should also provide facilities for applicants to view the information electronically at their premises where the applicant does not have an alternative way of accessing the information. However, PIAC recognises that, in some cases, it may be an unreasonable strain on an agency's resources to make this option available to all applicants, and suggests that agencies only have to provide viewing facilities where the applicant has no other means of access. Agencies should be required to inform applicants about the different options that are available when the freedom of information application is made.

### **Issue 53: Should agencies be able to decide to only provide access by electronic means, particularly where an application is made for a large volume of documents?**

If agencies are given the discretion to decide what would amount to a 'large volume of documents', it could give rise to the potential that they will resort to providing information only in electronic form even where it may be within the resource capabilities of the agency to provide information in another form. This would create a disadvantage to people who do not have access to computers or the Internet, or have limited download capacity. This is likely to particularly affect older applicants, financially disadvantaged people and people in areas with poor or slow Internet service, such as rural areas.

However, PIAC recognises that agencies, particularly smaller agencies, may sometimes be genuinely constrained by their lack of resources and therefore not able to provide information in the form chosen by the applicant. In such a situation, the agency should provide an alternative way for the applicant to access the information, such as providing facilities for the viewing of the information on the agency's premises and providing an electronic copy for possible later reference.

A solution to this may be for the agency to inform the applicant where it is of the opinion that the information can only be provided in electronic form due to the volume of the documents, and consult

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<sup>31</sup> FOI Independent Review Panel, above n1, 59-60.

<sup>32</sup> FOI Independent Review Panel, above n1, 59-61.

with the applicant as to what would be the best way to ensure access for the applicant. Any disputes about the method of access could be referred to the Information Commissioner, who should be empowered to decide whether the agency's claims are legitimate after reviewing evidence from the agency regarding its lack of resources.

### **Issue 54: Should agencies have the option of allowing an applicant to view but not be provided with a copy of a document where disclosure of the document to the world at large would be inappropriate?**

PIAC submits that an amendment to the FOI Act that enables agencies to allow an applicant to view a document but not be provided with a copy to ensure that the document is not disclosed to the world at large is contrary to one of the basic tenets of the FOI Act, namely that the motive of an applicant in seeking access to information is irrelevant.

Furthermore, in PIAC's experience individuals make requests for documents under the FOI Act in order to use that information for one purpose or another. Sometimes this use is general publication of the information. In other cases, the use is more limited, for example, informing their decision-making about whether or not to bring litigation or for use during litigation. However, in all of these cases, limiting the rights of applicants to viewing a document would undermine the practical value of being provided with documents under freedom of information in the first place. There is also a risk that agencies would not employ this provision on a selective basis but rather would use it in almost all cases.

In addition to these concerns, requiring an individual to go to the agency to view a document places a disproportionate burden on applicants who live further away from the offices of agencies and may give rise to discrimination claims if agency's offices are not fully accessible.

### **Issue 55: Are there sufficient justifications for the current approach to the cost scheme for the FOI Act?**

PIAC understands that the two main arguments in favour of the existing approach to costs are: (1) the need to recover the costs of processing freedom of information requests; and (2) the idea that costs may act as a deterrent against spurious claims

PIAC is not convinced by either argument. In relation to the first, PIAC notes the comments in the Solomon report that the existing system of costs does not actually reflect the costs involved in processing requests.<sup>33</sup> Furthermore, PIAC submits that the idea of recovering costs from freedom of information users is at odds with the idea that the freedom of information legislation is about the right of individuals to access information. As the Electoral and Administrative Review Commission commented in its 1990 report:

Access to information as to what decisions are made by government, and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens. All individuals should be equally entitled to access government-held information and the price of FOI legislation should be borne equally.<sup>34</sup>

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<sup>33</sup> Ibid, 186.

<sup>34</sup> Electoral and Administrative Review Commission, *Report on Freedom of Information* (1990) 181 cited in FOI Independent Review Panel, above n1, 185.

In relation to the second argument, PIAC is concerned that the existing costs in some cases may deter reasonable requests as well as potentially vexatious requests and suggests that there may be other more effective ways of dealing with vexatious requests.

### **Issue 56: Should the fees for initial and internal review be increased or decreased?**

PIAC suggests that the fees for initial applications and internal review should be removed from the FOI Act.

On a theoretical level, PIAC believes that the imposition of fees is contrary to the idea that individuals have a right to access information; rights should not be made conditional on paying for them. This is a cost that government should bear as part of fulfilling its democratic responsibilities of being transparent and accountable to the people. On a practical level, PIAC is not convinced that the existing fees actually cover the costs involved in acknowledging receipt of a freedom of information request and making an initial assessment of the request, particularly if the application fee is reduced on the basis of financial hardship or public interest to only \$15 to make an initial application and \$20 to seek an internal review.

