Review of the *Right to Information Act 2009* and the *Information Privacy Act 2009* Response to 2016 Consultation Paper (December 2016)

Submission by Megan Carter

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Introduction

I made a submission to the Review of the Acts in 2013, and have repeated several key parts of that submission here for the convenience of the team assessing submissions. Otherwise my comments in the previous submission still stand, and I have provided comments below on selected questions from the current Consultation Paper.

While the review canvasses many areas for improvement, there are four recommendations discussed, which if implemented would have the greatest impact in terms of improving the process and outcomes for requests made under the RTI and IP Acts. They are:

- Change to a single point of access under RTI Act (Question 7)
- Reinstate threshold of "substantial concern" for consulting third parties (Question 9)
- Repeal and amend certain exemptions (Question 11)
- Re-balance the Public Interest Balancing Test (Questions 12-14)

My comments against selected specific questions in the Consultation paper are below.

Question 4: Contract Service Providers - RTI

I would strongly support the extension of the RTI Act and the access provisions of the IP Act to contract service providers using the Commonwealth s.6C model. This level of coverage has been in place in the Commonwealth and NSW for some years now, without any reports of adverse effect or even of any workload of note. On an international level, it is seen as best practice to extend FOI to outsourced government functions to maintain accountability.

Question 6: Contract Service Providers - IP

Yes, the privacy obligations in the IP Act should be extended to contracted service providers and sub-contractors.

Question 7: Single point of access

The additional experience of the past 3 years in assisting agencies to administer applications under the RTI and IP Acts has strengthened my support for a single point of access under the RTI Act for both personal and non-personal (and mixed) access applications. I also assist (at no charge) members of the public to exercise their rights under RTI/IP (and FOI elsewhere), and it is unnecessarily confusing for them. It adds needless complexity when having to switch an application to the other Act; and explaining decisions made under the IP Act (with confusing reference to the RTI Act and its provisions) makes it even more difficult for the applicant to understand a decision letter.

Question 8: Schedules

There are many levels of detail which could be incorporated into a Schedule for use at the CEN stage, or to negotiate under section 41. It runs counter to the purpose of these provisions to require an agency to prepare a schedule with more than loose groupings by type and an approximate count of documents. It is a waste of resources to require detailed scheduling when it is likely that the applicant will not be proceeding with the application in that form. Discussion and consultation between the applicant, RTI officer and often, an expert from the relevant business unit, are much more likely to achieve an effective outcome. The requirement should not be maintained.

Question 9: Threshold for third party consultation

It is no surprise to me that the 2013 responses were almost all in favour of reinstating the threshold of "substantial concern" for third party consultation. The lower threshold has definitely increased the workload and complexity in terms of the number of third parties to consult, and the net effect is to delay access for the applicant. For non-personal applications, it can markedly increase the cost to the applicant as the time required is chargeable. If no other procedural recommendation is implemented from this review, this and the single channel for access should be implemented, as both would make a significant improvement in efficient processing for agencies and applicants.

Question 10: Third parties' right of review

I always wondered about the right of review of a third party who was not consulted, as it occurs "after the horse has bolted". In all the years this appeal right has been in place, I am not aware of any cases other than some anecdotal comments that there have been some complaints along these lines. Perhaps rather than a right of review, it could be a matter about which a complaint could be made.

Question 11: Exemptions

For the convenience of gathering all responses from this review process to its specific questions, I am taking the liberty of repeating below my comments on this matter from my 2013 submission.

Cabinet exemption

I recommend amalgamating **Clauses 1 and 2** into a redrafted Cabinet provision. Having 2 Cabinet provisions is unnecessarily cumbersome and confusing. I propose drafting a single provision which more closely resembles the terms of the original Cabinet exemption in the 1992 FOI Act, with a number of changes. The original terms of the Cabinet provision were as follows (omitting the conclusive certificate power which I do not recommend reinstating):

Cabinet matter

36.(1) Matter is exempt matter if—

(a) it has been submitted, or is proposed by a Minister to be submitted, to Cabinet for its consideration and was brought into existence for the purpose of submission for consideration by Cabinet; or

(b) it forms part of an official record of Cabinet; or

(c) it is a draft of matter mentioned in paragraph (a) or (b); or

(d) it is a copy of, or contains an extract from, matter or a draft of matter mentioned in paragraph (a) or (b); or

(e) its disclosure would involve the disclosure of any deliberation or decision of Cabinet, other than matter that has been officially published by decision of Cabinet.

