

DISCUSSION PAPER

FREEDOM OF INFORMATION
LEGISLATION IN THE PACIFIC
REGION

Acknowledgements

Producer

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This guide is not legal advice

This guide is policy advice only, not legal advice. While all care has been taken to be accurate, given the different legal systems of each Pacific Island Country, it is not possible in this general guide to give advice that is tailored to individual countries' circumstances. Governments, organisations and individuals must seek legal advice and further policy advice on their particular circumstances, to determine appropriate policy and law reform options.

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Executive Summary

Under the Inform project, SPREP requested a guide on freedom of information legislation. The brief for the guide included the need for drafting instructions and links to relevant examples.

The guide seeks to rekindle debate and discussion about the value of freedom of information laws, as well as to provide a practical roadmap for their introduction, where necessary.

The guide is in three parts.

Part 1 traces developments in the field across the Pacific, specifically in the following areas:

- the right to freedom of information
- the right to freedom of expression
- combined rights
- freedom of information laws
- policies or guidelines on freedom of information
- reporting requirements in relation to the environment.

Part 2 examines the principles necessary to underpin sound freedom of information laws. The principles are based on recent thinking in the field and crystallise a longer list endorsed at the Citizens' Constitutional Forum in Fiji over a decade ago. The principles discussed are:

- maximum disclosure
- openness
- limited exemptions
- access
- fairness and equity.

Part 3 identifies 13 key elements needed for proper and effective freedom of information legislation. These are:

- objects or purposes
- definitions
- information to be published
- meetings to be open and public
- obtaining the information
- exemptions (conclusive)

- exemptions (conditional)
- duty to assist
- need to give reasons
- time limits to avoid delays
- reasonable costs
- right of review
- review of the legislation.

Part 3 also includes examples of these elements, drawing heavily from legislation already in place in the Pacific.

Part 1: Introduction

The right to freedom of information is found in international law, as part of the right to freedom of expression. In particular, article 19 of the International Covenant on Civil and Political Rights provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) for respect of the rights or reputations of others;
 - b) for the protection of national security or of public order, or of public health or morals.

Australia and New Zealand have had freedom of information laws for over 30 years and is now into “second generation” legislation. Both the Australian and New Zealand governments introduced freedom of information laws in 1982.¹ State jurisdictions in Australia followed suit in the 1980s and beyond.²

Other Pacific countries have not been as quick to adopt freedom of information laws. However, it is also true to say that a large number of Pacific countries have started to embrace an open approach to government information.³ These initiatives operate at a number of different levels.

1. The right to freedom of information
2. The right to freedom of expression
3. Combined rights
4. Freedom of information laws
5. Policies or guidelines on freedom of information
6. Reporting requirements in relation to the environment.

1. The Right to Freedom of Information

First, at a constitutional level, some countries explicitly recognise the right to freedom of information. These include:

- Palau Constitution, Article IV, section 12

¹ (CTH) NSW Freedom of Information Act 1982 and (NZ) Official Information Act 1982.

² For example, see (NSW) Freedom of Information Act 1989; (QLD) Right to Information Act 2009 s 3(1); (SA) Freedom of Information Act 1991; (TAS) Right to Information Act 2009; (VIC) Freedom of Information Act 1982 s 3(1); (WA) Freedom of Information Act 1992.

³ The Marshall Islands and Niue restrict access to information to the Auditor General in the performance of their functions. Vanuatu also extends its right to information laws to private entities; however, this approach is not adopted here.

- Fiji Constitution, clause 17, 25 and 150
- Papua New Guinea Constitution, clause 51.

In Fiji and Papua New Guinea, the Constitution further provides that the right should be enshrined in legislation:

A written law shall make provision for the exercise by a member of the public of the right to access official information and documents held by the Government and its agencies (see Fiji Constitution, clause 150).

Provision shall be made by law to establish procedures by which citizens may obtain ready access to official information (see Papua New Guinea Constitution, clause 51(3)).

2. The Right to Freedom of Expression

Second, other countries have constitutionally recognised the right to freedom of expression. For example:

- FSM Constitution, Article IV Declaration of Rights, section 1
- Fiji Constitution, clause 17(1)
- Kiribati Constitution, clause 12(1)
- Nauru Constitution, clause 12(1)
- Palau Constitution, Article IV Fundamental Rights, section 2
- Papua New Guinea Constitution, clause 6
- Samoa Constitution, clause 13 (a)
- Solomon Islands Constitution, clause 12
- Tuvalu Constitution, clause 24
- Vanuatu Constitution, clause 5(1)(g).

The right to freedom of expression also commonly includes a right to freedom of information. This occurs in Fiji, Kiribati, the Solomon Islands and Tuvalu. For example, clause 17(1) (a) in Fiji provides:

Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes ... freedom to seek, receive and impart information, knowledge and ideas.

3. Combined Rights

Third, some countries combine these rights constitutionally. For example, Fiji and Papua New Guinea contain explicit provisions in relation to both freedom of information and freedom of expression under their Constitutions.