PIAC notes that other jurisdictions, including the UK, Tasmania and the ACT, do not charge any fees for initial requests or internal reviews.

### **Issue 57: Should there be different fees for personal affairs and non-personal affairs?**

PIAC does not propose to respond to this issue in light of its submission that all requests for access to one's personal information should be dealt with under the PPIP Act.

### **Issue 58: What is the appropriate basis for charging fees?**

PIAC submits that the charges that an agency may impose in respect of a freedom of information request should be based on the amount of information provided rather than the time taken to process a request. This was the approach recommended by the ALRC Report 77 in 1995.<sup>35</sup>

This approach has a number of advantages. Firstly, it would be easier for an agency to calculate costs on this basis and would ensure that the calculation of costs was more transparent to, and understandable by, applicants. It would also improve the consistency of charging across different government agencies.

Moreover, PIAC does not believe that applicants should be penalised if agencies does not have efficient records management systems. If an agency's record keeping systems are such that it takes them hours to process even a simple freedom of information request, the applicant should not be made to pay for that time. Indeed, the approach proposed may encourage agencies to reconsider and improve their existing records management system. Similarly, such an approach to costs would encourage applicants to narrow their search to only those documents that they are really interested in, and hence, are prepared to pay for. Conversely, such an approach may deter agencies from relying too heavily on exemptions given that the effect of adopting this approach to charges would be that if agencies refused to grant access to documents they would not be able to impose any charges in relation to that decision.

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<sup>35</sup> ALRC, above n5, 187.

**Issue 59: Should the FOI Act maintain a provision that allows for the reduction in fees and charges for demonstrated financial hardship and for public interest applications?**

PIAC agrees that the FOI Act should continue to allow for a reduction in (or waiver of) charges for demonstrated financial hardship and for public interest applications.

However, in PIAC's experience while agencies are generally prepared to reduce fees and charges when its clients can demonstrate financial hardship, for example, by providing a pensioner card, they are extremely reluctant to reduce fees on the basis of public interest. PIAC suggests that consideration should be given to ways to encourage agencies to use this discretion more often, for example through the provision of training or targeted guidance on this issue.

**Issue 60: Should agencies be given explicit authority to fully refund fees and charges in appropriate circumstances, for example, where there has been a significant delay in dealing with an application?**

PIAC agrees that agencies should be given explicit authority to refund fees, but submits that the refund of fees should be mandatory in identified circumstances and not merely subject to discretion.

**Issue 61: Should of the processes surrounding advance deposits be simplified?**

PIAC supports the proposal that the processes surrounding advance deposits should be simplified. In particular, an agency should only be allowed to ask an applicant to provide advance deposit once, before the application is processed.

**Issue 62: Should an applicant be permitted to seek internal review of a request for an advance deposit without having to wait for the expiry of the period specified for such a deposit to be paid?**

An applicant should be able to seek a review of a request for an advance deposit without waiting for a determination from the agency that it refuses to continue with the request because the advance deposit has not been paid.

**Issue 63: Should an applicant be permitted to seek external review of this decision without any internal review?**

PIAC submits that the first step in challenging all determinations made by an agency under the FOI Act should be internal review. Thus, PIAC does not agree with this proposal.

**Issue 64: Should the deposit be limited to a percentage of the estimated costs?**

PIAC agrees that advance deposits should be limited to the lesser amount of a specified percentage of the estimated costs or a specified amount to be determined from time to time by the Information Commissioner.

**Issue 65: What information should an agency provide about its calculations of an advance deposit and should this be found in the FOI Act?**

In light of PIAC's submission that processing costs should reflect the amount of information received rather than the time taken to process the request, applicants should be more easily able to understand how the advance deposit was calculated.

However, if the existing system is maintained PIAC submits information explaining how agencies calculate advance deposits should be found in guidelines rather than the FOI Act. However, agencies should still advise applicants of the calculation method in the notice of decision and should provide them with a copy of the relevant guidelines.

**Issue 66: Should the FOI Act specify the minimum time that an applicant is to be given to pay an advance deposit?**

PIAC submits that a minimum time period should be included in the FOI Act, although there should also be scope for this period to be extended by agreement between the parties.

**Issue 67: Should more guidance be provided in the FOI Act or a 'fees and charging order' as to the circumstances where disclosure of information would be in the public interest?**

PIAC submits that the existing guidance about the reduction of fees is sufficient; the real problem is that agencies do not appear to be following the guidance. Placing this guidance in the FOI Act or an order would not solve this issue and consideration should be given to providing better training about this issue to agencies and/or ensuring that regular reports about the operation of the FOI Act highlight the extent to which this discretion is used.