(2) Matter is not exempt under subsection (1) if it is merely factual or statistical matter unless—

(a) the disclosure of the matter under this Act would involve the disclosure of any deliberation or decision of Cabinet; and

(b) the fact of the deliberation or decision has not been officially published by decision of Cabinet.

(4) In this section—

"Cabinet" includes a Cabinet committee.

This has great benefits in terms of its brevity and simplicity, and maintains a better balance between accountability at the highest level of government, and the need to protect collective Ministerial responsibility. A tightly drawn Cabinet exemption is one of the hallmarks of excellence in FOI legislation, and in 1992, Queensland was at the forefront of excellence in FOI. It was a great disappointment that the 2009 reforms did not take the opportunity to bring back the balance to this crucial provision. While I acknowledge the enormous improvements in the government's approach to proactive publication of some Cabinet material, the unnecessary breadth of the 2 current Cabinet exemptions reduces accountability at the heart of government, which detracts from the other improvements in the Act.

If it is seen as desirable, a sub-paragraph protecting documents prepared for the purpose of briefing Ministers in relation to matters being considered by Cabinet would be in keeping with some other Australian jurisdictions.

I would also recommend a fixed 10-year time limit on the application of the Cabinet exemption, as is the case in NSW, Victoria and Tasmania, rather than the movable 10-year period as at present.

Other exemptions

There is little justification or need for the exemption in **Clause 3** (Executive Council) and I recommend it be omitted. If it is retained, then I recommend that it be returned to its 1992 form, as I have recommended above for the Cabinet exemption, and that it be subject to a fixed 10 year time limit.

The Solomon Review proposed time limits of 3 years for incoming Ministerial briefs, parliamentary estimates briefs and Question Time briefs, and I recommend implementing these time limits.

I do not consider the new exemptions **Clauses 4A and 4B** are warranted, especially as local government seems to have managed adequately for 17 years without the benefit of them.

I recommend the addition to **Clause 7** Legal Professional Privilege of provisions similar to those in the NSW *Government Information Public Access (GIPA)* Act, for its equivalent provision in Schedule 1 Clause 5:

> *"(2) If an access application is made to an agency in whose favour legal professional privilege exists in all or some of the government information to which access is sought, the agency is required to consider whether it would be appropriate for the agency to waive that privilege before the agency refuses to provide access to government information on the basis of this clause."*

I recommend that contractors for services to government be included in the list of those from whom deliberative process material would not constitute a breach of confidence in **Clause 8(2)**. They are, in effect, "insiders", as are the other entities on the list, and with the increase in outsourcing government functions, they should be included here.

The Solomon Review recommended omitting **Clause 11** (Investment Incentive Schemes) and I recommend that this unnecessary exemption be removed.

In clause 12(2), I recommend that the exception be clarified by the addition of a word such as "merely" or "solely", that is:

> *(2) Information is not exempt information under subsection (1) in relation to an access application if it is solely personal information for the applicant.*

Questions 12, 13 and 14: Public Interest balancing test

Again, for convenience in collating responses to this review, I will repeat the relevant parts of my 2013 submission for this question.

The public interest test is conceptually excellent, but difficult in practice. Decision-makers find it difficult to apply confidently, exacerbated by the confusion and duplication in Parts 3 and 4 of Schedule 4; and applicants find the statements of reasons confusing. So all changes being considered should have the key principles in mind of keeping the test as simple and understandable as possible, while maintaining its integrity.

The factors in Schedule 4, Parts 3 and 4 should absolutely be combined into a single list, with a better balance between the factors in favour of, and those against disclosure.

