

Key Features of Right to Information Legislation

Introduction

Right to Information (RTI/FOI) legislation is an essential mechanism to enable members of the public the opportunity to scrutinise the actions of government and its administration. Giving the people access to the information used by policy makers and governments provides a meaningful level of accountability and induces a much higher level of public participation, awareness and interest in policy-making and government itself. RTI/FOI legislation strengthens democracy by helping to provide the public with a basis on which government policies and actions can be discussed and debated, as well as allowing the performance of the government to be judged fairly.

The following table considers the key features that should be considered for inclusion in the development of an RTI/FOI legal framework. The features included in the table have been developed by drawing on:

- commitments that promote transparency and information access outlined in Australia's Open Government Partnership National Action Plan 2016-18, and Open Government Partnership National Action Plan 2018-20
- agreed standards promulgated by international bodies such as United Nations¹, the Organisation of American States², the Council of Europe³, European Union⁴, the Organisation for Security and Cooperation in Europe⁵ and the African Union⁶,

¹ International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200 A (XXI), 16 December 1966 (Article 19) and the First Optional Protocol; General Comment No. 34, UN Human Rights Committee, 12 September 2011

² Principles on the Right of Access to Information, Organisation of American States (OAS), CJI/RES. 147 (LXXIII-O/), 7 August 2008; Resolution on Access to Public Information: Strengthening Democracy, OAS General Assembly, AG/RES. 2514 (XXXIX-O/09) 4 June 2009; Model Inter-American Law on Access to information, OAS, 7 June 2011

³ Council of Europe Convention on Access to Official Documents, 27 November 2008; Recommendation Rec (2002) 2 of the Committee of Ministers on Access to Official Documents, 21 February 2002

⁴ Treaty on European union and Declaration on the Right of Access to Information, OJ C 191, 29 July 1992; Regulation (EC) No 1049/2001 of the European parliament and of the Council regarding Public Acces to European Parliament, Council and Commission documents, OJ 2001 L 145, 30 May 2001; Directive 2003/4/EC of the European parliament and of the Council on Public Access to Environmental Information, OJ 2003 L 41/26, 28 January 2003

⁵ Commitments: Freedom of Media, Freedom of Expression, Free Flow of Information, 1975-2017 (4th edition). Organisation for Security and Cooperation in Europe, November 2017

⁶ African Charter on Democracy, Elections and Good Governance, 30 January 2007; Model Law on Access to information for Africa, adopted by the African Commission on Human and People's Rights, 25 February 2013

- academic commentary from recognised experts in FOI/RTI legislation⁷, and
- key indicators for a right to access information legal framework developed by Access Info Europe and the Centre for Law and Democracy.

Purpose

It is intended that the following table will be used at the discretion of each Commissioner/Ombudsman for purposes including to inform future consideration of RTI/FOI legislation during statutory reviews or review by law reform bodies.

In identifying key features, Commissioners/Ombudsmen recognise that every FOI/RTI regime operates differently, and in conjunction with other relevant legislation and policies, that may impact on the creation of a robust RTI/FOI culture. This includes legislation concerning the handling of state records, privacy laws, information management and governance standards, and cyber-security policies. The intersection between these various regimes can contribute to the creation of a proactive release culture within public entities. Accordingly the table recognises that the principles informing key features may manifest to varying levels in each Australian jurisdiction.

This document brings together academic and expert commentary, legislative characteristics of national and international regimes, together with the operational experience of the independent regulators of Australian RTI/FOI schemes to present key features that promote an effective and efficient RTI/FOI legal framework.

A glossary of key terms used throughout the table below has been provided at Appendix A.

