Objective Ref. 11/8002

SUBMISSION FROM TRANSPORT FOR NSW (TFNSW)

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

Submission 1: Partial transfer of access applications

Amend the GIPA Act to permit the partial transfer of access applications to other agencies in circumstances where the other agency is known to hold information which is subject to the application.

Currently the GIPA Act does not permit partial transfer of an access application to enable it to be dealt with by multiple agencies or permit the partial transfer of an access application to another agency. This is inconsistent with the NSW Government Cluster structure – which was established to coordinate the efforts all NSW Government agencies which are implementing the Government's policies and services priorities for the community, outlined in its ten year strategic plan - *NSW 2021: A Plan to Make NSW Number One*.

In line with the Cluster structure, and to improve services to our customers, TfNSW is centrally coordinating receipt of all transport agency applications under GIPA. On a number of occasions documents are requested of one transport agency which is known to be held by multiple transport agencies. It would assist the customer if the Act were to allow applications in such cases to be handled by multiple agencies, or to be partially transferred to another agency, – rather than the current unwieldy process which requires the customer to make multiple applications and pay multiple fees.

Precedent

It is noted that both the Commonwealth ***Freedom of Information Act 1982*** (FOI Act) and the Queensland ***Right to Information Act 2009*** (RTI Act) have provisions which enable agencies to partially transfer applications.

In both cases, the legal entitlement to the requested information applies to both the original agency who received the application and the agency to which the applications are partially transferred (s 16(3A)(b) of the FOI Act and s 38(4)(b) of the RTI Act).

Submission 2: Ability to re-activate access applications

To provide a better customer service and preserve an applicant's rights of review, the GIPA Act should be amended to allow an applicant to retrospectively authorise an extension of the decision period for an access application **after** the application has become a deemed refusal. This amendment would preserve the applicant's rights of review and enable the agency to continue dealing with the application within time.

Section 57 of the GIPA Act provides the period within which an access application must be decided. However subsection 57(4) enables the decision period to be extended (and further extended) by agreement with the applicant.

Section 63 of the GIPA Act provides that should an agency not decide an application in the required time, the decision is deemed to have been refused. From this time, the applicant's review rights commence.

Whilst TfNSW does not have any concerns about the current provisions relating to the timeliness of decisions or deemed refusal, and will continue to proceed making a decision even after the deemed refusal, there are some circumstances when the deemed refusal presents unfavourable outcomes for both the applicant and the agency.

On a number of occasions, applicants have been willing to agree to an extension of the decision period, however due to delays or difficulties in contacting the applicant (for example, when the applicant is overseas), the applicant has not been able to be contacted in time to agree to an extension of time before the decision is deemed to be refused. When this occurs, the only options available for the applicant are to either immediately seek a review of the deemed refusal (or risk the time to seek such a review expiring) or resubmit their application. Neither of these options is ideal for the applicant.

The limitations of the GIPA Act in not allowing applicants to agree to reactive their application and, in effect, revoke the deemed decision, has caused inconvenience to and drawn criticism from applicants. The added administrative burden of having to recommence applications is experienced by both the applicant and the agency receiving the application.

TfNSW submits that, as a good will gesture, agencies should still refund any money when there has been a deemed refusal.

The information legislation of different jurisdictions permits, in different ways, an extension of time after there is a deemed refusal.

Precedent

The Commonwealth FOI Act also contains provisions relating to deemed refusals, however the agency continues to have an obligation to deal with the application until such time as the Information Commissioner has finalised any review decision. However, the Information Commissioner may, on request of the agency, without taking in account the views of the applicant, grant an extension of time for dealing with the application.

The Queensland RTI Act also provides for a deemed refusal (referred to as a 'deemed decision'). In such circumstances, the agency is prohibited from continuing to work on the decision. However, as with the FOI Act, the Information Commissioner may grant an extension of time to the agency to continue dealing with the application after it became a deemed refusal.

Submission 3: Information Commissioner's discretion

To provide a better customer service, applicants for information under the GIPA Act should be afforded the same flexibility for review as in other jurisdictions.

TfNSW submits that it is appropriate for the Information Commissioner to, in appropriate circumstances; receive applications for review which are made out-of-time. The ability to exercise such discretion would be of benefit to access applicants in circumstances where their application to the OIC has been delayed and bring the GIPA Act in-line with provisions of other jurisdictions.

TfNSW notes that section 90 of the GIPA Act provides that an application for the review of a decision must be made to the Information Commissioner within 40 days after the notice of the decision has been given to the applicant. There does not appear to be any discretion for the Information Commissioner to permit applications for review to be made out of time.

In contrast, sections 83(2) and 101(6) of the GIPA Act permits an agency and the NSW Civil and Administrative Tribunal respectively to receive applications for review after the time for seeking a review has elapsed.

Precedent

An application under the Commonwealth FOI Act must be made to the Information Commissioner within 60 days of the notice being given in the event that the information is refused, or 30 days if the information is provided. Under section 54T(2) &(3) the Information Commissioner may decide to grant an extension of time to apply for review if it is satisfied that it is reasonable in the circumstances to do so.

