AMENDED SUBMISSION ON REVIEW OF THE *Government Information (Public Access) Act 2009*

Introduction

The *Government Information (Public Access) Act 2009* (GIPA Act) came into effect on 1 July 2010. While in a number of respects it was similar to the repealed *Freedom of Information Act 1985* (FOI Act), there were a number of important differences, notably the change from documents to information, the removal of exemptions, and the introduction of the three-step public interest test, involving the weighing of public interest considerations in favour of and against disclosure.

The purpose of the GIPA Act is to "*maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective"*, and its object is to *'open government information to the public'* in a number of ways.

While this object remains valid, in the light of the move towards digital government, and recent events which have eroded trust in government at the highest levels, there are two areas of focus where the GIPA Act could be extended and to ensure that Government is truly open and accountable, as well as other areas where the GIPA Act could be improved to ensure that it is fair and effective.

This submission also makes comment on some other important areas which should be raised in the context of a review of the GIPA Act.

Addressing these issues would assist in advancing the NSW 2021 goals 29 to 32, aimed at restoring accountability to Government.

Discussion

This submission has three main areas of discussion:

- Open - enabling the GIPA Act to integrate with and advance government policy on Open Data and to support the NSW Government Information Management Framework.

- Accountable - enabling the GIPA Act to better facilitate accountability in government decision-making and to support the NSW Government Evaluation Framework; ensuring citizens rights to information about government services are not compromised when those services are outsourced.

- Fair and Effective – enabling the GIPA Act to be better understood and applied by the public, government agencies and the Information & Privacy Commission.

OPEN

The GIPA Act was a step forward in its move from documents to information, however with the continued movement towards digital government, the lines are becoming increasingly blurred between data and information. Access to data and information is not just about openness and accountability, but is about innovation and improved services. The GIPA Act should enable an integrated and consistent approach.

In 2012 the NSW Government released the NSW Government ICT Strategy, containing eight priority initiatives, including Open Government, Open Data, Information Management and Information Sharing. The key service capabilities associated with this Strategy are:

- Services Anytime Anywhere
- Community and Industry Collaboration
- Citizen Focused Services
- Better Information Sharing
- Financial and Performance Management

In the July 2013 the NSW Information Management Framework set out a common approach for managing and implementing standards for 'data and information'. In September 2013 came the NSW Government Open Data Policy, which is said to support the open government principles of 'transparency, participation, collaboration and innovation' identified in the NSW Government ICT Strategy. Section 1 of the NSW Government Open Data Policy sets out its purpose, which includes:

> Support the *Government Information (Public Access) Act 2009 (NSW)* (GIPAA) and promote simple and efficient compliance with the requirements set out in that Act.

However, there is an identifiable difficulty with the integration of these policies, because of the definitions of data and information.

	GIPA Act	**Open Data Policy**
Data	No reference	The representation of facts, concepts or instructions in a formalised (consistent and agreed) manner suitable for communication, interpretation or processing by human or automatic means… Typically composed of numbers, words or images. **Data is not information** until it is utilised in a particular context for a particular purpose (Office of the Australian Information Commissioner, 2013) …typically considered to be conceptually at the lowest level of abstraction

Information	'contained in a record'	Includes government information as defined in GIPAA. Any collection of Data that is processed, analysed, interpreted, classified or communicated in order to serve a useful purpose, present facts or represent knowledge in any medium or form. This includes presentation in: electronic (digital), print, audio, video, image, graphical, cartographic, physical sample, textual or numerical form (Office of the Australian Information Commissioner, 2013) …typically considered to be at a higher level of abstraction than Data
	Record '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'	

This leaves two important questions to which the answer appears to be 'no':

- Does the GIPA Act apply to data?
- If not, what is the mechanism for persons (including government agencies) to request access to datasets for use in innovative ways or to obtain new information which could be extracted from that data?

The following are examples where the GIPA Act was ineffective in dealing with a request for access to government data:

[THE FOLLOWING EXAMPLES ARE CONFIDENTIAL]

- [redacted]
- [redacted]
- [redacted]

[END CONFIDENTIAL SECTION]

The following is an example where an agency facilitated access to open data informally, however the agency employee was unsure whether the GIPA Act gave him authority to do so:

- A local land authority allowed a person who needed access to particular information held by the agency to have supervised access to the data and licensed software to undertake modelling.

The application of the GIPA Act should be extended to provide applicants with a legally enforceable right to apply for access to datasets, and for the same public interest considerations to be applied in making decisions in response to those applications.

ACCOUNTABLE

The public of NSW has been shocked in recent times by revelations of corruption at the highest levels on both sides of the political spectrum, leaving them wondering on what basis decisions have been made, and whether those decisions have been made on the basis of public or private interests, and whether business or influential lobby groups have been able to influence government decisions to the detriment of the public interest.

The NSW Government Evaluation Framework states:

> As highlighted in the recommendations of the Final Report of the NSW Commission of Audit into Government Expenditure, evaluation is a key tool to support evidence based policy and decision making in government… and as a tool for communicating and sharing valuable information.

The Framework goes on to talk about the importance of evaluation at all stages of a program, and refers to a number of types of evaluation, including formative (such as business case) and summative (cost-effectiveness and cost-benefit analysis). Indeed, cost-benefit analysis is referred to in the GIPA Act, where section 30(2)(c) provides for disclosure in relation to class 3 government contracts, as is the public sector comparator (s 30(2)(d)) and the contractor's full base case financial model (s 30(2)(e)).

However, because of NSW Government approval procedures for large projects such as major capital works, documents such as Economic Appraisal, Peer Review, Cost-Benefit Analysis, and so on, must be prepared and submitted to the Expenditure Review Committee, and by definition then become 'Cabinet Information'. Reports may also be prepared for Cabinet by agencies or independent experts on the effectiveness of pilot projects. There is no consistency in relation to the release of such information to the public.

Some examples include:

[THE FOLLOWING FOUR EXAMPLES ARE CONFIDENTIAL]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[END CONFIDENTIAL SECTION]

It is noted that the NSW Government Evaluation Framework contains a commitment to transparency and accountability and states that it is good practice to publish the findings of evaluations. It states that evaluation findings should be made publicly available unless there is an overriding public interest against disclosure, 'however large and complex evaluation reports should be provided to Cabinet for approval prior to publication'. There is no mechanism in the GIPA Act for the requesting of Cabinet approval for the release of Cabinet information.

There are a number of approaches which could be considered:

- That certain kinds of proposal, evaluation or assessment documents which are ordinarily prepared for Cabinet be nominated as open access information (noting that some redaction might be required)
- That at the time Cabinet considers such a document, that it also give instructions in relation to whether or not the document be released
- That, as with Legal Professional Privilege, where there is a requirement for the privilege holder to consider whether or not they will waive privilege, or for excluded information, where there is a requirement for an agency to ask another agency whether it consents to the disclosure of its excluded information, that where there is a request for Cabinet

information of an evaluative nature, that there be a requirement for the agency to seek Cabinet approval.

The provisions of the GIPA Act in relation to Cabinet information should be amended to allow certain types of Cabinet information to be reclassified or made available, either as open access information or through consideration and approval, in order to support government policy, restore trust in government, and to ensure a wider opportunity for all sections of the community to be involved in public debate.

Definition of an 'agency'

The GIPA Act should take into account the administrative realities of new and different models of service delivery to:

- ensure that the public's right to access information about the operation of important services, and especially their own personal information, is not removed, compromised or limited by changes such as privatisation, or outsourced delivery;
- protect the public's right to gain access to the same information about a service, regardless of whether the information is held by a government, non government or private service provider;
- make the service provider that holds the information take responsibility and be held accountable for complying with GIPA Act obligations;
- avoid further administrative burdens on government agencies, who at present have to try to obtain information from service providers where they have little or no control over the way in which records are made, kept, or searched for;
- facilitate decision-making closer to the source of creation of the information, by organisations who understand the implications of its release, rather than people remote from that information;

Some examples are:

[THE FOLLOWING EXAMPLE IS CONFIDENTIAL]

- [redacted]

[CONFIDENTIAL SECTION CONCLUDED]

- Under s 247 of the *Crimes (Administration of Sentences) Act 1999*, for a privately managed prison the GIPA Act and regulations apply to the management company and its employees as if the company were a local authority. This is not reflected in the GIPA Act, and a check of the Geo Group's website appears to have no reference to the GIPA Act, and no publicly available open access information.

- The GIPA Act does not appear to cover Regional Organisations of Councils or other council groupings such as Hunter Councils Inc (and associated companies, for example, involved with records management, waste and legal services with Council mayors and general managers on the board), which are increasingly being used to provide a range or services formerly provided by individual councils and to conduct activities such as procurement on behalf of Councils. This has the potential to remove areas of Council activity from the scrutiny of ratepayers.

The jurisdiction of the GIPA Act should be extended by a more comprehensive definition of 'agency', or by utilisation of schedule 4 and the Regulation to deem relevant organisations as agencies.

FAIR and EFFECTIVE

There are a number of ways in which the GIPA Act could be improved, to ensure that it is operates more fairly and effectively, particularly given the changes to the way in which the government is structured, and to prevent uncertainty and misunderstandings.

Open access information

Clarification should be provided in relation to the publication of Open Access information on either or both of an agency's website and the OpenGov website.

Non-government agencies providing community services directly to members of the public on behalf of government under new service models should be required to publish open access information (in particular policy information) on their websites as it relates to the provision of those services.

Government contracts

The definitions and provisions in relation to government contracts should be extended to take into account the range of different kinds of contractual arrangements, deeds or grants which are entered into by government with the private sector, non-government sector and other government agencies, under new service models, including contestability.

A provision should be included which encourages government agencies to disclose contracts of any value.

The value of a contract should be clarified as to whether it does or does not include GST, stamp duty or other kinds of taxes.

Subcontractors should be included in the information to be disclosed about contracts, to ensure greater transparency and to align with the information required to be provided on the NSW Government eTender site. Consideration should be given to including key personnel to be disclosed, to ensure that

agencies are not engaging with persons who have had adverse findings made against them by the ICAC.

Clarification should be given as to whether the requirement for a government contracts register is a separate requirement to the publication of contracts on the NSW government eTender website.

Consideration should be given to incorporating extra requirements from the NSW Premier's Memorandum 2007-01, such as the requirements listed in the Guidelines under the heading "Requests for disclosure of additional contract information".

Access applications

Access applications should be able to be lodged online and paid for by any means, including direct debit and credit card. Digital facilities are increasingly the way business is done in our society, and the approval of the Information Commissioner should not be needed to use such facilities (see s 41(2)). Access applications should also be able to be lodged and paid for at ServiceNSW centres.

Access applications should be able to be efficiently directed to the relevant agency within a cluster. The GIPA Act should recognise that while the NSW public sector organises itself in different ways, with some agencies having shared service arrangements, while others remain distinct, a member of the public should not be disadvantaged by not being aware of a cluster's particular administrative arrangements. The public should not be expected to know, for example, that an access application for one agency in a cluster must be sent directly to that agency and not the lead or overarching agency, or be required to submit separate access applications (with multiple application fees) where information falling within the scope of an access application is held by different agencies within a cluster.

Third party consultation

Section 54 consultations should be mandatory, where practicable. Agencies should not be able to refuse access to third party information without having consulted to see whether the person actually objects to release of the information. If someone is asking for access to information concerning another person, the person who is consulted should be able to know the identity of the applicant.

Personal factors

There are often compelling personal factors in relation to particular requests for information, where conditional access should be available as an option in response to a formal access application, and should be able to be reviewed. This would remove the anomalies such as where:

- A person makes an access application which is refused, they lose their application fee, are never told that if they had made an informal request they may have gained access.
- A person is told to withdraw their application, and that they will be provided with information informally; they are disappointed with the information provided but have no right of appeal.

Time limits for decision

The Act appears to envisage a small operation where one unit receives an application, searches for the information and makes the decision. The time limit within which an application must be decided should be extended to 30 to 40 working days, to allow for administrative realities, such as applications needing to be processed by a central unit, search requests sent to a variety of business units, multiple searches due to controlled access to information, compiling and copying of information, subject matter experts to consider the information and then a decision to be made by the delegated decision maker. Certain agencies in particular receive large numbers of applications, and many applications are for large volumes of information, which an agency may be prepared to process, but which will take considerable time.

Persistent/vexatious/voluminous etc applicants/applications

The right of the public in general to receive prompt responses to requests for information is sometimes compromised by an agency having to deal with persistent and difficult applicants and voluminous requests. The GIPA Act should provide strengthened provisions to manage such applicants, and more flexibility in meeting challenges of delivering a service to all in the public interest, in times of ever tightening resource restrictions.

Deemed refusal

The position with regard to 'deemed refusal' needs to be clarified. Section 51(3)(b) states that acknowledgement of a valid access application must include:

> A statement that the application will be **deemed to have been refused** if not decided by the required date.

However the relevant provision (section 63(1)) states:

> If an agency does not decide an access application within time, the agency is **deemed to have decided to refuse to deal** with the application…

The note to this section states that "A deemed decision to refuse to deal with an application is reviewable under Part 5." This is provided for in section 80(c):

> …a decision to refuse to deal with an access application (including such a decision that is deemed to have been made),

The terminology 'deemed to have been refused' in the acknowledgement letter is confusing for applicants, who invariably believe that they are entitled to a review of a decision to **refuse access** to the information if their application is not decided in time. However the actions which can be taken on review of such a decision are extremely limited, and do not involve a consideration of the merits of the access application.

The wording of section 51(3)(b) should be stated, or a note should be added, to make the true position clear.

"Conduct constituting a reviewable decision"

The GIPA Act should make clear (perhaps by way of example in a note) what is meant by 'conduct constituting a reviewable decision', which cannot be the subject of a complaint. An applicant may be satisfied with a decision made in response to an access application, but dissatisfied with the way in which their application has been dealt with (for example, no acknowledgement letter, or a decision which does not comply with section 61). A person who is dissatisfied should not be expected to know the difference between a complaint and a review in order for their matter to be dealt with. In this regard I note the provisions of section 15 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act).

Internal review

An internal review should be required before an external review (as for Privacy complaints), however consideration should be given to reducing or removing the cost for an internal review, and increasing the time by which the internal review has to be completed, to allow a complete decision to be made; also to allow for extensions of time, if further consultation is needed.

This would prevent the confusion which arises where original applicants do not need an internal review before an Information Commissioner review, but authorised objectors do. If the authorised objector does not realise they need an internal review, and the agency will not accept an internal review out of time, the authorised objector may then be prevented from requesting an Information Commissioner review.

Clarification should be given as to whether an internal reviewer can have regard to the original decision in conducting the review. There appears to be contradictory advice on this matter (Saggers & OEH, 8/02/2012 – no; discussion by IPC staff member re draft Internal Review fact sheet at Practitioner's meeting – yes).

Information Commissioner review

The Information Commissioner should be given the discretion to accept review requests out of time. This discretion is given to an agency and to the NCAT. The time limit for a review runs from when the notice of decision is given to an applicant. A notice is given when it is posted. If a notice of

decision is dated and signed on a particular date and then put in the internal mail system, it may not be posted until the next day. This means an applicant could miss out on their right of review by one day. Not all agencies have an outgoing mail register, and most applicants would not keep a copy of the postmarked envelope in which the decision was received.

There should be a time limit set within which the Information Commissioner must complete an external review, for example, six months for original applicant review, and three months for third party objector reviews. The shorter time for third party objector reviews is to reflect the fact that there has been a decision to release information, and that release of the information has already been delayed by the internal review appeal period, the internal review and the external review appeal period. The Information Commissioner should be able to complete a review within a reasonable timeframe, particularly as agencies must search for and make their decisions with such tight deadlines.

There should be a provision requiring agencies to respond to both the applicant and the Information Commissioner within a specified timeframe on whether or not the agency intends to follow the Information Commissioner's recommendations.

Where an agency agrees to reconsider its decision by way of internal review after an Information Commissioner review, an application should not be required to submit an internal review request form (as happens in some agencies).

An applicant should be prevented from requesting an Information Commissioner review of an agency decision which was the result of a reconsidered decision in response to an Information Commissioner review. In such cases the applicant should be required to request an NCAT review.

There should be a provision for the Information Commissioner to immediately remit a decision to the agency for reconsideration where the notice of decision does not meet the requirements of section 61; that is where the decision does not on its face demonstrate that the public interest test has been properly applied.

- The Information Commissioner should also be able to refer examples of poor agency record-keeping practice to the State Records Authority, given the importance of record-keeping compliance for the effectiveness of the GIPA Act.

Other Important Matters

There are some matters which should be raised for consideration, although whether they are strictly matters for the GIPA Act may be open to question.

Workplace investigations – unsuccessful complainants

Workplace complaints and investigations are amongst the most contentious issues dealt with by agencies. Of particular concern are those matters where:

- The person complained about makes counter-claims about the performance of the complainant which are preferred by the investigator. Unlike a court proceeding, where counter-claims would be put to a plaintiff, the complainant is never told about or given a chance to address the counter-claims. The complainant is simply told that their claim was unsubstantiated.

- The person complained about is found not to have committed a breach, but the investigation discovers serious structural, management, training or other problems within the agency which has contributed to the situation and makes recommendations for those issues to be dealt with. The complainant is never told of those problems or recommendations. The complainant is simply told that their claim was unsubstantiated.

More needs to be done to ensure that complainants whose claims are not substantiated are dealt with fairly and are provided with appropriate information to allow their issues to be resolved.

It is suggested that there should be a mechanism in place that where personal factors of an application indicate that information should be provided to a particular applicant, but not to the general public, conditional release is available as a reviewable alternative.

Information Commissioner

Under section 17 of the GIPA Act the Information Commissioner has a number of responsibilities to provide information, advice, assistance and training to agencies, to issue guidelines and other publications for the assistance of agencies, and to assist agencies in connection with the exercise of their functions under the Act (including services in relation to procedural matters in relation to access applications). Agencies face complex policy and procedural issues in relation to exercising their functions under the GIPA Act. In recent times there have been few new information access resources for agencies, and most has been relatively high level. This contrasts with the variety and depth of information, for example, provided by Queensland. In relation to policy issues, there is

A considerable portion of the GIPA Act and Regulation relates to mandatory open access information, and agencies invest significant resources in ensuring compliance. However it appears that the Information Commissioner

is not monitoring, auditing and reporting on the exercise by agencies of those mandatory requirements. The Information Commissioner's recent report to parliament on the operation of the GIPA Act does not contain any information about mandatory open access information, but appears to be a simple statistical aggregation and description of information provided by agencies mainly in relation to access applications. However, the focus of the GIPA Act and of government policy is on open and proactive release of information, with access applications being a last resort.

Tanya O'Dea

Background Information

- NSW government employee for 20 years
- Graduate Certificate of Commerce (currently studying Master of Commerce with Business Information Systems specialty)
- Member Right to Information/Privacy Practitioners' Network
- Member NSW Government Communities of Practice – ICT, Open Government, Change
- Member and Committee Member, Institute of Public Administration of Australia (NSW)
- Member, Governance Institute of Australia (CertGovRisk)

References

NSW Cabinet Office/NSW Treasury, *Memorandum No 2007-01: Public disclosure of information arising from NSW Government tenders and contracts* and *Guidelines* (2007)
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