4. Freedom of Information Laws

Fourth, other countries have introduced freedom of information laws. These include Palau, the Cook Islands and Vanuatu. Links to this legislation are as follows:

- Open Government Act 2014 (Palau)
http://www.paclii.org/pw/legis/num_act/ogarn9322014275/
- Official Information Act 2008 (Cook Islands)⁴
http://www.paclii.org/ck/legis/num_act/oia2008197/
- Right to Information Act 2016 (Vanuatu)
http://www.paclii.org/vu/legis/num_act/rtia2016234/

Notably, neither Fiji nor Papua New Guinea have passed freedom of information laws despite Constitutional provisions requiring such laws. Fiji introduced a Freedom of Information Bill in 2016.

5. Policies or Guidelines on Freedom of Information

Finally, some countries have introduced Bills, or have policies or guidelines in place to deal with freedom of information. For example:

- Tonga adopted a freedom of information policy in 2010 and established a FOI Unit, with the Ministry of Information and Communications⁵
- Fiji recently introduced the Freedom of Information Bill 2016
- In the Solomon Islands, Ministries such as the Ministry of Communication and Aviation have individual data sharing policies, some MOUs exist between Ministries while many are amending their laws to allow e-data sharing⁶
- Other jurisdictions adopt the practice of sharing information but have no written policy.⁷

6. Reporting Requirements in Relation to the Environment

There are legislated requirements across the Pacific in relation to reporting on the environment. These include:

- state of the environment reporting
- reporting on agency functions regarding the environment
- reporting on aspects of the environment.

⁴ Nauru also has an Official Information Act 1976; however, its purpose is to “prohibit the unauthorised communication of certain official information and the use of official information for private gain, and for matters related thereto.”

⁵ See <http://www.mic.gov.to/government/initiatives-freedom-of-information/3879-tonga-launched-its-freedom-of-information-policy>;

⁶ Questionnaire supplied by SPREP (January 2018).

⁷ See <http://www.abc.net.au/cm/lb/9268974/data/marshall-islands%3A-state-of-the-media-report-data.pdf>

6.1 *State of the Environment Reporting*

A growing number of Pacific nations have statutory duties to report on state of the environment. These include the Cook Islands, Federated States of Micronesia, Fiji, Marshall Islands, Palau and Vanuatu.⁸

6.2 *Reporting on Agency Functions regarding the Environment*

Legislation often requires environmental and natural resource management agencies and/or operators to report annually on their functions. This, in effect, amounts to a de facto state of the environment reporting function.⁹

6.3 *Reporting on Aspects of the Environment*

Legislation often requires agencies and/or operators to report on specific aspects of the environment such as the coastal zone, marine and wildlife, recreational reserves, fisheries, biological diversity, illegal trade, historic preservation, waste and ozone.¹⁰

⁸ See Cook Islands Environment Act 2003 s 9(1)(i); Federated States of Micronesia Environmental Protection Act s 208; Fiji Environment Management Act 2005 s 23; Marshall Islands National Environmental Protection Act 1984 s 126(f); Palau National Code Title 24 – Environmental Protection s 128 and Vanuatu Environmental Management and Conservation Act s 7.

⁹ Cook Islands Environment Act 2003 s 6; Federated States of Micronesia Marine Resources Act 2002 s 211; Fiji Environment Management Act 2005 s 10(6); Kiribati Seabed Minerals Act 2017 s 10(c); Niue Environment Act 2003 s 8; Papua New Guinea Environment Act 2000 s 19(1)(c); Papua New Guinea Fisheries Management Act 1998 s 21; Papua New Guinea Forestry Act 1991 s 20; Palau National Code Title 27 – Fishing s 128; Samoa Fisheries Management Act 2016 s 12.

¹⁰ See, for example, American Samoa Ecosystem Protection and Development Act s 24.0304(a)(3); Fiji Endangered and Protected Species Act 2002 s 6(1)(c); Kiribati Recreational Reserves Act 1996 s 8; Marshall Islands Coast Conservation Act 1983 s 306; Marshall Islands Historic Preservation Act 1991 s 213(i); Samoa Waste Management Act 2010 s 10; Samoa Fisheries Management Act 2016 s 4(3)(e); Tonga Waste Management Act s 6(k); Tuvalu Environment Protection Act 2008 s 30(1)(h).

Part 2: Principles

Freedom of information laws could arguably be based on five fundamental principles – namely:

1. the principle of maximum disclosure
2. the principle of openness
3. the principle of limited exemptions
4. the principle of access
5. the principle of fairness and equity.¹¹

1. The Principle of Maximum Disclosure

This principle establishes a presumption that all information held by public bodies should be subject to disclosure. There should be limited exceptions where this presumption may be overcome.

The integrity and availability of information should be protected, through proper resourcing and laws governing the maintenance and preservation of information by public bodies.

In order to give proper effect to this principle, it is also important that other laws do not override freedom of information laws.

2. The Principle of Openness

This principle has two elements. First, it recognises the need to promote, inform and support the community's right to information, including the need to assist the community to access information and to proactively publish and disseminate widely information of significant public interest. Second, there should be a presumption that all meetings of public bodies are open to the community.

