

# IN FACT



## Information Act newsletter

Freedom of Information and Privacy Protection in the NT Public Sector

**Issue 4 – March 2007**

### *Farewell*

This will be my final newsletter as Information Commissioner. My four years in office have been busy and rewarding. Much work has been done by my Office and by staff within public sector organisations to promote open and accountable government, while respecting and protecting individual privacy. I thank all concerned and commend them for their efforts.

I particularly wish to thank my staff for their work. A small office calls for a great deal of flexibility and adaptability. They have performed their varying roles with considerable skill and enthusiasm.

Ensuring that privacy protection and government accountability maintain high priority within government is an ongoing task. I discuss below just a few of the challenges that lie ahead.



**Peter Shoyer**  
**Information**  
**Commissioner**



### **Future Directions**

#### **Information Management**

The combination of laws relating to Freedom of Information, Privacy Protection, Records Management and Archives Management in one piece of legislation is a unique measure that has given rise to much interest throughout Australia.

It represents a major step forward in terms of how government manages its most vital asset — the information that allows it to serve the community. It is important that government continue to build on this integrated approach to information management.

It is equally important that future developments not be dictated merely by what can be achieved with new technology. Rather, they must be guided by carefully considered policy, developed to ensure that public sector organisations and the community they serve obtain the greatest benefit from this resource while maintaining adequate protection of individual rights.

In short, we should not do something merely because the technology is there. We must take time and care to decide what we need to do to get information management right, and then use available technology to its fullest to achieve those aims.

## Future Directions

### Freedom of Information

It is vital that staff of organisations continue to clearly focus on the essential features of this fundamental democratic right:

- Anyone is entitled to seek access to government information.
- No reason need be given for seeking access.
- Access must be granted, except to the extent necessary to protect essential public or private interests.

At times, the ability to maintain this focus may be tested when resources are tight, when applicants are demanding, when there are competing priorities. Nevertheless, all public sector organisations serve the community and transparency is a key element of good governance.

Organisations must not lose sight of the fact that accountability to the community is a part of their core functions.

Every public sector organisation is obliged to deal with FOI applications, and to deal with them as promptly and efficiently, and as fairly and openly, as is reasonably possible.

Organisations must continue to plan and innovate to increase public awareness and understanding of their functions and activities through good administration of the FOI scheme and through other measures that make individual and public access to information simpler and more effective.

This open and fair approach must also extend to the way in which organisations assist the Information Commissioner to deal with complaints about FOI decisions. Paraphrasing comments by the President of the Commonwealth Administrative Appeals Tribunal:

Just as the staff of departments or agencies will have assisted decision-makers in making the original decision, so too it is natural that they should adopt the same role so far as the Information Commissioner is concerned. The role of the support teams in the department or agency when the original decision was made was not a partisan role and it should not become a partisan role when the Commissioner is seeking to undertake precisely the same task as was undertaken by the original decision-maker.

See *How we deal with complaints – A guide for agencies*

<http://www.nt.gov.au/justice/infocomm/publications/guidelines.shtml>

### Updated guidelines available

We have recently refreshed our guidelines. There are now over 30 in total. They deal with various topics relating to FOI, Privacy Protection and the operations of our Office. Copies of the guidelines are available from our Office. They are also available through the updated *Guidelines* page on our website. <http://www.nt.gov.au/justice/infocomm/publications/guidelines.shtml>

## Future Directions

### Privacy Protection

Fresh challenges relating to protection of individual privacy seem to arise on an almost daily basis. Perhaps the most fundamental challenge is to reassert the importance of privacy rights in a world where technology facilitates virtually endless incursions into our private lives, and there are constant calls to permit intrusion in order to protect us from terrorists, from criminals and from fraudsters.

While the right to privacy is recognised as a fundamental human right, the onus seems to be constantly on the individual to justify why information about them should not be open to scrutiny. It is unfortunate but nevertheless increasingly necessary for proponents of privacy protection to face and address the perennial question, "Who cares about privacy if you have done nothing wrong?"

I made an attempt to address this issue in Part A of my recent submission to the Australian Law Reform Commission Review. <http://www.nt.gov.au/justice/infocomm/publications/submissions.shtml>

The Australian Privacy Foundation has also addressed the issue in the context of the Access Card debate. [http://www.privacy.org.au/Campaigns/ID\\_cards/HSAC-FAQ10.html](http://www.privacy.org.au/Campaigns/ID_cards/HSAC-FAQ10.html). That discussion includes links to a number of other articles on the subject that are worth reading.

Beyond that broader issue, there are many developments in prospect that will need careful attention in the future. I will raise just one.

### Biometrics

The lure of biometric identifiers is very strong. No need for cards or PIN numbers. No leaving behind your means of accessing services. You carry your fingerprint, iris, face and DNA with you wherever you go.

And the means of checking biometric identifiers is already relatively inexpensive and becoming cheaper all the time.

But in a world where automated and remote access is developing as a regular element of our interaction with government and businesses, biometrics present a potential goldmine for identity fraudsters.

