information Consultants Pty Ltd

Submission to the Review of the *Government Information (Public Access) Act 2009*

Contents

1. Overall comments on effectiveness of the Act

The implementation of the GIPA Act has undoubtedly improved the quantity of government information being made available to the public. In particular, the amount of information made available on agency websites and through portals such as OpenGov and Data NSW has increased markedly the amount of government information freely available.

While the title of an Act is a very small matter, I would like to make this comment. The name "GIPA" has very little public recognition. It appears to have been chosen as its acronym rhymes with "PPIPA" and "HRIPA", its sibling Acts. Many people residing in NSW also have dealings with the federal government, to which they apply under something still called the "Freedom of Information Act". Staff who deal with enquiries are mostly called Right to Information officers (influenced by the title of the Queensland Right to Information Act). The review provides an opportunity to reconsider the name of the Act.

There are several specific aspects of the Act which should be addressed to improve the effectiveness and efficiency of processing applications for access to information. These are set out below.

2. Interaction between GIPA and PPIPA

I would recommend all rights of access to information be moved to the GIPA Act. With the dual rights in PPIPA and GIPAA, there are 2 regimes with different costs, rules, timeframes and outcomes. It is confusing to the public. This was done in Queensland in relation to the RTI and IP Acts in 2009; their recent Discussion Paper for the review of their Acts favours placing the right of access to personal and non-personal information solely into the Right to Information Act.

3. Open Access Information for local councils : Development Applications

I am aware from my work with numerous NSW local councils that they have experienced some adverse effects from the changes brought by GIPA, in terms of their workload making open access information available to the public. The most notable example is in relation to development applications.

Schedule 1, Clause 3 of the GIPA Regulations states:

> *"(1) Information contained in the following records (whenever created) is prescribed as open access information:*
> *(a) development applications (within the meaning of the Environmental Planning and Assessment Act 1979) and any associated documents received in relation to a proposed development including the following …"*

For many councils, the introduction of GIPA has meant that they have received an increased number of requests for DA-related information, but notably, many of the

requests have been seeking **all** such information historically for a single property, often dating back over 50 years. I am aware of cases where the work involved in retrieving this historical information has been in excess of 40 hours for a single request. As it falls within Open Access information, provisions such as charging, or invoking the substantial and unreasonable diversion of resources refusal are not available as negotiation tools in order to reduce the work involved. Those seeking the information are in many cases conveyancers who then charge their clients fees for the information provided at no charge by the council. The fact that it is free means there is no disincentive to requesting every piece of information relating to every DA ever lodged, even if this is excessive in terms of what is required for the conveyance.

It is arguable that the open access provision was intended to apply to current ("proposed") development applications, rather than all such applications ever determined. If this were made clearer, then the problem of the voluminous historical searches would be solved. Other options to keep the volume of DA applications manageable include limiting the open access entitlement by time (for example, all those since a specified date such as 1998 or 2010), or those not yet archived off-site, or the most recent DA for the specific property.

Another aspect of the open access regime which needs clarification is the length of time for which material must be kept accessible on agency websites. In the case of Development Applications and associated documents, there is a significant volume of material for even a single application – many megabytes, even gigabytes, of information - largely because the material (plans etc) are in the form of scanned images. Retention for an unlimited period on websites involves storage costs and will eventually lead to problems with searching through the large volume of material.

I would also recommend that action be taken to accelerate discussions with the federal government for the amendment of the Copyright Act to allow local government to share in the s.183 license to use material for the services of the "Crown" (agency). There are other amendments to the Copyright Act which would also facilitate provision of access to the public, but the absence of local government from s.183 exposes them to needless risks when carrying out their obligations to make open access information available.

4. Fees and Charges

4.1 Processing Charges

Processing very small amounts of money, whether in the form of application fees or charges, is uneconomical for most agencies, as the cost of processing such payments through their finance systems is greater than the revenue gained. Many agencies are disinclined to pursue charges, advance deposits, etc., as the cost of the paperwork would often exceed the charges. Historically only a very small proportion of the charges notified are actually collected, and while this is for a variety of reasons, the net outcome is that agencies do not see the effort as worth the result. Any fees or

charges regime should have provision for waiver on the ground that processing or collecting the charges would be uneconomical, although it could be left to each agency to determine the precise level, based on the relative efficiency of its own finance system.

