electoral commission NSW

The Director
Justice Policy
Department of Justice

By email
justicepolicy@agd.nsw.gov.au

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Dear Director

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

I write to make submissions on behalf of the NSW Electoral Commission (NSWEC) to the above review.

I understand the purpose of the review is to determine whether the policy objectives of the GIPA Act remain valid and whether the terms of the GIPA Act remain appropriate for securing those objectives.

The object of the GIPA Act is to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective by:

a) authorising and encouraging the proactive public release of government information by agencies;

b) giving members of the public an enforceable right to access government information; and

c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

While the NSWEC supports this objective, we are also of the view that a number of GIPA Act provisions, as currently drafted, impede our ability to effectively and efficiently administer particular types of access applications, as follows.

Meaning of "working day"

Issue: A working day is defined in Schedule 4 of the GIPA Act to mean any day that is not a Saturday, Sunday or public holiday. The definition of *working day* does not extend to the Christmas Closedown period (See current Premier's Memorandum M2013-10).

An agency is required to acknowledge whether an access application is valid within 5 working days after an access application is received (GIPA Act s 51(2)). An agency is required to make a decision within 20 working days after an access application is received (GIPA Act s 57(1)).

If the statutory deadline for making a decision falls within the Christmas Closedown period, an agency can only extend the decision period if the applicant agrees (GIPA Act s 57(2) & 57(4)).

If an applicant does not agree to extend the decision period and the agency fails, due to the Christmas Closedown, to make a decision within the period which an application is required to be decided, the agency is deemed to have decided to refuse to deal with the application.

An application fee paid by the applicant is to be refunded if an application is deemed to have been refused (GIPA Act s 63(1)). No processing charges can be imposed for dealing with an access application if the application was not decided within time (GIPA Act s 63(4)).

Further any decision made after 35 days (by agreement with the applicant) or any deemed refusal is required to be reported to the Information Commissioner as part of an agency's annual reporting requirements (GIPA Act s 125).

Recommendation: Consideration should be given to all statutory deadlines imposed on agencies by the GIPA Act that do not take into account the Christmas Closedown period. The standard definition might be amended for particular provisions to mean a day that is not a Saturday, Sunday, public holiday, or not subject to any Christmas Closedown by an affected agency under any relevant direction of the Premier.

Decision to refuse to deal with application & threatening and abusive applicants

Issue: If an applicant makes an application that is valid but proceeds to harass or email or post material on one or several occasions to the principal officer of an agency or his/her delegate that is threatening, offensive, defamatory, or irrelevant to an applicant's application, there is no basis in the GIPA Act for an agency to refuse to deal with that applicant.

There are no grounds in section 60 of the GIPA Act that currently enables an agency to refuse to deal with an access application applicable to the circumstances mentioned above. There are no grounds in section 110 of the GIPA Act that currently enables an agency to apply for a restraining order applicable to the circumstances mentioned above.

Recommendation: Extend the circumstances that enable an agency to refuse to deal with an application to cover the applicant behavior mentioned above. This decision will be a reviewable decision. Alternatively, an agency should be able to apply directly to NCAT for a restraining order that prohibits an applicant from making informal requests and access applications to the agency. I note that the existing mechanism in the GIPA Act dealing with restraining orders requires significant changes.

Orders to restrain making of unmeritorious access applications

Issue: Section 110 of the GIPA Act provides:

> 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 restraint order.

There are two difficulties with section 110.

The first issue relates to the meaning of "lack merit". As mentioned, NCAT can only make a restraint order if the individual has made at least 3 access applications in the previous 2 years to one or more agencies that **lack merit**.

Section 110(2) provides that an access application is to be regarded as lacking merit if:

> (a) the agency decided the application by refusing to deal with the application in its entirety, or
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> (b) the agency decided the application by deciding that none of the information applied for is held by the agency, or
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> (c) the access applicant's entitlement to access lapsed without that access being provided (including as a result of failure to pay any processing charge payable).

