

BALANCING THE TREATMENT OF 'PERSONAL INFORMATION' UNDER FOI AND PRIVACY LAWS: A COMPARATIVE AUSTRALIAN ANALYSIS. PART 2

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Part 1 of this paper, published in *AIAL Forum* 80, looked briefly at:

- (a) What privacy regime, if any, exists in each Australian jurisdiction, and how is it manifested?
- (b) What does each privacy regime protect? What falls within the protection offered – for example does it govern a broader concept of 'personal information', or does it exclude certain matters, such as 'health information'?

Part 2 of the paper addresses the treatment of personal privacy as a concept under Australia's freedom of information laws. Each Australian jurisdiction deals directly or indirectly with protection of personal privacy to some extent when disclosure of documents under freedom of information laws is being considered. Despite this commonality of approach and the recognition that personal privacy deserves some protection, there appear to be sufficiently divergent approaches taken in how exemptions are applied, and substantial differences in the features which apply to these exemptions, to warrant closer examination and comparison.

In Part 2, I look at:

- (a) How each Australian jurisdiction deals with protection of personal privacy in relation to applications for access under their freedom of information/right to information legislation? What is the nature and scope of each relevant personal privacy related exemption provision or equivalent?
- (b) How the different jurisdictions manage the balance between privacy and freedom of information in how they treat personal information?

Commonwealth

The *Freedom of Information Act 1982* (Cth) (*Cth FOI Act*) addresses personal privacy using a concept of 'personal information'.¹ That term has the same meaning as in the *Privacy Act 1988* (Cth) (*Cth Privacy Act*):²

personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.

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Therefore, personal information can include information that identifies or could identify a person, says something about a person, it may be opinion (it does not have to be factual), it might be false, but must relate to a natural person/individual. It includes names, addresses, telephone numbers, dates of birth, medical records, taxation information, banking details, signatures, etc.

Under the *Cth FOI Act*, every person has a legally enforceable right to obtain access in accordance with the Act to documents of an agency or Minister other than exempt documents.³ The right exists and is unaffected by the reasons for seeking access (or the perceived reasons for seeking access).⁴

The exemption under the *Cth FOI Act* dealing with personal privacy is s 47F. It provides that a document is conditionally exempt if its disclosure under the *Cth FOI Act* would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The Australian Information Commissioner suggests that generally, the individual's identity needs to be reasonably ascertainable *by the applicant*. The ability of an applicant to reasonably ascertain an individual's identity will depend on the context and circumstances. It depends on whether it is practically possible for an applicant to link pieces of information to identify an individual. If the agency or minister is aware of relevant information that the applicant has (or could easily obtain) to ascertain the individual's identity, this is to be taken into consideration. An agency or minister must not, however, seek information from the applicant about what other information they have or could obtain. The Information Commissioner suggests that, where an agency or minister is unaware of the other information the applicant may have, the question to be asked is what other information a reasonable member of the public would be able to access.

This exemption does not apply if the personal information is only about the applicant.⁵ However, there are limitations to this in relation to certain health and well-being information.

Section 47F is one of the public interest conditional exemptions in the *Cth FOI Act*. This means that even if the requirements of s 47F are made out, the document is only conditionally exempt and access must be provided to the document unless, in the circumstances, access would, on balance, be contrary to the public interest.⁶

For the purposes of working out whether disclosure would on balance be contrary to the public interest, the *Cth FOI Act* sets out relevant factors and irrelevant factors. It is not an exhaustive list. One of the factors favouring disclosure is whether access to a document would allow a person to access his or her personal information.⁷ Further, in working out whether access would on balance be contrary to the public interest, an agency must have regard to any guidelines issued under s 93A by the Information Commissioner for the purposes of s 11B(5) of the *Cth FOI Act*.

The Information Commissioner has issued a guideline on public interest factors for and against disclosure some of which might be more relevant to matters involving personal information:⁸

Public interest factors favouring disclosure

- (a) The personal information is that of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests.
- (b) The personal information is that of a deceased individual where the applicant is a

close family member (generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household).

- (c) It will contribute to the administration of justice for a person.
- (d) It will advance the fair treatment of individuals in accordance with the law in their dealings with agencies.

Public interest factors against disclosure

- (a) The personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests.
- (b) The personal information is that of a deceased individual where the applicant is a close family member (like a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if they were alive.
- (c) It could reasonably be expected to prejudice the fair treatment of individuals and the information concerns unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.
- (d) It could reasonably be expected to impede the administration of justice for an individual.
- (e) It could reasonably be expected to harm the interests of an individual or group of individuals.

One of the more challenging aspects for decision makers is that, when weighing where the public interest balance lies, the decision maker must explain the relevance of the factors and the relative weight given to those factors in any statement of reasons for decision.

There are some safeguards built into the *Cth FOI Act* to enable persons whose personal information is in documents to have some input into the decision about whether or not to disclose such information. Section 27A(1) applies if access is sought to a document containing personal information about a person (including a person who has died) and it appears to the person (or dead person's legal representative) that the person (or representative) might reasonably wish to contend that:⁹

- (a) the document is conditionally exempt under s 47F; and
- (b) access would be contrary to the public interest under s 11A(5) ('exemption contention').

