Ombudsman
New South Wales

ABN 76 325 886 267
Level 24, 580 George Street, Sydney NSW 2000
T 02 9286 1000 | F 02 9283 2911
Tollfree 1800 451 524 | TTY 02 9264 8050
www.ombo.nsw.gov.au

Contact: Sanya Silver
Telephone: (02) 9286 0964

The Director, Justice Policy
Department of Justice
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam

Review of the *Government Information (Public Access) Act 2009*

I am writing in relation to the statutory review of the *Government Information (Public Access) Act 2009* (GIPA Act). While our office no longer has involvement with complaints about access to government information, we have a long history with the former *Freedom of Information Act 1979* (FOI Act). As I am sure you are aware, this office's review of the FOI Act resulted in the introduction of the GIPA Act and the associated changes to the way in which members of the community access information from government. I will begin with a general observation about the continuing validity of the policy objectives of the GIPA Act, and then turn to an area where I believe the work of our office and the other Australasian Parliamentary Ombudsman may be of use.

Access to data
The objects provision of the GIPA Act states that:

In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:

- *authorising and encouraging the proactive public release of government information by agencies, and*
- *giving members of the public an enforceable right to access government information, and*
- *providing that access to government information is restricted only when there is an overriding public interest against disclosure.*

The objects continue to be valid and essential to a representative democracy, but it is important to be mindful of and to recognise the continuing changes in community expectations and demands as to how these policy objectives will be fulfilled. Where members of the public once sought access to information solely in order to look behind a decision of government, people are now increasingly seeking quick and direct access to government information, and particularly data sets, which they then look to use to achieve a myriad of different purposes.

This need is recognised in the Open Access Principles developed by the former Office of the Australian Information Commissioner, the creation of data websites in most Australian jurisdictions (such as data.nsw.gov.au), and the creation of organisations such as the Australian Governments Open Access and Licensing Framework. Government data licence agreements are becoming common, and their terms far broader than they used to be.

There will always be a need for members of the public to have an enforceable right to access government information. This will allow people to ask informed questions about decisions that can often have a very real impact on their lives. Knowing this may happen also contributes to the rigour and effectiveness of the public sector. It may however be worthwhile extending the policy objectives of the GIPA Act to explicitly include supporting and facilitating access to publicly funded data sets. This could be accompanied by a requirement for data to be, wherever possible, easily searchable and reusable. This is already reflected in the NSW government open data policy, but a legislative foundation, with a recognised champion role for the Information Commissioner, would ensure it has a strong and long lasting foundation.

Unreasonable complainant conduct

Our office has a great deal of experience dealing with complainants who engage in unreasonable conduct. I feel that some of the insights and strategies we have developed in this area may have relevance to achieving the policy objectives of the GIPA Act, in particular the provisions relating to persistent applicants who lodge repeat GIPA applications lacking in merit.

The Australasian Parliamentary Ombudsman have jointly developed strategies for managing unreasonably persistent conduct by complainants. Our objective has been to assist agencies and complainants by identifying fair and reasonable strategies for addressing a problem that can have serious implications for agencies, the complainants in question and other complainants. Our *Managing Unreasonable Complainant Conduct Practice Manual* and our training packages on this topic are the most popular guidance material agencies seek, reflecting the difficulties many agencies experience with unreasonable conduct.

In keeping with our guidelines, many agencies apply reasonable limitations and conditions on how unreasonably persistent complainants may contact the agency or access its services. However, some individuals whose contact arrangements are appropriately restricted will often resort to making numerous GIPA applications and/or privacy complaints in order to circumvent the administrative restriction and engage the agency in further communication through a statutory vehicle. We see this is a growing problem for agencies. It is important to point out that this growing problem is not only a resourcing issue for an agency but also goes to the issue of equity, as agencies are not funded by the number of applications they process. Therefore the more resources are devoted to a particular individual the less that is available to be devoted to other individuals seeking to exercise those same rights.

Feedback we have received from a range of agencies indicates that a strengthened approach is needed to appropriately manage repeat unmeritorious applications that:

- enables the NSW Civil and Administrative Tribunal (NCAT) (and possibly the Information Commissioner) to implement a variety of management strategies to respond to different types and seriousness of repeat unmeritorious applications, and
- contains criteria that focus on and describe the problematic conduct such as numbers of applications, subject matter of applications and the conduct of the applicant.

Currently section 110 of the *GIPA Act* provides some criteria on which an order to restrain the making of unmeritorious access applications can be made. The section appropriately focuses on the conduct and type of applications and not the motives of the applicant. However, the definition of what access applications are to be regarded as lacking in merit does not address the problematic circumstances agencies can be faced with and could be expanded to cover applications which are:

- lacking in substance
- so obviously untenable or manifestly groundless as to be utterly hopeless, misguided or misconceived
- are in their face clearly delusional, imaginary, irrational or absurd, or an exercise in futility (based on a 'reasonable person' type test)
- repetitious in relation to their subject matter
- asking questions which are more appropriately answered by the agency outside the GIPA process.

In relation to conduct issues, the criteria might include descriptions of the access applicant's conduct as follows:

- has raised significant work health and safety issues for agency staff
- a number of access applications have been lodged that can reasonable be characterised as obsessive, habitual, persistent or manifestly unreasonable in the circumstances

It may be appropriate to consider expanding the current provisions of the GIPA Act which enable the NSW Civil and Administrative Tribunal (NCAT) to make restraint orders if it is satisfied a person is making a certain number of applications that lack merit (s.110).

The scope of the options that could be appropriately made available to the NCAT (and possibly to the Information Commissioner) should be expanded to provide greater flexibility, for example the ability to make orders which:

- specify that an application cannot be made in relation to a certain issue
- impose an upper limit on the number of separate applications a person can lodge, either generally or in relation to a specific agency, in any given period
- specify that an application cannot be made to an agency for a certain fixed period
- impose an upper limit on the amount of processing time that an agency needs to devote to dealing with any given application

- specify that an agency is able to charge full costs incurred by it in dealing with any subsequent application made within a given period.

An expansion to the available options would enable the NCAT and the Information Commissioner to implement a number of management strategies to respond to different types and seriousness of unmeritorious applications.

A final practical consideration is how agencies will become aware of applications that lack merit made to other agencies. Section 110(1) states that:

10 Orders to restrain making of unmeritorious access applications

(1) NCAT may order that a person is not permitted to make an access application without first obtaining the approval of NCAT if NCAT is satisfied that the person has made at least 3 access applications (to one or more agencies) in the previous 2 years that lack merit. Such an order is a restraint order.

The Information Commissioner is the logical central collection point for information about applications that lack merit of which they are aware. If the GIPA Act were amended to allow the Information Commissioner to confirm they hold information about applications that lacked merit in the preceding two years, the number of applications, and the contact details of the relevant other agency, agencies could then decide whether to proceed to seeking an order under section 110.

Please do not hesitate to contact Sanya Silver on 92860964 or ssilver@ombo.nsw.gov.au should you require further information or any clarification.

Yours sincerely

Bruce Barbour
Ombudsman

11/9/14