information and privacy commission
new south wales

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Director
Justice Policy
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Re: ***Review of the Government Information (Public Access) Act 2009***

Dear Director

Thank you for the invitation to make a submission to the review of the *Government Information (Public Access) Act 2009* (GIPA Act).

Section 17 of the GIPA Act provides for the role of the Information Commissioner. Fundamental to that role is to advance the objects of the GIPA Act. As you are aware, pursuant to my responsibilities under s37 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act), I recently tabled the IPC's inaugural *Review of the Operation of the Government Information (Public Access) Act 2009: 2010-2013* (the s37 Report). In this report, I focused on the technical operation of the Act across all agencies. I refer you to that report for a rich source of data on the operation of the Act and will focus in this submission instead on the overarching strategic issues in advancing the objects of the GIPA Act. I will however, take the opportunity to raise some operational issues which would benefit from legislative review, as well as raising some operational issues brought to my attention by other agencies.

Access applications a success

As you will note from the s37 Report, genuine reform of citizen access to government held information has already been achieved through the GIPA Act. The s37 Report shows that in the main, agencies are adopting the Act's flexible and timely approach to decision making to support greater release of information as shown by:

- consistent and credible levels of information release
- high levels of timeliness
- increasing number of valid applications and more invalid applications becoming valid
- the application of public interest test considerations that align with the type of information held
- greater release of information through agency reviews
- variation of original decisions through the review process

Importantly, the s37 Report shows that 45% of all decisions related to applications made for information other than personal information and a further 17% related to applications partially for personal and partially for other information. By contrast, in the Agreement in Principle speech for the GIPA Act, the then Premier noted that about two thirds of all applications for information under the now repealed *Freedom of Information Act 1989* (FOI Act) concerned personal information. This shift can be attributed at least in part to the success of the GIPA Act in raising citizen awareness of the different types of government information to which they have access.

Moving beyond access applications

While the s37 Report shows that the very specific and prescriptive approach to accessing information under the GIPA Act has provided tangible benefits to the public, there is a need to focus now on how to achieve a greater take up of the other access pathways provided by the GIPA Act, such as open access and informal release, in order to promote the capacity of the Act to inform policy development and service delivery.

Open access and informal release have advantages for agencies and applicants. In terms of open access for example, consent based proactive release of information between government agencies may be an effective mechanism to move beyond the current perceived barriers to information sharing in service provision. This approach can advance the Government's intent to move to a holistic model of service delivery to the citizens of NSW whilst being respectful of privacy safeguards.

While I do not advocate a prescriptive reporting regime for these access pathways, any reforms that can better promote the proactive release of government held information would be supported. This is essential in taking the next step in open government. One suggestion that has been raised with me is for the GIPA Act to require an agency to have in place arrangements for informal access applications, and to indicate the types of information usually available through this channel. I support consideration being given to such a requirement.

Government information is a core strategic asset

Openness and accountability are the cornerstones of good government. The move from the FOI Act to the GIPA Act acknowledged to some degree, the shift beyond providing access to government information on request. It acknowledged that government information is a core strategic asset, and open government will deliver more than just the important goal of increased public sector accountability and transparency.

A better-informed community means that users of government services will be better placed to participate in the design and delivery of those services. As such, increased openness is also a means by which the value of the information held by government can be unlocked to deliver better public services. To this end, government information should be discoverable, accessible and usable by the public.

The proactive release of government held information can also provide more competition in the market, leading to economic growth and transparency of business information. As Information Commissioner, my long-term focus is to help agencies with the shift to a more mature access to information framework that goes beyond the important goals of providing transparency and accountability to providing better government services to the people and businesses of NSW.

I would encourage the Department to consider whether the objects of the Act can be enhanced to highlight these important goals that can be achieved through the GIPA Act. I note that the Commonwealth *Freedom of Information Act 1982* (the Commonwealth FOI Act) has as one of its objects "… to promote Australia's representative democracy by contributing towards …increasing public participation in Government processes, with a view to promoting better-informed decision-making." Another object of the Commonwealth FOI Act is "…to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource."

