



information
and privacy
commission
new south wales

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Mr Peter Severin
Acting Secretary
Department of Justice
Locked Bag 5111
PARRAMATTA NSW 2124

Attention: Jacob Campbell, Senior Policy Officer
By email: jacob_campbell@agd.nsw.gov.au

Dear Mr Severin,

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

I write to you in relation to the statutory review of the *Government Information (Public Access) Act 2009* (the GIPA Act) to provide a further contribution to the review.

In the period since my original submission there have been a number of developments, including the Information and Privacy Commission's (IPC) analysis of compliance with the GIPA Act, recent cases by the NSW Civil and Administrative Tribunal (NCAT) and the government's establishment of the Digital Analytics Centre, that affect the context and operation of the GIPA Act. In addition, a number of other issues have been raised with me by stakeholders that merit consideration in the review.

Fifth pathway for information release

My previous submission reiterated the importance of a long term focus on helping agencies 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 suggested that consideration should be given to making more prominent in NSW legislation the potential for open government to lead to better service delivery.

In recent months various government initiatives and parliamentary inquiries have brought these issues to the fore. Recent examples include the NSW Domestic Violence Disclosure Scheme, the NSW Data Analytics Centre and the Legislative Council's inquiry into service coordination in communities with high social needs. In the context of information sharing between government agencies, there is an option to consider amending the GIPA Act to place beyond doubt that information can be released through exchange between agencies (as a fifth pathway to accessing information) whilst still maintaining the well-established and effective system of decision making under the GIPA Act.

This proposal, raised by the NSW Department of Premier and Cabinet, has been conveyed to the Department of Justice. The inclusion of a fifth pathway could assist in enhancing the operation of the remaining pathways in the GIPA Act. It could also provide a clear legal framework for agencies to apply and respond to the growing need to share information to provide holistic solutions for service delivery to customers.

Definition of personal information

As the Department is aware, there are differences in the definitions of personal information between the GIPA Act, the *Privacy and Personal Information Protection Act 1998* (the PPIP Act) and the *Health Records Information Privacy Act 2002* (the HRIP Act). Access to information can be sought under any of these Acts. This could have implications for the level of certainty that is provided to an applicant for access to information and result in different levels of protection provided to the applicant, depending on which Act is used.

It is important that there is consistency in the definitions of personal information between these Acts. The Review may wish to consider how best to address these differences and the issues that arise from this, and to take into account the benefits that the GIPA Act offers to members of the public, including the explicit presumption in favour of disclosure of information and the review rights attached to the formal access pathway.

Additional opportunities to achieve compliance

The IPC's own internal data shows that the number of NCAT matters the Information Commissioner has been notified of has been steadily increasing – from 36 reviews in 2010-11 to 115 in 2014-15.

Alongside this dramatic increase are significant costs for applicants (and possibly higher costs to agencies) of undertaking these matters.

Currently, the GIPA Act and *Government Information (Information Commissioner) Act 2009* (the GIIC Act) do not provide the Information Commissioner with the ability to enforce recommendations made following an external review of an agency's internal review or a complaint matter, or to enforce compliance with those obligations of the GIPA Act that are mandatory. This also means that the Information Commissioner is unable to provide a lower-cost and more timely and proportionate response.

Consideration could be given by the Review to providing the Information Commissioner with a power to issue directions as a way to assist in promoting better decision-making by agencies and to add to the set of tools available to the Information Commissioner. A directions power could also assist in providing greater assurance and certainty to applicants that recommendations that arise from external reviews conducted by the Information Commissioner will be complied with by agencies. There would also be likely cost savings to both applicants and agencies.

Information Commissioner's function of providing information, advice, assistance and training to agencies and the public

One of the functions of the Information Commissioner in relation to the operation of the GIPA Act concerns providing information, advice, assistance and training to agencies and the public on any matters relevant to the Act (section 17).

The need for specialised training on GIPA Act requirements is becoming more evident. For example, I recently conducted a proactive audit into universities' compliance with contract reporting obligations under Part 3, Division 5 of the GIPA Act. A recommendation of the final audit report was that the IPC investigate the development of guidance material for contract register obligations (recommendation 6). Given the specialised nature of training of this kind, a fee for service model would provide greater flexibility for the Information Commissioner to provide such a service.

Other agencies, such as the Office of Local Government, have in place a fee-for-service model to effectively provide similar services.