**Issue 68: Should the FOI Act provide for the 'public interest' discretion to be read broadly?**

In PIAC's experience agencies adopt a very narrow approach in determining whether disclosure of information is in the public interest and it should be reinforced that agencies should read the phrase 'public interest' broadly when determining whether or not to reduce the fees or charges.

**Issue 69: In assessing whether it is in the public interest to make information available, should the FOI Act specifically provide that the relevant test involves the likely outcome of release, not the possible motives of the applicant?**

As indicated above, PIAC believes that these issues are already adequately covered in the existing guidance, but agrees that the guidance should make it clear that the relevant test is the likely outcome of release, not the possible motives of the applicant. For example, while an applicant's motive may be financial gain and the likely outcome may be a commercial benefit, the test should still focus on the outcomes to ensure that a consistent approach is taken to this issue throughout the different provisions of the FOI Act.

**Issue 70: Should the time periods for dealing with initial applications and internal review applications be extended to reflect those in most other Australian and equivalent freedom of information jurisdictions?**

While PIAC cannot see any reason to slow down the process, it believes that the time period should be amended to be calendar rather than working days and in those circumstances it may be prudent to make the time period for dealing with initial applications 30 calendar days.

**Issue 71: Should different time periods be provided for the assessment and determination of personal affairs applications and non-personal affairs applications?**

See the response below to Issue 97.

**Issue 72: Should different time periods be provided for the assessment and determination of applications for documents that may be held in locations distant from the central office of an agency?**

PIAC is opposed to this proposal. From a practical perspective, this approach would add a layer of confusion to the operation of the FOI Act. One example of the difficulties this approach would create is who and by what criteria would it be determined that the locations of some parts of an agency were located a sufficient distance from the central office such that they should be subject to different time periods. Also, in light of technological advances, issues about physical distance should not pose the same problems for agencies as they might have before e-mails and fax communications.

**Issue 73: Should the FOI Act provide that the time period for dealing with an application can be varied by agreement between the agency and the applicant?**

PIAC supports the suggestion that the time period for dealing with a freedom of information request could be extended by agreement between the parties. However, PIAC notes that sometimes applicants have a multi-faceted relationship with agencies, for example, the NSW Police Force or the Department of Community Services and so may feel that if they don't agree to the agency's request for an extension of time, this may adversely affect other aspects of their dealings with the agency. PIAC submits that an agency should be required to seek an extension in writing from the applicant and there should be an option for the applicant (advised to them in that letter) to ask the Information Commissioner to determine whether or not the request is reasonable.

**Issue 74: Should the FOI Act provide for an extended time limit for lodging of a review application to the ADT by an applicant in circumstances where an agency determines to only partially release documents to which paragraphs 20(3)(d), 31(3)(d), 32(3)(d) and 33(3)(d) apply?**

If an applicant is unhappy with an agency's decision under paragraphs 20(3)(d), 31(3)(d), 32(3)(d) and 33(3)(d) of the FOI Act, the next step is to seek an internal review but an internal review must be concluded within 14 days or it is considered a 'deemed refusal' and time begins to run for lodging an application for an external review.

In these circumstances, it may be sensible to extend the time limit for lodging an external review so that an applicant would be able to wait to see whether the third party challenges the agency's decision before deciding whether to seek an external review of the decision.

The advantage of this approach would be that applicants could then ensure that their review included all the issues they wanted to cover; rather than leaving them in the uncertain position of being forced to apply for external review not knowing whether the documents may actually be released down the track.

### **Issue 75: Should the deemed outcomes of delay currently within the FOI Act be reconsidered?**

PIAC's clients are often frustrated by lengthy delays, which often undermine the reasons why a freedom of information request was made in the first place. At the moment, the only recourse if a decision-maker fails to meet a specified deadline is to treat it as a deemed refusal and seek a review of that refusal. In addition to the existing deemed outcomes provision, PIAC submits that there should be specific sanctions on agencies when they fail to comply with time periods. Sanctions could include mandatory refunding if any fees or charges imposed.

### **Issue 76: If agencies unreasonably delay determining an application, should:**

- (a) the application be deemed to be approved?**
- (b) the agency be precluded from claiming certain exception clauses?**
- (c) the agency lose the right to collect fees or be obliged to refund fees already collected**

PIAC believes that the appropriate sanction for an agency's failure to deal with an application in a timely manner is that the agency loses the right to collect fees or is obliged to refund any fees already collected. PIAC does not support any proposal that the outcome of an unreasonable delay should be a deemed approval or preclude an agency relying on certain exemptions. To apply this approach would result in the absurd situation where genuinely sensitive documents, for example, documents that could reveal the identity of a confidential source in relation to a serious criminal investigation, may have to be disclosed simply because an agency had delayed in processing the application.