While the GIPA Act's object of advancing a system of democratic Government that is open, accountable, fair and effective goes to these issues in terms of effectiveness, consideration should be given to making more prominent in NSW legislation the potential for open government to lead to better service delivery.

Contemporary and dynamic legislation

Changing nature of records
Although technological advances in information management were well underway when the GIPA Act commenced, rapid developments since that time have led to significant changes in the way government deals with information and the means by which documents are created and published.

The times when information was primarily recorded on paper and stored in physical files has long passed. Not only is there a continuing shift away from paper-based records to electronic records such as CCTV footage, e-tag and now OPAL card data, but there is also a shift in how this information is stored (e.g. through cloud databases) and combined to create new "records" at any given point in time. There is a question of whether the legislation is sufficiently flexible to deal with data in these non traditional forms and context. This is relevant to a number of provisions, including s72, s74, s75 and s76.

New service delivery channels
Technological advances have meant that the logistics and costs of storing and reproducing information have improved significantly and there has been a consequent massive increase in the volume of information held by government. This poses both opportunities and challenges. As Information Commissioner, I recently undertook a survey for the Centre for Freedom of Information. One of the questions related to whether NSW agencies could accept GIPA applications through social media. Without debating the merits of whether this would be a good policy initiative, I note that this would not be possible in NSW, as the GIPA Act requires access applications to be accompanied by a fee. Section 41(2), of the GIPA Act does provide for alternative forms of lodgment, and I have recently approved requests from Councils to use electronic lodgment to streamline the access application process. However, the requirement for an access application to be accompanied by a fee may be seen as presenting an unintended barrier in using social media for example.

Also apparent at the time the legislation was enacted but which has become a more prominent issue since then, is the shift in the provision of government services to the NGO sector. The NGO sector's demand for government held information is also increasing. The s37 Report shows a steady growth in access applications by NGOs, from 4% in 2010 to 20% in 2013. Currently, NGOs are not covered by the GIPA Act, unless required to through contractual arrangements.

Given the significant number of government services now being provided by the NGO sector, consideration should be given to providing for a legislative obligation for those institutions to comply with the requirements of the GIPA Act when undertaking particular government services or functions.

A coherent framework for information management

Access to government held information is regulated through a number of separate legislative instruments in NSW, including the GIPA Act, the *Privacy and Personal Information Protection Act 1998* (the PPIP Act), the *Health Records and Information Privacy Act 2002* (the HRIP Act) and the *State Records Act 1998*. The GIPA Act's aim to develop responsible and representative government that is open, accountable, fair and effective is not well served by having at least four pieces of legislation that govern the management of government held information, especially when there are inconsistencies in definitions of public sector agency, personal information and different paths to access information held by government under each piece of legislation.

The different paths to access personal information under the PPIP Act, the HRIP Act and the GIPA Act raise particular challenges for decision makers, especially if applications are made concurrently. Although s5 of the PPIP Act and s22 of the HRIP Act provide that nothing in those Acts shall affect the operation of the GIPA Act, applications made under the PPIP Act for government held information requires the decision maker to recognise the intersect with the GIPA Act and apply the GIPA Act framework to the privacy determination. While this appears to inject a coordinated approach, and that approach is consistent with the establishment of a single Information and Privacy Commission, it may also inject complexity. Differing definitions and frameworks for decision-making under the different pathways for access can lead to inconsistent decision-making and considerable confusion in terms of process for both the decision makers and the public. This is evidenced by several matters dealt with by the NSW Civil and Administrative Tribunal relating to this intersect. These issues are discussed further below in the operational issues section of this submission.

The citizens of NSW would be better served if there was a cohesive legislative framework for the management of government held information. More broadly, at a strategic level, a comprehensive whole-of-government strategic information policy would facilitate the best possible outcomes for an open, accountable and participatory government. Implementation of a whole of government strategy would build on the work being done under the NSW Government ICT strategy and facilitate better policy development and service delivery which reflects citizen input and contemporary data sets whilst also maintaining access and privacy rights in a more coordinated and contemporary way.