As it stands, Part 4 factors read as if they are of much greater significance than those in Part 3, partly from their wording and partly from their sheer length. Added to this is the hangover in the memories of decision-makers and applicants of the FOI years when these were exemptions, giving them greater weight. This completely unbalances the public interest test and would tend to result in anything but a pro-disclosure outcome.

The enormous level of duplication and overlap between Parts 3 and 4 make decision-letters overly lengthy and confusing to applicants. It also can cause decision-makers to take an approach of simply using the Part 4 factor (which sounds weightier and resembles the familiar exemptions), and sometimes "double-counting" with the counterpart Part 3 factor. When the Right to Information Act was enacted, government took a decision to treat the Schedule 4 Parts 3 and 4 elements as being less absolute and of less weight than the Schedule 3 factors, yet some of the decisions I have read treat the Part 4 factors as if they are indeed exemptions.

So, for many reasons, I strongly recommend amalgamating the Part 3 and 4 factors into a single Part. They should be worded in a comparable manner to the Part 2 factors, rather than sounding as if they are more important. I have drafted a very rough rewrite of Parts 2 and 3 which is at Attachment 1 to this submission. I recommend that it be circulated for comments to the practitioners who are making decisions under it every day, whereas I only make a few dozen decisions under RTI each year, although I conduct RTI /IP training regularly. They would be better able to assess the necessity and frequency of the factors in the two lists.

I employed several guiding principles in the re-draft attached.

1. Keep both the length of the two lists, and the length of the individual factors within them, as short as possible.
2. Keep the lists as close to "mirror images" of each other as practicable, to ensure a better overall balance in the public interest test.
3. Group the factors in both lists roughly by subject, similar to the approach of the NSW GIPA Act in s.14 (only for its factors against disclosure).
4. Within each group, I tried to sequence the factors by aspects such as their overall importance as public interest factors and their frequency of use in decisions.
5. I also reminded myself, and perhaps drafting within the Parts could also do this, that the list of factors in both Parts is not exhaustive. Only those which are of greatest importance or most frequent use should be listed, as any others can be developed and applied as needed. This is another reason I do not support adding more public interest factors to the lists as redrafted; in fact, I have omitted quite a few from both parts. Future reviews of the Act can consider whether the importance or frequency of need for certain factors should lead to additions, omissions, or re-ordering of the lists.

All of these principles should facilitate more confident and pro-disclosure decisions by decision-makers, and more readable and comprehensible decision-letters for applicants.

The details within the longer versions in Part 4 could be captured in what the Solomon Review called its Time and Harm Based Weighting Guide, and I am confident some drafting can be developed to deal with the relatively small amount of detail omitted from my proposed re-draft. (Although time did not permit drafting a proper Time and Harm-based weighting guide, I have at Attachment 2 some notes towards such a Guide, and the Solomon review of course provides more detail on this concept).

Questions 15-18: Disclosure Logs

Many of the changes in the Disclosure Log provisions made in 2012 have been antithetical to the objectives of RTI and go so far as to discourage use of the legislation. The amendments to s78, requiring the publication of the request before it has even been determined, are completely misplaced in something called a "Disclosure Log". I consider these amendments are a disincentive to investigative journalists, who lose the benefit of their initiative before they have even received any documents. Publication of the identity of an applicant could deter some applicants, and adds nothing of value to the material in a Disclosure Log. These provisions should be repealed.

The requirement to publish in a Disclosure Log immediately, or as soon as practicable, or even within 24 hours, is another disadvantage for investigative journalists, as they do not have sufficient opportunity to prepare a story based on information for which they have paid. In NSW, s.66(2) provides that if the material is published within 3 working days after the applicant has been given access, then the processed charges are fully waived:

> *s.66 (2) If the information applied for was not publicly available at the time the application was received but the agency makes the information publicly available either before or within 3 working days after providing access to the applicant, the applicant is entitled to a full waiver of the processing charge imposed by the agency.*

This acknowledges the commercial disadvantage caused by early release. I consider a period such as a week would be sufficient to allow exclusive use of information the applicant has paid for, before it is published to the world.