By way of example, the NSWEC Right to Information Officer (RIO) has been in the situation of having received three informal requests and one valid access application asking for the same information from the one individual. The information requested related to information subject to a confidentiality order by the NSW Supreme Court. The applicant was not satisfied with the explanation provided in response to all three informal requests. The applicant's access application was deliberately vexatious and lacked merit, but it did not lack merit as defined in s 110(2) GIPA Act.

In another example, we received two informal requests and one valid access application asking for the same information from the one individual. The information requested was publicly available free of charge on the NSWEC's website. The RIO explained to the applicant how he could access the information he requested from the NSWEC's website and the relevant provisions in the GIPA Act concerning publicly available information. The applicant demanded a particular type of record (as opposed to information) and became abusive. The applicant's access application was both vexatious and lacked merit, but it did not lack merit as defined in s 110(2) GIPA Act.

The second difficulty relates to the making of an application for a restraint order against a person. If NCAT must be satisfied that the person has made at least 3 access applications (to one or more agencies) in the previous 2 years that lack merit, how does NCAT know which agencies have received such applications? Further, how can an agency know if an applicant has made an application to another agency that has lacked merit? The RIO telephoned both NCAT and IPC regarding this issue and neither was able to assist.

Recommendation: Amend section 110 of the GIPA Act by expanding the meaning of "lack merit" and include vexatious applications. Section 110 should also contain a mechanism that enables an agency or NCAT to ascertain whether an application that lacks merit has been made to one or more agencies.

Decision to refuse to deal with application & previous informal requests

Issue: As currently drafted, the GIPA Act enables an agency to refuse to deal with an access application where the agency has already decided a previous access application for the information concerned (or information that is substantially the same as that information) made by the applicant and there are no reasonable grounds for believing that the agency would make a different decision on the application (GIPA Act s 60(1)(b)).

Unfortunately, the above ground for refusal does not extend to the situation where an applicant makes an access application where the agency has already decided a previous informal request for information concerned and where the agency has provided the applicant detailed reasons why the information requested is:

- excluded information,
- information that is not held by the agency,
- publicly available information,
- information for which there is a conclusive overriding public interest against disclosure.

Ideally, providing the applicant detailed reasons in response to an informal request for the above information is to help the applicant understand why the information will not be provided and to discourage the applicant from making an access application which would inevitably result in the same decision being made.

Recommendation: Extend the existing ground to refuse to deal with an access application to include informal requests so long as the agency provided the applicant reasons for its decision and the information requested is one or more of the types listed above. A decision to refuse to deal with an application is a reviewable decision.

Deemed refusal

Issue: If an applicant states that he refuses to deal with the principal officer's delegate or proceeds to ignore an agency's attempt to discuss an access application there are no means for the agency to reject an access application. Only an applicant can withdraw an application GIPA Act s 50).

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 and any application fee paid by the applicant is to be refunded (GIPA Act s 63).

Recommendation: If attempts by an agency to contact an applicant are ignored, then an agency should be able to reject the application and the application fee forfeited

Clarifying or reducing the scope of an access application

Issue: There are circumstances where an access application is valid (i.e. the application satisfies the formal requirements set out in s 41 of the GIPA Act, in particular, the information applied for can be identified) but the information is disproportionate or irrelevant to the applicant's motives for requesting the information but not to the extent that the information requested is an unreasonable diversion of resources as understood by NCAT e.g. involving 40 hours of work or more (GIPA Act s 60(1)(a)).

An agency is under an obligation to assist applicants (GIPA Act s 16) and in assisting applicants it would be expected that an agency advise an applicant if there is an

opportunity for the applicant to reduce or clarify the scope of the information applied for, particularly if processing charges are payable.

Unfortunately, the period within which the application is required to be decided does not stop running while the applicant is being given an opportunity to amend the application (GIPA Act s 49(5)). Whereas the period within which the application is required to be decided will stop running if an applicant is given an opportunity to amend the application because dealing with it would require an unreasonable and substantial diversion of an agency's resources (s GIPA Act s 60(4)).

Recommendation: The period within which the application is required to be decided should stop running while the applicant is given an opportunity to amend the application if an agency suggests or assists an applicant with reducing the scope of his/her application.

Thank you for the opportunity to make submissions to this important Act review.

Yours sincerely

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