Operational matters

1. Dual Pathways – the intersect between the GIPA Act and PPIP Act

   There is a clear relationship between the GIPA Act and the *Privacy and Personal Information Protection Act 1998* (PPIP Act) in that both the GIPA Act and the PPIP Act provide pathways to gain access to personal information.

In particular:

- Section 5 of the PPIP Act provides that nothing in the PPIP Act affects the operation of the GIPA Act and particularly notes that the PPIP Act does not operate to lessen any obligations under the GIPA Act.

- Section 20(5) of the PPIP Act provides that without limiting the generality of section 5, provisions in the GIPA Act that impose either conditions or limitations with respect to matters raised in sections 13, 14, 15 are not affected by this Act, and those provisions continue to relate to matters as if those provisions were part of this Act.

Conflicting definitions, particularly in what is considered to be captured and what is excluded by the terms "personal information" can create confusion and encourage multiple requests by applicants. The IPC has experienced cases where applicants sought personal information under one regulatory pathway and then upon finalisation of that request, the applicant then sought the same information under the other legislative pathway.

The complexity of this intersect can lead to inconsistent decision making by decision makers which does not promote clarity, nor meet the underlying objectives of either legislative regime.

2. Reporting requirements under the *Government Information (Information Commissioner) Act 2009* (GIIC Act).

   Section 37 of the GIIC Act requires that the Information Commissioner prepare an annual report on the operation of the GIPA Act across all agencies. Completing the report on an annual basis does not necessarily provide meaningful trends on the effectiveness and overall operation of the GIPA Act. Trends may be more readily demonstrated in preparation of a biennial report.

3. Right to have decision reviewed by Information Commissioner

   Section 89 of the GIPA Act provides that a person aggrieved by a reviewable decision of an agency may have the decision reviewed by the Information Commissioner.

   This creates a perceived conflict of interest where the reviewable decision is made by the IPC, and the Information Commissioner is later requested to conduct an external review.

4. IPC reviews under section 93 and s94

   Agencies are not required to respond to the applicant or the IPC after the Information Commissioner has made a recommendation under sections 93 or 94 of the GIPA Act. Whilst an applicant may seek a review by the NCAT 20 working days after the applicant is notified of the completion of the Information Commissioner's review, if the agencies do not advise applicants of their decision on the recommendation, then the applicant's right of review may be affected as time runs out.

   A requirement to report the outcome of a review under section 93 or 94 to the Information Commissioner would assist in measuring the effectiveness of the Information Commissioner review process.

A tiered approach to notification may assist agencies in informing the applicant of decisions in a timely manner and preserves any review rights available to the applicants.

Additionally clarification of the rights of review and timeframes that apply when an applicant seeks to withdraw an application to the IPC may assist in clarifying legal rights in these unique circumstances.

5. Consistent reporting timeframes across sectors

Some agencies, such as universities, report their GIPA data on a calendar year basis, while the majority report on a financial year basis. This impedes the Information Commissioner's capacity to complete trends analysis and effective comparisons across the sectors with different reporting requirements.

Whilst most universities are agreeing to calendar year reporting informally, there is benefit in providing for calendar year reporting for all agencies in legislation.

6. Reporting by Ministers

Ministers are not required to report on Clause 7 of the GIPA Regulation, but have done so by convention. The s37 report recognised that this convention was upheld.

I note the Department of Justice has requested Ministers to report:

- for consistency, on Schedule 2 and
- clause 7(b) and 7(c) of the Regulation from the financial year 2013-2014.

7. Advance deposits

Under section 69(1) agencies are required to ignore any reduction in processing charge to which the applicant may be entitled (e.g. under s65 or s66). s69(1) could be amended to require agencies to assess advance deposits based on the reduced entitlement.

8. Establishing the identity of the access applicant

Section 41 of the GIPA Act does not require an applicant to prove their identity in order for the application to be valid. This can raise a practical difficulty when an applicant asks for personal information, because without proof of identity, the agency runs the risk of inadvertently releasing personal information to a third party. In practice, an agency may ask for the applicant's identity under s55 (personal factors) of the GIPA Act. Although not a requirement, this can become a precondition to releasing information.