Where s 27A applies, the agency must not make a decision to give access unless the person concerned in relation to the personal information has been given a reasonable opportunity to make submissions in support of the exemption contention, and the agency has had regard to any such submissions, provided it is reasonably practicable in all the circumstances to give the person concerned that opportunity.¹⁰

There are also protections for individuals who make submissions about the exemption depending on the decision outcome. If the agency decides to give access to the document containing the relevant personal information, it must give notice of that decision to the person concerned (as well as the applicant). In the meantime, the agency is not to give access to the applicant until all review or appeal opportunities have run out and the decision remains unchanged.¹¹

If such a decision is made, then as an affected third party, the person whose personal information is involved has review rights to:

- (a) seek internal review of the access grant decision;¹² or
- (b) seek review from the Information Commissioner¹³ (in which case the onus is on the affected third party individual to establish that a decision refusing access should be made);¹⁴ and
- (c) seek review from the Administrative Appeals Tribunal of a decision of the Information Commissioner which is adverse to the affected third party (in which case the third party individual has the onus of establishing that a decision to refuse access is justified).¹⁵

Specific provisions provide for some caution when it comes to disclosing to an applicant a document containing information about the applicant that was provided by a 'qualified person' acting in that capacity, and it appears to the principal officer of the agency¹⁶ that disclosure to the applicant might be detrimental to the applicant's physical or mental health or well-being.¹⁷

A 'qualified person' is a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being.¹⁸ That includes but is not limited to a medical practitioner, psychiatrist, psychologist, counsellor, or social worker.

Where the principle officer considers that detriment might occur, the principal officer can direct that, to the extent the document contains such information, it is not to be given to the applicant directly, but rather to a qualified person nominated by the applicant, who carries on the same occupation as the qualified person who provided the information.

Some concessions are made to applicants seeking their own personal information. There is no charge payable for provision of access to a document that contains personal information about the applicant.¹⁹

Victoria

The *Freedom of Information Act 1982* (Vic) (*Vic FOI Act*) addresses personal privacy using a concept of personal affairs information, or more accurately, 'information relating to the personal affairs of any person'. Even so, a definition of that term only occurs in the context of and for the purposes of a specific exemption, even though the phrase appears in other provisions of the *Vic FOI Act*.

Under the *Vic FOI Act*, every person has a legally enforceable right to obtain access in accordance with that Act to a document of an agency other than an exempt document.²⁰ In relation to protection of personal privacy, s 33 is the relevant exemption provision. Section 33(1) of the *Vic FOI Act* is headed 'Document affecting personal privacy' and provides that:

A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

Section 33(9) of the *Vic FOI Act* provides that in s 33 the phrase 'information relating to the personal affairs of any person' has an inclusive meaning. That is, it includes information:

- (a) that identifies any person or their address or location; or
- (b) from which any person's identity, address or location can reasonably be determined.

That definition was introduced in late 1999, after a series of decisions of the Victorian Civil and Administrative Tribunal (VCAT) and its predecessor were divided as to the application of the phrase 'information relating to the personal affairs of any person' to staff and other

officers of agencies. This culminated in the *Frankston Hospital Case*,²¹ in which a convicted triple murderer was granted access to the nursing rosters for an outer suburban hospital, on the basis that the nursing rosters did not contain information about the nurses' 'personal affairs' information for the purposes of s 33 of the *Vic FOI Act*.

As a consequence of the resulting furore, the *Vic FOI Act* was amended to introduce in s 33(9) a broad definition of 'personal affairs' information, making it clear that s 33 could apply to information about **any** individual, regardless of whether or not they were an officer or staff member of an agency.

Another by-product of the *Frankston Hospital Case* was the introduction of an additional factor that must be considered as part of the balancing exercise in determining whether disclosure of personal affairs information would be unreasonable. Section 33(2A), introduced at the same time as s 33(9), provides:

An agency or Minister, in deciding whether the disclosure of a document under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, must take into account, in addition to any other matters, whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.

Even if an applicant is unlikely to take violent action against a person whose personal information would be revealed by disclosure of the documents, the mere fact that release of the information could create apprehension in the mind of the person concerned may be enough to render disclosure unreasonable.²²

More generally, determining whether granting access to personal affairs information would involve 'unreasonable' disclosure requires competing interests to be balanced. On one hand are the interests of the person seeking access to information and, on the other, the legitimate interests of a person whose privacy may be invaded by disclosure of a document.²³ The range of factors that may be considered is not limited in any way and can include, in addition to the s 33(9) requirement:²⁴

- the nature of the information;
- the circumstances in which the agency holds the information;
- the likelihood that the individual would wish to have his/her information disclosed without consent;
- whether disclosure may cause any person stress, anxiety or embarrassment;
- the motives of the applicant and whether or not they are commendable;
- the identity of the applicant and his/her interest in the information;
- whether there is any public interest in disclosure; and
- the current relevance of the information.