Under the reformed federal FOI Act, the provision to not charge an applicant for the first five (5) hours' work has, to some extent (amongst other benefits), addressed the issue of having to notify uneconomical charges. However, in practice, the next two or three hours' work then become uneconomical to notify, as they are amounts totalling no more than $60 or so. In practice this extends the "free area" to more like eight (8) hours.

In Queensland (*RTI* Regulation 5), while there is no charge for processing time less than 5 hours, once it exceeds that amount the entire period is chargeable.

> **"5 Amount of processing charge: Act, s 56**
> (1) The processing charge under section 56 of the Act for an access application for a document is:
>
> (a) if the agency or Minister spends no more than 5 hours processing the application: nil; or
>
> (b) if the agency or Minister spends more than 5 hours processing the application: $6.00 for each 15 minutes or part of 15 minutes spent processing the application.
>
> *Example:*
> *If the agency or Minister spends 3 hours processing an access application for a document there is no processing charge.*
> *If the agency or Minister spends 6 hours processing an access application for a document the processing charge is: 6 hours x 60 (to convert to minutes) / 15 (to determine the number of 15 minute blocks) x $6.00."*

In either model, the fact that there is no charge for less than 5 hours can be an incentive to applicants to narrow their requests to a more manageable size in order to avoid paying charges. This should assist agencies to manage their GIPA workloads. However there should be consideration given to enacting provisions which prevent abuse of the "5 hours free" exception, such as applicants who split what would otherwise be a very large request (incurring not only charges, but potentially attracting the "substantial and unreasonable diversion of resources" refusal) into many smaller requests designed to fall below 5 hours each.

The provision in s.60(3) which allows 2 or more requests relating to the same subject matter to be aggregated to assess the workload, should also be applicable when assessing the charges in relation to the five hours being free, taking into account the aggregation of requests made by requesters acting in concert (see recommendations in section 7 below). Many of the submissions made by Commonwealth agencies to the Australian Information Commissioner's Consultation on Fees and Charges note that they have already experienced applicants lodging multiple smaller requests designed to each fall below the 5 hour threshold.

4.2 Sliding scale for refund of charges when application overdue

A key element which is almost never addressed in reviews of the legislation is that of adequate levels of resources being provided to agencies to deal with their GIPA workloads in an effective and timely manner. Unlike activities such as public relations, agencies cannot control their GIPA workloads. There are many examples of agencies which are inadequately resourced relative to their GIPA workloads, and for such agencies the existence of a range of administrative defences and demand control mechanisms is essential. In an environment with sufficient staff resources to adequately handle GIPA activities, these protections would be much less significant, indeed perhaps unnecessary.

Where resources are inadequate, it seems needlessly harsh for an agency to have to refund all charges when statutory deadlines are not met. Certain categories of applicants (such as frequent users) now have an incentive not to cooperate with agencies, either in reducing the scope of a request or in agreeing to extensions of time, wherever such lack of cooperation is likely to gain them their requested information for free.

The underlying policy objective for the refund of charges for overdue requests, that is, to act as an incentive to agencies for prompt processing and compliance with statutory timeframes, could still be met by a sliding scale to refund a proportion of the charges (e.g. 25% for 1-2 weeks overdue, then 50% for 3 – 4 weeks overdue etc), which would alleviate the problem of discouraging users from negotiating the scope and timeframe.

4.3 Reimbursement of costs of retrieval from off site storage

An increasing expense to agencies arises from the need to retrieve records from off-site storage, frequently through private sector contractors, to process GIPA applications. In Queensland the access charges specified in the RTI Regulations permit agencies to recover such out-of-pocket costs from the applicant. The Queensland Regulations also provide for the recovery of any licensing fees (payable to third party vendors) for software that must sometimes be provided (along with the actual materials requested) in order for recipients to view or read or otherwise access information on certain media (e.g. X-rays on discs).

4.4 Unpaid charges to be recovered before subsequent request decided

Agencies should be given the power to refuse a new application from the same applicant if past charges have not been paid. I know of cases where an applicant abandons their application before paying the charges, then makes a new application, knowing that the documents have been assembled and the work effectively completed, with little additional time required. Although the agreement through the Advanced deposit process forms a basis for an agency to attempt recovery of a debt due, virtually no agency pursues this approach as it is usually uneconomical to

pursue such matters as debts. A "penalty" of this nature within the GIPA Act would be a more effective deterrent to this conduct by an applicant.

