NSW LAW REFORM COMMISSION

PRIVACY AND ACCESS TO PERSONAL INFORMATION: POINTS FOR DISCUSSION

July 2009

Copyright permissions

Disclaimer

Other publication formats

The NSW Law Reform Commission is committed to meeting fully its obligations under State and Commonwealth anti-discrimination legislation to ensure that people with disabilities have full and equal access to our services.

This publication is available in alternative formats. If you require assistance, please contact the Commission.

SUBMISSIONS

All submissions and enquiries should be directed to:

Ms Deborah Sharp
Acting Executive Director
NSW Law Reform Commission

Postal addresses: GPO Box 5199, Sydney NSW 2001
or DX 1227 Sydney

Email: nsw_lrc@agd.nsw.gov.au

Contact numbers: Telephone (02) 8061 9270
Facsimile (02) 8061 9376

The closing date for submissions is 31 August 2009.

Confidentiality and use of submissions

In preparing further publications on this reference, the Commission will refer to submissions made in response to these points for discussion. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked "confidential" will be determined in accordance with *the Freedom of Information Act 1989* (NSW).

TERMS OF REFERENCE

In a letter to the Commission received on 1 June 2009, the Attorney General, the Hon J Hatzistergos issued the following terms of reference:

> Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Law Reform Commission is ... to inquire and report on the legislation and policies governing the handling of access applications for personal information of persons other than the applicant under the *Freedom of Information Act 1989* (or any successor legislation).
>
> In undertaking this review, the Commission is to consider in particular:
>
> - The adequacy of the *Freedom of Information Act 1989* (and any successor legislation) concerning the handling of access applications for personal information in ensuring effective protection of individuals' privacy.
> - The adequacy of existing policies, and whether any new policies should be recommended, for the handling of access applications for personal information of persons other than the applicant.
> - The circumstances in which agencies should refuse to provide access to personal information of persons other than the applicant on public interest, including privacy, considerations.
> - The extent to which public interest, including privacy, considerations against disclosure apply in respect of access applications for personal information of public officials.
> - The intersection of, and desirability for a consistent legislative approach to, the treatment of personal information under the *Freedom of Information Act 1989* (and any successor legislation) and other legislation that is concerned with the protection of an individual's privacy.
> - Any related matters.

RELATED PUBLICATIONS

The Ombudsman's Review of the Freedom of Information Act 1989 (NSW), March 2009

PRIVACY AND ACCESS TO PERSONAL INFORMATION: POINTS FOR DISCUSSION

The Commission has been asked to inquire into and report on the legislation and policies governing the handling of access applications for personal information of people other than the applicant under the *Freedom of Information Act 1989* (NSW) ("FOI Act") or any successor legislation.

FREEDOM OF INFORMATION ACT 1989 (NSW)

Section 31 of the *Freedom of Information Act 1989* (NSW) provides that where a document contains information "concerning the personal affairs of any person (whether living or deceased)" an agency shall not give access to it unless it has taken such steps as are "reasonably practicable" to obtain the views of the person concerned as to whether the document is an exempt document under clause 6 of Schedule 1.

Clause 6 of Schedule 1, also entitled "Documents affecting personal affairs", provides:

> (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (whether living or deceased).
>
> (2) A document is not an exempt document by virtue of this clause merely because it contains information concerning the person by or on whose behalf an application for access to the document is being made.

The expression "personal affairs" is narrower than the expression "personal information" used in the Terms of Reference, and in the *Privacy and Personal Information Protection Act 1998* (NSW) ("PPIPA"), discussed below. In the leading New South Wales decision,[1] Justice Kirby held that the expression meant "the composite collection of activities personal to the individual concerned".

There is no guidance in the Act as to when a particular disclosure is "unreasonable", but the courts have held that it depends on a number of

1. *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

factors. In essence, the courts have said that the decision-maker must balance two competing public interests – the public interest of members of the public being given access to government documents and the public interest in preserving the privacy of third parties.

ISSUE 1

How do agencies determine that a document contains information concerning a person's personal affairs, and what steps do and should they take to contact and consult with third parties?

ISSUE 2

How, in practice, do agencies balance the interest of members of the public in being given access to government documents against the interest in protecting the privacy of third parties? In particular, what factors do agencies take into account in assessing the relative public interests? What factors should they take into account?