In short, in determining whether disclosure is unreasonable, the decision-maker must identify all facts and matters relevant to the question to be determined, and make an evaluative judgment based upon them. What amounts to unreasonable disclosure will necessarily vary from case to case. It includes having regard to a range of factors beyond the privacy of the persons whose affairs will be disclosed in determining whether disclosure is unreasonable.²⁵ Any matter which, as a matter of relevance, logic and proof informs the decision of whether the statutory condition is satisfied must be taken into account. In the end, the proper application of s 33(1) of the *Vic FOI Act* will require a decision-maker to consider all matters relevant, logical and probative to the existence of conditions upon which the section depends.²⁶

In Victoria, the application of the exemption is determined on the basis of disclosure to the

particular applicant, but potentially to the world because the agency cannot control what happens to a document once it is disclosed to the applicant. There is no such concept as conditional disclosure under the *Vic FOI Act* and an agency cannot rely on any assurances by applicants that they will not disclose the information more widely.²⁷ Therefore, consideration of the likelihood of wider dissemination beyond the applicant is relevant.²⁸

Agencies are not legally required to consult a person before determining whether or not disclosure of his/her personal affairs information would be unreasonable. However, a government practice note encourages consultation on the basis that it may be required by the existence of s 33(2A), as the individual concerned would be in the best position to advise whether the disclosure would, or would be reasonably likely to, endanger their life or physical safety.²⁹

It should also be noted that if an agency decides that disclosure of an individual's personal affairs information would not be unreasonable, it is required if practicable to notify the person who is the subject of that information (or in the case of a deceased person, that person's next-of-kin) of the decision, and of the right to seek review of such a decision.³⁰ Review is available from the VCAT, not the FOI Commissioner.³¹

Apart from a narrow exception in relation to certain health information, the exemption in s 33(1) does not apply where a person seeks a document containing information relating to their own personal affairs.

The specific exception about health information applies where an applicant seeks access to documents containing the applicant's health information. Section 33(4) requires the agency's principal officer to determine whether, on reasonable grounds, granting access to such a document would pose a serious threat to the life or health of the applicant. If so, access must not be given to the document as it is exempt; review procedures incorporated from the *Health Records Act 2001* (Vic) apply to the refusal decision.³²

Where the principal officer of the agency is not a doctor registered to practice as a medical practitioner under the Health Practitioner Regulation National Law, the agency must appoint a registered person to stand in the shoes of the principal officer when considering whether disclosure of the health information would pose a serious threat to the life or health of the applicant.³³ This is a mandatory procedure.³⁴

Some concessions are made to applicants seeking documents containing their own personal affairs information. Although they must pay an application fee to request access,³⁵ they may not be charged certain access charges (which are reduced even further if the applicant is suffering financial hardship).³⁶ But it should be noted that some charges are probably inescapable whether or not the information is about the applicant, and whether or not the applicant is impecunious.³⁷

A unique and, some would say, peculiar provision relating to personal affairs in the *Vic FOI Act* is s 33(6). In effect, it enables agencies to neither confirm nor deny the existence of documents where to include this information in a hypothetical document would cause the hypothetical document to itself be exempt on the basis of an unreasonable disclosure of personal affairs information. It applies mostly where an applicant seeks documents about another named individual, in circumstances where merely acknowledging whether or not such documents exist would unreasonably disclose information about the named person's personal affairs.

Australian Capital Territory

The *Freedom of Information Act 1989* (ACT) (*ACT FOI Act*) deals with personal privacy using the concept of 'personal information', defined as:

personal information means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.³⁸

This has been held to include dates of birth, occupations, private phone numbers, direct work phone numbers, private addresses and email addresses, and official titles.³⁹

Under the *ACT FOI Act*, every person has a legally enforceable right to obtain access in accordance with that Act to a document of an agency or Minister, other than an exempt document.⁴⁰

In relation to protection of personal privacy, s 41 is the relevant exemption provision. It provides that a document is an exempt document if its disclosure under the Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

As in Victoria, apart from a narrow exception in relation to certain health information, the exemption in s 41(1) does not apply where a person seeks a document containing his/her own personal information.

The health related exception applies where a requested document contains information of a medical or psychiatric nature concerning the applicant. Where the agency's principle officer considers that disclosure of this information might be prejudicial to the applicant's physical or mental health or wellbeing, the principal officer may direct that the information in question not be provided to the applicant directly, but rather to a doctor nominated by the applicant.⁴¹

As in the *Cth FOI Act*, s 27A of the *ACT FOI Act* applies if access to a document containing personal information about person (including a person who has died) is requested, and it appears to the agency that that person (or their legal representative if deceased) might reasonably wish to submit that the document is exempt under s 41.⁴²

In those circumstances, and if practicable, the agency must not grant access to personal information in a document unless the person concerned (or the legal representative of a deceased person) is given a reasonable opportunity to make a submission that the document is exempt (in so far as it contains personal information), and the decision-maker has considered that submission.

If such submissions are made, but the agency nevertheless decides to release the document, it must notify the person making the submission of the decision to disclose. The person concerned (or the legal representative of a deceased person) can apply to the ACT Civil and Administrative Tribunal (ACAT) for review of a decision to release a document containing that person's personal information.⁴³ The agency must not give access to the personal information until the time permitted for seeking review has ended and no application to the ACAT has been made, or unless the ACAT has dismissed the application, made a decision with the agreement of the parties, or affirmed the original decision.⁴⁴

Further, if the agency decides that a document is exempt under s 41 and the FOI applicant applies to the ACAT for review, the person who is the subject of the personal information (or their legal representative if deceased) must be informed by the agency of the application to

the ACAT.⁴⁵

Some concessions are made to applicants seeking their own personal information. In considering whether to remit access charges associated with a request, an agency must take into account whether the document contains personal information that relates to the applicant (or the person on whose behalf the application for access was made).⁴⁶ Similarly, the application fees associated with the making of a request for access or seeking review may be wholly or partly remitted if the agency is satisfied the document contains personal information that relates to the applicant (or the person on whose behalf the application for access was made).⁴⁷

New South Wales

The *Government Information (Public Access) Act 2009* (NSW) (*GIPA Act*) also deals with personal privacy using the concept of 'personal information', defined as 'information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion'.⁴⁸

'Personal information' includes such things as an individual's fingerprints, retina prints, body samples or genetic characteristics. Excluded from the definition is:

- information about an individual who has been dead for more than 30 years; and
- 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.

