NSW Right to Information/Privacy Practitioner's Network

Submission to the Review of the Government Information (Public Access) Act 2009

Submitted by Tim Robinson, Chairperson

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The NSW Right to Information/Privacy Practitioner's Network consists of practitioners in public sector agencies and organisations in NSW with responsibilities for access to information and privacy.

The following are the issues raised by members, they do not necessarily represent the views of their agencies nor are they in any order of significance.

1. **Need for one access act**

   The existence of access to information regimes under the GIPA Act and the privacy laws is confusing for the public and creates difficulties for agencies. The varying definitions of personal information, with the *Privacy and Personal Information Protection Act 1998* excluding some employment related information (s.4(3)(j)) adds to the confusion in the minds of applicants. Agencies and practitioners are faced with the daunting task of having to explain the fine distinctions and the consequences of a particular choice to applicants and the public.

2. **Identification of applicants – s. 51**

   The verification of the identity of an applicant for access to personal information should be included in s. 51 as part of the process for deciding such an application is valid.

3. **Unreasonable diversion of resources – s. 60(1)(a)**

   The volume of records now created and stored, particularly email has meant that for many agencies even apparently straightforward applications can encompass hundreds or thousands of pages of information. Agencies have limited resources available to process GIPA applications, especially smaller ones. The evidence required to prove that it is a diversion is extremely onerous for agencies (e.g. Colefax v DEC No 2[2013] NSWADT 130).

   As has been suggested at the Commonwealth level a 40 hour limit for dealing with applications should be put in place. Discretion could be given to agencies to deal with an application that would go over the 40 hours.

4. **Contract reporting – Part 3 Division 5**

   The contract reporting provisions are onerous to the point that many agencies are not compliant because the resources and expertise required are not available. It is not disputed that there needs to be accountability for the expenditure of public funds, but the current regime

is not cost effective. Anecdotal evidence is that there is very little public use of the contract registers by the public.

The universities have long argued that such reporting should specifically exclude contracts for the provision of research services by university staff. Such contracts do not related to the expenditure of public funds and are always commercially confidential.

5. Public interest test

There is view that the public interest test is unduly onerous for agencies. The example of Fire Brigade Employees' Union v Fire and Rescue NSW [2014] NSWCATAD 113 was provided, in which the cost to the agency was considerable to demonstrate that its decision was the correct one.

It has also been pointed out that if an applicant requests reduced charges for "Public Interest Benefit" (s.66) the agency is required to apply two different public interest tests.

6. Internal review – Part 5 Division 2

Experience with the long delays for external reviews of GIPA decisions has shown that making internal review option for the applicant to have been a mistake. This is particularly the case when the IPC recommends to an agency that the decision be reviewed – which is common. Internal reviews served a useful function and re-instating them as mandatory, or "encouraged" would free up the resources of the IPC and NCAT.

The time period for an internal review should be 20 working days, with the possibility of extension if consultation is required. An internal review should not be just reviewing the first decision, it should be a re-run of the whole process, from search for documents to consultation and drafting a totally new decision.

7. Unreasonable and persistent applicants – s.60

The current regime for proving applicant's unreasonable actions is too onerous for agencies. GIPA Act or IPC guidelines should apply the Ombudsman's definitions for unreasonable conduct.

There needs to be the power for an agency to refuse an application was vexatious. Such a decision would not be taken lightly by agencies and would have to be reviewable. However, many agencies feel they have expended considerable public resources in responding to an unreasonable applicant on a misconceived crusade.

Concern was also expressed at what was seen as harassment of agency staff by applicants in relation to their applications and the use of the information released.

8. Time limit for IC review – s.90

It is proposed that the Information Commissioner have the discretion to accept late applications.

9. Applications able to be made at central point

It would be of benefit to the public if applications could be lodged at a central point, such as Service NSW, or agency branches. Applications should be able to be made electronically or in hard copy.

10. Time within which access decisions must be made

The nature of both the public sector and or recordkeeping has changed since FOI was first introduced in 1989. Much of the 1980s mindset has continued into the GIPA Act. Information is not generally to be found in a file maintained by a registry. The proliferation of email and satellite systems makes searches for information increasingly complex and lengthy. The structure of agencies, shared services, outsourcing and arrangements with NGOs all compound the difficulty often met in dealing with access applications. It is now routine to have hundreds or thousands of pages of records returned in relation to an otherwise apparently simple access request.

There is a need to extend the time within which applications must be decided to 30 working days, plus 15 for consultation.

11. Strengthen provisions re outsourced services – s.4 and Schedule 4

It has been suggested that the definition of bodies covered by the GIPA Act in s.4 and Schedule 4 needs to strengthened to ensure they cover outsourced services and similar arrangements for the delivery of services to the public.

12. Big Data

A further issue concerning the relationship among the right to information and the privacy legislation (the GIPA Act, PIPP Act and HRIP Act) discussed in paragraph 1, is the question of the most appropriate mechanism for providing access to large datasets. Where these datasets do not contain personal information, the Open Data initiative has been established with the intention of supporting the proactive release of the government information. Unlike disclosures made in response to access applications, agencies can set conditions, eg the following from the Household Transport Surveys published by the Bureau of Transport Statistics at data.nsw.gov.au: "Users are welcome to copy, reproduce and distribute the information contained in this file for non-commercial purposes only, provided acknowledgement is given to the Bureau of Transport Statistics as the source."