¹¹ These principles are a distillation of the 9 principles developed by Article 19, a London-based organisation whose mandate is to promote respect for freedom of expression and adopted at the Citizens' Constitutional Forum in Fiji in March 2004. The 9 principles are:

- Maximum Disclosure
- Obligation to Publish
- Promotion of Open Government
- Limited Scope of Exceptions
- Processes to Facilitate Access
- Costs
- Open Meetings
- Disclosure Takes Precedence
- Protection for Whistleblowers

These Principles were originally developed in 1999, and were updated in 2015: see

https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf

These 9 principles have been endorsed by Abid Hussain, then the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 session of the United Nations Commission on Human Rights (E/CN.4/2000/63), and referred to by the Commission in its 2000 resolution on freedom of expression, as well as by his successor Frank LaRue in his report to the UN General Assembly in 2013 (A/68/362, 4 September 2013).

3. The Principle of Limited Exemptions

The right of the community to information is not absolute. There are circumstances where the release of information may harm the government and the community. Nevertheless, exceptions to the right should be clearly and narrowly drawn. For example, it has been suggested that three conditions must be met before information is withheld:

- the information must relate to a legitimate aim (as, for example, provided for in international law)
- disclosure must threaten to cause substantial harm to that aim
- the harm to the aim must be greater than the public interest in having the information.

4. The Principle of Access

The right to information can be undermined by other means – delay and costs. It is therefore important that requests for information should be processed quickly, and that costs of obtaining the information are reasonable (for example, limited to the actual costs of reproduction).

5. The Principle of Fairness and Equity

It is crucial that processes are fair and consistent, and that the community has a right to see the reasons for any decision not to disclose information, as well as appeal rights (both internally, and to administrative and judicial bodies).

Whistle-blowers should be protected where they disclose evidence of wrongdoing (such as the commission of a criminal offence, corruption or dishonesty, or serious threats to health, safety or the environment) as long as they acted with the reasonable belief that the information was substantially true. This should be done under complementary legislation.

Part 3: Key Elements

Freedom of information laws have become increasingly complex and complicated, particularly in those jurisdictions like Australia where they have been in operation for some time. The following part seeks to do two things. First, to build a foundation that reflects, and gives voice to, the principles outlined above.¹² Second, to devise key elements that avoid systemic problems encountered under freedom of information laws in the past – for example, delays; failure to provide proper reasons; high fees and charges; and a failure to have regard to public interest or reasonableness factors.

This part identifies thirteen (13) key elements for proper and effective freedom of information legislation. It is structured as follows:

1. Objects or purposes
2. Definitions
3. Information to be published
4. Meetings to be open and public
5. Obtaining the information
6. Exemptions (conclusive)
7. Exemptions (conditional)
8. Duty to assist
9. Need to give reasons
10. Time limits to avoid delays
11. Reasonable costs
12. Right of review
13. Review of the legislation.

1. Objects or Purposes

1.1 Overview

Freedom of information laws commonly have objects or purposes clauses. In turn, these objects frequently reference democratic ideals such as openness, accountability and public participation.¹³ A variation on this idea is the Palau Open Government Act 2014 which contains a Presidential Statement of Introduction.¹⁴

¹² Other important provisions, such as the establishment of an Information Commission or Commissioner, the need for a disclosure log, personal information, forms that access to the information takes, offences or the need to consult with third parties are not included here. However, the need for, or take-up of, such provisions will vary greatly across the Pacific depending on the current political, social and cultural environment, their current understanding of the issues, levels of resourcing and so on.

¹³ See, for example: (CTH) Freedom of Information Act 1982 s 3; (NSW) Government Information (Public Access) Act 2009 s 3(1); (NZ) Official Information Act 1982 s 4; (QLD) Right to Information Act 2009 s 3(1); (VIC) Freedom of Information Act 1982 s 3(1).

¹⁴ Section 2 of the Palau Open Government Act 2014 states: It is the intent of this Act: that the actions of the government be conducted openly, that all deliberations be transparent, and that all public government documents be open for public inspection. Indeed, this Act is intended to provide a legal framework for the rights that are already guaranteed to the people of the Republic in Article V, Section 12 of the Constitution of the Republic, which states that: "A citizen has the right to examine any government document and to observe the official deliberations of any agency of government".

It is a fundamental aspect of a democracy that government governs the people only with the consent of the people. The people, therefore, in consenting to be governed do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The President hereby finds that the people of the Republic insist upon being informed of the workings of the government so that they may retain control over the instruments of government that they have created for governance with their consent.

It is also common that such legislation gives an expansive role to such objects clauses, as this example from the Cook Islands shows:

The question whether any official information is to be made available, where that question arises under this Act, shall be determined in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it, except where this Act otherwise expressly requires (Cook Islands).¹⁵

1.2 Drafting Instructions

Model legislation should have an objects clause that contains the following elements:

- refers to the Constitutional right (where relevant)
- commits the government to be open, accountable, fair and effective
- has an overriding object that is to open government information to the public
- has subsidiary objects around:
 - promoting and authorising the public release of government information by agencies
 - giving members of the community a right to access government information
 - providing that access to government information is restricted only when there is an overriding public interest against disclosure.