### **Issues 77 and 78: How should urgent applications be dealt with?**

PIAC supports the proposal that the FOI Act be amended to allow an applicant to make an urgent application if they can identify a 'compelling need' to have their freedom of information request processed on an urgent basis. It is essential that the criteria for determining whether an application should be expedited be set out in the FOI Act. Once an applicant has satisfied this criteria, there should be a mandatory requirement that the agency process the application within the altered time frame. The amendments should also specify the relevant time limits and any additional fees (if applicable). However it is PIAC's view that there should not be any additional fees for urgent applications.

PIAC suggests that the following may be valid reasons for an urgent application:

- to assist the applicant in deciding whether to take certain action prior to the expiry of some limitation period (including administrative compensation schemes such as Aboriginal Trust Fund Repayment Scheme); or

- for a clearly demonstrable legal or administrative purposes such as being able to contribute to a forthcoming debate or being in a position to make a submission on a proposal or development application that will directly affect the individual.

PIAC also suggests that if an agency fails to process an application within the reduced time frame, any expedited fees should be refunded to the applicant and there should be an automatic extension of time if the documents were required in order to commence or respond to proceedings against the Government.

### **Issues 79, 80 and 81: Should agencies be able to extend the processing time for applications requesting large amounts of information?**

There should be scope for an agency to request an extended time period for processing large amounts of information. However, agencies should be required to seek an applicant's agreement to such a request and the conditions set out in relation to Issue 73 should equally be applied in relation to extensions for large amounts of information.

### **Issues 82 and 83: Should agencies be required to acknowledge receipt of freedom of information requests?**

PIAC believes that agencies should be required to respond to a freedom of information request within 14 calendar days of receiving the request, acknowledging receipt of the request and informing the applicant of the rights of review under the FOI Act.

Additionally, PIAC submits that an acknowledgement should also include a Schedule of documents that would enable the applicant to have the opportunity to narrow their request.<sup>36</sup> This would establish a dialogue between the applicant and agency about the documents requested, and assist the process.

### **Issue 84: Should sections 30–33 of the FOI Act be amended to provide that consultation is only required where the release of information contained in a document ... could reasonably be expected to be of substantial concern to a third party?**

PIAC is concerned that the words 'may reasonably be expected to be of substantial concern' are too vague and uncertain. PIAC prefers the existing test that if a document 'affects' personal affairs (or 'personal information') or business affairs, the affected third party should be consulted unless the material can be de-identified or aggregated.

### **Issues 85 and 86: Is concurrent use of subpoenas and freedom of information a problem that needs to be addressed?**

PIAC does not see a problem with the use of the FOI Act to obtain documents that may either inform a decision whether or not to bring legal proceedings or provide an individual with evidence in relation to ongoing proceedings.

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<sup>36</sup> FOI Independent Review Panel, above n1, 176-178.

## Chapter 7 Publication of Information

### **Issue 87: Is the requirement to provide Statements and Summaries of Affairs of continuing value?**

The intended purpose of the Statements and Summaries of Affairs under Part 2 of the FOI Act was to assist members of the public in identifying the agency or agencies likely to hold the documents they are seeking, and those documents that may be available without a freedom of information application.<sup>37</sup>

While acknowledging that this is a worthy objective, PIAC is not convinced that these Statements and Summaries achieve this purpose because of the lack of substantive information set out in them. Typically agencies' summaries only provide generic lists of information that may be relevant to the public and fail to provide sufficient detail on how to access that information. It would be more helpful to members of the public if more information about the actual document in which the information is contained is provided, or if the document itself is released to the public.

In PIAC's experience, another issue that undermines the value of Statements and Summaries is that agencies fail to (a) inform the public of their existence; and (b) make copies of the summaries readily available to the public.

Thus, PIAC submits that the Statements and Summaries should be replaced with the requirement to develop publication schemes and disclosure logs. Publication schemes would contain indexes of the information that is available (similar to summaries), but they would be of more use to members of the public because they would provide links to the actual information for the perusal of the public without the need for further action on their part.

### **Issue 88: Should the FOI Act be amended to require agencies to publish their Statement of Affairs, Summary of Affairs and all policy documents on the Internet?**

PIAC notes that the NSW government already encourages the posting of Statements and Summaries on agencies' websites.<sup>38</sup> The NSW FOI Manual also states that 'ready availability' of the information is necessary and that 'while the FOI Act prescribes the minimum requirements which must be met by agencies, other forms of dissemination are encouraged'.<sup>39</sup>

However, this is not a compulsory requirement for the agencies and PIAC is of the view that the FOI Act should be amended to make it mandatory for all agencies to publish their Statements and Summaries on the web, as well as all policy documents that could affect members of the public.