Under the *GIPA Act*, a person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4, unless there is an overriding public interest against disclosure of the information.⁴⁹ There is an overriding public interest against disclosure of government information for the purposes of the *GIPA Act* if (and only if):

- (a) there are public interest considerations against disclosure; and
- (b) on balance, those considerations outweigh the public interest considerations in favour of disclosure.⁵⁰

Although there are many factors for and against disclosure, some of those that may play a role in a finding that disclosure of personal information is or is not in the public interest include:

Public interest factors favouring disclosure

- (a) the general public interest in favour of disclosure of government information.
- (b) the information is personal information of the person to whom it is to be disclosed⁵¹ - the public interest in providing people with access to their own information is extremely strong and should only be displaced where the considerations against disclosure are overriding.⁵²

Public interest factors against disclosure

- (a) disclosure of certain classes of information are conclusively presumed to be against the public interest including about aspects of adoption and child protection.⁵³

For all of the following factors, each is but one of many factors that must be weighed in the balancing process to determine whether there is an overriding public interest against disclosure:

- (b) where disclosure could reasonably be expected to reveal a person's personal information.⁵⁴ This cannot apply if the personal information has already been publicly disclosed lawfully.⁵⁵
- (c) where disclosure could reasonably be expected to contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* (NSW) or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* (NSW).
- (d) where disclosure could reasonably be expected to prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness.
- (e) where disclosure could reasonably be expected to reveal false or unsubstantiated allegations about a person that are defamatory.
- (f) where disclosure could reasonably be expected to expose a person to a risk of harm or of serious harassment or serious intimidation.
- (g) Where, in the case of the disclosure of personal information about a child—it could reasonably be expected that disclosure of information would not be in the best interests of the child.
- (h) where disclosure could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests.⁵⁶
- (i) personal factors of the application can be taken into account including the applicant's identity, their relationship with any person, motives for the application, and any other factors particular to the applicant to the extent they are relevant to considering factors such as those in paragraphs (b) to (h) above.⁵⁷

The public interest factors against disclosure must be very significant to override the general presumption of disclosure in the *GIPA Act*, and the specific consideration in favour of disclosure of giving people access to their own information.⁵⁸

Personal factors of the applicant can be taken into account, including the applicant's identity, their relationship with any person, their motives for the application, and any other factors particular to the applicant.⁵⁹

As a procedural safeguard, an agency must take reasonably practicable steps to consult with a person (or a close relative of a deceased person)⁶⁰ before providing information relating to the person if:

- (a) the information includes personal information about the person, or is about their business, commercial, professional or financial interests; and
- (b) the person may reasonably be expected to have concerns about the disclosure of the information; and
- (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.⁶¹

The consultation seeks to ascertain whether the person objects to some or all of the information being disclosed, and the reasons for any such objection. The agency must take into account any objection to disclosure when determining whether there is an overriding public interest against disclosure of government information.⁶² If the person objects and the agency decides nevertheless to disclose the information, the person has review rights and the agency must not disclose the information pending any review.⁶³

Another personal privacy aspect of the *GIPA Act* is that there is no obligation to include in a disclosure log any personal information about an individual applicant or any other individual.⁶⁴ An individual can object to inclusion of certain information about them in a disclosure log on the basis that the information is personal information about the objector (or a deceased relative for whom they are the personal representative), or the information is about the objector's business, commercial, professional or financial interests.⁶⁵

A processing charge cannot be imposed for the first 20 hours of processing time where an individual applicant seeks his/her own personal information.⁶⁶

Where there is information about an individual applicant which is medical or psychiatric information, an agency can impose a condition that it be provided to a medical practitioner nominated by the applicant rather than directly to the applicant personally.⁶⁷

Queensland

The *Right to Information Act 2009* (Qld) (*Qld RTI Act*) does not itself contain any specific definition of personal information, personal affairs, or personal privacy. Rather, the definition of 'personal information' the dictionary in the *Qld RTI Act* simply says *Information Privacy Act 2009* (Qld).

The *Qld RTI Act* provides that a person has a right to be given access to a document of an agency or a Minister, subject to the rest of the Act.⁶⁸

Unlike most other Australian jurisdictions, the *Qld RTI Act* does not have a specific privacy related exemption. An agency or Minister may refuse access to a document to the extent it comprises exempt information as set out in Schedule 3,⁶⁹ but none of those exemptions specifically relate to personal privacy or personal information.

An agency or Minister may also refuse access to a document to the extent that it comprises information if disclosure would, on balance, be contrary to the public interest under s 49. Section 49 sets out how to determine whether disclosure would, on balance, be contrary to the public interest by reference to public interest factors in Schedule 4 of the *Qld RTI Act*.⁷⁰ Factors particularly relevant to personal privacy include:

Factors favouring disclosure

- (a) The information is the applicant's personal information.
- (b) The information is the personal information of a child within the meaning of s 25, the agent acting for the applicant is the child's parent within the meaning of s 25 and disclosure of the information is reasonably considered to be in the child's best interests.
- (c) The information is the personal information of a deceased individual and the applicant is an eligible family member of the deceased person.
- (d) Disclosure of the information could reasonably be expected to advance the fair treatment of individuals in their dealings with agencies.
- (e) Disclosure of the information could reasonably be expected to contribute to the administration of justice for a person.

