NSW GOVERNMENT | Premier & Cabinet

Reference: A917476

Ms G Carney, Acting Director
Justice Policy
Department of Justice
GPO Box 6
SYDNEY NSW 2001

By email: justice.policy@agd.nsw.gov.au

Dear Ms Carney

I refer to the letter from the Secretary of the Department of Justice, Mr Andrew Cappie-Wood inviting a submission from the Department of Premier and Cabinet to your statutory review of the *Government Information (Public Access) Act 2009* and the *Government Information (Information Commissioner) Act 2009.'*

I apologise for the delay in providing this response.

Please find attached a submission from the Department of Premier and Cabinet. We consulted with agencies and offices within the DPC cluster as requested (a list of agencies consulted is attached). Responses were received from the Electoral Commission, the Independent Commission Against Corruption, SOORT and the Barangaroo Delivery Authority. I attach a copy of their submissions for your information.

The Electoral Commissioner has raised an issue in relation to ballot papers that is additional to those raised in the submission made directly to you (dated 28 August 2014). I note that there is an existing commitment to address this concern with an amendment to the GIPA Act currently incorporated in a draft Elections Bill, not yet introduced into Parliament.

The letter from Barangaroo Delivery Authority highlights the problems experienced by smaller agencies in dealing with applications under the GIPA Act. Any work that can be done towards simplifying and streamlining the processes under the Act, allowing more flexible deadlines for large applications, and/or providing authoritative guidance (along the lines of the old FOI Manual), would significantly assist smaller agencies, and at the same time benefit all agencies.

Thank you for consulting the Department on the statutory review. Should your officers require any further information, please contact Fiona Cameron, Principal Legal Officer, on telephone (02) 9228 3225.

Yours sincerely

Paul Miller
General Counsel

19 December 2014

Department of Premier and Cabinet –

Submission to the Statutory Review of the *Government Information (Public Access) Act 2009* and the *Government Information (Information Commissioner) Act 2009*

DPC suggests that consideration be given to the following amendments to the *Government Information (Public Access) Act 2009* (***GIPA Act***).

Sections 44-48 – transfer of access applications

Consideration should be given to permitting an agency to transfer a *part* of an application to another agency under Part 4, Division 2.

Where an application is made for more than one category of information and the grounds for transfer under sections 45 or 46 apply to some but not all of those categories, it would be appropriate to allow the agency to transfer part of the application to another agency that is best placed to deal with it (and to continue to deal with the remainder of the application itself).

At present if the receiving agency holds any documents within scope at all, then the agency must process the application in full itself, and then inform the applicant that some of the documents are not held by it, which is a less satisfactory outcome for the applicant.

Section 52(5)

Consideration could be given to removing the *requirement* to refund an application fee received in respect of an invalid application (so that any refund would then be discretionary).

An application must be accompanied by a $30 application fee. If the application is otherwise invalid, agencies have an obligation to assist the applicant to make a valid application. However, if despite all such assistance, a valid application is never ultimately made, the agency is currently required to refund the application fee (section 52(5)).

Some invalid applications require a great deal of work analysing the application, assessing what the applicant is actually seeking, and trying to assist the applicant to make it valid. Processing charges cannot be imposed for this work (whether or not the application becomes valid).

If an agency has expended resources in assisting an applicant to make an invalid application valid (but despite such assistance no valid application is made), then it may be reasonable that any application fee already paid be treated consistently with section 60(6) (no automatic right to a refund where an agency refuses to deal with the application).

Such an approach also appears to be consistent with the general fee structure under the GIPA Act, which aims to establish some sort of balance between, on the one hand, maximising the rights of individual applicants to access information at lowest cost and, on the other hand, ensuring that public resources are not unreasonably diverted or wasted. It may also provide some (albeit attenuated) incentive to applicants to be conscious of the costs to the public when making applications.

Section 56(2)(c)

Clarify that the meaning of "research" is limited to "scientific or academic" research.

On occasion, journalist applicants have objected to the publication of material on agencies' disclosure logs by seeking to rely on section 56(2)(c) and contending that their application for that information has been for "research".