PIAC's view is that this amendment will serve to encourage the participation of the public in our democracy by ensuring that they are informed of any decisions that are made by the agencies, and of the policies that have guided those decisions. As *The Courier-Mail's* FOI Consultant said: 'It should not take

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<sup>37</sup> NSW Department of Premier and Cabinet and NSW Ombudsman, *The NSW FOI Manual* (2007) 42.

<sup>38</sup> *Ibid.*, 31.

<sup>39</sup> *Ibid.*

some government crisis, as in the case of recent events involving Queensland Health, for the public to become aware that mismanagement is occurring'.<sup>40</sup>

See also the response above to Issue 87 for PIAC's suggestions on the further types of information that should be published.

### **Issue 89: Should the definition of 'policy documents' be expanded to include all internal procedure manuals, performance measures, and reports to management about compliance with performance measures?**

In keeping with the idea of a 'push' model of freedom of information, PIAC agrees with this suggestion and adds that agencies should also be made to publish any background to their formulation of policies, research reports, risk impact statements, decisions of the Information Commissioner that relate to the agency and any departmental circulars.

In addition, the NSW Government should encourage:

... greater administrative release through the exercise of executive discretion in good faith and in appropriate circumstances (with sufficient legal protection) rather than the current tendency to refer all requests for documents to be managed through the longer and more expensive FOI processing model.<sup>41</sup>

PIAC submits that this encouragement will provide for a change to the culture of the agencies in NSW, and assist in paving the way for a truly open government in NSW.

### **Issue 90: Should the FOI Act contain a requirement that agencies establish and maintain a publications scheme?**

In the United Kingdom, every public body has a mandatory duty to develop, publish and implement a publication scheme that takes into account the public interest in access to the information that it holds. Agencies may either submit their own schemes for the Information Commissioner's approval, or adopt one of the model publication schemes that have been developed by the Information Commissioner for the different classes of public bodies.<sup>42</sup>

PIAC suggests that this system should be adopted in NSW as it will allow for the Information Commissioner to oversee the publication schemes without placing too much of a burden on him or her, and because it will allow: 'for the levering up of proactive publication obligations over time, as public bodies gain capacity in this area'.<sup>43</sup>

### **Issue 91: Should agencies be required to establish and maintain disclosure logs?**

In PIAC's view, agencies should establish and maintain disclosure logs to provide online access to any information that has already been released as a result of previous freedom of information requests. However, PIAC suggests that release of the information on a disclosure log should be delayed for a

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<sup>40</sup> John Doyle, *Submission to the FOI Independent Review Panel Discussion paper*, cited in FOI Independent Review Panel, above n1, 17.

<sup>41</sup> FOI Independent Review Panel, above n1, 19.

<sup>42</sup> *Ibid*, 20.

<sup>43</sup> *Ibid*, 21.

reasonable period of time to give the applicant some benefit from making the initial freedom of information application. Furthermore, in PIAC's view there is a risk that if such a requirement is not mandatory that agencies will not make it a priority to adhere to that requirement.

Some of the benefits of introducing disclosure logs include:

- providing the public with a user-friendly source of information disclosed under FOI by a public authority;
- allowing information disclosed to one requester to be made available to a wider public audience;
- allowing information released to be accompanied with supporting information, explaining issues of public interest in greater depth;
- giving the public greater understanding of what information the public authority holds, thus enabling the public to make better-informed information requests in the future.<sup>44</sup>

These benefits are consistent with the underlying purpose of freedom of information legislation.

PIAC cannot see why any agency would object to establishing these logs, as they will only contain information that has already been released. Further, the disclosure logs will complement agency publication schemes, and contribute to the increase of routine dissemination of information by the NSW Government, without the need for freedom of information applications to be made, and will ensure that the public are able to search for information with ease, as the information on the disclosure log should be subject to a search facility.<sup>45</sup>

Any disclosure log that is developed by an agency should ensure that access to information is provided through links to true copies of documents that members of the public can access without assistance from the agency. Also, as PIAC noted in response to Issue 44 above, an agency should ensure that people with a disability are able to access its disclosure log.

## **Issue 92: Should agencies be required to proactively identify and disclose information that is clearly in the public interest?**

PIAC has above indicated its support of the adoption of a 'push' model for the freedom of information legislation. In line with this model, PIAC's view is that agencies must be required to proactively identify and disclose all information, unless it is exempt. PIAC agrees with the recommendation in the Solomon report that freedom of information legislation needs to be considered as part of a whole-of-government policy on information, and that there should be more of an effort to focus on 'front-end' information policy issues of planning, creating and collecting information, rather than the current view of the freedom of information system as an administrative function that makes decisions about the dissemination of information in response to formal requests.

In particular, as indicated above, PIAC submits that the FOI Act should be amended to require agencies to establish and maintain publication schemes and disclosure logs, as well as publishing their Statement and Summary of Affairs on the web.

