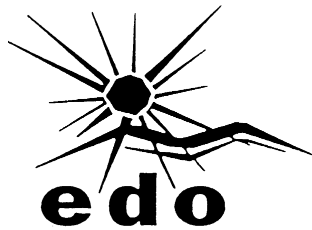

environmental defender's office new south wales

Submission to the Department of Premier and Cabinet, FOI Reform – Open Government Information

3rd June 2009

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *the fundamental role of early engagement in achieving good environmental outcomes*
- *the importance of indigenous involvement in protection of the environment*
- *the importance of providing equitable access to EDO services around NSW*

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Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the *Open Government Information Bill 2009 (Exposure Draft)* and the *Information Commissioner Bill 2009 (Exposure Draft)*. The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law.

The *Freedom Of Information Act 1982(FOI Act)* was introduced in 1989 by the Greiner Government, with the intention of instilling a culture of transparency, accountability and access to information to dispel the "bastion of secrecy"[1] of the NSW public sector. However, despite these good intentions, it has been observed that the FOI Act has failed to deliver the degree of openness and transparency that its advocates and sponsors anticipated".[2] The EDO's experiences with the NSW FOI regime mirrors this observation. The NSW FOI Act is an instrument that "encapsulates the key tension in representative democracy, between the right of individual voters and the public at large to be informed about the workings of government, set against the Executive's claims for confidentiality".[3]

Numerous legal commentators have drawn attention to the fundamental obstacles that exist when attempting to implement a "Freedom of Information Act regime atop a 'closed' Westminster system of government with ingrained habits of secrecy and strict information control."[4] Evidence suggests that these "habits of secrecy" are prevalent in many NSW agencies, with annual reports demonstrating that there has been a "significant and disturbing downward trend of determinations where all documents requested were released… from 81% of determinations in 1995-96 to 52% in 2005-06".[5] This is representative of a strong culture that has developed in some NSW agencies that "defaults towards secrecy rather than toward openness".[6]

In the EDO's opinion, there is no doubt that the FOI regime in NSW is in urgent need of systemic change. The EDO recently tendered a submission to the Ombudsman's inquiry into the current FOI legislation recommending a number of fundamental changes needed in order to facilitate and encourage the development of a transparent, accountable, efficient and effective FOI regime. The submission will draw on the recommendations made to the Ombudsman's inquiry.[7]

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[1] Wilenski, P. 1982, Review of NSW Government Administration – Further Report Unfinished Agenda, Review of NSW Govt Admin, Sydney.
[2] Timmins, P. 2005, Freedom of Information in New South Wales: 15 years on, *Freedom of Information Review,* Vol. 114, Pgs. 69-71.
[3] NSW Parliamentary Library Research Service, *Freedom of Information – Issues and Recent Developments in NSW*. Available at:
http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/1572d6956a794b4eca2572ea0004439a/$FILE/FOIFINAL&INDEX.pdf.
[4] Worthy, B. 2007, Freedom of Information in Britain – Lessons from Australia, *Alternative Law Journal*, Vol 32, Pgs 229-232.
[5] NSW Ombudsman Annual Report 2006-07. Available at:
http://www.ombo.nsw.gov.au/show.asp?id=457.
[6] Worthy, B. 2007, Freedom of Information in Britain – Lessons from Australia, *Alternative Law Journal*, Vol 32, Pgs 229-232.
[7] EDO (NSW) submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf.

Key Recommendations and Observations

Our key recommendations and observations are summarised below:

1) Changes to the Legislative Scheme
   - EDO supports the formulation of the three new proposed pieces of OGI legislation to bring about systemic change to the current inadequate NSW FOI regime.

2) Objects and Public Interest test
   - The EDO supports the more strongly worded presumption of disclosure in the objects of the OGI Bill;
   - The EDO supports the inclusion of a more prescriptive, accountable and transparent 'public interest test;'
   - The EDO supports the inclusion of public interest considerations 'for' and 'against' disclosure in the OGI Bill; and
   - The EDO submits that the OGI Bill should require that FOI Officers must undergo external training and accreditation prior to responding and processing FOI requests.

3) Exemptions
   - The EDO submits that whether or not a document is released should be assessed on a case by case basis, rather than whether it falls within a particular category;
   - The EDO submits that the OGI Bill be amended to clarify the scope of the cabinet exemption clause;
   - The EDO submits that Ministerial Code of Conduct should be removed from Schedule 1; and
   - The EDO supports the fact that agencies are encouraged to facilitate public access to information through removing those pieces of information that would otherwise prevent the document being disclosed.