The Irish FOI Act has a provision allowing for this in section 10(1)(f) which provides that the agency may refuse a request if:

> *"(f) a fee or deposit payable under section 47 in respect of the request concerned or in respect of a previous request by the same requester has not been paid."*

5. Application Process

5.1 Proof of identity as threshold requirement for personal information (s.41)

When an application for personal information is made, processes must ensure that the applicant is either the person concerned, or represents the person concerned. Checking evidence of identity has to occur before detailed discussions with applicants about the scope of their applications, as otherwise, privacy breaches would occur as the agency would inevitably confirm that agency records existed concerning the applicant, and perhaps even more detail about the range and scope of such records.

Queensland's RTI and IP Acts require verified evidence of identity to be provided as a condition of validity of the application. Without it, the "clock" does not start ticking. This would be preferable to the present system where many days can be wasted waiting for proof of identity to be provided, while the clock is ticking, yet processing cannot meaningfully commence.

5.2 Informal Requests

Many agencies have also had difficulty caused by the lack of a clear legislative basis to levy charges for informal requests. As a result, they have tended to restrict the informal request process to very small requests (involving less than one hour's work), as there is no incentive to treat larger requests as informal where there is no ability to charge. This does not assist in facilitating prompt, easy access for the public and undermines the value of the informal access provisions.

5.3 Disclosure of applicant's Identity when consulting third parties

I consider that the identity of the applicant is a significant factor for virtually any third party in the consultation process, and that it should be able to be disclosed as a matter of course. Not disclosing it can lead to unnecessary angst for the third party who inevitably speculates as to the worst possible inquirer. I have witnessed many times the distress of third parties when confronted with the consultation letter, and even telling them that they know the applicant, or that it is a family member, can reduce their concern (as they may fear it is a media applicant for example).

Even though it is the case that the applicant can distribute the documents without limitation, many situations are such that the applicant would be highly unlikely to do so (eg: intra-family requests). I recommend that the Act give the discretion to release the applicant's identity when consulting third parties, and this should be made clear to an applicant on the application form or in the acknowledgement.

5.4 Timeframes

A numbers of agencies have a "shutdown" period over Christmas/New Year during which no staff are available to receive or process GIPA applications. Most of the days of the shutdown period are not public holidays, and so they count in the processing "clock". I recommend consideration be given to defining this period as not counting as business days.

5.5 Electronic Communications

Under the Electronic Transactions Act s.13A, communications including applications are deemed to have been received when they are capable of being retrieved. As I understand this provision, this means that the date of receipt of emails sent on, for example, Friday 6.00 pm before a long weekend, or 6.00 pm Xmas Eve, is that same day. While this may not be as significant for initial date of lodgement of an application, it can have a significant impact in terms of clock stopping and starting when the response is lodged electronically. Examples of this are the periods involving requests for advance deposits, or consultation for large requests. I recommend consideration be given to making explicit in the GIPA Act that such communications are received when they are accessed on the next available business day.

6. Processing Issues

6.1 Third Party Consultation

In relation to the third party consultation provision, it is a great improvement on its predecessors in the former FOI Act. I recommend the insertion of the term "substantial" to the phrase "might reasonably be expected to have [substantial] concern" in section 54(1)(b), to limit time-wasting consultation over trivial issues. While subsection (1) allows a broad range of matters upon which consultation may occur, subsection (2) may appear to limit this. I would recommend the inclusion in subsection (2) of a further ground: that the information was provided on a confidential basis. While this will often overlap with the other grounds, in some cases it would stand alone and merits separate recognition.

In Queensland, the omission from s.37 RTI Act of the word "substantial" from the equivalent provision (s.51) in the FOI Act, led to a significant increase in the number of third party consultations which are found to be necessary using the much lower threshold of "may reasonably be expected to be of concern…". From my own experience and anecdotal evidence of other practitioners, the increase has not led to

any improvement in quality of decisions or the ability to more effectively protect sensitive information. Rather it has increased the amount of work for agencies, the processing charges for an applicant, and increased the delays in providing access to an applicant, even more so if a review is sought by the third party. It runs counter to the pro-disclosure stance of the Act, and the review process is sometimes exploited by third parties simply as a delaying tactic. This is exacerbated by delays in dealing with reviews by the OIC. Perhaps there could be a time limit in the Act on the OIC to finalise third party appeals as a priority, with a fixed time limit (no more than 2 months).