⁷ Mendel, T, *Freedom of Information: A Comparative Legal Survey* (UNESCO 2nd ed, 2008)

Paterson, M. *Freedom of Information and Privacy in Australia: Information Access 2.0* (LexisNexis Butterworths 2nd Edition 2015)

UN Commission on Human Rights 56th Session, *The public's right to know: Principles on Freedom of Information Legislation*. Annex II Report E/CN.4/2000/63

Coliver, S. *The Right to Information and the Expanding Scope of Bodies Covered by national laws since 1989* (Open Society Justice Initiative 2014)

Darbishire, H. *Proactive transparency: The Future of the Right to Information?* (World Bank Institute Governance Working Paper Series)

Neuman, L. *Access to Information laws: Pieces of the Puzzle. An Analysis of the International Norms* (The Carter Centre 2010)

Mitra, R., Ferguson, J & Nayak, V (eds.) *Implementing Access to information: A practical guide for operationalizing access to information laws* (Commonwealth Human Rights Initiative Revised Edition 2008)

Mendel, T *Designing right to information laws for effective implementation* (World Bank Group, Right to information working paper series 2015)

Statement of Principle	Key Features
Principles	
<p>1. The RTI/FOI legal framework should provide a clear statement that creates or acknowledges a legally enforceable right to access government information. This statement could take a number of forms, including a statutory provision that states every person has a right to access government information, subject to limits set out in the legislation.</p>	<p>Explicit statement of rights In principle, the RTI/FOI legal framework would provide a clear statement that creates or acknowledges a legally enforceable right to access government information and a corresponding obligation on agencies to disclose information.</p> <p>Objects clause Ideally, the RTI/FOI legal framework would include a clear statement of its intended objects, for example:</p> <ul style="list-style-type: none"> • encouraging proactive release of information by government agencies; • promoting openness and accountability of Government and Ministers; • providing members of the public with an enforceable right to access government information; • ensuring access is restricted only when there is an overriding public interest against releasing that information. <p>Presumption of disclosure In principle the RTI/FOI legal framework would establish a clear presumption that all information held by public entities is subject to disclosure, subject only to specific limited exemptions set out in the legislation. Ideally, the framework would establish an obligation for public entities to disclose information, subject to expressly stated exemptions or an overriding public interest against disclosure, and provide the public with a corresponding right to request information. Individuals would not need to demonstrate a specific interest in the information.</p>
<p>2. Building on the principles that there is a legal right to access information and</p>	<p>Ideally, the RTI/FOI legal framework would provide for different avenues for release of information, with formal applications to access information only required where information is not able to be released under</p>

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<p>that the RTI/FOI legal framework should contain a presumption of access:</p> <ul style="list-style-type: none"> a. The making of a formal application should only be required where information is not able to be released under an alternative pathway. b. The RTI/FOI legal framework should provide for alternative mechanisms for accessing government information subject to an overriding public interest against disclosure 	<p>an alternative pathway.</p> <p>Mandatory Publication and Proactive Release In principle, the RTI/FOI legal framework would establish an obligation for public entities to publish specific categories of information. The framework would establish both a general obligation to publish, and the key categories of information that must be published.</p> <p>In principle, the RTI/FOI legal framework would enable public entities to proactively release information that it holds unless there is an overriding public interest against disclosure. This would not allow a public entity to override legislative secrecy provisions.</p> <p>Informal requests In principle, the RTI/FOI legal framework would enable public entities to release information that it holds in response to an informal request unless there is an overriding public interest against disclosure.</p>
<p>3. The RTI/FOI legal framework should be interpreted and applied so as to further its stated objects, and the powers</p>	<p>In principle, the RTI/FOI legal framework would include a requirement that the framework is to be subject to a broad and beneficial interpretation.</p>

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<p>and discretions under the legislation should be exercised to facilitate and encourage access to information.</p>	
<p>Scope and Mandate</p>	
<p>4. The RTI/FOI legal framework should clearly indicate those public entities to which the scheme applies.</p>	<p>In principle, the RTI/FOI legal framework would extend to all public entities within the jurisdiction. Ideally, this would include:</p> <ul style="list-style-type: none"> • the executive branch • Ministers and their officers • publicly owned and controlled companies or enterprises • public authorities, including constitutional, statutory and oversight bodies • local government and universities • courts and tribunals but not in respect to judicial functions/tribunal proceedings. <p>Ideally, 'Public entity' would be broadly defined to include all public entities delivering public functions, regardless of whether they have been established under legislation, or some other type of administrative arrangement.</p> <p>Ideally, the framework would also include mechanisms to extend application to relevant documents held by private entities that perform functions of a public nature or receive significant public funding.</p>
<p>5. Members of the public should be able to request access to all information</p>	<p>In principle, the RTI/FOI legal framework would provide a definition of 'information' that is broad and technology neutral. Ideally, this definition should:</p>