4) Ministerial Certificates
   - The EDO supports the removal of Ministerial certificates under the OGI Bill.

5) Streamlined Review Rights
   - The EDO supports the fact that the OGI Bill provides that internal reviews are optional, as opposed to a mandatory prerequisite to obtaining an external review; and
   - The EDO welcomes the introduction of review rights by the Information Commissioner for all agencies, including the decisions of Ministers.

6) Fees and Charges
   - The EDO submits that the requirement for the payment of an application fee be removed. FOI information should be provided free to the public;
   - The EDO submits that the OGI Bill be amended to ensure that agencies are not permitted to demand a maximum advance deposit of 50% prior to responding to an application;
   - The EDO submits that processing fees be removed from the OGI Bill;

- The EDO submits that the OGI Bill be amended to identify the circumstances that amount to "financial hardship" in order to satisfy the waiver of 50% reduction in fees; and
- The EDO supports the proposed provision that an "agency cannot impose any processing charge for the first 20 hours of processing time"[8] for an applicant seeking personal information about themselves.

7) Time Periods and Deemed Refusal

- The EDO submits that the extension of time to 20 working days[9] in the OGI Bill should be amended to reflect the original 21 day period stipulated in the current FOI Act legislation;
- The EDO supports the fact that under the OGI Bill, applicants are notified of the receipt of their request "as soon as practicable after the agency receives the application and in any event within 5 working days;"[10] and
- The EDO submits that the default position of deemed refusal in the OGI Bill should be removed and that the Bill include a trigger mechanism which automatically requires an internal review to take place following the expiration of the reply period.

8) Sanctions

- The EDO supports introduction of the Offences Provisions; and
- The EDO submits that further sanction provisions are introduced to encourage compliance. These could include sanctions against agencies that apply the legislation incorrectly, consistently fail to provide adequate reasons for FOI decisions and fail to respond to FOI requests within the statutory timeframes.

9) Expedited FOI Requests

- The EDO submits that in exceptional circumstances, such as meeting litigation deadlines, the OGI Bill should provide for expedited determinations to be made in a reduced timeframe.

10) Information Commissioner

- The EDO supports the creation of the statutory position of Information Commissioner whose role includes determinative powers, compliance and monitoring;
- The EDO supports the provision clarifying that the Commissioner has powers to address both complaints and investigations;
- The EDO supports the notion that the Commissioner is to promote public awareness and understanding of this Act[11] and provide information, advice, assistance and training to agencies and the public on any matters relevant to this Act[12];
- The EDO submits that the OGI Bill be amended to require all NSW agencies to provide annual reports to the Information Commissioner. These reports should contain information such as the number of FOI applications received, those granted full disclosure and those refused.

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[8] *Open Government Information Bill 2009 (Exposure Draft),* Clause 64.
[9] *Open Government Information Bill 2009 (Exposure Draft),* Clause 54(4).
[10] *Open Government Information Bill 2009 (Exposure Draft),* Clause 48(2).
[11] *Open Government Information Bill 2009 (Exposure Draft),* Clause 17(a).
[12] *Open Government Information Bill 2009 (Exposure Draft),* Clause 17(b).

A Fresh Start

The EDO submits that the changes introduced by the *Open Government Information Bill 2009 (Exposure Draft)* and the *Information Commissioner Bill 2009 (Exposure Draft)* are overwhelmingly positive and will serve to increase the transparency, consistency and accountability of the application of FOI laws within NSW. In our previous submission to the Ombudsman's FOI review, we stated that:

> "there is no doubt that the FOI regime in NSW is in urgent need of systemic change. Implementing the changes needed will require a series of modifications across the entire structure of the **FOI Act** that will contribute to the development of a transparent, accountable, efficient and effective FOI regime."[13]

The fact that the legislation provides a "fresh start"[14] whereby the current "FOI Act will be scrapped, and replaced with new legislation which provides a clear focus on openness and a greater emphasis on the proactive release of information" [15] is certainly consistent with our recommendation of "systemic change" raised in our previous submission. As such, the EDO supports the FOI amendment package and is hopeful that this will drive a "cultural change throughout the entire NSW public sector towards greater openness in Government."[16]