Example of Objects Clauses:

Cook Islands Official Information Act 2008 s 4

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament –

- a) to increase the availability of official information to the people of the Cook Islands in order –
 - i. to enable their more effective participation in the making and administration of laws and policies; and
 - ii. to promote the accountability of Ministers of the Crown and officials, and thereby to enhance respect for the law and to promote the good government of the Cook Islands;
- b) to provide for proper access by each person to official information relating to that person;
- c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

¹⁵ Cook Islands Official Information Act 2008 s 5; See also (NSW) Government Information (Public Access) Act 2009 s 3(2); (NZ) Official Information Act 1982 s 5; Palau Open Government Act 2016 s 2; (QLD) Right to Information Act 2009 s 3(2); (VIC) Freedom of Information Act 1982 s 3(2)..

Model legislation should have an interpretive clause that refers back to the primacy of the objects clause as a means of interpreting provisions under the legislation.

**Example of Interpretation Clauses:
Palau Open Government Act 2014 s 2**

Accordingly, it is the intent of the President of the Republic that, as introduced, the provisions contained in this bill ... in providing for an open government and open access to the documents of the government the law shall be liberally interpreted, and that the provisions providing for exceptions to the open meeting requirements and open records requirements the law shall be strictly interpreted against closed meetings and the non- disclosure of records.

2. Definitions

2.1 Overview

Freedom of information legislation does not tend to rely heavily on definitions. This is perhaps due to its overriding focus on liberally interpreting provisions in light of the open access objects of the legislation.

In any case, key terms include the following:

- agency
- applicant
- document, record or information (often used interchangeably)
- Minister and Ministries
- personal information
- publish.

2.2 Drafting Instructions

Definitions will differ across jurisdictions, depending on issues such as cultural factors, other laws, relationship with other legislation and drafting preferences. It is important that definitions in relation to agencies, documents and personal information are as broad as possible to capture the requisite information. It is also important that freedom of information laws have an interpretive clause that emphasises the need for a liberal approach, consistent with the objects of the legislation.

**Examples of Definitional Clauses:
Cook Islands Official Information Act s 2**

Personal information means any official information held about an identifiable person.

Palau Open Government Act 2014 s 4

Public record means any written or printed book, paper map or plan of a governing body, which is the property thereof and in or on which an entry has been made or is required to be made by law, or which any public officer or employee of a governing body has received or is required to receive for filing, but shall not include records that invade the right to privacy of any person or business entity as defined in this Act.

Vanuatu Right to Information Act 2016 s 3

Personal information means:

- a) information about a person, whether living or deceased, and includes any of the following:
1. information relating to the race, gender, sex, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; or
 2. information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the person has been involved; or
 3. any identifying number, symbol or other particular assigned to the person; or
 4. the address, fingerprints or blood type of the person; or
 5. the personal opinions, views or preferences of the person; or
 6. correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; or
 7. the views or opinions of another individual about the person; or (ix) the name of the person where it appears with other personal information relating to the person or where the disclosure of the name itself would reveal information about the person.

Record means information held in any form or medium by a Government agency, relevant private entity or private entity, whether or not it was created by any of them or came into existence before the commencement of this Act, and includes:

- a) a record in writing; or
- b) a document, manuscript and file; or
- c) a film (including microfilm), negative, microfiche and facsimile copy of a document; or
- d) a map, plan, graph or drawing; or
- e) a photograph; or
- f) a disc, tape, sound track or other device in which sounds or other data are embodied, whether electronically or otherwise, so as to be capable (with or without the aid of some other equipment) of being reproduced; or
- g) an email, memo, opinion, advice, press releases, circular, order, logbook, contract, report, samples and models.

3. Information to be published

3.1 Overview

It is common practice to set down in legislation that agencies must publish certain information; essentially, this information relates to aspects of good governance and accountability.¹⁶

3.2 Drafting Instructions

Model legislation should contain a statement that the following elements should be published:

- information about the agencies' structure, functions and operations
- operational information including the agencies' rules, guidelines and practices
- information that is routinely given to the public
- information regarding elections (including laws and guidelines) and electoral rolls
- court decisions.

**Example regarding Information to be published:
Cook Islands Official Information Act 2008 s 22**

Publication setting out functions of Ministries and organisations

1. The Office of the Prime Minister shall cause to be published ... a publication that includes in respect of each Ministry and each organisation:
 - a) a description of its structure, functions, and responsibilities including those of any of its statutory officers or advisory committees; and
 - b) a general description of the categories of documents held by it; and
 - c) a description of all manuals, and similar types of documents which contain policies, principles, rules, or guidelines in accordance with which decisions or recommendations are made in respect of any person or body of persons in his or her or its personal capacity; and
 - d) a statement of any information that needs to be available to members of the public who wish to obtain official information from the Ministry or organisation, which statement shall include particulars of the officer or officers to whom requests for official information or particular classes of information should be sent.