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<sup>44</sup> UK Department for Constitutional Affairs, *Best Practice Guidance on Disclosure Logs* (2005) cited in FOI Independent Review Panel, above n1, 21- 22.

<sup>45</sup> FOI Independent Review Panel, above n1, 19.

### **Issue 93: Should the *bona fide* proactive release of documents attract the same protections as release under the FOI Act?**

PIAC agrees in principle that the protections under the FOI Act should be extended to officers who proactively release documents in the public interest in good faith.

If PIAC's suggestion that sanctions should be enforced against persons and agencies that interfere with the proper administration of the freedom of information process and against freedom of information officers who do not release documents where they are not exempt under the FOI Act is taken up, officers could feel that they are between a rock and a hard place if on the other hand they are exposed to an action for defamation or breach of confidence if they do release a certain document. This may lead to retention of the current attitude of certain officers who intentionally allow applications to go to internal review as they would rather err on the side of caution than to face the consequences of releasing a document that has not received the 'rubber stamp' of the internal review panel.

However, the protections of the FOI Act should only be accorded to officers who make *bona fide* releases of information, or in other words, release of information that is not exempt from disclosure under the FOI Act.

As stated above, PIAC's view on the exemptions under the FOI Act is that they should be narrowed as far as possible, and then made subject to an overriding public interest test. Schedule 2 should be repealed if possible, as no agencies should be accorded a blanket exemption from the provisions of the FOI Act. If the exemption provisions in the FOI Act are amended along the lines of PIAC's suggestions, it is submitted that the protection of the FOI Act for proactive release of documents coupled with the sanctions for non-compliance of the Act's provisions will make a valuable contribution towards setting up a 'push model' of freedom of information in NSW.

## Chapter 8 Amendment of Records

### **Issue 94: Should Part 4 of the FOI Act be amended to clarify that it is not limited in application to documents to which access was given under the Act?**

PIAC's position is that access to, and amendment of, one's own personal information should be dealt with under the PPIP Act and not freedom of information legislation. If this approach is adopted, concerns about the proper interpretation of Part 4 of the FOI Act will no longer be an issue.

However, for the sake of completeness, PIAC notes that the objective of Part 4 is to enable individuals to amend personal information about them held by the NSW Government where they believe the information is incomplete, incorrect or out of date. Whether this information is accessed under the FOI Act or some other legislated access regime should not affect the right to amend documents containing one's own personal information. PIAC suggests that if this Part is kept then consideration should be given to clarifying this issue either by way of legislative amendment or issuing guidelines to make this point clear.

### **Issue 95: Should reference to 'administrative functions' in Part 4 of the FOI Act be clarified?**

As noted in response to Issue 94, PIAC suggests that the PPIP Act should regulate amendment of one's own personal information. The PPIP Act does not limit amendment to information that is available for use by the agency in connection with its administrative functions.

However, if Part 4 of the FOI Act is retained, PIAC submits that what is meant by 'administrative functions' should be clarified and it should also be made clear that an agency's determination of its administrative functions will not necessarily be determinative.

### **Issue 96: Should guidance be provided on what can and cannot be amended as opposed to appended to records?**

If Part 4 of the FOI Act is retained, PIAC supports the proposal that better guidance should be given to agencies about amendment of information.

The starting point should be that if an individual can show that the information is incomplete, incorrect, out of date or misleading then the information should be amended. If an individual cannot satisfy the agency on this point, then the agency should still append a notation to the information.

## Chapter 9 Alternative Access Schemes

### **Issue 97: Should NSW adopt either a single statute that deals with access to and amendment of all information held by government or two statutes: one that deals with access to all non-personal information; and one that deals with access to and amendment of personal information?**

PIAC has approached this issue by considering the different objectives of the PPIP Act and the FOI Act. The PPIP Act is concerned with protecting an individual's right to privacy, including having their personal information protected by government, while the FOI Act is intended to ensure government accountability by allowing citizens to access government information.

PIAC believes that all matters relating to own's own personal information, including the right to access and correct one's personal information, are fundamental privacy rights that are more appropriately dealt with under the PPIP Act. The FOI Act should deal with access to all other information held by government. Section 5 and subsection 20(5) of the PPIP Act should be repealed and consideration should be given to which exemptions currently found in the FOI Act are relevant to personal information. Those exemptions should then be added into the PPIP Act.

To simplify the process of accessing information, PIAC submits that an applicant should not have to identify whether they are making a request under the PPIP Act or the FOI Act. Instead an applicant should be required simply to complete a generic 'Information Request' form setting out the information to which they request access. Each public sector agency should have an 'information officer' who is required to acknowledge receipt of all information requests within 14 days. An acknowledgement of an information request should confirm under which Act the request will be handled (based on whether it is a request for the individual's own personal information or any other information held by the government), and explain the relevant timeframes for processing the request. This procedure would simplify the process for individuals making it easier for them to access public information. The process should also enable a single request with multiple components to be split up to deal with an FOI Act request and a PPIP Act request without requiring separate requests to be lodged.

