Supplementary submission of the NSW Privacy Commissioner to the GIPA Review

The Issue

Parliament's intention that the GIPA Act balance the competing values of access to information and protection of privacy related interests, may not be being put into effect in at least one respect. The second reading speech makes the intention of Parliament clear. The relevant sections of the speech are set out in **Attachment A**.

This submission concerns the operation of section 94 of the GIPA Act at **Attachment B**. Section 94(2) of the GIPA Act requires the Information Commissioner to consult with the Privacy Commissioner where the Information Commissioner makes a recommendation against a decision of an agency that concerns a privacy-related public interest consideration against disclosure. The concern is that sections 92, 93 and 95 may be used to make recommendations that are not in line with decisions of agencies and involve privacy related considerations against disclosure.

The Context

The *Report on the operation of the Government Information (Public Access) Act 2009: 2014-2015* identifies that most applications were for personal information. 55% of decisions of agencies made under the GIPA Act in 2014-2015 related to personal information. There has been a 120% increase in the number of decisions relating to applications for personal information, from 3,247 in 2010/11 to 7,133 in 2014/15 (page 36 – highlighted on **Attachment C**).

In spite of this increase in the number of decisions concerning personal information, *The IPC Annual Report 2014 – 2015* (page 5 - highlighted on **Attachment D**) states:

> *In the reporting period the IPC considered 56 reviews of agency decisions that concerned privacy-related public interest considerations against disclosure. There were no cases in which the Information Commissioner's delegates recommended consultation with the Privacy Commissioner to facilitate a recommendation against a decision of an agency not to release personal information.*

The Privacy Commissioner has not been consulted in the 2015-2016 year. Publicly available review reports indicate that the last time the Privacy Commissioner was consulted under s94(2) of the GIPA Act was prior to September 2013.

A response to a Question on Notice provided to the Standing Committee on Law and Justice, *Inquiry into remedies for the serious invasion of privacy in NSW*, Hearing 30 October 2015 at **Attachment E** gives some indication as to why this may be occurring. It appears that recommendations may be made by the Information Commissioner under sections 92 and 93 of the GIPA Act that cover a range of matters in a review, such as the need to justify decisions and conduct adequate searches. It seems that where there are issues in a review other than privacy related concerns, recommendations may be made under section 92 or 93 of the GIPA Act. These sections do not require consultation with the Privacy Commissioner even where those recommendations concern a privacy related consideration against disclosure. The concern is that recommendations under section 92 and 93 may not align with

the decision of the agency that is under review, may concern privacy related interests, and may be made without consultation with the Privacy Commissioner.

An Example

A practical example of the use of sections 92 and 93 when a recommendation under section 94 might be able to made, can be seen in the attached publicly available review report at **Attachment F**. We have also included an analysis of the relevant sections of that report. The review concerns, in part, a decision of an agency to withhold some information because of a privacy-related public interest consideration against disclosure.

The review report finds that the privacy related consideration against disclosure relied on by the agency, which was the only consideration against disclosure of some of the information withheld, could not have applied to that information. It follows that there could not be an overriding public interest against disclosure of that information because the only consideration against disclosure of it did not apply.

However, the recommendation in respect of this information is made under section 93 of the GIPA Act. In our view this ought to have been a recommendation under section 94 of the GIPA Act, and because it concerns a privacy related interest, consultation with the Privacy Commissioner should have occurred under section 94(2) of the GIPA Act.

Conclusion

This may indicate a systemic issue for consideration in the context of the review of the GIPA Act. The adoption of Parliament's intention to create a consultative regime mindful of the need to balance access to government information (particularly open access) and the protection of privacy interests, may not be operating as intended. Section 94(2) is intended to facilitate this consultative balance of sometimes competing interests, however the information attached indicates that this consultative balance may not be operating as intended.

Consultation between the Commissioners over matters within their areas of expertise is a general feature of the Information Access and Privacy regime in New South Wales. The purpose of this, in part, is to maintain the confidence of agencies and the community in the appropriate management of personal and non-personal information. Consultation is a central feature of the regime and it is imperative that the competing interests of access to information and privacy related interests are appropriately balanced to ensure the ongoing success of this system, and confidence in it.

The interaction between the GIPA Act and the PPIP Act is at the heart of this issue. The issue is an important one in the context of the GIPA review. Section 130 (1A) of the GIPA Act appears to mandate the inclusion of issues such as this in the review of the GIPA Act.

Sean McLaughlan, Senior Advisor is the relevant contact officer for this submission. Sean may be contacted on sean.mclaughlan@justice.nsw.gov.au or (02) 9258-0820.

ATTACHMENT A: EXTRACTS FROM SECOND READING SPEECH - PRIVACY AND GOVERNMENT INFORMATION LEGISLATION AMENDMENT BILL 2010

"The Government has decided instead that there will be [one] office with two Commissioners of equal status. This will maintain the status and role of the Privacy Commissioner as an independent privacy advisor and champion."

"The two Commissioners will continue to exercise discrete functions in relation to privacy and access to Government Information. In accordance with the recommendations of the NSW Law Reform Commission, the bill creates obligations for the Commissioners to consult each other in relation to certain aspects of their responsibilities which may overlap. This will assist in ensuring that both privacy objectives and the objectives of open Government are taken into account so that an appropriate balance is struck between the two when they are in tension."

"The Information Commissioner also has the power to review certain agency decisions and then to make recommendations to agencies in relation to those decisions, including decisions to provide or refuse access to Government Information. Item [2] of schedule 3 requires the Information Commissioner to consult with the Privacy Commissioner before making a recommendation that involves a privacy-related public interest consideration against disclosure."

"Finally, it acknowledges that privacy legislation and open Government legislation sometimes overlap, and sometimes come into tension, and creates mechanisms for these competing values to be balanced where such tension exists."