¹⁶ (CTH) Freedom of Information Act 1982 s 8(2); Cook Islands Official Information Act sections 22; (NSW) Government Information (Public Access) Act 2009 s 18; (NZ) Official Information Act 1982 s 20; Vanuatu Right to Information Act 2016 s 7.

4. Meetings to be Open and Public

4.1 Overview

Legislation sometimes provides that all meetings (and minutes) are open and public, including no bars to entry of the community (such as the need to register).¹⁷ This type of provision may be more important in some countries than others, where such a practice may need to be encouraged.

4.2 Drafting Instructions

Model legislation should be clear that the presumption is that government meetings should be open to the public, with records kept and no artificial barriers to participation.

Examples regarding open meetings: Palau Open Government Act 2014 ss 5 and 6

Section 5. Meetings shall be open and public

- a) All meetings of a governing body shall be open and public, and all persons shall be permitted to attend any meeting of the governing body, unless otherwise provided by this Act or other law.
- b) The minutes of all meetings of any governing body that are open and public shall be available upon request
- c) A meeting of a governing body, and the minutes of that meeting, shall not be required to be open and public where the matter under discussion relates to information that shall not be disclosed to the public under Section 8.

Section 6. No conditions to attendance may be required

- a) A governing body shall not require registration or any other prerequisite information to be filed with the governing body before permitting a member of the public entry to an open and public meeting of a governing body.

5. Obtaining the Information

5.1 Overview

The process for seeking information is routinely triggered by the making of a request or application. It generally needs to be done with some particularity and contain certain information.¹⁸

¹⁷ Palau Open Government Act 2014 ss 5 and 6.

¹⁸ See, for example, Cook Islands Official Information Act s 11 and Vanuatu Right to Information Act 2016 s 13.

5.2 Drafting Instructions

Model legislation should be as flexible as possible as to what constitutes a request or application. In Vanuatu, a request can be made orally, in writing, and in any official language. This is a good model for the Pacific, as the requirements to fill in forms or write letters is likely to stifle access to the information.

At the same time, it is important to be prescriptive as to what is required so as to make the process as efficient as possible. The duty to assist (see below) is a key mechanism in balancing these competing interests.

Example on obtaining the information: Vanuatu Right to Information Act 2016 s 13

Application for access to information

1. A person who wishes to obtain information from a Government agency, relevant private entity or private entity is to apply to the relevant Right to Information Officer for access to information held by that Government agency ...
2. An application made under subsection (1) may be made in writing, orally or through any electronic means, in any official language, and to the relevant Government agency ... specifying the information required.
3. A Government agency ... must not deny access to information based on:
 - a) any of the applicants reasons as to why the application is being made; or
 - b) any opinion of an official as to the applicant's reason for applying.
4. An application under subsection (1) is to include the following information:
 - a) a postal address, fax number or email address to which the information may be sent; and
 - b) a telephone number at which the applicant may be reached; and
 - c) the form of access required in accordance with section 28; and
 - d) the language in which the information granted is to be supplied; and
 - e) an indication of whether the application is being made on behalf of a person and the submission of proof of the capacity in which the applicant is making the application, to the reasonable satisfaction of the Right to Information Officer; and
 - f) if the application is being made to a private entity - an explanation of why the information may assist in the exercise or protection of any right; and
 - g) an indication of whether the applicant believes that the information is necessary to safeguard the life or liberty of himself or herself or any other person, and the basis for that belief.
5. If an applicant makes an application orally, the Right to Information Officer must reproduce that oral application into written form and provide a copy to the applicant.
6. If a Right to Information Officer is able to provide an immediate response to an oral application and the response is to the satisfaction of the applicant, the Right to Information Officer must subsequently reduce the application to writing for documentation purposes.

6. Exemptions (Conclusive)

6.1 Overview

Certain documents may be exempt as of right. In other words, if the documents fall within these categories, they are conclusively exempt in certain jurisdictions (for example, in Australia under federal and NSW law).¹⁹

These include documents that may damage national security, defence or international relations; Cabinet documents; documents that may endanger the safety of a person; documents subject to legal professional privilege or documents that may prejudice the rule of law, including investigation of a breach of law or a fair trial.²⁰

6.2 Drafting Instructions

Model legislation should determine a list of exempt documents such as documents that:

- may cause damage to national security, defence or international relations
- are official Cabinet records, including documents submitted to Cabinet for consideration
- may endanger the safety of a person
- may prejudice the rule of law, including investigation of a breach of law or a fair trial
- may expose confidential sources of information
- may disclose law enforcement methods which would prejudice their effectiveness or the protection of public safety
- secrecy provisions apply to under other legislation²¹
- are subject to legal professional privilege
- contain information which, if disclosed, would be a breach of confidence
- would be in contempt of court, or contrary to an order if disclosed
- would infringe the privileges of Parliament if disclosed
- would destroy or diminish trade secrets if disclosed
- contain information about voters.

¹⁹ Vanuatu does not have a category of documents which are conclusively exempt. Rather, all categories of information may be published if there is an overriding public interest.