Subsections 12(6) – (8) of the *Local Government Act 1993* (NSW) should also be repealed so that all requests for access to the applicant's personal information held by a local authority are dealt with under the PPIP Act.

### **Issue 98: Should the legislation be amended to provide that personal information should be accessed through privacy legislation?**

PIAC agrees that the PPIP Act and the FOI Act should be amended to provide that one's own personal information should be accessed through privacy legislation and refers to its response to Issue 97 above for further details of how PIAC believes that this new streamlined system should work in practice.

**Issue 99: Should the privacy legislation be amended to focus on both the protection of privacy and the provision of access to personal information, and freedom of information legislation amended to primarily focus on the provision of rights of access to non-personal information?**

PIAC agrees with this proposal and refers to its comments in response to Issue 97 above.

**Issue 100: If the current position is to be retained, should a more streamlined processing regime be introduced or exemptions be reduced?**

See PIAC's comments in response to Issues 17 and 97 above.

**Issue 101: Should a statement be included in the FOI Act or PPIP Act that current and former employees of agencies have a right to access their personnel file?**

While submitting that personnel files should fall within the scope of 'personal information' and be subject to the protections provided by the PPIP Act, PIAC is of the view that further consideration needs to be given to whether access should be given to all documents contained in personnel files or whether some documents, in particular referee's reports, should be outside the scope of access provisions.

**Issue 102: If such a statement were to be included, in what circumstances should an agency be able to deny access to personnel files?**

See PIAC's response to Issue 101 above and PIAC's separate submission to the NSW Law Reform Commission on this issue.

## Chapter 12 Oversight and Accountability

### **Issue 123: Should a statutory position of an Information Commissioner be created?**

PIAC commends the NSW Ombudsman for his role in reporting on the FOI Act in his annual reports to Parliament and carrying out investigations that raise issues about the FOI Act, including initiating this review. However, PIAC recommends that an independent statutory position of an Information Commissioner be created. This would not only be a symbolic recognition by the NSW Government of the importance of the FOI Act, but would also create a separate body that would be better placed to act as an advocate for the freedom of information legislation.

The Information Commissioner would be able to fulfill a number of essential functions including monitoring, reporting, education, advice and formal guidance to both agencies and the community. In PIAC's view the role of the Information Commissioner would be essential in successfully changing the existing culture of secrecy within many government agencies. There should also be a provision in the FOI Act specifying that the Information Commissioner must have regard to the objects of and rationale for the FOI Act in the performance of his or her functions and the exercise of his or her powers.

In order to operate effectively, PIAC suggests that the Information Commissioner's appointment should be subject to review by an independent Parliamentary Committee that would not only be responsible for overseeing the work of the Commissioner, but should also be responsible for approving funding to ensure that the Commissioner has adequate resources to fulfill the statutory functions.

### **Issue 124: Should this position be held by:**

**(a) the Ombudsman; or**

**(b) a separate Information Commissioner appointed on a similar basis?**

PIAC supports the proposal that a separate Information Commissioner appointed on a five- to seven-year term; the appointment being subject to veto by the Parliament Committee established to oversee the operation of the FOI Act.

### **Issue 125: Should the Information Commissioner be given the responsibility for investigating complaints relating to how freedom of information applications have been dealt with or should this remain with the Ombudsman?**

PIAC suggests that it would be more appropriate for the Information Commissioner to investigate complaints under the FOI Act. The Information Commissioner should also have the power to initiate 'own motion' investigations.

### **Issue 126: Should the Information Commissioner have a determinative role or should this remain with the ADT?**

PIAC acknowledges that giving this role to the Information Commissioner may provide a quicker and cheaper system for resolving complaints. It would also avoid the problem of the Commissioner becoming a 'toothless' tiger.

However, on balance, PIAC submits that the ADT should retain the power to make binding decisions, other than decisions in respect of requests by agencies to extend the time period (see the response to Issue 73 above). One problem with the proposal to give determinative powers to the Information Commissioner is that this may create a conflict of interest with the Commissioner's other functions, particularly its role in giving advice and monitoring the operation of the FOI Act. Furthermore, many cases under the FOI Act raise complex issues of statutory interpretation and it is more appropriate that these be decided by the ADT.