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<p>that is in the possession, or under the control, of a 'public entity' on the date access is sought regardless of the form in which the information is stored, who created the information, how the agency acquired the information or the age of the document.</p>	<ul style="list-style-type: none"> • encompass all information that is held, possessed or under the control, of the public entity on the date access is sought regardless of the form in which the information is stored, who created the information, how the public entity acquired the information or the age of the information, and • remain current and responsive to changes in technology and government service delivery.
<p>6. The RTI/FOI legal framework should only limit access to information where disclosure would be contrary to the public interest.</p>	<p>Ideally, the RTI/FOI legal framework should operate without exemptions. Where any exemptions are included in the RTI/FOI legal framework, they should be clearly and narrowly drawn.</p> <p>Exemptions may apply to specified categories of information, specified public entities or specified functions of a public entity.</p> <p>Common exemptions across jurisdictions and outlined in international standards include:</p> <ul style="list-style-type: none"> • national defence and security • cabinet in confidence • judicial functions • legal professional privilege. <p>Ideally, the RTI/FOI legal framework would permit public entities to neither confirm nor deny the existence of information if doing so would prejudice one of the protected interests or for example where information is not held/does not exist.</p>

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Operation	
<p>7. The RTI/FOI legal framework should clearly articulate the decision making process for considering an application and factors to be considered under the public interest balancing test.</p>	<p>Where the RTI/FOI legal framework refers to disclosure being contrary to the public interest, the framework should clearly articulate the factors to be considered in assessing if disclosure is not in the public interest. The factors in favour of disclosure should not be limited:</p> <ul style="list-style-type: none"> • factors favouring disclosure in the public interest could include that disclosure could promote, contribute to or inform: open discussion and scrutiny of public affairs and government accountability; public debate on matters of serious interest; oversight of expenditure of public funds; the administration of justice; or innovation and the facilitation of research. • factors favouring non-disclosure in the public interest should be limited and could include that disclosure could prejudice, impede or harm: law enforcement or public safety; administration of justice; protection of the environment; an individual’s privacy or personal safety; or commercial business affairs <p>In principle, the RTI/FOI legal framework would also include an exhaustive list of irrelevant factors. These may include that disclosure that could cause or result in: embarrassment or loss of confidence in government; the document being misunderstood or misinterpreted; expose a public entity to legal proceedings or ‘mischievous conduct’ by the applicant.</p> <p>Ideally, the RTI/FOI legal framework would also articulate the steps to be undertaken as part of the assessment, consistent with the objects: commence with a presumption in favour of disclosure; identify and disregard any irrelevant factors; identify factors favouring disclosure; identify factors favouring non-disclosure; and balance factors favouring disclosure against factors favouring non-disclosure in light of the presumption in favour of disclosure.</p>
<p>8. The RTI/FOI legal framework should detail</p>	<p>In principle, the RTI/FOI legal framework would give consideration to the obligations on ‘public entities’. Consistent with the objects these could include:</p>

