

# **OBTAINING DOCUMENTS IN NSW UNDER FREEDOM OF INFORMATION AND SUBPOENAS**

**A Talk by Mark A Robinson, Barrister to the  
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## **Freedom of Information**

Legal practitioners in New South Wales have reported significant and persistent problems in seeking to obtain documents from NSW State government agencies under the *Freedom of Information Act* 1989 (NSW) (“FOI Act”). In this talk, I will attempt to assist FOI applicants by setting out an outline of the FOI process in NSW, a statement of the problems currently being experienced by NSW lawyers and their clients and provide a brief indication as to what can be done to achieve the objective – obtaining meaningful documents from the State government.

The FOI Act came into operation on 1 July 1989. It was the fourth Australian jurisdiction to do so after the Commonwealth.

The Long title of the FOI Act reveals the purpose of the Act. It is:

“An Act to require information concerning documents held by the Government to be made available to the public, to enable a member of the public to obtain access to documents held by the Government and to enable a member of the public to ensure that records held by the Government concerning his or her personal affairs are not incomplete, incorrect, out of date or misleading; ...”

Section 5 sets out the Act’s objects in more detail. The FOI Act seeks to achieve its objectives in three main ways:

- (a) by ensuring that information concerning the operations of the Government (including, in particular, information concerning the rules and practices followed by the Government in its dealings with members of the public) is made available to the public (s 5(2)(a) – this particularly relates to information on government policies and decision-making practices – see, section 14 & 15);

- (b) by conferring on each member of the public a legally enforceable right to be given access to documents held by the Government – agencies (s 16) and Ministers (s 35) , subject only to such restrictions as are reasonably necessary for the proper administration of the Government (s 5(2)(b)); and
- (c) by enabling each member of the public to apply for the amendment of such of the Government’s records concerning his or her personal affairs as are incomplete, incorrect, out of date or misleading (s 5(2)(c) and ss 39 & 48).

Section 5(3) & (4) provide:

“(3) It is the intention of Parliament:

- (a) that this Act shall be interpreted and applied so as to further the objects of this Act, and
  - (b) that the discretions conferred by this Act shall be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, the disclosure of information.
- (4) Nothing in this Act is intended to prevent or discourage the publication of information, the giving of access to documents or the amendment of records as permitted or required by or under any other Act or law.”

### **The Advantages of FOI**

FOI applications are (or are designed to be):

- Relatively quick;
- Relatively inexpensive (if the request is framed narrowly enough); and
- Might reveal documents that would have been discoverable or the subject of a subpoena had legal proceedings been commenced;
- Can be confidential, in that the identity of the principal, or true applicant, does not have to be disclosed;
- Might reveal documents that can form the basis of:
  - Judicial review proceedings as to the legality of a decision;
  - A complaint to the NSW Ombudsman, ICAC or Privacy Commissioner;
  - Other legal proceedings against the government, say, in negligence for breach of contract, or in negligence or misfeasance in public office (eg:

*Northern Territory of Australia v Mengel* (1995) 185 CLR 307) or for breach of statutory duty; and.

- Might reveal documents or records that contain incorrect, misleading or outdated information that should be amended.

The primary sources of information relating to FOI are the following:

- The Act itself and the 2005 regulations and the 1989 Fees and Charges “Order” made under s 67 of the Act;
- Recent decisions of the Court of Appeal of NSW and the Administrative Decisions Tribunal of New South Wales (“ADT”); eg in *General Manager, WorkCover Authority of NSW v Law Society of NSW* (2006) 65 NSWLR 502 (Handley, Hodgson and McColl JJA) (on the internal working documents exemption) (Note also the recent High Court decision on exemption certificates in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423);
- The NSW FOI Manual, August 2007, published by the NSW Department of Premier and Cabinet and NSW Ombudsman (“The FOI Manual”); and,
- The NSW Crown Solicitor’s FOI annotations and commentary in Robinson, *NSW Administrative Law*, (looseleaf) Volume 1.