There needs to be a discretionary element for inclusion in the Disclosure Log. Disclosure logs brimming over with released information of dubious interest or benefit to the public, undermine the very purpose they were designed to achieve: finding useful information is like looking for a needle in a haystack. Items which had been requested (either under RTI or via the Disclosure Log) more than once should

also receive some priority ranking, or a way of being more easily located, as they have demonstrated their value to the public.

Question 20: 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).

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.

Giving the power to the OIC to require an agency to conduct an internal review is similar to the NSW system for reviews under the GIPA Act. I support this recommendation.

Question 21: Right of review to QCAT

The right of review to QCAT should remain as it is at present.

Question 34: Other Amendments

I have adapted the following recommendations from my submission in 2013.

1. Definition of "Personal Information"

I would strongly recommend defining the term to specifically exclude certain aspects relating to public officials. At a minimum, some information relating to routine work information of public servants should be excluded in the definition in the Act, rather than merely in OIC Guidelines as at present. The breadth of the current definition has led to excessive third party consultation with public servants, excessive redaction of harmless information relating to public servants, and to voluminous

applications by public servants where charges are not applicable. (Example: "I want all emails containing my name in X period held by Y agency" by a member of staff. The emails located would include emails about agency activities (office cleaning, pest control etc) addressed to the applicant as one of thousands of agency staff).

An example can be seen in the WA FOI Act (Schedule 1 Clause 3(3)):

> *"(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to —*
> *(a) the person;*
> *(b) the person's position or functions as an officer; or*
> *(c) things done by the person in the course of performing functions as an officer.*
> *(4) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to —*
> *(a) the person;*
> *(b) the contract; or*
> *(c) things done by the person in performing services under the contract."*

Also in the NSW GIPA Act in Schedule 4 Clause 4:

> *(3) Personal information does not include any of the following:*
> *(b) information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.*

2. Repeat and Vexatious Applicants

The challenge of dealing with repeat applicants has increased in the years since my last submission to the review. The single most important provision which I would recommend as a solution 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 RTI, I would argue that even the avenue of seeking a vexatious applicant declaration from the OIC has been under-utilised since its enactment, so it is unlikely that agencies would abuse such a power. This decision would, of course, be subject to full review.

This is distinct and separate from the provision enabling an agency/ies to seek a declaration from the OIC that an applicant is vexatious. That provision should remain; however, the rarity of such declarations to date has left agencies believing that the threshold is so high as to be unachievable. The fact situation of the one declaration to date would also suggest this, based on an extraordinary number of applications in a short period, added to the quite unreasonable and unacceptable conduct of the applicant. Prior to the declaration, the respondent agency (and many others in Queensland) had expended at least hundreds, if not thousands of publicly-funded hours on this one applicant. 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 RTI 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 (thereby 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 RTI/IP decision makers in agencies, who have to keep dealing with the unreasonable applicants is too high a price to keep paying.

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

3. Substantial and Unreasonable 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 have addressed above.

While 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 point out that the Australian Information Commissioner in his review of Fees and Charges and in his submission to the Hawke review of the federal Act, recommended placing an absolute cap of 40 hours on the equivalent Commonwealth provision. As this is coming from an Information Commissioner, rather than from agencies, this review should give more weight to his recommendation.

4. Factors Particular to Applicant

The NSW GIPA Act includes a provision in section 55:

> ***55 Consideration of personal factors of application***
> *(1) In determining whether there is an overriding public interest against disclosure of information in response to an access application, an agency is entitled to take the following factors (the "personal factors of the application") into account as provided by this section:*
> *(a) the applicant’s identity and relationship with any other person,*
> *(b) the applicant’s motives for making the access application,*
> *(c) any other factors particular to the applicant.*

(2) The personal factors of the application can also be taken into account as factors in favour of providing the applicant with access to the information.
(3) The personal factors of the application can be taken into account as factors against providing access if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2-5 (but not clause 1, 6 or 7) of the Table to section 14.