Factors favouring non-disclosure

- (a) Disclosure of the information could reasonably be expected to prejudice the private, business, professional, commercial or financial affairs of entities.
- (b) Disclosure of the information could reasonably be expected to prejudice the

- protection of an individual's right to privacy.
- (c) The information is the personal information of a child within the meaning of section 25, the applicant is the child's parent within the meaning of section 25 and disclosure of the information is reasonably considered not to be in the child's best interests.
 - (d) The information is the personal information of an individual who is deceased (the deceased person), the applicant is an eligible family member of 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.
 - (e) 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.
 - (f) Disclosure of the information could reasonably be expected to impede the administration of justice for a person.

Factors favouring non-disclosure because of public interest harm

- (a) Except where the information is about the applicant,⁷¹ disclosure of the information could reasonably be expected to cause public interest harm if it would disclose personal information of a person, whether living or dead.

In addition to this general protection of personal privacy based on a public interest balance, specific protection is also provided for:

- (b) documents sought under an application by or for a child which comprise the child's personal information, the disclosure of which would not be in the child's best interests, under s 50; and
- (c) to the extent the document comprises an applicant's relevant healthcare information the disclosure of which might be prejudicial to the physical or mental health or wellbeing of the applicant, under s 51.

An agency may only give access to a document containing information that may reasonably be expected to be of concern to a relevant third party individual if the agency first takes reasonably practicable steps to:

- (a) obtain the views of the relevant third party (or a deceased's representative) about whether the information is contrary to the public interest;
- (b) to inform them that if access to the document is given, it may also be given under a disclosure log.⁷²

If the agency obtains the views of the relevant third party (who considers it to be contrary to the public interest), but the agency decides that it is not such information, it must give a written notice of decision to the relevant third party. Further, it must not give access to the document until:

- (a) the relevant third party gives written notice that no review will be sought; or
- (b) the review period has expired; or
- (c) any review has concluded⁷³ – whether that is internal review by the agency under Part 8 or external review by the Information Commissioner under Part 9.

Interestingly, if the relevant third party brings an external review application, he or she bears the onus of establishing that a decision not to disclose a document or information is justified.⁷⁴

Tasmania

The *Right to Information Act 2009* (Tas) (*Tas RTI Act*) addresses personal privacy using the concept of 'personal information', which is defined to mean 'any information or opinion in any recorded format about an individual whose identity is apparent or is reasonably ascertainable from the information or opinion' and 'who is alive or has not been dead for more than 25 years.'

Under the *Tas RTI Act* a person has a legally enforceable right to be provided in accordance with the Act with information in the possession of a public authority or Minister unless it is exempt information.⁷⁵ Information may be exempt information by virtue of a provision in Part 3 of the Act,⁷⁶ including s 36.

Section 36 provides that information is exempt if its disclosure 'would involve the disclosure of the personal information of a person other than the' applicant. This appears to be very broad in coverage but there is an additional public interest requirement; information is exempt only if the principal officer of the public authority determines that disclosure would be contrary to the public interest after taking into account all relevant matters.⁷⁷

In determining whether disclosure is contrary to the public interest, consideration must be given at least to those matters set out in Schedule 1 of the *Tas RTI Act*, while those matters in Schedule 2 must be disregarded. Factors that must be considered include:

- whether the disclosure would promote or hinder equity and fair treatment of persons in their dealings with government;
- whether the disclosure would promote or harm the interests of an individual or group of individuals; and
- whether the disclosure would harm the business or financial interests of any person.

A procedural safeguard exists to give affected individuals some input into decisions related to disclosure of information that may be about them in limited situations. First, there must be an application for information where the information was provided to the public authority or Minister by a third person.⁷⁸ Secondly, the principal officer or Minister decides that disclosure of the information concerned may be reasonably expected to be of concern to the third party. In those circumstances, before deciding whether or not to disclose that information, if practicable, the principal officer or Minister must send a notice to the third party to seek his/her views about possible disclosure of the information within 15 working days. If a decision is made to disclose the information after receiving the third party's views, notice of decision must be provided to that person, also notifying them of the right to seek review of the decision.⁷⁹ Where the decision is made by a delegated officer, the right of review is to seek internal review by the principal officer.⁸⁰

Northern Territory

The *Information Act 2002* (NT) (*NT Information Act*) again addresses personal privacy using the concept of 'personal information', defined to mean 'government information from which a person's identity is apparent or is reasonably able to be ascertained.'

Interestingly, the *NT Information Act* provides that every person has separate rights to obtain access to government information other than personal information,⁸¹ and to obtain access to his or her own personal information.⁸² A person may apply to a public sector organisation for access to government information held by the organisation, including the person's personal information.⁸³ The public sector organisation can refuse access to the information if the information is exempt.⁸⁴

The exemption dealing with personal privacy is found in s 56. It provides that information may be exempt if the disclosure of the information would be an unreasonable interference with a person's privacy (with respect to personal information) and it is not in the public interest to disclose the information.⁸⁵ It states that disclosure of information may be an unreasonable interference with a person's privacy even though the information arises from the performance of a public duty.

