information and privacy commission
new south wales

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Law Reform Commission
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SYDNEY NSW 2001

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Dear Sir/Madam,

Open justice review
Court and tribunal information: access, disclosure and publication

The purpose of this correspondence is to provide a preliminary submission to the NSW Law Reform Commission to assist in framing the issues to be addressed in consultations. These comments are made in relation to the terms of reference in general.

Information and Privacy Commission

The Information and Privacy Commission NSW (IPC) is an independent statutory authority that administers legislation dealing with privacy and access to government held information in NSW.

The IPC administers the following NSW legislation:

- *Government Information (Public Access) Act 2009* (NSW) (GIPA Act)
- *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act)
- *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act)
- *Health Records and Information Privacy Act 2002* (NSW) (HRIP Act).

As part of its function the IPC:

- promotes and protects privacy and information access rights in NSW and provides information, advice, assistance and training for agencies and individuals on privacy and information access matters
- reviews the performance and decisions of agencies and investigates and conciliates complaints relating to public sector agencies, health service providers (both public and private) and some large organisations that deal with health information
- provides feedback about the legislation and relevant developments in the law and technology.

<u>Information access</u>

The Information Commissioner upholds and protects information access rights. The Information Commissioner's functions include power to:

- review decisions made by NSW government agencies and deal with complaints about information access
- undertake investigations, issue guidelines and other publications to assist agencies and citizens in understanding the operation of the GIPA Act
- monitor, audit and report on the exercise of agency compliance with the GIPA Act
- make reports and provide recommendations about proposals for legislative or administrative change.[1]

Privacy

The Privacy Commissioner upholds and protects privacy rights. The Privacy Commissioner's functions include to:

- oversee the conduct of internal reviews by agencies
- deal with complaints about privacy related matters
- assist public sector agencies in preparing and implementing privacy management plans
- prepare and publish guidelines relating to the protection of information and health privacy.[2]

The role of the GIPA Act in facilitating access to information

The GIPA Act establishes a proactive, open approach to gaining access to government information in NSW. Section 3 of the GIPA Act details the object of the Act, which is to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective. Under section 5 of the GIPA Act there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure. The GIPA Act:

- authorises and encourages the proactive release of information by NSW public sector agencies
- gives members of the public a legally enforceable right to access government information
- ensures that access to government information is restricted only when there is an overriding public interest against releasing that information.

The GIPA Act applies to all NSW government agencies. This includes a court.[3] 'Court' is defined as including a tribunal, a Magistrate and a coroner, and a registry or other office of a court and the members of staff of that registry or other office.[4] However, the Act only applies to courts in respect of their non-judicial functions, as discussed under 'Excluded information' below in this paper.

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[1] GIPA Act section 17.
[2] PPIP Act section 36.
[3] GIPA Act section 4(f).
[4] GIPA Act schedule 4 clause 1.

Public interest test

Under the GIPA Act, all government agencies must disclose or release information unless there is an overriding public interest against disclosure.

The High Court has noted that '[w]hen used in statute, the term ["public interest"] derives its content from the "subject matter and the scope and purpose" of the enactment in which it appears.'[5]

The GIPA Act does not define 'public interest', but section 12 states that there is a general public interest in favour of the disclosure of government information. The note to section 12(2) provides a list of examples of public interest considerations in favour of disclosure of information.

Fundamental to the obligation to release information is the overarching presumption in favour of disclosure of information (GIPA Act section 5). This is the starting point for all decisions regarding information access by: mandatory proactive disclosure; authorised proactive release; information release; and in response to access applications.[6]

Accordingly, when deciding whether to release information, decision makers must commence the public interest test from the position of acknowledging the presumption in favour of disclosure of information. For example, section 9(1) of the GIPA Act provides that a person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 of the Act unless there is an overriding public interest against disclosure of the information.

A determination as to whether there is an overriding public interest against disclosure is to be made in accordance with principles set out in section 15 of the GIPA Act. Those principles ensure that decisions are free from political or other interference thereby preserving the duty of decision makers to uphold the public interest.

The GIPA Act also provides mechanisms to preserve sometimes competing legislated rights and still achieve the ultimate purpose of releasing information in the public interest. These mechanisms include the ability to redact information to preserve commercially sensitive information or maintain personal privacy. The GIPA Act also encourages the creation of a new record or data set to facilitate the release of information.

The interaction between the GIPA Act and agency information relating to the court

Agencies may be asked to provide access to information that relates to court proceedings. Clause 3(c) of the table to section 14 of the GIPA Act provides that there is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any court proceedings by revealing matter prepared for the purpose of or in relation to current or future proceedings.

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[5] *Hogan v Hinch* [2011] HCA 4 (10 March 2011).

[6] GIPA Act Part 2 Division 1.

To show that this is a relevant consideration against disclosure of information, the public sector agency may need to consider such questions as:

- Which court proceedings would be prejudiced?
- How would the court proceedings be prejudiced?
- What event was the information prepared in response to?

The agency needs to provide sufficient detail with respect to the anticipated prejudicial effect, and base this on relevant facts. It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based.