Such a model may have application to the GIPA Act to assist the Information Commissioner to effectively support agencies and the public. The Review may wish

to consider the inclusion of a fee-for-service model through, for example, amendments to the GIPA Act or the *GIPA Regulation 2009* (the GIPA Regulation).

Operational matters

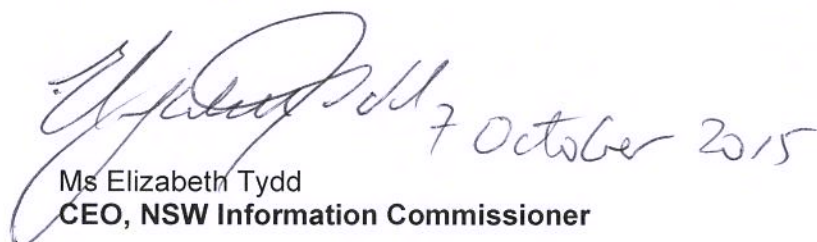
There are also a number of additional operational issues for the Review's consideration (**Attachment A**). Some of these have been identified within the IPC and others have been raised by NSW public sector agencies.

These issues relate to:

- disclosure logs
- third party objectors
- section 110 of the GIPA Act
- consultation with third parties
- the scope of clause 7(a) of the GIPA Regulation 2009
- the relationship between the *Government Information (Information Commissioner) Act 2009* (the GIIC Act)
- copyright
- third party documents held by an agency
- compliance with the obligations for a register of contracts.

Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact David Marcus, Manager Performance Reporting and Projects, on (02) 8071 7041, or by email at david.marcus@ipc.nsw.gov.au.

Yours sincerely

 7 October 2015
Ms Elizabeth Tydd
CEO, NSW Information Commissioner

ATTACHMENT A

The following points for the Review's consideration address some operational issues identified by the IPC or which have been raised by agencies.

Disclosure logs

A decision to include information in a disclosure log is a reviewable decision under section 80(m) of the GIPA Act.

When agencies decide whether to include information in a disclosure log, they must consider whether the information may be of interest to other members of the public as set out in section 25 of the GIPA Act. It is not clear whether this is the same test that an external review body should apply when reviewing a decision to include information in a disclosure log.

Where a third party objector is seeking a review of decision to include information in a disclosure log, it is unclear whether they must only make out one of the grounds in section 56(2) of the GIPA Act, or whether a balancing exercise is required. The onus under section 97 of the GIPA Act is unclear, as are the requirements on a third party objector in order to make a case against the inclusion of information in a disclosure log.

Both agencies and third party objectors might be unclear on what is expected of them when a third party objects to the inclusion of information in an agency's disclosure log, and during a review of a decision to include information in a disclosure log.

The following provisions are relevant to these circumstances:

- section 25, GIPA Act
- section 26, GIPA Act
- section 54, GIPA Act
- section 56, GIPA Act
- section 80(m), GIPA Act
- section 97, GIPA Act

Third party objectors

Section 54 of the GIPA Act relates to consultation with third parties before providing access to information requested through a formal access application. The IPC has identified a number of issues in relation to the interpretation of section 54, issues that arise when a third party objects to the release of the information, what is expected of agencies in relation to third party consultation and the role of the Information Commissioner.

Issue	Impact	Relevant material
Where a third party objects to the release of information under the GIPA Act, it is unclear what burden the third party objector bears to establish the applicability of their objections and justify a decision to not release	Both agencies and third party objectors might be unclear about what is expected of them in terms of providing information and the test for decision making.	The following provisions are relevant to these circumstances: <ul style="list-style-type: none">• Section 54, GIPA Act (Consultation on public interest considerations)

Issue	Impact	Relevant material
<p>information.</p> <p>This issue must be considered in the context of both the initial application where the third party is consulted by the Agency, and an internal review where the third party objector is the applicant for the review.</p>		<ul style="list-style-type: none"> • Section 14, GIPA Act (contains the only public interest considerations against disclosure that can be taken into account in an access application) • Schedule 1, GIPA Act (contains the conclusive presumptions against disclosure) • Sections 97(2) and 105(2), GIPA Act (note: these are relevant because there is no similar provision that applies to third party objector initiated internal reviews)
<p>The GIPA Act does not make clear what information the Information Commissioner may inform herself with when conducting an external review of an agency internal review that decided to provide access to information despite third party objections. For example, is it open to the Information Commissioner to consider the Agency's initial notice of decision and solicit submissions from the original access applicant when conducting an external review of an agency's third party objector internal review?</p>	<p>External reviews may not be fully informed if certain information is not available to the Information Commissioner for consideration.</p>	<p>The following provisions are relevant to these circumstances:</p> <ul style="list-style-type: none"> • section 97(2), GIPA Act • sections 14, 15 and 16, GIIC Act
<p>The GIPA Act does not make clear what recommendations are available to the Information Commissioner when conducting an external review</p>	<p>It is possible that an agency's decision in the initial application is deficient but is not reviewed externally because a third party objector</p>	<p>The following provisions are relevant to these circumstances:</p> <ul style="list-style-type: none"> • Sections 92, 93,