²⁰ See Cook Islands Official Information Act s 6; (NZ) Official Information Act 1982 s 6; (NSW) Government Information (Public Access) Act 2009 s 14, Schedule 1; Palau Open Government Act 2016 s 8; Vanuatu Right to Information Act 2016 ss 42 to 50.

²¹ It is important that public bodies are not exempt per se, notwithstanding that they may need to conduct some of their affairs secretly. For example, in NSW Australia the Independent Commission Against Corruption is not exempt; however, any documents it produces relating to corruption prevention, complaint handling, investigative and reporting functions are exempt: see NSW Government Information (Public Access) Act 2009 s 19 Schedule 2.

Examples of List of Exempt Documents (Conclusive)

Palau Open Government Act 2014 s 8

Section 8. Exceptions.

The following information shall not be made available to the public:

- a) information properly classified as secret in the interest of national defense or foreign policy as follows:
 1. information may be classified as secret in the interest of national defense where the disclosure of the information would compromise the current ability of the Republic of Palau or the United States to provide for the defense of the Republic of Palau;
 2. information related to negotiations with another country or another foreign entity that has its principal place of business in another country.
- b) information related solely to internal operation procedures and practices of the governing body the release of which would potentially risk circumvention of law or regulations;
- c) information specifically exempted by other statutes;
- d) a trade secret or privileged or confidential commercial or financial information obtained from a person or legally established corporation or entity in the Republic of Palau;
- e) a privileged inter-agency or intra-agency memorandum or letter;
- f) a personnel, medical, or similar file the release of which would constitute a clearly unwarranted invasion of personal privacy; provided that disclosure of a government employment contract or contract of an independent contractor working for a government, including any contracts that are performed as part of the execution of a foreign aid grant, are deemed to not be an invasion of personal privacy;
- g) information compiled for law enforcement purposes, the release of which:
 1. could reasonably be expected to interfere with law enforcement proceedings
 2. would deprive a person of a right to a fair trial or an impartial adjudication,
 3. could reasonably be expected to constitute an unwarranted invasion of personal privacy,
 4. could reasonably be expected to disclose the identity of a confidential source,
 5. would disclose techniques, procedures, or guidelines for investigations or prosecutions, or
 6. could reasonably be expected to endanger an individual's life or physical safety;
- h) information contained in or related to examination, operating, or condition reports about financial institutions that the Financial Institutions Commission regulates or supervises;
- i) attorney client privileged communications or attorney work product
- j) judicial deliberations; or
- k) information related to informal negotiations or discussions that take place as a part of the decision making process of a governing body prior to a meeting where a final action is made; however, any negotiations or discussions that take place during a meeting in which a final action is taken shall be conducted in accordance with Section 5; and
- l) information related to a declared and confirmed State of Emergency in accordance with the Constitution of the Republic.

7. Exempt Documents (conditional)

7.1 Overview

There is another class of documents which are not conclusively exempt. For these documents, access is conditional under modern freedom of information laws - that is, conditional on a balancing of public interest considerations.

Conditionally exempt documents may include documents that may prejudicially affect, say, province-to-province relations, deliberative processes, financial or property interests of the nation, certain operations of agencies, personal privacy, business, research and the economy.²²

In determining whether these documents should be disclosed, the decision maker must in fact consider and balance competing public interest factors – that is, the public interest factors above against disclosure versus the public interest factors that favour access to the information.²³

Factors that favour access to the document include:

- the promotion of public participation in Government processes and increasing scrutiny, discussion and review of Government activities;
- increasing recognition that Government information is a public resource;
- facilitating and promote public access to information promptly and cost effectively;
- informing debate on a matter of public importance;
- promoting the effective oversight of public expenditure; and
- allowing a person to access their personal information.²⁴

The decision maker must not take into consideration factors such as whether the document may cause embarrassment to or loss of confidence in the government, the possibility of misinterpretation or misunderstanding the document, whether the author is of high seniority in the relevant agency or if access to the document may cause confusion or unnecessary debate.²⁵

7.2 Drafting Instructions

Model legislation should properly frame the role of the competing public interests – those against disclosure versus those in favour of disclosure.

²² (CTH) Freedom of Information Act 1982 Part IV Division 3; (NSW) Government Information (Public Access) Act 2009 s 14 Table.

²³ See (NSW) Government Information (Public Access) Act 2009 Part 2 Division 2.

²⁴ (CTH) Freedom of Information Act 1982 s 11B(3).

²⁵ (CTH) Freedom of Information Act 1982 s 11B(4); (NSW) Government Information (Public Access) Act 2009 s 15; (TAS) right to Information Act 2009 s 33(3) and Schedule 2; Vanuatu Right to Information Act 2016 s 38(3)-(5).