Source:
http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/e7a03a03fb59cd87ca25774b0019c595/$FILE/LC%207110.pdf

Second Reading

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [3.30 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

Last year, the Government introduced the *Government Information (Public Access) Act 2009*, which is to commence on 1 July this year. That Act delivers on the Government's commitment to improve the transparency and integrity of Government in New South Wales. It does so by promoting greater access to Government information. With that Act, the Government also introduced the *Government Information (Information Commissioner) Act 2009*, which establishes the independent Office of the Information Commissioner (OIC), led by the Information Commissioner, who will be an independent "champion of open Government".

NSW also has a unique record in relation to privacy. In 1975 it was the second jurisdiction in the world to enact privacy legislation. And in 1998 the Labor Government introduced the *Privacy and Personal Information Protection Act 1998* which established the first enforceable standards for the New South Wales public sector when collecting, using and disclosing individuals' personal information. The Privacy Commissioner, a statutory office holder under the Act, is the "champion of privacy", who provides authoritative advice on privacy-related matters.

Questions about the privacy of personal information and access to Government information will naturally overlap. They both involve rights to access information and impose obligations on Government in the way that it deals with information. They are both concerned with transparency and with holding Government accountable. They may also be in tension with each other, for example where a person seeks access to Government information which includes a third party's personal information. There will sometimes be a need to strike a balance between the importance of disclosure, in the interests of open Government, and the importance of protecting individuals' privacy.

In recognition of this relationship between the values underpinning privacy legislation and legislation about open Government, this bill merges the Office of the Information Commissioner and Privacy NSW to create a significant new body, the Information and Privacy Commission. The new Information and Privacy Commission will be a "one-stop shop" for the people of New South Wales in matters involving access to Government information, privacy and personal information. The creation of this single office gives effect to the view of the NSW Law Reform Commission, set out in its 2009 Report number 125, *The Offices of the Information and Privacy Commissioners*, that a single office should administer legislation about privacy and access to Government information.

As the Law Reform Commission pointed out, the creation of a single office will help to ensure that agencies and individuals receive consistent information and advice. It will also allow for co-ordinated training and assistance to be provided to agencies. By providing one point of contact for these matters, "referral fatigue" should be reduced. Also, shared corporate services should result in operational efficiencies.

I turn now to the key features of the bill.

Part 4.3 of schedule 4 creates the Information and Privacy Commission, replacing the Office of the Information Commissioner. The Information Commissioner will be the Head of the Commission, with responsibility for managing its budget and administration, and employing and allocating staff. Item [23] of schedule 1 transfers the existing staff of the Privacy Commissioner to the Information and Privacy Commission, where they will be employed alongside the staff of the Information Commissioner.

The Privacy Commissioner will be located in the Information and Privacy Commission, and will no longer be administratively dependent on the Department of Justice and Attorney General This will strengthen the ability of the Privacy Commissioner to fulfil his or her statutory functions.

Given the importance of the position of Privacy Commissioner, and to ensure consistency of appointments in the Information and Privacy Commission, item [3] of schedule 1 amends the *Privacy and Personal Information Protection Act 1998* so that the Privacy Commissioner is to be appointed and removed in the same manner as the Information Commissioner. This implements one of the Law Reform Commission's recommendations. Like the Information Commissioner, the Privacy Commissioner will be appointed subject to veto by a joint parliamentary committee and will only be eligible to be re-appointed once. The Commissioner will only be able to be removed from office following a resolution of both Houses of Parliament.

The NSW Law Reform Commission recommended that the Privacy Commissioner should be a Deputy Information Commissioner. The Commission's view was that the Information Commissioner rather than the Privacy Commissioner should report to Parliament on the operation of privacy legislation and that the exercise of certain functions of the Privacy Commissioner should require the approval of the Information Commissioner.

The Government has decided instead that there will be on office with two Commissioners of equal status. This will maintain the status and role of the Privacy Commissioner as an independent privacy advisor and champion. However, the Information Commissioner will have additional responsibilities as Head of the Commission. This model has the strong support of the Acting Privacy Commissioner and the Information Commissioner.

To ensure that there are strong and unbiased advocates for both privacy and for access to Government information, the bill provides that the Privacy Commissioner cannot be the same person as the Information Commissioner, and vice versa.

Each Commissioner will report to Parliament on their respective functions and the operations of their respective legislation. These reports will be included within the annual report of the Information and Privacy Commission. Item [12] of schedule 1 creates a new obligation on the Privacy Commissioner to report to Parliament on the operation of the *Privacy and Personal Information Protection Act 1998*. This reporting requirement aims to ensure that Government agencies are complying with that Act. The reporting obligations of each Commissioner will ensure also that there is transparency and accountability regarding the distribution of resources in the Information and Privacy Commission. Currently, the Privacy Commissioner makes his or her annual report to the Minister rather than to Parliament. Providing for the Privacy Commissioner to report directly to Parliament will enhance the independence of the Privacy Commissioner and place them in the same position as the Information Commissioner.

Item [6] of schedule 1 extends the functions of the Joint Committee on the Ombudsman and the Police Integrity Commission, consisting of members of Parliament, to include oversight not only of the Information Commissioner but also of the Privacy Commissioner. This will assist in ensuring that the Information and Privacy Commission functions effectively as a single office, rendering both Commissioners subject to the same accountability mechanism.

Item [11] of schedule 1 establishes an Information and Privacy Advisory Committee, as recommended by the NSW Law Reform Commission, and abolishes the existing Privacy Advisory Committee. This new advisory committee will advise both the Information Commissioner and the Privacy Commissioner on matters relating to the performance of their functions. A key advantage of having a single advisory committee is that it will be able to consider the areas of overlap and interaction between privacy legislation and open Government legislation.

