Larissa
Kotlaroff/CRD/NSW_AG
05/09/2014 04:35 PM

To Kathrina Lo/JP/NSW_AG@NSW_AG,
cc Stephen Bray/JP/NSW_AG@NSW_AG
bcc
Subject GIPA Act Review

Dear Kathrina

Attached is the response of Justice Legal to the GIPA Review. A hard copy has been sent via internal mail.

Kind regards

Larissa Kotlaroff I GIPA & Privacy Officer
Justice Legal, Department of Justice
Level 3, 60-70 Elizabeth Street, Sydney 2000
GPO Box 6, Sydney NSW 2001
Phone: (02) 8224 5350

 - 2014_08_22 Lttr to K Lo Justice Policy.doc

Ms Kathrina Lo
Director
Justice Policy

File No: 11/004857
Contact: L Kotlaroff
8224 5350

Dear Ms Lo

I refer to your Memorandum relating to a review of the *Government Information (Public Access) Act 2009* (GIPA Act) and the *Government Information (Information Commissioner) Act 2009* (GIIC Act) and your invitation for agencies to make a submission to the review. I note the review will also consider the relationship between the GIPA Act and the *Privacy and Personal Information Protection Act 1998 (PPIP Act).*

Justice Legal processes formal applications in the Department of Justice and views the GIPA Act as, for the most part, meeting its policy objectives in respect of giving members of the public an enforceable right to access government information and restricting access to information only when there is an overriding public interest against disclosure.

Members of the public are aware of the enforceable right to access information using the four avenues provided under the GIPA Act. Agencies are also meeting this objective by releasing information daily in the course of their business without the need for applicants to lodge formal access applications under the GIPA Act. However the GIPA Act does not require agencies to capture statistics on this form of release of information. To measure such release would likely place an onerous burden on business areas within an agency. The informal release of information has been promoted and encouraged across this Agency and information is also released under other legislative requirements. For example Juvenile Justice, a division of this Agency releases information in accordance with the following legislation: Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*; *Crimes (High Risk Offenders) Act 2006*; *Child Protection (Offenders Register) Act 2000*; *Migration Act 1958*; *Community Services (Complaints Reviews and Monitoring) Act 1993* and the *Child Protection (Working with Children) Act 2012.*

Information requests are also made by the Coroners Court, Mental Health Review Tribunal and NSW Police. The GIPA Act does not currently provide for acknowledging information released in this way.

The reporting mechanisms for capturing information regarding access applications do not reveal the complexity of applications received by agencies. Although agencies are able to charge for the time taken to process applications, the complexity of the work involved in analysing the material and ensuring adequate advice has been provided from subject matter experts on the implications of information released is not a measurable component of addressing applications under the GIPA Act.

A further consideration in dealing with complex and voluminous requests is the absence of a cap for determining what constitutes an "unreasonable diversion of resources" in section 60(1)(a). This Agency adopts the view that if an application is estimated to exceed forty (40) hours, it is an unreasonable diversion of this Agency's resources. Including a cap in the legislation would provide consistency across agencies in respect of making such decisions.

It has also become apparent that many of the more complex and lengthy applications involve individuals using the GIPA Act to access workplace grievance and investigation files. The policies guiding such investigations note that information obtained will be treated in confidence however this confidentiality is tested when applicants apply for the complete files. Agencies are obliged to undertake third party consultations with all staff involved in the investigation. Third parties have expressed their anxiety and frustration at having to revisit investigations that have been completed. Critically, many advise of their reluctance to participate in future Departmental investigations given the real likelihood that their personal information could be released, particularly as it includes the personal information of the applicant making the application which is a public interest consideration in favour of disclosure under section 12(2)(d). This compromises mechanisms in place within agencies to consider workplace grievance and conduct matters- this clearly was not the legislative intent of the GIPA Act.

In addressing applications where consultation is required, third parties will often request the identity of the applicant and the reason for their application. This Agency has included a section in the application form for applicant's to note if they consent to their name being given for the purposes of consultation, however including this within the GIPA Act, particularly the reasons for making the application would be useful. The provision of reasons for lodging an application would also be useful in determining the scope of what an applicant is seeking when the application on its face, would appear to be an unreasonable diversion of resources.

A further consideration in managing the workload associated with access applications is the issue of unreasonable or persistent applicants making continuous applications to the same agency for information. Although provision exists in section 60(3) for considering one or more applications as the one application in instances where the applications are related and made by the same applicant, this would suggest that such a provision would only apply where applications are lodged concurrently. This Agency has experienced an applicant who has lodged six access applications, two internal reviews and one external review over a period of six months with each application requesting further and detailed information about previously released information. Each application is slightly different to make it a new application under the GIPA Act. Such requests place an unreasonable burden on the business area extracting the information particularly when the same staff member is required to address each application under the GIPA Act. The power to make decisions regarding multiple applications on one issue and vexatious litigants may be an appropriate power for the Commissioner to exercise and could be included in the GIIC Act.

It is considered that the required period of time for considering an internal review under section 86 of the GIPA Act does not provide agencies with sufficient time to make a new decision in respect of the application. It is suggested that the review period be increased to 20 working days as provided for the consideration of access applications to allow for a new decision, as if the original decision had not been made (section 84).

A further issue which should be considered is the provision within section 128 to bring proceedings for an offence under the GIPA Act. The proceedings envisaged by the

GIPA Act are summary and consequently are to be undertaken within six months of the offending conduct, however the nature of the offences are such that conduct will only become evident following the internal review. The time limit within which proceedings can commence should be considered for the purposes of the review of the GIPA Act, given there may be insufficient time for all the steps to be undertaken in respect of summary proceedings. Currently, section 128(2) reads to suggest that any individual could bring proceedings for an offence under the GIPA Act given the ability of the words 'with the authority of' to be read broadly to mean 'in the name of'. This could be amended by including a consent provision.

The GIPA Act also has as a third policy objective to open government information and encourage the proactive release of government information by agencies.

Agencies are required to make their open access information publicly available on a website maintained by the agency as provided in section 6(2) of the GIPA Act. However as part of the NSW Government's open government initiative, NSW agencies are encouraged to publish open access information on the opengov website. This results in duplicity of information. The purpose of the opengov website is to free up agency websites to host other information. The legislation should acknowledge the most appropriate means of publishing this information.

Since the introduction of the GIPA Act there has been a swift and significant move towards open data and open government. Reliance has been placed on the provision within the GIPA Act on opening government information to the public, however the GIPA Act does not reflect this commitment by Government nor does it equip agencies for the release of information in this way, particularly, the release of 'big data'. Although the GIPA Act provides guidance in determining whether there is a public interest in the disclosure of information, this is based on the assumption that such requests would be treated as a proactive release of information under the GIPA Act. Agency focus and responsibility for open government and open data differs across government, and may be within the ICT, Communications, Records or Information Access areas of a particular agency. Accordingly, consideration may not necessarily be given to applying the public interest test in releasing such information.

As a final consideration, although applications for personal information may be made under both the GIPA and PPIP Acts, it is the experience of Justice Legal that applications for personal information are dealt with under the GIPA Act. The provisions within the GIPA Act provide the necessary protections for an agency should information requested also involve the personal information of third parties and from the applicant's perspective, the GIPA Act provides an opportunity for seeking a review of a decision.

Should you have any further questions regarding the views of Justice Legal, please contact Larissa Kotlaroff, GIPA & Privacy Officer on 8224 5350.

Lida Kaban
Director
Justice Legal