As a policy matter, the proposal that investigative journalists and other media applicants might be given a period of "exclusivity" after obtaining information under the GIPA Act was expressly considered but rejected when the Act was developed and enacted, on the basis that it would run counter to the overriding objects of the Act.

Rather, allowing information to be withheld from more general publication so that it may be properly used for research purposes appears to have been intended to protect and promote legitimate scientific and other academic research.

Section 58(1)(c) and Section 59 - information that is "already available" to the applicant

- Section 59 should also apply if the agency or another agency has previously released the requested information to the applicant under GIPA
- Section 59 should also apply to information "usually available at no charge" to the applicant.
- Documents produced to Parliament in response to an order for papers under Standing Order 52 are generally publicly available, except where a claim for privilege is made. Section 59 should recognise these documents as already available to the applicant.

Section 58(1)(c) of the GIPA Act provides that an agency can decide a GIPA application by deciding that the information sought is already available to the applicant.

Section 59 currently provides an *exhaustive* list of circumstances in which an agency can decide that information is already available, being information which is:

(a) made publicly available by the agency or some other agency in accordance with a legislative instrument other than this Act, whether or not availability of the information is by inspection only and whether or not availability is subject to a charge, or

(b) available to the applicant from, or for inspection at, the agency free of charge in accordance with this Act or the agency's policies and practices, or

(c) contained in a document that is usually available for purchase.

This is a very narrow and specific list.

It makes no sense to exclude from this list information that has made publicly available (eg on an agency website) under the GIPA Act (by this agency or another agency), or made previously available to the particular applicant (but not publicly) under the GIPA Act by this agency or another agency.

DPC received three GIPA applications relating to information that had previously been produced to Parliament in response to an order under Standing Order 52 (SO52). The Legislative Council has common law powers and privileges that are "necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute" (*Egan v Willis* (1998) 195 CLR 424). This includes the power to compel the production of documents from the Executive Government, the procedure for which is established under SO 52.

The relevant order to produce papers covered all of the information requested in the GIPA applications. Accordingly, the applicant could access the information (other than privileged information) from the Parliament, but a SO52 call for papers is not currently contemplated in s59 as a means by which information is "already available" to the applicant.

As well as extending the list in section 59 to include the above matters, consideration could be given to making the list inclusive rather than exhaustive.

Section 60(1)(d) - information is or has been the subject of a subpoena

Section 60(1)(d) allows an agency to refuse to deal with an access application (in whole or in part) if the information sought is or has been the subject of a subpoena or other order of a court for the production of documents *and is available to the applicant* as a result.

Consideration should be given to deleting the requirement that the information is available to the applicant. The requirement that the information was the subject of a valid subpoena etc made by or on behalf of the applicant should suffice. If the information was the subject of the subpoena but was not produced in response to the subpoena, then presumably and logically, the information is not held by the agency.

If the information was produced under subpoena but not made available then it follows that the information is not information appropriate to be made available to the applicant. In those circumstances, a GIPA application should not be permitted as a way of the applicant seeking to circumvent the processes of the Court in respect of accessing subpoenaed documents.

Section 60(1)(a)

Greater clarity could be provided around what amounts to an "unreasonable and substantial diversion of resources".

The GIPA Act provides no limit to the size of an application, although agencies are permitted to refuse to deal with an application if it amounts to a substantial and unreasonable diversion of resources.

The Act gives agencies a relatively short period for processing an application, after which the agency cannot claim processing charges and has to refund the application fee and any processing charges paid in advance.

The Act specifically contemplates a relationship between the decision period and the test for unreasonable and substantial diversion of resources in section 60(2) where it says that, in making this decision, the agency is not required to have regard to any extension by agreement of the decision period. However, decisions of the NCAT in this area suggest that this provision may not be being applied as intended.

Consideration could be given to including in the Act a statement that any application that would require more than a specified number of hours of processing time or cannot feasibly be completed within the decision period (including, if it involves consultation etc, the longer period allowed by those extensions) is taken to involve an unreasonable and substantial diversion of resources.