### **Fees and Charges**

Fees and charges are summarised below (from the FOI Manual at [6.1.6]):

<b>Nature of Application</b>	<b>Application Fee</b>	<b>Processing Charge</b>
Access to records by natural person about their personal affairs	\$20 - \$30	\$30 per hour after first 20 hours
All other requests	\$20 - \$30	\$30 per hour
Internal review	\$20 - \$40	Nil
Amendment of records	Nil	Nil

Notes: The application charge is subject to 50% reduction for financial hardship and public interest reasons. Processing charges should be estimated to the nearest quarter hour according to time taken, whatever the task. Refunds of internal review charges may apply as a result of successful reviews and successful applications for amendment of records. No application fees may be charged for internal reviews in relation to amendment of records.

### **Exempt Bodies**

Certain agencies are exempt from the operation of the FOI Act to some extent and they are listed in Schedule 2 of the Act. Some of those listed there are as follows:

The office of Director of Public Prosecutions—prosecuting functions.

The Independent Commission Against Corruption—corruption prevention, complaint handling, investigative and report functions.

The office of Public Trustee—functions exercised in the Public Trustee's capacity as executor, administrator or trustee.

The office of Ombudsman—the complaint handling, investigative and reporting functions of that office.

The Health Care Complaints Commission—complaint handling, investigative, complaints resolution and reporting functions (including any functions exercised by the Health Conciliation Registry).

The Child Death Review Team—all functions.

The Police Integrity Commission—corruption prevention, complaint handling, investigative and report functions.

The office of Privacy Commissioner—the complaint handling, investigative and reporting functions of that office.

The New South Wales Crime Commission—investigative and reporting functions.

The President of the Anti-Discrimination Board—complaint handling, investigative and reporting functions in relation to a complaint that is in the course of being dealt with by the President.

The Department of Local Government (including the Director-General and other Departmental representatives)—complaint handling and investigative functions conferred by or under any Act on that Department.

## **Exempt Documents**

The exemptions are listed in Schedule 1 of the Act and are divided into three broad groups:

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1. Restricted documents (Schedule 1 Part 1);
2. Documents requiring consultation (reverse FOI) (Schedule 1 Part 2); and
3. Other Exempt documents (Schedule 1 Part 3).

These exemptions include:

### ***Restricted Documents (Schedule 1 Part 1):***

- Cabinet documents (clause 1)
- Executive Council documents (clause 2)
- Documents affecting law enforcement and safety (clause 4)
- Documents affecting counter-terrorism measures (clause 4A)

### ***Documents requiring consultation (Schedule 1 Part 2):***

- Documents affecting inter-governmental relations (clause 5)
- Documents affecting personal affairs (clause 6)
- Documents affecting business affairs (clause 7)
- Documents affecting the conduct of research (clause 8)

### ***Other Documents (Schedule 1 Part 3):***

- Internal working documents (clause 9)
- Documents subject to legal professional privilege (clause 10)
- Documents relating to judicial functions etc (clause 11)
- Documents the subject of secrecy provisions (clause 12)
- Documents containing confidential material (clause 13)
- Documents affecting the economy of the State (clause 14)
- Documents affecting financial or property interests (clause 15)
- Documents concerning operations of agencies (clause 16)
- Documents subject to contempt etc (clause 17)

## **Reverse FOI**

Where an application is made that seeks documents affecting intergovernmental relations (Schedule 1, Clause 5 and s 30), personal affairs (Schedule 1, Clause 6 and s 31), business affairs (Schedule 1, Clause 7 and s 32) or other documents affecting the conduct of research (Schedule 1, Clause 8 and s 33), a procedure generally known as “reverse FOI” is activated under ss 30-33 of the Act.

Briefly, the procedure is that before any decision is permitted to be made to release the subject documents, the FOI officer must first notify the interested third party (the government, agency, person or corporation the subject of the documents) and afford them limited opportunity to make submissions against a possible release of the documents. If the decision-maker decides to release the documents in spite of the submissions of the third party, that third party has the right to commence external review proceedings in the ADT or make a complaint to the NSW Ombudsman.

## **Review of FOI Determinations**

Where there is a refusal to grant access to a document, the applicant may seek internal review of the decision by the agency (s 34). If the applicant remains unhappy after the internal review decision, an application may be made to the ADT, General Division, for external review of the decision (s 53). The Tribunal conducts independent merits review in a de facto hearing and makes a binding determination.

