NSW GOVERNMENT | Planning & Environment

14/11891

Office of the Secretary

Mr Andrew Cappie-Wood
Secretary
Department of Justice
GPO Box 6
Sydney NSW 2001

Dear Mr Cappie-Wood

Thank you for your letter of 15 July 2014, inviting a written submission to the review of the *Government Information (Public Access) Act 2009* (GIPA Act) and the *Government Information (Information Commissioner) Act 2009.*

I enclose the Planning & Environment Cluster's submission to the review.

In our view the GIPA Act is achieving its objects. The submission addresses four topics relating to changes in technology, training of GIPA officers, the collection of personal and health information and copyright issues. It then suggests refinements to a small range of specific provisions.

I do not seek confidentiality in relation to the submission.

If you have any questions please contact David Watson, Manager Information and Complaints, at the Department on (02) 9228 6116.

Yours sincerely

Carolyn McNally
Secretary 26.9.14

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COMMENTS	RECOMMENDATIONS
to collect and create government data.	
2. GIPA training There is currently no required training or competence level for GIPA practitioners who make formal access and internal review decisions. Adoption of a standard would be likely to improve compliance and consistency of practice across the sector.	2. All practitioners should be required to undertake an approved GIPA training course within 6 months of appointment, with the Information Commissioner to approve the courses.
3. Personal and Health information The same definition of 'personal information' is used in the *Privacy and Personal Information Protection Act 1998* (PPIP Act), *Health Records Information Privacy Act 2002* (HRIP Act) and GIPA Act. However the exclusions from the definition of 'personal information' in clause 4(3) of Schedule 4 of the GIPA Act differs significantly from the exclusions in section 4(3) of the PPIP Act and section 5(3) of the HRIP Act (which also differ but considerably less). What this means is that information that may be considered as 'personal information' under the GIPA Act may not be considered 'personal information' under the PPIP Act, and therefore may not gain the benefit of clause 3(b) of the Table to section 14 of the GIPA Act (i.e. public interest considerations against disclosure) despite being still 'personal information'. This seems overly complicated. It is also considered that there should be an express public interest consideration against the disclosure of health information. 'Health information' is defined and dealt with in the HRIP Act and is consequently excluded from the PPIP Act (by virtue of section 4A), but is not mentioned in the GIPA Act at all (apart from the reference to Health Privacy Principles in clause 3(b) of the Table to section	3. Consideration should be given to aligning the 'personal information' exclusions in the GIPA, PPIP and HRIP Acts as far as possible. 4. Consideration should be given as to whether the GIPA Act should be amended to include a definition of 'health information'. 5. a) Consideration should be given to inserting a public interest consideration against disclosure of health information in clause 3 of the Table to section 14, e.g. adding a new clause 3(a1) "reveals an individual's health information" or adding the word "health" to clause 3(a). b) alternatively, consideration should be given as to whether the Table to section 14 should be amended to remove clause 3(b) and to add 'health information' to clause 3(a). Either option, taken with the addition of a definition of health information to the GIPA Act, would enable a quicker decision as there would be a public interest consideration against the

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COMMENTS	RECOMMENDATIONS
14).	disclosure of health information.
4. Copyright Section 72(2)(c) of the GIPA Act states that access must be provided in the form requested by the applicant unless to do so would involve an infringement of copyright. Section 6(6) makes clear that the mandatory release of certain government information does not require an agency to so in a way that would constitute an infringement of copyright. Copyright issues are significant for the Department which publishes its Disclosure Logs on its website. Section 54 requires consultation where information subject of an application concerns a person's business, commercial, professional or financial interests. While this may cover the copyright interests of the person it would be helpful for this to be specified so the copyright owner is consulted. In as much as agencies publish information listed in their Disclosure logs on their websites the issue of copyright is significant. It would also be helpful if the Information Commissioner created a specific guideline to assist agencies on how to comply with both copyright and information access legislation.	6. Consideration should be given as to amending section 54(2)(b) to insert the words "(including copyright)" after the word "business". 7. Consideration should be given to developing a guideline to specifically address issues of copyright raised by the GIPA Act's application across the public sector.

PROCEDURAL MATTERS

1. Section 4 – Interpretation	8. Consideration should be given to adding a note to the definition of "government information" in section 4 which refers to the definition of 'record' in Schedule 4(10), or alternatively, and preferably, inserting a definition for 'record' into section 4.