The guidance from the IPC has indicated that consultation with affected third parties must be undertaken even when the agency has formed the view that the material should not be disclosed. If this is the correct interpretation of the provision, I strongly recommend that it be amended to clarify that consultation is only required where disclosure is contemplated. Otherwise, consultation would take place which is pointless (in that the third party's rights were never at risk) and frequently distressing to third parties who are, for instance, victims of crime (and the applicant is the perpetrator, where the agency does not intend to release any records).

6.2 Records of deceased persons

For consultation with close relative of the deceased under s.54(3), I recommend consideration of a provision such as appears in Queensland's Right to Information Act using the concept of an "eligible family member". This would make it clearer and easier to identify the appropriate person with whom to consult and reduce disputes concerning which relative is "closer".

> *RTIA s.37:*
> *"representative, in relation to a deceased person, means the deceased person's eligible family member, or, if 2 or more persons qualify as the deceased person's eligible family member, 1 of those persons."*
>
> *"eligible family member—*
> *1 eligible family member, of a deceased person, means—*
> *(a) a spouse of the deceased person; or*
> *(b) if a spouse is not reasonably available—an adult child of the deceased person; or*
> *(c) if a spouse or adult child is not reasonably available—a parent of the deceased person; or*
> *(d) if a spouse, adult child or parent is not reasonably available—an adult sibling of the deceased person; or*
> *(e) if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was not an Aboriginal person or Torres Strait Islander—the next nearest adult relative of the deceased person who is reasonably available; or*
> *(f) if a spouse, adult child, parent or adult sibling is not reasonably available and the deceased person was an Aboriginal person or Torres Strait Islander—*

a person who is an appropriate person according to the tradition or custom of the Aboriginal or Torres Strait Islander community to which the deceased person belonged and who is reasonably available.
2 A person described in item 1 is not reasonably available if—
(a) a person of that description does not exist; or
(b) a person of that description can not be reasonably contacted; or
(c) a person of that description is unable or unwilling to act as the eligible family member of the deceased person for the purposes of this Act."

6.3 Part-transfer of applications

The Act should allow for the part-transfer of an application between agencies. Applicants are not always aware of which agencies hold the information they are seeking, and a single application may cross over between agencies. Administrative re-arrangements of functions between Departments may also result in some records being split across agencies.

7. Refusal provisions : minimising the administrative burden on agencies

7.1 Unreasonable and substantial diversion of resources

This refusal provision has in my view been under-utilised in the past, leading to applications where hundreds of agency hours have been expended on a single application. This is sometimes linked with the behaviour of unreasonable and repeat applicants, which I am also addressing in this submission.

There has always been understandable reluctance to place a quantifiable upper limit to the resources which would be "substantial and reasonable" (changing as it does with factors such as the size and capacity of the agency, and the value of the information sought, amongst many others). I would like to draw attention to the recommendation of the Australian Information Commissioner in his review of Fees and Charges, and the recommendations of the Hawke Review of the federal FOI Act, which would place an absolute cap of 40 hours on the equivalent Commonwealth provision. As this recommendation is coming from an Information Commissioner, rather than from agencies, this review should give more weight to his recommendation.

There could be discretion to undertake a greater quantum of work, if the circumstances warranted, and the agency had the capacity. For some very small agencies, however, even a 40 hour limit would be more than they could accommodate, and it should remain possible to refuse based on the specific circumstances of the case. However, an absolute limit of 40 hours would reduce the amount of work required to justify a refusal decision where the work would be obviously much higher. The refusal would be subject to full review.

7.2 Vexatious requests

However, the single most important provision which I would recommend is that agencies are given the power to refuse an application as vexatious. While it has traditionally been regarded as a draconian power, and anathema to the ethos of access to information, I would argue that even the avenues of seeking a vexatious applicant declaration from the Federal OAIC and the Queensland OIC have been under-utilised since their enactment. It is therefore unlikely that agencies would abuse such a power. This decision would, of course, be subject to full review.

There are a number of cases of which I have personal knowledge where agencies have expended at least one hundred (and more) publicly-funded hours on a single applicant. In most instances, the applicants are those which would be classed by the Ombudsman as Unreasonable Complainants, with fixations on past wrongs, dating back more than 20 years in some cases. Based on anecdotal and some first-hand evidence, this represents a gross waste of public resources and should have been prevented at a much earlier stage.