The composition of the Information and Privacy Advisory Committee adopts the recommendation of the NSW Law Reform Commission and draws on the model for the Commonwealth's Information Advisory Committee. The new Committee will consist of:

- § the Information Commissioner, who will be the chair;
- § the Privacy Commissioner; and
- § the following part time members:
  - ° two senior officers from Government agencies, nominated by the Minister in consultation with relevant Ministers;
  - ° four people, not from Government agencies but nominated by the Minister:
    - § two of whom have a special knowledge of, or interest in, matters affecting access to Government information; and
    - § two of whom have special knowledge of, or interest in, matters affecting the privacy of persons.

The two Commissioners will continue to exercise discrete functions in relation to privacy and access to Government information. In accordance with the recommendations of the NSW Law Reform Commission, the bill creates obligations for the Commissioners to consult each other in relation to certain aspects of their responsibilities which may overlap. This will assist in ensuring that both privacy objectives and the objectives of open Government are taken into account so that an appropriate balance is struck between the two when they are in tension.

§ The Information Commissioner has the power to issue guidelines about public interest considerations against the disclosure of Government information, including some which are privacy related. In doing so, item [1] of schedule 3 requires that the Information Commissioner consult with the Privacy Commissioner.

§ The Information Commissioner also has the power to review certain agency decisions and then to make recommendations to agencies in relation to those decisions, including decisions to provide or refuse access to Government information. Item [2] of schedule 3 requires the Information Commissioner to consult with the Privacy Commissioner before making a recommendation that involves a privacy-related public interest consideration against disclosure.

§ Item [4] of schedule 1 requires the Privacy Commissioner, when exercising his or her power to issue guidelines about the Information Protection Principle relating to limits on disclosure of personal information, to consult with the Information Commissioner.

To further assist decision-makers to strike the right balance where privacy and open Government considerations are in tension:

§ Item [3] of schedule 3 gives the Privacy Commissioner the right to appear and be heard in any proceedings before the ADT in relation to a review under Part 5 of the Government Information (Public Access) Act 2009, where such proceedings involve a privacy-based public interest consideration against disclosure. Item [9] of schedule 1 gives the Information Commissioner the same rights in respect of a review under the Privacy and Personal Information Protection Act 1998 involving the provision of access to Government information.

§ Further, when the Minister exercises his or her power to recommend the making of a regulation under the Government Information (Public Access) Act 2009, item [4] of schedule 3 requires the Minister to consult with the Privacy Commissioner when the regulation concerns the protection of individual privacy or a privacy-based public interest consideration against disclosure.

The Joint Committee is currently required to keep under review the public interest considerations against disclosure, set out in the *Government Information (Public Access) Act 2009*. Its role is to ensure that their policy objectives remain valid and the content of the relevant provision remains appropriate for securing those objectives. Item [7] of schedule 3 requires the Joint Committee to consult with the Privacy Commissioner on any review of those public interest considerations against disclosure that concern a privacy-based public interest consideration.

Apart from these important reforms in relation to the role of the Privacy and Information Commissioners and the new Information and Privacy Commission the bill also simplifies and streamlines the right to correct one's personal information held by Government agencies. The right to correct one's personal information is a crucial component of privacy protection. It allows a person to go to an agency and, if the person believes the agency has recorded their information incorrectly, to seek to amend that information. This gives individuals some control over what personal information is held about them.

At present, there are two ways that a person may amend their personal information: one in the *Privacy and Personal Information Protection Act 1998* and another in the *Freedom of Information Act 1989* (to be transferred into Part 6A of the *Privacy and Personal Information Protection Act 1998* on 1 July 2010). Item [10] of schedule 1 removes the latter option, preventing the persistence of two separate regimes for amending personal information which overlap and potentially conflict.

The Freedom of Information Act method of amending personal information provides detailed and prescriptive rules for written applications, with a fee, 21 days for determination or deemed refusal, and review procedures. The second method of amending personal information, under section 15 of *Privacy and Personal Information Protection Act 1998*, is much simpler and more flexible. It simply requires public sector agencies to amend an individual's personal information, at the request of the individual, to ensure that it is accurate. This applies to all "personal information," not just documents. If the agency is not prepared to amend the information (for example, if the agency considers the information is already accurate), the agency must take reasonable steps to attach a Statement from the relevant individual to the information.

The bill abolishes the *Freedom of Information Act* option for amending personal information, as recommended by the NSW Law Reform Commission, and leaves the simpler method as the sole mechanism for amending personal information. This reform acknowledges that there is no necessity or utility in maintaining two separate, and potentially inconsistent, regimes.

Item [2] of schedule 1 provides for amendment of personal information contained in Ministers' records as well as agencies' records. Items [7] and [8] of schedule 1 make clear that in relation to decisions of Ministers or their staff about amending records, internal review will not be available but review will still be available in the Administrative Decisions Tribunal.

The merger of Privacy NSW with the Officer of the Information Commissioner will co-ordinate the activities of the Privacy Commissioner and the Information Commissioner. It will create a one-stop shop for individuals and agencies to seek advice and redress in relation to access to Government information and the protection of the privacy of personal information. It will also create administrative and operational efficiencies. Finally, it acknowledges that privacy legislation and open Government legislation sometimes overlap, and sometimes come into tension, and creates mechanisms for these competing values to be balanced where such tension exists.

I commend the bill to the House.

ATTACHMENT B: S94(2) GIPA ACT

94 Recommendation as to public interest against disclosure

(1) The Information Commissioner may make a recommendation against a decision of an agency that there is an overriding public interest against disclosure of government information.

(2) The Information Commissioner must consult with the Privacy Commissioner before making a recommendation under this section about a decision that concerns a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to section 14).