Objects

The EDO has previously submitted that there is a need for a strongly worded presumption of disclosure in the objects of the FOI legislation. The EDO therefore supports the amendments to the objects clause, which stipulates that one of the objects is to "advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public."[17] The wording used in this section of the OGI Bill clearly conveys a stance that encourages disclosure. Furthermore, the EDO supports the following clauses within the objects of the OGI Bill which again undoubtedly emphasise openness and accountability:

- *encouraging the proactive release of government information;*
- *giving members of the public an enforceable right to access government information; and*
- *providing that access to government information is restricted only when there is an overriding public interest against disclosure.*[18]

Finally, EDO supports the inclusion of a provision stating "(T)here is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure."[19] All these comments highlight the intention of the OGI Bill

[13] EDO (NSW) submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf.
[14] A Companion Guide to the Bills. Available at: http://www.dpc.nsw.gov.au/__data/assets/file/0018/45171/OGI_Guide.pdf.
[15] A Companion Guide to the Bills. Available at: http://www.dpc.nsw.gov.au/__data/assets/file/0018/45171/OGI_Guide.pdf.
[16] A Companion Guide to the Bills. Available at: http://www.dpc.nsw.gov.au/__data/assets/file/0018/45171/OGI_Guide.pdf
[17] *Open Government Information Bill 2009 (Exposure Draft),* Clauses 3(1).
[18] *Open Government Information Bill 2009 (Exposure Draft),* Clauses 3(1)(a-c).
[19] *Open Government Information Bill 2009 (Exposure Draft),* Clause 5.

to encourage the development of a culture within agencies that is geared towards disclosure.

Proactive Release of Information

The EDO supports the emphasis placed on the proactive disclosure of certain information required by agencies throughout the proposed OGI Bill. For example clauses 6-11, 18, and 20-22 of the bill require that:

- *An agency must at intervals of not more than 12 months review its program for the release of government information:*[20]
- *The certain "open access information" is required to be made publicly available such as:*[21]
    - *the agency's current publication guide;*
    - *information about the agency contained in any document tabled in Parliament;*
    - *the agency's policy documents; and*
    - *the agency's disclosure log of access applications.*

Furthermore the EDO supports the fact that the OGI Bill proposes that increased protection be afforded to agencies who release information proactively or in response to an informal request. The OGI Bill provides that agencies releasing such information will be given the same protection as if they had released information in response to a formal application.[22]

Public Interest Test

In our previous submission to the NSW Ombudsman, we called for the introduction of a more prescriptive public interest test. We believe it necessary to encourage consistency throughout the process involved in determining whether the release or withholding of information is in the public interest. It was for these reasons we recommended that the essential features of the public interest should be included in the Act to provide better clarity and guidance to both agencies and applicants regarding how and when to apply the public interest test. It is however important to specify that any list not be an exhaustive list of considerations, but instead consist of various factors which might arise in considering whether the disclosure of certain information, would be contrary to the public interest. As such the EDO supports the introduction of:

- Schedule 2 - *Public interest considerations against disclosure*;
- Clause 12 - *Public interest considerations in favour of disclosure*;
- Clause 14 - *Public interest considerations against disclosure*; and
- Clause 15 - *Principles that apply to public interest determination.*

Furthermore we support the formulation of the public interest test provided in the OGI Bill.

> *There is an* ***overriding public interest against disclosure*** *of government information for the purposes of this Act if (and only if) there are public interest considerations against*

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[20] *Open Government Information Bill 2009 (Exposure Draft),* Clause 7(3).
[21] *Open Government Information Bill 2009 (Exposure Draft),* Clause 18.
[22] Freedom of Information (FOI) Reform Companion Guide. Available at: http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf.

disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.[23]

We also support the objects clause of the OGI Bill which provides that "access to government information is restricted only when there is an overriding public interest against disclosure."[24] The EDO submits that the introduction of this phrase into the OGI Bill will encourage the creation of a default position of disclosure as opposed to one of refusal. In terms of who should be applying the public interest test and the discretion afforded, the EDO submits that an agency's FOI officer should be required to undergo external training and accreditation prior to processing and responding to FOI requests.