This explicitly allows consideration to be given to particular factors of the applicant in making an access decision, following the decision in *Marke* by the Victorian Court of Appeal, which has been endorsed by the Queensland Information Commissioner as applicable in Queensland. Given the long-standing view of "Release under FOI is release to the world", the insertion of a provision similar to the NSW s55 would make clear to decision makers that it is quite valid to take into account, where relevant, factors particular to an applicant. This increases the number of release decisions, which is in keeping with the pro-disclosure bias.

5. Fees and Charges – other

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 under a CEN forms a basis for an agency to attempt recovery of a debt due, virtually no agency pursues this approach. A "penalty" of this nature within the RTI 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."

6. Extension of "Neither Confirm nor Deny" provision

The definition of "prescribed information" for Section 55 (Neither Confirm nor Deny (NCND)) should be extended to cover the exemptions in Schedule 3, Clause 7 (Legal Professional Privilege) and 8 (Breach of Confidence). I have experience of applications framed in terms which require the NCND response, for example: "I seek any legal advice provided to the agency supporting Decision X, or that the interpretation of term Z excludes ABC", in other words, an affirmative response exempting the documents would reveal at least part of their substance. For Clause 8, an application could be framed as "I seek any information provided by person / company X about topic Y " where the information was given in confidence (but not in a law enforcement context or Clause 10 would cover it) and confirming its existence would cause detriment. If it would assist the steering committee I would be happy to discuss and provide more examples in support. The UK FOI Act allows the NCND response to be provided in relation to all of their exemptions.

7. Form of Access exception

I recommend an additional exception be provided in section 68(4) Form of access, that access in the form requested would be contrary to the public interest. This would allow some flexibility to decision-makers where the disclosure of the material itself does not cause the harm, but the form of access may lead to harm.

Examples of situations where this may be useful include:

1. Access to CCTV footage by way of inspection (for instance, to assess if there is any basis on which to sub-poena the footage), where access in the form of a copy may prejudice privacy or security.
2. Access to CVs and job application details of successful applicants, where access by inspection should satisfy the accountability requirements (merit-based selection), whereas access in the form of a copy could facilitate plagiarism, which is already a problem.
3. In the field of child protection, allegations made by a child against their parents are disclosed to the parents in an attempt to resolve the case. When the parents apply for a copy under RTI, it is difficult to argue confidentiality and privacy as it has been disclosed. However, a hard copy in the hands of the parents could be damaging to the child at some future point. The decision on access could be to allow inspection but not a copy.

Such a provision is in section 72(2) of the NSW GIPA Act:

> *(2) The agency must provide access in the way requested by the applicant unless:*
> *(d) there is an overriding public interest against disclosure of the information in the way requested by the applicant.*

8. Offences

The NSW GIPA Act includes 2 additional offence provisions which I would recommend be included in the Right to Information Act.

> ***116 Offence of acting unlawfully***
> *An officer of an agency must not make a reviewable decision in relation to an access application that the officer knows to be contrary to the requirements of this Act.*
> *Maximum penalty: 100 penalty units.*

> ***120 Offence of concealing or destroying government information***
> *A person who destroys, conceals or alters any record of government information for the purpose of preventing the disclosure of the information as authorised or required by or under this Act is guilty of an offence.*
> *Maximum penalty: 100 penalty units.*

Note about the author:

I have been working in the field of FOI 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, the Cayman Islands and China. Much of this time has been as an FOI practitioner, consultant and trainer.

I worked with the Department of Justice and the Attorney General on the implementation of FOI into Queensland in 1992-3, and since that time have regularly provided training and advice to decision-makers in Queensland. I was closely involved in the development of guidelines under, and training decision-makers in, the new *Right to Information* and *Information Privacy Acts* since 2009. I have trained over 1000 staff of Queensland agencies in the new provisions.

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 coauthored a book on "FOI: Balancing the Public Interest" (2nd edition, published by UCL London).

Attachment 1: Public Interest Balancing Test

Redraft of Schedule 4 Parts 2 and 3 – omitting Part 4

Schedule 4 Part 2: 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.

Other

Disclosure of the information could reasonably be expected to reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective, or 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.