Alternatively, or perhaps as a first step, such 'rules of thumb' might be considered for inclusion in guidance from the Information Commissioner. Such an approach might be better able to address the differences between various agencies (for example, large agencies processing large numbers of requests for the applicant's own personal information (police, health) and small agencies dealing with large applications for their business documents (eg Barangaroo)).

It may also be helpful for the Information Commissioner to collect information to benchmark the proportion of each agency's budget that is allocated to (or consumed by) handling GIPA applications, and accordingly develop some best practice guidelines around appropriate staffing levels for this function.

Section 63(1)

Consideration could be given to removing the requirement for an agency to refund the application fee in circumstances where the application has been transferred to a second agency (which has made a late decision).

Section 63(1) (alongside section 48) operates to require the application fee to be refunded by the agency which initially received an application, where the application has been transferred to another agency and that second agency makes a late decision.

The requirement for a refund in such circumstances does not appear to serve the purpose of creating an incentive on the transferee agency to decide the matter within time, given that the original agency has no control over the timeliness of processing the application once it has been transferred.

The requirement to provide a refund creates an administrative cost that may be greater than the value of the fee itself (which is the same reason why the Act does not require the fee to be transferred between the two agencies in the first place).

(It is noted that the problems identified here may be alleviated in the future if there is developed a central lodgement point for GIPA applications to all agencies, which could provide the necessary assistance to draft valid applications and identify the appropriate agency to handle the matter. This would also facilitate electronic payment/refunds.)

Section 64 – Processing charges

If necessary, it should be confirmed that processing time includes all general administration that is incidental to or associated with the processing of an application.

Section 64(2) of the GIPA Act defines the 'processing time' for an application as the total amount of time that is necessary to be spent by any officer of the agency in:

(a) dealing efficiently with the application (including consideration of the application, searching for records, consultation, decision-making and any other function exercised in connection with deciding the application), or

(b) providing access in response to the application (based on the lowest reasonable estimate of the time that will need to be spent in providing that access).

The OIC's '*Guideline 2: Discounting charges – special benefit to the public generally*' dated March 2011 indicates that the OIC's view is that "agencies cannot charge for registering the application, conversations with the applicant to clarify the request or reduce the scope, drafting file notes, drafting letters (including notification of a valid application, or advance deposit letters), postage, internal conversations, printing and other general administration incidental to or associated with processing the application".

DPC does not agree with the OIC's narrow interpretation of processing time contained in Guideline 2.

The items listed in section 64(2)(a) of the GIPA Act are expressed in broad terms and on their plain English reading would encompass the matters excluded by the OIC. There is nothing in the legislation to indicate that these matters were not intended to be included as part of the processing time.

Registering applications enables agencies to track their progress and ensure that they are processed in a timely manner. Discussions with applicants to clarify a request or reduce the scope of an application allow agencies to better understand what information the applicant is seeking and ensure that applications are dealt with in the most efficient manner, and providing the greatest level of satisfaction to the applicant. Internal discussions with relevant parts of an agency that hold information falling within the scope of the application ensure that all relevant information is identified. These discussions also enable information access officers to raise any queries and ensure that information being provided is accurate and complete. Drafting letters often requires a considerable amount of work, particularly for letters notifying an applicant of a decision involving a complex consideration of relevant overriding public interest considerations against disclosure. Drafting file notes, particularly for discussions with applicants, is good administrative practice and recommended by the Ombudsman.

Processing charges do not reflect the actual cost to agencies of processing requests for access to government information. Clearly setting out all tasks required to process an application and the associated time involved allows applicants to understand the work required in processing their application and provides a justification for processing charges. Processing charges imposed by DPC are based on conservative records of the time that was required to efficiently process an application. DPC considers that an excessively narrow interpretation of processing time does not encourage agencies to adhere to best practice in processing applications for access to government information.

Before amending the provision, consideration could be given to seeking formal legal advice as to the proper interpretation of the current provision. It may be that no amendment is necessary.

Section 64

Clarify that certain disbursements can be recovered as a processing charge.

The GIPA Act does not allow for the recovery of any costs other than "processing charges" which are calculated by reference to the time spent by agency staff on an application – See Part 4, Division 5.