Excluded information

Section 6 of the GIPA Act provides that it is to be conclusively presumed that there is an overriding public interest against disclosure of information that is excluded information of an agency, other than information that the agency has consented to the disclosure of. Section 43(1) of the GIPA Act provides that an access application cannot be made to an agency for access to excluded information of the agency. Clause 1 of Schedule 2 to the GIPA Act provides that information that relates to the judicial functions of a court is excluded information. This means that an application cannot be made to a court for information that relates to the judicial functions of the court.

The role of the PPIP Act and HRIP Act

The PPIP Act establishes the Information Protection Principles (IPPs) that govern how NSW public sector agencies collect, store, use and disclose personal information. The PPIP Act also contains a series of exemptions from the IPPs in specific circumstances.

The HRIP Act establishes the Health Privacy Principles (HPPs) that govern how NSW public sector agencies and private sector organisations collect, store, use and disclose a person's health information. The HRIP Act also contains exemptions from the HPPs in specific circumstances.

'Personal information' is defined in section 4 of the PPIP Act and in section 5 of the HRIP Act. 'Health information' is defined in section 6 of the HRIP Act. Section 4 of the PPIP Act defines personal information as '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 whose identity is apparent or can reasonably be ascertained from the information or opinion.'

The interaction between the privacy legislation and the court

As a public sector agency, courts and their registries must comply with the PPIP Act and the HRIP Act. However, section 6 of the PPIP Act provides that nothing in the Act affects the manner in which a court or tribunal exercises its judicial functions. Section 13 of the HRIP Act contains a similar provision.

The role and effect of Privacy Codes of Practice and Public Interest Directions

There may be times when an agency seeks a waiver of its obligations to comply with the IPPs or HPPs. In some circumstances, a Privacy Code of Practice or a Public Interest Direction may be made.

Privacy Code of Practice

A Privacy Code of Practice is a legal instrument, made under Part 3, Division 1 of the PPIP Act. A Privacy Code of Practice allows a public sector agency or organisation to make changes to an IPP or provisions that deal with public registers. Part 5 of the HRIP Act contains similar provisions in relation to modification of the HPPs.

Codes must not be stricter than the principles and they should not be seen as a tool for blanket exemptions to the principles. Codes of Practice must still meet a number of requirements to ensure that they protect privacy. Agencies must consult the Privacy Commissioner when preparing a Privacy Code of Practice, and a draft must be submitted to the Attorney General.

Public Interest Directions

Under section 41 of the PPIP Act, the Privacy Commissioner, with the approval of the Attorney General, may make a Public Interest Direction to waive or make changes to the requirements for a public sector agency to comply with an IPP. Section 62 of the HRIP Act contains similar provisions in relation to the HPPs. The general intent is for the Directions to apply temporarily. If a longer term waiver or change in the application of an IPP is required, then a Code of Practice or legislative amendment may be more appropriate.

The Privacy Commissioner must weigh the public interest in considering whether to make a Direction. If the Privacy Commissioner is satisfied that the public interest in making a Direction outweighs the public interest in the application of the IPPs to the conduct at issue the Privacy Commissioner will submit the draft Direction to the Attorney General, and seek the Attorney General's approval to make the Direction.

A Direction does not permit conduct that would otherwise be unlawful. In other words, it does not override any other laws, contracts or agreements which may already affect an agency.

The digital environment and privacy considerations

The digital environment has the potential to improve and streamline the delivery of services to NSW citizens, including by promoting and facilitating access to information. However, it is essential that any digital service delivery project is implemented in a way that ensures compliance with the PPIP Act and the HRIP Act.

Non-publication orders in the digital environment

The NSW Civil and Administrative Tribunal (NCAT) has recently considered matters that involve non-publication orders in the current digital environment. A number of matters involved concerns about the names of individuals and extracts of information being extracted out of context and published on a website and social media. For example, on 14 June 2018, the Tribunal made orders pursuant to section 64(1)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW) (CAT Act).[7] Section 64(1) of the CAT Act is in the following terms:

> (1) If the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party) make any one or more of the following orders:
> (a) an order prohibiting or restricting the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by, or appearing before, the Tribunal),
> (b) an order prohibiting or restricting the publication or broadcast of any report of proceedings in the Tribunal.
> (c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,
> (d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.

In one matter, the Tribunal made a non-publication order in an instance where it recognised that the naming on social media of staff member of a government agency could cause stress or a feeling of being threatened.[8]

Any review of access, disclosure and publication of court and tribunal information might consider the balance between the public interest, the public's enforceable right to access information, the ability to make non-publication or suppression orders and the rights of individuals to have their privacy rights upheld and protected.

Contact details

We hope that these comments will be of assistance. If you have any questions regarding these comments, please contact Sonia Minutillo, Director Investigation and Reporting on 1800 472 679 or by email at [redacted]

[7] *Zidar v Department of Justice (No 2)* [2018] NSWCATAD 214.

[8] *Fraud Detection & Reporting Pty Ltd v Department of Justice* [2018] NSWCATAD 63.

Yours sincerely

[redacted]

Elizabeth Tydd 30 May 2019
NSW Information Commissioner
CEO Information and Privacy Commission
Open Data Advocate

[redacted]

Samantha Gavel
NSW Privacy Commissioner
29/5/19