### **Issue 127: What should be the functions of an Information Commissioner?**

PIAC submits that the Information Commissioner should be a champion of the FOI Act and increase both its profile and compliance among agencies. Some of the specific functions of the Information Commissioner may include:

- (a) monitoring the operation of the FOI Act: for example, preparing annual reports, conducting audits or investigations of agencies and issuing report cards on the performance of agencies;
- (b) providing advice and promoting awareness: including providing training, accrediting other trainers to provide comprehensive training to freedom of information officers, promoting community awareness through liaison officers and media appearances, providing guidance and advice to the public; and
- (c) investigation and complaints handling: including being able to undertake 'own motion' investigations.

### **Issue 128: Should the Information Commissioner have both freedom of information and privacy roles?**

PIAC suggests that consideration should be given to adopting the recommendation of the Solomon report that the Information Commissioner should administer both the FOI Act and the PPIP Act to ensure that tensions between these Acts are managed. However, if this approach is adopted, PIAC suggests that within the office of the Information Commissioner there should be two deputies, one responsible for privacy legislation and the other for the freedom of information legislation.<sup>46</sup>

### **Issue 129: Should the Information Commissioner be subject to oversight by a relevant Parliamentary Committee?**

PIAC agrees with the proposal that a Parliamentary Committee should be established whose role is to oversee the Information Commissioner, including the appointment of the Commissioner and Deputies (see above in response to Issue 128) and funding for the office of the Information Commissioner.

### **Issues 130 and 131: Should there be a statutory obligation on agencies to report annually to a central agency on their implementation of the FOI Act?**

PIAC submits that all agencies should be required to report annually to the Information Commissioner on their implementation of the FOI Act. The Information Commissioner should also issue guidelines that specify how agencies should comply with these reporting requirements to ensure that statistics and reports provided give a clear and comprehensive picture of an agency's implementation of the FOI Act. The Information Commissioner should be able to provide annual report cards, based upon agencies'

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<sup>46</sup> Ibid, 273-274.

reports and other evidence such as investigations by the Commissioner on how well each agency is complying with the requirements of the FOI Act. This would allow the Information Commissioner to highlight best practices as well as agencies that were performing poorly under the freedom of information legislation.

**Issue 132: Should the body (in receipt of agency reports) produce an annual report to Parliament on the implementation of freedom of information in NSW?**

PIAC supports the proposal that the Information Commissioner should produce an annual report to the Parliament about the implementation of freedom of information law in NSW.

## Chapter 13 Guidelines and Training

### **Issue 133: Should a designated body provide freedom of information guidelines?**

One of the functions of the Information Commissioner would be to issue guidelines about the operation of the FOI Act as well as providing advice to the community and agencies about specific issues.

### **Issue 134: How can the helpfulness and relevance of freedom of information guidelines to practitioners be ensured?**

There are a number of ways that the Information Commissioner could ensure that guidelines are helpful and relevant.

Firstly, the development of guidelines should involve consultation with practitioners and non-government organisations.

Second, the Information Commissioner should be able to promote awareness of any guidelines issued through the media and training.

Third, consultation mechanisms should be built into the function of the Office of the Information Commissioner. This should take the form of both a resourced Information Advisory Committee, similar to the Privacy Advisory Committee established under Part VII of the *Privacy Act 1988* (Cth), and regular broad consultation with particular sectors. Consultation with these groups about proposed guidelines would be another way of ensuring the relevance of any guidance produced by the Information Commissioner.

### **Issue 135: Should guidelines be binding on agencies subject to the FOI Act?**

PIAC is not convinced about the practical value of making guidelines binding on agencies. If there was simply a statutory provision to this effect, then the question arises as to what consequences there would be if an agency fails to comply with the guidelines. Alternatively, the guidelines could be incorporated into orders but this would affect the flexibility of the guidelines. Instead PIAC submits that if an agency fails to comply with existing guidelines, this may be an argument that an applicant could rely on in an external review to challenge the agency's decision.

Making guidelines binding would effectively give the entity issuing the guidelines legislative power. PIAC submits that binding instruments should be subject to the usual legislative review process, either as an Act or subordinate legislation.

### **Issue 136: Should guidelines be issued by a central government agency or by an independent watchdog?**

See the response to Issue 133 above.

**Issue 137: How can it be ensured that agency staff who have a role in the assessment and/or determination of freedom of information applications have completed certain basic training on the FOI Act?**

There should be a requirement under the FOI Act that all freedom of information officers have completed a certain level of training or accreditation on the FOI Act. PIAC submits that this could be linked to the provisions in the FOI Act about the role of freedom of information decision-makers. PIAC suggests that the Information Commissioner could be responsible for accrediting training courses to ensure that they are consistent with the Commissioner's guidance and the FOI Act.

**Issues 138 and 139: Who should have responsibility for the co-ordination or provision of freedom of information training?**

PIAC submits that consideration should be given to the Office of the Information Commissioner providing freedom of information training to Officers or overseeing the training given to freedom of information Officers, for example, by certifying accredited and recognised training courses.