Issue	Impact	Relevant material
<p>of an agency internal review that decided to provide access to information despite third party objections.</p> <p>The GIPA Act does not provide the scope of what agency decisions can be considered in such an external review (e.g. is it only the internal review decision subject to recommendations or is the initial decision also subject to recommendations?)</p>	<p>can only bring their internal review decision to the Information Commissioner for review.</p>	<p>94 and 95, GIPA Act, all relate to the Information Commissioner's powers of recommendation.</p>
<p>When an agency decides an information access application in the first instance or on internal review, and decides to provide information despite the objections of a third party, section 61 does not apply and section 126 does not require the Agency to provide reasons for providing access to the information.</p>	<p>A third party objector might be unaware why a decision that adversely affects them has been made.</p>	<p>The following provisions regulate the information an agency must provide when deciding access applications:</p> <ul style="list-style-type: none"> • Section 61, GIPA Act (information provided in notice of decision when access is refused) • Section 126, GIPA Act (information in all notices of decision)
<p>The GIPA Act is unclear about situations where an internal review decision is made but not notified within the statutory timeframe. For example, is an Agency deemed to have made the original decision if an internal review decision is made but not notified to the Applicant within the 15 day statutory time frame? This is further complicated when there are multiple third party objectors seeking internal reviews concerning the release of the same or subsets of the same information.</p>	<p>The outcome of internal reviews may be unclear and/or disputed by relevant parties leading to conflict over technical issues rather than the substantive issues.</p>	<p>The following provisions are relevant to the circumstances:</p> <ul style="list-style-type: none"> • Section 86(1), GIPA Act (time frame for making and notifying of access decisions) • Section 86(5), GIPA Act (effect of not making decision in s86(1) time frame) • Section 126(2), GIPA Act (defines notification process for access applications)

Section 110

Two recent NCAT cases considered the use of restraint orders powers under section 110 of the GIPA Act – *Pittwater Council v Walker* [2015] NSWCATAD 34 and *Palerang Council, Queanbeyan City Council & Goulburn Mulwaree Council v Powell* [2015] NSWCATAD 44.

The Review is an opportune time to consider the operational effect of the NCAT cases on the GIPA Act, and to note the differences between how the GIPA Act and the *Freedom of Information Act 1982* (Commonwealth) (FOI Act) address vexatious litigants.

In particular section 89K of the FOI Act allows the Information Commissioner to declare by written instrument that a person is a vexatious applicant – the request for the declaration can be done on initiative by Information Commissioner or by agency or Minister. Other relevant provisions of the FOI Act include section 89L (grounds for declaration), section 89M (effect of declaration) and section 89N (review by Tribunal).

Commonwealth decisions in relation to declarations of vexatious applicant include *Sweeney and the Australian Information Commissioner and Ors* [2014] AATA 531.

Consultation with third parties

Agencies are currently not required to consult with third parties when considering whether to release information under the authorised proactive release and informal release pathways.

This means that third parties are treated differently depending on which pathway information is released. For example, agencies must consult with a third party under section 54 of the GIPA Act in relation to access application, while no such requirement exists for the other pathways.

The relevant provision is section 54 of the GIPA Act.

Informal release of information

As the GIPA regime matures it is increasingly clear that the robust processes for handling formal applications need to be complemented by more emphasis on informal and proactive release pathways. A number of agencies are already taking steps in this direction. For example, some local councils no longer require a formal GIPA application for much planning documentation, instead releasing it informally (and therefore free-of-charge) or proactively releasing the information.

This direction is to be commended, however agencies are currently not required to report on details of information that is released informally. This reduces the ability of the IPC to monitor the extent to which the informal pathway is used and to target its regulatory effort in a proportionate, risk-based way. The IPC has previously requested agencies to voluntarily report on information released through this pathway.