The Act is silent on whether disbursements can be claimed, but the Office of the Information Commissioner has made clear that agencies cannot charge for "postage ... printing and other general administration incidental to or associated with processing the application".[1] In other jurisdictions, the imposition of charges for disbursements such as photocopying costs is expressly allowed (for example, Victoria, Queensland and Western Australia).

It seems reasonable for some disbursements, such as the fees imposed for retrieving files from archives, to be recoverable as a processing charge.

Section 82

Clarify that internal review is not available if the agency is a Minister.

Section 82(2) was amended by the *Government Information (Public Access) Amendment Act 2012* by replacing the previous words ("Internal review of a decision is not available if the agency is a Minister") with the following: "Internal review of a decision is not available if the decision is made by the principal officer of the agency or a Minister (or a member of the Minister's personal staff)."

This gives rise to some difficulty if a Minister delegates decisions to a Departmental Liaison Officer (DLO) in his or her office, because DLOs are not members of the Minister's personal staff. The policy intent of the previous wording should be reinstated; that is, internal review is not available if the decision is made by or for a Minister.

Section 85

Clarify that an application for internal review is invalid unless and until the application fee is paid.

Section 85 would be clearer if it had an equivalent of section 52(2) that says that the application for internal review is invalid if the fee is not paid, and is deemed to have been made on the date the fee is subsequently received by the agency. It may also be appropriate to provide that section 51A (dealing with the effect of fee waiver or reduction on an application) applies to applications for internal review.

Section 86

The review period for an internal review should be able to be extended by up to 10 working days if the reviewer determines that new searches are required.

An internal review has to be done by a different officer and requires the making of a new decision as if the earlier one had not been made (section 84).

However, the decision period for internal reviews is shorter (15 days) than that for the original decision (20 days).

Sometimes the issues on review are confined, but sometimes new searches are required. It is suggested that the review period, like the initial decision period, should be able to be extended by up to 10 working days if the reviewer determines that new searches are required in the same way that section 86(2) allows the internal review period to be extended if new consultation is required.

Section 93

If the Information Commissioner recommends that an agency reconsider an application because of a long delay in the Commissioner considering the matter (and a possible change in circumstances during that delay) then this should be by way of a fresh application for the information rather than returning the matter for reconsideration.

---

[1] Guideline 2: Discounting charges - special benefit to the public generally, March 2011 ([1.6]-[1.7]) (**Tab D**).

Reviews by the Information Commissioner have sometimes taken up to 12 months or longer to conclude. If the Information Commissioner then returns the matter to the agency for reconsideration, the Act currently provides that no application fee or processing charges can be charged. When such a long period of time has elapsed since the initial decision, reconsideration involves a complete remaking of the decision, as the status of the information may well have changed (eg in terms of whether it is now publicly available) and the public interest considerations may also have substantially changed since the original application was decided.

If a significant part of the Commissioner's reason for returning the decision to the agency is that circumstances may have changed in the meantime (as opposed to there having been any flaw in the making of the original decision), the reconsideration should be treated as a new application, and fees and processing charges should be allowed.

Accordingly, it is recommended that, if the Commissioner does not make a decision within three months of the original decision, a recommendation for reconsideration should not be available; instead the Commissioner should be limited to recommending that the applicant submit a new application. In doing so, the Commissioner may include a recommendation as to whether the application fee and/or processing charges should be waived.

Section 110 - Unmeritorious access applications

Consideration could be given to adding the following grounds for applying to the NCAT for a restraint order (and/or for refusing to deal with an application under section 60):

(a) an applicant behaves in a manner that is offensive, threatening, abusive or harassing (see example provided in the Electoral Commission submission),

(b) an applicant has made one or more informal requests for the same or substantially the same information and that request has already received a considered response from the agency,

(c) applications are made by (or on behalf of) a party to proceedings, relating to the subject matter of current or proposed court proceedings, and would constitute an abuse of process or an attempt to circumvent appropriate court controls on the process of information exchange between parties (including as an alternative to discovery).

