SUBMISSION FROM PETER TIMMINS

This submission has been prepared in haste to meet your deadline of 29 August.

It is by no means comprehensive.

I would welcome the opportunity to discuss relevant issues at any time. I have no objection to publication.

Peter Timmins.

Submission

Title of the act

A preliminary issue is the title of the GIPA act. Queensland and Tasmania when undertaking a similar rewrite of freedom of information legislation in 2009/2010 adopted the title 'right to information' for the act to replace the freedom of information act. This title is used also in many overseas jurisdictions instead of freedom of information. Successive information commissioners have used 'right to information' in promoting the act in NSW, preferring these words to convey in shorthand what the legislation is about. Right to information is a simple straightforward title. If not 'right to information' consideration should be given to something less of a mouthful, than GIPA, for example 'government information act.'

Are the policy objectives appropriate?

1. The policy objectives and provisions of the GIPA act do not reflect the current context for managing government information that is evident in various government policies, plans and initiatives including "Governing in the Digital Age." The object section of the GIPA act states the democratic transparency and accountability purpose of the legislation. The section should also state that government information is a resource to be managed and utilised for economic and social purposes, along the lines of Section 3 of the Commonwealth FOI act. Information in digital form and 'open data' should be referred to in setting out legal rights to access information, and agency obligations to publish and respond to requests for access.i

2. 'Increasing public participation' should be included as a stated purpose (see Section 3 of the Commonwealth act)

.3.The objects refer to"government information" defined in s 4 as information contained in a record held by an agency. Although it becomes clear on reading other provisions that define 'agency' and in Schedule 4, the lack of a clear statement in the title, objects or rights sections tends to obscure the fact that the act extends to information held by a Minister and a person employed by a Minister under Part 2 of the Members of Parliament Staff Act 2003.

This may to some extent explain why relatively few formal access applications are made to ministers' offices. According to the report by the Information Commissioner on the operation of the act 2010-2013 (Appendix 7 p78) a total of 69 GIPA applications were received by all ministers during this three year period. By way of comparison, ministers in Western Australia received almost as many in one year, 65 FOI applications in 2012-13 and 146 in the previous

year, more than twice the three year NSW total (WA Information Commissioner Annual Report 2012-13 P18.) There are various ways to convey up front that the act is not limited to an agency. The Commonwealth act (s 11) provides a right of access to documents of an an agency and to an official document of a minister. The stated object of the WA act (s 3) is to "make the persons and bodies that are responsible for State and local government more accountable to the public."

Terms of the act

4. The definition of government information, a term used in the objects section, should reflect the fact that information is primarily held in digital form. The current definition (s4) is "information contained in a record." Record is defined (Schedule 4 Clause 10) as "any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means." The wording with 'document' and 'written form' placed first seems more attuned to the paper based past than the digital age.

There is no specific reference to metadata in the act although metadata is clearly 'information.' Section 28 of the Queensland RTI act includes a narrow definition of the term that provides a starting point for consideration..

6. The stated object of the act is to provide access to government information in order to "maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective." But only two of the three branches of government are covered by the definition of 'agency': agencies in the executive branch and the courts (in respect to matters of an administrative nature) . The Parliament is specifically excluded. The parliamentary departments were allocated $140 million in the Budget. Given the object, the act should extend to these agencies that provide administrative services to the parliament and members of parliament. This appears to be the case in Tasmania (http://foi-privacy.blogspot.com.au/2009/11/tasmanian-parliament-hiding-bold-step.html#.U_vPDUh4IUk), and was the case federally (http://foi-privacy.blogspot.com.au/2012/10/senate-estimates-query-foi-issues.html#.U_vQ0Eh4IUl) until Parliament removed them from the act in 2013. (The Hawke review, still to be acted upon by the Federal government recommended the departments other than the Parliamentary Budget Office be brought back under the FOI act in relation to matters of an administrative nature.)