Other practitioners would be able to provide more quantifiable evidence to support the need for this provision, however even based on my own personal experience as a consultant to agencies, I am aware of a number of cases where a single applicant has made dozens of applications, not quite identical (thereby not falling into the repeat application provision), and often personal in nature (therefore not being deterred by charges). When a single applicant in effect causes the expenditure of thousands of dollars of public money for nil or negligible benefit to themselves or the community, then it is obvious that a solution has to be found, or the hostility towards these few applicants taints the perception of the Act as a whole in the eyes of senior managers of agencies. The additional stress and burn-out caused to the GIPA decision makers in agencies, who have to keep dealing with the unreasonable applicants, is too high a price to keep paying.

Such a refusal provision appears in s 20 of the *Right to Information Act 2009* (Tas):

> ***20. Repeat or vexatious applications may be refused***
> *If an application for an assessed disclosure of information is made by an applicant for access to information which —*
> *(a) in the opinion of the public authority or a Minister, is the same or similar to information sought under a previous application to a public authority or Minister and*
> *the application does not, on its face, disclose any reasonable basis for again seeking access to the same or similar information; or*
> *(b) is an application which, in the opinion of the public authority or Minister, is vexatious or remains lacking in definition after negotiation entered into under section 13(7) —*
> *the public authority or Minister may refuse the application on the basis that it is a repeat or vexatious application.*

I would note here that significantly, the Queensland Ombudsman, previously the Queensland Information Commissioner, in his submission to the Solomon Review of the Queensland FOI Act, recommended that agencies be given the power to refuse a vexatious application.

In addition, the Australian Information Commissioner, in his submission to the Hawke Review of the federal FOI Act, recommended such a power be given to agencies:

> *215. There are two advantages to such an approach compared to the existing vexatious applicant provision in the Commonwealth FOI Act. The first advantage is that it could provide agencies with the opportunity to promptly and efficiently manage at their own initiative an individual request that would fall under the definition of an abuse of process under the current vexatious applicant provisions. Such a power would be consistent with the objects of the Act by allowing agencies to respond promptly to requests (as per s 3(4)) without having to devote resources to repeated or vexatious requests where it would be unreasonable to do so. The second advantage is that it would only apply to a particular request or series of repeated requests without impacting on the applicant's right to make other requests or to reframe the request classified by an agency as vexatious.*

7.3 Group of requesters acting in concert

The refusal provisions should also encompass the situation where the behavior of a group of requesters, acting together, constitutes vexatious conduct. One recent example is illustrated in the decision of the OAIC, *Farrell and Department of Immigration and Border Protection [2014] AICmr 74* [1]. In that decision, 121 requesters were crowd-sourced to apply for closely-related material relating to incidents in detention centres. In other examples with which I am familiar, multiple requests have been lodged simultaneously by more than 20 related corporate entities for substantially similar material. While each individual request would amount to less than a substantial use of resources, the cumulative effect would easily amount to more than a substantial use of resources.

The Irish FOI Act has a refusal provision which would address these situations:

> *"10._(1) A head to whom a request under section 7 is made may refuse to grant the request if*
> *(e) the request is, in the opinion of the head, frivolous or vexatious, or forms part of a pattern of manifestly unreasonable requests from the same requester or from different requesters who, in the opinion of the head, appear to have made the requests acting in concert…"*

[1] http://www.austlii.edu.au/au/cases/cth/AICmr/2014/74.html

In light of what appears to be an increase in the frequency of concerted requester behavior such as this, similar provisions should be included in the refusal provision in section 60(1)(a) (aggregation of requests which would be an unreasonable and substantial diversion of resources) as well as any refusal relating to vexatious requests.

7.4 Use of FOI during litigation

A further ground of refusal is raised in several recommendations made by the Australian Information Commissioner in his submission to the Hawke Review of the FOI Act.

