1. Whether the policy objectives remain valid

Southern Cross University ("SCU") supports the policy objectives of the *Government Information (Public Access) Act* 2009 ("the Act". SCU is committed to transparency in government and is committed to meeting its obligations under the Act.

SCU makes this submission to the review of the Act to communicate some difficulties we have encountered with the Act. We set out below issues we have experienced with specific provisions of the Act. SCU submits these situations illustrate how the policy objectives of the Act are not being met because of ambiguity in its sections.

2. The first issue relates to the definition of government information held by an agency: Whether documents which an agency comes into possession of *otherwise* than through the agency's usual business, should be included in the definition of "Government information held by agency".

This is a situation SCU has experienced, where an agency ("the first agency") came into possession of a document via one of its employees, who utilised the agency's email system for other business purposes. The document was the property of a second agency.

The first agency did not receive or create the document in the course of the first agency's usual business. The document had no relevance to the official business of the first agency and the first agency *accidentally* came into possession of it. However, in response to an access application, the first agency applied the Act and decided it was obliged to release the document to the applicant because the document was a document it "held".

The Act defines Government information held by agency as:

"Schedule 4,

Clause 12 ***Government information held by agency***

(1)A reference in this Act to government information held by an agency is a reference to:

> *(a) information contained in a record held by the agency, or…*
>
> *…*
>
> *(d) information contained in a record that is in the possession, or under the control, of a person* ***in his or her capacity as an officer or member of staff*** *of the agency…"*

and 'record' is defined as:

"Schedule 4, Clause 10 (1) In this Act: ***record*** *means 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…"*

Clause 12(1)(d) would appear to anticipate that documents that the agency comes into possession of *otherwise* than in the course of their official business, may be excepted from 'government information held by an agency' . However, Clause 12(1)(a) is more broadly worded, which creates ambiguity in this definition.

SCU submits that under the *Privacy and Personal Information Protection Act* 1998 (NSW) ("PPIP Act"), such a document would be an exception to the definition of *personal information* because of the following:

*"Section 4(4)For the purposes of this Act, personal information is **held** by a public sector agency if:*

(a) the agency is in possession or control of the information, or
*(b) the information is in the possession or control of a person employed or engaged by the agency **in the course of such employment or engagement**,…*
(c) the information is contained in a State Record in respect of which the agency is responsible under the State Records Act 1998."

and

*"Section 4 (5) For the purposes of this Act, personal information is not **collected** by a public sector agency if the receipt of the information by the agency is **unsolicited**."*

Under the *State Records Act 1998*, the definition of State Record is:

*"**State Record** means any record made and kept, or received and kept, by any person **in the course of the exercise of official functions** in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section."*

These other Acts provide clearer guidance that unsolicited documents are not 'records of an agency'.

In SCU's submission, 'government information held by an agency' should not include documents which are unsolicited by the agency and which they would not ordinarily create or come into control or possession of in the usual course of their business.

3. The second issue relates to procedural fairness: Whether an agency conducting an internal review should consult with a third party when conducting the internal review.

Section 84(1) of the Act sets out the manner in which an internal review under the Act is to be conducted:

*"84 **Conduct of internal review***
*(1) An internal review is to be done by making a new decision, as if the decision being review (the **original decision**)had not been made, with the new decision being made as if it were being made when the access application to which the review relates was originally received…"*

In SCU's submission, a person conducting an internal review should consult with any affected third party (whether they were consulted in relation to the original decision or not) and should *not* rely on any consultations conducted by the original decision maker.

SCU has sought guidance in relation to this situation with the office of the Information and Privacy Commission ("IPC"). The IPC referred SCU to the only provision that refers to consultation with a third party on an internal review (section 86(2)), which states:

"86 ***Required period for determination of internal review***
(1)…
(2)The review period can be extended by up to 10 working days if consultation is required with another person with whom the agency has not previously consulted in relation to the application."

In SCU's submission, this section relates to timeframes and provides that an extension of time is *only* available if consultation with a *new* party is required. SCU submits that this section does not *preclude* consultation with a party who had been consulted when the original decision was being made. Further, SCU submits that as a matter of procedural fairness, an agency that may be affected by a decision to release a particular document should be consulted when an internal review is being conducted.

4. The third issue relates to Section 110 which empowers NCAT to make a restraint order. SCU's query relates to how an agency could enliven this section in practice.

Section 110 provides:

"110 ***Orders to restrain making of unmeritorious access applications***
(1)NCAT may order that a person is not permitted to make an access application without first obtaining the approval of NCAT if NCAT is satisfied that the person has made at least 3 access applications (to one or more agencies) in the previous 2 years that lack merit. Such an order is a ***restrain order****."*

SCU would like guidance on how this section could ever be enlivened because one agency would never have knowledge of access applications made by an individual to other agencies, unless there were a breach of an Information Protection Principle under the *Privacy and Personal Information Protection Act* 1998.

This section was presumably intended to provide an avenue of relief to an agency experiencing a series of unmeritorious applications from an individual. However, it would be rare for an agency to experience 3 such applications in 2 years. The inclusion of the words

"(to one or more agencies)"

suggests an agency could take into account unmeritorious applications made by the same individual to other agencies. However, in SCU's submission, this would be impossible to demonstrate in practice.

Conclusion

SCU raises the above examples to illustrate how application of the Act in practice can have unintended consequences which don't further the policy objectives of the Act. In SCU's submission, the ambiguity in some sections of the Act (as illustrated by these examples) creates uncertainty for agencies who are trying to comply with the Act.

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