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<p>the compliance obligations of public entities.</p>	<ul style="list-style-type: none"> • to establish a mandatory publication scheme for specified categories of information • to publish an annual information statement setting out, minimum requirements for example the public entity’s functions, organisational structure, and sufficiently detailed categories of electronic and hard copy documents held by the public entity • to actively promote compliance with FOI/RTI obligations. Relevant steps to promote compliance could include the appointment of dedicated officers responsible for ensuring the public entity’s compliance with FOI/RTI obligations, ensuring appropriate staff training in FOI/RTI obligations, and promoting awareness of FOI/RTI obligations to the public entities’ clients and the public • to provide assistance to applicants. This may include assistance to reframe requests that are vague, unduly broad or otherwise need clarification, and provide appropriate assistance to applicants who have special needs • to refer the applicant to another public entity if it is known that the information/document is held by that other public entity • to conduct adequate and reasonable searches, and • to comply with minimum standards for the management of records.
<p>9. The RTI/FOI legal framework should articulate the arrangements for streamlined, simple, fair and cost-effective applications.</p>	<p>In principle, the RTI/FOI legal framework would:</p> <ul style="list-style-type: none"> • articulate the procedural requirements for making an application • detail the minimum requirements for a valid application. While official forms may be provided and their use encouraged, a request should be accepted in any format that provides sufficient information for the public entity to identify the information sought and communicate back to the applicant • clearly state that applicants should not be required to provide reasons for making their application • detail procedures for consulting with third parties expected to have substantial concerns about

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	<p>information to which access is sought</p> <ul style="list-style-type: none"> • impose clear timeframes for the processing of applications, with extensions of time available with the consent of the applicant • require public entities to provide adequate written reasons for the decision when refusing to provide access to information and advise the applicant of any review mechanisms available to them • establish that applicants have the right to request an internal review by the public entity but this should not be mandatory • allow the public entity to refuse to deal with an application if it would require an unreasonable and substantial diversion of its resources or where the application is a repeat of an earlier application in a material way. • narrowly define the right of an agency to refuse to process an application where the information sought is exempt from the face of the request • allow a public entity to redact information from a document or create a new document where this would facilitate release • allow a public entity to make a decision to refuse access on the basis that information does not exist or cannot be found only after having taken reasonable steps to locate the requested information • establish procedures for an internal review that are simple, free and require the review to be completed within stipulated timeframes • establish rights and procedures for a person to complain to the Office Holder about the conduct of a public entity in the exercise of its functions under the RTI/FOI legal framework • articulate clear and objective criteria that must be established for declaring an applicant vexatious. Based on those criteria, a public entity may seek a declaration from the relevant authority that a

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	<p>person is a vexatious applicant. The public entity may also subsequently seek a revocation of such a declaration, and</p> <ul style="list-style-type: none"> • provide some flexibility to enable a public entity to remake a decision during the internal or external review process.
<p>10. The RTI/FOI legal framework should provide a right of external review to the Office Holder and/or Judicial Authority.</p> <p>11. The framework should detail the procedures for an external review.</p>	<p>In principle, the RTI/FOI legal framework would give consideration to the necessary arrangements to facilitate the external review of a public entity's decision, including:</p> <ul style="list-style-type: none"> • that an applicant has the right to lodge a request for an external review of a public entity's decision with the Office Holder • clearly identify those decision of a public entity that are reviewable decisions • clear procedures, including timeframes, for processing an external review • that the public entity generally bears the onus of demonstrating that its decision on an application was justified with any exceptions clearly articulated • that decisions of the Office Holder are binding and enforceable • that the Office Holder has the power to order appropriate remedies for the applicant and impose appropriate structural measures on the public entity • that no fee can be imposed for an application for external review • that an applicant has a right of appeal to a judicial authority on a question of law • the Office Holder should have a well-defined and publicised complaints process for complaints about the FOI/RTI practices of public entities, and • that the Officer Holder may make a declaration that a person is a vexatious applicant. The Office Holder may also subsequently revoke a declaration. Ideally, the framework would articulate clear and objective criteria for the making of such a declaration.