In 2011, a decision by the Office of the NT Information Commissioner distinguished between information about a person's home life, and information about their behaviour when carrying out publicly funded employment. It held that releasing the latter type of information would not be an unreasonable interference with privacy. The decision maker had earlier concluded:

However I do not consider that disclosure of the name of a member of staff of a public sector organisation, without any more information about their personal circumstances, could possibly constitute an interference with their privacy, whether 'unreasonable' or not. In my view, staff names, position titles, and salary rates attaching to positions in public sector organisations should be, and most often are, publicly available information.⁸⁶

As a procedural safeguard, a public sector agency must not disclose information about a person, where that disclosure might interfere with privacy, unless it first seeks the person's views.⁸⁷

South Australia

The *Freedom of Information Act 1991 (SA)* (*SA FOI Act*) addresses personal privacy using the concept of 'personal affairs', defined as:

personal affairs of a person includes that person's—

- (a) financial affairs;
- (b) criminal records;
- (c) marital or other personal relationships;
- (d) employment records;
- (e) personal qualities or attributes,

but does not include the personal affairs of a body corporate;

Under the *SA FOI Act*, an agency may refuse access to a document if it is an exempt document by virtue of Schedule 1 of the Act.⁸⁸ The relevant exemption in Schedule 1, dealing with personal privacy, is cl 6. It sets out when a document is an exempt document, and then provides for a limited exception as to when a document may not be exempt.

Clause 6(1) provides:

A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

A specific provision dealing with criminal and similar allegations is contained in Clause 6(2) of Schedule 1, which provides:

A document is an exempt document if it contains allegations or suggestions of criminal or other improper conduct on the part of a person (living or dead) the truth of which has not been established by judicial process and the disclosure of which would be unreasonable.

Neither of the subclauses applies merely because a document contains information about the applicant, there is a prima facie right of individuals to have access to their own information.

However, there is a further narrow exception to this general right of access to one's own personal information set out in cl 6(3). It provides (in summary) that a document is exempt where it contains:

- (a) information about an applicant who is less than 18 years old (or was when the information was 'furnished'); or
- (b) information about an applicant who is (or was when the information was furnished) suffering from mental illness, impairment or infirmity, or is about such a person's family or circumstances; and
- (c) disclosure would be unreasonable having regard to the need to protect that person's welfare.

As a procedural safeguard, an agency must not give access to a document that contains information concerning the personal affairs of any person (whether living or dead) (except where that person is the applicant) unless the agency has first taken reasonable steps to obtain the person's views.⁸⁹

Western Australia

The *Freedom of Information Act 1992 (WA)* (*WA FOI Act*) addresses personal privacy using the concept of 'personal information', defined as follows:

personal information means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead —

- (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or
- (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.

The definition of personal information has been interpreted widely to include information which, if coupled with information which one other person may have, enables the identity of the person to be ascertained. It does not have to in and of itself identify the individual. The WA Information Commissioner has found:

As the purpose of the clause 3 exemption is to protect the personal privacy of individuals about whom government-held documents contain personal information, in my view the definition of 'personal information' should be construed in a way that achieves that purpose and accords with the objects of the FOI Act. I am inclined to the view, therefore, that if any person, even if only a person having some additional knowledge, could reasonably ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act.⁹⁰

Under the *WA FOI Act*, an agency may refuse access to a document to the extent that it contains matter that is exempt under Schedule 1 of the Act.⁹¹ The relevant exemption is contained in cl 3 of the Schedule. It starts with a proposition as to when something is exempt matter and lists various exceptions or limits to that exemption. Clause 3(1) provides that:

Matter is exempt matter if its disclosure would reveal personal information about an individual (whether

living or dead).

The exceptions to that exemption – namely, where matter is not exempt matter and therefore a document is not exempt – are (in summary):

- (a) Where disclosure would reveal personal information about the applicant. Of course, where an applicant seeks information about himself/herself, the agency must take reasonable steps to satisfy itself of the identity of the applicant and ensure that only the applicant (or their agent nominated in writing) receives the document.⁹²
- (b) Where merely because disclosure would reveal, in relation to a person who is or has been an officer of an agency, *prescribed details*⁹³ relating to the person, their position or function as an officer, or things done in performing their functions as an officer.
- (c) Where merely because disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, *prescribed details*⁹⁴ relating to the person, the contract, or things done in performing the contract.
- (d) If the applicant provides evidence of the individual's consent to disclosure.⁹⁵
- (e) If, on balance, its disclosure would be in the public interest.

Interestingly, the *WA FOI Act* specifically provides that, if the applicant has requested access to a document containing his/her personal information, the fact that matter is personal information about the applicant must be considered as a factor in favour of disclosure for the purpose of making a decision as to —

- (a) whether it is in the public interest for the matter to be disclosed; or
- (b) the effect that the disclosure of the matter might have.⁹⁶

There are some other specific personal privacy related provisions in the *WA FOI Act* which may be of interest. For example, access can be refused if the information in a document is about a child who is not yet 16 years old, if the agency is satisfied that access would not be in the best interests of the child, and if the agency is satisfied that the child does not have the capacity to make a mature judgment as to what might be in his or her best interests, whether or not the child is the applicant.⁹⁷

Similarly, access can be refused if the information in a document is about an intellectually handicapped person, and the agency is satisfied that access would not be in the best interests of the person, whether or not the person is the applicant.⁹⁸

