NSW GOVERNMENT
Crown Solicitor's Office

Your Ref: A421424; 14/00896
My Ref: AD2014.78
T01 John McDonnell
Tel: (02) 9224-5219
Fax: (02) 9224-5222
Email: crownsol@agd.nsw.gov.au

15 September 2014

Mr Andrew Cappie-Wood
The Secretary
Department of Justice
Dx 1227 SYDNEY

Dear Mr Cappie-Wood

Government Information (Public Access) Act 1998

I refer to your letter dated 15 July 2014 in which you invited me to make a submission in respect of your review of the *Government Information (Public Access) Act 1998* ("the *GIPA Act*"). I am writing to provide you with my views in respect of some matters under the *GIPA Act* which may benefit from clarification.

Section 54

Circumstances may arise where an agency holds documents that are, in essence, the documents of another agency. For example, documents of another agency may be held by SICorp in connection with workers compensation claims; the Office of the Children's Guardian may hold documents originating with the NSW Police Force or the Department of Family and Community Services. Although s. 45 of the *GIPA Act* does allow for an application to be transferred where it relates more closely to the functions of the other agency, the conditions for s. 45 will not always be met, for example, if the other agency does consent and/or if the document, although created by the other agency, does not relate more closely to that agency's functions. Furthermore, s. 45 does not seem to contemplate the transfer of only *part* of an application.

In these circumstances, the agency holding the other agency's documents may face some difficulties assessing the public interest considerations arising with respect to those documents. For example, the agency may not have sufficient information to know whether disclosure of a document could reasonably be expected to reveal the identity of an informant, or prejudice an ongoing investigation. The *GIPA Act* does not, currently, make any provision for consultation with the other agency in this circumstance. If an agency does, nevertheless, engage with the other agency in an effort to understand what public interest considerations may arise, they may be at risk of contravening provisions of the *Privacy and Personal Information Protection Act 1998*, for example, if such consultation revealed the identity of the applicant.

One possibility would be to amend s. 54 of the *GIPA Act,* or to insert a new provision, which provides that an agency *may* consult with another agency for the purpose of determining whether there is an OPIAD, where that other agency may reasonably be expected to have concerns regarding the disclosure of the information, and those concerns would be relevant to the question of whether there is a public interest consideration against disclosure. Such a provision would not compel consultation, but would allow an agency holding another agency's documents to inform itself as to any sensitivities that may be involved in the release of a particular document. This would also address concerns about a potential breach of the *Privacy and Personal Information Protection Act 1998* ("*PPIP Act*"), as any associated disclosure that may occur in the context of such consultation would be one necessarily implied or reasonably contemplated for the purpose of s. 25 of the *PPIP Act.*

Section 59

One of the options available to a decision-maker in respect of a *GIPA Act* application is to decide that some or all of the information sought is already available to the applicant (s. 58(1)(c)). Section 59(1) provides:

> "(1) An agency can decide that information is already available to an applicant only if the information is:
>
> (a) made publicly available by the agency or some other agency in accordance with a legislative instrument other than this Act, whether or not availability of the information is by inspection only and whether or not availability is subject to a charge, or
>
> (b) available to the applicant from, or for inspection at, the agency free of charge in accordance with this Act or the agency's policies and practices, or
>
> (c) contained in a document that is usually available for purchase."

There is no scope for determining, under the *GIPA Act,* that information is already available to an applicant on the ground that the applicant is in actual possession of the information (for example, correspondence previously sent to an applicant). The review may wish to consider whether s. 59 ought to be amended in order to include actual possession in the list of circumstances in which s 58(1)(c) determination may be made. (If so, it may also be prudent to include an exception for circumstances where an applicant notifies the decision-maker that s/he has previously been in possession of information but no longer is.)

Sections 82, 89 and 100

These provisions enable a "person aggrieved" by a reviewable decision to apply for an internal review, review by the Commissioner, or review by the Tribunal (respectively). However, the *GIPA Act* does not provide a definition of "person aggrieved". I am aware of some cases in which proceedings before the Tribunal were not commenced by the person who made the initial application under the *GIPA Act* (for instance, where an initial application was made by a wife, and the Tribunal review proceedings commenced by her husband). In such matters, the parties sometimes regard themselves jointly as the initial applicants. However, unless the initial application was dealt with in that way by the decision-maker, I suggest that it is probably not ordinarily appropriate for a person other than the original applicant to commence review proceedings before the Tribunal, having regard to such matters as the consideration of personal circumstances under s. 55 of the *GIPA Act.*

While it may be appropriate in some cases for a person to be represented by another (which is a matter for the Tribunal to determine in the management of its own processes), it may be helpful for the meaning of "person aggrieved" to be more clearly set out in the *GIPA Act*.

Section 112

In proceedings in which I have recently been involved, an issue arose as to a possible notification under s. 112 in circumstances where the relevant Minister was already a party to the proceedings. In order to take such circumstances into account, the review may wish to consider empowering the Tribunal to make a report to an alternative person, such as the Commissioner or the Attorney, in addition to the Minister.

Schedule 1

Schedule 1 to the *GIPA Act* sets out categories of information in respect of which there is a conclusive presumption of overriding public interest against disclosure (see s. 14(1)). For example, where information would be privileged from production in legal proceedings on the ground of legal professional privilege, it is subject to such a conclusive presumption (cl. 5 of Sch. 1).

