information and privacy commission
new south wales

Our reference: IPC14/A000074

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

Attention: The Director, Justice Policy
By email: justice.policy@agd.nsw.gov.au

15 SEP 2014

Dear Mr Cappie-Wood, Andrew,

Re: Statutory review: *Government Information (Public Access) Act 2009*

I write in response to your letter dated 15 July 2014 advising of the review of the *Government Information (Public Access) Act 2009* (GIPA Act).

Thank you for the opportunity to comment on the right to government information and the issues that arise in the context of the legislation I administer, the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Personal Information Protection Act 2002* (HRIP Act.) I note that s130(2) of the GIPA Act requires the Minister to consult with the Privacy Commissioner on the review of the Act. Accordingly, I will provide my comments to him to facilitate this provision.

The review is "to determine whether the policy objectives of the Acts remain valid and whether the terms of the Acts remain appropriate for securing these objectives" (s130 of the GIPA Act).

The objective of the GIPA Act is "to open government information to the public ……. and to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information". And, the former Premier when introducing the GIPA Bill to Parliament on 17 June 2009 described the legislation as:

> *a framework based around the principles of proactive disclosure, a presumption in favour of public interest disclosure, … and a new Information Commissioner. Just as importantly, the new legislation ensures that … the right of an individual's privacy will continue to be protected. New South Wales already has an independent Privacy Commissioner to monitor and promote issues concerning personal and information privacy.*

I support the objectives of the Act and obviously, the Parliamentary intent.

EC

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General comments

By way of background comments, the GIPA Act is concerned with government information whereas the PPIP Act and HRIP Act are concerned with personal and health information held by public sector agencies, but which is pertaining to the identity of individuals. To my mind, there is an important difference between 'government information' as used in the 'open government' sense and in the treatment accorded to and the public's expectations of information which is about them and which can identify them, that is, *'personal information'*.

In terms of the statutory review of the GIPA Act my comments focus on two areas; access to information and excluded information although other issues, some operational, exist. The former two points were communicated to the Attorney General earlier in 2014.

Legislative framework for accessing personal information

A key intersection between privacy legislation and the GIPA Act concerns mechanisms to access personal information and the responsibility of public sector agencies in the handling and management of access requests.

Incomplete understanding of the longstanding mechanisms to access personal information via privacy legislation can easily lead to conclusions that these privacy provisions add complexity to accessing personal information using GIPA.

The access to personal information provisions in privacy legislation arise from a very important human right which in turn, underpins privacy rights. The right to know what information is held about you and the right to correct personal information are very significant democratic and human rights. NSW privacy legislation provides both; the right to know and the right to correct. Removal of these rights from privacy legislation would be a retrograde step particularly in relation to correction of inaccurate, out of date or incomplete personal information as currently allowed. Both the PPIP Act and the HRIP Act provide individuals with rights to both access and correct their personal and health information.

In contrast, the GIPA Act does not allow correction of personal/health information, although it allows such information to be accessed. The inclusion of such a right of correction for personal/health within GIPA legislation (if envisaged) would raise however, serious issues as to how well this correction provision would apply to other non-personal or 'government' information.

The access provisions in privacy legislation arise from the particular circumstances addressed by the respective pieces of legislation. The HRIP Act deals with health information (and personal information held with health information). Unlike the GIPA Act, the HRIP Act applies to both public and private health service providers and organisations holding health information that are over a certain size. Further, the ability of individuals under the HRIP Act to access (and correct) health/personal information applies to both public and private health sectors. Without extending the GIPA Act to the private health sector the ability to access health information held by the private health sector will be lost if access is restricted solely to the GIPA Act. Indeed, such a proposal would restrict access currently available to those to whom the information relates. I draw to your attention that a significant proportion of the formal complaints I oversight as Privacy Commissioner, concern the inability to access health records held by private health service providers. A not insignificant number of these complaints also relate to the accuracy or completeness of health/personal information.

Yet, to retain the access and correction provisions within the HRIP Act but remove them from the PPIP Act and rely upon access under the GIPA Act creates significant inconsistency between the two major pieces of NSW privacy legislation.

Both the PPIP Act and HRIP Act do not require the payment of a fee for access and correction of personal and health information. On the other hand, the GIPA Act requires the payment of an application fee for an application to be valid (although this can be waived).