6. Much was made in the lead up to the enactment of the act to the 'push' model.The act sets out what constitutes "open access information' (s 18) and how and in what form such information must be made publicly available.

In addition to information specified in the act an agency is required by the Government Information (Public Access) Regulation to publish (a) a list of the Department's major assets, other than land holdings, appropriately classified and highlighting major acquisitions during the previous financial year, (b) the total number and total value of properties disposed of by the Department during the previous financial year, (c) the Department's guarantee of service (if any), (d) the Department's code of conduct (if any). The Regulation requires a minister to include in open access information media releases and details of overseas travel, The Minister may, without limiting section 6 of the Act, make such publications publicly available on a

website maintained by a Government Department for which the Minister is responsible.The Regulation also sets out publication requirements for local government.

Government in the Digital Age should be in keeping with public expectations about access to information. This would suggest continuous or regular disclosure throughout the year of a wide range of information not now published or published once a year as required by annual reports legislation and government policy. Examples include senior management travel and overseas visits and purpose, expenses and hospitality, financial and performance data, grants, gift register, consultants and nature of the engagement, and land disposal. (For the purpose of comparison the South Australian Government now requires monthly publication of expenditure by ministers and chief executives on mobile phones, credit cards, travel and ancillary office expenditure, capital works, consultants, gift register and procurement practices http://dpc.sa.gov.au/proactive-disclosure-government-information)

The act prescribes an overriding public interest against disclosure of information contained in the Register of Interests kept by or on behalf of the Premier pursuant to the Code of Conduct for Ministers. An Information Commissioner Guideline for local councils provides relief from the obligation under the act to publish on the internet as part of the "open access " publication requirement, the register of interests of councillors and designated members of the staff. (A contrast with the situation in Queensland where the *Local Government Regulation 2012* requires publication of the Register of Interests of the Mayor and Councillors.) While some information in these registers may be highly personal and inappropriate for publication on the internet or release in response to an application, some level of automatic public disclosure of interests on the internet would be consistent with the democratic transparency and accountability purposes of the legislation.

The open access provisions make no reference to data and data sets. The voluntary publication of data sets is encouraged as part of Governing in the Digital Age. Consistent with that initiative and the objects, an agency should be required to compile and publish a list of data sets and publish on its website those data sets that are relevant to public purposes and to keep the data sets up to date on a regular basis.

7. Form of access. The act requires open access information to "be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate." It is silent on the form of access and on searchability standards. Much of the published open access information is in PDF packets which limit searchability.

The publication of contract details on some agency websites in this way is commonplace and significantly undercuts the transparency and accountability purpose. This is particularly the case where the agency is not a user of the NSW eTendering website which does have a wide search capability. (Example University of Sydney http://sydney.edu.au/arms/info_freedom/Services.pdf)

The act should require that data sets are included in open access information, and where published or released must be in formats that lend to easy and efficient reuse via technology: in open, machine-readable formats.

Some agencies pay little regard to useability of published information. The absence of mandated requirements probably explains this.

Contrast the good example of the addition of a search function to the webpage and publication of information released in the Disclosure Log by the Department of Premier and Cabinet
http://www.dpc.nsw.gov.au/about/accessing_dpc_information/dpc_disclosure_log
with no search function and the need to contact the agency for information released as listed on the Disclosure Log webpage of Transport for NSW
http://www.transport.nsw.gov.au/content/disclosure-log

The form of access provision (s 72) for information released in response to an access application is based on a 'paper and other' distinction that does not reflect the digital environment. This should be recast with access in requested digital form given primacy.

8. Information held: The act (s 121) extends to certain information held by a contractor engaged to provide services to the public on behalf of the agency. Consideration should be given to inclusion of a broader provision that extends scope to information about funded private organisations. (Tasmanian Right to Information Act (s 8)).