Example Regarding Exempt Documents and the Public Interest:

(TAS) Right to Information Act 2009 Part Division 2

Division 2 - Exemptions subject to public interest test

33. Public interest test
34. Information communicated by other jurisdictions
35. Internal deliberative information
36. Personal information of person
37. Information relating to business affairs of third party
38. Information relating to business affairs of public authority
39. Information obtained in confidence
40. Information on procedures and criteria used in certain negotiations of public authority
41. Information likely to affect State economy
42. Information likely to affect cultural, heritage and natural resources of the State

Vanuatu Right to Information Act 2016 s 38(3)-(5)

3. Subject to subsections (4) and (5), a Right to Information Officer is to consider any of the following factors when determining whether access to information is in the public interest:
 - a) the objects of this Act;
 - b) the prevention of the commission of offences or other unlawful acts;
 - c) the prevention of a miscarriage of justice, abuse of authority or neglect in the performance of an official duty;
 - d) the promotion of effective use and oversight of public funds and expenditure;
 - e) whether the information is to be used for public debate or discussions;
 - f) the promotion of public participation in the political process and decision-making;
 - g) the avoidance of any danger to the health or safety of an individual or the public;
 - h) the avoidance of unauthorised use, or misuse of public funds;
 - i) the protection of the environment;
 - j) any other factors as the officer may consider relevant from time to time.
4. A Right to Information Officer must not take into account any of the following factors when deciding whether access to information is contrary to the public interest:
 - a) that access to the information could result in embarrassment to, or cause a loss of confidence in the Government of Vanuatu;
 - b) that access to the information could result in any person misinterpreting or misunderstanding the information;
 - c) that the author of the document was, or is of high seniority in the Government agency or relevant private entity to which the application for access to the information was made;
 - d) that access to the information could result in confusion or unnecessary debate.
5. A Right to Information Officer must consider any guidelines issued by the Information Commissioner ... when determining whether access to information is contrary to the public interest.

8. Duty to Assist

8.1 Overview

As noted above, the process for seeking information is triggered by the making of a request and needs to be done with some particularity and contain certain information.²⁶ However, failure to abide by the process does not allow the request to be denied, nor require the request to be re-made.

Rather, a duty is commonly placed on public bodies to assist a member of the community seeking information, including transferring the request to the appropriate agency (where relevant).²⁷ The practice of deleting or redacting excluded information can also assist members of the community to access documents.²⁸

8.2 Drafting Instructions

Model laws should place a positive duty on public bodies to assist in a request for information, including transfer to another agency and the deletion of exempt material.

Examples of the Duties to Assist:

Vanuatu Right to Information Act 2016 ss 18, 21 and 23

Section 18: Duty to assist applicants

If an application for access to information is made, and that application does not comply with the requirements under subsection 13(4), the Right to Information Officer is to take reasonable steps to assist the person or applicant, free of charge, to make the application in a manner that complies with this Act.

Section 21: Transfer of application

1. If an application for information requires information that is held by another Government agency..., the Right to Information Officer must transfer the application, or part of it as may be appropriate, to the relevant Government agency ...

Section 23: Partial grant of access

1. If an application for access to information contains an exempt matter, the Right to Information Officer must delete the exempt matter before granting access to the information.
2. If access to information is granted with the deletion of the exempted matter, the applicant must be notified of:
 - a) the deletion of the exempt matter; and
 - b) the information to which access has been granted; and
 - c) his or her right of appeal ...; and
 - d) the information to which access has been denied and the statutory provision by virtue of which the exempted matter is deleted.

²⁶ See, for example, Cook Islands Official Information Act s 11 and Vanuatu Right to Information Act 2016 s 13.

²⁷ (CTH) Freedom of Information Act 1982 s 16; Cook Islands Official Information Act ss 12 and 13; (NSW) Government Information (Public Access) Act 2009 s 16; (NZ) Official Information Act 1982 ss 12 and 13; Vanuatu Right to Information Act 2016 ss 15 and 21.

²⁸ (CTH) Freedom of Information Act 1982 s 23; Cook Islands Official Information Act s 17; (NSW) Government Information (Public Access) Act 2009 s 74; (NZ) Official Information Act 1982 s 17.

9. Need to give reasons

9.1 Overview

Where information is not released, the agency should give proper reasons for the decision.²⁹

9.2 Drafting instructions

Model legislation should require the giving of reasons, as well as the grounds for those reasons.

Examples on the need to give reasons:

Vanuatu Right to Information Act 2016 s 18

Access to information denied

If an application for access to information is denied, the notice to the applicant referred to in paragraph 16(1) (b) must:

- a) state the reasons for the refusal; and
- b) inform the applicant of his or her right of appeal ..., the procedure for applying and the applicable time limits ...

(CTH) Freedom of Information Act 1982 s 26

Reasons and other particulars of decisions to be given

1. Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:
 - a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
 - aa) in the case of a decision to refuse to give access to a conditionally exempt document - include in those reasons the public interest factors taken into account in making the decision ...

²⁹ (CTH) Freedom of Information Act 1982 s 26; Cook Islands Official Information Act sections 21; (NZ) Official Information Act 1982 s 27; Vanuatu Right to Information Act 2016 s 18(a).