As a procedural safeguard, an agency is not to provide access to personal information about a person other than the applicant unless the agency has taken such steps as are reasonably practicable to obtain the views of that third party individual or, if dead, their closest living relative.⁹⁹

The nature of this exemption has been summarised by the Western Australian Freedom of Information Commissioner in the following terms:

I consider that clause 3 is a recognition by Parliament that State and local government agencies collect and hold sensitive and private information about individuals and that the FOI Act is not intended to open the private and professional lives of its citizens to public scrutiny without the consent of the individuals concerned where there is no demonstrable benefit to the public interest in doing so.¹⁰⁰

There is a concession provided to applicants who wish to obtain personal information about themselves, in that no application fee or charges are payable for giving an applicant access to 'personal information about the applicant'.¹⁰¹ If an applicant does not pay the \$30

application fee, the application is only valid as an application for access to the applicant's personal information. Any information in the requested documents about other people is outside the scope of the application and, therefore, need not be disclosed.¹⁰²

Conclusion

This brief comparison of Australian jurisdictions confirms recognition in each jurisdiction that, either directly or indirectly, protection of personal privacy is warranted. It is the precise form which that protection takes which results in many similarities and equally as many differences in areas such as:

- what types of information are specifically included or excluded from protection;
- whether information about public servants is covered;
- whether or not affected individuals must be consulted before a decision is made about disclosure of information;
- in determining whether or not personal information is to be disclosed, a balancing of factors for and against should take place – but there are differences as to those factors;
- whether the identity, motives and intended use of personal information by an applicant can or cannot be taken into account;
- special acknowledgement that certain health based information about an applicant should be treated differently; and
- whether affected individuals have review rights if their information is to be released.

Endnotes

- 1 The *FOI Act* originally dealt with personal affairs but moved to personal information, broadening the scope of what is covered and to be consistent with the Privacy Act 1988 (Cth), with amendments in 1991.
- 2 See definition of personal affairs in s 4, *FOI Act*.
- 3 Section 11(1), *FOI Act*.
- 4 Section 11(2), *FOI Act*.
- 5 Section 47F(3), *FOI Act*.
- 6 Sections 11A(5) and 31B, *FOI Act*.
- 7 Section 11B(3)(d), *FOI Act*.
- 8 Guideline available at: <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines/part-6-conditional-exemptions/applying-the-public-interest-test> as at 18 July 2014.
- 9 Section 27A(2) sets out what the decision maker must consider in determining whether a person might reasonably wish to contend the matters set out in s 27A(1)(b)(i) and (ii).
- 10 Section 27A(4), *FOI Act*.
- 11 Sections 27A(5) - (7), *FOI Act*.
- 12 Sections 53B, 53C and 54A, *FOI Act*.
- 13 Section 54M, *FOI Act*.
- 14 Section 55D(2), *FOI Act*.
- 15 Section 61(2), *FOI Act*.
- 16 The powers and functions of a principal officer in s 27F can be exercised by an appropriately authorised person: s 27F(6), *FOI Act*.
- 17 Section 47F(4), *FOI Act*.
- 18 Section 47F(7), *FOI Act*.
- 19 Regulation 5(1), *FOI Charges Regs*.
- 20 Section 13, *Vic FOI Act*.
- 21 *Coulston v Mornington Peninsula and District Hospital* (Unreported, VCAT, 22 November 1998, Senior Member Megay).
- 22 *Akers v Victoria Police (No 1)* [2003] VCAT 397; *Koch v Swinburne University* [2004] VCAT 1513 at [28].
- 23 *Victoria Police v Marke* [2008] VSCA 218, at [76], [93], [96], [103], [106].
- 24 *Page v Metropolitan Transit Authority* (1988) 2 VAR 243, 245-6.
- 25 Id [74], [76], [97].