The rights to access and to correct personal and health information without charge are important privacy rights. I am concerned that the consolidation of access to personal information under the GIPA Act would remove these rights. Such changes should be driven by rigorous evidence or research that demonstrates removing important privacy rights and the incurring of a fee would provide better outcomes for NSW citizens.

The current climate of heightened awareness of the threats to privacy means that such a change is unlikely to be well received. For the reasons outlined above, I do not support the GIPA Act becoming the mechanism by which personal information can be accessed.

It needs to be asked: are the purported problems supposedly arising from the various means to access personal information, of a magnitude that warrants undermining privacy legislation and establishing cumbersome and unwieldy provisions for agencies to administer under the GIPA Act? Perhaps an alternate approach could be considered, such as making privacy legislation the preferred means of accessing personal information or retaining the status quo including access under the *State Records Act 1998*.

Lastly, feedback from stakeholders and observation based on my complaint handling and advice functions to NSW public sector agencies suggests that there are operational issues in the way the GIPA Act provisions are applied to requests to access personal information. These issues could be assisted by the publication of relevant resources by the Information and Privacy Commission.

Excluded information

The second matter I raise concerns the definition of excluded information under the GIPA Act as it applies to the Office of the Privacy Commissioner. My concern relates to an unintended barrier to good administrative practice and an inconsistency in the framework applying to the Privacy Commissioner and Information Commissioner in their statutory functions of oversighting agencies' complaint handling.

This arises from the apparent inconsistency under Clause 2 of Schedule 2 to the GIPA Act and the treatment of "excluded information" of the Office of Information Commissioner and the Office of Privacy Commissioner. Information about certain NSW Government agency functions is considered 'excluded information' under the GIPA Act. An application seeking excluded information of the agency to which the application is made will be considered invalid under section 43(2) of the GIPA Act. Excluded information also provides the basis for a conclusively presumed overriding public interest against disclosure where an application is made to an agency other than the agency whose excluded information is in issue.

Clause 2 of Schedule 2 to the GIPA Act provides that the following functions are excluded information:

- *Office of Information Commissioner: review, complaint handling, investigative and reporting functions.*
- *Office of Privacy Commissioner: complaint handling, investigative and reporting functions.*

As can be seen, the 'review' function is absent from those excluded functions of the Office of the Privacy Commissioner. This absence creates an inconsistency between the ability of the Privacy Commissioner and the Information Commissioner to receive the benefit of this exclusion and its promotion of effective oversight of privacy complaint handling undertaken by public sector agencies.

Part 5 of the PPIP Act requires the Privacy Commissioner to oversight the internal review function of public sector agencies as set out in s53 and s54. Under the legislation there is a requirement for agencies to inform me of an application for internal review, to keep me informed of progress of the review, and then inform me of the findings of the review. I am able to make submissions to the agency in connection with the internal review. I am also able to undertake the internal review if requested by the agency. Presently my role in the review function may be open to question as to whether or not information provided to me by an agency (as required under the PPIP Act) is "excluded information" under the GIPA Act.

It would be sensible if the functions of the Privacy Commissioner in relation to "excluded information" were aligned with those of the Information Commissioner by including the review function I have under the PPIP Act. This ensures that my role is adequately covered, specifically that the internal review information provided to me by an agency, and possibly vice versa, will be considered "excluded information" under the GIPA Act.

The proposed amendment is intended to ensure that, as for the Information Commissioner, additional information relating to my involvement with the agency and the internal review process cannot be the subject of a valid application under the GIPA Act. This will enable more open, two way flow of information from agencies. This appears to be the purpose for certain information being 'excluded information' under the GIPA Act. This will both protect the privacy of an individual whose information is provided to me, and facilitate the provision of open and honest information to my office by an agency thus ensuring a more robust and effective review process and better outcomes.

I raised this concern with the Attorney General in correspondence of 28 May 2014. The Attorney agreed that closer examination and possibly amendment is warranted.

I hope this advice is of assistance. Please do not hesitate to contact me if you would like to raise any issue. I can be contacted on (02) 8019 1611, or by email at elizabeth.coombs@ipc.nsw.gov.au if you have any queries.

Yours sincerely

Elizabeth Coombs

Dr Elizabeth Coombs
NSW Privacy Commissioner
15/9/2014