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<p>12. The RTI/FOI legal framework should clearly articulate any offences under the framework and the relevant penalties.</p> <p>13. The framework should also articulate any protections that apply.</p>	<p>In principle, the RTI/FOI legal framework would give consideration to:</p> <ul style="list-style-type: none"> • any offences under the framework and the sanctions that may be imposed. Offences may include: <ul style="list-style-type: none"> – unduly influencing or obstructing the Office Holder or staff of the independent oversight body – failing to include information that a person knew to exist or intentionally providing misleading records or information (or recklessly failing), – unauthorised concealment or destruction of records – directing unlawful action, or recklessly/knowingly make a decision known to be contrary the RTI/FOI legal framework • providing the Office Holder with the power to address systematic failure by a public entity to comply with its obligations under the framework • articulating the legal protections that apply to those who, in good faith, release information pursuant to the framework, or release information that discloses wrongdoing, • providing the Office Holder with the power to promulgate Standards as a mechanism to facilitate the proper administration of the legislation, and • providing that the Office Holder and staff of the independent oversight body are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the framework.
<p>14. Access to information should be free of barriers to enable all citizens to exercise their rights.</p> <p>15. Imposing an application fee may be a disincentive to some applicants,</p>	<p>Ideally, where application fees or other charges are imposed, the RTI/FOI legal framework would provide:</p> <ul style="list-style-type: none"> • for a centrally set modest application fee • that search or processing charges may be imposed and that such charges must be fair and reasonable • that a public entity may impose a charge for the costs of document reproduction, limited to cost-recovery or less, and

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<p>particularly those who are disadvantaged.</p> <p>16. The RTI/FOI legal framework should require that any application fees and charges imposed are to be kept as low as possible.</p>	<ul style="list-style-type: none"> for the waiver, reduction or refund of fees and charges for impecunious applicants or on public interest grounds or financial hardship.
Role of Information Commissioner	
<p>17. The RTI/FOI legal framework should provide for an independent statutory Office Holder and establish an independent oversight body to support the functions of the Office Holder.</p> <p>18. The office holder should have regulatory and review functions designed to promote compliance with the RTI/FOI system, but may also have other functions, including</p>	<p>In principle, the RTI/FOI legal framework would provide for an office responsible for promoting compliance with the Act through the exercise of review and other regulatory powers.</p> <p>The framework would clearly articulate the functions of the Office Holder, including: advocacy functions; educative functions; awareness and information functions; performance monitoring functions; and any additional functions necessary for the operation of the RTI/FOI system.</p> <p>Ideally, the RTI/FOI legal framework would provide that the Office Holder has statutory independence from the executive government whose decisions it is responsible to review. The Office Holder would have security of tenure, with their term of appointment able to be terminated only on limited grounds, such as misbehaviour or incapacity. The Office Holder would not be subject to direction.</p> <p>Ideally, the RTI/FOI legal framework would establish an appropriately resourced independent oversight body to assist the Office Holder to undertake their functions in a timely manner.</p>

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<p>advocacy functions; awareness and information functions; performance monitoring functions; and additional functions necessary for the operation of the RTI/FOI system.</p>	
<p>19. The RTI/FOI legal framework should provide the Office Holder with a range of powers designed to allow them to promote and enforce compliance with the RTI/FOI legal framework.</p>	<p>In principle, the RTI/FOI legal framework would give consideration to the range of powers required by the Office Holder to allow them to promote and enforce compliance with the RTI/FOI legal framework. Ideally, these would include powers to:</p> <ul style="list-style-type: none"> • conduct merits-review of RTI/FOI decisions, and make binding decisions in the place of the original decision maker, including the power to order appropriate remedies, to make binding and non-binding recommendations to improve a public entity’s RTI/FOI systems and make referrals to the relevant judicial authority • receive and investigate complaints about the RTI/FOI activities of public entities, and to make binding and non-binding recommendations to improve compliance with the framework, and • conduct investigations on the Office Holder’s own initiative, with an ability to make binding and non-binding recommendations to improve compliance with the framework.
<p>20. An effective RTI/FOI legal framework requires that all parties are aware of the rights and responsibilities enshrined in the RTI/FOI legal framework.</p>	<p>In principle, the RTI/FOI legal framework would give consideration to the range of powers required by the Office Holder to fulfil its advocacy functions including to:</p> <ul style="list-style-type: none"> • be a champion of open government and to promote appropriate open access to information. • provide advice and publish materials to assist public entities to fulfil their compliance obligations • commission external research, and