Schedule 4 Part 3: Factors favouring nondisclosure in the public interest

Functions of Government

Disclosure of the information could reasonably be expected to prejudice the effectiveness, or the conduct, of tests, investigations, audits or reviews.

Disclosure of the information could reasonably be expected to prejudice the management functions of an agency, including staff management or the conduct of industrial relations.

Disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information.

Disclosure of the information could reasonably be expected to prejudice a deliberative process of government.

Disclosure of the information could reasonably be expected to prejudice intergovernmental relations, including by divulging information of a confidential nature that was communicated in confidence by or for another government.

Disclosure of the information could reasonably be expected to prejudice the security or good order of a corrective services facility.

Disclosure of the information could reasonably be expected to prejudice the economy of the State.

Disclosure of the information could reasonably be expected to expose any person to an unfair advantage or disadvantage as a result of the premature disclosure of information concerning any proposed action or inaction of the Government or an agency.

Individual Rights:

Disclosure of the information could reasonably be expected to be an unreasonable interference with [or have an unreasonable impact on] an individual's privacy.

The information is the personal information of a child and disclosure of the information is reasonably considered not to be in the child's best interests.

The information is the personal information of an individual who is deceased (the ***deceased person)*** and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.

Disclosure of the information could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.

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

Business :

Disclosure of the information could reasonably be expected to prejudice the business, professional, commercial or financial affairs of entities.

Disclosure of the information could reasonably be expected to diminish the value of trade secrets of, or information of a commercial value to, an agency or person.

Disclosure of the information could reasonably be expected to prejudice the competitive commercial activities of an agency or person.

Disclosure of the information could reasonably be expected to have a substantial adverse effect on the financial or property interests of the State or an agency.

Disclosure of the information could reasonably be expected to prejudice the conduct, effectiveness or integrity of research of an agency or a person.

Other

Disclosure of the information could reasonably be expected to impede the protection of the environment.

Disclosure of the information could reasonably be expected to prejudice public health and safety.

AND any other factors favouring non-disclosure in the public interest.

Attachment 2: Time and Harm Based Weighting Guide

This is not a draft of such a Guide, but merely a list of suggested elements which could be included. The Solomon Review Report provides a number of other elements.

Inter-governmental relations: 10 year time limit
Financial and property interests of agency or government: 8 year time limit

Deliberative Process

- If the deliberative processes include public consultation, the public interest against disclosure can only be considered until the public consultation starts.
- This public interest consideration does not apply for information to the extent it consists of factual or statistical information; or expert opinion or analysis.
- It also does not apply to the record of, or statement of the reasons for, a decision, order or ruling.
- 5 year time limit

Personal Information

- likely to be greater harm if it was also conveyed in circumstances of confidentiality;
- likely to be greater harm when it consists of "sensitive information" as per definition in Information Privacy Act;
- likely to be less harm if information about another person is being disclosed to the person who provided the information
- consider the following as likely to reduce potential harm of release:
    - (a) the extent to which the information is well known;
    - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
    - (c) the availability of the information from publicly accessible sources.

Business Information:

- 5 year time limit – can be extended once by a further 5 years on application to OIC.
- likely to be greater harm if it was also conveyed in circumstances of confidentiality
- consider the following as likely to reduce potential harm of release:
    - (a) the extent to which the information is well known;
    - (b) whether the person / entity to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
    - (c) the availability of the information from publicly accessible sources

Prejudice future supply of confidential information:

- likely to be less or no harm when government agency has power to compel provision of information
- likely to be less or no harm when the information is given in order to obtain some benefit, licence or approval from the government
- likely to be less or no harm if the supplier would be disadvantaged if they failed to supply the information
- Contractors to government – add into the list of those excluded for deliberative process information
- for non-personal information - 5 year time limit – can extend once by 5 years on application to OIC;
- personal confidential information – no time limits

General Principles of Time-Based Harm

- likely to be greater harm before decisions are made and announced
- likely to be less or no harm after the decision has been made or announced
- likely to be greater harm before investigations, reviews, audits have been completed
- likely to be less or no harm after they have been completed