(3) Despite section 91, the Information Commissioner may disclose information to the Privacy Commissioner in the course of consulting with the Privacy Commissioner under this section.

14 Public interest considerations against disclosure

(1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.

(2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

(3) The Information Commissioner can issue guidelines about public interest considerations against the disclosure of government information, for the assistance of agencies, but cannot add to the list of considerations in the Table to this section.

(4) The Information Commissioner must consult with the Privacy Commissioner before issuing any guideline about a privacy-related public interest consideration (being a public interest consideration referred to in clause 3 (a) or (b) of the Table to this section).

Table

3 Individual rights, judicial processes and natural justice There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects: (a) reveal an individual's personal information, (b) contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* ,

What information was asked for?

Most applications were for personal information

In 2014/15 across all sectors (Figure 18):

- 55% of outcomes related to personal information applications;
- 38% of outcomes related to applications for other than personal information; and
- 7% of outcomes related to applications for both types of information.

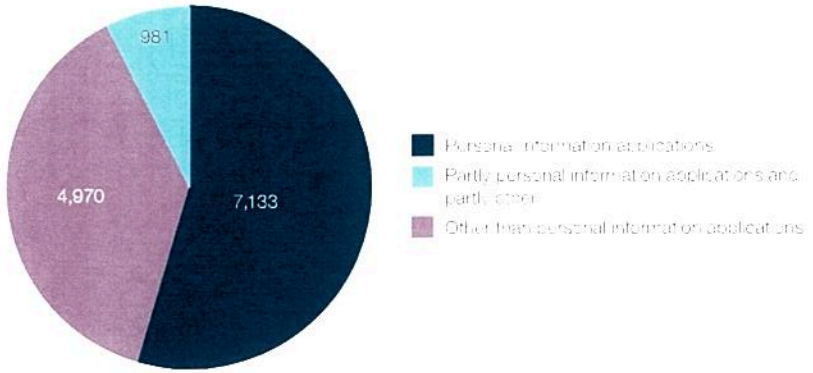
As Figure 19 shows, the distribution of outcomes across application types was consistent with 2013/14. There has been a 120% increase in the number of outcomes relating to applications for personal information, from 3,247 in 2010/11 to 7,133 in 2014/15.

The type of information sought varied across sectors

Different sectors experienced markedly different patterns of outcomes in 2014-15. In the government sector, over 60% of outcomes were for applications for personal information. As Figure 20 shows, this percentage fell to 31% if outcomes relating to the NSW Police Force were excluded (as over 90% of outcomes for that agency related to applications for personal information). This pattern of use has been identified for the first time and the IPC will examine it further.

In the council sector, over 80% of outcomes related to applications for other than personal information.

Figure 18: Outcomes by type of information applied for, 2014/15



"What information was asked for?" is reported and measured by the requirement for agencies to report on the number of outcomes for applications made for personal information, other than personal information or a combination of both types of information from Table B, Schedule 2 of the GIPA Regulation.

Figure 19: Number of outcomes by type of information applied for, 2010/11 to 2014/15

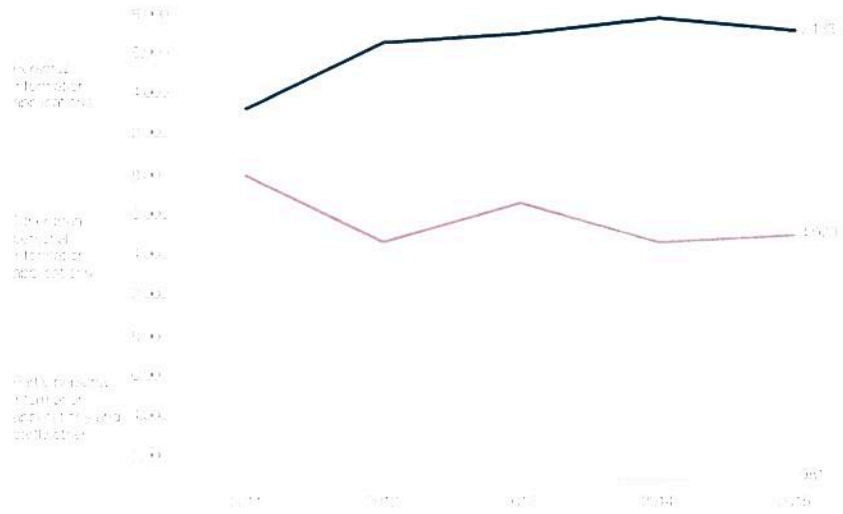
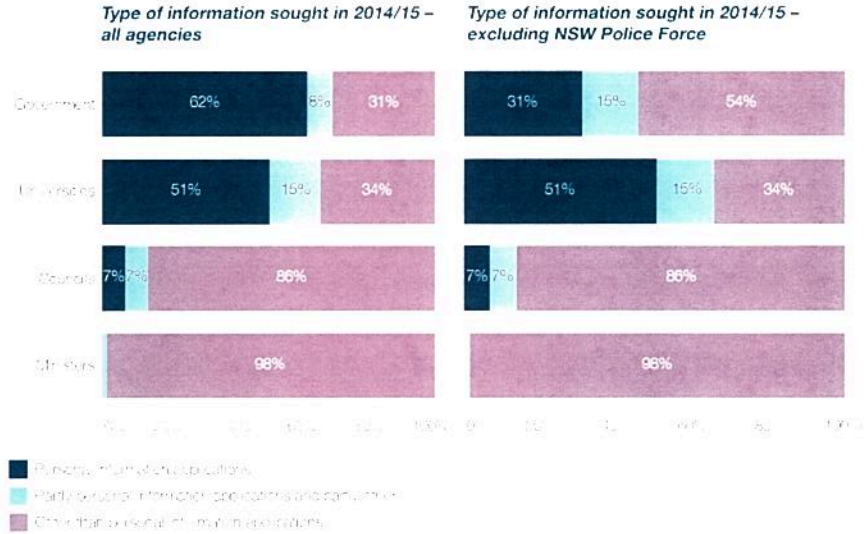


Figure 20: Percentage of all outcomes by type of information applied for, including and excluding NSW Police Force data, 2014/15



Chief Executive Officer and Information Commissioner – overview

Achievements and Report to NSW Parliament

The IPC has developed an advanced appreciation of the balance between information access and privacy, and through this integrated approach authoritatively regulates citizens' fundamental rights.