Alternatively, an applicant may make a complaint to the NSW Ombudsman, who has extensive powers to investigate and to make recommendations in this area. One cannot have the ADT and the Ombudsman looking at the same matter at the same time.

## **The ADT’s Override Discretion**

The Tribunal’s override discretion was recently discussed in *Cianfrano v NSW Ombudsman* [2007] NSWADT 235 at [25] (Montgomery JM) in the following terms:

“In *University of New South Wales v Gerard Michael McGuirk* [2006] NSWSC 1362 the Supreme Court confirmed that the Tribunal has discretion to order access to be given to documents which are exempt documents under the FOI Act if it decides that to do so is the correct and preferable decision with regard to the material then before it. The Tribunal’s President summarised the current thinking in regard to the exercise of this discretion in his recent decision in *Cianfrano v Director General, Premier’s Department* [2007] NSWADT 216. He specifically considered whether exempt matter should be released and observed that the Tribunal has a broad, unfettered discretion to release exempt documents, matching that of the agency. The President reviewed a number of authorities that have considered the issue and stated at paragraph [24]:

24 At this early point in the exercise of this power, the following principles to guide the exercise of the discretion have emerged:

- (1) The Tribunal must first ascertain whether the matter is exempt matter.
- (2) The Tribunal should only exercise the power to decline to refuse disclosing exempt matter where there are strong grounds justifying the overriding of the exemption.
- (3) The question of whether there are strong grounds should take account of the objects of the FOI Act as expressed in s 5.
- (4) Even in the case of matter that falls within one of the ‘restricted documents’ categories of exemption (see cl 1 (Cabinet documents), 2 (Executive Council documents) and 4 (Documents affecting Law Enforcement and Public Safety) of Schedule 1) the only absolute exemption arises where the Minister has granted a certificate pursuant to s 59.
- (5) In the case of restricted documents, particular account should be taken of the concern addressed by s 5(2)(b), i.e. whether or not a restriction of access is ‘reasonably necessary for the proper administration of government’.”

## Time Limits in Processing FOI Applications

From [4.2] of the FOI Manual:

### Summary of time limits on agencies and Ministers (calendar days)

TASKS	AGENCIES	MINISTERS
Deal with application. (See [4.2.1-4.2.13])	As soon as practicable and in any case within 21 days of receipt (this may be extended to 35 days if consultation required).	As soon as practicable and in any case within 21 days of receipt (this may be extended to 35 days if consultation required).
Deal with application <b>transferred</b> from another agency. (See [3.11.6])	Within 31 days of receipt of application by the first agency OR within 21 days of receipt by second agency, whichever is the earlier. (Allows maximum of 10 days for transfer). Again, this may be extended by up to 14 days if consultation is required.	Within 31 days of receipt of application by the first agency OR within 21 days of receipt by second agency, whichever is the earlier. (Allows maximum of 10 days for transfer). Again, this may be extended by up to 14 days if consultation is required.

Deal with application for <b>internal review</b> . (See [7.1.7-7.1.9])	Within 14 days of lodgement.	Not applicable.
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### Summary of time limits for applicants (calendar days)

INTERNAL REVIEW	APPLICATION FOR AN AGENCY'S DOCUMENTS	APPLICATIONS FOR A MINISTER'S DOCUMENTS
Lodge application for internal review.	Within 28 days after notice of determination given or after 'deemed refusal' (ie if no notice of determination is provided then 49 days after initial application received).	Not applicable.

EXTERNAL REVIEW	APPLICATION FOR AN AGENCY'S DOCUMENTS	APPLICATIONS FOR A MINISTER'S DOCUMENTS
Lodge complaint with <b>Ombudsman</b> .	No time limit, but generally within 6 months [policy]. However, to retain the right to appeal to the ADT the complaint must be lodged within 60 days of the notice of determination being given to applicant (or 'deemed refusal'). A complaint generally cannot be considered by the Ombudsman unless and until any internal review rights have been exercised.	Not applicable.
File appeal with <b>ADT</b> .	Within 60 days of notice of determination given (or 'deemed refusal'), or within 60 days of notification of Ombudsman completing action. An appeal cannot be made to the ADT unless and until any internal review rights have been exercised.	Within 60 days after notice of determination given (or 'deemed refusal').