One result of cl. 5 of Sch. 1 to the *GIPA Act* is that, where a party to proceedings is unable to obtain documents through interlocutory process within those proceedings (relevantly, by discovery, subpoena or notice to produce) due to the existence of the privilege, it is not open to the party to attempt to obtain the same documents by means of the collateral process of a *GIPA Act* application.

However, in respect of other kinds of privilege, the same protection would not be available. For example, pursuant to Ch. 6, Pt. 5, Div. 2 of the *Criminal Procedure Act 1986*, a defendant to criminal proceedings cannot compel production of certain documents created for the purpose of providing counselling services to a victim of sexual assault (referred to as Sexual Assault Communications Privilege, "SACP"). While there are some public interest considerations against disclosure which may be applicable to such information, it would still be open to such a person to seek to obtain, by means of the collateral process of a *GIPA Act* application, documents which in the criminal proceedings would be subject to SACP. While leave to obtain documents subject to SACP may be granted by the court hearing the matter, it may only grant such leave in the circumstances set out in s. 299D of the *Criminal Procedure Act*. Different considerations would be relevant for the purpose of determining the balancing test under s. 14 of the *GIPA Act*, and it would be open to a decision-maker to provide a defendant with access to such information even where a court had already made a determination against access. (In relation to SACP, see also Ch. 3, Pt. 3.10, Div. 1B of the *Evidence Act 1995*.)

Another example of a privilege in legal proceedings which may potentially be circumvented by the *GIPA Act* process would be documents that a Court, in proceedings involving the applicant, has held to be subject to public interest immunity (*Evidence Act* Ch. 3, Pt. 3.10, Div. 3).

Another aspect of legal proceedings which may be compromised by the ability of litigants to obtain access to documents by collateral means is the integrity of the implied undertaking. Ordinarily, whenever a litigant obtains documents or other materials in the course of legal proceedings, he or she is subject to an implied undertaking that those materials will not be used for purposes other than those proceedings, except with leave of the court. Where a

public sector agency is a party to legal proceedings and engages in the exchange of documents and evidence in good faith, an opposing party will be bound by the implied undertaking in the same way as in any other proceedings. However, there is currently nothing to prevent such an opponent from making an application under the *GIPA Act* for access to the same documents (since, as discussed above, it is not open to an agency to decide that information is already available to a person in such circumstances). Pursuant to s. 73, such an agency would be unable to impose any conditions on the use of such materials.

All of the foregoing may, perhaps, be summarised by the statement that the *GIPA Act* may be utilised by litigants so as to circumvent the otherwise inherent right of a court to control its own processes.

While it may be expected that, in most cases, the balancing exercise in respect of such information would favour non-disclosure, the *GIPA Act* presently leaves open the possibility of access. The review may wish to consider whether Sch. 1 should be amended so as to enable decision-makers to rely upon a conclusive overriding presumption against disclosure in circumstances where a court has previously determined that, for reasons of privilege, a party should be refused access to the same information.

Schedule 4

Pursuant to cl. 1 of Sch. 4 to the *GIPA Act*:

> "***working day*** means any day that is not a Saturday, Sunday or public holiday."

As you would be aware, a number of agencies are now subject to compulsory shut-down periods between Christmas and early January. In light of the requirements of s. 57 of the *GIPA Act*, the review may wish to consider amending this definition in order to take such compulsory closures into account. For example, "working day" could be defined to mean "a day on which the office of the respondent is ordinarily open" or words to similar effect.

Interaction between *GIPA Act* and *PPIP Act*

Section 20(5) of the *PPIP Act* provides:

> "(5) Without limiting the generality of section 5, the provisions of the *Government Information (Public Access) Act 2009* that impose conditions or limitations (however expressed) with respect to any matter referred to in section 13, 14 or 15 are not affected by this Act, and those provisions continue to apply in relation to any such matter as if those provisions were part of this Act."

The apparent intention of this provision is that information cannot be disclosed under the access provisions of the *PPIP Act* which would not be available to an applicant under the *GIPA Act*. So, for example, an individual could not seek his or her personal information under the *PPIP Act* insofar as that information was contained in a document subject to legal professional privilege (due to the effect of cl. 5 of Sch. 1 to the *GIPA Act*, read together with s. 14(1)).

I think there is some uncertainty in the wording of s. 20(5) of the *PPIP Act*, in that it effectively applies to ss. 13-15 of the *PPIP Act* any "conditions or limitations" imposed by the *GIPA Act*. It is not clear, for example, whether such "conditions or limitations" would include

the conditions attending lodgement of a valid access application under the *GIPA Act*. Would the effect of s. 20(5) of the *PPIP Act* be that, in order for an application for access to information under s. 14 of the *PPIP Act* to be valid, an applicant must pay an application fee and/or comply with the other requirements of s. 41(1) of the *GIPA Act*? On one reading, this could be said to be a "condition" in respect of access to information imposed by a provision of the *GIPA Act*, and thus be within the meaning of s. 20(5) of the *PPIP Act*.

If the intention of s. 20(5) is merely to impose the conditions and limitations under the *GIPA Act* that would affect a determination under s. 58 of the *GIPA Act* to a decision under any of ss. 13-15 of the *PPIP Act*, it may be beneficial to clarify that point in the legislation.

Yours faithfully

John McDonnell
Assistant Crown Solicitor
for Crown Solicitor