Section 110 currently provides that the NCAT can make an order if the NCAT is satisfied that the person has made at least three access applications in the previous two years (to one or more agencies) that lack merit. The definition for lacking merit naturally and usefully incorporates where an agency has refused to deal with an application in its entirety under section 60. DPC considers however that the grounds for a restraint order (and for refusal to deal with an application under s60) should be expanded, as outlined above.

Some well-resourced litigants and their large law firms appear to consider that a GIPA application is an acceptable mechanism to avoid the costs they would otherwise have to pay in relation to a discovery order. There may be alternative ways to address this problem:

- providing in the table to Section 14 an additional public interest consideration against disclosure if the information could be sought by the applicant through court processes associated with current or anticipated proceedings,
- this may need to be combined with an amendment (or note) to section 55, clarifying that a personal factor particular to the applicant that may be taken into account is whether they are a party to court proceedings or have indicated their intention to commence court proceedings.

Section 125

Clarify that the obligation of an agency to provide a copy of its annual report to the Information Commissioner arises after the relevant Minister has tabled the report in Parliament.

Most agencies, like DPC, report their GIPA statistics as a part of their agency's Annual Report. Annual Reports are required to be provided to the Minister within four months after the end of the financial year, and are then required to be tabled in Parliament within a month of their receipt.

The statutory requirement in section 125(1) to provide a copy of the report to the Information Commissioner does not have a time frame on it. It is not appropriate to provide a copy of the report to the Information Commissioner until the Minister has tabled the report in Parliament, as the document is not a settled and public document until that time and in accordance with the usual principle that a document required to be tabled in Parliament should be so tabled before it is otherwise made available. Accordingly, section 125(1) should have added at the end words to indicate that, if the GIPA report is contained in a report required to be tabled in Parliament, the obligation to provide it to the Information Commissioner does not arise until after the report has been tabled.

Clause 2(2) of Schedule 1

Clarify that information contained in a Cabinet document of a former Government can be released if the former Premier has approved the release.

It is suggested that clause 2(2)(a) of Schedule 1 of the GIPA Act be amended to clarify that Cabinet information contained in a document is not subject to a conclusively presumed OPIAD if the Premier or Cabinet of the Government to which the document relates or the Premier or Cabinet of a subsequent Government belonging to the same political party or coalition of parties has approved the public release of the document.

Section 14 (1) and Schedule 1 (Clause 2) of the GIPA Act provide that there is conclusively presumed to be an overriding public interest against the disclosure (OPIAD) of Cabinet information. However, clause 2(2)(a) of Schedule 1 provides that information contained in a document is not Cabinet information if public disclosure of the document has been approved by the Premier or Cabinet.[2]

It is not entirely clear whether the reference to "the Premier or Cabinet" in clause 2(2)(a) means the current Premier and Cabinet (ie., the persons occupying those positions at the time the decision on the GIPA application is being made) or the Premier and Cabinet at the time the document was created.

The question matters particularly where the Cabinet information relates to a previous Government of a different political party.

By longstanding convention, the Cabinet documents of a previous government of a different political party are not generally made available to current Cabinet Ministers (including the Premier). That convention recognises the interests of protecting collective Ministerial responsibility (see M2006-08, 'Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions'). M2006-08 also provides that, "[w]here access is proposed to be given to the Cabinet documents of a previous Government, either to current Ministers or to third parties, the person who was the Premier at the time the documents were created is advised and consulted."

It appears that the GIPA Act may need to be amended to ensure that it operates consistently with convention.

Clause 2(4) of Schedule 1

Clarify that information is not Cabinet information to the extent that it is contained in a document that

---

[2] Clause 2(2) does not contemplate a procedure for making a request to the Premier or Cabinet as part of a GIPA application for approval to release a Cabinet document. Nor does it give the applicant any specific rights, or impose any specific obligations on the Department, if such a request is made.

In accordance with section 53 of the GIP Act, the agency's responsibility is to consider whether the relevant information had or had not been approved for public disclosure by the Premier at the time the application was received by the Department. If it had not been, then the relevant information will not be excluded from the definition of Cabinet information by clause 2(2)(a) of Schedule 1.