Whether banking online or getting access to a building or office through an unsupervised entry point, we rely on the security of identifiers to protect us and the security of the organisations we are dealing with.

That is another reason why biometrics are so attractive. They can be very authoritative. They presently give a high level of assurance that you are dealing with the right person.

The trouble is that, as their use spreads throughout the community, biometric information will be stored in more and more databases. In more and more places with more or less security. More and more people will have access whether authorised or illicit. And the potential for unauthorised use and disclosure will grow accordingly.

What makes this a problem of fundamental significance is that loss of biometric information is a life sentence. You do not just get a new set of fingerprints or a new iris if someone purloins information about them.

Your privacy and security are at risk from that point until the day you die. And so is the security of organisations that rely on these identifiers to ensure the security of their operations, whether they be a school library, a video store, a social services organisation or a high level military installation.

Just as flooding an economy with too much money can lead to devaluation of the currency, flooding the community with biometric information will lessen or negate its value for individuals and for the community as a whole.

It is important for all of us to consider what measures should be put in place to regulate the use of biometric identifiers in order to protect privacy and to maintain the value of this information to individuals and to the community.

### Information Commissioner Presentations

We conduct an ongoing series of introductory presentations for anyone interested in Freedom of Information and Privacy Protection, and advanced forums to update the skills of administrators and practitioners in particular areas of interest.

We welcome requests from organisations and representatives of community groups. Presentations can be tailored to meet the needs of a particular public sector organisation or community group. Feel free to contact the Office to discuss any ideas for a presentation.

## Office of the Information Commissioner Reading Room

The OIC maintains a Reading Room in our offices at Level 7, 9-11 Cavenagh St.

Available materials include:

- Annual Reports from various jurisdictions
- Federal Privacy Handbook
- FOI and Privacy texts
- FOI and Privacy publications from other jurisdictions
- Information Commissioner Guidelines
- Recent articles of interest.



You are welcome to come to the reading room to browse or we may be able to help you with resources on a particular issue. Please phone 8999 1500 before you come to make sure that the room is available.

# FOI Update

## Exempt matter can be disclosed

In *University of NSW v McGuirk* [2006] NSWSC 1362, the New South Wales Supreme Court decided that the independent reviewer of NSW FOI decisions has a discretion to order access to documents that are found to be exempt under the *Freedom of Information Act 1989* (NSW).

That discretion arises even though there is a provision prohibiting disclosure of exempt matter by the Administrative Decisions Tribunal in its reasons for decision or otherwise (section 55).

Section 102 of the *Information Act* sets out a similar limitation on disclosure of exempt matter by the Information Commissioner. Consideration will have to be given to whether the provisions of the *Information Act* permit the exercise of such a discretion by the Commissioner even in cases where information is found to be exempt.

For exemptions involving a public interest test, it would appear unlikely that such a discretion would be exercised in favour of disclosure as the balance of competing public interest factors would already have been assessed.

However, if a similar approach is adopted in the Territory, it may prove significant in the case of exemptions that are not stated to contain a public interest test.

## Recent FOI Decisions

### NSW Supreme Court

<http://www.austlii.edu.au/>

Legal professional privilege – litigation privilege – decision that litigation privilege not available in respect of proceedings before Commonwealth AAT. *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530.

### NSW ADT

<http://www.austlii.edu.au/>

Legal professional privilege – litigation privilege – consideration of decision in *Ingot Capital Investments* that Cth AAT proceedings did not give rise to litigation privilege – decision that litigation privilege available in respect of NSW ADT FOI proceedings – discussion of improper purpose exception to privilege – decision that litigation privilege applied to documents in issue. *Cianfrano v Director-General, Attorney-General's Department* [2007] NSWADT 8.

Cabinet exemption – whether sole purpose test – meaning of “deliberation”, “deliberative process” – meaning of “information concerning any deliberation or decision of Cabinet” – documents in issue exempt - need to consider discretion to order access to exempt documents. *McGuirk v Director General, The Cabinet Office* [2007] NSWADT 9.

## Commonwealth AAT

<http://www.austlii.edu.au/>

Waiver or remission of fees - Journalist employed by Sydney Morning Herald applied for information on federal government's Welfare-to-Work package – request that fees be halved in the public interest – charge of \$13,055 – factors for and against remission discussed – potential for applicant to benefit commercially – decision to refuse remission affirmed. *Peatling and Department of Employment and Workplace Relations* [2007] AATA 1011 (12 January 2007).

Amendment of information - details recorded by medical practitioner – record of information provided by a third party – applicant disputed the accuracy of statements of the third party – record was not incomplete, incorrect, out of date or misleading, because it was an accurate statement of the information conveyed to the medical practitioner – minor correction of one factual statement – whether or not document should be altered in relation to that issue - decision that note be added to the document. *“WBT” and Department of Defence* [2007] AATA 5 (5 January 2007).

