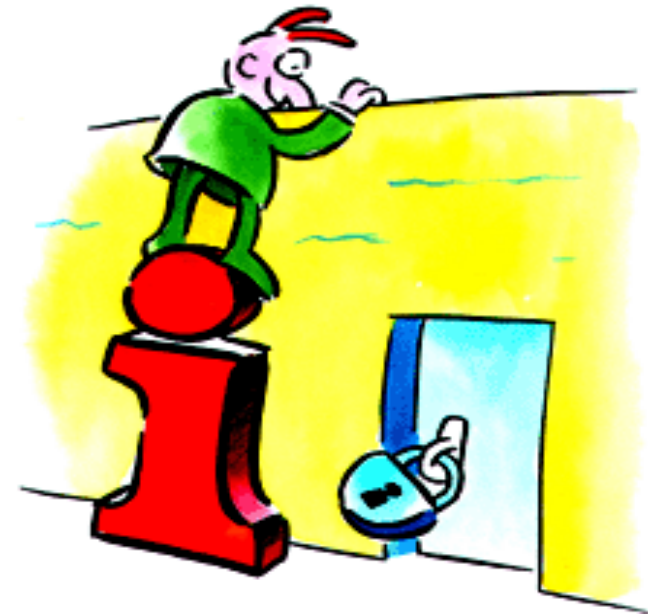


# FREEDOM OF INFORMATION

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# Outline

- What is Freedom of Information?
- Purpose of FOI legislation
- Overview of elements of FOI legislation
  - Proactive release of information
  - Disclosure & the public interest test
  - Review rights
  - Fees & charges
  - Time periods & deemed refusal
  - Sanctions
  - Expedited requests
  - Role of an Information Commissioner
  - Exemptions
  - Ministerial certificates
- How FOI laws can be used
  - EDO case studies



# What is Freedom of Information?



- Laws creating enforceable rights for members of the public to access government documents and information
- In Australia
  - ▣ Currently these laws are under review at the Federal level and in NSW
  - ▣ The information proposed is considered 'best practice' FOI legislation and borrows elements from the existing and the proposed FOI legislation in Australia

# Purpose of FOI laws

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- To create a system of responsible and representative government that is open, accountable, fair and effective
- To encourage government to be pro-active in releasing information to the public
- To give members of the public an enforceable right to access government information
- To ensure that access to government information is unrestricted except where there is an overriding public interest *against* disclosure

# Elements of FOI legislation

- Proactive release of information
- Disclosure & the public interest test
- Review rights
- Fees & charges
- Time periods & deemed refusal
- Sanctions
- Expedited requests
- Role of an Information Commissioner
- Ministerial certificates
- Exemptions



# Proactive release of information



- Provisions requiring:
  - ▣ Government agencies to review their programs for the release of information at intervals of 12 months or less
  - ▣ Certain ‘open access’ information should be made publicly available, aside from FOI processes – information such as:
    - A list of the agency’s current publications;
    - Information about the agency already contained in any document tabled in Parliament;
    - The agency’s policy documents;
    - The agency’s register of access applications.

# Disclosure & the public interest test

- Necessary to have consistency in the process for determining whether the release or withholding of information is in the public interest
- A 'public interest test' should be included in the legislation.