There is, of course, nothing to prevent a person wishing to access Cabinet information from writing to the Premier separately requesting that the Premier consider authorizing public release of the document. Such a request would, however, not be *under* the GIPA Act as such.

consists solely of factual material.

Schedule 1, clause 2(4) provides that "[i]nformation is not Cabinet information to the extent that it consists solely of factual material unless the information would:

(a) reveal or tend to reveal information concerning any Cabinet decision or determination; or

(b) reveal or tend to reveal the position that a particular Minister has taken, is taking or will take on a matter in Cabinet."

Where an applicant has sought access to a particular Cabinet document (which clearly contains information not merely factual in nature), it has sometimes been suggested that clause 2(4) of Schedule 1 could require an agency to meticulously assess what information in the document could be characterised as merely "factual material" and, to that extent, provide such information.

Requiring an agency to undertake such a word-by-word, sentence-by-sentence approach would appear to be unreasonable and to do little to further the policy objectives of the Act in circumstances where, given the applicant is requesting access to a Cabinet document and therefore are presumably not interested in only receiving (and being charged a significant processing fee for having identified) "solely...factual information" that might happen to be contained in the Cabinet document.

The purpose of clause 2(4) of Schedule 1 is to ensure that documents that consist solely of factual material are not immune from disclosure as a result of the operation of clause 2(1) of Schedule 1 merely because they have been submitted to or otherwise form part of a Cabinet deliberation.

This exclusion was carried over into the GIPA Act from the previous *Freedom of Information Act* (which applied to "documents" rather than "information").

Consistent with the practice under the previous Act, the exclusion should require an agency to assess whether, *collectively*, the information contained in a document consists solely of factual material before it can be conclusively presumed that there is an OPIAD. This ensures that documents that only contain factual material – the disclosure of which would not undermine collective Ministerial responsibility – are not immune from disclosure under the GIPA Act simply because they happen to fall within a class of documents that is otherwise protected by clause 2(1) of Schedule 1.

Such an approach is also consistent with established legal principles which recognise that it is appropriate that Cabinet documents of the kind described in clause 2(1) of Schedule 1 be viewed as a class for the purposes of determining whether or not they should be subject to disclosure: see eg *Commonwealth v Northern Land Council* [1993] HCA 24 at 7.

Clause 1 of Schedule 4 – Interpretive provisions – *"working day"*

DPC supports the Electoral Commissioner's request that the Act recognise the Christmas close down period as days to be excluded from the definition of working day (in addition to Saturday, Sunday and public holidays).

While in our experience most applicants have often been willing to agree to extensions over this period, it is a significant administrative burden to write to all affected applicants and negotiate this extension. Even if relevant staff are available to continue processing GIPA applications in this period, there are insufficient staff available in the rest of the Department to conduct thorough searches.

Clause 4(3)(b) of Schedule 4 – Personal information

Consideration should be given to expanding the GIPA exemption from "personal information" so that it applies to "an individual's name, *title, agency or office* and non-personal contact details" and "*particular* public functions"; and amending the PPIPA and HRIPA to include an equivalent exemption.

The GIPA Act contains an exemption from the definition of personal information for: information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.

There seem to be significantly different views amongst agencies about the proactive release in generally available publications of the names of people engaged in the exercise of public functions

(for example, in the course of building a database of NSW boards and committees some agencies expressed reluctance to disclose publicly the names of people sitting on Government boards/committees even though this information is gazetted).

Currently the PIPPA only provides an exemption for "information about an individual that is contained in a publicly available publication." In the absence of a mirroring provision in these Acts, the release of this information under GIPA might in some circumstances operate as a breach of the Information Protection Principles.

Rather than the amendment proposed above, consideration could be given to whether it may be sufficient simply to provide clearer guidance to agencies on the issue to ensure a consistent approach across Government.

Clause 14 of Schedule 4 – Defunct agencies

Specific provision should be made for the circumstances where a Minister ceases to hold office. DPC suggests providing that there is no successor agency to a Minister, with the result that any application that has not been dealt with to finality at the time the Minister ceases to hold office lapses. The application fee should be refunded, and the new Minister or the relevant portfolio agency should be required to assist the applicant to formulate a new application.