Where datasets contain personal information that is health information as defined by the HRIP Act, the HRIP Act provides a robust framework for disclosure of that information, such as for research purposes, where the Privacy Commissioner can issue guidelines that stipulate the requirement for ethics approval. This means the researcher is bound by an obligation to use the data responsibly.

The GIPA Act refers to "the right to access to government information", as distinct from a right to obtain (in a format such as Excel) and manipulate data contained in a government dataset. It

would be helpful for this to be made clearer. Currently, should an applicant make an access application for a copy of information from an agency's dataset, the agency may well be required to provide it, without any ability to set conditions on its use.

13. Legal privilege – s.14(1) and Schedule 1 clause 5

In many agencies functions and activities formerly done by administrative staff are being carried out by practicing solicitors. As a consequence much information is now legally privileged and so subject to the conclusive presumption that its disclosure is contrary to the public interest. This presumption is not reviewable. Agencies are required in s. 5(2) to consider if they will waive privilege in relation to an access application. Anecdotal evidence suggests such a waiving is rare.

14. Cabinet information

There is the need for greater clarity around Cabinet information – for example, s. 30(2)(c) requires the results of any cost-benefit analysis of a class 3 contract to be disclosed, yet the cost benefit analysis is usually prepared for submission to the Expenditure Review Committee, and is therefore a Cabinet document.

In line with some of the sentiments of the *NSW Government Evaluation Framework* (August 2013), the formative evaluative information listed there being specifically excluded from the definition of Cabinet information. Given the recent revelations of the extent of corruption within the highest levels of the NSW Government, the public should have access to this kind of independent/agency analysis in relation to big programs which are going to cost a lot of money and where lobbyists/industry may stand to make a lot of money. The *Evaluation Framework* also refers to program evaluations being made publicly available under GIPA, but for some big projects obtaining Cabinet approval first. There is no mechanism in the GIPA Act for obtaining Cabinet approval.

15. Fees

The cost of receiving fees exceeds the fee for many agencies. In practice processing fees and advance deposits are not collected. A number of views were expressed in relation to this matter:

- As the size and complexity of many personal information requests means agencies regularly exceed the time in the Act which, requires a refund which is also cumbersome to process and so it would be simpler to remove fees entirely.

- The fee structure is based on 1989 and does not reflect current costs to agencies and so needs to be increased to reflect reality.

- A sliding scale of refunds when applications go over time, which is not uncommon with the size and complexity of many applications. Considerable work can be expended in processing an application which then cannot be concluded in the time set in the Act. If the applicant does not agree to an extension of time all fees must be returned.

- Where an applicant has unpaid fees/charges from an earlier application outstanding an agency should be able to refuse an new application until the fee/charge has been paid.

16. Local government DAs

The inclusion of all DA information in Schedule 1 of the Government Information (Public Access) Regulation 2009 as open access information creates an unnecessary burden on local government councils. It results in historical research being done under the GIPA Act, which is not appropriate. The provision should apply to current – in the sense of proposed – applications, not all that have been received by a council.

17. Third party consultation

Consultation should not be mandatory when there is a reasonable likelihood that the agency will not release the information that would otherwise be the subject of consultation.

An agency should be able to disclose the identity of an applicant as part of the consultation process. It is generally the first question a consulted person will ask and is relevant to their decision making in response to the consultation. Applicants would be made aware that their identity may be disclosed as part of the consultation process.

Section 57(2) states:

(2) The decision period can be extended by up to 10 working days for either or both of the following reasons (with a maximum extension under this subsection of 15 working days for any particular access application):
(a) consultation with another person is required under a provision of this Act,
(b) records are required to be retrieved from a records archive.
The decision period can only be extended to allow for mandatory consultation, not just consultation that the agency chooses to do.

This does not allow for instances where there is a need for multiple third party consultations.

The Act should allow for this by extending the period allowed for a decision in the case of multiple consultations. The period should go from the date of the first consultations to 10 days from the date the last consultation is sent out.

The Information Commissioner can monitor ay possible abuse as part of the normal monitoring of agency compliance with the GIPA Act.

18. Deferred access

1. *Section 78 (4) states:*

(4) If access to information is deferred for more than 12 months, the applicant is entitled to make a further access application for the information. No application fee or

processing charge is payable in respect of the further application and access pursuant to the further application cannot be deferred under this section.

The wording is ambiguous. The wording as it is currently, would allow someone who has had an application for information deferred for more than 12 months to make a further GIPA application immediately and, as the wording states, cannot be charged a further fee and the matter cannot be further deferred. The Act needs to stipulate the further application cannot be lodged until after the 12 month period expires.

19. Reviews

The appeal process is very confusing. An applicant can either make an Internal Review or appeal directly to the Information Commissioner or NCAT, but a third part must lodge an Internal Review before s/he can appeal to the Information Commissioner or, alternatively, appeal straight to the NCAT.

The third party should have to lodge an Internal Review before s/he can appeal to either the Information Commissioner or NCAT. Alternatively, take away the need for a Third Party to lodge an Internal Review before s/he can appeal to the Information Commissioner.

The external appeal process needs to be consistent and less confusing.

20. Copyright

Local government councils continue to have concerns regarding copyright and the release of DA's. They do not believe that the indemnity under the EPA Act is sufficient protection for councils. They request that the Department of Justice make representations to the Commonwealth Government that the Copyright Act be amended to resolve the issues currently faced by local government.