> ***"Reducing the use of FOI process for legal discovery***
> *154. During consultations carried out by the OAIC for the Charges Review, some agencies raised the concern that the FOI request process is being used as a less expensive alternative to discovery in civil litigation. In effect, an agency providing documents through FOI rather than discovery could be subsidising the litigation, in circumvention of the principles that would otherwise apply.*
>
> *155. The recommendation made in the Charges Review regarding the introduction of a 40-hour processing limit would partly address that concern. A 40-hour limit would not deprive a party involved in or contemplating litigation from obtaining some relevant documents under FOI, but if extensive discovery was planned the party would have to rely on litigation procedures that are subject to court supervision and cost reimbursement rules.*
>
> *156. Another possible option would be to adopt the model offered by the RTI Act. Section 53 of that Act states that access may be refused where 'the applicant can reasonably access the document under another Act, or under arrangements made by an agency, whether or not the access is subject to a fee or charge'. Yet another option would be to provide in the FOI Act that a party involved in litigation against an agency cannot make an FOI request for documents relating to issues in contention in the litigation until the conclusion of that litigation. "*

8. Decision Making: Public Interest test

I strongly recommend including a longer list of factors favouring disclosure in the public interest. It would bring an appropriate balance to the legislation, which otherwise states only briefly the emphasis on public interests favouring disclosure in s.12, compared to the length of the sections in the Table after s.14 setting out the public interests against disclosure.

Part 2 of Schedule 4 of Queensland's *Right to Information Act (RTIA)* 2009, lists the factors in favour of disclosure. The RTI Act states clearly that these are not the only public interest factors favouring disclosure which may be taken into account.

Below is a list of public interest factors favouring disclosure which I prepared for my submission to the review of the Queensland RTI and IP Acts. I based it on their current lists of factors in their Schedule 4, but grouped the factors in a similar way to the s.14 Table of factors against disclosure.

Factors favouring disclosure in the public interest

Government Accountability
Disclosure of the information could reasonably be expected to enhance accountability of the Government or an agency.
Disclosure of the information could reasonably be expected to enhance accountability for expenditure of public funds.
Disclosure of the information could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.
Disclosure of the information could reasonably be expected to reveal deficiencies, or assist inquiry into possible deficiencies, in the conduct or administration of an agency or official.
Disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.

Participation in Government
Disclosure of the information could reasonably be expected to promote open discussion of public affairs.
Disclosure of the information could reasonably be expected to contribute to informed debate on important issues or matters of serious interest.
Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community.

Individual Rights
The information is the applicant's personal information.
Disclosure of the information is reasonably considered to be in a child's best interests.
*The information is the personal information of an individual who is deceased (the **deceased person)** and the applicant is an eligible family member of the deceased person.*
Disclosure of the information could reasonably be expected to assist a person to seek a legal remedy.
Disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies.

Disclosure of the information could reasonably be expected to contribute to the administration of justice generally, or for a person, including procedural fairness.

<u>Other</u>
Disclosure of the information could reasonably be expected to reveal that the information was—
(a) incorrect; or
(b) out of date; or
(c) misleading; or
(d) gratuitous; or
(e) unfairly subjective; or
(f) irrelevant.
Disclosure of the information could reasonably be expected to contribute to the facilitation of research.

AND any other factors favouring disclosure in the public interest.

I am concerned about the limitation to the public interest factors against disclosure: *"In balancing these considerations, an agency cannot take into account any considerations against disclosure other than those set out in this Schedule."*

As was said by the High Court in *Sankey v Whitlam* (1978) 142 CLR 1, the categories of public interest should not be limited:

> *"34. Relevant aspects of the public interest are not confined to strict and static classes. As Lord Hailsham of St. Marylebone observed in D.v. National Society for the Prevention of Cruelty to Children [1977] UKHL 1; (1978) AC 171, at p 230 "The categories of public interest are not closed . . .". In that case their Lordships discerned an aspect of the public interest, hitherto unremarked and which was quite unconnected with the affairs of central government but which was nevertheless proper to weigh in the balance and which in the outcome sufficed to outweigh that other public interest which exists in there being available to the court the information necessary for it to do justice between litigants. (at p60)"*

I strongly recommend amending this to follow the Queensland model, where the lists of public interest factors both for and against disclosure expressly state that they are not the only factors which can be taken into account (s.49(3)).

Changing social mores and specific circumstances may well arise which have not been foreseen in this list. One scenario might be: A person requests details of public service health sector employees who are suffering from specified (notifiable) diseases. Whilst there are many public interest factors favouring disclosure and non-disclosure, one public interest should relate to damaging the confidence of the public in the ability of the health system to protect sensitive personal information, which may lead to a reduction in the willingness of people to present themselves for

testing and treatment. While this could be squeezed into the privacy and law enforcement / public safety public interests, it is more accurately gauged and expressed in its own terms, rather than trying to make it fit a predetermined wording. My concern over having lists of public interest factors has always been that such lists limit the decision maker and could lead to a technically legal, but unfair or unbalanced decision.