Our first five years

As we move towards our five year anniversary it is important to review the first years of operation at the Information and Privacy Commission (IPC). The IPC Annual Reports since 2010 – 2011 to date have provided authoritative inputs for analysis.

The inaugural Information Commissioner described the establishment of the IPC as a merger and heralded the 'single door' model through which service to the public and government agencies is central to the IPC's operations. To deliver 'One Organisation' the IPC established a 'single brand', website and case management system; a new integrated organisational structure; targeted training programs; and improved corporate governance systems. These achievements have well positioned us to better deliver services to NSW citizens and regulated entities.

Importantly I acknowledge the integrity and commitment to service displayed by all IPC staff who have proactively sought opportunities to promote our statutory functions and effectively elevate compliance by agencies. I also acknowledge the Privacy Commissioner's focus on championing privacy as we work together to ensure that we uphold our statutory responsibilities through an efficient and effective single service point.

IPC structure and systems

IPC staff numbers have remained consistent since 2013. However our integrated structure has been updated to ensure compliance with the *Government Sector Employment Act 2013* (GSE Act). Two new and talented Directors – Director Investigation and Reporting Roxane Marcelle-Shaw and Director Business Improvement Samara Dobbins – now facilitate our integrated service delivery. We have also realised the intent of the GSE Act through the adoption of IPC values, invested in capacity building and better aligned our corporate governance. Our Audit and Risk Committee and the Information and Privacy Advisory Committee provide sound advice to guide our operations.

IPC case work

The *Government Information (Public Access) Act 2009* (GIPA Act) provides a robust decision-making framework to achieve balanced outcomes in promoting the release of information. Through this legislative framework agency decision-makers are achieving meaningful outcomes that successfully balance considerations in favour of disclose such as accountability with those against disclosure including security and privacy.

This mature and integrated approach is reflected in the IPC operational model in which IPC staff review agency decisions and authoritatively apply the public interest test to achieve a constructive balance between information access and privacy

CEO AND NSW INFORMATION COMMISSIONER ELIZABETH TYDD

rights. In the reporting period the IPC considered 95 reviews necessitating evaluation of information release considerations against withholding or redacting information to promote personal privacy. In the reporting period the IPC considered 56 reviews of agency decisions that concerned privacy-related public interest considerations against disclosure. There were no cases in which the Information Commissioner's delegates recommended consultation with the Privacy Commssioner to facilitate a recommendation against a decision of an agency not to release personal information.

There have been annual variations in the lodgement of complaints and reviews. The five year average for GIPA Act and *Government Information (Information Commissioner) Act 2009* (GIIC Act) complaints and reviews at 380 per annum; and for *Privacy and Personal Information Protection Act 1998* (PPIP Act) and *Health Records Information Privacy Act 2002* (HRIP Act) complaints and reviews at 268 per annum. The resultant ratio of case work is 2:3 (PPIP Act/HRIP Act:GIPA Act/GIIC Act).

Since the establishment of the IPC overall information access applications have significantly increased, and privacy review applications have remained relatively constant. However privacy complaints have increased and complaints concerning information access have decreased.

Under the GIPA Act and the PPIP Act the respective Commissioners appear before the New South Wales Civil and Administrative Tribunal (NCAT). In the five years since 2010 there has been a significant increase in NCAT notifications for information access applications which commenced from a low base of 36 in 2010 – 2011 to 115 in the current year. Decisions regarding our role in NCAT proceedings require a credible and transparent decision-making framework to properly identify significant issues and allocate resources. In the reporting year I refined this process in information access notifications to ensure that we are better placed to effectively manage the increasing demands.

In terms of proactive regulatory initiatives (investigations), throughout the five years the IPC has conducted six in privacy and five in information access. ▶

information and privacy commission
new south wales

Enquiries: David Marcus
Telephone: (02) 8071 7041
Our reference: IPC15/A000133

Ms Vanessa Viaggio
Principal Council Officer
Upper House Committees
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: law@parliament.nsw.gov.au

Dear Ms Viaggio,

Answers to questions on notice: Inquiry into remedies for the serious invasion of privacy in New South Wales

I refer to your email of 4 November 2015 attaching the transcript of my recent appearance before the Committee.

Please find attached responses to the questions on notice raised by Committee members in my capacity as Chief Executive Officer, Information and Privacy Commission, and as Information Commissioner.

I would also like to make some corrections to the transcript. These appear at:

- Page 10, paragraph 2, second sentence: please include the following bolded word:

  *"...that would be something that in my capacity as the IPC **CEO** I would be actively pursuing"*

- Page 10, paragraph 6, final sentence: please remove struck out text and include the bolded text:

  *"...So ~~they~~ **there** are an ~~application~~ **applications** made under the GIPA Act, and ~~its~~ **the** reporting, I would absolutely concede, is pretty global, for information of that nature"*

Please do not hesitate to contact David Marcus, Manager Performance Reporting and Projects, on (02) 8071 7041, or by email at david.marcus@ipc.nsw.gov.au if you have any queries.