## WA Information Commissioner

<http://www.foi.wa.gov.au/Decisions2006.htm>

Final report of inquiry into Obstetric and Gynaecological services at hospital – personal information exemption - whether “de-identified” information is personal information – whether case histories so specific as to allow identification of individuals – whether sufficient that one person or a small group already having some knowledge of a matter are able to identify – identity and knowledge of applicant may be relevant – decision that case histories would reveal personal information – de-identification relevant to application of public interest test – public interest favours disclosure – deliberative process exemption – public interest favours disclosure – confidential information communicated in confidence – prejudice to future supply of information – not exempt. *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23 (12 December 2006).

### Office provides policy assistance

The Office of the Information Commissioner assists public sector organisations in the development and review of systems, policies and legislation.

We are available to discuss potential issues that proposals raise, particularly relating to the collection and handling of personal information. We aim to identify potential privacy issues and offer options that will protect privacy while promoting the objectives of the proposal.

We welcome approaches from organisations at the earliest possible point in the development or review process.

# Privacy Update

## Privacy Awareness Week

Members of the Asia Pacific Privacy Authorities forum (APPA) have agreed to join together to promote Privacy Awareness Week from 26 August to 1 September 2007. The Office of the Information Commissioner is planning joint initiatives with APPA members, and Territory-specific events. Anyone with ideas for activities or who wishes to participate in some way can contact the Office.

## Privacy Act review

The Australian Law Reform Commission (ALRC) review of the Commonwealth *Privacy Act* is continuing, with two Issues Papers having been published and numerous submissions received. ALRC officers recently visited Darwin for a number of meetings and forums as part of an Australia-wide consultation process.

[www.alrc.gov.au](http://www.alrc.gov.au)

## Access Card

The proposed Health and Social Services Access Card continues to present as a lively subject for debate. Copies of recent submissions in relation to the card are available at: [http://www.accesscard.gov.au/submissions\\_exposure\\_draft.html](http://www.accesscard.gov.au/submissions_exposure_draft.html)

## Common law privacy rights

The English Court of Appeal decision of *Ash v Mckennitt* [2006] EWCA Civ 1714 provides an overview of developments in English law relating to the protection privacy through the action for breach of confidence.

Search Bailii website, <http://www.bailii.org/>

Ms McKennitt is a folk singer of some renown. She was successful in preventing the publication of certain information in a book primarily about her life written by a long-time friend. The case discusses the scope of the law of breach of confidence and the interaction between Articles 8 and 10 of the *European Convention on Human Rights* as they are incorporated into English law.

In the previous edition, I referred to a New Zealand Court of Appeal decision (*Television New Zealand Ltd v Rogers*) discussing the privacy tort described in *Hosking v Runting* [2005] 1 NZLR 1. Leave has been granted to appeal the decision in *Rogers* to the NZ Supreme Court but no decision had been published at the time of writing.

## Recent Case Notes

### NSW Court of Appeal

<http://www.austlii.edu.au/>

Extent to which organisation responsible for conduct of employee acting for a purpose extraneous to purposes of the organisation. [Note: There are substantial differences between the NSW legislation and the *Information Act* in this regard.] *Director-General, Department of Education and Training v MY* [2006] NSWCA 270.

### NSW ADT

<http://www.austlii.edu.au/>

Use of information created in an employment context for purpose of assessing qualification to enter into course of study – whether use was within scope of professional responsibilities or a private act – one

action private, another action not – organisation breached Act in respect of one action – decision to order payment of \$500. *OD v Department of Education and Training* [2006] NSWADT 312 (8 November 2006).

Failure to take reasonable steps to ensure information accurate – investigation of prescribing practices of, and comments attributed to, medical practitioner – practitioner suspended – reports prepared on basis of interviews with third parties – failure to check accuracy of information provided. *JD v Director General, NSW Department of Health* [2006] NSWADT 353 (12 December 2006).

Disclosure in breach of privacy legislation – assessment of damages - \$7,500 damages awarded. *JD v NSW Medical Board (No.2)* [2006] NSWADT 345 (5 December 2006).

## VCAT

<http://www.austlii.edu.au/>

Closed circuit television surveillance in school computer room – footage used in connection with enquiry into performance of teacher – whether personal information – whether use for secondary purpose related to primary purpose – whether teacher would

reasonably expect use – complaint dismissed. [Note: This case also provides useful analysis of the meaning of ‘necessary’ at paragraphs 76-84.] *Ng and Department of Education* [2005] VCAT 10054 (6 June 2005).

## NZ Privacy Commissioner

<http://www.privacy.org.nz/home.php>

Disclosure of personal information - School Principal visited home of volunteer worker to discuss issues relating to school book club orders – could not contact her – her father lived next door – spoke to her father about the issues – subsequently sent copy of letter regarding issues to father – School Board agreed to apology and for Board members and Principal to attend privacy training – complaint settled on that basis. *Case Note 87892* [2006] NZ PrivCmr 16 (December 2006).

Disclosure of personal information – Former co-worker of complainant disclosed personal information to new employer of complainant – Decision that University responsible for disclosure – no evidence of harm – complaint settled by agreement. *Case Note 89291* [2006] NZ PrivCmr 17 (December 2006).



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