Consideration could be given to relocating the entire section of law enforcement and public safety factors set out in Item 2 of the table after section 14 to Schedule 1, as it previously had the status of an exemption. It is still absolute in other Australian jurisdictions.

The limitation on Schedule 1, that there is no discretion for release of any material covered by the provisions, is a backward step from the FOI Act, which allowed the decision maker discretion in the application of the exemption provisions. I recommend that this discretion be returned to the Act in order to better fulfil its objectives for maximising openness and access. Queensland's RTI Act in s.47(2) states:

> *(2) It is the Parliament's intention that—*
> *(a) the grounds are to be interpreted narrowly; and*
> *(b) an agency or Minister may give access to a document even if a ground on which access may be refused applies.*

9. Review Process

9.1 Internal Review

I have always regarded internal reviews as performing a number of useful roles, and recommend that internal review should be made mandatory as it was under the FOI Act.

Properly undertaken, internal review is an opportunity for an agency to correct its own errors (if any), search more thoroughly, consider new arguments, re-assess its own position, and present a more favourable decision, or a better set of reasons to the applicant. It should also reduce the number of cases proceeding to external review. If an agency regards internal review as a "rubber stamp" or a "loyalty test", then it simply wastes the time of the applicant and the agency. I support a proper internal review system, and would prefer that it remain mandatory (other than when the original decision was made by the agency head or Minister). I also consider it enhances accountability of the agency, and of the original decision-maker, instead of "letting things go through to the keeper" (the OIC or NCAT).

In light of the average times taken at external review, the original intention of making internal review optional as "fast-tracking" of decisions, has simply not eventuated. If anything, the increased volume at the OIC level has led to an increase in their workload and consequent delays. Internal review deals more efficiently and

quickly with sufficiency of search issues, and happens much closer in time to the original decision, facilitating better searches. By the time 5 or 6 months have elapsed, the staff involved in the original case handling have often left the area, or forgotten intricacies of the case due to the passage of time.

If internal review is not made compulsory, it should be encouraged by the imposition of a $100 fee for IC review applicants who do not seek internal review when it is available to them. This is recommended in the federal Information Commissioner's Charges Review report.

9.2 Role of the IPC

I would also recommend that consideration be given to empowering the OIC to make binding determinations on all review matters before it, rather than recommendations as at present. Such determinations would then be subject to review by NCAT, perhaps limited to appeal on a point of law rather than full merits review. The OICs of Queensland and WA have had such powers from their inception, and their systems are highly regarded throughout Australia and beyond.

The OIC should be given the power to declare an applicant vexatious and to limit their right to make applications for access, amendment and review. Such powers are exercised by the Queensland, NT and federal Information Commissioners, although they have been used very sparingly. In NSW, the only such powers at present are held by NCAT, however an enormous amount of resources are expended by agencies and the OIC itself before such applicants appear frequently enough to justify such a declaration by NCAT.

I recommend that the IPC as a priority develop a Policy and Procedures Manual for GIPA similar to that produced jointly by the Premiers Department and Ombudsman for FOI. The current guidelines are brief and piecemeal, and do not address a wide range of matters which are necessary for practitioners. This would have a side benefit of reducing the need for practitioners to call the OIC Enquiry line with such questions. The IPC should also publish case notes, if not full text de-identified decisions, for review cases. Even without determinative powers, this would be of great value to practitioners in developing consistent interpretation and application of the Act.

Note about the author:

I have been working in the field of FOI / access to information since late 1981. Initially I was involved in the implementation of FOI in the Commonwealth government, then in NSW, Queensland, and the Northern Territory; I have also worked on implementing FOI in Ireland, the United Kingdom and China. Much of this time has been as an FOI practitioner, consultant and trainer.

I worked on the initial implementation of FOI into NSW in 1989 and since that time have provided training and advice to hundreds of decision-makers in NSW. I have worked with dozens of NSW agencies on the implementation of GIPA and dealing with GIPA casework.

I have been the Director of Information Consultants Pty Ltd since 1998. I was appointed an Honorary Senior Research Fellow with the Constitution Unit at University College London in 2003. In 2006 I co-authored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London).