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2. Sections 7 and 8 – Proactive and informal disclosure (a) While agencies within the cluster are finding these provisions useful, some concern has been expressed that the limitation in section 8(6) on the authority needed to exercise functions under that section has led to an overly formal process. For example, DP&E and OEH policy sets informal disclosure authorisation at a more senior level than formal disclosure under section 9. (b) The GIPA Act is clear about how access is to be provided for a formal application (sections 72 and 73). However, such clarity is lacking in respect of the 'reasonable conditions' that can be imposed by an agency under section 8(2). Consistency in the application of the provision across government is desirable for applicants. There are at present different guidelines and parameters in different agencies, which create a confusing environment for applicants. It would be helpful for guidance to be given as to what would constitute reasonable conditions, including, though not limited to, whether reasonable charges for photocopying and the provision of information on disc or memory stick, would be considered reasonable conditions. (c) A third party has no right of review of a decision to disclose information under section 8. At present each agency decides individually whether it will ignore third party rights or, in the spirit of section 54, apply third party rights to section 8 applications, or direct applicants to section 9 when there is third party material in the information requested. (d) Information and Privacy Commission guidance notes would assist in ensuring consistency and uniformity informal release of information.	**9.** Consideration should be given to developing a guideline on the application of section 8 and protocols for informal disclosure. **10.** Guidance needs to be provided to what are "reasonable conditions" under section 8. **11.** Consideration should be given as to whether or not third parties should have review rights in respect of a decision under section 8. **12.** Consideration should be given to developing a guideline on the application of section 8 on the informal release of information.

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3. Section 14 – Public interest considerations against disclosure The public interest considerations against disclosure are listed in a table in section 14. This layout makes it difficult to refer to specific elements in a GIPA report.	**13.** Consideration should be given to amending section 14 by removing the Table and placing its contents in separate section of the GIPA Act.
4. Sections 25, 26 and 56 – Disclosure log Sections 25, 26 and 56 deal with the requirement for each agency to publish a disclosure log. Information disclosed under an access application must be listed on the log if the information disclosed is information that the agency considers may be of interest to other members of the public. A guideline on best practice would assist agencies with providing better services e.g., provision of hyperlinks for information in the disclosure log. Consideration could also be given to how long disclosure log entries should be kept on the website, given the natural tendency for information to lose relevance over time, and what should be done with the entry and hyperlinked information subsequently. A period of three years retention, with discretion to extend, would seem reasonable.	**14.** Consideration should be given to developing a guideline on what constitutes best practice for disclosure logs. **15.** Consideration should be given as to amending the GIPA Act to specify the minimum time disclosure log entries should remain on the log.
5. Section 41 – How to make an access application Section 41(a) requires that an access application be in writing. Section 41(c) requires that an application *"be accompanied"* by a fee of $30. Section 41(d) requires that an access application state a postal address as the address for correspondence in connection with the application. It is now common for correspondence dealing with access applications to be received and sent by email, and some applicants	**16.** Consideration should be given to amending section 41(a) to specify electronic lodgement of access applications. **17.** Consideration should be given to amending section 41(c) to enable the application fee to be paid within a specified period after lodgement of the application, while making clear the application is not valid until the fee is received.

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even ask for contact to be by email only. It is however difficult for an email to be accompanied by a fee of $30. This section has no requirement for the applicant to provide a name, but GIPAA officers often need to communicate with applicants. In this Department's experience it is rare not to have to do so to properly and efficiently process applications. Where an applicant is requesting access to their personal information, or another person, an agency will require some form of identification to ensure the information is only released to those with a right to receive it. It is consequently difficult to process applications without applicant names.	**18.** Consideration should be given to amending section 41(d) to require either a postal or an email address. **19.** Consideration should be given to amending section 41 to require a contact name.
6. Section 53 – Searches for information Section 53(4) provides that an agency is not required to search for information in records held by the agency in an electronic backup system. A definition of "electronic backup system" would be valuable, providing some assurance to applicants that this provision was not being too broadly interpreted and to agencies that searches of certain information sources were not required.	**20.** Consideration should be given to developing a guideline on what is an "electronic backup system".
7. Section 54 - Consultations Section 54 requires consultation of persons including agencies before providing access. Significant resources are expended by NSW government agencies consulting with each other. Much of this consultation raises little objection. A reduction in this part of the processing of access applications would be advantageous both to agencies in terms of cost and efficiency and to applicants in terms of reduced charges.	**21.** Consideration should be given to providing guidance to agencies as to how they may reduce the amount of interagency consultation undertaken, e.g. by specifying that information of a routine nature need not be the subject of consultation between agencies.
8. Section 54(2A) It is unclear why a notice is to be sent to a person stating that their information *will be* included in the agency's disclosure log	**22.** Consideration should be given to changing the word "will" to the word "may" in section 54(2A).