- 26 Id [104]; *Re Shewcroft and ABC* (1985) 7 ALN 307; *Re Lavidos and Office of Corrections (No 3)* (1990) 4 VAR 150, 154; *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.
- 27 Id at [30]-[31], [69]-[70], [105]-[106].
- 28 Id at [5], [86], [99].
- 29 Victoria, Department of Justice, *Practice Note 12: Personal Information Exemption*, [6] as at 17 July 2014 at <http://www.foi.vic.gov.au/home/for+government+agencies/practice+notes/practice+note+12+personal+information+exemption#ConsultationWithThirdParties>
- 30 Section 33(3), *Vic FOI Act*.
- 31 Section 50(3), *Vic FOI Act*.
- 32 Section 33(4), *Vic FOI Act*.
- 33 Section 33(5), *Vic FOI Act*.
- 34 *Morgan v Inner South Community Health Service Inc* (Unreported, VCAT, 9 September 2008) at [15] available at <http://www.foisolutions.com.au/documents/MorganvInnerSouthCommunityHealthService.pdf>
- 35 Two fee units under the *Monetary Units Act 2004* (Vic) which as at 1 July 2014 was \$26.50.
- 36 Sections 22(1)(h)(iii) and 22(1)(i), *Vic FOI Act*.
- 37 See s 22, *Vic FOI Act* and Schedule to the *Vic FOI Regulations*.
- 38 Dictionary, *ACT FOI Act*.
- 39 *Thornton v Director of Public Prosecutions* [2009] ACAT 40.
- 40 Section 10, *ACT FOI Act*.
- 41 Section 41(3), *ACT FOI Act*.
- 42 Section 27A(3) of the *ACT FOI Act* sets out factors to consider in determining whether the individual concerned might reasonably wish to submit that the document is exempt.
- 43 Section 69A, *ACT FOI Act*.
- 44 Section 27A(4), *ACT FOI Act*.
- 45 *Ibid*.
- 46 Section 29(3)(b), *ACT FOI Act*.
- 47 Section 30(1)(b), *ACT FOI Act*.
- 48 Clause 4, *Schedule 4, GIPA Act*.
- 49 Section 9, *GIPA Act*.
- 50 Section 13, *GIPA Act*. For an examples of how this balance is applied in practice see *Gee v Department of Education and Communities* [2014] NSWCATAD 7; *Cameron v Commissioner of Police New South Wales Police Force* [2014] NSWCATAD 13; *Pedestrian Council of Australia Limited v North Sydney Council* [2014] NSWCATAD 80.
- 51 Section 12(2)(d), *GIPA Act*.
- 52 Id at [2.6].
- 53 Section 14(1) with clauses 9 and 10, *Schedule 1, GIPA Act*.
- 54 The reference to personal information should be taken as personal information about someone other than the person requesting the information: *NSW Guideline 4*, at [3.3].
- 55 See definition of reveal in cl 1 of *Schedule, GIPA Act*.
- 56 Section 14(2) and Table (which provides an exhaustive list – it cannot be added to by Guidelines issued by the Information Commissioner: s 14(3)), *GIPA Act*.
- 57 Section 55(1), (3), *GIPA Act*.
- 58 Office of the Information Commissioner, New South Wales, *Guideline 4: Personal information as a public interest consideration under the GIPA Act*, December 2011, at [2.3], available as at 15 July 2014 at: http://www.ipc.nsw.gov.au/aqdbasev7wri_assets/privacy/m727302l5/guideline_gipa_4_personalinfo_publicinterestest.pdf (NSW Guideline 4).
The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies: s 12(3), *GIPA Act*.
- 59 Section 55(1) and (2), *GIPA Act*.
- 60 Section 54(3), *GIPA Act*.
- 61 Section 54(1) and (2), *GIPA Act*.
- 62 Section 54(4) and (5), *GIPA Act*.
- 63 Section 54(6) and (7), *GIPA Act*.
- 64 Section 26(3), *GIPA Act*.
- 65 Section 56(2), *GIPA Act*.
- 66 Section 67, *GIPA Act*.
- 67 Section 73(3), *GIPA Act*.
- 68 Section 23, *Qld RTI Act*.
- 69 Section 47(3)(a), *Qld RTI Act*.
- 70 For examples of how this balance is applied in practice see: *Young and Queensland Police Service* [2013] QICmr 16; *F60XCX and Queensland Ombudsman* [2014] QICmr 28; *Brodsky v Gympie Regional Council* [2014] QICmr 17.
- 71 Or a person on whose behalf an application is made.
- 72 Section 37, *Qld RTI Act*.
- 73 Section 37(3), *Qld RTI Act*.
- 74 Section 87(2) and (3), *Qld RTI Act*.
- 75 Section 7, *Tas RTI Act*.

- 76 Section 5(1), *Tas RTI Act*.
77 Section 33, *Tas RTI Act*.
78 That is, not the applicant.
79 Section 36, *Tas RTI Act*.
80 Section 43(2), *Tas RTI Act*.
81 Section 15, *NT Information Act*.
82 Section 16, *NT Information Act*.
83 Section 18, *NT Information Act*.
84 Section 24(1), *NT Information Act*.
85 Section 50, *NT Information Act*.
86 Decision F1/10-11 available at http://www.infocomm.nt.gov.au/publications/documents/_pf_summaries_web_foi_2.pdf
87 Or if the person is a child, has a disability or is deceased, a permitted representative under s 155 of the *NT Information Act*.
88 See definition of exempt document, s 4(1), *SA FOI Act*.
89 Section 26, *SA FOI Act*.
90 *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23, [53]; *Re Terrestrial Ecosystems and Department of Environment and Conservation* [2013] WAICmr 9, [75]-[80].
91 For definitions of terms see the Glossary in the *WA FOI Act*.
92 Section 29, *WA FOI Act*.
93 These include name, position, job description, anything done in performing their functions or duties, etc: cl 9(1), *WA FOI Regulations*.
94 These include name, qualifications relevant, position described in the contract, the nature or details of the services provided, anything done in performing the contract, etc: cl 9(2), *WA FOI Regulations*.
95 Bearing in mind it is an offence if, in doing so, the applicant knowingly deceives or misleads a person performing functions under the *WA FOI Act* to get personal information about another person: s 109, *WA FOI Act*.
96 Section 21, *WA FOI Act*.
97 Section 23(4), *WA FOI Act*.
98 Section 23(5), *WA FOI Act*.
99 Section 32, *WA FOI Act*. There are specific provisions dealing with situations in which the third party (or closest living relative) is a child under 16 or is intellectually handicapped.
100 *Re Terrestrial Ecosystems and Department of Environment and Conservation* [2013] WAICmr 9, [70].
101 Section 16(1)(d), *WA FOI Act*, and reg 4, *Freedom of Information Regulations 1992* (WA).
102 *Re Georgeson and Government Employees Superannuation Board* [2013] WAICmr 10.