Exemptions

The EDO notes that the OGI Bill, at Schedule 1, sets out a list of *Information for which there is conclusive presumption of overriding public interest against disclosure*. This is a newly worded section regarding exemption clauses. EDO stressed in its previous submission that under current FOI laws, access to a document can be refused purely on the basis that it falls within a 'class' of document. Refusing a document on such a basis encourages the use of blanket refusals whereby an agency can justify denying FOI requests on the basis that the information requested falls into a particular class. Instead, we submit that each document must be assessed on its own merits which would include an assessment of whether the release of the information contained is contrary to the public interest. Some information, such as those relating to witness protection legislation or the identity of jurors, will be easily identified as having an overriding public interest against disclosure. Despite this fact, the EDO maintains that the refusal of access to documents should only occur where the harm caused by disclosure of a document outweighs the public interest in having it released.

In terms of 'Cabinet Information', should this be retained as a class of exempt information under Schedule 1 of the OGI Bill, the EDO submits that amendments similar to those proposed under the Commonwealth FOI reforms should be introduced. These reforms regarding Cabinet Information were introduced to "clarify the scope of the exemption and to ensure that it only covers documents at the core of the Cabinet process. This will ensure the exemption cannot be misused to cover documents which are not genuinely Cabinet documents."[25]

The EDO also questions the reasoning behind the inclusion of the Ministerial Code of Conduct under Schedule 1. The OGI Bill provides that:

> *information the disclosure of which would disclose information contained in the Register of Interests kept by or on behalf of the Premier pursuant to the Code of Conduct for Ministers of the Crown adopted by Cabinet.*[26]

The EDO believes that this information should not be considered the subject of conclusive presumption of overriding public interest against disclosure.

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[23] *Open Government Information Bill 2009 (Exposure Draft),* Clause 13.
[24] *Open Government Information Bill 2009 (Exposure Draft),* Clause 3(1)(c).
[25] Freedom of Information (FOI) Reform Companion Guide. Available at: http://www.pmc.gov.au/consultation/foi_reform/docs/Companion_Guide.pdf.
[26] *Open Government Information Bill 2009 (Exposure Draft),* Clause 11.

Furthermore, the EDO commends the incorporation of the clear requirement that entire documents should not be refused on the basis of sensitive information that could easily be removed from the document (i.e. reducing the implementation of blanket refusals). The OGI Bill instead provides that:

> "An agency must facilitate public access …by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure..."[27]

The EDO supports this amendment.

Ministerial Certificates

Previously under the *FOI Act*, the Premier (as the Minister administering the FOI Act) could issue a Ministerial Certificate stating that a "specified document is a restricted document" and that this shall "be taken to be conclusive evidence that the document is a restricted document."[28] This restricted both the Ombudsman and the ADT from reviewing the issuing of a Ministerial Certificate, allowing review to be carried out only by the Supreme Court.[29]

The previous legislation also provided that although the certificate must specify "the reasons for the Minister's decision that the document is a restricted document"[30] it provided no parameters or guidance stipulating what amounts to a legitimate reason for refusal, or what documents can be subject to such a certificate. The issuing of Ministerial Certificates is a process that has already been abolished in both Victoria and Western Australia, and the Commonwealth has also signalled this intention "cabinet has agreed to abolish conclusive certificates and legislation to do that will be introduced later this year."[31] The EDO therefore supports the removal of Ministerial certificates under the new legislation.

Streamlined Review Rights

The EDO believes that the current requirement for applicants to undergo an internal review process (where 68%[32] are upheld) prior to being able to apply for an external review[33] places an unfair burden on the applicant. In our previous submission, we stated;

> "The EDO therefore believes that whilst there still should remain an option for an applicant to pursue an internal review by the agency that originally denied the information requested, it should not be a prerequisite to obtaining an external review. That is, internal reviews should be optional, not mandatory."[34]

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27 *Open Government Information Bill 2009 (Exposure Draft),* Clause 6(3).
28 *Freedom of Information Act 1989 (NSW)* Sec 59(1).
29 The Supreme Court is able to review whether "there are reasonable grounds for the claim that the document is a restricted document", *Freedom of Information Act 1989 (NSW)* Part 5, Division 3.
30 *Freedom of Information Act 1989 (NSW)* Sec 59(1A)(a).
31 Moore, M. 2008, 'Ministers to lose power to keep documents secret', *Sydney Morning Herald,* July 22. Available at:
http://www.smh.com.au/news/national/lifting-the-lid-on-secrets/2008/07/22/1216492416181.html.
32 NSW Ombudsman, Discussion Paper: Review of the *Freedom of Information Act 1989* September 2008.
33 *Freedom of Information 1989* (NSW) Sec 52(2)(b).
34 EDO (NSW) submission to the NSW Ombudsman on the *Freedom of Information Act 1989*. Available at: http://www.edo.org.au/edonsw/site/pdf/subs08/081112_foi.pdf.