The Review may wish to consider whether agencies should be asked to provide information on their use of the informal pathway as part of the current annual reporting requirements. The relevant provision is sections 7 and 8 of the GIPA Act.

Clause 7(a), GIPA Regulation

Agencies are currently not required to report on details of information they have released throughout the reporting year. This means that the Information Commissioner's regulatory oversight of this pathway is impaired by a lack of information, resulting in an incomplete regulatory view.

The following provisions are relevant to agency reporting on authorised proactive release:

- Section 7, GIPA Act
- Clause 7(a), GIPA Regulation

Relationship between GIIC Act and Public Interest Disclosures Act

Further consideration is required about the interaction and intersection between complaints made under GIIC Act and public interest disclosures made under *Public Interest Disclosures Act 1994* (the PID Act), including government information contraventions under the GIPA Act (sections 116 to 120 of the GIPA Act).

Issues arise in relation to the different pathways and impact of section 89(4) of the GIPA Act that prohibits the Information Commissioner from dealing with a complaint under section 17 of the GIIC Act about the conduct of an agency that amounts to a reviewable decision.

The Information Commissioner's functions to receive and consider complaints under the GIIC Act and made with the protections of the PID Act about government information contraventions (or offences) are limited by the prohibition in section 89(4) of the GIPA Act.

Complaints made under section 12D of the PID Act to the Information Commissioner mostly relate to reviewable decisions. For example, a complaint could be about an agency not locating the information requested and deciding that the information is not held, meaning the capacity for the Information Commissioner to deal with the complaint is prohibited in terms of section 89(4) of the GIPA Act. Complaints about information that is not found may relate to matters of record keeping or searches undertaken.

The specific offences in sections 118 and 119 of the GIPA Act would not amount to, in some instances, a PID about a government information contravention.

The following provisions are relevant:

- Sections 116 to 120, GIPA Act
- Section 89(4), GIPA Act
- Section 17, GIIC Act
- Section 4(1), PID Act (definition of government information contravention)
- Section 12D, PID Act (PID about Government information contravention)

The following cases relate to the issue of record keeping does not necessarily mean misconduct:

- *Patsalis v Commissioner of Police, New South Wales Police Service* [2003] NSWADT 213 at 63
- *Stanley v Roads and Maritime Services* [2014] NSWCATAD 123 at 59

Government contract registers

As stated above, the Information Commissioner recently conducted a proactive audit into universities' compliance with contract reporting obligations in the GIPA Act. A recommendation of the final audit report was that university Vice-Chancellors' complete an annual compliance attestation (recommendation 2). The Review may wish to consider whether this recommendation should be reflected in the GIPA Act, noting the benefits that may accrue from greater accountability and ensuring legislative compliance.

The report also observed that information entered by universities on the register is not always meaningful or accurate (observation 2.1). This may be a matter to address in the GIPA Act, for example, to provide greater clarity around the terms used in the Act on government contract registers.

The final audit report can be access here

http://www.ipc.nsw.gov.au/sites/default/files/file_manager/IPC_Report_universities_compliance_GIPA_August_2015_ACC.pdf

Agency issues

The following issues have been raised by NSW public sector agencies to the IPC.

Issues	Harm/Impact	Relevant material
Copyright: It is unclear what the obligation of an agency is in relation to copyright in situations where the copyright owner cannot be contacted, for example, where the copyright owner is no longer in business.	The GIPA Act's obligations may be applied inconsistently and there is potential non-compliance by agencies due to a lack of understanding.	The following provisions are relevant in relation to copyright: <ul style="list-style-type: none"> • Section 6(6), GIPA Act • Schedule 1, GIPA Regulation in relation to local councils
Third party documents held by an agency: It is unclear what the obligations of an agency are in relation to third party documents held by an agency that relate to non-work activities, particularly those documents acquired through use of email.	The GIPA Act's obligations may be applied inconsistently and there is potential non-compliance by agencies due to a lack of understanding.	n/a
Register of contracts: Agencies have raised concerns about the ability to efficiently and effectively comply with the contracts register obligations set out in the GIPA Act; agencies have questioned the level of regulatory burden that is imposed by these obligations	The GIPA Act's obligations may be applied inconsistently and there is potential non-compliance by agencies due to a lack of understanding.	The relevant provisions appear in Division 5, Part 3 of the GIPA Act.