9. Informal access. The act (S8) authorises an agency to release government information in response to an informal request but leaves the whole issue of informal release to the agency's discretion. Informal access has the potential to reduce costs and facilitate speedy access. The extent to which agencies facilitate access to information in this way is unknown.

Consistent with the objects, the act should require an agency to develop and publish an informal release policy that indicates the type of information usually made available in this way, and how it may be accessed, to review the policy on a regular basis and to report annually on the operation of the scheme.

10. Formal Access. As there is no mandated requirement many NSW agencies do not encourage or accept electronic lodgment of an application or electronic payment of fees and charges. Applications must be lodged by mail and payment by cheque or money order. This is not consistent with governing in the digital age. The act should specify that facilities for electronic lodgment and payment must be provided.

Public interest: The act (s 12) lists five examples of public interest considerations that favour disclosure. The examples appear to be drawn largely from a more extensive list of such factors in the Queensland RTI act (Schedule 4)
http://www.austlii.edu.au/au/legis/qld/consol_act/rtia2009234/sch4.html

The addition of other examples from this list would assist agencies and users of the act who seek to balance public interest considerations:Disclosure of the information could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community; Disclosure of the information could reasonably be expected to ensure effective oversight of expenditure of public funds. Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official. Disclosure of the information could

reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.

Drawing from the Queensland schedule this consideration should be added to Irrelevant factors (s15): The person who created the document containing the information was or is of high seniority within the agency.

Unfortunately I have not had time to re-examine schedules 1 and 2 and the table in Section 14 in any detail.From a quick browse, the list of preserved secrecy provisions in other acts should be subject to close scrutiny; the need for the provision concerning the Executive Council seems questionable given the Commonwealth removed a similar exemption from the FOI act in 2010; some of the conclusive OPI against disclosure such as " a document created by the former Information and Intelligence Centre of the Police Service or the former State Intelligence Group" involve no harm test and at least 10 years have passed since the former was abolished; and the cross references to the Privacy and Personal Information Protection Act and Health Records and information Privacy Act add complexity to already complex considerations.

11. Reporting: in addition to statistical returns each agency should be required to report on steps taken to increase transparency, address cultural change issues, and its plan and specific initiatives for the year ahead.

12. Review of decisions.The separate disconnected review processes are a frustration for aggrieved applicants for a variety of reasons: the long lead time taken to review decisions in the IPC, the recommendatory rather than determinative powers of the Commissioner (ss 92-94), the absence of a provision that requires an agency to respond to a Commissioner recommendation within a specified time, the need to restart the whole process through an NCAT application if an agency does not accept the Commissioner's recommendation or maintains its position despite critical observations by the Commissioner.

The architecture should be reconsidered to promote speedy finalisation of review of decisions with the Commissioner given power to determine the status of disputed information as is the case with the Australian, Queensland, and West Australian information commissioners, and the Tasmanian and South Australian ombudsman. As In Queensland and Western Australia further review rights to the tribunal might be based on error of law grounds.

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13.The act does not contain an object section. The act sets out functions of the Commissioner (complaints, investigations, reporting) in addition to those conferred by GIPA (s 17, s 22). 'Champion' doesn't quite capture it.

In my view while the Commissioner has powers (Division 4) that extend to those enjoyed by a Royal Commission (s 29) and to make reports to Parliament and the minister, the legislation does not confer sufficient authority to require agencies to conform with the spirit and intention of the GIPA act. The Commissioner for example can issue 'guidelines' regarding open access information, but the guidelines are simply that. The Commissioner can make recommendations in conducting merit review or in concluding an investigation but an agency can chose to ignore them.

Stronger powers in these areas might better advance the objects of the GIPA act.

I have run out of time but at some point would value the opportunity to discuss other issues including the structure of the Information and Privacy Commission and the relationship between the legislation under review and privacy legislation. On this latter point, you are no doubt aware of the many recommendations from the NSW Law Reform Commission arising from their inquiry that have not been acted upon.

29 August 2014