EDO therefore welcomes the fact that the OGI Bill allows for an external review without the requirement to firstly undergo an internal review in certain circumstances. ANEDO submits that by allowing a decision to be reviewed by the Information Commissioner[35] or the Administrative Decisions Tribunal (ADT)[36] directly there is the potential for information to be disclosed in a much more efficient manner.

Furthermore the EDO welcomes the introduction of review rights by the Information Commissioner for all agencies, including the decisions of Ministers.

Fees and Charges

Although there have been no increase in fees and charges[37] associated with FOI applications with the introduction of the *OGI Bill*, the EDO has concerns with some of the fee and charge provisions within the proposed legislation. Our previous submission to the Ombudsman referred to some of the points made by the Honourable Justice Kirby in an address to the International Commission of Jurists in London, regarding the "Seven Deadly Sins" of an effective freedom of information regime. In regard to costs and fees for FOI application, he stated that one of the downfalls was to "render access to FOI so expensive that it is effectively put beyond the reach of ordinary citizens."[38] The EDO is concerned that the proposed costs in the Bills associated with requests for information may prove to be a financial obstacle that is insurmountable for some members of the community.

Application Fee and Advance Deposits
We submit that the application fee of $30[39] should be removed. In addition to making the FOI system accessible to all, the removal of the fee would also be important symbolically. It would signify to agencies and the public alike, that access to public information is a fundamental democratic right and "not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens."[40]

In terms of Advance Deposits, Clause 66 provides that "the maximum advance deposit that can be required is 50% of the amount that the agency estimates to be the total processing charge for dealing with the application." The EDO submits that it is often the advance deposit that can render the FOI process prohibitively expensive, and should therefore be removed. Evidence collected in the NSW Ombudsman's Annual Reports shows that the number of FOI applications reported to have been refused on the basis that advance deposits were not paid has risen from 36 in 1995-96 to 172 in 2004-05 and finally to 296 in 2005-06. This equates to an 822% increase in FOI refusals in 10 years purely as a result of the financial constraints imposed by the legislation. In light of this, the EDO suggests that the new OGI Bill should be amended to make it clear that FOI is a free service provided to the public. As His Honour Justice Kirby observed:

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[35] *Open Government Information Bill 2009 (Exposure Draft),* Clause 84(2).
[36] *Open Government Information Bill 2009 (Exposure Draft),* Clause 95.
[37] The OGI Bill states that there will be no increase in the following fees for FOI requests: Application fee $30 (which also covers the first hour); Processing Charges (per hr) $30; Internal review $40.
[38] Kirby, M. 1997, *Freedom of Information: The Seven Deadly Sins,* British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, London. Available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm.
[39] *Open Government Information Bill 2009 (Exposure Draft),* Clause 30(1)(c).
[40] Electoral and Administrative Review Commission, *Report on Freedom of Information,* December 1990, pg 183.

> *It is important for governments, whatever their political complexion, to understand that some basic activities of government simply have to be provided at the general cost of the taxpayer. They represent the price of governing a civilised community. To expect the user to pay fully for basic government services, such as a day in court, is surely wrong. The same, is true of FOI charges.*[41]

Additionally in terms of processing fees, with dramatic advancements in technology the process or searching, obtaining and delivering a document is now significantly more streamlined and efficient. The EDO believes that application fees (if retained) should reflect this technological progress. If NSW agencies have not upgraded their information storage systems to be more efficient, enabling them to continue to charge large fees to cover the costs associated with locating documents as a result of archaic information storage systems, then this will not provide any incentive for improved efficiency within an agency. We therefore suggest that the advance deposit and application fees be removed from the OGI Bill.[42]

Discounted processing charge—financial hardship

The EDO supports the clause whereby applicants are entitled to a "50% reduction in a processing charge imposed by an agency if the agency is satisfied that the applicant is suffering financial hardship."[43] The EDO does however suggest that the Bill or associated regulations should provide further guidance regarding what amounts to 'financial hardship' for both agencies and applicants. We also submit that this clause also be amended to explicitly state that the application fee also be waived in circumstances of "financial hardship."