Yours sincerely

24 November 2015

Elizabeth Tydd
Chief Executive Officer
NSW Information Commissioner

6

ATTACHMENT A

Standing Committee on Law and Justice, Inquiry into remedies for the serious invasion of privacy in NSW

Hearing, 30 October 2015

Responses to Questions on Notice – Information Commissioner

Question 1: (Mr Shoebridge, page 11)

> "I just want to be clear—I may have misunderstood you. There were 90 occasions where your office was asked to review a decision by a government department not to release information because of privacy considerations and on not one of those occasions did you recommend the release of the information, on a review. Is that what you say?"

Answer

I can confirm my advice to the Committee that there were no external reviews in the reporting period in which the IPC recommended that the Information Commissioner consult with the Privacy Commissioner to facilitate a recommendation against a decision of an agency not to release personal information, pursuant to section 94 of the *Government Information (Public Access) Act 2009* (GIPA Act). This information is contained in the Information and Privacy Commission's Annual Report 2014/15.

I also confirm that the legislation does not provide the Information Commissioner with the power to 'overturn' an agency decision when exercising the external review functions. Rather, the Information Commissioner has powers of recommendation. In conducting external reviews, recommendations may be made to an agency:

- as the Information Commissioner thinks appropriate (section 92);
- that the decision be reconsidered and a new decision be made (section 93);
- against the agency's decision that there is an overriding public interest against disclosure of government information (section 94); and/or
- that any general procedure of an agency in relation to dealing with access applications be changed to conform to the requirements of the GIPA Act or to further the object of the GIPA Act (section 95).

The Information Commissioner's external reviews of agency decisions are delegated to employees of the IPC. As stated on the introduction of the *Government Information (Public Access) Bill* and the *Government Information (Information Commissioner) Bill* into Parliament, "*It makes sense to have a single body overseeing both the key issues relating to government information—privacy and public access.*"

In 2014-15, the IPC finalised 359 information access external reviews. Ninety five of these included privacy-related public interest considerations (often amongst other public interest considerations). The IPC made recommendations to agencies in 56 of those reviews.

Where the IPC made recommendations to agencies, those recommendations covered a broad range of matters such as, for example, the need to justify decisions, the conduct of searches for information within the scope of access applications, the form of access for release of information, and that agencies have regard to the matters raised and guidance provided in review reports, pursuant to sections 92 and 93 of the GIPA Act.

ATTACHMENT F: ANALYSIS OF AN IPC REVIEW REPORT EXAMPLE (FULL REPORT ATTACHED)

Review of 14 April 2015 of Department of Family and Community Services (IPC reference: IPC14/R000624) available on the IPC Web Site

- Paragraphs 47(a)-(c) on page 8 (**Tab 1**) relate to information withheld from the Applicant in reliance on the public interest consideration against disclosure found in clause 3(a) of the table to section 14 (a privacy related public interest consideration against disclosure).

- Under this clause, and guidelines published by the Information Commissioner, the agency must determine that the information is **both** personal information **and** that it would be *revealed* to the Applicant if it was disclosed in response to the application.

- The statements at paragraphs 58(e) and (f) (**Tab 2**) that "*we are not satisfied that this information would be revealed to the Applicant if it was disclosed*" show that the public interest consideration against disclosure does not apply to the information.

- If the (apparently) only relevant public interest consideration against disclosure supporting the agency decision not to release this information does not apply to that information, there can be no overriding public interest consideration against disclosure of that information to the Applicant based on that consideration.

- A recommendation under section 94 against a decision of an agency that there is an overriding public interest against disclosure in respect of at least that part of the information withheld is the proper result.

- This is a decision that "*concerns a privacy related public interest consideration*" because it relates to a public interest consideration referred to in clause 3(a) of the table to section 14 of the GIPA Act.

- The provisions of section 94(2) that require consultation with the Privacy Commissioner ought to have been enlivened.

- At paragraph 58 of the review report the recommendations concerning this (and other) information are made under section 93.

- There is no consultation provision in s 93, however this recommendation is at variance with the decision of the agency, and concerns a privacy related public interest consideration against disclosure.

- It is noted that the review also concerns issues other than privacy related interests.

This analysis was prepared by Sean McLaughlan, Senior Advisor to the NSW Privacy Commissioner. This analysis is not publicly available and is prepared solely for the purposes of elaboration of the submission to the GIPA Review. The IPC review report that is the subject of this document is publicly available on the IPC Web Site (complete copy attached printed from the website). The link is: http://www.ipc.nsw.gov.au/sites/default/files/file_manager/Review%20Report%20IPC14%20R000624%20ACC.pdf

information and privacy commission
new south wales

Review report under the *Government Information (Public Access) Act 2009*

Applicant:	Ms Leslie Iggleden
Agency:	Department of Family and Community Services
Report date:	14 April 2015
IPC reference:	IPC14/R000624
Keywords:	Government information – conclusive presumption – risk of harm reports – prejudice supply of confidential information – disclose information provided in confidence – personal information – best interests of a child – public interest test

Contents

Summary

1. Ms Leslie Iggleden (the Applicant) with assistance from the Many Rivers Family Violence and Legal Service applied under the *Government Information (Public Access) Act 2009* (GIPA Act) to the Department of Family and Community Services (the Agency) for information about the removal and placement of her daughter.

2. The Information Commissioner recommends that the Agency reconsider its decision under section 93 of the GIPA Act, and make a new decision with respect to:

   a. the request for "case notes for the period 31 July 2008 to 1 July 2010";

   b. two items of information that are not dates, contained in paragraph seven of page 90;

   c. paragraphs 11-12 of page 32 - no reasons were given for withholding this information;

   d. page 2 – it is not clear what personal information would be revealed if this information was disclosed;

   e. paragraph 5 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed; and

   f. paragraph 7 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.