*'There is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.'*

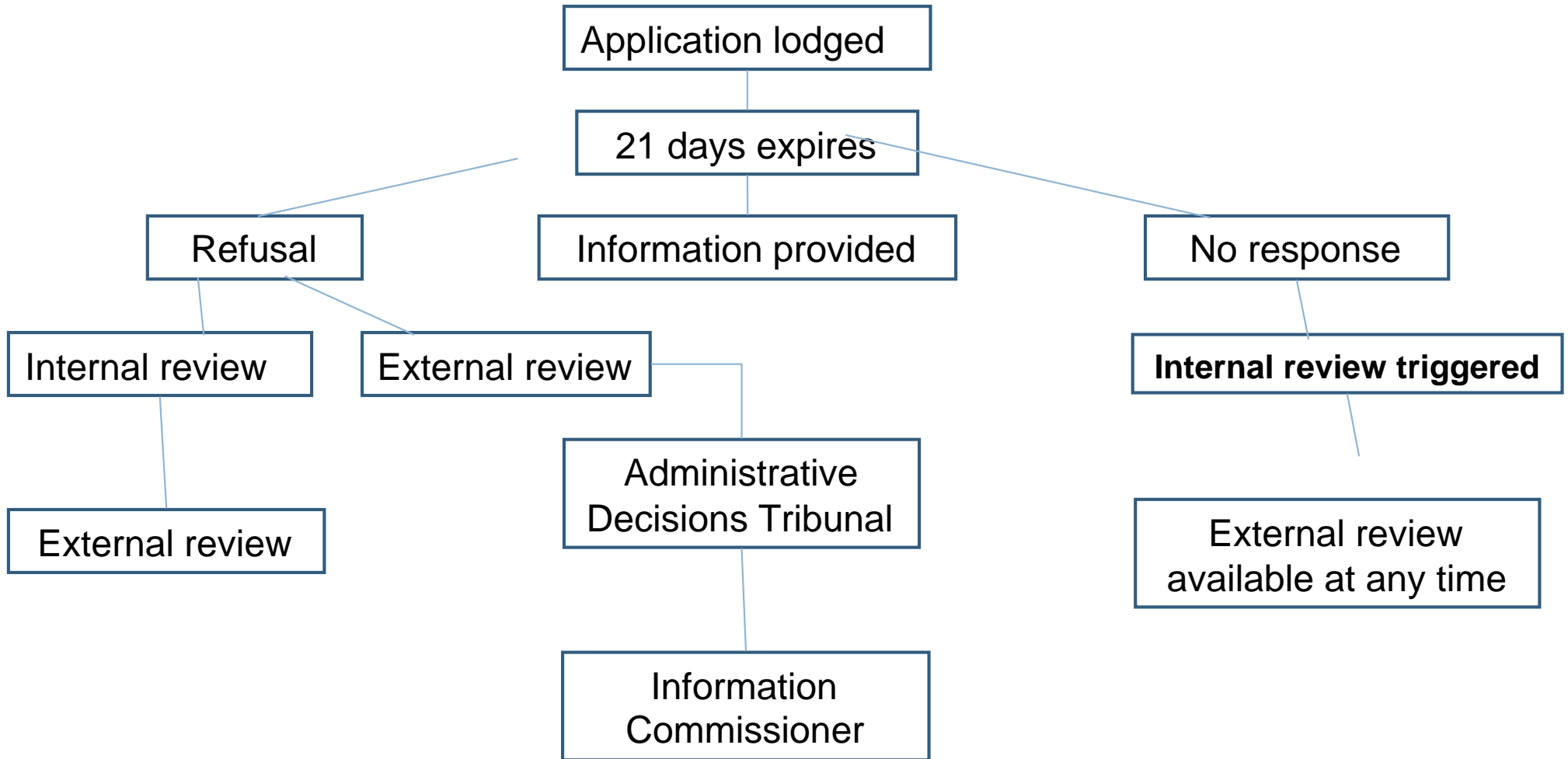
# Review rights



- Two review procedures:
  1. Internal (within the agency handling the application)
  2. External
- Provisions should allow for external review without the need to first undergo an internal review
- An Information Commissioner role could possibly provide for an external review of agency decisions also



# Best practice review process



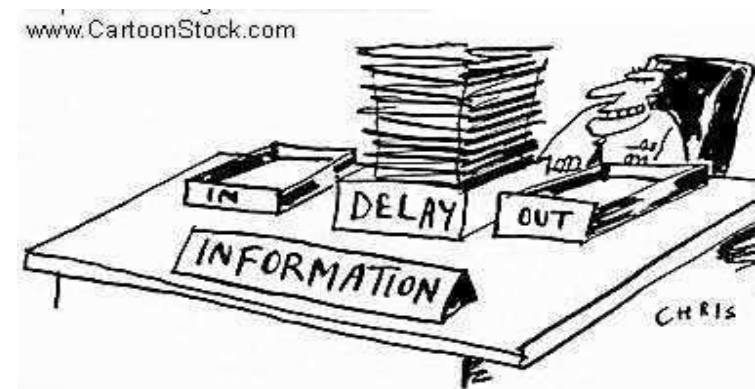
# Fees & charges



- Access of public information should be a fundamental democratic right
- Creation of an application fee threatens to place FOI processes beyond the reach of ordinary citizens
- Provisions should also exclude any requirement of advance deposits
- Where an application fee is applied, the legislation should allow for circumstances of 'financial hardship'
  - ▣ A definition of 'financial hardship' should be included
  - ▣ Public interest?