Waiver of processing charge for personal information application

The EDO supports that the OGI Bill provides that where an applicant is seeking access to personal information from an agency regarding themselves, then that "agency cannot impose any processing charge for the first 20 hours of processing time for the application."[44]

Time Periods and Deemed Refusal

The *FOI Act* provisions relating to time periods currently stipulate that "an application shall be dealt with as soon as practicable (and, in any case, within 21 days) after it is received."[45] The EDO submits that the extension of time to 20 working days[46] in the OGI Bill should be amended to reflect the original 21 day period stipulated in the current legislation.

The EDO supports the fact that the OGI Bill introduces the requirement that an agency must notify an applicant that their request has been received "as soon as practicable after

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41 Kirby, M. 1997, *Freedom of Information: The Seven Deadly Sins,* British Section of the International Commission of Jurists, Fortieth Anniversary Lecture Series, London. Available at: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_justice.htm.

42 We note the proposals in the OGI Bill that if an agency fails to comply with the required timeframes for dealing with an initial application fee, the fee be refunded with no additional fee required for an internal review. Despite recognising this as a positive amendment on the previous legislation, we submit that the application fee should be completely removed.

43 *Open Government Information Bill 2009 (Exposure Draft),* Clause 62(1).

44 *Open Government Information Bill 2009 (Exposure Draft),* Clause 64.

45 *Freedom of Information Act 1989* (NSW) Sec 18(3).

46 *Open Government Information Bill 2009 (Exposure Draft),* Clause 54(4).

the agency receives the application and in any event within 5 working days after the application is received."[47] The EDO submits that keeping applicants informed throughout the process will contribute to a more transparent and accountable State FOI regime.

The EDO does not support the retention of the principle of 'deemed refusal' within the OGI Bill. The Bill currently provides that if "an agency does not decide an access application within time, the agency is deemed to have decided to refuse to deal with the application..."[48] The EDO submits that this default position should be removed as it may contribute to a culture of withholding, as opposed to disclosing information. The EDO alternatively recommends that the Bill be amended to introduce of a trigger mechanism which automatically requires an internal review take place following the expiration of the reply period. This places the responsibility on the agency, as opposed to the applicant, to progress the FOI request through the application process. Any agency that fails to conduct such an internal review within the required amount of time should be liable to penalty provisions.

Sanctions

The delay, and often failure, of NSW agencies to respond to FOI requests in a timely manner (or even at all) is a situation that needs to be remedied. With the *FOI Act* currently unable to impose penalties on agencies who fail to determine FOI applications within statutory time frames, there is neither a 'carrot', nor a 'stick' to bring about change within the NSW FOI regime. The EDO therefore supports the introduction of the Offences Provision under Division 2 of Part 6 of the Bill; particularly those that make it an offence for any person to improperly influence decisions on access applications.[49] Furthermore we support the creation of offences for concealing or destroying government information for the purpose of preventing disclosure.[50]

Although the OGI Bill does provide that there exists a general "Offence of acting unlawfully"[51] we submit that the Bill be amended to include specific provisions introducing sanctions against agencies that continually apply the legislation incorrectly, fail to adhere to statutory timeframes, or fail to provide adequate reasons for their access determinations. The EDO submits that the inclusion of such provisions will not only increase the speed at which FOI applicants are issued a response, but will also assist in changing the cultural tide in NSW agencies from a default position of secrecy and concealment to one of information disclosure.

Expedited Requests

The EDO submits that amendments should be made to the OGI Bill to provide applicants the opportunity for expedited determinations. As the Solomon Report states:

> For some applicants seeking documents through FOI, it would be fair to say that access delayed, is access refused.[52]

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[47] *Open Government Information Bill 2009 (Exposure Draft),* Clause 48(2).
[48] *Open Government Information Bill 2009 (Exposure Draft),* Clause 60(1).
[49] *Open Government Information Bill 2009 (Exposure Draft),* Clause 113.
[50] *Open Government Information Bill 2009 (Exposure Draft),* Clause 115.
[51] *Open Government Information Bill 2009 (Exposure Draft),* Clause 111.
[52] The Right to Information, *Reviewing Queensland's Freedom of Information Act.* The report by the FOI Independent Review Panel, June 2008. Available at: www.FOIreview.qld.gov.au/.