3. On our review of the documents we observed that additional information was redacted on the basis of a conclusive presumption of an overriding public interest against disclosure. The Information Commissioner recommends:

   a. under section 93 of the GIPA Act that the Agency reconsider this information in light of the guidance provided in paragraphs 25-31 of this report; and

   b. under section 92 of the GIPA Act that in future decisions the notice of decision and schedule of documents clearly identify the reasons for all redacted information.

Information requested

4. The Applicant applied under the GIPA Act to the Agency for access to copies of the following information:

   a. *Any/all affidavits submitted for Community Services to the Court supporting the Emergency Care and Protection Order in or about January 2007;*

   b. *Any/all affidavits submitted for Community Services to the Court that accompanied the Care Plan filed 4 April 2007;*

   c. *Any/all Case Plan meeting notes pursuant to section 4 of the Care Plan filed 4 April 2007;*

   d. *Transition plan pursuant to section 4 of the Care Plan filed 4 April 2007; and*

   e. *Case notes for the period 31 July 2008 to 1 July 2010.*

Decision under review

5. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application. This is a reviewable decision under section 80(d) of the GIPA Act.

6. In accordance with section 97 of the GIPA Act, in this review it is the Agency who bears the burden of establishing that its decision is justified.

7. In the course of this review we have considered the Agency's decision and information provided by the parties, including an unredacted copy of the information that was withheld.

Request for case notes and information withheld without reasons

8. In its decision issued on 18 September 2014, the Agency responded to the first four items in the access application but did not respond to the fifth item (the fifth item requested case notes for the period 31 July 2008 to 1 July 2010). This appears to have been an oversight on the part of the Agency, as the fifth item was on a different page of the access application to the other four items. The Information Commissioner recommends that the Agency make a new decision about the case notes as this was not addressed in the original decision.

9. With respect to the first four items, the Agency decided to provide access to some information and to refuse access to other information because of an overriding public interest against disclosure.

10. We also note that information was redacted from paragraphs 11-12 of page 32, however it is not clear on what basis this information was withheld. We recommend this information is also reconsidered because, in the absence of a reason to withhold the information, we cannot find that this redaction is justified.

The public interest test

11. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.

12. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.

13. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.

14. Section 13 requires decision makers to:

    a. identify relevant public interest considerations in favour of disclosure,

    b. identify relevant public interest considerations against disclosure,

    c. attribute weight to each consideration for and against disclosure, and

    d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.

15. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

16. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (section 12(2) of the GIPA Act).

17. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:

    a. the information is about the Applicant and her family, and there is a general public interest in individuals being aware of the nature of records held about them by Government agencies;

    b. there is a general understanding that the public interest is best served by transparency in Government decision-making – transparency is best achieved when access to Government records is permitted; and

    c. section 5 of the GIPA Act provides a general presumption in favour of the disclosure of government information and section 9 provides a legally enforceable right for individuals to receive access to government information for which they have applied except where there is an overriding public interest against disclosure of the relevant information.

Public interest considerations against disclosure

18. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.

19. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.

20. The words "could reasonably be expected to" should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.

21. In its notice of decision the Agency raised one conclusive presumption of an overriding public interest against disclosure from schedule 1 to the GIPA Act and four public interest considerations against disclosure of the information from the table to section 14 of the GIPA Act.

22. The conclusive presumption of an overriding public interest against disclosure is found in clause 10 of schedule 1 to the GIPA Act:

> *It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the Children and Young Persons (Care and Protection) Act 1998 applies.*

23. The four public interest considerations from the table in section 14 of the GIPA Act are listed below, which provide that there is a public interest consideration against disclosure of information if its disclosure could reasonably be expected to:

a. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (clause 1(d) of the table to section 14 of the GIPA Act);

b. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act);

c. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act); and

d. in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed (clause 3(g) of the table to section 14 of the GIPA Act).

24. I will discuss each of these considerations and how they were applied by the Agency to the information in turn.

Conclusive presumption against disclosure – risk of harm reports

25. If information falls within the scope of one of the clauses in schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release the information. This means that the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

26. Clause 10 of schedule 1 to the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the *Children and Young Persons (Care and Protection) Act 1998* (CYPCP Act) applies.

27. Section 29 of the CYPCP Act provides protection for people who make reports or provide certain information, in good faith, to the relevant Director-General. Section 29(1)(f) provides that the identity of the person who made a report about children who may be at risk of harm, and any information which could identify them, must not be disclosed except with the consent of the person who made the report.

28. If a report is a report to which section 29 applies and is made in good faith, section 10 will apply to that report. The question of whether a report is made "in good faith" should be determined as a question of fact on the ordinary meaning of "good faith": whether it was made honestly. If a report is not made in good faith, section 29 will not apply and nor will the conclusive presumption against disclosure.

29. While section 54 of the GIPA Act requires an agency to consult with third parties under certain circumstances, this does not apply to information that falls within the scope of schedule 1. There is no requirement on an agency to consult before claiming this conclusive presumption against disclosure.

30. The schedule of documents indicates that the only items of information redacted in reliance on this presumption appear on pages 90-91. The information provided to us by the Agency indicates that four items were redacted from paragraph 7 of this document in reliance on this conclusive presumption. We are satisfied that the presumption applies to two of the items, which are dates. However, we are not satisfied that the other two redacted items constitute information "contained in a report to which section 29 of the

CYPCP Act applies." For this reason we recommend that the Agency reconsider its decision with respect to those two items of information.

31. On our review of the documents we observed that additional information (for example some information on pages 29-34) were also redacted on this basis. We are satisfied that the presumption applies to that some of information, however we recommend that the Agency reconsider this information in light of the guidance provided above.

Consideration 1(d) – prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions

32. Clause 1(d) of the table at section 14 states:

> *There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to … prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (whether in a particular case of generally).*

33. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:

    a. the information was obtained in confidence;

    b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and

    c. the information facilitates the effective exercise of the Agency's functions.