ISSUE 3

Does clause 6 of Schedule 1 provide adequate protection for the privacy of third parties?

ISSUE 4

What policies do agencies have in relation to access applications for personal information of persons other than the applicant?

PRIVACY AND PERSONAL INFORMATION ACT 1998 (NSW)

In considering whether the FOI Act provides adequate protection for the privacy of individuals when handling applications for access to personal information, one issue that the Commission is keen to explore is the extent to which the FOI decision-maker has regard to the PPIPA, in particular sections 18 and 19, which contain the Information Protection Principles (IPPs) dealing with the disclosure of personal information.

Section 18 of PPIPA provides that a public sector agency that holds personal information must not disclose it to a person other than the person to whom it relates unless one of the following three exceptions applies:

(a) the disclosure is directly related to the purpose for which the information was collected and the agency has no reason to believe that the individual concerned would object, or

(b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10 (which deals with information provided at the time of collection) that information of that kind is usually disclosed to that other person or body, or

(c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

Section 19 of PPIPA provides for special restrictions on disclosure of sensitive information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities. Personal information relating to any of these matters must not be disclosed unless disclosure is necessary "to prevent a serious and imminent threat to the life or health of the individual concerned or another person."

ISSUE 5

To what extent are FOI decision-makers aware of PPIPA, in particular the disclosure provisions in sections 18 and 19? Do FOI decision-makers take these provisions into account in deciding whether to give access to a document? Should they do so?

OTHER RELEVANT LEGISLATION

The terms of reference also ask the Commission to consider the overlap between the FOI Act and other legislation concerned with protection of an individual's privacy.

The relevant legislation is:

(i) the FOI Act;

(ii) PPIPA;

(iii) the *Health Records and Information Privacy Act 2002* (NSW);

(iv) the *Local Government Act 1993* (NSW); and

(v) the *State Records Act 1998* (NSW).

ISSUE 6

What problems arise in practice from overlapping provisions concerning disclosure, access and amendment under these different Acts?

GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 (NSW)

On 26 June 2009 Assent was given to the *Government Information (Public Access) Act 2009* (NSW) ("GIPA Act"), which repeals the FOI Act. Section 5 of the GIPA Act creates a presumption in favour of disclosure of government information unless there is an "overriding public interest" against disclosure.

Section 13 provides that there is an overriding public interest against disclosure if and only if there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure. There is a conclusive presumption that there is an overriding public interest against disclosure of the information described in Schedule 1.

Section 14(2) provides that the only other considerations that may be taken into account as public interest considerations against disclosure are those listed in a table to that sub-section. Clause 3 of that table, entitled "Individual rights, judicial processes and natural justice", is the successor to Schedule 1, clause 6 of the FOI Act. It provides as follows:

> There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:
>
> (a) reveal an individual's personal information,
>
> (b) contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002*
>
> …
>
> (g) in the case of the disclosure of personal information about a child – the disclosure of information that it would not be in the best interests of the child to have disclosed.

"Personal information" is defined as follows in Schedule 4, clause 4 of the GIPA Act, in terms which are similar to the definition in PPIPA.

> (1) … information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion.

Personal information includes an individual's fingerprints, retina prints, body samples or genetic characteristics.[2]

Section 54, the successor to s 31 of the FOI Act, which deals with consultation on public interest considerations provides that:

> (1) An agency must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person in response to an access application if it appears that:
>
> (a) the information is of a kind that requires consultation under this section, and
>
> (b) the person may reasonably be expected to have concerns about the disclosure of the information, and …
>
> (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.
>
> (2) Information relating to a person is of a kind that requires consultation under this section if the information:
>
> (a) includes personal information about the person …

ISSUE 7

How will the new provisions of GIPA be applied? Will they provide greater or less protection for privacy in NSW?

PUBLIC OFFICIALS

The Commission has been asked to consider the extent to which public interest including privacy considerations apply in respect of access applications for personal information about public officials.

ISSUE 8

Do FOI decision-makers consider any additional or different factors where the access applicant seeks personal information about public officials? Should they?

2. *Government Information (Public Access) Act* 2009 (NSW) Schedule 4, clause 4(2).