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<p>Advocacy about the importance and benefits of effective access policies assists to promote effective compliance.</p> <p>21. The Office Holder should play a critical role in supporting integrity, transparency and accountability, and promoting information flow between public entities and the community.</p>	<ul style="list-style-type: none"> • provide information and assistance to citizens and public entities to foster an understanding of the rights and responsibilities created by the framework.
<p>22. The RTI/FOI legal framework should empower the Office Holder to monitor and audit the RTI/FOI policies and practices of public entities and</p> <p>23. The RTI/FOI legal framework should require public entities to report to the Office Holder on those policies and practices.</p>	<p>In principle, the RTI/FOI legal framework would give consideration to the range of powers required by the Office Holder to monitor and audit a public entity's performance and compliance with the RTI/FOI legal framework, , including powers to.</p> <ul style="list-style-type: none"> • assist agencies to publish information, and review, investigate and monitor compliance with any information publication scheme • publicly assess performance of public entities • make recommendations to parliament • table special reports in parliament, and • publish reports regarding any monitoring or auditing activities.

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<p>24. The RTI/FOI legal framework should provide that the Office Holder has the necessary power and mandate to do all things necessary or convenient in connection with performance of the Office Holder's functions.</p>	<p>In principle, the RTI/FOI legal framework would provide the Office Holder with all necessary powers and mandate to do all things required to effectively exercise the functions of merit review, compliance monitoring and auditing. Ideally, the framework would provide that the Office Holder shall have the powers of a Royal Commission.</p>
<p>Statutory oversight</p>	
<p>25. To ensure that the FOI/RTI legal framework remains operationally effective and continues to meet its stated objectives, it should be subject to legislative review at regular intervals.</p>	<p>In principle, the RTI/FOI legal framework would provide that a review of the framework is to be undertaken every five years, with a report on the outcome of the review to be tabled in parliament.</p>
<p>26. To ensure transparency in all aspects of the operation of the FOI/RTI legal framework, reporting requirements should be established for both the Office Holder and all public entities which are</p>	<p>Ideally, the RTI/FOI legal framework would:</p> <ul style="list-style-type: none"> • require public entities to report annually on the actions they have taken to implement their FOI/RTI obligations, including reporting of statistical data on applications received. • require the Office Holder to report annually to parliament on the operation of the framework, and • require the Office Holder to report annually on the activities of the independent oversight body.

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subject to the framework.	
27. The RTI/FOI legal framework should empower the Office Holder to report to the Parliament	In principle, the RTI/FOI legal framework would empower the Office Holder to make a special report on any matter relating to the functions of the Office Holder to the Parliament. Such a report may include a recommendation that the report be made publicly available.
28. The RTI/FOI legal framework provides for judicial review of decisions of the Officer Holder on questions of law.	Ideally the Office Holder is the final merit review decision maker for access applications. However, there should be appeal to an appropriate judicial authority on any questions of law related to the Office Holder's formal external review decisions.

Appendix A - Common terms

Term	Definition
Applicant	The individual or organisation who makes a request or application for access to information
Application	A request for access to government information made under the RTI/FOI legislation
Complaint	An expression of dissatisfaction with the practice of an agency, excluding a formal decision made in response to an application for access to information
Decision maker	An officer of a public entity responsible for processing and determining an application to access information
Exemptions	Refers to government information that the legislature has determined should not be accessible under the RTI/FOI legal framework
Independent oversight body	The agency established under the RTI/FOI legislation to support the Office Holder
Informal request	An alternative information access mechanisms that is not a formal application
Judicial authority	A Court or Tribunal empowered to receive applications for review under the RTI/FOI legislation
Office Holder	The independent statutory Office Holder whose responsibilities include at a minimum review of RTI/FOI decisions (e.g. Ombudsman or Information Commissioner)
Public entities	Any government agency, statutory body or other organisation which is subject to the RTI/FOI legislation
RTI/FOI	Right to information or freedom of information
RTI/FOI legal framework	The legislation, statutory instruments, or case law that provides a right of access to information