34. Although the GIPA Act does not use the phrase "future supply", the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.

35. It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an express or inferred understanding that the information would be kept confidential.

36. We have reviewed the information on pages 29-34 and 165-167 that was redacted on this basis. Some of this information was collected under a legislated process (this is referred to in the documents as a 'section 248') and other information was collected from individuals. We are satisfied that the information collected from individuals falls within this consideration, however we are not satisfied that the Agency has justified the application of this consideration with respect to information collected under section 248. We asked the Agency for information about section 248 requests as at the relevant time and were provided with a copy of section 248 of the *Children and Young Persons (Care and Protection) Act 1998*. This provision allows the Agency to direct a prescribed body to furnish it with information relating to the safety, welfare and well-being of a child or young person. It is the duty of a prescribed body to whom a direction is given to comply promptly with the requirements of the direction. As the section 248 requires the prescribed body to provide the information we are not satisfied that disclosure would prejudice supply of such information to the Agency in the future.

Consideration 1(g) – found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

37. Clause 1(g) of the table at section 14 states:

> *There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).*

38. To show that this is a relevant consideration against disclosure, the Agency must establish:

    a. the information was obtained in confidence; and

    b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or

    c. otherwise result in the disclosure of information provided.

39. In raising this public interest consideration against disclosure the Agency needs to ensure the information is in fact confidential.

40. Once satisfied that the information is confidential information, the agency should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.

41. In each circumstance where the Agency applied this consideration against disclosure it did so in conjunction with the consideration against disclosure at clause 1(d) of the table to section 14 of the GIPA Act. Our comments about the information redacted on this basis are set out above. We note that whether or not the information was compelled under a section 248 is not relevant to the application of consideration 1(g), as there is no concern with prejudice of future supply of information. However, we are not satisfied that the information provided under a section 248 was provided in confidence and note that there is no requirement in section 248 of the *Children and Young Persons (Care and Protection) Act 1998* that information provided is held in confidence.

Consideration 3(a) – reveal an individual's personal information

42. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure states:

> *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual's personal information.*

43. Personal information is defined in the GIPA Act as being:

> *...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion.* [Schedule 4(4)(1) GIPA Act]

44. Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.

45. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. This Guideline sets out what is meant by 'personal information' in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information.

46. In order to establish that this consideration applies, the Agency has to:

    a. identify whether the information is personal information

    b. consider whether the information would be revealed by disclosing it under the GIPA Act.

47. The Agency redacted information based on this consideration from pages 1-2, 29-34, 90-91 and 165-167. We have reviewed this information and we are satisfied that the Agency's decision is justified except for the redactions at:

    a. page 2 – it is not clear what personal information would be revealed if this information was disclosed.

    b. paragraph 5 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.

    c. paragraph 7 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.

Consideration 3(g) – best interests of a child

48. Clause 3(g) of the table to section 14 of the GIPA Act provides:

> *Individual rights, judicial processes and natural justice*
>
> *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:*
>
> ...
>
> *(g) in the case of the disclosure of personal information about a child—the disclosure of information that it would not be in the best interests of the child to have disclosed.*

49. In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 3(g) and base this on substantial grounds.

50. The definition of the phrase "could reasonably be expected to" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.

51. For this consideration to apply the information must be personal information about a child and the Agency must demonstrate why disclosure would not be in the child's best interests.

52. The Agency redacted information based on this consideration from pages 29-34 and 165-167. We have reviewed this information and are satisfied that it applies to the relevant withheld information on page 165-166. However we are not satisfied that it applies to the information relevantly withheld from

6

paragraphs 8 and 9 on page 32. We note that the information withheld from paragraphs 8 and 9 on page 32 was also withheld on the basis that disclosure could reasonably be expected to reveal personal information. We are satisfied that on that ground the redaction was justified so we do not make any recommendation about these paragraphs.

Was the Agency's decision justified?

53. The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.

54. Agencies should:

    a. set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;

    b. set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;

    c. make a decision about which way the balance lies, in light of the weight in favour and against

55. If at this stage the agency considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether. These provisions are found in sections 72 to 78 of the GIPA Act.

56. It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.

57. Having considered the reasons provided by the Agency in its notice of decision and the content of the withheld information, we are satisfied that the Agency's decision is justified except for the recommendations outlined below.

Recommendations

58. The Information Commissioner recommends that the Agency reconsider its decision under section 93 of the GIPA Act, and make a new decision with respect to:

    a. the request for "case notes for the period 31 July 2008 to 1 July 2010";

    b. two items of information that are not dates, contained in paragraph seven of page 90;

    c. paragraphs 11-12 of page 32 - no reasons were given for withholding this information;

    d. page 2 – it is not clear what personal information would be revealed if this information was disclosed;

e. paragraph 5 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed; and

f. paragraph 7 on page 33 – we are not satisfied that this information would be revealed to the Applicant if it was disclosed.

59. On our review of the documents we observed that additional information was redacted on the basis of a conclusive presumption of an overriding public interest against disclosure. The Information Commissioner recommends:

a. under section 93 of the GIPA Act that the Agency reconsider this information in light of the guidance provided in paragraphs 25-31 of this report; and

b. under section 92 of the GIPA Act that in future decisions the notice of decision and schedule of documents clearly identify the reasons for all redacted information.

60. We ask that the Agency advise the Applicant and us by **24 April 2015** of the actions to be taken in response to our recommendations.

Review rights

61. Our reviews are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.

62. The Applicant has the right to ask the NCAT to review the Agency's decision.

63. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

Phone: 1300 006 228
Website: http://www.ncat.nsw.gov.au

64. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the IPC or NCAT.

Completion of this review

65. This review is now complete.

66. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner