NSW GOVERNMENT | Trade & Investment

Office of the Secretary

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Review of the Government Information (Public Access) Act 2009 (GIPA Act)

I refer to the invitation by Mr Cappie-Wood to make a submission to the review of the GIPA Act. All NSW Trade & Investment cluster agencies have been given an opportunity to comment and make suggestions while State Owned Corporations were encouraged to make their own submissions direct to your Department.

The intent of the GIPA Act to provide access to information concerning the policies, decisions and actions of agencies and Government, subject to any overriding public interests against disclosure, is strongly supported. The following comments and suggestions are made to improve the process through which access to government information is managed and made available.

Third Party Information

One major area of concern relates to information provided by third parties for which access applications are subsequently received. Due to the business oriented functions undertaken by NSW Trade & Investment GIPA applications predominately seek access to information concerning the business affairs of third parties held by the Department. During the 2013-2014 reporting period there were no applications received where the applicant was solely seeking access to their own personal information, and only two applications where the information sought related to the applicant's personal affairs.

A substantial proportion of applications therefore seek access to business information which was provided by third parties to enable the Department to exercise its functions. That information had been provided for a specific purpose and usually has a level of commercial or operational sensitivity. A common response when third party consultation is undertaken on the potential release of such information is that disclosure would affect the level of detail and candour included in any subsequent information provided to the Department.

The quality of the information provided by third parties has a direct effect upon the Department's ability to effectively exercise its functions, make decisions and manage significant state resources. Any diminution in the quality of such information is of significant concern.

While the Table at s14 of the GIPA Act allows Business Interests to be considered as a factor against disclosure, an overriding public interest against disclosure must then be made out for any such information to be withheld. That can only be determined where the total weighting attributed to the factors against disclosure is considered to be greater than the total weighting applied to those factors favouring disclosure.

The presumption in favour of disclosure of government information prescribed under s5 of the GIPA Act, and reiterated at s12(1), makes a significant initial contribution to the weighting to be attributed to the factors favouring release when the public interest test required under s13 is applied.

This initial weighting to favour the release of information contained in documents and records created by agencies and government in the exercise and discharge of their proper functions is appropriate. The continued application of a similar initial weighting favouring the release of documents and records created by third parties, however, is not supported due to the detrimental impact that may have upon the quality of material supplied to the Department in order to exercise its functions. A common response to consultation requests is that if the information in contention is to be made available to a GIPA applicant then any further reports or documentation required by the Department will be edited to only provide information they are comfortable in making publicly available.

It is recommended that s5 and s12 of the GIPA Act be amended for the presumption in favour of disclosure to only apply to information contained in documents and records that have been created or commissioned by agencies or government. Third party supplied information would still fall within the scope of access applications and may be considered for release, but any such decision would be based upon the outcome of the public interest test without the initial presumption favouring release.

Part 5 – Review of Decisions.

A second major area of concern relates to the process to review decisions. At present applicants may apply for internal review and/or external review by the Information Commissioner and the NSW Civil & Administrative Tribunal (NCAT). Third party objectors may apply in the first instance for internal review or to NCAT.

Internal review required before access to external review

The time allowed to submit an application for internal review after a decision is made is 20 working days, while that for external review is 40 working days. As information cannot be released while any review rights are on foot it therefore takes a minimum of 40 working days for an applicant to access information which was decided should be released but was subject to third party objections.

The current arrangements allow multiple mechanisms for review of the same information by various parties. This may be further complicated when different aspects of the same decision are being challenged in different forums.

The Department had one matter where 26 third parties sought internal review of that part of the decision releasing their information, some of whom then subsequently applied for external review by the Information Commissioner. The original GIPA applicant, however, had immediately sought external review by the then Administrative Decisions Tribunal (ADT) against that part of the decision to refuse access to some third party information.

The internal reviews were decided prior to the ADT matter being settled and were then subject to referral by some of the third parties to the Information Commissioner for external review. Further rights of review by the ADT then attached to the outcome of the Information Commissioner review even though this concerned the same information that had previously been subject to ADT review.
In providing scope for internal reviews and separate external reviews by the Information Commissioner and NCAT to be conducted concurrently on different aspects of decisions made on the same application, the process can be unnecessarily complicated and may substantially delay the finalisation of access applications.

To overcome these concerns it is recommended that in all cases an internal review must be undertaken prior to allowing access to external review. If no internal reviews are sought, then any information which was decided should be released over the objections of the third party could be provided to the applicant at the expiration of internal review application period (20 working days) rather than waiting for the expiration of the 40 working day external review application period as must occur at present.

Timing of internal review decisions
A practical issue is that 20 working days are available after the decision is made in which to apply for internal review, which currently must then be decided within 15 working days. That allows an internal review application to be made on 'day 1' which must then be decided by 'day 16' although the other parties still have 4 working days available to submit their own internal review application. Multiple internal reviews concerning the same access application is a substantial duplication of effort.

A much more effective solution would be for the 20 working day period to apply for internal review to remain, but for the 15 working day period available in which to make a decision to commence at the expiration of the 20 day application period.

In that way all internal reviews for any particular access application would be received by 'day 20' after the original decision, and they could then be considered jointly in making a new decision by 'day 35'. That allows any further information or arguments put forward by the parties to support their position to be considered jointly and a single, comprehensive decision to be made.

Review rights for each party to lapse if not exercised
The purpose of s81 in extending the review period available in regard to each decision made for an access application to the end of the review period available for the latest decision is unclear. That provision appears to 'reactivate' all lapsed review rights for all parties if one party exercises their right of review at any time. This has the effect of further delaying when information which was decided should be released may be provided until the expiration of the last of the review periods available to any of the parties.

It is recommended s81 be repealed on the basis that each opportunity for review should lapse if not taken up within time by the party concerned.

Consultation on internal review material
Section 86(2) allows a further 10 working days in which to decide internal reviews '*if consultation is required with another person with whom the agency has not previously consulted in relation to the application*'.

It is recommended this subsection be revised to include consultation with parties who may have previously been consulted. On occasion additional documents are identified for which such third party consultation is appropriate – particularly where adequacy of search issues have been identified.

Advice of external review applications
Where applications for external review are made to the Information Commissioner or NCAT, notice of the review application should also be required to be served upon the agency. Delays in being advised of such reviews may lead to the inappropriate release of material subject to appeal.

Unreasonable and substantial diversion of resources
GIPA applications received by NSW Trade & Investment are often complex and involve a large quantity of material. The time and cost to search for, access and retrieve information from available systems and archives can be considerable and must be achieved within the resources available.

Quantifying what is an unreasonable and substantial diversion of resources
Although applicants may be requested to narrow the scope of their application to make this process more manageable, there is no obligation upon them to do so. To refuse to deal with an application under s60(1)(a) due to being an unreasonable and substantial diversion of resources is a reviewable decision. In the absence of any quantification of what is considered to be an unreasonable and substantial diversion of resources it remains a subjective assessment open to interpretation and conjecture. While an applicant may consider their application 'deserves' to have substantial time and effort directed towards satisfying their request, the finite resources available dictate that less resourcing is then available to meet the requirements of the other applications on hand.

To provide equitable access to government information it is recommended that 35 hours be specified as the upper limit of what is considered to be a reasonable allocation of resources to process a GIPA application. The equivalent of one person working full time for one week on a single application is considered to be a suitable commitment consistent with the object of the Act.

Including consultation requirements when deciding if there is an unreasonable and substantial diversion of resources
At present s54(1) requires agencies to take '*such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person…'.* Consultation with third parties is an important and crucial step in the public interest test. Third parties may have valid concerns about the potential release of their information which need to be taken into account when making a decision. Alternatively, if they do not have any such concerns, that also has an effect upon the outcome of the balancing process when applying the public interest test.

The requirement to take '*reasonably practicable'* steps to consult with affected third parties has been applied in practice to consider whether the contact details of third parties is available or able to be obtained in order to consult with them.

That position was taken in considering an application to access the sensitive business information of over 900 third parties. The applicant was advised it was considered an unreasonable and substantial diversion of resources to undertake the necessary consultation with that number of businesses and requested to revise the scope of their application.

The subsequent external review offered an alternative view of s54(1) - that where consultation was not '*reasonably practicable*' due to the number of third parties involved consultation was not required and a decision may be made without consulting those third parties. On that basis, the time which would otherwise have been required to consult with numerous third parties should not be considered in deciding whether there was an unreasonable and substantial diversion of resources.

Consultation is an essential element to inform the public interest test and ensure a considered decision is made. It is recommended the resourcing required to consult all affected third parties is specified as being a consideration when assessing whether an application should be refused under s60(1)(a) due to requiring an unreasonable and substantial diversion of resources.

Time available in which to make decisions on access applications and internal reviews
It is recommended that the period within which access applications and internal reviews are required to be decided stops running during the Christmas close-down period announced annually by the Premier.

If you require any further information or assistance please contact Ron Taylor, Manager Governance & Information Requests on (02) 9995 0911 or Ron.Taylor@Trade.nsw.gov.au

Yours sincerely

Mark I Paterson AO
Secretary
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