I note that in Queensland, a different approach is adopted. Under section 23(3) of the *Right to Information Act 2009* it is a requirement, if seeking personal information, to prove your identity within 10 days, in order for an application to be valid. In addition, the Queensland legislation requires the applicant to state whether access is being sought for use or benefit of the applicant or a third party (and if a third party, who). This model appears to offer advantages.

Agency Issues

In my role as Information Commissioner, agencies have raised with me the following issues which can, in their view, impact upon their capacity to provide access to government information.

9. Refusing to deal with an application

   Under section 60(1)(a) of the GIPA Act, an agency can refuse to deal with an application if it would require an unreasonable and substantial diversion of the agency's resources.

   While this is an important safeguard for agencies from unreasonable requests, it does not address situations where an applicant makes multiple access applications per year to the same agency on similar matters. Consideration should be given to how the intent of this provision could be better applied.

10. Development applications as open access documents

    Clause 3(1) of Schedule 1 of the GIPA Regulation provides that information about development applications is prescribed as open access information from the moment it is created. This can cause delays in determination processing when an applicant makes multiple requests for the development approvals resulting in interference with procedural fairness of the application. Community consultation is already a requirement during the development application process.

    Defining development applications as open access information from when a *determination* is made may be of assistance.

11. Copyright issues in open access development applications

    Under Section 6(6) of the GIPA Act it is noted that mandatory release does not require or permit open access if it may constitute an infringement of copyright.

    This is perceived by some local councils as inconsistent with the requirement for development applications to be provided as open access documents, as development applications contain intellectual property subject to copyright. Some local councils stress the significant operational impacts associated with compliance.

12. Processing charge for dealing with an access application

    Under s64 of the GIPA Act there are provisions for agencies to charge processing fees for both 'dealing efficiently with the application' (s64(2)(a)) and 'providing access in response to the application' (s64(2)(b)). Generally, agencies are only charging processing fees for 'dealing efficiently with the application' because examples are provided in the legislation. Agencies have commented that it is unclear what processing charges would be appropriate for providing access.

    Further legislative clarification may assist in addressing this issue.

13. Transfer of applications

    One of the requirements for a valid application is the payment of a $30 fee. The fee is not required to be transferred when an application is transferred to another agency under s48 of the GIPA Act.

    Agencies seek guidance as to which agency is required to assess the validity of the application including acknowledging that the application fee has been received.

14. Unsolicited documents

    There is some debate as to whether unsolicited documents that have no relevance to the official business of the agency would be captured by an access application. Agencies attribute this to ambiguity in the meaning of 'government information held by an agency' as defined in clause 12 of Schedule 4 of the GIPA Act and the meaning of 'record' in Clause 10 of Schedule 4.

    Other legislation such as the PPIP Act and the State Records Act provide clearer guidance to indicate that unsolicited documents are not caught.

15. Access to personal information

    During the course of a review of the NSW Legislative and Policy Framework for Government Records Management the requirement for clarification of the primary source of access to information was identified. The IPC provided advice, at that time that the GIPA Act did not provide an opportunity for individuals to amend their information held on record by an agency as is provided under the PPIP Act and the HRIP Act.

    The provisions under s16 of the PPIP Act and clause 9, Schedule 1 of the HRIP Act do not, of themselves facilitate clarification of the options available to access personal information.

    However guidance is provided under Section 20(5) of the PPIP Act which provides that conditions or limitations in the GIPA Act apply with respect to agencies' obligation to provide an applicant with knowledge of personal information held; access to and amendment of personal information under sections 13, 14 and 15 of the PPIP Act.

    This means that a person cannot obtain access to any information under s14 of the PPIP Act that could not be accessed under the GIPA Act.

    Additionally, section 5 of the PPIP Act is broad. and provides that nothing in that Act lessens the obligations under the GIPA Act.

    In examining the intersect of the legislative regimes, the representations by agencies seeking clarification are appreciated.

Please do not hesitate to contact me if you have any further questions. Alternatively, the contact officer for this matter with the IPC is Seckin Ungur, Acting Manager Performance Reporting and Projects, on (02) 8071 7014, or by email at seckin.ungur@ipc.nsw.gov.au.

Yours sincerely

Elizabeth Tydd
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