A good example in our experience is gathering information in relation to a development application under the *Environmental Planning and Assessment Act 1979* within the 28 day limitations period for merits appeals in the Land and Environment Court. In such circumstances the quick availability of information is crucial. The EDO submits that in exceptional circumstances, such as meeting litigation deadlines, the OGI Bill provide for expedited determinations to be made in a reduced timeframe.[53]

Information Commissioner Bill 2009

In our submission to the Ombudsman, we proposed that an independent statutory position of Information Commissioner should be created whose role would include determinative powers, compliance and monitoring, as well as the authority to implement proposed sanctions. The EDO therefore applauds the introduction of the *Information Commissioner Bill 2009* which creates the position of Information Commissioner.

Clause 17 of the OGI Bill sets out the broad powers afforded to the Information Commissioner. In providing comments we will primarily address Part 3 of the *Information Commissioner Bill 2009* (IC Bill) which sets out the following functions of the Information Commissioner; complaints, investigations, powers of the Commissioner, and disclosure of information. This submission will now address some of these functions in more detail.

Complaints

The EDO supports the fact that the Information Commissioner is given the powers to address complaints. However we believe that the fact that the Commissioner "may decide to deal with a complaint or to decline deal with a complaint"[54] is discretionary and does not encourage transparency. Therefore we submit that the Bill be amended to state that when a complainant receives notice "of the Commissioner's decision on whether to deal with the complaint"[55] this should be accompanied by reasons for the Commissioner's decision (especially in the case of the refusal to investigate).

Investigations

The EDO supports the broad investigative powers afforded to the Information Commissioner to investigate "the systems, policies and practices… that relate to functions of agencies under an Information Act."[56] Furthermore the EDO supports the fact that the IC Bill permits the Commissioner to:

a) enter and inspect any premises occupied or used by an agency, and
b) inspect any record or thing in or on the premises.[57]

However we submit that, in the interests of transparency, the Bill should be amended to state that if an investigation is discontinued, the Commissioner should not only give

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[53] An example that the EDO often encounters concerns the 28 day period within which an appeal must be initiated to the Land and Environment Court.
[54] *Information Commissioner Bill 2009*, Clause 17(1).
[55] *Information Commissioner Bill 2009*, Clause 19.
[56] *Information Commissioner Bill 2009*, Clause 20(1).
[57] *Information Commissioner Bill 2009,* Clause 25.

notice to the complainant, but also set out the reasons for the complaint being discontinued.

Powers of the Commissioner

In addition to the powers set out above, the EDO supports the inclusion of the broad powers afforded to the Commissioner requiring an agency to produce a "statement of information… any record or other thing or… a copy of any record."[58] Furthermore our previous submission also suggested that the Information Commissioner should be given powers, inter alia, in regards to monitoring and compliance. The EDO therefore supports the fact that the Commissioner has the powers "to monitor, audit and report on the exercise by agencies of their functions under, and compliance with, this Act."[59] We submit that an additional function of the Commissioner should be to receive and access annual reports of all NSW agencies containing information such as the number of FOI applications received those granted full disclosure and those refused. The EDO submits that this would assist in identifying those agencies consistently failing to adhere to the pro-disclosure objectives of the new OGI Bill in addition to providing the community with a summary of FOI claims.

Training and Awareness of FOI Laws

In our previous submission to the Ombudsman we suggested that the Information Commissioner undertake an advice and awareness function. Advice and awareness should be carried out in a way similar to that suggested by to the Parliamentary Legal, Constitutional and Administrative Review Committee (LCARC) through "such outlets as public libraries, educational institutions and newspapers, using such means as posters, pamphlets and public speaking engagements… in addition to maintaining a website where the material would also be available in a passive way."[60] This would assist in making the community aware of their rights to request public information, which should assist individuals to participate in government decision-making processes in a substantive and informed manner. We therefore support the fact that the Information Commissioner has the role in:

- promoting public awareness and understanding of this Act and to promote the object of this Act;[61] and
- providing information, advice, assistance and training to agencies and the public on any matters relevant to this Act.[62]

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[58] *Information Commissioner Bill 2009,* Clause 24(1)(a-c).
[59] *Open Government Information Bill 2009 (Exposure Draft),* Clause 17(g).
[60] The Right to Information, *Reviewing Queensland's Freedom of Information Act*. The report by the FOI Independent Review Panel, June 2008. Available at: www.FOIreview.qld.gov.au/.
[61] *Open Government Information Bill 2009 (Exposure Draft),* Clause 17(a).
[62] *Open Government Information Bill 2009 (Exposure Draft),* Clause 17(b).