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information, when the requirement to send the notice arises in respect of a person whose information *is likely to be included*. This seems inconsistent as the person's information is likely to be included but may not be included.	
9. Section 56 – Disclosure log Section 56 authorises objections to inclusion in disclosure log. Section 56(3) describes required content of an agency's acknowledgement of receipt of an access application. Section 51(3) describes other required content of an agency's acknowledgement. However there are no cross-references in the two provisions.	**23.** Consideration should be given to cross-referencing in notes sections 51(3) and 56 (3), or bringing the content together in the one provision.
10. Section 57 – Deciding applications Under section 57, an agency must decide an access application within 20 days after the agency receives the application. The time limit to process large applications is insufficient, particularly for smaller agencies or regional offices. The Act needs to be amended to allow a further extension of time in instances where an agency is processing an application in good faith as quickly as possible while continuing its other core work, but is simply unable to meet the statutory timeframes for compliance. Government policy enforces agency shut-downs for all but skeleton staff for the two weeks after Christmas. Most of these days are working days for the purposes of the Act, which is lost processing time.	**24.** Consideration should be given to allowing an extension of the decision period for large applications. **25.** Consideration should be given to amending clause 6 of the Regulation to remove from decision periods the working days occurring during the enforced agency shut-downs in the two weeks after Christmas.
11. Section 60(4) – Decision to refuse to deal with application Before refusing to deal with an application, the agency must give the applicant an opportunity to amend the application as an amendment may significantly reduce the amount of work involved to process the application and therefore the outcome. This process is very time	**26.** Consideration should be given to amending section 60(4) to stop the clock until there is agreement on amended terms of an access application, with a limit to prevent the clock being stopped for a significant amount of time.

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intensive and demanding on the resources of the agency. Section 60(4) currently provides that the period within which the application is required to be decided stops running while the applicant is being given an opportunity to amend the application. We would suggest that this provision be expanded so that the clock is stopped until there is agreement between the applicant and the agency as to the terms of the application, up to a limit of ten working days.	
12. Sections 65 and 66 – Discounted processing charges Sections 65 and 66 of the GIPA Act, and clause 9 of the Government Information (Public Access) Regulation 2009 (Regulations), refer to the entitlement of applicants to a discount of processing charges in certain circumstances. Clause 9 of the Regulations requires the application of a 50% discount for non-profit organisations. Not all non-profit organisations are set up for philanthropic or community-building purposes and not all need discounts. There is no clarification in the GIPA Act or the Regulations as to what evidence is required to show an applicant is a non-profit organisation needful of a 50% discount.	**27.** Consideration should be given to amending sections 65 and 66 of the GIPA Act and clause 9 of the Regulations to require non-profit organisations to provide evidence that payment of the full processing charge would be likely to lead to the organisation's financial hardship.
13. Section 78 – Deferred access Section 78 allows deferral of access to information that is required by legislation to be published. The agencies publish other information i.e., investigative reports which are of interest to the public. The Act does not allow deferral of access to such information until the completion of the investigation.	**28.** Consideration should be given to amending section 78 to expand the definitions of information to which access can be deferred in an access decision.
14. Section 79 – Subpoena Section 79 allows non-compliance with a subpoena relating to	**29.** Consideration should be given to adding Notes beneath sections 60(1)(d) and 79(1) cross-referencing each provision.

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information already subject of an access application. Section 60(1)(d) allows an agency to refuse to deal with an access application for information already subject of a subpoena. It would be helpful for notes to cross-reference these provisions.	
15. Section 84 – Conduct of Internal Review In section 84 it is unclear whether the searches, third party consultations, narrowing of terms and most other completed processes, and the information subject of the initial decision, should also be ignored, the processes repeated and the information identified and scheduled again.	**30.** Consideration should be given providing guidance in the internal review processes.
16. Section 85 – Internal review application fee Section 82 of the GIPA Act allows a person aggrieved by a decision to have that decision reviewed, if the decision is one of those listed at section 80 of the GIPA Act. Section 85 of the GIPA Act stipulates that a fee of $40 is payable by the applicant for an internal review. However, if a third party objects to the release of his or her personal information and the agency decides to give access regardless of this objection, the third party must also pay this fee if it seeks an internal review of this decision. While agencies can use section 127 to waive this fee, it would be preferable for the GIPA Act to expressly state that no application fee is required in these circumstances.	**31.** Consideration should be given to removing the requirement for an internal review application fee in circumstances where an objecting third party's personal information is subject of a decision to disclose following an internal review.
17. Section 87 – Processing charges The lack of allowance of any processing charge for an internal review in section 87 creates an unnecessary burden on the agency who is subject of an internal review, particularly if the application for internal review is not based on the quality of the initial decision.	**32.** Consideration should be given to permitting agencies to levy reasonable processing charges for the conduct of internal reviews and third party internal reviews.
Annual reporting and statistical information	