10. Time Limits to Avoid Delays

10.1 Overview

Strict time limits are commonplace under freedom of information laws, so that the legislation works smoothly and effectively.³⁰

10.2 Drafting Instructions

Model legislation should stipulate specific time periods for the following (suggested timeframes are in brackets):

- Notification of the receipt of a request (14 days)
- Decision to release or refuse access to information (21 days from receipt)
- Application for internal review (within 30 days of notification of a decision)
- Completion of internal review (30 days from receipt)
- Application for external review ((within 30 days of notification of a decision)

Example regarding time limits to avoid delays:

Vanuatu Right to Information Act 2016 s 14

14. Decisions on Requests

1. Subject to this Act, the Ministry or Minister of the Crown or organisation to whom a request is made in accordance with section 11 or is transferred in accordance section 13 of this Act shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that Ministry or Minister of the Crown or organisation:
 - a) decide whether the request is to be granted and, if it is to be granted, in what manner and for what charge (if any); and
 - b) give or post to the person who made the request, notice of the decision on the request.

³⁰ (CTH) Freedom of Information Act 1982 s 15(5); Cook Islands Official Information Act s 14; (NSW) Government Information (Public Access) Act 2009 s 57; (NZ) Official Information Act 1982 s 15; Palau Open Government Act 2016 s 9(a).

11. Reasonable Costs

11.1 Overview

It is important that access to information is achievable, and not merely a formal right.³¹ Unless provisions are included to promote a fair and equitable approach to the right to government information, the community may not be able to access information and the objects of the legislation will be undermined.

11.2 Drafting Instructions

Model legislation should ensure that costs are reasonable, based on reproduction costs and contain discounts or exemptions where financial hardship or public benefits exist.

³¹ (CTH) Freedom of Information Act 1982 s 29(5); Cook Islands Official Information Act s 14(3); (NSW) Government Information (Public Access) Act 2009 ss 7(2), 65 and 66; ; (NZ) Official Information Act 1982 s 15(2); Palau Open Government Act 2016 s 9(b); Vanuatu Right to Information Act 2016 s 30.

Examples on reasonable costs:

Cook Islands Official Information Act 2008 s 14

Any charge fixed shall be reasonable and regard may be had to the cost of labour and materials involved in making the information available to, and to any costs incurred pursuant to, a request of the applicant to make the information available urgently.

Vanuatu Right to Information Act 2016 s 30

2. An applicant is not required to pay any reproduction fee:
 - a) when lodging an application; or
 - b) in relation to time spent by the Right to Information Officer in searching for the information requested; or
 - c) in relation to time spent by the Right to Information Officer in examining the information to determine whether it contains exempt matter or deleting exempt matter from the information.
3. An applicant must not pay a reproduction fee in the following circumstances:
 - a) for the reproduction of personal information of the applicant, or if application is made on behalf of another person of the personal information of that person; or
 - b) if the application is made on behalf of a natural third party for whom the applicant is a guardian; or
 - c) if the application is related to a deceased third party in respect of whom the applicant is the next of kin or the personal representative; or
 - d) for the reproduction of information which is in the public interest; or
 - e) if the Right to Information Officer has failed to comply with the time for responding to an application under section 16 or if an extension of time has been made under section 20, within that extended period of time.

(NSW) Government Information (Public Access) Act 2009 ss 65 and 66

65 Discounted processing charge – special public benefit

1. An applicant is entitled to a 50% reduction in a processing charge imposed by an agency if the agency is satisfied that the applicant is suffering financial hardship.

66 Discounted processing charge – special public benefit

1. An applicant is entitled to a 50% reduction in a processing charge imposed by an agency if the agency is satisfied that the information applied for is of special benefit to the public generally.

12. Right of review

12.1 Overview

Freedom of information legislation frequently provides review or appeal rights against a decision to refuse to release information, otherwise its intent could be undermined administratively.³²

12.2 Drafting instructions

Model legislation should ensure that there are review or appeal rights against the refusal to release information. These rights should include internal review and external review to a Tribunal, Information Commissioner or Court.

Example on Review Rights:

Cook Islands Official Information Act 2008 Part 5

(CTH) Freedom of Information Act 1982 Part VI, VII and VIIA

NSW Government Information (Public Access) Act 2009 Part 5

(NZ) Official Information Act 1982 Part 5

Vanuatu Right to Information Act 2016 Part 7

(WA) Freedom of Information Act 1992 Part 4

³² Cook Islands Official Information Act Part 5; (CTH) Freedom of Information Act 1982 Part VI, VII and VIIA, (NSW) Government Information (Public Access) Act 2009 Part 5; (NZ) Official Information Act 1982 Part 5; Vanuatu Right to Information Act 2016 s 68.

13. Review of the legislation

13.1 Overview

A review of the operation of the legislation, and whether it is achieving its objectives should be undertaken at regular intervals.³³

13.2 Drafting instructions

Model legislation should require a review of the legislation – its objectives and its provisions – every three to five years.

Example clauses on review of the Act:

NSW Government Information (Public Access) Act 2009 s 130

Review of Act

1. The Minister administering this Act is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
3. The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
4. A report on the outcome of the review is to be provided to the Minister administering this Act and tabled in each House of Parliament within 12 months after the end of the period of 5 years.

³³ (CTH) Freedom of Information Act 1982 s 93B; Cook Islands Official Information Act Part 6; (NSW) Government Information (Public Access) Act 2009 s 130.