Section 88 of the Queensland RTI Act permits the Information Commissioner to accept an application for review beyond the statutory 20 business days.

Submission 4: Reference to the disclosure of information which is 'defamatory'

TfNSW submits that the word 'defamatory' in Item 3(e) in the Table to section 14 be supplemented with additional wording which is more consistent with the administration of the GIPA Act by non-legal personnel.

Currently, Item 3(e) in the Table to section 14 of the GIPA Act contains the following:

> ***3 Individual rights, judicial processes and natural justice***
>
> *There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:*
>
> *……*
>
> *(e) reveal false or unsubstantiated allegations about a person that are defamatory,*

As currently drafted, the Act requires officers to make a decision as to whether the information could reasonably be expected to be defamatory. This is a complex legal decision, which is inconsistent with the concept that the GIPA Act is drafted to be administered by non-lawyers.

The issue with this public interest consideration against disclosure is the difficulty in determining whether the information itself could reasonably be expected to be defamatory. A decision as to whether information is defamatory can be extremely complex and difficult to determine for courts, let alone an agency making a decision as to whether information should be withheld.

It is suggested that Item 3(e) in the Table to section 14 of the GIP Act be amended as shown in bold:

> *(e)*
> ***(i)** reveal false or unsubstantiated allegations about a person that **may be** defamatory**, or***
> ***(ii) prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent, improper or***

dishonest conduct

Precedent

Schedule 4, Part 3, Clause 6 of the Queensland RTI Act refers to a factor favouring nondisclosure if 'disclosure of the information could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.'

Submission 5: Clarification of the status of metadata in access applications

TfNSW submits that the GIPA Act should include a provision which relates to 'metadata' and specify that it is not caught within the terms of the application unless specifically requested by the applicant.

The GIPA Act permits applications to be to agencies for any 'record' which is held by the agency. 'Record' is defined as:

> **10 Meaning of "record"**
>
> (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.
>
> (2) A reference in this Act to a record includes a reference to a copy of the record.
>
> (3) For the purposes of the definition of ***record*** in this Act, the knowledge of a person is not a record.

This definition is broad enough to include metadata which is held by the agency, however such information may not be routinely considered by agencies when dealing with access applications.

Precedent

The Queensland RTI Act provides that an access application is taken to only include metadata in circumstances where this has been expressly requested in the application.

Clarification of the status of 'metadata' would assist in providing more certainty over the information which is requested by access applicants.

Submission 6: Christmas 'closedown'

TfNSW submits that agencies should be afforded additional time to deal with access applications when actions fall due during extended holiday periods.

Each year, from approximately Christmas eve until the first business day in January, agencies are encouraged to 'shut-down' all business which does not require customer contact. This 'shut-down' period is based on the premise that there is a decreased demand for government services due to the high number of public holidays and that many persons take additional holidays over this period.

The GIPA Act however does not provide any additional time for agencies to deal with access applications over this period, however the *Government Information (Public Access) Regulation 2009* does recognise school holiday periods and difficulties in responding to access applications which transverse these times.

Compliance with the timeframes contained in section 57 of the GIPA Act become difficult when actions are required to occur during this period.

Precedent

Clause 6 of the *Government Information (Public Access) Regulation 2009* provides that when an application is received by a school, the decision period under section 57 of the Act is extended by the number of working days occurring in that school holiday period after the application is received.

Submission 7: Contract value

The inclusion of many 'low-value' contracts provides the public with a large volume of information which is of little public interest.

TfNSW submits that the reportable value of a government contract, as contained in Division 5, Part 2 of the GIPA Act should be revised and increased.

Whilst the value may have been appropriate when introduced, the obligation to disclose government contracts of a value of $150,000 is an unreasonable administrative burden on agencies who manage multiple contracts whose time would be better spent improving the quality of information which is disclosed about larger contracts and projects.

The *NSW Government Procurement Guidelines: Tendering Guidelines* recommend that 'open tenders' are appropriate for construction contracts (which do not involve pre-qualification schemes) and other consultancy contracts, which are for the value of $250,000 or more. TfNSW submits that the value of $250,000 might be a suitable starting point in determining when a contract is required to be disclosed under the GIPA Act.

Submission 8: Variations Triggering Contract Disclosure

Under section 27 of the GIPA Act a government contract is only disclosable where it has an actual or estimated value of $150,000 or more. Section 33 deals with variations but only refers to the updating of information already disclosed in the Register. The Act is silent as to contracts which are not initially disclosable but which later become disclosable.

Example:

After obtaining a fee estimate of $120,000 an agency engages a law firm to draft transaction documents. This engagement is not a disclosable contract. Unexpectedly, the transaction becomes more complicated and, 60 days later, additional documents are required and a revised fee estimate is provided totalling $160,000. The engagement now becomes disclosable however the time to disclose it (45 days from the date of the original engagement) has already passed.

Recommendation:

Add section 27 (4) as follows:

> ***(4) Where the value or estimated value of a government contract is less than $150,000 but subsequently its value or estimated value increases to $150,000 or more then information about it must be entered in the register within 45 days of the contract becoming disclosable.***