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18. General comments Schedule 2 of the Regulation provides a set of tables which the agencies are required to populate with statistical information of GIPA applications. The tables are expected provide an overview of GIPA applications and the decisions made by the agency. There are a number of anomalies in the statistical information required by Schedule 2 of the Regulations. For example, in relation to clause 7(b) of the Regulations, which refers to the number of access applications received by the agency: (a) this total can be misunderstood to include applications for internal review and external review to the Information Commissioner and NCAT; (b) the total excludes invalid applications, but most if not all agencies will register invalid applications because it is possible for them to become valid applications (c) the total also excludes transferred applications, probably to avoid double counting when these totals are added up to obtain a sector total. However most if not all agencies will register applications which are subsequently transferred because they are valid, have an application fee associated with them, and transfer may be refused.	**33.** Consideration should be given to amending clause 7(b): (a) to include, the words "(i.e. applications under section 9)" after the words "access applications"; (b) to include all access applications received in the year except applications transferred to other agencies, including valid, invalid, withdrawn and processed; (c) to include separate totals for transferred applications and applications brought forward and carried forward into the next year, to allow reconciliation between total number of applications dealt with and the sub-totals of all processing categories.
The most significant anomaly in the Regulation is the absence of any stated relationship between the tables in Schedule 2 of the GIPA Regulation. This means there is no way for an agency to cross-check figures for accuracy. Neither does Schedule 2 show the numbers of applications carried forward from the previous year, thus it is not possible to usefully compare the total of applications received in clause 7(b) of the Regulations to the totals of	**34.** Consideration should be given to amending clause 7(c) of the Regulation to include any applications brought forward from the previous year to which Schedule 1 of the Act was applied.

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applications decided in tables A and B. By comparison, the tables in Appendix B to the FOI Manual, which set out the annual reporting requirements under the *Freedom of Information Act 1989*, were reconcilable, with annotations to guide the compiler. The GIPA tables were created in their present form quite purposefully to simplify GIPA annual reporting as compared to the old FOI regime. In fact the lack of relationship between tables and lack of comparable totals makes reporting more difficult than previously. Clause 7(c) of the Regulation requires the agency to report the number of access applications received by the agency during the year that the agency refused using Schedule 1. This number excludes any applications brought forward from the previous year to which Schedule 1 was applied. It also bears no relationship to the numbers required in Table D, even though Table D would be the obvious place to compare number of applications decided using Schedule 1 and number of times Schedule 1 categories were applied in those applications.	
19. Schedule 2 – Statistical Information Section 58(2) of the GIPA Act allows the making of supplementary decisions and these decisions must be recorded in Tables A and B of Schedule 2 of the GIPA Reg. But they are not separately reported even though agencies must have the separate figures in order to include them in the tables. Thus there is no possibility of determining how many access applications were actually decided by an agency in the year. Decisions to defer access are not caught by Schedule 2 yet they are	**35.** Consideration should be given to amending Schedule 2 of the Regulations to include supplementary decisions and decisions to defer access. **36.** Consideration should be given to amending Schedule 2 tables as follows: a) Tables A and B to include vertical and horizontal totals, b) Tables A and B to include Invalid applications and Transferred applications,

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reviewable decisions under section 80(h) of the GIPA Act. They are a subset of decisions to give access. There are unexplained inconsistencies between tables of identical structure.	c) Annotations to be added between Tables A and B to indicate that the vertical totals and total of completed applications for Tables A and B should be equal, and that the Invalids totals in both tables should equal the sum of totals in Table C, d) Tables C, D and E to show vertical totals, e) Table F be annotated to indicate that the number of withdrawn applications should be included, f) Table H to be annotated to clarify whether Table H should or should not include review applications for which a decision is yet to be made. **37.** Consideration should be given to amending Schedule 2 to include a table to report on whether internal reviews were decided within the statutory timeframe (15 days plus any extensions), decided after the statutory timeframe (by agreement with applicant) or not decided within time.

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