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FOI implications for local government under the ICAC framework

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What I will speak about

- Overview of the FOI Act
- What has changed in FOI under the new ICAC framework for councils?
 - *ICAC Act 2012*
 - *Whistleblowers Protection Act 1993*
 - Code of Conduct for Elected Members
 - Investigations under the *Ombudsman Act 1972*



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FOI Act - objects and administration

Objects of the FOI Act

- openness, accountability of agencies
- facilitate effective participation by the public in the processes of making and administering policy and law

Administration of the FOI Act

- interpret and apply the Act to facilitate the objects
- exercise discretions to favour disclosure, and not breach privacy

Note sections 6, 8 of the Local Government Act

- council to act as a representative, informed and responsible decision-maker in the interests of the community
- council must provide open, responsive and accountable government

Recent case law - agencies are mere custodians of documents:

DPLG v Chapman [2012] SADC 120



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FOI Act process

- applicant applies to the agency for access to documents
- agency makes a determination about whether to give access
- applicant may apply for internal review of the determination, if dissatisfied
- agency makes an internal review determination
- applicant may seek an external review by a review authority such as the Ombudsman if dissatisfied, or appeal the determination to the District Court
- applicant and agency may appeal to the District Court against the Ombudsman's determination
- third parties also have review and appeal rights if the documents concern their personal, business or professional affairs



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FOI Act - determinations

Upon receipt of an application for access to documents, an agency can make different determinations, such as:

- s14A - extend the time to deal with an application
- s18(1) - application is too broad and will unreasonably divert resources
- s18(2a) - application is an abuse of the right of access
- s 36 - amend personal records about the applicant
- s 23 - give access
- s 23 - refuse access to 'exempt' documents, under Schedule 1



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Determination to refuse access to 'exempt' documents - section 23(2)(e)(f) FOI Act

A notice of a determination to refuse access to exempt documents must:

- relate the contents of the documents to all of the elements in the exemption clause in Schedule 1
- explain the reasons for refusal, and not just state the exemption clause in Schedule 1
- give the factual basis for the reasons and refer to the sources of information on which those facts are based
- if there is a public interest test in the exemption clause, show reasons why on balance, disclosure would be contrary to the public interest (that is, weigh up the factors in favour and against disclosure)



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What has changed in FOI for councils under the ICAC framework?

- very little
- no significant modification to FOI Act provisions
- councils are still ‘an agency’ for the purposes of the FOI Act and have responsibilities under the Act
- FOI processes are essentially the same
- there may be greater impact or interest because of:
 - the amendments to the Local Government Act (Schedule 3 to the ICAC Act), and
 - the Mandatory Code of Conduct for Elected Members



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Amendments to the FOI Act (Schedule 3, ICAC Act)

Extension of the definition of 'agency' to include:

- regional development assessment panels
- council development assessment panels under the *Development Act 1993*

This means that

- a DAP is liable to receipt of an FOI application and must process it
- if council receives an FOI application for documents that
 - are not held by council but are held by the DAP; or
 - are held by council but are more closely related to the functions of the DAP,

the council may transfer the application (section 16 FOI Act)



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Amendments to the FOI Act (Schedule 3, ICAC Act)

- OPI and ICAC are exempt agencies under Schedule 2 to the FOI Act
- This means that a person cannot apply to OPI or ICAC under the FOI Act for access to documents
- Note that the Ombudsman is also an exempt agency under the FOI Act (FOI applications cannot therefore be made to the Ombudsman)



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Where an agency holds OPI / ICAC documents ...

Can an applicant nonetheless request FOI access to OPI / ICAC documents which are held by an 'agency'?

- strict provisions of sections 54, 56 of the ICAC Act
- it is an offence to directly or indirectly disclose any information about an OPI/ICAC complaint, except as authorised by the Commissioner
- depending on the wording of the FOI application, this may mean that the agency's determination should:
 - claim the documents as exempt under clause 12(1) (secrecy provisions in other legislation), or
 - neither admit or deny the existence of documents (see section 23(3) and (4) FOI Act)
- care needs to be taken to not disclose exempt matter in the notice of determination, if such disclosure would be an offence



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Where an agency holds Ombudsman investigation documents ...

Can an applicant nonetheless request FOI access to these documents?

- Ombudsman investigations must be conducted in private (section 18(2) Ombudsman Act)
- it is an offence for a person/council, to whom information has been disclosed by the Ombudsman in an investigation, from using the information for a purpose other than that for which it was disclosed (section 26(4) Ombudsman Act)
- again, this may mean that the agency's determination should:
 - claim the documents as exempt under clause 12(1) (secrecy provisions in other legislation)
 - care needs to be taken not to reveal exempt matter in a determination if this¹¹ would be an offence.



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Whistleblowers Protection Act 1993

The Whistleblowers Protection Act is still operative, although the ICAC is charged with conducting a review of the Act

If an FOI application requests documents which reveal the identity of a whistleblower (that is, a person who makes 'an appropriate disclosure of public interest information')

and

the whistleblower has not given consent for their identity to be revealed, then the FOI Act does not apply (s7(2) Whistleblowers Protection Act)



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Mandatory code of conduct for elected members

- has the force of legislation (s 63 Local Government Act)
- is divided into three parts:
 - Part 1 - Principles
 - Part 2 - Behavioural Code
 - Part 3 - Misconduct
 - Appendix - Criminal matters
- makes no specific mention of the FOI Act
- so, where an FOI application is made, council must apply the FOI Act in the usual way



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FOI access to documents about code of conduct complaints ...

- note that at the conclusion of an investigation, a breach of Part 2 and Part 3 of the Code must be reported at a public meeting
- the Ombudsman's report under Part 3, must also be provided at a public meeting
- these reports are therefore available to the public, and a person need not resort to the FOI Act to obtain access
- in the interests of accountability, the Ombudsman has a policy of erring on the side of openness and publishing his final reports on investigations on the office's website and Austlii



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FOI access to documents about code of conduct complaints ...

- there may be grounds for refusing FOI access to documents while a code of conduct investigation is current
- if the Ombudsman is investigating a complaint about council, for example, it is an offence for a person/council to whom information has been disclosed, from using the information for a purpose other than that for which it was disclosed (section 26(4) Ombudsman Act)
- this would include releasing a document under the FOI Act
- e.g. if information is disclosed by the Ombudsman to a person or a council to enable them to participate in the investigation, the party must maintain the confidentiality of that information. Failure to do so may be an offence (penalty \$20 000)



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FOI access to documents about code of conduct complaints ... Ombudsman investigations

- however, the Ombudsman can authorise disclosure of information if it is in the public interest (s 26 Ombudsman Act)
- unless the Ombudsman has authorised access to investigation related documents, it is likely that council would claim the Ombudsman documents are exempt under clause 12(1) (secrecy provisions in other legislation - see s 26 Ombudsman Act)



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Take home message ...





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