### Problems and Strategies

There are numerous problems with the operation of the NSW FOI Act that have been identified over many years.

Most of them centre around:

1. Delay;
2. Failure to provide proper reasons;
3. High fees and charges and advance deposits; and,
4. Failure to have regard to public interest or reasonableness factors.

Some of these problems are identified in the following reports:



The NSW Ombudsman's Report "*Freedom of Information – The Way Ahead*", January 1995, a Special Report to Parliament.

The NSW's Auditor-General's Report "*PERFORMANCE AUDIT- Freedom of Information- Ministry of Transport; Premier's Department; and Department of Education and Training*" August 2003

Irene Moss, AO, Chair, "*Report of the Independent Audit into the State of Free Speech in Australia*", at pp 89-151, 31st October 2007, commissioned by Australia's Right to Know (a consortium of media and publishing companies).

I note that the NSW Ombudsman, Mr Bruce Barbour, has recently commenced his own further and general review of the NSW FOI Act (Sydney Morning Herald 23 April 2008 page 3)

### **The Problem of Delay**

The FOI Act provides for decisions to be made as soon as practicable and in any case, within 21 days after it is received (s 18(3) - documents and s 41(3) – amendments ).

Often, a lot needs to happen within the agency in a short space of time.

If the 21 days expires, there is a deemed refusal (eg: s 24(2)) and the applicant may then go straight to internal review (eg: s 34). If there is no determination after 14 days, the applicant has 60 days within which to commence proceedings in the ADT or make a complaint to the NSW Ombudsman.

Your early action can assist the decision-maker to make a timely decision by the following:

1. Make your client's FOI application simple and straightforward;
2. If possible, indicate in the application the name, number and location of the relevant file or files. Be as specific as possible;
3. Do not ask for information – ask for documents.
4. Be prepared to negotiate with the agency as to the terms of the FOI request and particularly its scope;
5. Remember an agency cannot refuse to accept an application that is insufficiently or too widely drawn – it must first take such steps as are "reasonably practicable to assist the applicant to provide such information" (s 19(1)).
6. Research your agency first – find out what kind of files are kept, their generic name and where they are located. This kind of information might already be available in the annual published summaries of affairs published by the agency pursuant to ss 14 & 15 of the Act (if so, it cannot properly be the subject of an

FOI application);

7. Follow up your client's FOI application regularly by telephone and letter;
8. If your client wants to obtain whole files, you should ask for the front and back covers (inside and out).
9. Consider seeking access first only by way of inspection, so that the actual documents you require may be copied or requested later.

If the agency frequently fails to provide documents within a reasonable time, you should report the agency to the NSW Ombudsman or the Auditor-General or write to the responsible Minister (or all three).

If the matter is not resolved you ordinarily should not hesitate to commence proceedings in the ADT (\$55 filing fee) and attend (in person or by telephone) a planning meeting conducted by the Tribunal. You should annex a copy of the internal review decision (or the application and a note that no internal review determination arrived within the 14 day time limit). In the ADT form section that asks for "*What are your reasons for seeking review of this decision?*", if you are not able to fully state the reasons why you are making the application, you should at least simply state "*The decision is not the correct or preferable decision*".

At the planning meeting, all of the problems that are outstanding with the agency may be identified by you and addressed by the Tribunal (if necessary, by coercive orders or directions).

This need not be an expensive or lengthy process. The Tribunal is long experienced in dealing with difficult agencies.

### **No Proper Reasons**

Failure to provide proper reasons has long been identified as a major problem.

The failure should be identified when the applicant seeks internal review.

Proper reasons, that include a discussion and evaluation of the public interest factors and the necessary discretions in section 27 & 28 of the Act should be formally requested.