Where a Minister ceases to hold office, either at the time of an election or due to a Cabinet reshuffle or otherwise, the question arises as to what is the successor agency.

As a matter of practice, information held by the former Minister is, in accordance with the *State Records Act*, usually returned to the portfolio agency, the Department of Premier and Cabinet (in relation to cabinet documents), or sent to State Records to be retained as State archives.

Accordingly, an application made to an incoming Minister will mostly meet with the response that no information is held. Significant resources can be expended by an incoming Minister's office, however, in dealing with pending applications, reviews and appeals from decisions made by a former Minister.

The most satisfactory outcome for the applicant in these circumstances will be if the Department and/or Minister's office assists the applicant to frame a fresh application. The applicant can elect to either seek information held by the new Minister, or information held by the relevant Department. In either event, the scope of the application will most often need to be recast in the light of the changed recipient.

In addition, it is clearly inappropriate for an incoming Minister to have access to information held by a former Minister following a change of Government. The proposed change will ensure that incoming Minsters are not deemed to be successor agencies under the GIPA Act.

Multiple applications for the same document

There is no provision in the GIPA Act to resolve the situation of multiple agencies dealing with the same GIPA application, including where simultaneous applications are made to agencies in other States. The interagency transfer provisions do not apply when multiple agencies hold the same documents (for example Ministerial council documents, interdepartmental contracts or agreements), as in that situation each agency that holds the document is required to respond.

There is potentially a significant waste of resources – any number of agencies could be dealing with the same application at once. If the scope of the application brings up different documents held by different agencies (but with some overlap), the applicant should be entitled to have all applications proceed. However, it is, from a whole of government perspective, an unnecessary diversion of resources where the same document is being sought from multiple agencies, all of which hold this document, and therefore have to make a decision in relation to it.

A different but similar problem arises where applications are made for the same document in different jurisdictions. There is currently no ability to refuse to deal with an application for a document on the basis that the document more closely relates to another jurisdiction and an application for its release is being sought under that other jurisdiction's legislation.

Both of these issues could be addressed if the legislation required applicants to disclose in their application whether they have applied previously or concurrently to another agency (whether in NSW or elsewhere in Australia) for the same information. While it may still be difficult in some circumstances to determine whether or not two applications are dealing with identical documents, liaison between agencies could determine the extent of overlap. This could be accompanied by providing a discretion for an application to be put on hold while another agency deals with the same application, to the extent the particular documents sought are identical. The intent is not to have a second agency refuse access simply because the first agency did, but to avoid waste of resources if the document becomes available to the applicant from the first process.

DPC Cluster Agencies and Offices consulted

Craig van der Laan, Acting Chief Executive Officer
Barangaroo Delivery Authority

The Hon Megan Latham, Commissioner
Independent Commission Against Corruption

The Hon David Levine AO RFD QC
Inspector of the ICAC and
Inspector of the PIC

Mr James Cox, PSM, Chief Executive Officer
Independent Pricing and Regulatory Tribunal of NSW

Mr Jim Betts, CEO
Infrastructure NSW

Charles Turner, Chief Executive
Institute of Sport

Dr John Keniry AM, Commissioner
Natural Resources Commission

Mr Colin Barry, Electoral Commissioner
NSW Electoral Commission

Mr Phil Minns, Acting Chief Executive Officer,
Office of Sport

Mr Bruce Barbour
NSW Ombudsman

Mr Don Colagiuri
Parliamentary Counsel's Office

The Hon Justice Conrad Staff
Parliamentary Remuneration Tribunal

The Hon Bruce James QC
Police Integrity Commissioner

Mr Graeme Head
Public Service Commissioner

Statutory and Other Officers Remuneration Tribunal

Jamie Barkley, Chief Executive Officer
Sydney Cricket and Sports Ground Trust

Janett Milligan, Executive Director
Venues NSW

Alan Marsh, Chief Executive Officer
Sydney Olympic Park Authority

Mr Grant Hehir,
Auditor General of NSW