# Time periods

- Provisions requiring an application to be dealt with as soon as practicable *and* specifying a time period within which applications *must* be responded to
- Provisions should also require that applicants be notified as soon as (or within 5 days of) their application is received
- Provisions should also encourage an agency to keep applicants informed throughout the process to create transparency and accountability



# Deemed refusal



- In circumstances where the request is not responded to within the stipulated time frame, it is presumed to have been refused
- Legislation needs to avoid adopting the default position of ‘deemed refusal’
- Best practice FOI laws would allow for a trigger mechanism where an internal review is automatically prompted when the time period for a response expires

# Sanctions



- Necessary to create a system where requests are responded to by government agencies in a timely and efficient manner
- 3 types of offence by an agency required:
  - Offence for a failure to determine applications within the timeframe (or provide adequate reasons for a refusal)
  - Offence for any person to improperly influence decisions on access applications
  - Offence for concealing or destroying government information for the purpose of preventing disclosure

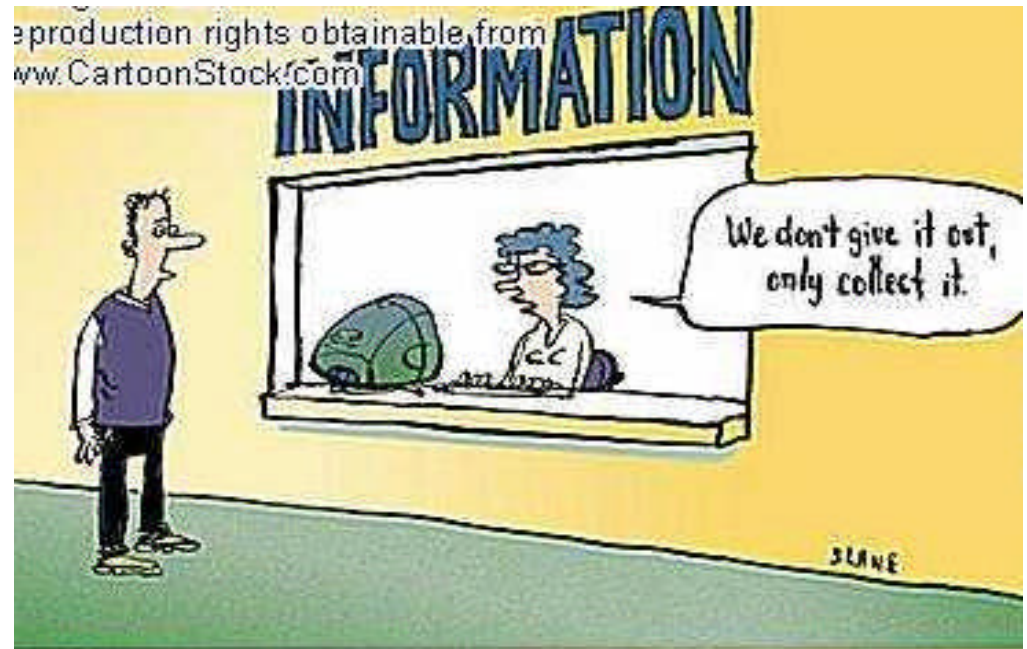
# Expedited requests



- Legislation should provide for expedited (fast-tracked) requests
- Crucial in circumstances where an applicant is seeking information to appeal a decision in court
- In environmental and planning law in Australia, such a provision is required to meet litigation deadlines, eg. Where appealing a development approval in NSW

# Information Commissioner

- A role created by the draft proposed legislation in Australia
- Role of the Commissioner includes:
  - ▣ Powers to determine applications
  - ▣ Powers to monitor & investigate
  - ▣ Powers to enforce & implement sanctions
- Agencies should also be required to report under FOI legislation, on the number of applications, how many were refused/successful



# Ministerial certificates



- Generally anti-disclosure provisions
- Where the Minister administering the Act makes a declaration that a specified document is a restricted document
- Eg currently the only appeal rights to this decision lie in the Supreme Court in NSW
- Any provision allowing for such a mechanism should not be included in the legislation



# Exemptions

- Information for which there is conclusive presumption of overriding public interest against disclosure
- Problem where legislation specifies classes of document which will not be disclosed
  - ▣ Refusal of access should only take place on a case-by-case assessment – applying the PI test
- Provisions should allow for the removal of sensitive information from documents prior to their release

*‘An agency must facilitate public access.. by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being a public interest against disclosure.’*

# How FOI laws can be used

- EDO case studies

1. Caroon Coal Action Group

- Application under *Freedom of Information Act* for:

- Expression of interest for an exploration licence
- Information before the decision maker when exploration licence granted

- Use in litigation:

- The information is being used in litigation: because of the documents we were able to determine what the cause of action was before we commenced proceedings.
- Currently before the Administrative Appeals Tribunal

# How FOI laws can be used

## 2. Lithgow Environment Group

- Application under *Freedom of Information Act* for:
  - Annual Licence Returns (results of monitoring of discharges of pollutants into the environment)
  - Documents relating to our clients' complaints about pollution
  
- Use in litigation
  - Licence returns are being used as evidence of pollution
  - Other documents indicated that the Enforcement Authority was not prepared to do anything about pollution, which encouraged client to commence proceedings.