If the internal review does not provide such reasons, the ADT may direct such reasons be provided at the first planning meeting. Alternatively, the ADT has power under section 65 of the *Administrative Decisions Tribunal Act 1997* (NSW) ("ADR Act") to remit the matter to the administrator for further determination (while keeping the ADT proceedings on foot). This is also commonly done at planning meetings before the Tribunal.

### **High Fees and Charges and Advance Deposits**

Not a lot can be done about this apart from pursuing an appeal to the ADT.

It does normally arise in relation to an applicant seeking access to his or her own personal file. It arises in the general FOI category where a person seeks access to documents on the workings of government.

The Ombudsman had an excellent idea in its 1995 report (at page 17). It was recommended that if there was delay in determining an FOI application, the agency must waive any fees owing and refund any fees paid. Further, the agency was limited in the number of exemptions it may claim! Unfortunately, the NSW government did not act on this recommendation.

The best way to deal with it is by being up front about how much money your client wishes to be exposed to and by setting limits early on.

If possible, avoid the fees and charges entirely by making your application under the *Privacy and Personal Information Protection Act 1998*(NSW) (“PIIP”). Section 14 provides:

“A public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.”

See also section 12 -12B of the *Local Government Act 1993*(NSW) which provides for rights of free access to many Council documents.

## Subpoenas

Your toolkit for consideration of subpoenas generally in NSW is as follows:

- Part 33 (Subpoenas) of the *Uniform Civil Procedure Rules 2005* (“UCPR”) (available at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au));
- Rule 1.9 UCPR (Objections to production of documents and answering of questions founded on privilege);
- Form 26 (Subpoena to produce) of the UCPR Forms (available at [http://www.lawlink.nsw.gov.au/lawlink/spu/ll\\_ucpr.nsf/pages/ucpr\\_forms](http://www.lawlink.nsw.gov.au/lawlink/spu/ll_ucpr.nsf/pages/ucpr_forms)); and,
- Registrar of the Supreme Court of NSW- *Subpoena Lists and practices* - New procedure as of Tuesday, 29 January 2008.

Also useful is the *Evidence Act 1995* (NSW), particularly:

- Section 55 (relevant evidence) s 55(1) provides: “The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.”; and,

- Part 3.10 (Privileges) – ss 117 and on.

You should refer to my (partly outdated in that it was pre-UCPR) paper “*Collecting Evidence for Trial: Discovery, Subpoenas, Notices To Produce & Privilege*” (a paper I delivered to the University of NSW, Faculty of Law, CLE Seminar - “*Commercial Contract Litigation*” in Sydney on 12 November 2002 and published at [www.robinson.com.au](http://www.robinson.com.au)).

The basic principles set out there have not changed. However the formal rules and forms have changed.

Particularly useful recent papers on Subpoenas are:

- “Subpoenas, Discovery and Interrogatories” a paper presented by Justice Kevin Lindgren and Justice Paul Le Gay Brereton and prepared by Justice John Bryson in the “The 2008 Judges Series” seminar to the College of Law on 27 February 2008 (08/29.3); and,
- Subpoenas [2005] NSWLC 5 a useful wide-ranging paper by Blacktown Magistrate Gordon Lerve dated 14 April 2005.

The standard texts (and annotated UCPRs) are:

- *Ritchie's Uniform Civil Procedure NSW*, Taylor, P; Elms, E; Bellew, G; Meek, M; Bartush-Peek, T (2 volume looseleaf service) (LexisNexis); and,
- *NSW Civil Practice & Procedure* - Hamilton J & Lindsay SC (looseleaf services - Lawbook Co) and the *NSW Civil Practice & Procedure Suite Online* (Lawbook Co).

More recent cases include:

**On** subpoenas addressed to corporations – “by its proper officer”.

*Regina v Ronen* (2004) 62 NSWLR 707 ([2004] NSWCCA 67) (Spigelman CJ, Mason P and Kirby J)

**On** whether Auditor-General required to produce documents in compliance with a subpoena - whether secrecy provisions in s 38(1) of the *Public Finance and Audit Act 1983*(NSW) prohibit compliance (they do not).

*Sydney Water Corporation v PricewaterhouseCoopers* [2008] NSWSC 361 (Bergin J)

Thank You